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Dominique Legros

Mainstream Polygamy

The Non-Marital Child Paradox In The West

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Foreword

In this work, Legros reveals the inconsistencies of the West's monogamous marital practices. The author accomplishes this by analyzing Western marriage conventions from a non-Western perspective. He argues that this "othering" of Western monogamy facilitates the securing of otherwise unattainable insights into this matrimonial system. He begins by "othering" France, the country of his youth, then moves to the United States and subsequently to Latin America.

This research puts forth the repercussions of France's decision in the 1970s to grant full birth-status rights to non-marital progeny. Legros argues that this legal action inadvertently opened a loophole allowing men or women to practice a form of true polygamy, which he calls "mainstream polygamy." Similar changes in law have taken place in many parts of Europe and throughout the Americas over the last 60 years, a period that could be referred to as the illegitimate child's emancipation era. In this book, Legros examines *why* the old laws were put into place in the first place and explores, from a comparative anthropological perspective, the many social consequences of the recent legal changes. The author ends by putting forth the various theoretical ramifications associated with emergence of polygamy in the West.

Legros contributes much toward our understanding of contemporary marriage practices by rigorously documenting the pre-Christian origins of Western monogamy. He also accurately shows how each year, this marriage practice generated large numbers of individuals who were deprived of their father's inheritance and who, typically, were treated as pariahs. The investigator sheds much needed attention on the many injustices visited upon "illegitimate" children. Additionally, the author also demonstrates the value of an outsider's perspective when seeking to understand social practices, especially our own that are often taken for granted. Most importantly, Legros' work shows how the labeling of certain individuals as "illegitimate" is a fundamental violation of their rights as human beings.

This work will likely encourage scrutiny of past and present Western notions of legitimacy and propriety. In Renaissance Europe, for example, Philip I, Landgrave of Hesse, found his wife, Christina of Saxony, sexually unappealing. Therefore, the

nobleman sought and obtained a dispensation from Martin Luther to take a second wife (i.e., Margarete von der Saale). Because Philip I was a well-known champion of the Reformation, this polygynous union took place in private so as to avoid a public scandal (De Lamar 1992; Faulkner 1913; Hastings 2003).[1]

In the Americas, one need only consider the situation of the Sally Hemings, who was impregnated by her slave master, Thomas Jefferson.[2] Despite the fact that the DNA analysis has shown a genetic match between the "legitimate" and "illegitimate" Jeffersonian lines, Sally Hemings' living descendants are not granted membership in the prestigious Monticello Association nor will they be permitted to be buried alongside "legitimate" Jeffersonian offspring in the historic Monticello Graveyard (Barry 2008).

Legros' exposé of past and present contradictions in the Western tradition will no doubt inspire thoughtful reflection on the origins and repercussions of many of our received traditions. I hope these considerations will encourage all parties to work for the creation of a more just society.

Rock Hill, SC, USA Richard J. Chacon

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[1] Eventually, Luther would approve of polygyny in general as he believed it was not contradictory to scripture (De Wette [1828] 2010).

[2] At this time, a man was prohibited by law from acknowledging as his, children born to his mistress or mistresses.

Book Abstract

In this essay, I explore the forms of knowledge generated by exoticizing the subject studied. Monogamy in Western cultures is analyzed from a distance, initially from the cultural perspective of a Kenyan writer who underlines the moral evils unwittingly generated by systems that impose universal monogamy and generate annual cohorts of illegitimate children. The essay then considers the case of France in the light of one of the few cross-culturally valid anthropological definitions of marriage, which emphasizes the linkage between matrimony and the birth-status of children. In the context of this comparative understanding, the legislative changes made by France regarding the status of out-of-wedlock children are shown to have surreptitiously created a situation that entitles its citizens, males or females, to enter into bonds that are either true polygynous or true polyandrous marriages. A Frenchman may today have legitimate children and legal heirs from several women that he is seeing concurrently; a French woman may live with and keep several male partners and have legitimate children and legal heirs from any of them. From an anthropological perspective, where, then, lies the difference with African or other polygynous or polyandrous family structures? New, equivalent legal frameworks have been created with similar results in the very heartland of so-called modernity: not only in France, but also in Great Britain, Germany, the United States, Colombia and Guatemala, to name only a limited number of examples. Few Westerners will readily accept the results of such an objective analysis. That polygamous marriages are now possible in their societies will seem, to them, to be as far away from reality as a cubist portrait radically diverges from a live model observed by the painter. This leads us to address the larger issues of "re-presentation" from afar, objective truth and ethics.

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I would also like to show gratitude to Chantal Collard and Christine Jourdan for their constructive criticisms of a related but much shorter essay on this subject published in French (Legros, 1996), as well as to Lina Tzeckas who volunteered a draft translation of this work. It is to be noted that in this earlier work I wrongly assumed that universally imposed monogamy came from first- and second-generation diasporic Jewish Christian converts. In the present essay, I suggest that its origin is most likely to be found in polytheist Greek and Roman matrimonial practices as well as in those of their Indo-European predecessors. The present essay also broadens the scope of the earlier work in that it takes into account the numerous additional changes made in French filiation laws between 1996 and 2009, as well as similar developments that have now taken place in North and South America.

My thanks also go to several institutions that graciously authorized reproduction or use of their copyrighted resources: the journal *Culture* (now *Anthropologica*) that gave me permission to freely borrow and translate, when useful, from my initial shorter French text; the *Musée National Picasso* (Paris) for allowing the reproduction of Dora Maar's portrait via the *Réunion des Musées Nationaux Grand Palais*, Paris, and *Art Resource*, New York (Fig. 1, left); the *Estate of Pablo Picasso* and the

Artists Rights Society (ARS), New York, for permitting the reproduction of Picasso's *Weeping Woman* (Fig. 1, right); finally, the French newspaper *Libération* for authorizing reproduction of its cover page dated January 12, 1996, and to Patrick Artinian for allowing me to reprint his brilliant photo of President Mitterrand's funeral (Fig. 2).

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Contents

Chapter 1
In Praise of Exotopy

> We need to anthropologize the West: show how exotic its constitution of reality has been; emphasize those domains most taken for granted as universal […]; make them seem as historically peculiar as possible […]. Paul Rabinow (1986: 241).

Classical Western anthropology is haunted by the story of its death foretold (unmoved readers may skip this tale of woe and move directly to Chap. 2). The discipline is based, or so have complained critics over the last three decades, on a wrong-headed exoticizing approach, which ultimately spells its demise. By training their eyes first and foremost on cultural practices that diverge most from those of Europe and Euro-America, Western anthropologists have exoticized the cultures of *others*, caricaturized them, and, at times, denigrated them. *Others* are almost always peoples with cultures markedly different from that of the observer or writer or reader.[1] To be an *other* is to be the *observed* in writing or film by an alien observer.

Now, as Johannes Fabian once asked, where lies the justification when James Boon, an anthropologist, "attempts to read the [Balinese] system of branching irrigation canals literally as diagrams of kinship and social structure" (1983: 135). Does anthropology not thus attribute to *others* an exotism that is as extraordinary as it is unproven and improvable? Furthermore, such exoticization transforms obvious cultural difference between contemporaries (the observer and the observed subjects) into a temporal distance that wrongly defines the observed's worldview and lifeworld as outdated. To complicate matters, in the age of globalization, the cultural differences on which the discipline has focused seem to be giving way to an unparalleled phenomenon of cultural convergence if not homogenization. As a result of such critiques and changes, anthropology as it was originally conceived is now partly discredited—at least in North America.

[1] Fabian (1983: *passim*) uses the expression "*the Other*." Not to be too repetitive, I resort alternatively to the terms "*other*," "*others*," "*otherness,*" and "*another*." Still, the meanings are the same as in Fabian's *Other*.

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This new turn manifests itself as a refusal to essentialize differences. Some claim that all societies, no matter how small, are as culturally pluralistic as large immigrant societies such as the United States. In micro-societies, internal cultural fragmentation is taken to be linked to gender dichotomization, temporal distance between generations, division between socioeconomic strata and/or regional subgroups, and so forth (Rosaldo 1993: 207–214). Personal social networks resulting from individuals' actual experience always crosscut collective categories such as cultures (Amit and Rapport 2002). According to this view, the classical definitions of culture (see Kroeber and Kluckhohn 1952), which presuppose a certain degree of homogeneity, are therefore untenable. Along the same lines, if a society never comes with only one culture or at least a dominant one, as classical theory purports, any cross-cultural comparative study of societies is *ipso facto* unwarranted (Rosaldo 1993). Thus, logically enough, ethnographic reports should be limited to what the observer has directly witnessed or heard firsthand. Moreover, as Lila Abu-Lughod points out (1991), ethnographers should never regard their factual observations as valid for the whole society. They should confine themselves to what has been termed the "ethnography of the particular"; i.e., to the experiences of only those informants with whom they have physical contact, or else, more radically, mainly to the ethnographer's own existential angst while interacting with natives in the field (see, for example, Crapanzano 1980; Clifford and Marcus 1986).

For others, particularly recent anthropology graduates, rejecting classical comparative anthropology translates purely and simply into a refusal to carry out fieldwork in faraway, exotic places. By staying home and studying contexts and topics familiar to them, they eliminate the risk of exoticization. (Unfortunately, this also entails eschewing the enlightening culture shock and healthy stress of a lengthy sojourn abroad, truly far away from home.) This calculated step backwards seems all the more justified now that the world is supposedly becoming more uniform. For some, cultural divergences have been transformed by globalization into differences in degree; for others, they have become differences that now can be found at home, in pluralistic Western societies, where *others* are settling in ever-growing numbers.[2] Instead of having to move to the field, they consider that the field has fled to them.

The critical stance at the root of these reactions is, however, somewhat overblown. While it is true that the belief in a global culture is based on some factual experience, are not such observations mainly those of upper middle classes whose contact with faraway places is limited to week-long, all-inclusive vacations on exclusive beaches at resorts where any too-disorienting cultural differences manifested by the natives (mainly the hotel personnel and guest artists) are carefully veiled? Yet, we know for a fact that beyond the guarded gates of these havens, the world, rather than becoming more homogenous, keeps on fragmenting itself according to new sets of criteria (Marcus and Fischer 1986: 133–134). Rosaldo is certainly

[2] For the relative importance of world migration in the Western world and its near insignificance in most other geographical areas, see Legros 2008.

correct in claiming that identity varies according to the subgroups of a society. Yet it is no less true that a society's internal variations, are—and will continue to be—less fundamental than cultural gaps between a subgroup in society X here and any subgroup in society Z, located thousands of miles away, and living in a different modernity, historicity, and linguistic reality (for example, among Rosaldo's Ilongot people in the Philippines). For each of these *differences* across the world, there are groups that are culturally *peculiar* or *exotic* in relation to one another, and out of such divergences arises what Fabian called "the *problematic* simultaneity of different, conflicting, and contradictory forms of consciousness" (1983: 146)—one of the concrete aspects of the contemporary world, which is also the one over which Western attempts at cultural globalization regularly stumble. And it is only because such differences remain and will continue to flourish that we may continue to speak of *others* and *ourselves,* not to essentialize either us or them, but to underscore the self-renewal of cultural difference through constant but divergent borrowings and changes in their culture's content, on the one hand, and ours, on the other. Pasta and tomato sauce are emblematic of today's Italy. But the fact that tomatoes and pasta are originally from Mexico and China, respectively, does not make Italy's cooking Mexican or Chinese, or even Sino-Mexicano; the fact that the Spanish were the importers of the fruit did not make them take the turn the Italians took. Mexicans' uses and recipes remained in Mexico but were seemingly ignored in Europe. The history of the world distribution of potatoes from the Andes is similar. China, India, Ireland, France, and Germany made quite different cultural inventions with the same new staple food. Meanwhile, the Andean peoples maintained uses that are still unknown to the neophytes who invented new potato uses in France, China, and so on. And it is, in every domain, such divergent transformations that have instituted, institute, and keep renewing gaps between cultures. For divergent evolutions that keep separating Canadian or U.S. First Nations and mainstream Canada or the United States, see Legros (1999, 2000). Gandhi's position on self-renewed autonomy between cultures is now famous:

> I do not want my house to be walled in on all sides and my windows to be stuffed. I want the cultures of all lands to be blown about my house as freely as possible. But I refused to be blown off my feet by any. I refuse to live in other people's houses, as an interloper, a beggar or a slave (Gandhi 1924: 170).[3]

A century later, multitudes in large and small-scale cultures still subscribe to such a view. Some are in subaltern positions, others, as in China, much less so. The comparative approach will therefore never lack for the cultural divergences that allow it to ascertain what is universal among human beings, at what level of abstraction, and what is not.

[3] See Mohandas K. Gandhi 1924: 170. Gandhi started the weekly *Young India* in 1919, long after having worked as a migrant in South Africa. This famous quote also reveals that Gandhi was aware of the actual status of the international migrant abroad, and had anticipated that of the contemporary international unskilled migrant.

The problem of a society's internal disparities is not new. Let us not forget how it was solved by Mikhail Bakhtin, for whom culture is never made of a single, homogenous discourse adopted by each and every member of a society, but "consists in the discourses retained by collective memory (the commonplaces and stereotypes just as much as the exceptional words [written literature, poetry, films]), discourses in relation to which every uttering subject must situate himself or herself" (see Todorov 1984: x). While such an understanding allows for internal contradictions to exist within any given culture, it also acknowledges the peculiarity of distinct cultures by recognizing in each a specific pattern of contradictory discourses that *are retained* by collective memory and actually discussed and negotiated (as opposed to other possible discourses set aside, rejected, or, most often, just plainly unheard of). In other words, members of a particular culture do not situate themselves in relation to discourses that fall outside of a tacitly agreed-upon inventory of a limited variety of divergent positions. Within a given society, this is particularly obvious in the case of opposed discourses on gender or age strata relations.

The purpose of underscoring differences occurring across the world is to avoid falling prey to what Korean anthropologist Choong Soon Kim (1983, 1990, 1997) calls *ethnonihilism* or *reverse essentializing,* which is so prevalent today: attributing to *others* an identity truly akin to *one's own* (tacitly deemed to be the truly universal one) in order to avoid the risks of seeming to stress foreign cultural traits that are abhorrent in the observer/reporter's culture. As Sahlins points out (1995, 2005), to do so amounts to applying in theory what imperialism attempts to impose in practice: denying *others*, their specificities, and the different value systems they are struggling to promote (in those cases where the *others* have not become ethnonihilist themselves, denying any value to their own culture). As Rabinow writes, such a form of "Occidentalism is not a remedy for Orientalism" (1986: 241).[4]

At this point we are left with the seemingly most crucial point made against classical anthropology: focusing on differences between *us* and *them* exoticizes *others,* overamplifies some of their cultural features, and thus gives distorted, even seemingly incongruent images of their culture. All too often, the descriptions of reality this focus offers is to the *other*'s reality what a cubist portrait by Picasso is to the model who posed for that portrait: a nose is placed where one would expect to see an ear and so forth. As Fabian writes, referring to Boon's work, it is as if the layout of the Balinese irrigation system seen from the sky was truly "diagramming" the kinship system of the Balinese.

Can such liberties be taken with cultural and social facts? Can exo-anthropologists truly break away from immediate reality, as artists do, and look below the surface to represent "deeper" truths? For those rejecting classical comparative anthropology, such license is thoroughly unacceptable. We cannot keep "playing around" with the immediacy of *others*' lives.

[4] Here Occidentalism is the reverse of Buruma's Occidentalism, defined as the *others*' hate of a caricatured West. See Ian Buruma, "The Origins of Occidentalism." *The Chronicle of Higher Education*, February 6, 2004.

Here I take the opposite view and will attempt to demonstrate that it is somewhat frivolous to write off classical anthropological theory in this way. In spite of appearances, the dislocated "paintings" generated through exoticization are in fact the most thought-provoking in anthropology (obviously, only when successful). And to be effective, exotopic anthropology will often require as many trials as a cubist painting. To take one example, Picasso's powerful representation of a grief-stricken face demanded quite an intensive period of experimental work. From May to October 1937, this led him to produce 36 unique related works (9 canvas, 21 drawings on paper, and some 6 sketches on matchboxes).[5] Of course, like a cubist painting, an exotopic study transfigures or even disarticulates the culture of the subjects being studied; but by proceeding in this way, it gives insight into dimensions of human experiences that normally remain invisible to the observed (or to the observer when in turn she or he is the one being the observed; see (Fig. 1.1) on pages 6–7). As Bakhtin points out:

> [When I see another human being], I "always see and know something that he, from his place outside and over against me, cannot see himself: parts of his body that are inaccessible to his open gaze (his head, his face and its expression), the world behind his back, and a whole series of objects and relations, which in any of our mutual relations are accessible to me but not to him" (1990: 23). Correlatively, that which only I see in the other is seen in myself, likewise, only by the other" (ibid: n. 2).

While this position is about knowledge of individuals in face-to-face situations, Bakhtin invokes the same paradigm for the understanding of cultures:

> In the realm of culture, exotopy is the most powerful lever of understanding. It is only in the eyes of an other culture that the alien culture reveals itself more completely and more deeply (but never exhaustively, because there will come other cultures, that will see and understand even more) (in Todorov 1984: 109–110).

Here, I argue in favor of this dialogical position by *othering* Western-style monogamy, more precisely, any culture that socially imposes universal monogamy, even to kings and princes, even to the most wealthy men or women, as has been the case in ancient Greece and Rome as well as in historical Europe or America. I will exoticize such universal monogamous systems, or "anthropologize" them, dislocating them in the manner of classical comparative anthropology by observing them from without.

To this end, I first begin by adopting the critical eye through which a Kenyan writer, David Maillu, looks at Western monogamy in general, showing its evil social consequences for out-of-wedlock children and unmarried mothers. Then, using a British definition linking the legitimacy or illegitimacy of the children born to a woman to the existence or absence of a marriage, I deconstruct the French conception of wedlock, which is mainly based on a notion of an alliance between bride and groom as well as between their respective families, or so French anthropologists believe. From the Anglo-Saxon perspective, which is foreign to the French subjects being observed, it will be seen that, in contemporary France, marital laws purporting to impose monogamy do not preclude the possibility of true polygamous marriages

[5] See: Weeping Woman', Pablo Picasso, Tate, Catalogue Entry T05010 Weeping Woman 1937 Femme en pleurs. At http://www.tate.org.uk/art/artworks/picasso-weeping-woman-t05010/text-catalogue-entry (retrieved Jan 15, 2012).

Fig. 1.1 Left *Dora Maar* (anonymous, black and white, ¾ portrait, 1930), was the model for Picasso's Weeping Woman (*right*) painted in 1937 (Portrait of Dora Maar, Musée National Picasso, Paris; courtesy © Réunion des Musées Nationaux Grand Palais, Paris, and Art Resource, New York). Right "*Weeping Woman*" by Picasso (Painting at the Tate Modern Gallery, London; courtesy © 2013 Estate of Pablo Picasso / Artists Rights Society (ARS), New York). In 1937, Picasso had just fallen in love with Dora but he was still seeing another mistress (Marie-Thérèse Walter). Marie-Thérèse wanted exclusivity and asked Pablo Picasso, in his studio, in Dora's presence, to choose between them. Dora defended her equal right to be with Pablo. The painter felt he loved them both, could not choose, and told them that they would have to fight it out themselves, at which point the two women began to wrestle. Years after, Picasso described this event "as one of his choicest memories" (as reported in Gilot and Lake, 1964: 210-211). Gilot was a subsequent lover he met in 1943. Although Picasso sued Gilot in 1964 to block publication, there may be some truth to the story. At any rate, one can easily imagine the insecurity and grief the two women may have known for a time.

Fig. 1.1 (continued) Picasso must have seen Dora in moments of acute crisis. Now focus on Dora's photo and imagine that Picasso had just photographed Dora in tears. Never a photo would have captured her deeper angst as does so powerfully his painted "representation" of what he witnessed and felt. Note the effective contrast between the normality of the nice 2 little hat, hair, background decor, and the completely devastated face of Dora: the nail biting barely hidden behind a second overlapping image of her same left hand, this time so properly manicured; Dora's attempts at reaching her stuffed nose with her right hand; the handkerchief with which she covers her face; one of her eyes popping out of its socket; the tears, etc. Dora's tear-streaked face is clearly not meant to represent only the model in crisis but also a particular crisis as a model for a universal symbol for rage, grief and anguish. Inside the painting we are inside suffering itself. See Weeping Woman', Pablo Picasso, Tate, Catalogue Entry T05010 Weeping Woman 1937 Femme en pleurs. At http://www.tate.org.uk/art/artworks/picasso-weepingwoman-t05010/text-catalogue-entry (retrieved Jan 15, 2012).

for all its citizens. Unlike Bill Henrickson, a Mormon polygamist character in the HBO drama television series *Big Love*, a contemporary French citizen does not have to hide that he lives with three women and the children he has had with them.

In popular parlance, polygamy refers almost always to a man with several wives. In reality, polygamy comprises two forms of plural marriages: polygyny (a man with several wives) and polyandry (a woman with several husbands). In this essay, I use polygamy whenever both forms are involved in the discussion and either polygyny or polyandry, depending on the case, when only one of the two subforms is discussed. When there is a need to discuss the man who inseminated the mother, without implying whether or not he is to be recognized as the legal father, I use the word *genitor*. When it is necessary *not* to spell out whether a mother is to be recognized as the legal female parent of her child, I use the word *genetrix*.

To most Frenchmen who strongly believe that their matrimonial system is strictly monogamous, the cross-cultural anthropological truth that, in fact, it is not so anymore, cannot but be both unsettling and enlightening. French citizens might not initially recognize their own marriage system in either of these two exo-dislocated portraits (Maillu's and the British's), but we will see that the "quasi-cubist" portrayals they offer are much more revealing than would be a description adhering closely to a Frenchman's order of words and things.

Viewing the French alone on the hot seat, other Europeans and Euro-Americans might breathe a sigh of relief. This, however, will be of short duration, for I will soon turn my attention to recent developments regarding the birth-status of illegitimate children in Europe (Great Britain, Germany, Denmark, Spain, Italy, Belgium, the Netherlands, etc.), Latin America, and the United States—changes that have resulted in legal situations similar to that of contemporary France. This will serve to illustrate how other Western cultures, like France, also allow true polygamy to coexist alongside monogamy.

Following that demonstration, I will return to an important matter. Had the French legislative texts been analyzed from the standpoint of alliance theory alone, they would have yielded different conclusions. However, I will not attempt to determine the truth status of opposed anthropological paradigms. My reason for eschewing this question is that recent developments in French jurisprudence show that the birth status of children may also be taken to be indicative of the existence of wedlock, even in the absence of a matrimonial alliance between genitor and genetrix and its solemnization through a civil or religious wedding ceremony.

In Europe, socially imposed universal monogamy is a wholly pre-Christian cultural tradition (see Chief Justice Bauman 2011: at points 150–153). While contemporary Europeans and others take imposed universal monogamy to be a worldwide norm, or at least a norm that ought to be upheld the world over, it has been, in fact, a rather rare institution up to recent times (Scheidel 2009: 280–291, 2011; Murdock 1949, 1967, 1981). Today, even as Western cultural imperialism keeps attempting to impose monogamy as a universal norm, polygamy still remains legal in 50 out of a 192 nation-states. To be accurate, polygamy is even more widespread than this, for it is tolerated in many so-called monogamous countries where ethnic or religious minorities are still legally permitted to preserve its practice. Such is the case, for

example, in one French overseas department (Mayotte, Indian Ocean), where polygamous marriages existing before 2005 remain fully valid, even though any new such pluri-marriage has been banned since 2003; in southwestern China, where among the Northern Pumi or Chrame around 30 % of the marriages are polyandrous, 15 % polygynous, and 55 % monogamous[6]; or in Nepal, where a fair percentage of unions are polyandrous (Ross 1984).

My purpose in anthropologizing the dogma of imposed universal monogamy is to transport European or Euro-American readers to the "tropical island shores," so to speak, of the ones being *observed* by newcomers—a position unfamiliar to Westerners—and thus draw their attention to two points. Firstly, classical anthropology does indeed detach reality from the way it is experienced by those who are being observed. One understands the massive distortions resulting from the exo-anthropological viewpoint more easily if the institutions analyzed are *one's own*, rather than those of the others, on the other side of the earth, and about which Westerners know almost nothing that is not already mediated by missionaries, explorers, ethnologists, and others. Secondly, and notwithstanding the bends and twists of the anthropological account, for the women and men being observed, such anthropological *bricolage* with bits and pieces of what constitutes their reality brings to the fore aspects of their actual lifeworld of which they were so far unconscious, but which were no less real than the ones of which they were already fully aware.

To be transparent, I must indicate that I turn the anthropological lens unto the Western world after devoting my entire anthropological career since 1972 to the study of the Tutchone Athapaskan of the Yukon Territory in Canada, and that I have been profoundly changed by my connection with the lifeworld of this people, as well as, more importantly, by my nearly constant thinking—literally days on, days off, and off days—of what it reveals about the human condition in general. We fieldworkers are indeed notoriously annoying with our endless references to the people we have studied with, too often an unheard of culture in some remote corner of the earth.

It is futile to try to communicate in a few lines the intellectual impact of being confronted at age 26 with a Subarctic matrilineal and matrilocal culture of hunters and gatherers with a rule of bilateral cross-cousin marriage, preferably first-degree (Legros 1978, 1988), and with a religion full of various powers (the *zhäak* of actual animals, of those that live in the forest, rivers, and lakes) but without God or gods or even heroes (ibid 2007). I may only state that, at present, I talk about the Western lifeworld from the vantage point of *Horizontverschmelzung*—Hans Gadamer's concept that translates as "fusion of horizons" (see Gadamer 2004). I bring a horizon conditioned by the travail of getting to understand the Tutchone horizon: by their travail and mine of interpreting the actual pulls and tows of each other's lifeworlds, by the near impossibility of transposing the terms of their culture into the terms of mine, and by the reciprocal anxieties of past times spent disentangling the meaning

[6] See: Commission nationale consultative des droits de l'homme (CNCDH), *Étude et propositions: la polygamie en France* (texte adopté en assemblée plénière le 9 mars 2006): at http://www.annuaire-au-feminin.net/rapportPOLYGAMIEfrHostalier.doc (retrieved Feb. 28, 2009); for China see: http://www.asiaharvest.org/pages/profiles/china/chinaPeoples/C/Chrame.pdf (retrieved Dec. 19, 2011).

of far-reaching departures between our horizons. And it is from this late new horizon that I endeavor to undertake an exotopic observation of socially imposed universal monogamy as one particular aspect of the Western lifeworld. To Bakhtin, there is no better prelude to successful dialogue than this ability to maintain one's alterity during empathy. But in the present essay, my *outsidedness* from the West is a by-product of my previous anthropological *Horizontverschmelzung*.

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[7] Bauman available at: http://www.bishopaccountability.org/decisions/2011_11_23_BC_Supreme_Court_C_1588_Re_Section_293_Criminal_Code.htm (retrieved March 11, 2013).

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Chapter 2
Monogamy? Exoticizing a 3,000-Year-Old Pre-Christian Western Tradition

Anthropologizing Western society is a dire undertaking. Anthropological concepts were developed in Europe and North America. They are all too often notions simply derived from the way in which Western cultures distinguish that which is normal—and poses no problems—from that which is unaccustomed, strange, exotic, and raises questions calling for answers: the practices of *others* (see Moffat 1992: 222). This somewhat parochial anthropological epistemic model prevents the Western analyst from observing her culture from afar—from a step back and a distance that is essential to see for oneself, as Rabinow (1986) encourages, the exotic side of our Western institutions, just as *others* may see them.

For this reason, to defamiliarize ourselves with socially imposed universal monogamy, we should first consider observations made about it outside the Western world. To this end, I will refer to an amazing essay published in 1988 by David G. Maillu, a Kenyan intellectual who does not want his country to adopt our universally imposed monogamous matrimonial standard, which, he claims, would impart a fundamentally unfair social status to a great many women and children, just as it has done for centuries in all European societies and in the Americas. An unusual critique from someone who rejects ethnonihilism, and whose argumentation is worth detailing to grasp its relevance fully.

Maillu starts by alleging that the number of African men that are polygynous corresponds to just as many men in Europe and America who are also linked to more than one woman at the same time through what he calls the *wife-plus-mistress(es) system* (Maillu 1988: 30–31). The case of former French President François Mitterrand is a good example of such practice (even though it was not known to Maillu). While remaining married to his legitimate wife, Danièle, with whom he had two sons, President Mitterrand had a mistress (Madame Pingeot), with whom he had a daughter (Mazarine) (Fig. 2.1). And according to rumors circulating among some of the journalists at the newspaper *Le Monde,* he is believed to have had a second mistress with whom he supposedly fathered a son (anonymous, personal communication). In Europe and America, the number of men who engage in such "polygynous" practices probably represents a small proportion of the total male population.

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Fig. 2.1 Funeral of French President Mitterrand, January 1996. © Patrick Artinian / Libération /12/01/1996. Courtesy © Libération and Patrick Artinian. In the foreground, the coffin of the President carried by six gendarmes. Immediately behind the coffin, Madame Danièle Mitterrand, the first wife of the President, between the two sons she had with him. She lived in Paris in the family apartment on rue de Bièvre. Immediately behind her, coming out of church, Madame Pingeot, the President's mistress, accompanied by Mazarine (head leaning to her left), the daughter she had with him. She and her daughter lived in an annex of the Palais de l'Elysée. A bishop and two assisting priests look out over the procession as it leaves the church. Had he been a journalist, David G. Maillu (1988), our Kenyan observer, might have written the following caption. The French President, who saw to his own funeral arrangements, seems to have wanted to state that "polygamy" was nothing out of the ordinary. He had said as much to journalists shortly before his death. Was he not justifying African polygamous traditions at a time when some of our own African fellow citizens want to renounce them? He must be recognized for his courage, in contrast to others, for acknowledging the daughter he had with his second wife and for not having made her a bastard but his legal child. His first wife and her son Robert are to be admired for their grand gesture when inviting Mme Pingeot and Mazarine to the funeral and declaring they loved Mazarine because she is a Mitterrand like them. It seems that Western culture is finally on its way to becoming more civilized.

In most parts of Africa the situation is similar, for up to 97 % of all marriages are monogamous (but there have been exceptions in some regions and countries where polygamy has reached up to 50 % of all marriages in the past). Besides, what distinguishes Europe from Africa is rooted neither in practices nor in statistics, but instead in long-divergent societal attitudes towards a given common practice: concurrent plural liaisons or what I shall call "conjunctions."[1] I prefer this somewhat quaint word over that of "liaison" or "affair" because conjunction merely evokes "the state of being conjoined," that is, "brought together so as to meet, touch, overlap, or unite" (*Merriam-Webster Dictionary*), without entailing positive or negative value judgments referring to the legitimacy or illegitimacy of the conjunction.

Since time immemorial, African societies recognized that multiple conjunctions were just so many marital relationships that had to be legitimized and regulated (with standards varying from place to place) so as to be socially controlled and not left to the mere whims of individuals, as is the case in the wife-plus-mistress(es) system.

Maillu does not refer to Greco-Roman Europe, but some additional data will further his argument. According to Numa Denis Fustel de Coulanges' highly respected study of classical times, the ancient Indo-Europeans already adhered to an imposed universal monogamous system (1956: 47–48, original 1864, book second, Sect. II):

> The institution of *sacred* marriage must be as old in the Indo-European race as the domestic religion [worship of one's family ancestors and, for a married woman, of her husband's ancestors]; for the one could not exist without the other. […] [Marriage] united man and wife by the powerful bond of the same worship and the same belief. The marriage ceremony, too, was so solemn, and produced effects so grave, that it is not surprising that these men did not think it permitted or possible to have more than one wife in each house. *Such a religion could not admit of polygamy* (emphasis added).

Unequivocal evidence of universal monogamy in Ancient Greece goes back to the seventh century BCE and in Rome to the third century BCE (Scheidel in Chief Justice Bauman 2011 at 150 through 153; Scheidel 2009, 2011). Furthermore, advances in the recently developed method of phylogenetic comparative research (Fortunato 2011) support de Fustel de Coulanges' inferences for much older dates.

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[1] Conjunction is borrowed from eighteenth-century French legal vocabulary. Conjonction was then the term used to designate any mating between a man and a woman. On occasions, when the *conjonction* was illicit, the text qualified the word *conjonction* by adding an adjective such as in *conjonction réprouvée* (see **"**De la Bâtardise**"**, in *Dictionnaire de Droit et de Pratique* par M. Claude-Joseph de Ferrière, doyen des docteurs-régens de la Faculté des droits de Paris, et ancien avocat au Parlement, 2 tomes, Paris: chez Savoye, 1762; in *Livres des sources médiévales* at: http://www.fordham.edu/halsall/french/batard.htm (retrieved Dec. 16, 2008)). In its primary meaning conjonction remains neutral as to whether the union is legitimate or illegitimate. It merely refers to the action *de se conjuguer* (from which stem conjugal and *conjugial* in English), *de se joindre,* and *de s'unir physiquement*. Licensed spouses live in complete *conjunction*, as do unmarried lovers and gay couples (see*Trésor de la langue Française* at: http://atilf.atilf.fr/dendien/scripts/tlfiv4/showps.exe?p=combi.htm;java=no (retrieved Dec. 9, 2011). In English, conjunction may retain the French meaning (see "Male and Female Created He Them," by Rev. Dr. Erik E. Sandstrom, at: http://lastchurch.com/index1/maleandfemale.doc (retrieved Dec. 18, 2008)).

> These reconstructions push the origin of [Indo-European] monogamous marriage into prehistory, well beyond the earliest instances documented in the historical record; this, in turn, challenges notions that the cross-cultural distribution of monogamous marriage reflects features of social organization typically associated with Eurasian societies, and *with "societal complexity" and "modernization" more generally* (ibid: 87, emphasis added).

As this contemporary work suggests, and as Fustel de Coulanges advocated years ago, it is quite plausible that universal monogamy is a fundamental characteristic of societies speaking Indo-European languages.

Dumézil's work on Indo-European marriages (1979) is at once better detailed and more ambiguous regarding imposed monogamy versus the possibility of plural marriages. Dumézil distinguishes four routes that lead to the establishment of a socially honored intimate union between a man and a woman: (1) capture of the girl by the groom-to-be without the girl's or her parents' consent; (2) groom's payment for the girl to the girl's father (in kind or in services) with or without the girl's expressed consent; (3) gift of the girl, and of wealth, to the groom-to-be by the girl's father; (4) freely consented union between a man and a woman without any parent's or relative's interference (ibid: 44–45, 80, passim). Depending on the groom's social stratum, one of the four paths is preferable to the other three (ibid: 45). Thus, when marriage remains monogamous and lifelong, only one path will have been taken. So far, this still meshes well with a universal monogamous system.

However, besides this, Dumézil advances as a speculative hypothesis ("*hypothèse maxima," "à la limite"*) the possibility for a man to take several spouses (in sequence or concomitantly), following any or all of the four paths (ibid: 45, 60). He also discusses episodes from epics that illustrate the existence of such a "polygynous option" (ibid: 59–71). However, these classics involve only cultural heroes, kings or high-ranking noblemen, and unfold in an era when Indo-European societies had already been deeply divided into social strata or classes for centuries. Are Dumézil's examples relevant in the much earlier context discussed by Fustel de Coulanges or Fortunato?

Dumézil's text includes another difficulty. In Chap. 3, we will see that a union is a full-fledged marriage only when the children born from that union are granted full birth-status rights by society. And Dumézil is not clear at all about the status of the different sets of children born from the different women involved in one plural union, neither for the late period he discusses, nor for the era preceding the division into social classes. If these birth rights differed greatly, we cannot speak of true polygamy in the anthropological sense (as will be discovered in Chap. 3); only of a plural union consisting of one marriage and in addition of one or more socially honored concubinal arrangements. As Dumézil avoids the words *polygamy* or *polygyny* and even use an expression like "his titular wife" in the context of Heracles' plural unions (ibid: 60), I am tempted to compare Dumézil's late Indo-European plural unions (even more so possible earlier forms) to a similar reality in Roman classical times.

In Rome, in that epoch, the dissolution of a religious marriage (*confarreatio*) remained difficult if not impossible. Husband and wife had to attend a formal religious ceremony (*diffareatio*) lead by a priest and witnessed by two persons, during

which they had to pronounce "formulas of a strange, severe, spiteful, frightful character, a sort of malediction, by which the wife renounced the worship and [domestic] gods of the husband" (Fustel de Coulanges 1956: 47–48). It is true that wealthy or powerful men were often in concurrent intimate conjunctions with several women, but this only meant that each additional female partner was merely a concubine, who, while certainly a fully legitimate partner, was never a wife or "the wife."

Now, when belief in Christ first spread from a small Jewish community in Palestine to the large Jewish Mediterranean diasporas throughout the Roman Empire, there were perhaps five Jews settled in the Diaspora for each one still living in Palestine. Shlomo Sand (2009: 145) estimates the diasporic population to four millions. Many were former polytheist people who had earlier converted to Judaism which was a popular and proselytizing religion before Christianity muzzled it. The first Christian converts were diasporic Jews and long after the New Testament Canon was completed (110 CE at the latest), a majority of Christian converts were still Greek-speaking diasporic Jews (perhaps one fifth of all diasporic Jews). Christian Gentiles, that is, former Greco-Roman polytheists, were still a minority. By 250 CE, Christian Jews may have been as many as one million (Miles 2002: 59, 110–111, 306). To many of them, conversion to Christianity had not meant a renunciation of Jewish culture (ibid: 258; see also, for greater details, the case of the Sabbatian Christians of Edesse in Mesopotamia (Julien and Julien 2001), no more than it had for Jesus, and, of a Jewish culture that had always held polygyny to be legitimate and respectable (see Genesis 4:19, 16:1–4, 25:6, 26:34, 31:17; Deuteronomy 21:15; Judges 8:30; 1 Samuel 1:1–2; 2 Samuel 12:7–8; 1 Kings 11:2–3; 1 Chronicles 4:5; 2 Chronicles 11:21, 13:21. 24:3, etc.).

Reading these passages in the Bible, one has the impression that in ancient Israel, like anywhere else in the world then (and now), polygyny was, in any given population, much less common than monogamy, but that such plural marriages also went without saying. When discussed in the Bible, polygynous arrangements are presented to the reader as mere matters of fact. The narrator spells out their existence only because it may be useful for understanding the story being told. When this is not important, no precise descriptions are given as to the nature of the marriage.

Exodus (21:10–11) offers the rudiments of a codification of the duties imposed and the rights granted in a polygynous marriage. The Hebrew language version translates as:

> (10) If another [wife] he takes for himself, [then] her board [his first wife's], her clothing, or her oil he is not to diminish [others translate *her oil* as "marital intimate relations"].
>
> (11) If these three [things] he does not do for her, She is to go out for nothing, with no money [without having to pay any compensations] (see Fox's new translation from the Hebrew, 1990: 348–249).

While this does not mean that Jews necessarily encouraged polygyny (indeed some Indo-European who had converted to Judaism may have desisted from such practice), this passage clearly indicates that the institution was regarded as a valid form of marriage recognized by God and was subject to a legal framework. It must be noted that, in Judaism, as in early Christianity and later in Islam, marriage was

not a sacrament but a contract between families. The presence of a rabbi was not even required. For that reason, from a Roman polytheist religious viewpoint, a Jewish marriage was only the equivalent of Roman concubinage or cohabitation.

A similar status was granted by Rome to early Christian converts' marriages, which for the most part followed the traditions of their nations of origin (diasporic Jewish communities or polytheist nations). There existed then no formal Christian liturgy for marrying. Marriage could simply be by mutual agreement in the presence of ordinary witnesses. The marriage would be consummated the same day. The blessings or the presence of a priest were not required (Armstrong 1991: 264). By the first half of the fourth century CE, the Church encouraged its converts to give themselves some actual matrimonial rights and duties through a *post facto* registration of their Christian unions under Roman civil law. This confirms how informal were Christian marriages then.

The three most famous New Testament passages on matrimony—Matthew 5, 19, Corinthians 7, and Ephesians 5, all composed before 110 CE—express neither a position on polygyny nor on a need for socially imposed universal monogamy. True enough, according to the apostles, Jesus assailed fellow Jews who claimed to have the right to repudiate a wife almost at a whim. He accepted divorce but only in the case of a wife's sexual unfaithfulness:

> Matt. 5:32 But I tell you, everyone who divorces his wife, except in a case of sexual immorality, causes her to commit adultery. And whoever marries a divorced woman commits adultery.
>
> Matt. 19:9 And I tell you, whoever divorces his wife, except for sexual immorality, and marries another, commits adultery (Holman Christian Standard Bible, Blum (ed.), 2009).

Luke synthetized these verses as follows:

> Luke 16:18 Everyone who divorces his wife and marries another woman commits adultery, and everyone who marries a woman divorced from her husband commits adultery (ibid).

The King James Bible, which seems to rest on a different Greek original, is more flowery:

> Matt. 19:9 And I say unto you, Whosoever shall put away his wife, except [it be] for fornication, and shall marry another, committeth adultery: and whoso marrieth her which is put away doth commit adultery (King James Bible, 1769 Oxford Authorized Version).

Many interpret these references as imposing monogamy. Yet, nowhere does it denounce the institution of polygyny per se. It may very well be read as "a man who does not repudiate his first wife, who keeps protecting and supporting her, and who takes a second one, does not commit adultery." In a polygynous culture such as that of ancient Israel, any honest husband considered it his honor to enshrine the rights of his first spouse(s) before taking a second or third one. Jesus, faithfully Jewish as he was, knew that, and it is striking that in Mathew's text he is not presented as opposing polygyny at all but only unjustifiable repudiation. On that score Jesus was explicitly going against divorce, which was then legal. If he had been against polygyny, which was then legal as well, he would have clearly said so. True enough, he is still justifying repudiation in one case: that of an adulterous married woman. Why? In his time the normal punishment for that crime was to be stoned to death in public

(lapidated). It is evident that, in the case at hand, unacceptable as repudiation was to Jesus in general, it still constituted a progress over stoning.

Our interpretation is all the more plausible if we consider (1) that the possibility of true polygynous marriages was taken for granted in Jesus' Israel and was scandalous only among the Romans (see below); (2) that in Matt. 5:32 and 19:9 Jesus is foremost concerned by the break-up of an already existing marriage and thus by the separation of what God had already united into one flesh (this explains why the new husband of a repudiated wife is, from Jesus' vantage point, embroiled in the then capital crime of adultery—his new wife "still belongs" to her first husband); and (3) that nowhere does Jesus rebuke polygyny (e.g., the *addition* of a second wife without divorcing the first, etc.), while speaking of adultery when an abusive repudiations has taken place in order to take a second wife.

That husband and wife become one flesh does not preclude that three or four persons may equally become one flesh, just as three or four metal pieces that may have no use taken separately may be turned into one functional artifact if welded together. Abraham's or King David's plural marriages provided Jesus with vivid examples.

In any event, Jews resisted Roman emperors' edicts forbidding Jewish polygyny as late as 393 CE (see Reinach 1873/1919: 3(1): 631). And Rabbinic Judaism first "suspended" (not prohibited) polygynous marriages only around 1030 CE, initially only among Ashkenazim in Northern France and Germany (a religious ban known as *herem* adopted at the synod of Worms and attributed to Rabbenu Gershom Ben Judah[2]), later in Central Europe, and then Spain and Italy. The 1030 herem was true to all intents, constructions, and purposes, and yet it also allowed for one or two exceptions. Non-European Sephardim and most of the Oriental Jewish communities practiced polygyny alongside monogamy from time immemorial up to the end of the Second World War and formally outlawed it only after 1950, following the creation of the state of Israel.[3]

By the time of Jesus' death and during the next few centuries, upper class polytheist Romans were facing difficulties in dealing with concurrent intimate conjunctions, then common, and the different rights to be granted to children born from an official wife and from concubines. The history of marriage and concubinage under Roman law is complex. Under early Roman law, as among the ancient Teutons, and possibly most Indo-Europeans, religious marriage (*matrimonium confarreatio,* or *coemptio* or *usus*) was permitted only between two free persons of similar social standings. Concubinage (*concubinatus*) was then a different form of pair bonding that was recognized as legitimate and morally valid. It was resorted to when the conditions for a true *matrimonium* were not met (absence of the right to marry called *connubium*). In Rome, concubinage was the rule for many non-citizens, some lower-status men and women, as well as for aristocrats or free men taking a woman

[2] Rabbenu Gershom ben Judah was born at Metz in 960 and died in Mainz in 1028 or 1040 depending on the sources. See Rabbenu Gershom ben Judah and Polygamy in www.JewishEncyclopedia.com (1901–1910 edition).

[3] Greer Fay Cashman, Why not Mr… & Mrs… & Mrs…? *Jerusalem Post*, Apr 3, 2006.

from certain lower social strata. Most slaves' pair bonding followed the different rules of the *contubernium*. It is to be noted that well into the second millennium CE, concubinage remained the sole form of marriage known by most of the European peasantry (Ariès 1982). It was then a near-equivalent of today's common law marriage in North America.

Latin concubinage was *de facto* overwhelmingly monogamous among poorer classes. Nevertheless, among aristocrats and other powerful men, its practice often resulted in simultaneous conjunctions between one man and several women. But such concubinal multiple intimate conjunctions were never equated with plural marriages and thus to polygyny. Any woman who was an addition to a living titular wife was designated a concubine. A man's concubine never was considered to be a titular wife and enjoyed none of the latter's prerogatives and inheritance rights. In addition, the children of concubines could not inherit from their father. Finally, a woman who had been legally wedded but not in full accordance with all the *matrimonium* religious and social rules (no dowry, for example) was also considered a concubine, not a titular wife, even when her partner had no other mate (See: Berger 2002: *passim.;* Karras 2006: 119–120; Le Jan 1995: 271–274; Rich 1890: *passim*; Tacitus 1999 [98 CE]: Chaps. 18, 19, 20; Weill and Terré 1983: 587 [references to Weill and Terré's legal volume are to paragraph numbers not to pages]; Zalewski 2004: 117–118).

It was only toward the end of the Roman Empire that concubines, and later their children, acquired some significant legal rights to inherit (Zalewski 2004: 117–119), but without the concubine being granted the status of a titular wife. The Roman concubine system started then to serve one of the purposes polygyny has in societies, where, to have an heir, a man may legally marry additional women (but in such cases women who enjoyed a full wife status, not as in Rome (Goody 1985: 83–84).

Thus, when Indo-European-speaking Roman Europe was adopting Christianity as its dominant religion, it could have seized the opportunity and solved its concubine problem by adopting Jewish laws regarding polygyny. Their lawfulness was then uncontested within Judaism. There was already an emperor, Valentinian II, who had briefly tried to legalize polygyny in 383–384 (Montesquieu 1817: 218). But this is disputed as that emperor was then only 13 years old. His father, Valentinian I, is also reported to have passed an edict allowing polygamy. But only one source mentions the fact. Moreover, if Valentinian II truly ever was pro-polygyny, by the end of his life, he enforced strictly monogamous policies. He died in 392. At any rate, Christian Europe refused to legitimate concomitant plural marriages (Duby 1983 and Duby in Goody 1985: 6), perhaps because the practice of polygyny, not its legality, was already shunned by some Jews, as well as, most likely, because of a deep-seated attachment of Christian Gentile converts to a Greco-Roman core value, possibly of very ancient Indo-European origin (the impossibility noted by Fustel de Coulanges for a fully religious marriage to be any other than monogamous).

At least Saint Augustine sides with this view when writing in *The Good of Marriage* in 401 CE:

> […] It is in a man's power to put away a wife that is barren, and marry one of whom to have children. And yet it is not allowed; and *now* indeed *in our times*, and *after the usage of*

Rome, neither to marry *in addition*, so as to have more than one wife living (emphasis added).[4]

Saint Augustine is the most thoughtful Christian thinker of antiquity. His testimonial cannot be taken lightly. Italics in this quotation emphasize his understanding of history: The illegality of adding a second or a third wife to a first one (not repudiated) is new and finds its origin in Pagans' customs, rather than, or so is implied, in those of the Judean and diasporic Jews who were then converting to Christianity.

Sometime between 200 and 400 CE, Christian converts from a Jewish background ceased to outnumber Gentile converts. For that reason, non-Jewish matrimonial traditions took precedence over that of the first Jewish proselytes, apostles and other teachers. True polygyny became unthinkable, as in preceding polytheist times—a pagan (so-called) but nonetheless deeply religious era notwithstanding. Thus, Gentile Christian Europe never addressed the negative social consequences of holding true polygyny anathema, irrespective of the unjust treatment this implied for concubines and their children.

Later, the Church gradually eliminated the privileges granted in late Roman times to concubines and especially to their offspring. Finally, after the Councils of Mainz (852) and Tribur (895), it started to defined concubinal conjunctions in the upper classes as mere fornication and participating females and males as fallen creatures (Zalewski 2004: 118). Their children began to be known as bastards.[5] This was first directed at the Frankish aristocracy, who, like its Germanic ancestors and the Romans, admitted as legal and fully respectable concubinal relationships kept in addition to a binding monogamous marriage between two free persons. It is significant to note that the term *bastard* (*bastardus* in 1000 CE medieval Latin) derives not from a Latin root but most likely from *banstu,* signifying in medieval German "*tie* with a socially inferior woman"—*banstu* being itself possibly derived from the Indo-European verb *bhendh*, meaning *to tie* (Rey 1998: I, 349). Afterwards, these measures were progressively applied to the whole population living in monogamous concubinage (not to mention in pluri-concubinage). A few centuries later, in the early 1200s, the Church took total control of all possibilities to obtain a true marital status by making marriage a Christian religious sacrament exclusively. In the process, it gave itself a complete monopoly on the capacity to marry anyone.[6] Later,

[4] Saint Augustine, *Of the Good of Marriage* (Translated by Rev. C.L. Cornis), Chap. 7. See http://www.newadvent.org/fathers/

[5] According to Goody (1985), the categories of mistress and bastard were devised by the Church so that when childless couples passed away without legitimate heirs their estate would go to the Church. To preserve the late Roman concubinage system would have put the Church in competition with the children of mistresses defined as legitimate heirs. In so doing, writes Goody, the Church sought to maximize the number of estates, bequests or legacies it inherited each year. The Church devised other institutions to reach the same ends: the prohibition of adoption, of divorce, of endogamy, and so on. Summarized as simply as possible, Goody's argument makes the Church look quite callous, but readers are encouraged to read his analysis for details.

[6] "Sacrament of Marriage." *The Catholic Encyclopedia*. At: http://www.newadvent.org/cathen/09707a.htm (retrieved Dec. 17, 2011). This is why, up to the end of World War II, Jewish marriages were recognized only as mere concubinage in some Catholic countries such as Poland.

in the cross-currents of the Reformation and the Counter-Reformation, concubinage or marriage performed privately, even monogamous unions, were finally denied any recognition at the Council of Trent (1545–1563) (Ariès 1982). The Church thus resurrected the prehistoric Teutons' and early Romans' conceptions of marriage as a sacred institution following a rigorously monogamous standard, beliefs possibly of even earlier Indo-European polytheist origin, as Fustel de Coulanges (1956: 47–48) and Fortunato (2011) suggest. It also hypostatises monogamy into a fundamentalism, inasmuch as the additional aristocratic pluri-concubinal arrangements allowed under the earlier monogamous systems were definitively barred, together with monogamous concubinage, which was the marriage model of most of the peasantry (Ariès 1982). The results were spectacular. The rate of ordinary concubinage involving one man and one woman brutally fell to historic lows in much of Europe (around 1 %). This lasted for close to a century. Nonetheless, around 1750, the rate of illegitimate birth started to grow again: in France, 1.8 % in 1760–1769, 2.6 % just before 1789, 4.4 % en 1810, 6.6 % in the 1820s, and above 7 % in 1860; in Britain 3.3 % in 1741–1760, 4 % in 1761–1780 and over 5 % as early as 1781–1787. A similar phenomenon took place in Scandinavia and in Germany (Sohn 2006).

Once concubinage could no longer be regarded as a quasi-marriage or as a common law marriage, the Church paid much less attention to the possibility that some men could have permanent liaisons with several women at once. Yet, such practices just went underground and did not disappear from the upper classes, as is aptly proven in the history of medieval and later monarchic regimes and, more recently, through examples such as that of the former French President François Mitterrand (singled out from many others, such as Roosevelt, Kennedy, etc.). It continued to exist, concealed, in the wife-plus-mistress(es) system evoked by our Kenyan observer.

Maillu's criticism of any socially imposed universal monogamy is leveled against the negative social outcomes stemming from outlawing polygamous *behaviors* altogether—side-effects that, while unintentional, are nevertheless real. The expression "negative side-effects" designates those unwanted and unwelcome results of an action that turns against the good intentions of those who initiate the deed. Maillu first points out that imposing monogamy on every individual must inevitably create a dichotomy between officially married spouses, on the one hand, and persons being in a mistress/lover relationship, on the other, and worse, between legitimate children (born from an officially married wife) and illegitimate children, or bastards (born from one mistress). This necessarily creates two classes of citizens: one with rights and one with many fewer rights or, depending on the case, virtually none.

At this point, some will have been put off by my using the term "bastard." Why don't I drop it and use politically correct contemporary euphemisms such as *natural*

In the eyes of the Polish State, all Jewish children were systematically declared to be illegitimate (*unehelich*). They could bear only their mothers' last names and had no legal fathers. They could be legitimized afterwards but as the fees were exorbitant for simple villagers in a *shtetl*, most Jewish parents never bothered to change either their children' illegitimate status or their own (Mendelsohn 2007: 89).

child or *non-marital child,* for example? My main reason is to let Westerners face for a moment what their own legal concepts have come to mean in popular parlance. The aim is also to remind legislators of the cultural horror centuries of Western law have created: the bastard concept and the dire lifeworld this has entailed for whole cohorts of children who eventually all became second-class adults. In no way should it be understood as an attempt to stigmatize the unfortunate individuals who received this epithet and suffered from it. Besides, the most recent euphemism—the non-marital child—is itself a paradox. As I shall outline below, today's non-marital child has the same rights as a legitimate child that his father may have conceived with an official wife. For that reason, from an anthropological viewpoint, the non-marital child's mother is to be regarded as actually married to her child's genitor, even when that one man is already officially married to someone else and remains so married. Thus, paradoxically, while the bastard was a true non-marital child when that locution did not even exist, the contemporary non-marital child has ceased being anything but non-marital as that very same locution has been coined.

Maillu describes our institutions as an exo-ethnographer would; as we would perhaps view them, too, if we could observe them from afar. While we, in the West, would never use his turns of phrase, they nevertheless problematize for us that which we take for unproblematic, and this gives them a strong heuristic value. In the following sections I summarize part of Maillu's argument while trying to preserve the way he expresses himself (ibid: 30–31). Readers are forewarned that he analyzes Western societies as they functioned up to the 1960s, and that he takes an exclusively male point of view, which will be off-putting to some.

In Western societies, when a man falls in love with a woman other than his wife and wants to avoid putting his wife and children through the ordeal of divorce and the impoverishment that this would entail for them, he must keep the second "wife" a secret. Generally, in order not to complicate matters more than necessary, the man asks his second woman not to bear him children. If she becomes pregnant, whether by accident or by design, and delivers the baby, that child will be illegitimate under the law—a second-class citizen who will be labeled a "bastard" and who will bear that social stigma for his entire life. A bastard has no rights *vis-à-vis* his father; neither rights to inherit from him, nor the right to enjoy the company of his paternal relatives, nor the right to use his father's family name. In the Western world, any child born to a second or third "wife" must live his entire life with the shame of having been born illegitimate. He is generally shunned and despised by those who should count themselves as his blood relatives. Whenever he claims rights he should have through his father, he becomes embroiled in fierce battles with the legitimate members of his patrilineal family. In addition, he is almost always thwarted by the courts, as laws put him in the wrong at the outset. His status is inferior to that of the children born to his father's first wife and, as if that were not enough, the law does not even recognize him as being related to them in any way. A Western child born to a second or third "wife" has to grow up, so to speak, ashamed of his own presence in the world.

In the European tradition and in America, the second "wife" has no right to her husband (regardless of the duration of her relationship with him or the happiness

and children she has been able to give him). She is not legally entitled to inherit any of his wealth (not even a small portion to enable her and the children she has given him to continue to live comfortably should he predecease her). Nor can she ask him to be introduced into his circle of family and friends. She is also barred from attending ceremonies that mark important milestones in his professional life. She must be understanding and accept it. She cannot take her husband's name. Under no circumstances can she be seen at his side, at the market, or in the streets, much less walking holding hands with him. She must avoid any encounters with his official wife and accept that this other woman's social aspirations always take precedence over her own. Of all the women with whom a man might be involved, only his licensed first wife has any legal rights where he is concerned. Socially isolated, second and third "wives" must live in permanent quarantine. So Western civilization dictates.

To maintain his respectability, the husband is obliged to present a false image of who he really is. In public, all his behaviors must be calculated so as to give the impression that he has one wife and only one. In each of his conjugal lives, he must conceal much of his true self and always hide his true feelings. He must constantly pretend, if not lie outright. At all times and in all circumstances, he must deny the existence of the second "marriage" and the existence of the children conceived in his second bed. Even worse, under the implicit "arrangement" of the second "marriage" (in fact, there is neither a license nor a signed contract), he is free to abandon his second "spouse" without notice. This means he must assume no financial or social responsibility for her or her children. Is it not inhumane for any society to treat women who are second "spouses" and mothers in such a way? And what about the second-class status imposed on their children?

Because everywhere some men will continue, as in the past, to have more than one female partner at a time, Maillu asks the following questions: Between Africa, on the one hand, and Europe, on the other, which of the two civilizations may boast a marital system that is best adapted to the real world and is fairest to *all* women and *all* children? Traditional Sub-Saharan Africa, where both monogamous and polygamous marriages are accepted? Or the West, with its monogamous façade, which produces serious inequalities in status between two classes of women and two classes of children?

Rather than look at the institution of monogamy in itself and for itself, Maillu questions instead the sociological consequences of prohibiting polygamy altogether. He views socially imposed universal monogamy as the converse of prohibiting polygamy. In so doing, he depicts monogamy in the West in a way that we do not readily recognize as our own institution. Yet, in the broad strokes of his brush, we discern that his observations are quite fair, at least for the pre-1960s period. And this is precisely how we can defamiliarize ourselves with what socially imposed universal monogamy is in the eyes of *others* and in reality. By the same token, we realize that our Western marriage system might not actually go without saying. Maillu's approach reminds us of Bakhtin, for whom "it is only in the eyes of an *other* culture that the alien culture reveals itself more completely and more deeply" (quoted in Todorov 1984: 109–110). Except that here, we are the alien culture. His method is also not unlike structuralism, which also first calls into question those aspects of the

other's kinship and marriage system that appear to be inexplicable from the perspective of Western kinship and marriage (Lévi-Strauss 1956). To Maillu, the inexplicable among *us* is our irrational opposition to officializing any form of polygamy, even if on a very limited scale, for meritorious cases alone (for mistresses who have become mothers and for their children, for example).

Some will no doubt object that Maillu's exo-ethnography is anachronistic. Today, almost all Western societies have not only legalized divorce, but also made it readily available. A man can break off his relationship with his first wife and then marry his new love interest. There are now ways for him to remain within the boundaries of monogamy while living out numerous passions in the course of his life. Of course, the same holds true for women, but Maillu is sexist and focuses on male practices.

In all fairness, however, it must be stated that not everyone sets out to use divorce as a tool. To borrow Maillu's terminology, the existence of a second "wife" does not drive all first wives in the Western world to seek divorce (women generally lose an average of 20 % of their financial resources after divorce, while men tend to gain 10 %). The former French first couple, Danièle and François Mitterrand, provides a good example of this trend to not want to de-marry. It therefore cannot be stated that the wife-plus-mistress(es) system has completely disappeared. In certain social classes and other groups divorce is still not morally acceptable.

Besides, by divorcing and remarrying, do we really remain within strictly monogamous practices? Many Westerners do not believe so. Thus, for strict Catholics, a marriage can only be dissolved on the death of one spouse (unless the union breaches certain rules, such as incest prohibitions, in which case the marriage is declared to have been null and void from the beginning). For most Catholics, divorcing in a civil court for the purpose of remarrying is tantamount to a polygamous practice since the first marriage continues to exist while a second or third is contracted. Stricter Catholics will not even recognize the second union as a true marriage and speak of fornication instead. Proof of the seriousness of such accusations can be found in the fact that priests must refuse Holy Communion and other sacraments to any Catholic who has remarried after obtaining a divorce in civil court.[7]

Anthropologists who are part of Western cultures take a different track. They prefer to apply the term "serial" or "consecutive monogamy" to the phenomenon resulting from divorces. If so, do they not lack objectivity in so doing? Do they not

[7] "Are divorced people permitted to receive Holy Communion?" *The diocese of Lincoln*. At http://www.dioceseoflincoln.org/purple/divorce/index.htm#4. "Today there are numerous Catholics in many countries who have recourse to civil *divorce* and contract new civil unions . . . The Church maintains that a new union cannot be recognized as valid, if the first marriage was. If the divorced are remarried civilly, they find themselves in a situation that objectively contravenes God's law. Consequently, they cannot receive Eucharistic communion as long as this situation persists . . . Reconciliation through the sacrament of Penance can be granted only to those who have repented for having violated the sign of the covenant and of fidelity to Christ, and who are committed to living in complete continence." In *Catechism of the Catholic Church*, Part Two: The Celebration of the Christian Mystery, Section Two: The Seven Sacraments of the Church, Chapter Three: The Sacraments at the Service of Communion, Article 7: The Sacrament of Matrimony, V. the Goods and Requirements of Conjugal Love, point 1650. Web access at: http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a7.htm (retrieved Dec. 11, 2008).

adopt a parochial rather than an analytical approach to the nature of our systems of de-marriage and re-marriage? For Maillu who, like Montesquieu's Persian visitor to eighteenth-century Paris (Montesquieu 1721), observes our Western practices from a distance and analyzes them from a world perspective, with the neutrality and detached objectivity of an outsider, it would be more accurate to speak of "serial polygyny" for men and "serial polyandry" for women. On this point, his anthropologizing of us is singularly both unsettling and lucid.

> In the Whiteman's world, tradition and law, when a husband wants a second wife, he divorces his first wife in order to clear the ground for the second wife. If he wants a third wife, he divorces the second to make way for the third, and so on. And the White woman engages in polyandry by divorcing her first husband to marry the second; divorcing the second to marry the third, and so on (Maillu 1988: 29).

True, we would never explain our "de-marriages" by stating that we "want a second or third wife" and that to do so we must first "clear the ground" by divorcing the current wife. A Western man (or woman) would simply claim that he/she can no longer put up with his/her current wife (or husband). On the other hand, because the very existence of extramarital relationships is often the cause of petitions for divorce, are we not somewhat hypocritical? Has a man not in fact already fallen in love with a second woman before he even begins to disparage the first? Writing in the eighteenth century, the great Samuel Johnson spelt out that truth with a touch of humor:

> It is so far from being natural for a man and woman to live in a state of marriage, that we find all the motives which they have for remaining in that connexion, and the restraints which civilised society imposes to prevent separation, are hardly sufficient to keep them together . . . [In the absence of society], when the man sees another woman that pleases him better, he will leave the first (in G. B. Hill (ed.), 1934, Vol. 2, p. 165, March 31, 1772).

If Johnson's observation is fair, then surely the way that Maillu anthropologizes us reveals the true cause of our second or third re-marriages better than we can explain them ourselves. Christopher Lasch, author of *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (1978), would probably not hesitate to subscribe to such an analysis. For him (ibid: 320–322, *passim*), our practices downgrade, and even deride, our longstanding tradition of the nuclear monogamous family and the concomitant notion of responsibility towards one's children. It could be added that half of us jump from one happy relationship turned sour to the next without stopping to consider that the presence of children from the previous union will inevitably keep us in a permanent "kinship" relationship of sorts with our former spouse or spouses.[8] We moreover neglect to entertain the notion that the second union will certainly have its own set of challenges (no doubt over new and different conflicts) and that these difficulties could lead to a third re-marriage. For Sacha Guitry, whose cynical views have always been on the mark, marriage amounts

[8] Some Inuit languages include several different kinship terms to designate ex-spouses; French and English only have "my ex." They should perhaps develop a more sophisticated terminology expressing gender differences, order of separation, and so on.

to spending far too much time arguing about problems that would never have occurred had we remained single.

Maillu is not entirely mistaken in claiming that we conceal our polygynous and polyandrous practices by serializing our relationships. In fact, his take on our system of de-marriage/re-marriage is tantamount to what Christianity made of similar practices towards the end of the first millennium. It, too, realized that polygynous unions were being concealed behind repudiations and re-marriages, which were commonplace in the aristocracy. That is why it ultimately reinforced the idea that repudiation (and divorce) was unlawful except when the Pauline or Peterine privileges were involved—when one spouse was not baptized (for details, see Georges Duby 1983; Goody 1985: 53-59).[9] As this was not fully conclusive, the few rights still left to illegitimate children were eventually abolished with the ecclesiastical prohibition of all concubinage in 1545–1563 (Beckert 2008: 99).

If we were to refuse to recognize a form of serial polygamy in Western contemporary societies and to insist that this phenomenon is in fact serial monogamy, Maillu could also make the case that polygyny does not exist in his society by presenting his system—tongue in cheek—as a micro-cyclical monogamous system. After all, could he not have some fun with semantics too and say that the so-called polygynous African man is in reality "monogamous" in that he never sleeps with more than one wife at one and the same time?

Now, which of these diverse structures is the most responsible? The wife-plus-mistress(es) system with the cohort of second-class women and bastards that it inevitably produces? Serial monogamy, with its succession of divorces and the ensuing ruptured ties between parents and children? Micro-cyclical monogamy (e.g., polygyny), which recognizes that some may engage in "conjugal bulimia" without however instituting cruel break-ups (between spouses and children) and without depriving any of the parties involved of their rights to belong to a family group and enjoy a certain degree of stability?

It could be said that depicting our practices as polygyny rather than as serial monogamy is simply six of one and a half dozen of the other. Is there then actually no real difference between, on the one hand, Western societies that tolerate the wife-plus-mistress(es) system and accept divorce, while encouraging neither, and, on the other hand, societies where "polygamous unions" receive full legal recognition alongside monogamous marriage?

Sixty years ago, when any birth out of wedlock was still illegitimate, we would have had to admit that there was indeed a difference between Europe and Maillu's Africa. To add a second or third spouse to a licensed first spouse was still legally impracticable. However, it would be false to maintain such a claim today, as there

[9] In cases of incestuous marriages, bigamy, etc., prohibiting all divorces created problems for the Church. As divorce was not allowed, the Church had no choice but to twist its own semantics and it treated all illegal unions as null and void from the initial first step made during the wedding ceremony. In other words, it preferred to establish that one of its religious sacraments was automatically stripped of any divine sanction if it had been used to *consecrate* an impossible union.

are several Western countries where the notion of illegitimate birth is no longer valid.

I will start with France. Other mainstream Western cases, especially in the Americas, will be considered in Chap. 6. Inasmuch as France legally recognized that illegitimate children were entitled to the same rights as legitimate children, from an outsider's point of view, it has unwittingly given French citizens the right to enter into true polygamous marriages, with common or separate residences. The equality of rights between legitimate and illegitimate children was achieved through several pieces of legislation adopted since 1972 and one crowning ordinance on *filiation* (descent) passed in 2005, made enforceable in 2006 and further clarified in 2009.[10] As the "new rights" related to polygamy are a wholly unintended consequence of the equality of rights granted to illegitimate children, most French citizens are still unaware of their reality (only the Catholic Church sensed, albeit confusedly, that changing the status of illegitimate children would weaken the monogamous standard and, *nolens volens*, disparaged the reforms on these grounds). However, from the viewpoint of an anthropologist with an outside perspective, in our case an Anglo-Saxon viewpoint, it is nonetheless true that the adoption of these laws *de facto* gave French people a right to enter into actual polygamous marriages, quite resembling many of those found in other parts of the world.

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[10] These various laws were passed on January 3, 1972 (on parentage or filiation); January 8, 1993 (on children' rights); November 15, 1999 (solidarity pact between couple not legally married); Dec 3, 2001 (surviving spouse's and adulterine children's rights); March 4, 2002 (parental authority); March 4, 2002 and June 18, 2003 (family name); May 26, 2004 (divorce); July 4, 2005 (ordinance on parentage or filiation); Loi no 2009-61 du 16 janvier 2009 ratifiant l'ordonnance no 2005–759 du 4 juillet 2005 portant réforme de la filiation, abrogeant et modifiant diverses dispositions relatives à la filiation.

[11] Bauman available at: http://www.bishopaccountability.org/decisions/2011_11_23_BC_Supreme_Court_C_1588_Re_Section_293_Criminal_Code.htm(retrieved March 11, 2013).

[12] Berger available at: http://books.google.ca/books?id=iklePELtR6QC&pg (retrieved Dec. 2, 2011).

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Chapter 3
Mistress, Concubine, Spouse, Lover or Paramour? The Need for a Cross-Culturally Valid Definition of Marriage

Most French anthropologists define marriage as an alliance between a bride and her groom and between their respective families. This approach, which has yielded many excellent results for the structural study of kinship (see Lévi-Strauss 1969 [1949]), is less revealing when applied to the French cultural context itself, for in this case there exists no outsidedness separating the observer and the observed. In effect, alliance theory is largely based on the popular conception of marriage in France. One needs only mention that the term *alliance* is, in French, also the contemporary noun for a wedding ring (*une alliance*). Conceptualizing marriage primarily as an alliance between groups may date back to at least the Roman Christian era, judging by the already Lévi-Straussian explanation given by Saint Augustine for the prohibition of incest (*De citate Dei* [413–426 CE], Book XV, Chap. 16; cf. Saint Augustine 1958: 350–353).

Inasmuch as this approach does not take into account the connectedness between marriage and legitimate descent, it is blind to the watershed changes made to the French matrimonial regime through a series of legislative amendments to the status of illegitimate children. And it is probably because of that singular blindness that the proposed amendments have eventually been adopted (though, as will be shown in Chap. 4, after many steps forward followed by a few steps backward). It is difficult to imagine that the relatively conservative French parliament would have otherwise passed laws that unwittingly amounted to legalizing polygamy for all French citizens, immigrants, and refugees, males or females.

Now, because alliance theory makes it impossible to bring to light the new matrimonial possibilities introduced by the birth-status recently granted to illegitimate children, I will adopt the Anglo-Saxon conception, which itself clearly links marriage to the question of the legitimacy of children. In so doing, I will wittingly introduce a *disconnectedness* between the subject of study, as it is locally conceived in France, and the Anglo-Saxon tool with which I will deconstruct and reconstruct it in cubist fashion, so as to view it under new light. The introduction of such distance is one of the characteristics of Bakhtinian exotopy and of exo-anthropology (see Chap. 1 and Lévi-Strauss 1963), whose heuristic value this essay aims to illustrate.

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How, then, is marriage defined by anthropologists in the United Kingdom? Kathleen Gough (1959) has proposed a definition that has since become a classic:

> Marriage is a relationship established between a woman and one or more other persons, which provides that a child born to the woman under circumstances not prohibited by the rules of the relationship, is accorded full birth-status rights common to normal members of his society or social stratum (ibid: 32).[1]

Gough very carefully weighs her choice of words: "One or more other persons" (not *men*) is meant to take care of Sub-Sahara African cases, such as the Nuer, the Nandi or the Igbo, where a highborn woman could marry one or several women, and become the legal father of their children (sired by preselected lovers). The highborn woman thus insured a patrilineal issue to her lineage when the latter lacked married male members in her generation (Lévi-Strauss 1983: 1222). Other parts of Africa (McCall 2000: 134–136) and other regions of the world, such as Native America, offer similar cases. The choice of the words "more persons" also takes into account group marriages as they were practiced among the Nayar of India as well as true fraternal polyandry (several brothers married to one woman), as in Nepal and Tibet. The phrase "under circumstances not prohibited" makes the definition applicable to cases where, for instance, a husband legally repudiates a child (causing him to lose all his birth-status rights) for having been sired by his mother's paramour (i.e., a married woman's lover), but without divorcing that child's mother. The expression "full birth-status rights" refers to all social relations and all rights to property that a child acquires at birth by virtue of his legitimacy—rights transmitted through the father and the mother. In a patrilineal system, these rights include the child's rights vis-à-vis a *pater* as an individual and also vis-a-vis that *pater*'s kin. Subsidiary rights may come from the mother's side. In a matrilineal system, most of the child's rights are derived from his mother's and his mother's brothers' kin group. Subsidiary rights may also be inherited from the father side. In a cognatic descent regime such as the Western system (also known as bilateral or Eskimo), rights come more or less equally from the mother's and father's side. In a double descent system certain kinds of rights are derived from the mother's side (say movable property for example), while other kinds of rights come from the father's (say, family name and unmovable property).

Yet, everything is relative. For instance a right to one's father's family name is not universal. French recent history offers a good example. Until a law passed on July 1, 2006,[2] a child received only her father's patronym as her family name (there were exceptions but few). The same rule applied for a boy. After that date, the law allowed

[1] I first considered that true polygamy had just become a legal possibility in the West in 1972 after reading Kathleen Gough's cross-cultural definition of marriage in her article on Nayar women's marriage patterns in India (1959). Her work made me realize that when France's concept of "free union" was considered from Gough's Anglo-Saxon point of view, the then new legal rights granted by France to non-marital children sanctioned polygamous marriages. I met with Dr. Gough at that time in Vancouver, B.C., but incompatible scheduling prevented us from concluding our initial discussion. Nevertheless, this essay incorporates several of her suggestions and I wish to honor her memory here.

[2] See "Définition de nom, prénom". *Dictionnaire du droit privé français* par Serge Braudo, Conseiller honoraire à la Cour d'appel de Versailles. See at: http://www.dictionnaire-juridique.com/moteur.php (retrieved Jan. 19, 2013).

the parents to choose between the father's patronym alone, the mother's alone, or the father's *and* mother's patronyms, or the mother's and father's. Thus today, full birth-status rights include all these four options, and the question of whether a child is born with full birth-status rights becomes one of whether her parents had all these naming options when she was born or adopted—the fact that she receives her mother's or her father's patronym alone is no longer conclusive in itself.

In passing, I will ignore this novelty in the analysis of the French case below and do as if nothing had changed in French rights regarding family names. This will in no way change the conclusions that will be drawn but will spare us, each time we discuss full birth-status rights in France, an awfully cumbersome iteration of the four options presently available on the one hand, and, when called for, that of the father's patronym alone in times past.

Although Gough does not actually specify this, it should be added that the notion of "full birth-status rights" does not necessarily entail equal rights among all legitimate children. In some monogamous systems, the first-born may have special status in relation to his younger brothers, and brothers may have statuses that differ from that of their sisters, even older ones. In such cases, the less important rights attributed to some of the children must be regarded as the "full birth-status rights" of those who are second- or third-born, and so on. In some polygynous systems, the status of children born to different wives can vary in relation to the rank of each wife (the same may apply to polyandrous marriages where a second husband's child may have less rights than a first husband's child). If such is the case, the less important rights attributed to some of the children must then be considered as being the "full birth-status rights" of those who are born from second or third spouses, and so on.

In cases when a child acquires full birth-status rights by virtue of his mother's intimate conjunction with one particular person (or more), that relationship is to be defined as a marriage between his mother and that person (or persons)—regardless of how peculiar the conjunction of the woman and her partner(s) may appear to Western eyes. It is under this condition that the intimate conjunctions that Nayar women had with their many sexual partners are considered to be actual marriages contracted within a system of group marriages, rather than being a libertarian form of generalized promiscuity (despite all initial appearances). This criterion is also what makes it possible to classify as a marriage the type of union that two Nuer women may sometimes contract between themselves. If an intimate conjunction between a woman and a man or a woman (or one or more persons) does not give her child full birth-status rights, but instead deprives that child of much or even all of those rights, then, by definition, that intimate conjunction is considered in her culture to be the opposite of a marriage. Society asserts that it is so by assigning the child a lowly status that makes him or her an "excluded" party.

Lastly, the criterion of the legitimacy of children shows just how a society can rid itself of the institution of marriage as Gough defines it. It would need only stop granting full birth-status rights on the basis of paternity (or, more accurately, to renounce that concept) and begin conferring full birth-status rights to children simply for being born to a woman, regardless of her relevant intimate conjunction(s) with any other person(s). Even matrilineal Navaho Indians, foolishly presented by some New Agers as ignoring the institution of marriage, do not come close to this.

Admittedly, their children are mainly born *to* their mothers' respective clan and derive most of their birth rights from the latter, but they are also born *for* their fathers' clan, which thus also provides part of any child's full birth-status rights (Witherspoon 1975).

It must be stressed that, in Gough's definition, a marriage ceremony or some sort of formal solemnization is not needed for a true marriage to have taken place. Citizens from at least 11 states in the United States and nine Canadian provinces know this full well. Among them true common law marriages exist (Koegel 1922).[3] It is nearly enough for a man and a woman to have children together, or to have publicly lived a conjugal relationship for a short period (3 years on average, but it varies depending on the state or province) to be almost automatically recognized as being fully married, sometimes even when not wanting to be. For the most part, such marriages by "habit and repute," initiated by no wedding ceremony whatsoever, provide legal rights and duties between "spouses" equivalent to those granted through a marriage solemnized by a civil or religious ceremony. Paradoxically, the break-up of a common law marriage is far more difficult to achieve than that of a solemnized marriage. Common law marriage cannot be dissolved through regular divorce proceedings; instead, the partners must petition a special court.[4] Before the Council of Trent (1545–1563), the existence of marriages through common law rules was still tolerated throughout Europe, and earlier, in the Middle-Ages, was most likely the norm rather than the exception among lower class people.[5]

Some regular folks might find it curious that anthropologists would attribute to a mere "intimate conjunction" between a woman and a man (or more) the status of a full marriage because a child born from such an "affair" is granted full birth-status right. All the same, a recent French law case proves *a contrario*, but beyond a doubt, that such is indeed the case, even in French legal culture, too, and even though most Frenchmen are not aware of it.

This is evidenced by the manner in which French laws and courts handle children born from strictly prohibited incestuous conjunctions. As with the bastard child of yesteryear, an offspring born from an incestuous conjunction between a man and a woman is still systematically denied "full birth-status rights common to normal members of his society." The civil code states (Art. 310–2; old Art. 334–10)[6]:

> Where there exists between the father and mother of the child *one of the prohibitions to marriage due to lineage* (emphasis added) laid down by Articles 161 and 162, if parentage [in French: *filiation*] is already established with respect to one of them, *it is prohibited to establish parentage with respect to the other by any means whatever* (emphasis added).

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[3] "Marriage Laws of the 50 States, District of Columbia and Puerto Rico." *Wex*. Legal Information Institute (retrieved Dec. 9, 2011); "Definitions." *Family Law Act, R.S.O. 1990, c. F.3*. Canadian Legal Information Institute. 20 July 2009 (retrieved Dec. 9, 2011).

[4] "Common-law marriage." *West's Encyclopedia of American Law*. See at: http://www.answers.com/topic/common-law-marriage#Wests_Encyclopedia_of_American_Law_d

[5] "Concubinage." *Catholic Encyclopedia*. Available at: http://www.newadvent.org (retrieved Dec. 9, 2011).

[6] The civil code is constantly changing with the adoption of new laws. In consequence, when I refer to it for a given year or period, I refer to the civil code as it was formulated in that particular year or period, not to the latest version.

Let us first note how complicated this text is. A second reading might be in order. Then, we cannot help but notice that prohibiting double parentage is here directly and explicitly linked to the possibility or impossibility of a marriage. For its part, art. 161 stipulates: "In direct lineage, marriage is prohibited between all ascendants and descendants *and the relatives by marriage* in the same lineage" (italics added to emphasize that the prohibition is not merely a matter of consanguinity). Art. 162 states that "In collateral lineage, marriage is prohibited between brother and sister."[7]

Thus, still today, a child born from an incestuous conjunction may only have one legal parent. The reason for this is easily understood. To let both the incestuous genitor and genetrix acknowledge their parentage with their common child would amount to acknowledging that genitor and genetrix—say brother and sister—are allowed to form a nuclear family and to enter into, or stay in, a marital relationship.

This is well illustrated by a case adjudicated in France's highest court in 2004. Brigitte and Gilles were born from the same father but from different mothers.[8] In 1990, a child, Marie, was born to them. This child was legally acknowledged by both Brigitte and Gilles shortly after birth. Nonetheless, as the child was born from an incestuous relationship (in the eyes of the law), Gilles' acknowledgment of paternity (fatherhood) was legally annulled in 1992 by a *tribunal de grande instance.* The reason given was that marriage is "prohibited between a brother and a natural or legitimate sister," and that for this reason the law prohibits that the child be acknowledged by both parents. In 1998, Gilles found an indirect way to re-establish paternity with his child. He requested to adopt her. After all, was he not the child's maternal uncle too? And nothing in the law prohibited adoption by an uncle. Now that takes *chutzpah* (not merely Cartesian logic)! A lower court refused, claiming that while intrafamilial adoption is legitimate and desirable, it would in the case at hand institute "a *new relationship* contrary *to public order*" (emphasis added). What was on the state prosecutor's and the judges' minds when they wrote "a *new relationship*"? After acknowledging the incestuous conjunction, what sort of additional relationship could be so *contrary to public order*? Obviously, a marital relationship between the two half-siblings!

In 2001, an appellate court overturned the lower court's decision and allowed Gilles to proceed with the adoption in the interest of the child. At this point, one needs to know that the child had above normal intelligence, knew the conditions of her birth, and supported her parents' petition to the court.

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[7] *Civil code.* Translated by Georges Rouhette, Professor of Law, with the assistance of Dr Anne Rouhette-Berton, Assistant Professor of English. Updated 04/04/2006. Date of the last known relevant amendment: Act no 2006–399 of 4 April 2006. At http://195.83.177.9/code/liste.phtml?lang=uk&c=22 *(retrieved Jan. 15, 2009). In the original French, this article reads as follows:* "S'il existe entre les père et mère de l'enfant un des empêchements à mariage prévus par les articles 161 et 162 pour cause de parenté, la filiation étant déjà établie à l'égard de l'un, il est interdit d'établir la filiation à l'égard de l'autre par quelque moyen que ce soit". In the Rouhette's translation Art. 162 repeats Art. 163 and is in blatant error. As there are other errors, I have checked the translation against the French original. On the Brigitte and Gilles' case see: Blandine Grosjean, "Inceste: la justice reste inflexible, la cour de cassation refuse qu'un homme adopte la fille qu'il a eue avec sa demi-sœur". *Libération* (Paris), Jan. 7, 2004.

[8] I use pseudonyms throughout the story.

Despite everything, adoption proceedings were suspended at the request of an *avocat général* (chief prosecutor Jerry Saint-Rose) from the *Cour de cassation* (somewhat like the Supreme Court). He appealed for the state to intervene on the grounds that adoption cannot be used as a legal device to make lawful an "unlawful relationship" (what if not a marital bond?). On January 6, 2004, the *Cour de cassation* agreed with the *avocat général* and denied Gilles the right to adopt his daughter. He will thus never become her legal father (unless the law is changed) and the child will never have full birth-status rights.[9] More important in the eyes of French courts, no one will ever be allowed to advance that someone is or has been permitted to be in a matrimonial relationship with a half-sibling and *a fortiori* a full sibling. For this discussion, the key point is that granting full birth-status right to an incestuous natural child, even in her own interest, amounts to conferring a marriage status to the incestuous relationship out of which the child was born.

Contemporary French legal doctrine states that double parentage is forbidden only in order to hide, from the world and the child, the latter's incestuous origin (Paillet 2006: 311; Terré and Fenouillet 2005: 667; references to Terré and Fenouillet's legal volume are to paragraph numbers, not to pages). However, this argument is not convincing in the least. First, it must be fairly obvious to anyone that absolute secrecy can be achieved only when and if genetrix and genitor keep preserving it. When Art. 310–2 is invoked by a court it is because the conditions of the incestuous birth are already publicly known. Moreover, if and when one of the two parents divulges the truth to the child or others, it will be known irrespective of the fact that the law officially establishes that the child has only one parent (Brigitte but not Gilles). Thus, the law is either unnecessary or powerless to hide the truth. Secondly, the relevant French law is paradoxical in that the courts that deny double parentage or filiation to the incestuous child allow that very child to be financially compensated for having her full family being denied to her. To benefit from such compensation, she must sue her incestuous father and uncle in court for damages (or mother, if she had acknowledged her second and was denied maternity) (Paillet 2006: 316–319). Put another way, in this case the courts admit that it is in the best interest of the incestuous child to know the conditions of her birth and to reveal them in court. In the light of such contradictions, the "hide the truth" argument sounds terribly hollow—very much like an *ex-post facto* Freudian rationalization. In this respect, it is to be noted that some other European countries (Germany,

[9] For further details on this case, see 01–01.600, Arrêt n° 75 du 6 janvier 2004, *Cour de cassation—Première chambre civile, Cassation*, Paris, France, *available at* http://www.courdecassation.fr/agenda/default.htm (retrieved, Oct. 1, 2004); Blandine Grosjean, "Un Inceste fraternel en quête de paternité: l'avocat général a demandé aux conseillers de rappeler que l'interdit de l'inceste est la base absolument fondamentale du droit de la famille et l'un des piliers de notre société". *Libération* (Paris), Dec. 3, 2003; Laurence Brunet, "La prohibition de l'inceste en droit civil. Un interdit en peau de chagrin". *Informations sociales* 2006/3, No 131, p. 70–77. Available at: http://www.cairn.info/article.php?ID_REVUE=INSO&ID_NUMPUBLIE=INSO_131&ID_ARTICLE=INSO_131_0070 Nathalie Guibert, "L'adoption d'une fillette née d'un inceste en Cassation". *Le Monde* (Paris), Dec. 4, 2003; Blandine Grosjean, "Inceste: la justice reste inflexible, la cour de cassation refuse qu'un homme adopte la fille qu'il a eue avec sa demi-sœur". *Libération* (Paris), Jan. 7, 2004.

Austria, Greece, Portugal, Switzerland, Croatia, Turkey, and the Province of Catalonia in Spain) do not prohibit the establishment of full parentage or filiation in the case of incestuous relationships (Paillet 2006: 315).

The "marriage-like" argument, on the contrary, has the advantage of making all such contradictions disappear. The child is deprived of his full birth-status rights not to punish him; for that matter, the courts admit that he is entirely innocent and that he may be compensated through the courts for damages inflicted to him by these very courts that were "forced to do so." Neither is the deprivation of the child meant to punish his parents. For that, fines or jail terms imposed on genetrix and genitor could be the appropriate measures. There remains only one possibility: granting double parentage would amount to acknowledging the existence of a nuclear family based on incest as well as that of a marital relationship between a brother and a sister. Let us recall that article 310–2 clearly spells out that double parentage is specifically forbidden because "there exists between the father and mother a prohibition to marriage." One cannot be clearer. By forbidding double parentage, the incestuous parents are *ipso facto* and forever prevented from transmuting their "criminal conjunction" into any form of marriage. The courts acknowledge that unfortunately this is to the detriment of an innocent child. It is thus logical that they attempt to remedy the situation.

The marriage argument also has the merit of being most congruous with a very long past, during which, as we will detail in next chapter, children with full birth-status rights status could only come from a marriage, whereas, by definition, all children deprived of such rights were born out-of-wedlock. There existed then a clear reciprocal link between marriage and the legitimacy of children and between the illegitimacy of children and the absence of marriage. It seems that today's civil code may still be simply, and unknowingly, paying homage to that cultural past.

At any rate, we will see below that around 1900, French senators and other legislators were quite explicit in holding that granting full birth-status rights to a natural-born child amounted to defining the conjunction of its genitor and genetrix as marriage, and that to do so would allow for "polygamy" [their word] to exist in the case of a married man having natural children with a mistress.

Elsewhere in the Western world, *others* may find the above peculiar to the French only and not applicable to them. How may the existence, or nonexistence, of a marriage between two persons be truly ascertained on the mere basis of the birth-status rights of their children? Nonetheless, recent Western cultural history may further prove that Gough's single most defining criterion hits exactly the right note. Over the last few decades, Western homosexuals have fought for equality of rights with heterosexuals, including for an equal right to marry. For many in the gay movement, this right to marry must come with rights to have and raise children and for the two homosexual partners to become co-parents of these children—just as prevails in the case of heterosexual couples. The fact that same sex partners cannot procreate without a third party opposite sex contribution of some sort is irrelevant. Among two married lesbians, the two parents of a child born to one of the two spouses (or adopted by one of them) are to be the genetrix and, by virtue of her marriage, her female spouse automatically. Among married male homosexual couples, the two

parents of a child are to be the adoptive male spouse and his male spouse automatically. The same would apply if one of the partners elected to father a child through a surrogate mother. In effect, the genetrix or surrogate mother abandons her infant to its genitor, the latter acknowledges or adopts the baby, and by virtue of his marriage, his male spouse automatically becomes the baby's other parent.

As gay marriage is opposed by large segments of the population, provinces, local states, and nation-states have long refused to allow homosexuals to marry and especially to adopt as a couple. With the passing of time, some political entities have offered various forms of civil unions for gay and lesbian couples. These unions were, however, deprived by law of many of the rights attached to heterosexual marriages, in particular, but not only, of the right to have both partners jointly recognized as the two parents of any child procreated or adopted by one of the partners. In more recent years, a few states have finally allowed gay and lesbian couples to officially marry, just like heterosexual couples, without, however, necessarily granting married homosexual couples the right to adopt jointly. As of 2010 only the following states had granted rights to both marry and to adopt jointly: Argentina, Belgium, Canada (except in two territories), Iceland, the Netherlands, Norway, Sweden, South Africa, and Spain. Since then, debates have been raging in Brazil (both rights are recognized but are at the mercy of the courts), Mexico, Portugal, Uruguay, and the United States (with only some states adopting gay marriages while remaining unclear about right of joint adoption). France finally legislated marriage and joint adoption for homosexual couples in May 2013.

This reveals that gay activists are quite aware that a right to marry without the right for a married gay or lesbian couple to become co-parents is not a full-fledged marriage. For them, like for Gough, having children with full birth-status rights is the outstanding distinctive feature of any full-fledge marriage. The piecemeal granting of homosexual rights by most governments confirms the same point. Pressed by the weight of traditions and popular opposition, they all attempted to resist gays' and lesbians' demands by withholding as long as feasible their right to achieve true marriages. How? First, by granting civil union instead of marriage, second by granting marriage but with no possibility for co-parenthood, and finally, but only reluctantly, by allowing marriage with co-parenthood rights equal to those of heterosexual couples whose children have two parents and, as relatives, their two parents' respective relatives (a network that lies at the base of full birth-status rights). Indirectly, this implies that even in the West only a union with a potential for children with full birth-status rights qualifies as a full-fledged marriage. Correlatively, this illustrates once more the relevance of Gough's birth-status rights criterion in defining what qualifies as a marriage and what does not, even in the context of contemporary Euro-based cultures.

Notwithstanding, even if geographically limited, the present-day existence of true and full marriages between males forces us to adapt Gough's definition slightly. Marriage can no longer be only "a relationship established between *a woman* and one or more other persons," but rather a relationship established between *a person* and one or more other persons, which provides that a child procreated or adopted by one of these person or otherwise procured through a surrogate genetrix, under

circumstances not prohibited by the rules of the relationship, is accorded full birth-status rights common to normal members of his/her society or social stratum.

Let us now turn to other Anglo-Saxon definitions of marriage. There are a number of variations. They usually add criteria to that of the legitimacy of children: marriage transfers authority over the bride from her father to her husband; matrimony gives the husband a monopoly over his wife's sexuality; it establishes strong affinal ties between a man and his wife's brothers; it dictates fidelity between spouses; it provides reciprocal rights between them, and so on. Still, as the criteria multiply, particularly in the case of reciprocal rights between spouses that so obviously derive from Western conceptions, the definition becomes increasingly inoperable in a number of non-Western societies (e.g., in most matrilineal cultures where final authority over the bride remains vested in her descent group, and, obviously, in polygamous cultures where fidelity and rights of inheritance cannot be reciprocal). The great advantage of Gough's definition is that it rests on a *single* and *sufficient* criterion—the child's birth-status rights that are everywhere enough to reveal whether the mother's relevant relationship or intimate conjunction is a marriage or not. The same applies when her definition is rephrased to account for true homosexual marriages. Gough (1959) recognizes that in any given society, other rights may accompany marriage (reciprocal inheritance rights between spouses, for example), but these are secondary as far as she is concerned, inasmuch as in many societies, such as that of the matrilineal Nayar, spouses are not bound by any such obligation (ibid: 33). By focusing on the most universal aspect of marriage (wherever this institution exists), her definition helps us grasp why in other parts of the world certain relationships that appear to us as peculiar, unusual, or even shocking are actual forms of marriage that we simply never considered or even imagined possible. It will in turn be shown that her definition has a heuristic value particularly in the French context, no doubt because it is a powerful means to observe that culture from afar, with a certain detachment, empowering us to see it as that of an exotic people.

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Chapter 4
Anthropologizing Traditional Marriage in France

To demonstrate how the laws passed between 1972 and 2009 gave contemporary French people the possibility to enter into true polygamous marriages, we will first examine the birth-status rights of children as they were defined before 1972, based on the mother's various possible types of conjunction with a man or one or more persons. Then, we will look at the rights of the same children as they have been enacted under the new legislations. In order to better grasp the extent of the upheaval, the situation in 1972–2009 will be contrasted with that of the end of the nineteenth century and beginning of the twentieth. To discuss the few very timid amendments made between 1900 and 1972 would needlessly burden the essay (see Weill and Terré 1983: 469–470). To avoid any semantic slippages, I will use the expression "certified" or "licensed" marriage to mean marriage as it is commonly understood among French natives, and "marriage" without such qualifiers for intimate conjunctions that conform to the cross-cultural Anglo-Saxon anthropological definition.

During the period 1890–1910, the French civil code[1] contained a number of fundamental conceptual distinctions regarding our subject. The term *marriage* (certified marriage) was sharply distinguished from *concubinage* by virtue of the birth-status rights that it conferred: children born in a certified marriage were legitimate (*légitimes*); those born from any concubinal conjunctions were by definition illegitimate (*illégitimes*). The civil code also distinguished between simple concubinage (*concubinage simple*) and adulterous concubinage (*concubinage adultérin*). Concubinage was considered to be simple if neither of the partners was linked to a third party through a certified marriage. As the adjective "simple" is ambiguous in English, I will herewith replace simple concubinage with the expression "balanced concubinage" when greater clarity is called for. Concubinage was adulterous if one of the parties (or both) was (were) related to a third party through a certified marriage.

[1] Some of the notions contained in the civil code do not exist in English-speaking countries, most of which use the common law system. The translated terms in our essay are either borrowed from other authors or simply suggestions.

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An illegitimate child born in balanced concubinage was called a "natural-born child" (*enfant naturel*), while a child born in adulterous concubinage was called an "adulterine child" (*enfant adultérin*). By its very designation, all went as if the natural child was conceived and delivered in the state of nature as opposed to that of culture (in the sense of society, civilization). Just as revealing, in English, and adulterine child may also be termed a "spurious child" (Krause 1976: 44–48).

We shall begin with an examination of the birth-status rights of simple natural-born children. If not indicated otherwise, the main source will be Weill and Terré's law volume (1983: 43; 45 n2; 469,2,a; 469; 470; 471,2; 589; 605; 610; 611; 634–636; 650; 654, 678, 679, 697). First, the civil code stipulated that natural-born children could be related to their progenitors only (biological father and mother exclusively), never to their two progenitors' own relatives. Still, this was not automatic, for to be a parent of her child the parturient had first to *avow* her maternity (*aveu de maternité*) and sign an *acknowledgment* form. Only then was she recognized as the mother and the child as hers. It goes without saying that the father also had to formally acknowledge his child (ibid: 605; 611). Nevertheless, even after their parents' voluntary recognition, natural-born children had no legal relationship with their biological grandparents, uncles, aunts, cousins, and so on. For good measure, the law strictly prohibited them from trying to establish any such relationships through the courts. Needless to say, natural-born children could not be heirs to any of them. They could only inherit from their father and mother, and only within certain narrow limits. For example, when a widow (certified marriage) entered into concubinage and had a natural-born child, this child's share of his mother's estate was smaller than the share that went to her legitimate children from her former licensed marriage (if there were two legitimate siblings, only one sixth of the estate went to the natural-born child versus 2.5 sixth to each of the two legitimate ones). When a natural child was in competition with certain of her parents' ascending relatives, she received only three quarters of her parent's estate. Other restrictions applied when in competition with certain of her parents' collaterals. Additionally, it was made legally impossible for parents to provide their natural-born children (through *inter-vivos* gifts from one parent or both) with a portion larger than just indicated. *Inter-vivos* gifts are made from one person, before her death and before her estate will be divided and dispersed, to another living person. Worse, if a natural-born child was acknowledged by one of his parents after that parent's marriage to a third party, the child in question was stripped of all his already limited hereditary rights under article 337. This was easily enforced because, under French law, the right to bequeath (the freedom in making out a will) is considerably more restricted than under common law in Canada or the United States. For example, while an illegitimate child could not be made a full heir under any circumstances, a legitimate child could not be disinherited and still cannot. A will or a part thereof that does not comply with the provisions of the law is null and void and cannot be executed.

It should also be noted that before 1896, natural-born children were not considered heirs in the regular sense of the term, and that under the laws of the Old Regime (before the revolution of 1789), bastards' birth-status rights were then almost

nonexistent. Our main source for this is Claude-Joseph de Ferrière.[2] For instance, simple bastards were only entitled to receive food from their mother and/or father (see also Weill and Terré 1983: 650). Yet, a mother who, to "save her honor," had not acknowledged her own child, could not be sued for not assisting that child. A simple bastard belonged to no family. He could inherit from neither of his two parents (nor, of course, from any of his parents' relatives). Correlatively, neither could his mother or father inherit from him. If a bastard died childless when his parents were still alive, his estate went to the King or to the High Justice Lords (*Seigneurs hauts-justiciers*). A simple bastard could be called a "child" on the condition of adding some epithet to the word child, such as "natural child." The Church further contributed to this social exclusion by prohibiting through Canon Law any illegitimately born subject to enter into any Church career.[3] It is interesting to note that, after 1793, well into the 1789 French revolutionary maelstrom, the French term *bâtard* was dropped from the legal vocabulary and replaced by the more "politically correct" "natural" or "illegitimate" child.

Thus, 100 years ago, and more so in earlier times, the birth-status rights of a simple bastard or natural-born child (an innocent infant born out of wedlock) were in no way full birth-status rights as granted to any child born from a certified marriage.

To return to the 1900 context, in the case of an adulterine child, birth-status rights were even more restricted than was the case for natural children (see Weill and Terré 1983: at 469,2,b; 520; 526; 560; 600–601; 678; 679). Under the law, a married man (certified) was strictly prohibited from acknowledging a child born to him outside of his legal marriage (e.g., from a mistress)—even if and when he petitioned the courts and insisted on having his paternity recognized and his mistress' child acknowledged as his. Correlatively, his mistress was prohibited from petitioning the courts to have her adulterous lover (a man officially married to a third party) legally recognized as the father of the child she had with him. Thus, no parentage or descent line could ever be established between the genitor and his adulterine child. Here one cannot help recalling the contemporary case of Gilles, his half-sister Brigitte, and their daughter Marie. Then as now, the courts' reasoning was that double parentage would have amounted to acknowledging the existence of a marriage between two persons who were not permitted to intermarry.

In the case of a married woman (certified) the drama unfolded differently. In French law as in Roman law, the *pater est quem nuptiae demonstrant* (the father is

[2] See "De la Bâtardise". In *Dictionnaire de Droit et de Pratique* par M. Claude-Joseph de Ferrière, doyen des docteurs-régens en la Faculté des droits de Paris, et ancien avocat au Parlement, 2 tomes, Paris: chez Savoye, 1762. Extract quoted in *Livre des sources médiévales* at: http://www.fordham.edu/halsall/french/batard.htm (retrieved Dec. 16, 2008).

[3] A career in the Church was possible for a bastard only if a papal dispensation was granted. Such cases were very rare. See "Bastardy," Encyclopedia of Children and Childhood in History and Society. http://www.faqs.org/childhood/Ar-Bo/Bastardy.html (retrieved Dec. 3, 2011).

whom the marriage vows indicate),[4] meaning, in the French context, that while a woman's licensed marriage lasts, only her licensed husband may be recognized as the father of any and all of her children, even those she conceives with a lover (art. 312, 1 of the civil code), unless the husband is in a position to disavow the child with proofs to support his disavowal. When the woman's certified husband did not disavow the child sired by his wife's lover, the child was deemed to be a legitimate infant of his mother and of her certified husband. Moreover, a married woman was legally prohibited from petitioning any court to have her baby recognized as her lover's child (ibid: 560; 600; 601).

Now, it should be stressed that disavowal was near to impossible for the husband, especially if his wife had kept sharing house with him during the conception period (ibid: 530; 531; 543; 546). In the past, the husband had to prove that he never could have been in an intimate conjunction with his wife during the conception period: he was journeying in a distant land at the time, he was in prison, his wife had been abducted, and so forth. (In the last few decades, the husband has been allowed to submit the results of DNA tests, but only after the courts admit, on different grounds, a strong probability of non-paternity.) What is more, art. 340 of the civil code originally promulgated by Napoleon stipulated that "investigation of paternity is forbidden." While this seriously limited the cheated husband's attempts at proving his wife's extramarital affair, it also (1) protected the legal rights of married women from excessively suspicious and jealous husbands, and (2), not surprisingly, also prevented men from being sued for paternity by their mistresses or concubines (art. 340 was modified in 1912).

When a woman's certified husband managed to legally disavow a child sired by his wife's lover, the law took the following path. As in such cases Nature makes quite evident who the child's genetrix is, the wording of the law bent what Nature clearly spelled out. The connection between the adulterous mother and her adulterine child could only be "duly noted" (*constatée*) by the court, but not "acknowledged" or "recognized" (*reconnue*). This deprived the woman's adulterine child of legal parentage or descent with his own mother/genetrix. Such an adulterine child was neither allowed to receive or to bear his genitor's last name (his mother's lover's name) nor to inherit any of his biological parents' estate (or any of his parents' relatives).

Adulterine children could only lay claim to food and a few other necessities. When an adulterous husband or wife divorced his or her certified spouse and legally married his or her concubine or lover (which produced a certified marriage), they still could not legitimize the children they had conceived together in adulterous concubinage (Weill and Terré 1983: 469; 469, 2, b; 534, 679). In 1904, while a bill on adultery was being debated, the Senate was firmly opposed to legitimizing such children, as it would have led, it was alleged, to "a post-facto consecration of polygamy" [the senators' words] (ibid: 678). In 1915, legislators once again stated their case that they did not want to give a man the opportunity to legitimize after the fact

[4] The complete Roman phrase is: *Mater semper certa; pater est quem nuptiae demonstrant* (The [identity of the] mother is always certain; the father is whom the marriage vows indicate).

any children he had fathered with other women with whom he might have been in conjunction concurrently with his legal wife (ibid: 679).

As pointed out by two lawyers, the civil code of that time made a natural-born child a stigmatized child and an adulterine child a true social pariah (ibid: 469, 2).

Under the Old Regime, the birth-status rights of the adulterine child were more drastically limited in that the courts further restricted the liberalities that they could receive from their "authors," meaning their parents. To be sure, bastards born to a king, or a prince (but not to a mere nobleman) were treated more favorably than lower class bastards; yet, princely bastards remained just that their entire life. As Ferrière (1762) our eighteenth century source, puts it, "bastard laws" (*droit de bâtardise*) were to ensure that "marriage [could be] the sole legitimate venue for the propagation of the human *genus*"[5] (see also Weill and Terré 1983: 469, 2, b; 470, 650).

To return to the period *circa* 1900, how should we classify concubinage and the practices linking one individual to several other persons of the opposite sex simultaneously? By all accounts, even for the more common case of monogamous balanced concubinage, the provisions of the civil code made it impossible to equate any form of concubinage with marriage, either as defined in French law or as understood in the broader Anglo-Saxon anthropological sense. It had nothing to do either with a common law marriage or with a quasi-marriage, or with an incomplete and inferior marriage, as in classical Roman and German times. Under the law, all children born in balanced concubinage were automatically deprived of the full birth-status rights granted to any legitimately born members of his society or social stratum. The courts were then in full agreement with Gough (1959: 32), according to whom an absence of full birth-status rights for a child indicates that his mother gave birth out of wedlock, or as it is phrased more to the point in popular French, "*est né hors mariage*" (born from without marriage). As a result, at that time, in the case of balanced concubinage involving three or more people simultaneously (say, a man and two women, all unmarried) and, *a fortiori,* in the case of adulterous concubinage (two in the trio are married to each other or one of the trio is officially married to a fourth party), there was no true polygyny or polyandry. From our anthropological Anglo-Saxon perspective, for polygamy to have existed, children born from the adulterous concubinage should have enjoyed birth-status rights equal to those of children born in a certified marriage. However, as we have seen, they most certainly did not. Even simple natural-born children could not belong to their father's or mother's respective families; their only legal ascendants were their biological genitor and genetrix. In fact, divesting all children born in balanced or adulterine concubinage of their full birth-status rights was deliberately engineered to make certified monogamous marriage the sole recognized venue for the biological and social reproduction of society. The reasoning seems to have been that for monogamy to be universally imposed and for true polygamy to be completely ruled out, the state (or earlier, the Church) must recognize one and only one intimate conjunction as a marriage, certify it, and then reject all other intimate conjunctions as

[5] "De la Bâtardise", ibid.

nonexistent (more precisely subject to no possible substantiation, as is still the case today with the monogamous incestuous conjunction of Gilles and Brigitte).

Why was monogamous balanced concubinage included in the non-marriage category? The reason may have resided in the fact that, by definition, the state could exercise no control over the ever-possible addition of new partners in the concubinal relationship. If it had adopted today's common law Anglo-Saxon solution and acknowledged only one of the concurrent relationships as a "common law marriage," eschewing the additional conjunctions, it would have simply postponed the day of reckoning. Indeed, transforming one of the concubinal relations into a common law marriage while giving all additional conjunctions a *non*-marriage status would have granted a bastard status to the children born to the women who remained mere mistresses. And as a point of fact, under a common law system, polygynous Mormon Fundamentalists' open secret of cohabiting with several spouses without much legal harassment is not to let a local state or a province or a federal state declare that a single of their multiple conjunctions is a common law marriage.[6]

Leaving aside fundamentalist Mormons hijacking the law, clearly, as asserted by a German sociologist (Beckert 2008: 99), "the definition of the legitimacy or illegitimacy of children gives expression to the structures of social recognition by which society regulates its system of family membership." And, in our case, universal monogamy was effectively imposed by defining all children born to an individual from without a licensed marriage as outside that individual's lineage and ultimately outside society.

Notwithstanding, French people paid a heavy societal price for their uncompromising attachment to universal monogamy. Year after year, it automatically generated a cohort of second-class citizens—a caste of innocent children stigmatized as bastards by ordinary folks for what society knew to be the "faults" of their parents alone. At the dawn of the twentieth century, these children represented between 8.07 % and 8.70 % of the total number of children born in France (Weill and Terré 1983: 473, 2, n.4). As late as the 1920s, some small-town clerks would enter the mention "bastard" or "unknown father" on their birth certificates. To prove their identity, French citizens had to present this document at regular intervals throughout their lives. One may imagine the humiliation for those who were born "bastard."

There is little wonder, then, that Maillu (1988) would question Western matrimonial practices. What might an outsider make of societies that do not hesitate to severely handicap (psychologically, socially, and financially) and cut loose a significant proportion of its child population in order to be in *formal* compliance with a rule of universal monogamy—a rule that it knows full well will not be fully respected in practice? Even married women would admit as much. In the 19th century they were the initiators of a significant number of the adulterous concubinal relationships. Prevented from divorcing or not wishing to do so, they just took a second male partner, a paramour or illicit lover, without asking anyone's permission (Sohn 2006).

[6] See "Is Polygamy Illegal?" In Polygamy—Frequently Asked Questions. At http://www.absalom.com/mormon/polygamy/faq.htm (retrieved Jan. 20, 2009).

Lady Chatterley never was a lone exception. If we know more of males taking sexual liberties, it is only because male society pays attention when men reminisce about their "conquests," while being at the ready to vilify any women boasting about the passions she aroused, perhaps even among those very men so pleased with themselves.

At this juncture, an important question arises: When society imposes universal monogamy by making it strictly impossible to acknowledge any of its inevitable pluri-conjunctions as polygamous marriages, does that not make its culture somewhat "too uncivilized," "savage," perhaps "too fundamentalist," or at the very least, "totally irrational" over a self-imposed polytheist interdict so ancient that its original meaning is lost? Otherwise, how are we to explain the fact that male-with-male true marriages with co-adoption rights could be legislated in 10 Western countries (first time ever in world history) while a legally *explicit* right to true polygamy must absolutely be denied even though it has been recognized elsewhere in the world for most of human history? Fustel de Coulanges (1956) would have us speak of a long-lasting inherited Indo-European taboo whose original polytheist significance has remained buried for at least the last 2,000 years.

How can we hold monogamy to be morally superior to polygamy if to enforce universal monogamy one must legislate that some innocent infants will be born with almost none of the rights enjoyed by all others? When children have to be taken hostage to uphold a cultural value, is not that value entirely compromised? In addition, when we know that imposed universal monogamy takes its roots not in Jesus' explicit teachings, but rather in the perpetuation by Gentile converts of a key facet of their former Roman and perhaps Indo-European polytheist religion, do we not feel somewhat estranged from what we presently regard as decency, propriety, the public good, modernity, and progress?

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[7] Sohn at http://hal.archives-ouvertes.fr/docs/00/08/58/42/PDF/Concubinage.pdf

Chapter 5
Legislating Polygyny and Polyandry in Mainstream France

Some of our concerns were already expressed before the 1960s by a handful of French legal minds who ultimately spearheaded the initial 1972 reform of the birth-status rights of children born in either balanced or adulterous concubinage. This reform was perfected over the 1980s and 1990s and was ultimately finalized in 2001–2009 by the abandonment not only of the more than 2,000-year-old distinction between children with full birth-status rights and children with no equivalent rights, but also of the very concept of legitimacy itself.[1] Conversely, the extent of legislative reforms over the last 40 years makes it possible to state that France now permits its citizens, even when already officially married to one person, to practice, if they so wish, true polygyny or true polyandry, free of any legal harassments, just as other societies do or did in other parts of the world, before Western cultural imperialism "modernized" them.

By "true polygamy" I mean a pattern of concurrent intimate conjunctions that, based on a cross-cultural definition of marriage, constitutes, from an anthropological viewpoint, a polygamous marriage and not merely a balanced or even adulterous pluri-concubinage, as was the case before 1972.

The initial amendments to the civil code that led to this outcome date from 1972, when filiation laws on parentage were rewritten to state that "natural-born children generally have the same rights and obligations as legitimate children in their relationship with their father and mother" (Civil code, art. 334, 1; see also Weill and Terré 1983: 590, 591). The restriction suggested by the word "generally" was intended for adulterine children. This will be discussed separately below.

Let us first examine today's birth-status rights for a baby who, before 1972, would have been called a "simple natural child," and before 1793, a "bastard." (Except where indicated otherwise, our source is Weill and Terré 1983: at 43, 224, 263, 474, 590, 591, 593, 594, 596–599, 605, 650, 652, and 655).

[1] See *Rapport au Président de la République relatif à l'ordonnance no 2005–759 du 4 juillet 2005 portant réforme de la filiation* (NOR: JUSX0500068P), *Journal officiel de la République Française (JORF)* no 156 du 6 juillet 2005, page 11155, texte no 18. Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000262516&dateTexte= (retrieved Jan. 22, 2009).

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Nowadays, a natural child born in balanced concubinage can inherit from his parents just as a legitimate child does. Concubinage has been relabeled *union libre* (free union) in the sense of open-ended union, and "marital life" (*vie maritale*) is often used in connection with it. If father and mother subsequently enter into a certified marriage and have legitimate children, those younger children do not have more rights than their natural-born siblings whose births date back to when their parents were still living in free union. The same applies for natural children born from a *union libre* after a divorce from a certified spouse. Natural-born children can now inherit the entire estate of their parents, not three quarters only as in earlier times—of course, the estate is divided into equal shares among them and their legitimate siblings, if any exist (ibid: 655; 655, b). More importantly, natural children are now integral parts of their parents' respective families and lineages (ibid: 474, 2, b). Those who previously had neither legal cousins, nor aunts, uncles, or grandparents, are now full-fledged members of their father's and mother's respective kin groups (ibid: 474, 1; 2, b). If the parents of a natural child die while the child is still a minor, the latter's grandparents (or uncles, aunts, etc., as applicable) may inherit parental rights and obligations (ibid: 263, 224, 590, 652). Better yet, reciprocal inheritance is now permitted between natural-born children and their parents' respective relatives—up to six degrees in the collateral lines (ibid: 655, b), and, it would appear, with no limit as to degrees of ascent or descent. What makes inheriting reciprocal is that for a natural-born child, now having the same rights as a legitimate child, the law grants members of his mother's and father's lineages rights to inherit from him (for example, in case of his early death) just as from any legitimate child (ibid: 474, 2, b, 1).

Furthermore, the provisions of the civil code in no way prohibit a man or woman from simultaneously entering into several free unions. A man may therefore officially acknowledge as "his" children born to him the same year from several concurrent female partners and can even give each of these children his family name (ibid: 43, 474). He thus becomes the legal *pater* of all the children of all the women with whom he entertains a physical conjunction during a given period. And all those children automatically become full-fledged members of his family and lineage where they maintain equal rights of inheritance in relation to one another, and with legitimate half-siblings they might have. Better yet, the man and his female partner*s* are entitled to an extensive series of assistance programs that the French government provides to families: three days paid leave for the father at each birth, family allowances, allowances for young children, family supplement, social assistance, allowances for childcare, maternity benefits, financial support for children's school supplies, monthly allocations for part-time job-retraining for parents staying at home, and secondary education bursaries for their children. In France, when added up, these social benefits constitute a significant part of the state annual budget. Other interesting details are worth mentioning: (1) on the death of their *pater*, all children born to him from all his female partners can lay claim to death benefits, which are paid out of the French government's social security fund; (2) a man's mistresses may now choose to use their common male partner's family name (*patronyme*) as a married name, each being known, for example, as "Madame Dupont" (Berthon and Hartwig 1994: 105, 113). This is so because under French law the only legal name

of a woman (officially married or not) is her maiden name, and remains so throughout her life. Changing one's name by taking on a married name (for a woman her husband's patronymic name, and for a man, the addition of his wife's patronym to his own name) is only recognized as a custom, a traditional practice.[2]

Within the context of present legislation, a female has, under free union, rights quite similar to those of a man. Since there are no opposing legal indications, a woman and her male partners are free to establish full-fledged descent, not only between the mother and her child, but also, at the men's and woman's discretion, between that child and any of her male partners, whether or not the person designated as the legal *pater* is actually the child's biological father. What's more, jurisprudence and the civil code contain some minimal provisions in the event that a woman's lovers cannot come to an agreement with the woman or disagree between themselves over whom the child should have as his legal father (Weill and Terré 1983: 668).

What are we to make of the status that is now known as free union in France? Can we still speak of mere concubinage in comparison to marriage? We saw that prior to 1900, concubinage and marriage differed radically in that children born from balanced concubinage were systematically deprived of most of the birth-status rights enjoyed by legitimate children. Today, however, the birth-status rights of a natural-born child are the same as the full birth-status rights of any legitimate child. At present, free union therefore meets all the main criteria of the cross-cultural definition of marriage: a relationship between a woman and another person or more which insures that the child born to that woman from that relationship is endowed with full birth-status rights. As a result, in the eyes of any objective outside observer, and from a cross-cultural viewpoint, today's free union is in France what would undeniably be defined as marriage in most other parts of the world. It can no longer be treated as concubinage in the original Latin sense of the word. Today, concubinage in that old sense may exist only if a woman keeps secret her liaison and the identity of who fathered her child. Curiously, French authorities seem to half-heartedly acknowledge the reality of such a change: the municipal "Certificate of

[2] Referring to two other sources, Terré and Fenouillet (2005: 605) claim that a concubine does not have the right to bear the name of her male concubine. However, their sources are pre-1972 (see their footnote 6) while Berthon and Hartwig's are post-1972. Moreover, to bear one's "married" name is not an obligation and more like the granting of a privilege by the husband (or today, the male concubine) and not a right in the full sense of the term. Weill and Terré (1983: 45) use the expression *droit d'usage personnel* adding that it is not transferable. In 1970, the case has been decided by the *président du tribunal de grande instance de Saint Etienne,* who wrote that a husband may, for personal reasons, even during his marriage, prohibit his certified wife from bearing his patronym. See Ordonnance du Président du Tribunal de Grande Instance de Saint-Étienne, (ordonnance de référés, 2 mars 1970), Durafour c/dame Blomer. At http://carlscoaching.over-blog.com/article-28625666.html (retrieved Dec. 22, 2011). I remember the case as follows. In early 1970, a well-established conservative politician sued his wife who was campaigning for a left-wing party against him. He asked the court that she be forbidden to use his well-known last name (her married name of many years) during her campaign. His request was accepted as legal.

Concubinage" they deliver is also officially known as "Certificate of marital life."[3] This is all the more amusing as the French adjective *maritale* in *vie maritale* (rather than *conjugale*) connotes the dominance of male over female (Rey 1998: II, 2142),[4] just as prevailed between spouses in certified marriages during the first half of the twentieth century and earlier.

Another way to fully grasp the magnitude of the change initiated by the 1972 reform is to hypothesize that all French citizens now renounce certified marriage and choose to live in free unions. Could we then say that France has no marriage institution anymore? To answer that we have to keep in mind Gough's criterion: *for the institution of marriage to disappear children have to receive full birth-status rights from the mere fact of being born to a woman.* Now, this is not what would occur in France if certified marriage would cease to exist. This is so because in that culture a child's full birth-status rights include the right to a *pater* as well as, just as crucial, membership in that *pater*'s family and lineage. Thus, the mother would still have to entertain a relationship with at least one other person for her child to receive full birth-status rights. Given our hypothesis, she would have to be in a free union. Now, since a free union between a woman and at least one other person would be what "provides" the child with full birth-status rights, we can plainly see that free union does in fact institute a marital relationship or marriage as defined by Anglo-Saxon anthropology. (From this point of view, the concept of marriage is probably not dissociable from the concept of *pater*—a role that, it will be recalled, is occasionally fulfilled by a woman as among the Nuer in Eastern Africa.) Assigning the status of concubinage (in its original sense) to free union would be completely aporetic, as we would no longer be able to distinguish between free unions from actual contemporary concubinal practices that result in diminished birth-status rights for a person's children (as when a woman keeps her relationships totally secret). In fact, unlike the true concubinage of times past, modern-day balanced free union could be viewed as the French structural equivalent of contemporary common law marriage in North America, in the local states or provinces where it is legal. Nonetheless, free union remains exclusively French in that it institutes no reciprocal rights and duties between spouses, only between parents and children, and in that it does not demand reciprocal sexual fidelity.

Focusing only on the couple, we readily acknowledge that there is a sharp difference between today's marriage under free union and historical marriage as a certified marriage. The first entails no legal obligation of fidelity, no mutual obligations, and no reciprocal rights between spouses (Terré and Fenouillet 2005: at 605). The historical type of marriage legally imposes sexual fidelity, numerous obligations and reciprocal rights between partners. Yet, we have seen that any globally valid

[3] See *La documentation française,* 5 août 2004, Réf.: F1433. The official blank form for such a certificate states the following: "I, the undersigned, FIRST AND LAST NAME, living at FULL ADDRESS, swear to be living maritally (or in free union) with FIRST AND LAST NAME living at the same address at ADDRESS." As is the case for a certified marriage, both partners and two witnesses must sign the document.

[4] See: *Trésor de la langue française* at: http://atilf.atilf.fr/dendien/scripts/tlfiv5/advanced.exe?8;s=3943996770 (retrieved Feb. 26, 2009);

definition of marriage must ignore such differences and focus only on whether a child born from either union (free or historical) is provided with full birth-status rights or not (Gough 1959). To refuse to do so would lead to wrongly classifying numerous societies as ignoring the institution of marriage. For example, among the matrilineal and matrilocal Northern Tutchone Athapaskan (Yukon Territory) I have worked with since 1972, marriage was fully recognized and very stable, yet entailed no obligation of sexual exclusiveness and none of the duties and mutual rights between spouses that are known in Western cultures. There, a father bequeathed his property not to his wife or children, but to his sister and sister's children. His children belonged to their mother's lineage and not to his. They inherited from their mother's brothers. Support for a widow came from her brothers and matrilineal nieces and nephews, for a widower from his sisters and matrilineal nieces and nephews. To infer an absence of marriage from this absence of reciprocal rights between spouses would be thoroughly ethnocentric.

Now, since from a cross-cultural perspective free union is a true marriage, how can one avoid speaking of true polygyny when a Frenchman engages in several free unions at the same time, or of true polyandry in the case of a French woman who simultaneously involves herself with several men (or other persons)? Moreover, since the civil code specifically indicates that free union does not include any obligation of fidelity and since the same code does not prohibit any man or woman to enter into several free unions concurrently (see Terré and Fenouillet 2005: 605), we now see how French men and women presently have the option of becoming fully polygamous if they so wish. Terré and Fenouillet, the two eminent jurists who have written the authoritative Dalloz guide to the civil code (ibid.) used in all French law schools admit as much when explicitly teaching law students that under the civil code "concubinage [free union] does not exclude polygamy" (ibid). This is why *union libre* could also rightly be translated as "open-ended union" rather than by the more ambiguous "free union."

Today, just as in the polygamous traditional Africa dear to Maillu, a man's children from several concurrent women come into the world not as bastards but with full birth-status rights. Their father has the right to transmit his patronym to each and all of them and all these children have a right to bear their father's name (Weill and Terré 1983: 43, 474). They are all full-fledged members of his lineage, and all have strictly equal rights to his estate, and so forth. Just as in some other societies, a French woman may now covenant with several men to legally start a true polyandrous home and family. Thus, a given woman may very well settle down in a free union with two brothers named Paul and Pierre Martin, and eventually take the name of Mrs. Martin: a case of fraternal polyandry that could become known as "Mrs. Martin & Mr. Martin & Mr. Martin."

The number of French citizens born outside of a certified marriage has evolved from about 8 % in 1900, to 6 % in 1960, to over 10 % in 1980, over 30 % in 1990, 37.2 % in 1994, 42.7 % in 1999, 46.2 % in 2003, 48.4 % in 2005, and finally 50.5 % in 2006.[5] How many of these children are born from relationships that are polyga-

[5] Berthon and Hartwig 1994: 114. See also the catholic newspaper *La Croix* dated January 15, 2008 at http://www.la-croix.com/article/index.jsp?docId=2326072&rubId=4076 (retrieved Feb. 27, 2009).

mous in the cross-cultural meaning of the term? A very small part, no doubt, but not an insignificant one judging by the probable number of natural children begotten by the wife-plus-mistress(es) system that once existed—a number perhaps not very far from that of societies we readily classify as polygamous (cf. Murdock 1949, 1967, 1981), not because they prohibit monogamy, but because they allow a certain degree of polygyny or polyandry (or both) to co-exist alongside predominantly monogamous marriages. I am trying to be conservative in my estimates by basing myself, rightly or wrongly, on the probable scope of the wife-plus-mistress(es) system that carried penalties and was therefore not practiced too overtly. Such prudence seems all the more necessary as we cannot expect French citizens to all have the desire and the means to be polygamous and to have all perceived the potential for polygamy hidden since 1972 within the new terms of the *union libre*. Even the French government has not realized it. Since 1993, it wastes money, police, and court resources to persecute many of the 16,000–20,000 North and West African immigrant polygynous households living in France (some 180,000 persons, children included),[6] while it could choose to preserve the peace by treating polygamous marriages contracted abroad as mere concurrent free unions in France, a practice which it now fully allows its home citizens to adopt (Terré and Fenouillet 2005: 605). Indeed, the existence of French's free unions with "legitimate children" may explain in part why, in 2003, many Muslims from Mayotte, an overseas French department in the Indian Ocean, went along, without too much open hostility, with the French central state prohibiting new licensed shariah law polygamous marriages for the first time ever.[7]

Already some differences have been noted between contemporary French polygamy and Maillu's Kenyan polygamy. For one, in France, free union parents do not have reciprocal rights and duties towards each other. In the second place, the contemporary French free union regime lets polyandry coexist with polygyny (this also occurs elsewhere in the world, such as among the Tutchone, but very rarely). Third, when the existence of multiple partners is not kept secret, French plural unions seem to be much more consensual or informal than in areas where polygamy has existed for centuries and where it is highly codified. They remain consensual and possibly open-ended out of necessity, mainly because of the legally imposed absence of rights and duties between spouses. One may leave one's triad or quartet on any short notice. All the same, when children are born, it is likely that they become more stable. Children have a propensity to beg for a presence of their fathers and mothers. Half-siblings want to see each other. Parents are touched and temper whatever desire for uncompromising independence they still harbor.

[6] See Commission nationale consultative des droits de l'homme (CNCDH), *Étude et propositions: la polygamie en France* (texte adopté en assemblée plénière le 9 mars 2006): at http://www.annuaire-au-feminin.net/rapportPOLYGAMIEfrHostalier.doc (retrieved Feb. 28, 2009). Whereas prior to 1993 France allowed polygynous household from abroad to migrate to France it has since made it a crime punishable by a 1-year jail term and a 45,000 euros fine. For the United States, see Nina Bernstein, "In secret, polygamy follows Africans to N.Y." *New York Times*, March 23, 2007.

[7] See Michael Houseman, "Le mariage (*mafungidzo/arusi*). A propos de la polygamie à Mayotte", *Zangoma* 6, 2006, pp. 16–18.

To distinguish long-established non-Western polygamy from the seemingly more permissive form it has taken in contemporary France, I will speak of "mainstream" polygamy, polygyny or polyandry. It could have been "neo-polygamy" but I do not like the lack of genuineness implied by the prefix "neo." *French mainstream polygamy is no less polygamous, so to speak, for being very recent (or "neo-") and more informal; from a cross-cultural perspective, it is full-fledged polygamy.* I am aware that the neologism "polyamory" (also known as "polyfidelity") has existed since the 1990s, but we will see in Chap. 6 that it is a different concept: polyamory includes some conjunctions that are mere concubinage from a mainstream polygamy perspective; and excludes, for instance, wife-plus-mistress(es) conjunctions when an adulterous spouse keeps his/her plural liaisons secret from his/her partners. Postmodern polygamy has also been proposed for the American context. Still, because mainstream polygamy includes the wife-plus-mistress(es) system, even when concealed, we must admit that not all is postmodern in mainstream polygamy.

So far, I have avoided discussing the more complicated case of the post-1972 adulterine child's birth-status rights, that is situations in which at least one of the two free union parents is, in addition, the licensed spouse of a third person.

Prior to 1900, such children were the most "disenfranchised." They were forever deprived of their right to have their adulterous genitor as legal father or their adulterous genetrix as legal mother, independently from her certified husband. As we saw, when a married woman's husband proved his non-paternity beyond a doubt, her illegitimate child's birth could only be "duly noted," not acknowledged. Conversely, if her husband did not successfully prove that he could not possibly be the genitor, he, the husband, was automatically acknowledged as the child's father, she as his legal mother, and the child as the legitimate child of both. There was no judicial possibility whatsoever for the adulterous mother to petition the courts to have her paramour recognized as the legal father of her adulterine child.

Adulterine children' rights were limited to food. They were prohibited to inherit from anyone, adulterous genitor or genetrix included. In other words, an array of legal measures made certain that the wife-plus-mistress(es) system could never be a form of polygyny or polyandry, new, mainstream, or otherwise.

For the post-1972 period, it is necessary to distinguish between two stages in how the adulterine child has been treated: (1) from 1972 to 2001, her birth-status rights improved considerably but remained less than those of a legitimate or of a simple natural child; (2) it is only after a new law in 2001 regarding succession, and an ordinance on filiation finalized in 2006 and further clarified in 2009, that her birth rights were at last solidly placed on a strictly equal footing with those of legitimate or natural children. The major hesitations of the legislative branch during these three decades are worth detailing. They demonstrate a constant reluctance to acknowledge complete birth-status rights in the case of adulterine children for fear of making too overt the polygamous potential this would entail.

From 1972 to 2001, the adulterine child was only partially brought in line with the legitimate child. The 1972 law and a few that followed gave her, among other entitlements, the right to be acknowledged by her adulterous father or adulterous mother, and the right to bear the name of her genitor, even when the latter was not

divorced from his certified spouse (Weill and Terré 1983: 601). She was granted the right to inherit all of her genitor's estate *if* her genitor*'s* certified spouse had predeceased her husband and had left no legitimate children. In addition, the adulterine child became a relative of her parents' relatives, with no limits in ascending or descending lines and up to the sixth degree in collateral lines (Weill and Terré 1983: 43, 2; 45; 474, 1, 1, a; 601; Berthon and Hartwig 1994: 104, 113, 114, 117). In this way, Mazarine, the adulterine daughter of President Mitterrand, became a legal and full-fledged member of the Mitterrand lineage when her father acknowledged her. And the serving president of France was entitled to a three days paid paternity leave when his adulterine daughter was born. It is doubtful that he took it. For more about this right, see Berthon and Hartwig (1994: 104).

Nevertheless, in 1972, the law still curtailed an adulterine child's rights by stipulating three major exceptions: (1) such a child could not be raised in the conjugal home with his legitimate half-siblings without the consent of his father's certified spouse (or mother's certified spouse) (Weill and Terré 1983: 474, 1, 1, b; 657); (2) if the certified spouse was still alive when the adulterous father passed away, the adulterine child received only half of what his father's estate would have devolved to the certified spouse in his absence; and (3) if there were legitimate children eligible for a share of the estate, the adulterine child received only half of what he would have received if all the children of the deceased, the natural children and the adulterine child included, had been legitimate (ibid: 658, 1, 2, 3).

In 1979 and 1981, the European Court condemned Belgium for imposing similar restrictions in its succession laws. According to that court, this amounted to discrimination on the basis of birth, and was unacceptable under international law. Some French legislators felt the pressure to do away with these restrictions. In 1990, a project of law was drafted to eliminate them, but failed to pass. In 1995, a new text proposed to maintain them. At this juncture, in a different case, the highest court of France (*Cour de cassation*) considered that the European Court was in error. The French court's main point was that:

> These [inheritance] measures do not amount to a discrimination based on birth—as is forbidden by European laws—because they are bound to a *law and order principle* of our legislation *according to which marriage has a monogamous character*, and [they] aim only at protecting the [monogamous] spouse and the [legitimate] children who are victims of adultery (emphasis added; Terré and Fenouillet 2005: 666, n 3).[8]

As Terré and Fenouillet argue (ibid), to pretend that the discriminatory dispositions are there only to protect the certified spouse and legitimate children from the evil of adultery is either a specious excuse or a sophistry. The adulterine child is also a victim of the adulterous parent and it is hard to see how the alleged injuries done to some of that adulterer's victims are undone by drastically curtailing the rights of inheritance of his other victims. Yet, this type of argument has been resorted to by some French judges at least up to 2000. Nonetheless, despite its spurious reasoning

[8] French original: "Ces dispositions [successorales] ne constituent pas une discrimination fondée sur la naissance—et comme telle interdite par le droit européen—car elles sont liées *au principe d'ordre public de notre droit selon lequel le mariage a un caractère monogamique* et visent seulement à protéger le conjoint et les enfants [légitimes] de l'adultère". In Terré and Fenouillet 2005: 666, n 3.

on the question regarding the protection of victims, the overall argumentation is unwittingly illuminating in that it explicitly links the survival conditions of socially imposed universal monogamy to the possibility of discriminating between children in matter of birth-status rights.[9] I will return to this point below and in Chap. 7.

From our cross-cultural perspective, these discriminatory measures meant that, unlike a balanced free union, an adulterous free union was perhaps not yet a full marriage inasmuch as adulterine children only received a diminished part of what were normal full birth-status rights of inheritance. Incidentally, this may explain why the legitimate wife was then entitled to legally object to the mistress using her husband's patronym as her own "married name" as well. For more about this entitlement then enjoyed by the legitimate spouse, see Berthon and Hartwig (1994: 113). As a result, a baffling paradox was created. Generally speaking, French folks consider a married man with one or several mistresses as being the most flagrant case of a "polygamous" man, much more so than any *unmarried* man with two or more female partners. One way to solve the conundrum would have been to define an adulterous free union as a second-class marriage. After all, the married man's adulterine children had significant rights when compared to what prevailed before 1900. Such a classification would be reasonable since, as we have seen, in some polygynous cultures children's full birth-status rights may vary according to the rank of each of the spouses. President Mitterrand's marital lives could then have been analyzed as conforming to such polygynous family systems that include one separate dwelling for each spouse.

Notwithstanding, subsequent legal reforms have led to a different outcome. In 2000, the European Court of Human Rights condemned France for discriminating between adulterine and other children (Arrêt Mazureck c. France, Feb. 1, 2000). The French state's response took close to two years. On December 3, 2001, it passed a law on "Surviving spouse's succession rights," which granted adulterine children exactly the same inheritance rights as those of all simple natural children—rights that, it must be reiterated, had been the full birth-status rights of all legitimate children since 1972 (Terré and Fenouillet 2005: 666). Taken together with other related new laws, this resulted in a watershed in French family law that a *Report to the President of the Republic* summarized as follows:

> Drawing the conclusions from the equality of status between children, [the ordinance of July 4th, 2005] proceeds to the formal deletion of the notions of legitimate and natural filiation, around which was articulated title VII [of the civil code]. Consequently, *[*the *concept of children's] legitimization is also eliminated* (translation D.L.; emphasis added).[10]

[9] Bernard Vareille, "L'enfant de l'adultère et le juge des droits de l'homme". Paris: Recueil Dalloz, 2000, p. 626. Available at Recueil Dalloz © Editions Dalloz 2011, http://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/SEPTEMBRE_2011/D2000-626.pdf (retrieved Dec. 23, 2011).

[10] "Tirant les conséquences de l'égalité de statut entre les enfants, [l'ordonnance du 4 juillet 2005] procède à la suppression formelle des notions de filiation légitime et naturelle, autour desquelles était articulé le titre VII [du code civil]. Par voie de conséquence *la légitimation [des enfants] est, elle aussi, supprimée*" (emphasis added). In "Rapport au Président de la République relatif à l'ordonnance no 2005–759 du 4 juillet 2005 portant réforme de la filiation (NOR; JUSX0500068P)". *Journal de la République Française* no 156 du 6 juillet 2005 page 11155, texte no 18. At: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000262516&dateTexte= (retrieved March 1, 2009).

This was adopted on July 4, 2005. It became applicable on July 1, 2006, and was clarified in 2009. This means that today a married Frenchman (certified) may have children from his mistresses who are all born with full and complete birth-status rights, bear his surname, and so on. In addition, if his certified wife chooses to stay at his side, she can no longer legally object to his raising his non-marital children in their family home. In the rare case where a certified wife enjoys the company of her husband's mistress, she is in no way legally prevented from asking her to come and share the family home. Furthermore, these natural children are, strictly speaking, on an equal footing with the children their father has with his certified wife. Between them, inheritance rights have become completely equal. Conversely, from our anthropological cross-cultural point of view, this implies that this Frenchman may now lead a truly polygynous life with his mistresses and certified wife. Indeed, his children from both his mistresses and his certified wife are all equally his legal children and heirs, the grand-children and heirs of his parents, the legal nephews and nieces of his siblings, and so forth. Now, as one may very well ask, in which way might such a European man's social station be said to fundamentally differ from that of Maillu's man openly heading a polygynous family in Sub-Saharan Africa? To pastiche our Kenyan scholar, at present, an African polygynous man could rightly object to his Western critics:

> What my tradition allows me to do is no different from what a Frenchman is now free to do with several women. All my children from my different wives are equally mine. None of them are to be regarded as bastards, just as the Frenchman's children born from several women at the same time are now legally his. Even his government recognizes that. And his children are in no way bastards at all. So where is the difference with us here in Africa? If a modern country like France now adopts our ways of seeing, it must be that from the beginning nothing was wrong with our polygamous traditions.

Some differences will duly be noted by our Western critics. While there are reciprocal rights between that Frenchman and his certified wife, there are none between him and his mistresses. Now, we have to reiterate here that to be cross-culturally valid, our definition of marriage does not require that there be rights or duties between spouses, for in various cultures these do not exist, and therefore cannot be part of a universal definition of marriage. Our African man may live in a culture without such reciprocal rights. If so, should his wives be regarded as non-wives and his multiple conjunctions as spurious-polygyny? Obviously not! Now it could also be that our imaginary man is living in an African culture where reciprocal rights between spouses exist. If such is the case, his Western critics might find themselves in a hotspot for he might protest and answer them:

> Your new laws have made the bastard child a legitimate child. Good! Your family may now include children from the several women you are seeing, not just from one alone. Good! Now go one step further, do like us, give the second, and third woman, a status as good as that of the first wife. Why should there be such a big difference between your children's different mothers, between your different wives. Are they not all equally mothers, do they not equally support you… and your children.

Maillu may have been too hasty in interpreting the old European wife-plus-mistress(es) system as a true equivalent of African polygyny. We have seen that over 40 years ago a mistress's child was still totally deprived of full birth-status rights. However, post-modernity vindicates our Kenyan scholar. In our times, even a licensed married man is no more limited to live in a form of "half-baked" polygyny. The West has come full circle, back to a very old Jewish wisdom. True polygyny, in the anthropological sense, is now also fully possible for already-married mainstream citizens and others in at least one European nation-state: France.

What of adulterous women? Have the French law reforms allowed them to enter into true polyandrous marriage? Historically, an adulterous wife (certified) and an adulterous husband had asymmetrical rights in relation to their respective adulterine children. Before 1972, a woman could never deny the paternity of her husband even with irrefutable proofs that he was not the biological father and that she had been unfaithful to him. Her petition was inadmissible in any court, as by law the father could only be the mother's husband unless, and only unless, the husband (not his wife) could prove otherwise.

The 1972 reform gave an adulterous certified wife the right to contest the paternity of her husband (Weill and Terré 1983: 560), but—and this is important—only after divorcing her husband and marrying her adulterine child's genitor. Her legal husband's paternity could be legally disavowed only when she sought to legitimize her adulterine child in order to establish filiation (descent) between that child and her paramour (now her new husband), in place of filiation between her child and her ex-husband (ibid: 561; 601).

In other words, the children of a man's mistress were legally allowed to bear their adulterous father's family name and to become part of his family (as exemplified by the Mitterrand family), while, *in cases where there were no divorce, remarriage and disavowal*, it prohibited *a matre* adulterine children (the mother in the free union pair is officially married to someone else) from taking the patronym of their biological father (and even mother's) and instead obliged them to take the patronym of their mother's certified husband. At the time when President Mitterrand complied with a form of mainstream polygyny, Madame Mitterrand could never have taken revenge through mainstream polyandry, even from the Anglo-Saxon anthropological point of view adopted in this essay.[11]

The series of new laws passed between 2001 and 2009 have now opened the door of polyandry for married women, albeit unintentionally again. The main change is that, today, an adulterous genetrix is the mother of her illegitimate child by virtue of her name being written on the child's birth certificate. If her husband's name is not on that document (at the hospital, the mother can choose not to communicate it to

[11] Fortunately, this did not prevent Madame Mitterrand from also taking advantage of opportunities life offered her, as she later disclosed, tongue in cheek, in a T.V.A. interview in Québec when asked about the gallivanting of her late famous husband. (One would expect nothing less from this remarkable woman who could love and respect her certified husband while taking the liberty of living her own freedom).

the registering officer), he is not presumed to be the father of that child. In that case, the mother's paramour may acknowledge the child as his and thus become his legal father (Terré and Fenouillet 2005: 666).[12] If the mother maintains her conjunction with her paramour and her legal husband does not divorce her, she may raise her adulterine child together with her legitimate children in the family dwelling she shares with her husband. Various arrangements are feasible for the paramour to see and raise his child: the adulterine mother can visit him frequently, or for that matter, if everyone agrees, the paramour may move into his mistress' home and share space and her with her husband (or the other way around, to be politically correct). In the next chapter, when considering the polyamory movement in North America, we will see that such immoderations are not in the least imaginary. With the benefit of historical hindsight, Western wisdom now supersedes that of ancient Jewish times in that, at present, it takes into account the polyandrous option to deal to a fuller extent with unavoidable human vagaries. Maillu who supports polygyny in Kenya but not polyandry might object. All the same, he should first have long conversations with wise African women and men who practice true polyandry such as among the Masai, the !Kung, or the northern Nigerians (Starkweather 2010).

We will return to the case of the French adulterine woman's child in Chap. 7 when examining the constraints that beset any rigidly defined system or case of new sociocultural reengineering. For now, let us examine the geographical extent of mainstream polygamy.

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[12] See also "Filiation". *Dictionnaire du droit privé français* par Serge Braudo, Conseiller honoraire à la Cour d'appel de Versailles. At http://www.dictionnaire-juridique.com/moteur.php (retrieved Jan. 19, 2013).

[13] Starkweather at: http://digitalcommons.unl.edu/anthrotheses (retrieved Jan. 20, 2013).

Chapter 6
The Geographical Extent of Western Mainstream Polygamy: Europe, North America, and Latin America

In France, bringing the birth-status rights of natural-born children in line with those of legitimate children was first inspired by the *British Family Law Reform Act* of 1969 and by a similar law passed in Germany on August 19, 1969 (Weill and Terré 1983: 472). Like France, Great Britain and Germany have subsequently further harmonized the illegitimate child's birth-status rights with those of a legitimate child.[1]

Now, it is important to stress that France was *forced* into completing this reform by the now famous judgment Mazureck v. France, handed down on February 1, 2000, by the European Court of Human Rights. This ruling required France to adjust the birth-status rights of its adulterine children with those of its simple natural children, which were then already matched with the full birth-status rights of its legitimate children born from certified marriages (Terré and Fenouillet 2005: 666). As this judgment (and two related judgments passed against Belgium in 1979 and 1991) are presently an integral part of European jurisprudence, we may safely assume that children's birth-status rights are already harmonized (as, for instance, in France, Great Britain, Germany, Belgium, Denmark, Spain, Italy, and the Netherlands), or will eventually be so, in every European country.[2] Thus, it is to be

[1] WF Rechtsanwälte Frank & Collegen, "German Inheritance Law - Intestate Succession," 2008. *HG Legal Directories.org.* At: http://www.hg.org/article.asp?id=5397. Family Law Reform Act 1987 (U.K.). At: http://www.legislation.gov.uk/ukpga/1987/42/pdfs/ukpga_19870042_en.pdf. "Inheritance Disputes (Illegitimate child)." In Brief: Free Legal Information. At: http://www.inbrief.co.uk/estate-law/making-a-dependency-claim.htm (retrieved Feb. 8, 2012). *Le statut de l'enfant adultérin (Allemagne, Angleterre et Pays de Galles, Belgique, Danemark, Espagne, Italie et Pays-Bas), Note de synthèse du Sénat français, non datée.* http://www.senat.fr/lc/lc47/lc47_mono.html#toc9 (retrieved Jan. 18, 2013).

[2] "Le statut de l'enfant adultérin (Allemagne, Angleterre et Pays de Galles, Belgique, Danemark, Espagne, Italie et Pays-Bas)". *Note de synthèse du Sénat français,* no date. See http://www.senat.fr/lc/lc47/lc47_mono.html#toc9 (retrieved Jan. 18, 2013).

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expected that mainstream polygamy will become feasible, alongside monogamy, in all of its 27 nation-states, albeit with varying national modalities, and perhaps, here and there, with historical lags due to last ditch resistance. In the contemporary European context, however, there is little risk in predicting that national struggles for maintaining existing historical inequalities in birth-rights will not win out.

We now examine whether the legal changes made in these countries have also taken place in the American part of the Western world, focusing on the United States and two Latin American taken as examples. Has the illegitimate child been fully emancipated in the Americas too? Has this resulted in some forms of true polygamy becoming feasible in these states?

Unlike for France, this chapter must rely on syntheses provided by other scholars who have focused on the changes brought about with respect to the status of illegitimate children. Inevitably, it cannot but take the form of a preliminary survey, subject to further revisions. This is because the legal landscapes involved are too complex for a single researcher: rules of inheritance and birth-status rights vary between nations in Latin America, and between local states in the United States (see Kleijkamp 1999), and to complicate matters, restrictions for drawing up a will also differ from society to society. The syntheses to be used will nevertheless help in delineating some of the broad changes that have occurred. As the relevant literature was not meant to ascertain whether the transformation of the bastard's status inadvertently introduced the possibility of polygamy in mainstream South and North America, they necessarily leave out some small details that would have been important for our study. For that reason, some of my conclusions will have to remain tentative.

Yet, this may have the advantage of stimulating readers who have access to greater details regarding their national laws to dialogically interact with the analysis presented here, to nuance it, to cast it in a sharper light, or even to revise it.

The roots of U.S. family laws lie in the English recognition, until the 1740s, of common law marriage. Nevertheless, by the second half of the eighteenth century, after the *1753 Marriage Act* abolishing common law marriages, restrictions as drastic as those of the French Old Regime applied under common law in Britain and continued to do so well into at least the first half of the nineteenth century.

As an eighteenth century British legal source writes, bastards are

> not looked upon as children to any civil purpose. The incapacities of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius,* he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived […]. [This is so because] he hath no father […] and is looked upon as the son of nobody […]. Yet, he may gain a surname by reputation, though he has none by inheritance (Blackstone 1793: 458–459).

In her comparative study of filiation laws, Kleijkamp (1999: 209–210) draws attention to another significant point for that early period:

> contrary to the continental European civil code practices, [common law bastards] were even deprived of the possibility of being legitimated by the subsequent marriage of their natural parents—legitimation was unknown to the common law (ibid).

For a child born to a married couple, birth-rights were of a totally opposite nature. A married genetrix was instantly recognized as the legal mother of her child and her

husband as her child's legal father. This was automatic and that man was indeed the only male that could be recognized as the legal father. The child belonged to his mother's and father's kindreds and had reciprocal rights of inheritance therein. Historically, the quasi-inescapable presumption of paternity of the mother's husband:

> could only be rebutted by a showing that the husband and wife did not have access to each other during the probable time of conception. Initially, the only permissible evidence to prove non-access was demonstrating that the husband was "beyond the seas" at the time of conception (Pendleton 2008: 2828).

Many of the new common law rules were carried to the American colonies, but not all. For example, the colonies and later some local states ignored part of the British *1753 Marriage Act* and kept recognizing the earlier notion of marriage by mere cohabitation, habit, and repute, called common law marriage. As we have seen, some still do. Whereas such marriages are undocumented and merely *de facto*, the children's genitor and genetrix are, by law, the children's legal mother and father. The offspring are legitimate and all are born with full birth-status rights. Moreover, after independence, the United States modified in a more liberal direction the laws pertaining to parentage and inheritance rights in the absence of any certified or common law marriage. Between the end of the nineteenth and beginning of the twentieth century, most local states passed legislation declaring that the out-of-wedlock child was a member of his mother's family, with a right to inherit from the mother [and mother's relatives], the same as a legitimate child (Kleijkamp 1999: 210). "Still, as Pendleton writes (2008: n 37), the law did not recognize a father-child relationship when a child was born out of wedlock until the latter part of the twentieth century," except when genetrix and genitor married subsequently.

Thus, from our perspective, the out-of-wedlock child remained "one half of a bastard," with much diminished birth-status rights as compare to a legitimate child. Admittedly, he enjoyed birth-status rights with his mother and mother's kindred. Yet, he was still deprived of the same rights on his genitor's side. In consequence, our main question is whether the tremendous changes American family law has undergone in the last 40 years permit today that such a child enjoys full birth-status rights with regards to his father and father's kindred as well.

It remains, however, that determining the contemporary birth-rights of an out-of-wedlock child in a federal state like the United States is a complicated endeavor. First, in cultures with a common law historical background, freedom to bequeath through a will is fully recognized. A parent may wholly disinherit a legitimate child in favor of an out-of-wedlock one or, for that matter, in favor of a nonprofit organization. Any permutation is also perfectly possible. To some, this implies that fixed birth-status rights cannot be said to exist when freedom to bequeath is allowed. However, that is not the case and is evidenced by intestate succession laws that determine, among other matters, the blood (consanguineal) and other relatives that are entitled to inherit from an estate when no will has been left by the decedent. As a result, rights granted by intestate laws are birth-status rights that, true enough, any bequeather or testator is allowed to alter or not, at his/her pleasure or displeasure with an heir, just as a judge may sentence someone to jail or to the electric chair and deprive him of his rights. While we admit that a testator may be an arbitrary judge

when an actual judge should only arbitrate fairly, we note that in both cases already granted rights may be curtailed, and for these rights to be curtailed they have to exist in the first place. It is these first-place rights that preexist for each American citizen that we need to examine in the case of the out-of-wedlock child. Are they identical to those of a marital child?

Yet, even after this disambiguation, complications remain. In the United States, local states legislatures are the entities enacting birth-status rights as well as family and inheritance laws. If each local state was left to act alone, one may imagine the legal cacophony that would be played out in the nation. Local states understood this long ago and in 1892 created a *National Conference of Commissioners on Uniform State Laws*, also known today as *Uniform Law Commission*. It is a non-profit organization. Each of its members is a jurist appointed by his or her local state. The organization debates in which areas of law should there be uniformity among the states and drafts acts accordingly. These acts are carefully crafted and proposed to the various states a model legislation known as uniform acts. Some local states' legislatures adopt these models, adapting them only to the language and terms of their other existing state laws. Other states prefer their own direct formulation. In all cases, the models proposed by the National Conference, or the laws directly enacted by local state legislatures, must conform to federal Supreme Court decisions and other relevant court precedents. Besides, the federal government may "impose" itself by withholding federal funding for this or that purpose from a state if the latter does not enact this or that corresponding legal feature in its laws or regulations.[3]

To ascertain the contemporary birth-status rights of out-of-wedlock children, one may thus start with the relevant *Uniform Parentage Act (Amended and Revised in 2002) (UPA)*,[4] which provides the overall picture for the nation. This act was drafted mainly to resolve paternity issues for purposes of child support and custody determinations, but, incidentally, clearly reveals who has (or not) the right to become the father of an out-of-wedlock child and under what circumstances. It also reveals who may be forced by the courts to become such a father. The somewhat related *Uniform Probate Code* (*UPC*), amended in 2003, which deals with intestate successions, is less relevant, not only because it bears on contested paternity determinations as linked to successions, but also because it defers to the *Uniform Parentage Act* for paternity determination. Our main focus is on whether a man is today legally allowed to voluntarily acknowledge his child born out-of-wedlock (not necessarily forced to) and on whether the birth-status rights granted to that child by his recognition amounts, taken together with the birth-status rights granted by the child's unwed mother, to the full birth-status rights enjoyed by marital children.

A final complication: the general picture provided by these two uniform legal documents must be completed with examples of how a local state enacts the model

[3] See the Uniform Law Commission web site at http://uniformlaws.org/Narrative.aspx?title=About the ULC. Wikipedia also has an excellent summary from which is borrowed the present overview. See: http://en.wikipedia.org/wiki/Uniform_Law_Commissioners.

[4] *The Uniform Parentage Act (Amended or Revised 2002)* is available at: http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm (retrieved Jan. 31, 2012).

it receives. This is so because some states enact the proposed model with modifications or prefer to pass their own legislation that reflects in different ways what is requested in the model.

In this short essay, we will address this issue by limiting ourselves to a single local state. We will focus on Georgia, which had not enacted the UPA as of 2008,[5] and examine whether this state managed to conform to the national model, and to what extent.

Let us begin with the national model. Interestingly enough, the UPA (section 202) makes an initial statement quite similar to what is found in contemporary France:

> A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.

This phrasing directly stems from:

> a series of Supreme Court cases in the 1970s and 1980s [that] addressed the [older] law's discriminatory treatment of children born outside of marriage and required states to treat marital and non-marital children equally for purposes of inheritance and intestate succession (re: Trimble v. Gordon, 430 U.S. 762 (1977) and Reed v. Campbell, 476 U.S. 852 (1986) (Pendleton 2008: n. 39).

To make certain that as many individuals as possible have a father, and incidentally, full birth-status rights, UPA section 606 adds that:

> An individual whose parentage has not been determined has a civil right to determine his or her own parentage, which should not be subject to limitation except when an estate has been closed (Section 606, 2002 comments).

Paternity between a child and a man may be voluntarily and fully established through "an effective acknowledgment of paternity by the man under Article 3" (Section 201 b) (2)). For this acknowledgment to be effective:

> The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity (Section 301).

This is crowned by a *Federal IV-D Statute Relating to Parentage,* which provides that "a valid, un-rescinded, unchallenged acknowledgment of paternity is to be treated as equivalent to a judicial determination of paternity." Here, it is important to note that to receive federal child support enforcement funds a state must enact laws that greatly strengthen the effect of a man's voluntary acknowledgment of paternity (42 U.S.C. § 666(a)(5)(C)). Finally, section 203 stipulates that "a parent–child relationship established under this Act *applies for all purposes* [emphasis added], except as otherwise specifically provided by other law of the State." This is reinforced by Section 305 (a):

> A valid acknowledgment of paternity filed with the [agency maintaining birth records] is equivalent to an adjudication of paternity of a child *and confers upon the acknowledged father all of the rights and duties of a parent* [emphasis added].

[5] Since 2008, Georgia may have enacted the *Uniform Parentage Act* (See: http://www.uslegalforms.com/paternity/georgia-paternity-forms.htm (retrieved Feb. 3, 2012).

After taking into consideration the above measures, and inasmuch as local states cannot contradict UPA's legislative recommendations without risking the loss of some federal funding, we may thus posit that in the United States, most everywhere, out-of-wedlock children with a legal mother and a legal father (voluntarily acknowledged or otherwise recognized) receive full birth-status rights, equal to those of a marital child. Like in Europe, great progress has been achieved in the name of all children (for taxpayers' sake, too), and the changes from what prevailed 50 years ago are highly significant.

As a result, if we still adhere to Gough's anthropological definition of marriage, non-marital intimate conjunctions in the United States that become publicly known and documented through children' birth are to be regarded as being, in fact, true marriages from a comparative point of view. I am fully aware that this conclusion may come as a shock. Yet, one historical anecdote may help clarify the legal changes that have occurred since the beginning of the Republic. As Chacon explains in his foreword to the present essay, while a widower, Thomas Jefferson is reported to have impregnated Sally Hemings, one of his house slaves, who was also an African-American half-sister of his deceased certified wife Martha Wayles (through Martha's father and one of his female slave). Sally may have had other children from Jefferson.

Despite the fact that a DNA analysis has shown a genetic match between the European and African-American Jeffersonian lines, Sally Hemings' living descendants are not granted membership in the Jefferson's Monticello Association. This happens to be so because in Jefferson' and Hemings' times, any man was prohibited by law from acknowledging as his, children born to a woman who was not his certified wife. Now, if the same story were to happen today in 2013, not only would Jefferson be legally allowed to acknowledge his child or children with Hemings, which we are sure the gentleman he was would, but if he did not, courts would compel him to do so, irrespective of racial considerations. Jefferson's child or children with Hemings would receive full birth-status and inheritance rights (rights strictly equal to those of Jefferson's marital children with Martha Wayles); his children with Hemings would be named Jefferson, not Hemings; they would openly be known as the Jeffersons and be entitled to membership in the Monticello Association as well as to be buried in the Monticello graveyard alongside President Jefferson's other descendants through Martha Wayles. All this would be dictated by law, not done as a favor. True enough, all along I assume that a contemporary Jefferson and his society would have none of the old Jefferson's possible partialities. Nevertheless, from this, it is easier to grasp how much today's legal world has radically changed and in what respect a contemporary free union between a man and a woman can be a true form of marriage that matches Gough's cross-cultural definition of the institution.

Another way to realize the extent of the changes brought about by the eradication of the bastard status is to picture a situation not that unrealistic. If I can be forgiven, imagine that your father has died. His will is going to be officially opened and read. Besides your mother and siblings there are present other heirs about your age and looking somewhat like you, but that you have never met or even seen. The will is read and the other heirs receive shares strictly equal to yours. Are you not going to admit then that your father raised two different families at the same time, that he

might have lived in a marital conjunction with another woman besides your mother? Once again, it would be the court's decisions and the law that dictates the unfolding of such an unexpected event. However, would the difference with traditional polygyny be that great?

But I anticipate. At this juncture, we must note that if it were not for one complication, the UPA would have left unsaid whether or not a man is legally allowed to acknowledge his paternity of several children born the same year of several women with whom he is in concurrent conjunctions. Everything in the Act's philosophical stand suggests not only that he may but must, and yet, nowhere is this directly addressed.

The enlightening complication comes from not so uncommon a situation: What if the out-of-wedlock child the man has acknowledged was born to a woman who was already married to someone else? Thanks to the "presumption" law, as long as a marriage is valid, a child's father is and must be the mother's husband (section 204). In such case, that woman's husband will also be the father of our first man's child, automatically. As a result, the child will have two fathers.

The UPA takes the following position on this prickly issue:

> To deal with this circumstance, many states have passed laws allowing the presumed father [the mother's husband] to sign a denial of paternity, which must be filed as part of the acknowledgment. The UPA adopts this common sense solution (see Section 302, 2002 comments).

Sections 302–305 clarify that:

> If a child has a presumed father, that man must file a denial of paternity in conjunction with another man's acknowledgment of paternity in order for the acknowledgment to be valid. If the presumed father is unwilling to cooperate, or his whereabouts are unknown, a court proceeding is necessary to resolve the issue of parentage. The denial is valid only if: (1) an acknowledgment of paternity signed, or otherwise authenticated, by another man is filed pursuant to Section 305.

In section 304, the UPA even reckons the possibility of full cooperation between husband, wife, and paramour for it recommends to local states legislatures that "(a) an acknowledgment of paternity and a denial of paternity may be contained in a single document."

Now, the obverse result of an unmarried genitor's right to become the legal father of a married woman's non-marital child is that in the contemporary United States a woman may legally have children with full birth-status rights from two different men she is seeing concurrently. In our comparative anthropological perspective, such rights translate as a right to a true polyandrous marriage. An objection will be raised: in such circumstances a husband will immediately divorce his wife and the latter will be left alone with her fancy man. Still, whereas divorces will often occur, not all husbands leave their wives because the latter have lovers. And, in spite of expectations, no law prevents a married man from remaining married to his unfaithful wife, from engaging in sexual relations with her, all the while accepting that sexual relations exist between her and her paramour. How often this actually happens is irrelevant. This essay's main point is merely to demonstrate whether contemporary laws make it possible for mainstream polygamous marriages to occur

when individuals so choose. What matters is the existence of such an option, neither how it is locally conceptualized nor how popular it is. And so much is clear: in the United States, like in France, emancipating the bastard child has created a legal possibility for true polyandry to take place—inadvertently, but unequivocally.

Inasmuch as the law grants full birth-status rights to children a woman has with two men (or more), she is seeing concurrently over a period of years, we can safely infer that the UPA allows corresponding rights for men by allowing them to acknowledge children born from several women they are seeing concurrently. We will see that conservative Georgia spells this out most clearly, even in the case of an already married man. Thus, we may infer that mainstream polygyny has recently become a national legal option in the United States as well. Pendleton (2008: n. 98) lists the following states as having enacted the UPA as of 2008:

> Alabama (2007); California (2007); Colorado (2007); Delaware (2008); Hawaii (2007); Illinois (2008); Kansas (2006); Minnesota (2007); Missouri (2007); Montana (2007); Nevada (2007); New Jersey (2007); New Mexico (2007); North Dakota (2007); Ohio (2008); Oklahoma (2007); Rhode Island (2007); Texas (2007); Utah (2007); Washington (2008); Wyoming (2007).

It is to be expected that most will have opened the mainstream polyandrous and polygynous options simply by enacting and emulating the model Parentage Act.

Are there significant differences when a state does not enact the UPA directly or when it chooses to phrase its local parentage statute independently? The example of Georgia is interesting in that, as of 2007, it had its own local parentage legislation (Pendleton 2008: n. 137). Such a disinclination by a culturally conservative state to adopt the UPA might lead us to expect that its independently formulated corresponding laws would reflect only the least permissive legislation necessary to conform to nondiscriminatory Supreme Court decisions, and to other relevant precedents and federal U.S. statutes.

What of Georgia then? An examination of its key legal measures on parentage reveals that, on the whole, Georgia's independent legislation conforms to the aims formulated by the *Uniform Law Commission*. Below, however, we will highlight a substantial difference with the UPA's recommendations in the matter of a married woman with a paramour. We start with what Georgia's independent legislation and the UPA have in common.

First, for an adulterine child, acknowledgment and legitimation by an adulterous father is fully allowed by law. The *Georgia Benchbook* used by judges is revealing:

> XXVI, C. 3. A married father's statutory right to legitimate a child born of a woman not his present wife is absolute, subject only to the qualification that the natural mother may object if she shows valid reasons why the petition should not be granted. *The father's wife has no legal status to object*. […] While legitimation enables the child *to inherit from the father and to enjoy the father's name and like amenities*, the child's right to inherit does not extend to the father's wife who is not its mother, or to its half brothers and sisters [emphasis added].[6]

[6] *Benchbook*, Chapter XXVI. See at: http://www.georgiacourts.org/councils/cjcj/PDF/Benchbook%20Chapters/ch26.PDF (retrieved Jan 28, 2012).

The last sentence does not affect the full birth-status of the adulterine child for she inherits from her own mother and mother's relatives, and from her father and father's other relatives as well. Likewise, one supposes that, reciprocally, her half-siblings who were born legitimate cannot inherit from her or her mother. Their birth-status rights are therefore equal. This last sentence was probably meant only to clarify that the adulterine child has no broader rights (i.e. inheritance from father and father's wife in addition to inheritance from her unwed mother's estate) than those a legitimate child receives at birth (inheritance from father and father's wife only).

Second, in the context of free unions (nobody is officially married to anyone), nothing indicates that a man or a woman is precluded from entering into several intimate conjunctions concurrently. In addition, nothing prevents a man from siring non-marital children with several different women he is seeing concomitantly. On the contrary, even in the case of a married man, the law attempts to facilitate the process. Indeed, the state mainly seeks to have as few wards of the state as possible. To achieve this end (and reduce state' expenses), it finds it most expedient to identify plausible genitors and to corner them into becoming the legal fathers of their non-marital children. At the same time, it overlooks the mainstream polygamous options resulting from a plurality of concurrent paternity acknowledgments made by a single man.

For unmarried women the situation is asymmetrical. Short of having non-identical twins from two different eggs inseminated by two different men during the same ovulation period (a very rare occurrence), a woman can give birth to only one child (or twins, etc.) in any given year from only one of the men she is seeing concurrently. At best, if she lives in a mainstream polyandrous context, her men can only take turns acknowledging paternity. Thus, because of this time-related factor, and the relative invisibility of the domestic arrangement that results, mainstream polyandry takes many more years to materialize through children's births than mainstream polygyny. The state, which ignores that the woman and the men have joined in a polyandrous family unit, legally empowers each of the woman's men, like any other men, to voluntarily acknowledge paternity. Short of that, it imposes DNA testing, adjudicates who is the genitor, and make that man the legal father of one of her children. This solution is very close to the one found in France after 1972 (see Chap. 5).

We now come to the juncture where Georgia departs from the UPA's recommended model. At first glance, the same *Benchbook* simply seems more ambiguous regarding whether married women have rights of acknowledgment and legitimation of an adulterine child by their lover—rights that would be the obverse but equivalent of their husbands' rights. Georgia, like most states, recognizes a presumption of paternity that assumes that as long as a marriage lasts, the husband is automatically the legal father of each of his certified wife's children. It is reported that the main rationale of this policy is to preserve the unity and stability of already existing family units. The *Benchbook* used as guideline by judges insists on this point:

> XXVI, C, 5. The primary purpose of the legitimation and paternity statutes is to provide for the establishment rather than the disestablishment of [the child's] legitimacy and [of the husband's presumed] paternity.[7]

[7] Ibid.

Even so, in two other paragraphs, it admits, although reluctantly, that a married woman and her paramour or lover have the right to legitimate their common child separately from the woman's legal husband and her children with him.

> XXVI, C. 8. The mother may testify that the 'legal father' is not biological father of her child and testify as to the identity of the biological father.
>
> XXVI, C. 2. The husband of a woman at the time of conception or birth is a party at interest when another man claims fatherhood of a child in a legitimation proceeding, and due process requires that he be served.[8]

In this context, if a husband remains married to his wife, her dual conjunction with her husband and her lover could rightly be defined as a polyandrous marriage, that is, in comparative anthropological terms. In effect, Georgia law seems to allow her to have children with full birth-status rights from two different men whom she sees concurrently: her husband and her paramour. The fact that some of the children have to be voluntarily legitimated by the paramour (as opposed to automatically legitimated within the marriage bond), that the process of legitimating an out-of-wedlock child takes more time and care, and that the courts seems less sympathetic to such a cause does not alter the apparent right the woman seems to enjoy to have two sets of legitimate/legitimated children (or more) from two (or more) different men between whom she shares her life.

Notwithstanding, the same *Benchbook* relying on much older court cases slams the door on making feasible this mainstream polyandrous option for married women. Here is what it adds:

> XXVI, C. 4. Where the possibility of access between husband and wife exists, the presumption of legitimacy [the husband is the father of any of his wife's children, even when non-marital] should not be overcome absent clear proof. Stephens v. State, 80Ga. App. 823 (1950). When *sexual intercourse between husband and wife is proved, nothing short of impossibility should impugn the legitimacy of offspring* [i.e. the husband is the legal father no matter what]. Simeonides v. Zervis, 120Ga. App. 883 (1969) (emphasis added).

Clearly, the *Georgia Benchbook* bars a married woman having sex with her husband and her paramour from ever having her paramour recognized as the legal father of some of her children, even if her husband agrees to deny his presumed paternity. As a result, a married woman cannot practice true mainstream polyandry (only adulterous conjunctions), and yet, as we just saw, the same *Benchbook* fully allows her husband to enter into mainstream polygyny by his acknowledging his non-marital children. As the *Benchbook* states, his wife cannot even object; she can only (we suppose) divorce him. Only a constitutional lawyer would venture to say how the Supreme Court of the United States would evaluate this Georgian scheme.

To conclude, we must note, however, that most of the legal measures independently taken by a local state, even when culturally conservative and jealously so, will at least in part conform to what the UPA indirectly permits in terms of mainstream polygamy. This fact, taken together with the number of states that have enacted the UPA, leads us to infer that mainstream polygamy has become an option in most

[8] Ibid.

parts of the United States, just as it has in those parts of Western Europe that have spent the last 40 years legislating the emancipation of all illegitimate children. The complex beauty of the United States legal system may reside in that it can always entertain an exception that at least allows for a disclaimer of sorts. In this respect, the past remains forever unfinished while the present already lays claim to be the future.

So much for the existence of the mainstream polygamy option in the United States! Now, who exercises it? Leaving aside fundamentalist Mormons, other religious sects and a few ethnic minorities,[9] how many people in the nation are involved? Precise answers are impossible to give. In the United States, polygamy, "new," "neo," "mainstream," "everyday," or otherwise, is not an achievement to crow about. Only some leads are available. Besides, one can only expect fairly low numbers for even in cultures where concurrent marriages have been legal for centuries, polygamous families are much less frequent than monogamous ones (Gray ed. 1998).

Among the first leads are a few stunning demographic facts: (1) As of 2008, "nearly one-in-five American women end[ed] her childbearing years [15–45] without having borne a child, compared with one-in-ten in the 1970s" (Livingston and Cohn 2010: 1); (2) "41 % of American infants born in 2009 were borne by an unwed mother;" [that 41 % level] "compares with 33.2 % in 2000 and 18.4 % in 1980;" [… and this is not a result of teenage pregnancies alone for in 2009] "one in five births to women aged 30 and older were to unmarried women" (Martin *et al.* 2011: 11); (3); by age 44, "a little over half (53.2 %) of American males have had no biological children" (Nock 2007). Thus, roughly speaking, and ignoring the few years difference between the studies, by age 45, 80 % of women have at least one biological child, whereas only 50 % of males do.

One utterly dim-witted interpretation would be that out of 100 men and 100 women, 50 males impregnate 80 females and that on average one active male has an intimate conjunction with 1.6 women concurrently. This would be a reckless conclusion to draw because many males may have their first biological child well after age 44. Still, it does reveal that a significant number of older men must be in conjunction with women younger than them, a reality that may very well harbor cases of untold adulterous mainstream polygynous marital schemes.

At any rate, other variables make it impossible to draw from these data any reasonable quantitative inferences regarding the proportion of mainstream polygamous marriages (let alone precise numbers). As the author of the study on men warns:

> Over the course of their lives, men father children in multiple circumstances. For some, all of their births are in marriage. For some, all are in cohabiting unions. And for some, all are born while the man is not sharing any type of living arrangement with the mother. There are also complex combinations of marital and unwed births for some men (Nock 2007: 1).

Non-marital births may be to men who are not living with a partner ("single") or to men who are currently living with someone in a domestic cohabiting relationship ("cohabiting"). Births recorded as "marital" are those that occurred while the man

[9] See Nina Bernstein, "In Secret, Polygamy Follows Africans to N.Y." New York Time, March 23, 2007.

was legally married to the mother. Some other possible patterns to consider include the following: A man and his girlfriend have a child while living together. They subsequently marry and have another child. This man has, therefore, both a cohabiting and a marital birth. Another man fathers a child with a woman he does not live with. They subsequently form a cohabiting household and have another child. This man has both a "single" and a "cohabiting" birth. Finally, a married man and his wife have a child. They divorce when she is pregnant with their second child and she subsequently gives birth. He has, then, a marital and a single birth. As will be seen, these and several other patterns of fatherhood are not uncommon in the U.S. (ibid: 3–4, table 1).

Nevertheless, in the context of this essay, discussing the complexity of these demographic trends is fundamental for understanding the extent to which the Western family unit has mutated over the last 30 or 40 years—literally mutated. As Meyer writes:

> The traditional ideal of a "nuclear family," made up of a married couple raising their children, is fading, down from 40 % of all households in 1970 to less than a quarter by 2000. It is probably not too much to say that "the domestic unit in early 21st century America [has become] a crazy quilt of one-parent households, blended families, singles, unmarried partnerships and same-sex unions (quoted in Pendleton, 2008: n.4).

To be honest, I always need to be reminded of today's new times. Otherwise, I forget, and unconsciously project the more subdued cultural landscape of the 1960s and 1970s onto that of the beginning to the twenty-first century. However, this somewhat antiquated viewpoint (it is as if I were already from another planet) has one advantage: to observe today's matrimonial practices from the distance needed for this essay requires no great efforts on my part.

Well, in any case, taking account of the factualness of the "crazy quilt" is essential in identifying the interstices of the social fabric in which mainstream polygyny or polyandry is allowed to materialize in today's mainstream society: the single male with several non-marital children; one-female-headed households with an irregularly present male; unmarried partnerships; men who father a child with women they do not live with; married men with late non-marital children.

Fortunately, some attempts have recently been made to estimate a part, but only one part, of the number of mainstream individuals leading a "polygamous" life in the United States. Ironically, this is reported in British Columbia Chief Justice Bauman's recent ruling (Nov. 2011) upholding the prohibition of polygamy in Canada. The estimates bear on polyamory, which is also known as "polyfidelity" and "postmodern-polygamy" (Bauman 2011: at paragraph 430)—Justice Bauman uses the word *polygamy* as a synonym of polyamory (ibid: at 236). That social movement goes back to the 1990s or rather started to make the headlines only around that period (ibid: at 435). Briefly defined:

> Polyamory is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:
>
> a) men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks.
> b) no sexual orientation is regarded as superior to any other (ibid: at 138).

In the words of one of the scholars who has studied the phenomenon:

> [Polyamory] vary as to the number of people involved, the sexes of those involved, the sexualities of those involved, the level of commitment of those involved, and the kinds of relationships pursued. Imaged as a form of commitment which is flexible and responsive to the needs and interests of the individuals involved, rather than a rigid institution imposed in cookie cutter fashion on everyone, this new polygamy reflects postmodern critiques of patriarchy, gender, heterosexuality and genetic parenthood. Such a 'postmodern polygamy' might occasionally look like traditional patriarchal polygamy, but it differs in important ways. For example, it could as easily encompass one woman with several male partners as it could one man with multiple female partners (Maura Strassberg quoted in Bauman, 2011: at 430).

After listening to polyamorist witnesses, Justice Bauman adds that "polyamory is not casual group sex. Rather, its fundamental value lies in the relationships at its core" (ibid: at 431):

> Another foundational element to the practice is that each party must know of and consent to both the possibility and reality of other relationships within the group. This need for openness and consent at all times necessitates considerable self-awareness, communication, conflict resolution and emotional processing on the part of all members."(ibid: at 434) … "All relationships are consensual." (ibid: at 432]. "Other than their relationship structure, *polyamorists live mainstream lives fully integrated with their communities* [emphasis added] (ibid: at 435).

Witnesses filed affidavit evidence regarding their personal relationships and polyamorist philosophies. Two examples will give an idea of the institution's surprising ordinariness, so to speak:

> John Bashinski is in […] a conjugal relationship with two other adults, Ms. Joyce and Mr. Baird. Ms. Joyce and Mr. Baird had been in a conjugal relationship with each other for approximately 12 years before being joined by Mr. Bashinski. *No rite or ceremony was conducted to celebrate or confirm the formation of the triad, nor do the members have a fixed plan to conduct such a rite or ceremony in the future* [emphasis added]. The triad resides in the same house. They are raising a daughter, who is the legal and biological child of Ms. Joyce and Mr. Baird. Mr. Bashinski and Mr. Baird each have an ongoing sexual and romantic relationship with Ms. Joyce […]. Mr. Bashinski discusses the self-image and commitment of the triad as follows […]: Each member of our triad sees each of the others as a lasting and committed conjugal partner. Among ourselves and with others, we refer to each other using the words "husband", "wife" and "partner". Although we do not see any relationship as absolutely indissoluble, our understandings and agreements include:
>
> a. intent to stay together indefinitely;
> b. an accord to work through even major relationship problems rather than to dissolve the triad;
> c. an understanding that our relationship will persist regardless of circumstantial changes, such as changes of health, changes of financial circumstances, and changes of work;
> d. an obligation of affirmative concern, in all our actions, for the stability of the family and for the desires, concerns, feelings, and well-being of all family members; and
> e. an obligation of continuing financial support for an appropriate period of times should the triad be dissolved (ibid: at 449–451).

The second example is provided by Karen Ann Detillieux.

> Ms. Detillieux is married to Mr. Detillieux. They are the biological parents of two children. Since 2007, Ms. Detillieux has been in a second conjugal relationship with Mr. Mahaffy. There is no sexual relationship between the two men. The three, together with the children, which include Mr. Mahaffy's two children, live together and consider themselves a family

> unit. *With respect to ceremony, Ms. Detillieux deposes* […]: Mr. Detillieux and myself were legally married in a religious ceremony in 1995. *There has been no rite or ceremony to mark the relationship between Mr. Mahaffy and myself* [emphasis added], although we wear matching rings to reflect our commitment. We often speak of a ceremony and have the desire to act on this idea (ibid: at 452–455).

Why did both Mr. Bashinski and Ms. Detillieux depose that no ceremony was performed for the arrival of the third person in their triad? The reason is rather sad. Under the law, such a ceremony could have been be interpreted as a wedding ritual, and celebrating a wedding while a former marriage is not yet dissolved is a "crime" entailing up to a 5 year jail term. Section 293 of the Canadian criminal code leaves no room to maneuver, literally:

> (1) Everyone who (a) practices or enters into or in any manner agrees or consents to practice or enter into
>
> i. any form of polygamy, or
>
> ii. *any kind of conjugal union with more than one person at the same time*, whether or not it is by law recognized as a binding form of marriage; or
>
> (b) *celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),* is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years [emphasis added] (quoted in Bauman, 2011: at 852).

Indeed, this is precisely the article of law that Chief Justice Bauman upheld at the conclusion of his Supreme Court hearings. The triads could have been accused either of bigamy or polygamy, as legally defined. In law, bigamy is the crime of marrying a person while one is still legally married to someone else. It results in polygamy. What of Ms. Detillieux who was so touching? She had matched their three wedding rings while still patiently longing for a time when their commitment to each other and to the four children could be consecrated openly.

Sources on the number of individuals who engage in polyamory are limited. Jessica Bennett, a senior writer and editor at *Newsweek*, writes that openly polyamorous families in the United States may number more than half a million (quoted in ibid: at 439). Deborah Anapol estimates "that one out of every 500 adults in the United States is polyamorous". She indicates that "others have speculated that a number in the range of 3.5 % of the adult population prefer polyamorous relationships, which would put the figure at about ten million people" (ibid: at 440). If we take into account that mainstream polygamy includes most polyamorous unions as well as less progressive forms of polygamous free unions (a man sharing his life between a wife and a secret mistress, for example), the numbers could be slightly higher.

Notwithstanding, we have to be prudent. Ms. Detillieux's triad could never materialize, for example, as mainstream polyandry in Georgia. Any child born to her would have her husband and not her partner as his legal father. Even so, I initially found these numbers dumbfounding. They only appeared much less so when compared with the numbers of gays and lesbians that range between 4 % and 5 % of the nation's population according to a serious and recent conservative estimate, and

represent around 10 % according to Alfred Kinsey's 1948 pioneering study.[10] In any event, a 3.5 % rate for mainstream polygamy, including most polyamorous conjunctions, would put polygamous practices in the United States in the range found in many cultures that have permitted polygamous marriages for centuries. For example, in the past, India had an occurrence of polygyny of about 4 % of the Hindu population (before polygyny was outlawed for Hindus) and of about 3 % within the Islamic population (*New World Encyclopedia*). In the 1950–1960 period, parts of Sub-Saharan Africa had rates that ranged between 30 % and 40 %, but this is comparatively exceptional (Tabutin 1974). Still, as Chief Justice Bauman mentions, numbers for polyamory remain small but are far from insignificant (Bauman 2011: at 436).

These estimates having to remain what they are, only estimates, we now turn to Latin America, where the polyamory trend is much less developed. The focus will be on standard mainstream polygamy resulting from the emancipation of the bastard child.

Under Spanish and colonial laws, illegitimate offspring were social pariahs as in earlier Europe and North America, with close to no rights when compared to legitimate children (White 1839: (I) 48–70, 98–117). Their conditions were not very different from those in France or Great Britain (Montluc 1871: 307–308), except that in the case of balanced concubinage, offspring could be more easily legitimated through the subsequent marriage of their genitor and genetrix.[11] During that time, neither concomitant free unions nor adulterous conjunctions could be regarded as concurrent marriages, even from our anthropological standpoint. As a result, no actual polygamy could exist during that period in any shape or form. Only pluri-concubinage could, and then it had to be carefully dissimulated, adulterous conjunctions being then an often prosecuted serious criminal offence (Wertheimer 2006: 390–391).

Following independence from Spain, conditions changed. For example, between 1877 and 1945, Guatemala enacted reforms that achieved what France did only in 2006. Wertheimer (2006) provides a remarkable study of these transformations. It is too long to be detailed here but worth summarizing. I will merely paraphrase the author who has focused on the very features of the law that interest us.

The 1877 Guatemalan civil code began to erase the line separating legitimacy from illegitimacy by granting illegitimate children some limited inheritance rights, and by allowing fathers to voluntarily acknowledge their paternity through several practical means. Fathers could also be forced to do so through filiation suits (ibid: 395–396). It took the new civil code of 1933 to further improve the birth-status

[10] "Interview with Gary Gates of the Williams Institute, U.C.L.A., by Ramon Johnson." Gary Bates is a senior fellow researcher in demography at the Institute. (http://gaylife.about.com/od/index/a/garygates.htm retrieved Feb. 8, 2012).

[11] Morin, Claude, "Age at Marriage and Female Employment in Colonial Mexico." Paper read at the *International Conference Women's Employment, Marriage-Age and Population Change*, University of Delhi, Developing Countries Research Center, March 3–5, 1997. Available at: http://www.hst.umontreal.ca/U/morin/pub/CIDHInd97.htm (retrieved Jan. 22, 2012).

rights of illegitimate children. In that new code, the legal distinction between legitimacy and illegitimacy disappeared entirely and all children, "whether born inside or outside of marriage, [began to inherit] equal shares." The Constitution of 1945 enshrined these rights. All offspring, whatever the marital status of their parents, enjoyed "the same rights." The Guatemalan Congress ordered all keepers of public records henceforth to omit "all references to the legitimacy of children and the marital status of parents" (ibid: 396–397). This was important, because prior to 1945, birth certificates spelled out whether a child was legitimate or born out-of-wedlock and also reported the mother's marital status as well as the father's (when he was listed at all). For instance, a birth certificate might only mention "Julia Gomez, Ladina, out-of-wedlock, daughter of Mercedes Gomez, unmarried." This system made it easy to see and stigmatize those who were born illegitimately (ibid: 397) because, following Hispanic traditions, a legitimate child always received two surnames: his father's and his mother's, in that order. For example, the surname Montegro Gomez indicates that Montegro was the father's first surname and Gomez the mother's first surname. The out-of-wedlock child whose father had not "acknowledged" him or her, in contrast, went through life with a single surname, which was a major cause of self-devaluation: that of his or her mother standing conspicuously alone (ibid: 397–398).

Wertheimer (ibid) offers a vivid example from the 1960s to demonstrate how the birth-status of out-of-wedlock children was transformed when such children were acknowledged by their genitors in the post-1945 legal context.

Julio Diaz Gonzales[12] had five children: three from his wife Cristina Alburez Brañas and two from his concubine Gloria Peralta (a single surname and powerful signifier indicating that she herself was never acknowledged by her father, a certain Valderrama). The two women gave birth to Julio's five children in alternate years. Julio was paying for their respective dwellings, which were in the same neighborhood, only one block apart. He was automatically deemed to be the father of his three children with Cristina, his certified wife, and voluntarily acknowledged his two children with Gloria a few days after each birth. Each set of birth certificates listed the mother and the father (three times Cristina Alburez Brañas, twice Gloria Peralta, and five times Julio Diaz Gonzales). Neither set revealed whether the parents were married and whether the children were legitimate (ibid: 398). According to Wertheimer:

> The legal standing of Gloria's two children was indistinguishable from that of Cristina's three. This benefited Gloria's children. Gloria's children also benefited from Julio's decision to "recognize" his paternity. Because Gloria was not married, the paternity of her children was not officially assumed. […] His decision to take advantage of Guatemalan legal reforms by "recognizing" his paternity in the civil registry just days after his children's births secured three important rights for Gloria's children: the right to a paternal surname, the right to claim child-support from Julio during his life, and the right to inherit fully from him after his death (ibid).

[12] Names are pseudonyms that have been partially changed from Wertheimer's study (2006) to clarify the Hispanic rule of father's and mother's name transmission.

Gloria's two children, unlike Gloria herself, had double surnames from the start—Julia Díaz Peralta (b. 1964) and Omar Díaz Peralta (b. 1966). Neither faced the social stigma that their mother had endured for having but one surname (ibid: 399). Cristina's three children received the surname Diaz Alburez.

From our perspective, Julio and Gloria's conjunction meets the anthropological criteria of a marriage. Like Julio's children with Cristina (the certified wife), Gloria's children (offspring of a concubine) receive their father's surname, enter into his family as well as their mother's, are entitled to child support from their father during his lifetime, and inherit shares of his estate that are equal to those of their Diaz Alburez half-siblings. Gloria's children with Julio are thus born with full birth-status rights. For that reason, in our comparative perspective, Gloria conjunction with Julio must be defined as a marriage. As a result, Julio must be deemed to be involved in a mainstream polygynous marriage. How could an outside observer, our Kenyan scholar David Maillu, for instance, not see in these two concurrent conjunctions a legal reality identical to that which applies in the case of an African polygynous husband?

The fact that Julio became the father of Cristina's children automatically but had to acknowledge his children with Gloria to achieve the same result is unimportant in the comparative perspective. Additionally, while he voluntarily acknowledged his children with Gloria, the results regarding polygyny would be the same if he had refused to do so and been forced to recognize them following a filiation suit.

What matters in our study is not what an individual does but *what the law authorizes or forces him to do* and, in the case at hand, whether it allows or forces him *to provide full birth-status rights to his children with a concubine* while remaining married to a certified wife and while sharing his life between the two women. In other words, the features of the legal system are this essay's subject of study, not the character or the personal will of individuals immersed in or confronted with that legal system.

Wertheimer does not discuss the polygamous possibilities offered by Guatemalan law in the context of mere plural free unions (with none of the partners involved in a certified marriage). Nevertheless, it is perfectly logical to infer from the data he presents that since 1945, Guatemalan legislation allows mainstream polygyny under free unions as much as French law does in the same context, although in the latter case, only since the 1972–2009 period.

Drawing on a longitudinal study of court docket books from 1929 to 1989, thousands of cases, and census data, Wertheimer has been able to ascertain the long-term results of these reforms on Guatemalan matrimonial practices. To his surprise, while these reforms shifted the courts' focus from enforcing the respect of fidelity obligations in certified marriages to the well-being of out-of-wedlock children, they have unexpectedly buttressed adulterous concubinage and, thus, from the present essay's perspective, expanded the number of mainstream polygynous marriages in the country. The reasons are simple. First, as we have seen, married men were allowed to legitimate their concubines' children while remaining officially married to someone else. Second, and more importantly, the law and the courts greatly facilitated filiation suits undertaken by concubinal mothers and thus increased the number of men "acknowledged," so to speak, as having fathered full birth-status rights children to several women concurrently (to their wives and their concubines) (ibid: 397, 419–420).

"In the 1964 census, 'attached' (married or united) women outnumbered attached men by over twenty-three thousand" (ibid: 384). This represented 6.5 % of all attached women (ibid: 420). Adulterous concubinage was certainly one factor contributing to this imbalance. For example, "if Cristina, Julio, and Gloria reported married/married/united" to the census workers, "they would have increased the "attached" total by two women but only one man" (ibid: 384).

> By 2002, attached women outnumbered attached men by 190,000. *If accurate*, this figure would mean that up to 18 % of attached Guatemalan women may have been sharing men in 2002" (ibid: 420; emphasis added, for Wertheimer recommends caution with these census numbers and implies that 18 % can only be a maximum percentage).

I need to add that this ratio must also include women who may share men in the context of free unions. Moreover, given gendered cultural differences, it may be inflated by a number of men who may have listed themselves as single, when in fact they had "female partners" who listed themselves as "attached." At any rate, if further studies were to confirm these figures, or at least their range, the number of anthropologically defined polygynous marriages in the West might be in some cases proportionally higher than in some of the 50 states in which polygyny or polyandry is fully legal since "time immemorial." Unfortunately for us, Wertheimer's study does not investigate what Guatemalan laws allow for officially married or unmarried women in terms of our comparative definition of polyandry. Logic leads us to infer that they probably allow it in the context of free unions but the French and Georgian past expériences warn us that it may not be necessarily so in the context of married women, due to the husband's presumption of paternity.

Recent developments seem to indicate a similar trend in Colombia. On July 24, 2001, it revised its civil code, eliminating jail terms (up to 4 years) for bigamists (someone officially married who officially marry someone else without having divorced the first spouse). It also conceded pardons for those formerly convicted and decriminalized the practice.[13] This set off a furor. Women' rights activists and the Church protested.[14] The Colombian bishops said, "This is a green light to infidelity and promiscuity, and sends a wrong signal about the state's concern for the stability of the family."[15] Bishop Hector Gutierrez Pavon added: "This norm is disrespectful to women, who are usually the victims of this infamy."[16]

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[13] Amparo Ramirez notes that if marrying in addition to one's current spouse "is not a crime anymore, […] it may lead to other felonies such as civil status forgery or suppression of information." See Myriam Amparo Ramírez (Redactora de *El Tiempo*) "La Bigamia." *El Tiempo*, 24 de febrero de 2001. At: http://www.eltiempo.com/archivo/documento/MAM-604578 (retrieved Jan. 17, 2012). Still, it remains to be ascertained whether there are no such felonies if the second spouse has been informed that a first marriage continue to exist.

[14] Javier Baena, "Revised Bigamy Law Upsets Colombia." *Associated Press*, June 12, 2001. Available at: http://www.polygamyinfo.com/intnalmedia%20plyg% 2092ap.htm (retrieved Oct. 1, 2004).

[15] World Watch, "Colombia, Bigamy No Longer a Crime." *Catholic World Report* Aug./Sept. 2001. Available at: http://www.catholic.net/RCC/Periodicals/Igpress/2001-09/wcolumbia.html (retrieved Oct. 1, 2004).

[16] Ibid.

Florence Thomas, a well-known French-born feminist leader from Bogota's *Universidad National* agreed: "The bishops are right about the consequences this will have in Colombian society. This is definitively a step backward for the cause of women in society."[17] Notwithstanding, this watershed change may be considered an indicator only. To be conclusive one should conduct a thorough analysis of the rights and duties of biological fathers and of their legitimated and legitimate children. The same questions should be answered for women.

Does all this mean that mainstream polygamy cannot be resisted and will spread everywhere? The case of the Philippines demonstrates that this is not necessarily so. It also reveals the price to be paid. In 2008, a consolidated bill was filed to amend Article 177 of the family code. Under the bill, out-of-wedlock children were to be deemed legitimate even in the presence of impediments for either or both parents to enter into marriage (cases of adulterous conjunctions, incest). The Philippines Episcopal Commission on Canon Law fully supported the change. Chairman Bishop Medroso even said "*You know our society.* I hope there will be no more dividing line between legitimate and illegitimate children" [emphasis added].[18] However, as of December 20, 2009, the amended article 177 states that children born out of wedlock could be legitimated only if there were no impediments to marriage between the biological parents and eventually if the biological parents were marrying officially.[19] This seems to imply that a man may enter into three or four concomitant free unions, but cannot legitimate any of his children until he marries one of his female partners; that after he has done so, he cannot legitimate any of his other children with his other mistresses, unless he divorces his first wife and remarries his next mistress, and so forth.[20] As a result, it is presently impossible for any man to be involved in several marriages at the same time, even when marriage is anthropologically defined in broad terms. Thus, mainstream polygyny is impossible. The same applies for a woman and mainstream polyandry. Note that the price paid by Philippine society is that "the dividing line between legitimate and illegitimate children" is wholly preserved, against Bishop Medroso's best hopes, and that each year, the Philippines still generates, thanks to the law, cohorts of bastards with greatly diminished birth-status rights through no fault of their own.[21]

As granting full birth-status rights to non-marital children is in line with the *homo aequalis* ideology (Dumont 1984) dominant in today's West; and as it is an enforcement of preexisting democratic principles according to which each and all

[17] Ibid.

[18] See "Bishop backs bill accepting illegitimate children." In *Clerical Whispers*, September 30, 2008. http://clericalwhispers.blogspot.com/2008/09/bishop-backs-bill-accepting.html (retrieved Jan. 18, 2012).

[19] See *Legal Updates*, "Family Code of the Philippines: Primer on Legitimation." See at: http://famli.blogspot.com/2007/02/family-code-of-philippines-primer-on.html (retrieved Jan. 19, 2012).

[20] "Executive Order No. 208," *Family Code of the Philippines.* Title VI: Paternity and Filiation, Chap. 1. Legitimate Children, Chap. 3. Illegitimate Children. At: http://www.familymatters.org.ph/Family%20Code/FC%20Table%20of%20contents %20 sample%20with%20links.htm (retrieved Jan. 20, 2012).

[21] Ibid. Article 176 (retrieved Jan 20, 2012).

individuals are born with equal rights, we should expect that, unlike the Philippines, an increasing number of Western or westernizing countries will be revising their descent laws so as to desist from making legal differences between the rights of legitimate and illegitimate children. As a result, more nations will also indirectly offer to all their citizens, men and women alike, the possibility to enter into matrimonial conjunctions that, from an anthropological and comparative perspective, will be polygamous and not merely pluri-concubinal. In the next chapter we will examine the constraints that will make it extremely difficult to solve this conundrum.

In the meantime, readers from Japan, or say India, or China or Russia or other countries, might want to explore what is happening in their respective countries with respect to the new form of polygamy that might be arising as a result of the rights granted to out-of-wedlock offspring. Although it is unusual for an author to ask for collaboration, I would be grateful to be kept informed (legros.domi@gmail.com).

What will matter is not what people do, believe, or believe they do with regard to marriage. For a given society, the two primordial questions are: (1) What are the full birth-status rights of legitimate children? (2) Is a child born out of certified wedlock granted all these birth-status rights? In federal states the unit of analysis may have to be the local state rather than the entire federation. Rights will also necessarily vary from country to country or from political unit to another. In Germany, for example, full birth-status rights include the right to be financially supported by mother and father for one's university education, often well after one has reached the age of majority. Now, in all likelihood, such a birthright does not exist in many other nations. In a country with ethnic minorities, birth-status rights will most likely also vary from one ethnic group to another. In cultures with strict unilineal (matrilineal or patrilineal) descent, legitimate children may not belong to their mothers' or fathers' lineages in the same manner. To be complete, birth-status rights for illegitimate children need to reflect distinctions locally made between the parents' respective kindred or lineages, that is to say, filiation-related rights and duties over the child will not necessarily be the same for mothers' and fathers' lineages or kindreds, like they are in France, Germany, or the United States. Finally, in some places, the birth-status rights of males and females may differ (usually to the economic detriment of females). In such cases, the lesser birthrights of females have to be defined as the full birth-status rights granted to women by the culture in question, and not as a lack of full birth-status rights comparable to that of a bastard. In other cases, first-, second-, or third-born, and so on, may also have different full-birth status rights.

It will also be important to keep in mind that the key question is not whether many individuals are involved in mainstream polygamous marriages, but rather whether legislative revisions regarding the birth-status of out-of-wedlock children now allow mainstream polygamous marriages (as anthropologically defined) to coexist alongside monogamous marriages, certified or common law. Furthermore, the real question is not how many men (officially married or not) choose to acknowledge their so-called "spurious" children, but rather if state laws (or treaties and other documents regarding minorities) allow them to acknowledge such children, to give them full birth-status rights, especially when born from different women in a given year. The subject of study is the contemporary state legal culture and its

consequences, unexpected or deliberate, not the whims of citizens. The same questions must be answered about what the law provides for married (officially) and unmarried women. It would seem that it is not always identical. Ironically, it must be added that when an extra-conjugal paternity is not voluntarily acknowledged by a married man (certified), but proven through court proceedings, it imposes upon that man a true polygamous marriage (anthropologically speaking) that he may not have wanted. This is so if his extra-marital paternity confers full birth-status rights to his mistress' child. The same applies for an unmarried man with several concurrent female partners in the context of free unions. For married or unmarried women, my guess is that the law will have made matters more complicated, just as in France between 1972 and 2001 as well as in the state of Georgia (U.S.A.), and it may prove rewarding to explore this issue in details for what it reveals about the human condition and its constraints. Finally, it will be important to investigate whether the law attempts to directly punish women and/or men in concurrent conjunctions. If such is the case, are the sanctions sufficient to impede the country's potential for mainstream polygamy? I have my doubts about this, but it is worth documenting. It is also crucial to reiterate that, from a comparative anthropological perspective, the existence (or absence) of a monopoly over the sexuality of one's spouse(s) is irrelevant, as is the presence (or not) of reciprocal rights and duties between spouses.

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[26] Martin at: http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf (retrieved Feb. 3, 2012).

[27] Nock at: http://aspe.hhs.gov/hsp/07/births-to-men/rb.pdf (retrieved Feb. 5, 2012).

[28] Pendleton at: http://www.cardozolawreview.com/content/29-6/PENDLETON .29.6.pdf (Retrieved Jan. 31, 2012).

[29] Wertheimer at: http://www.historycooperative.org/journals/lhr/24.2/pdf/wertheimer_lhr.24.2.pdf (retrieved Jan. 16, 2012).

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Chapter 7
Constraints in Cultural Engineering, Exotopic Observation, and Truth

Self-anthropologization is a worthwhile exercise. By treating monogamy as a cultural feature belonging to a people observed from afar, from the vantage point of Bakhtin's outsidedness or exotopy, we are able to realize how taking socially imposed universal monogamy as unproblematic presupposes the idea that it can be removed from the institution of bastardry with which it is inextricably intertwined; the institution that, in itself, contradicts the Christian principle that babies are born innocent from wrongdoings. For centuries, all Christian children born out of wedlock were automatically assigned a bastard and pariah status. Couples who did not contract a certified marriage knew that this would totally delegitimize their eventual progeny. Still they went along. As the authorities (Church, then state) would only certify one marriage per person and heavily punish offenders, licensed marriages became the method by which the self-reproduction of socially imposed universal monogamy was ensured.

The reason why the institution of bastardry cannot be dissociated from socially imposed universal monogamy is that suppressing the negative sanctions that the concept bastard embodies *ipso facto* transforms concubinage into a system of free unions that are true marriages from a cross-cultural standpoint. To do without the notion of the bastard thus accordingly confers the status of true polygamy to that which, previously, could only have been labeled pluri-concubinage or wife-plus-mistress(es) system. In reality, the bastard child is a dross that is inevitably produced as such by any overly rigid marriage system. This becomes clear when considering a culture that allows polygyny. What if it limits the number of wives to four? What are the birth-status rights of children born to an additional fifth female partner? Besides, what of the birth-status of a non-marital child born to a first or second or third certified wife?

The exo-anthropological approach shows that the "real savagery" of bastardizing innocent children cannot be eliminated unless polygyny and polyandry are introduced into the social body as full marital unions—a move that, in the eyes of many in the West, constitutes, in turn, the *others*' "ultimate barbarousness."

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Imagine, for example, that French parliamentarians were to pass legislation such that mainstream polygamy could no longer be made possible through the loophole of multiple concomitant free unions. Laws would have to stipulate that only one free conjunction at a time may be regarded as a free union deserving a *certificat de vie maritale* (certificate of marital life). Yet, from Kathleen Gough's anthropological viewpoint, any other intimate bonds existing in addition to this first single free union would also be considered to be marriages as the children born from them would have full birth-status rights. To avoid this, clearly, the new laws would have to withdraw full birth-status rights from children born from the additional free conjunctions. And France would then find itself right back at square one with a new class of bastard children, regardless of the new euphemism that would unavoidably be coined to designate such "out-of-first-free-union" children. The same would happen if the *Uniform Parentage Act* attempted to limit the number of intimate partners a woman or a man may have concurrently. Sunni Islam provides a concrete example of such a logical outcome (I exclude the period when non-Muslim women war captives were made concubines). It defines as illegitimate any child born to a Muslim woman outside of the marriage bond. This applies to any single mother and also to any adulterous wife. Moreover, if a birth occurs less than six lunar months after the date of the marriage, the child is deemed illegitimate, even if the husband is the actual genitor and wants to acknowledge his progeny. This six-month issue is a majority view in the *Shafie* school of law that some scholars in the other schools share while others do not. That six months matter that much for many is mentioned here only to illustrate how the married/unmarried opposition under Islamic law is as solid as under Christian canon law.

Throughout his life, an illegitimate Muslim child is the subject of humiliation, scorn, and discrimination. At times, he will be called "son of a whore." Now, as a man cannot be wedded to an additional woman after he has already married four, he cannot acknowledge his children with a fifth or a sixth female partner. These additional children are deemed wholly illegitimate and receive none of the most important birth-status rights under Islam: rights to a father and to his father's lineage, rights of maintenance, of inheritance, custody and protection. In essence, the fifth female partner's children are the strict equivalents of the pre-1972 *a patre* adulterine child in France. Thus, as Islamic polygyny, wherever it is still allowed, is restricted to four wives, the bastard conundrum is only postponed to a later day of reckoning. Interestingly enough, in the *Hanbali* school of law, as well as to some extent in the *Maliki* and *Hanafi* schools, there are today less severe shariah scholars attempting to enable actual genitors to legally acknowledge any child they may have sired, whether within the bond of a marriage contract or not (this, in the interest of the children) (Sujimon 2010).[1]

[1] See Shahanaaz Habib, "Illegitimate children: Seeking a revision of the Law." *The Star* (Kuala Lumpur, Malaysia), November 6, 2011. At: http://thestar.com.my/news/story.asp?file=/2011/11/6/nation/9850636&sec=nation (retrieved Jan. 25, 2013).

Could it be that societies that accept both unfettered polyandry and polygyny are not so much opposed to the high moral standards of true monogamy (remember that the vast majority of their members practice it) as to the unintended evil effects (the institution of bastardry) of socially imposed universal monogamy, or of any other restrictive matrimonial system. What should one think of a legal scheme that stigmatizes at birth some human beings for life, all in the name of a cultural ideal that, as is well known to all, is too rigid to apply to the circumstances of each and every member of society—including many women, notably in the past (see Sohn 2006), when sex entailed a risk of being impregnated that was much higher than it is today, thanks to birth control techniques?

The history of cultural institutions such as marriage could well depend primarily on the ethical contradictions that develop between an ideal they seek to impose (universal monogamy for instance) and the means (the institution of bastardry) they use to exclude the adoption of other possible ideals (monogamy with some room made for polygamy). From this perspective, the evolution of the family and of matrimonial systems might very well be largely independent of technological and economic progress (see Legros 1988 for the case of matrilocal versus patrilocal bands of hunters and gatherers). It would span extremely long periods of time (*très longue durée* to borrow Braudel's phrase (2000) for long-term, unchanging historical trends). It would take the form of ultra-long-term cycles beginning with a problem's proposed solution that, in its closing stages, becomes the difficulty to overcome by admitting that the initial problem was perhaps a lesser evil. For example, quasi-polygynous concubinal conjunctions in late Roman times was the problem that in the beginning was resolved through the reification of the institution of monogamous marriage and bastardry (possibly of Indo-European origin); at the end of a long cycle, it is the immorality of this institution that has become the problem whose resolution points towards the admission of mainstream polygyny and polyandry. Europe and the West in general seem to offer a show-case for such a possibility.

Initially, part of the Christian message went far in attacking family and domestic solidarity. According to Luke, Jesus said:

> If anyone comes to Me and does not hate his own father and mother, wife and children, brothers and sisters—yes, and even his own life—he cannot be My disciple (Holman Christian Standard Bible, Blum (ed.), 2009).

His teachings recognizing the inevitability of marriage and family life were more positive, but still fastidious enough. After a marriage was contracted, short of a wife's adultery, there was no practical possibility for divorce. One is led to suppose that very early on in the history of Christianity, in Israel and in the diaspora, when a wife was barren and her converted husband wanted children, he could only take a second wife. As mentioned earlier, this may be why Jesus never spoke against polygyny *per se*, or against the levirate (having to marry one's deceased brother's childless widow) or uncle-niece marriages, all Jewish institutions that at the time were still regarded as fully legal solutions for insuring families with legitimate progeny. During this period, among polytheist Gentiles in the Roman Empire, true polygyny was taboo. Strict monogamy was the only possible form a religious marriage could take. Plural conjunctions could exist, but only in concubinal terms.

Because of the confrontational attitudes they adopted, and because they straddled two cultural universes both of which they rejected, early Christians were hated by most, even within their own families. As Tertullian (c. 160 CE–c. 225 CE) reports for as late as the decades preceding and following the year 200 CE:

> Some [polytheists] would even make a compromise with their hatred of Christianity, to their own disadvantage; being well satisfied to be injured in the tenderest points, provided they are freed from the intrusion of such objects of hatred [Christians] in their own homes. The husband, who hath now no longer any reason for jealousy, expels his now virtuous wife from his house: the father, formerly indulgent, disinherits his now obedient son: the master, once lenient, sends his now faithful slave from his sight. Each one becomes hateful, in proportion as he is amended by the profession of this [Christian] faith. The improvement, which hath followed from it, is not sufficient to counteract the general hatred towards the Christians.[2]

Tertullian forgets the power of Jesus' nonviolent social philosophy: "But I tell you, don't resist an evildoer. On the contrary, if anyone slaps you on your right cheek, turn the other to him also" (Matthew 5:39, Holman Christian Standard Bible, 2009). He also leaves out Jesus' own message of hate: "virtuous wife," "obedient son," and "faithful slave" were but the placatory masks worn by converted individuals concealing their then unmentionable rejection of the old Roman systems. Would Jesus' followers be so hated if their righteousness had not manifested itself as a desire to overthrow the old classical world order and as an unrelenting will for power?

The hallmark of the Empire was mutual respect between the various gods of the different peoples it had conquered and the right to live according to one's national religion. That principle of public law explains why, in earlier times, Romans, favoring the Jews' intolerant god, sacrificed "the requirements of their official religion, by exempting Jews from carrying out the religious rites imposed on everyone else" (Juster 1914: 248). To be persecuted as indeed they were, Christians must have represented an unparalleled threat to social order. Howbeit, Christians held their ground over the course of the second and third centuries, and with Gentile converts increasing in number, it is likely during this period that they reified universal monogamy, a non-Jewish core religious value, and made it mandatory for all, Jewish converts included. This would explain why, in 401 CE, Saint Augustine was at pains to clarify, curiously, that it was "according to the usage of Rome" that polygyny was no longer allowed (see Chap. 2).

Even so, in the second and third centuries another polygynous-like reality developed among some Pagan Gentiles themselves. Very gradually, children born in Roman concubinage were granted rights, including some rights of inheritance from one's father. Concubines never became wives, but clearly, concubinage began to provide children to heirless couples and to function as polygyny did and does elsewhere in the world. After Constantine's conversion in 312 CE, most persecutions ended. Christianity had survived but, at the time, only as one religion among others. Its leaders, however, lost no opportunities in moving against late Roman concubinage. In the

[2] *The Apology of Quintus Septimius Florens Tertullianus,* Chap. 3. In Temple Chevalier, A translation of the Apology of Tertullian, 2nd edition, London: Gilbert and Rivington, 1851. At: http://www.tertullian.org/articles/chevallier_apology.htm

name of Christianity, Constantine reverted to older Roman traditions and forbade the transmission of property to out-of-wedlock children (Harper 2011: 461).

After 380 CE, Theodosius (future Theodosius I, but then only a *de facto* co-Augustus with Valentinian II) made Christianity the state religion of the Empire, and with the full support of Christian religious leaders, let it bloom into religious totalitarianism. Violent persecution of polytheist worshipers by Christians began (MacMullen 1997: 1–31). Old and famed temples were torn down, chiefly in the Eastern part of the Empire, but, ironically, only because the Western part was to be taken over by "Barbarians." All other religions and doctrines became not merely false but criminal. Repressive institutions of state and of the Church tracked down culprits. Only Judaism was spared. It stood as a lone exception. More exactly, Christian theologians were eager to keep the Jews, Judaism less so. Jews had to be present, but exclusively:

> [to] serve [Christian theological] purpose, to demonstrate […] the truthfulness of evangelical predictions: the realization of the poverty and decay of Jews. Thus, Christian Rome left Jews with only the minimum strictly necessary for the existence of their religion. […] It belittled and degraded it. This worship had to be in hiding, its buildings […] decrepit, in ruin and in small number (Juster 1914: 250; translation D. L.).

Even the Jews' right to their own matrimonial laws and customs was revoked, including the right to polygynous marriages and the leviratic duty:

> Dec. 30, 393, Emperor Valentinian [II], Theodosius I and Arcadius Augusti to Infantius Count of the East: No one of the Jews will maintain his own custom in marital unions, nor shall obtain a marriage according to his own law, *nor shall he enter into different marriages at one time* [emphasis added] (Justinian code 1.9.7., quoted in Grubbs 2002: 185; Valentinian II died in 392 and year 393 may be an error in the Justinian Code or in Grubbs).

This is the imperial fiat, signed by two co-emperors, that was initially referred to in Chap. 2. Hidden from Christians' view, this edict went unheeded among Jews, at least until Rabbenu Gershom Ben Judah's time, circa 1030 CE. If it were not for that one act of resistance, all polygynous conjunctions and pluri-concubinal arrangements would have ceased to be validated in the Empire by any institution as early as the fifth century CE.

Nonetheless, the Church kept pressuring people to change their customs. The process lasted centuries. It was made step by step, oftentimes with a step or two backward. After delegitimizing polygynous-like concubinal children as well as heirs from balanced concubinage, it outlawed endogamy, adoption, divorce, widows' remarriage, and so forth—all of which had allowed late Roman families with no legitimate offspring to perpetuate themselves through *ad hoc* heirs (Duby in Goody 1985: 6).

From then on, socially imposed universal monogamy (with close to no possibility of divorce) became the sole possible form of marriage and remained so for the next centuries, that is, throughout a long period of radical economic transformations (slave-based economy in late Roman Empire, the manorial system of the feudal ages, the mix of feudal landed-property and mercantile capitalism during the Renaissance and absolute monarchy, and finally, over the last 200 years, industrial capitalism, world imperialism, state socialism).

Two thousand years after the inception of Christianity, France and other Western nations have reintroduced the option of polygyny while adding the option of polyandry. Why? Certainly not for economic reasons! It is, I suggest, only because socially imposed universal monogamy under Christianity had created the quandary of bastard children. After so many centuries, there was no memory among today's legislators that the institution of bastardry was a form of social engineering devised to eliminate the possibility of polygamous quasi-marriages, not to speak of polygamous actual marriages. Contemporary jurists resolved the problem of the immorality of bastardry without realizing that, in doing so, they were unsuspectingly taking on what in their eyes was surely the greater immorality, that of the polygynous solution, to which they added that of polyandry.

The history of some institutions can thus be seen as determined by *ad infinitum* ethical debates with no available satisfactory solution. The proof is to be found in France's 1972 and post-1972 legislative mix that seems to be the result of compromises made over the years on the basis of ideas and social pressure that were as numerous as they were contradictory—an unfolding that appears to be the end of a very long winding road guided by the elusive notion of "ethical progress," which consists in reverting to precisely what was prohibited fifteen centuries earlier in the very same name of "ethical progress."

After the Church successfully prohibited people from divorcing and re-marrying, one fact quickly became clear: prohibiting divorce did not prevent couples from breaking up. In the eighteenth century, Samuel Johnson, quoted above, was still reminding us of that truth. Early on, the Church agreed to a compromise. It admitted separation but without ending the marriage (this practice was still common in Italy not that long ago.) Nonetheless, being separated without being able to obtain a divorce opened the way to subsequent forms of conjunction (concubinage without being divorced) that were even less tolerable by religious standards than an institution of de-marriage and re-marriage would have been. Faced with a stubborn and dogmatic Catholic Church, European civil societies, such as France, had no choice but to legalize civil divorce through the state—gradually and prudently.

True polygamy, however, remained impossible due to a strict conceptual opposition in civil law between certified marriage and concubinage, and to the fact that children born in concubinage were automatically deprived of full birth-status rights. They were first called *bâtards*, and later *enfants illégitimes, naturels*. During the last century, however, the continuing existence of castes of regular bastards and pariah adulterine bastards began to be seen as creating acute socioethical problems. In France, the dilemma was resolved only slowly: the category of illegitimate child was first replaced by that of natural child, which, in turn, was finally eradicated in 2006–2009 with the unformulated hope that polygamous unions, being presented as multiple concurrent free unions or wife-plus-mistress arrangements, would remain invisible.

That the initial reform of 1972 was the product of unprincipled compromises is made clear by the status then given to a child born to a married man's mistress. Granting such a child the same birth-status rights as the children of the legitimate spouse would have made obvious that the new legislation rendered polygyny possible, if not in words at least in deeds. What else to make of a man with two women he

is seeing concurrently (his wife and mistress), and who each gives him children with equal full birth-status rights? More than 65 years earlier, French senators had already made observations to this effect (Weill and Terré 1983: 679). So as to spare French civil society, that had professed certified monogamy for over a millennium, differences had to be devised to distinguish between natural children born from balanced free unions, on the one hand, and children from adulterous conjunctions, on the other.

First, adulterine children were granted only half the inheritance privileges granted to the offspring of balanced free unions and certified marriages. Adulterine children were thus still treated as some kind of bastards, or at least semi-bastards (perhaps the term "morganatic child" would be a better fit). In this way, the law went against its central ethical goal, which was to eliminate all distinctions between simple natural-born children, adulterine children and legitimate children. Jurists who formulated the law for legislators called this sleight of hand a "transaction without glory" (see Terré and Fenouillet 2005: at 666).

Second, certified marriage would be favored and for that reason entitled the wife of an unfaithful husband to certain privileges (the husband cannot raise his mistress' children in his wife's home without his wife consent; his objecting to her refusal would be inadmissible in court, etc.). Contrariwise, it was legislated that free unions did not prescribe faithfulness for either partner. No imposed fidelity for free-unionists! How come? Was that not wholly immoral? Yes, or rather "yes but," for to impose fidelity would have created more ethical problems than it would have solved: i.e. the second free-union would have generated bastards.

Third, by law, no rights were provided for a mistress whose male partner (unmarried or married) had in turn cheated on her and left her with the responsibility for their children (ibid: 595, 1; Berthon and Hartwig 1994: 113).

Fourth, while under the law, certified marriage continued to uphold the reciprocal rights and obligations that had existed between spouses before 1972, it was stipulated that free unions would not entail any of these rights or obligations, in particular the reciprocal right to inherit, as enjoyed by certified spouses (Weill and Terré 1983: 593, 594; Berthon and Hartwig 1994: 128–130).[3] It was also hoped that the latter legal distinction made enough of a difference to conceal from traditionalists the polygamous "look" of plural free union*s* yielding full birth-status rights children and heirs.

Still, the fact that spouses joined in free union are not entitled to inherit property from each other does not detract from the marriage status of contemporary free unions, since reciprocal rights of inheritance between spouses cannot be a defining criterion for a cross-cultural definition of marriage.

To complicate matters, the rights of the adulterous wife (certified) in relation to her natural child were distinguished, to the detriment of women in general, from the rights of an adulterous husband. Before 1972, provided he had solid proof of his absence at the time of conception, a man could deny his adulterous wife's child, but

[3] *Droit de la Famille: le Concubinage* par L. Gauvenet. At: http://danc.free.fr/famille/concub.htm#1.1.3 (retrieved Feb. 6, 2013).

his wife could not deny his paternity even with irrefutable proof (her petition was inadmissible in any court). The 1972 civil code gave an adulteress the right to disavow her husband's automatic legal paternity and have her adulterine child acknowledged by her lover. Nonetheless, there were exacting conditions for this: she first had to divorce her husband, then marry her lover, and then her new husband had to formally seek to acknowledge their adulterine child as his (Weill and Terré 1983: 560,561; 601). This should remind us of the difference between an adulterer's rights and an adulteress' rights in 2008 in Georgia (U.S.A.), although there are no indications that this Southern state tried to outdo the Gallic rooster in this matter.

France, under the pressure of a condemnation from the European Court of Human Rights, made further legal changes during the period 2001–2009. These changes allowed an adulterous wife to have only her name on her adulterine child's birth certificate, thus eliminating her husband as the presumptive father. Her paramour was then eligible to acknowledge his child with her as his. In the absence of a divorce from the husband, it was only then that a married woman was allowed, unknowingly to the legislator, to become polyandrous in the comparative sense, if she and her partners (lovers and husband) so chose.

The 1972 initial legislation was thus itself "bastard" as it assigned the *a patre* adulterine child the status of semi-bastard, while assigning the *a matre* adulterine child the curious privilege of being, on the one hand, the legitimate child of a non-father, and on the other hand, the non-child of its biological father.

The long 1972–2009 legal overhaul remains "bastard" in that couples living in free union (most in monogamous ones) are still denied the right of reciprocal succession (Terré and Fenouillet 2005: 613–616), which, following contemporary French popular mood, should have gone without saying—the lack of such a provision was already raising some serious questions among some jurists in the early 1990s (see Berthon and Hartwig 1994: 97–141). In fact, some heterosexual free union partners, who are more numerous today than ever, now express, like gay right activists, the need to be legally recognized as the rightful heir of their partner's estate. They feel that living in free union should give partners the same rights and privileges as certified marriage, as it already does for their children.

The deep-seated reason why an adulterous man's children were still to be implicitly treated as semi-bastards in the eyes of the law has already been explained. It should be added that the reformers also sought to protect the feelings of non-adulterous certified spouses (as well as those of their legitimate progeny) who had put their faith in the sacrament of marriage; indeed, subjects and then citizens had been accustomed for centuries to socially imposed universal monogamy excluding all forms of complementary marriages and therefore precluding any possibility of additional family segments seeking succession (Weill and Terré 1983: 474, 1, 1, b; 658; 658, 3). Yet, these excuses were only the obverse of the deeper-seated reason: this would have made all too transparent the fact that the mistress or lover relationship had been transformed into a marriage as well.

Now, why were adulterous women and their lovers prohibited from acknowledging their natural adulterine children? It defies reason, since under the 1972 civil code there was no longer such a "taboo" on adulterous husbands and their

mistresses' children. Perhaps, in the early 1970s, it was still culturally unthinkable, among jurists and legislators (overwhelmingly males), that a French married woman would ever want it to be known in her family that she had a lover while maintaining respect for her husband. It is also possible that it was then unthinkable among many French women who had interiorized millennia of male prejudice regarding such questions. It was difficult to imagine that they might want to proudly and publicly draw attention to inspiring the passions of more than one man, as were openly boasting warrior caste polyandrous Nayar women in India two centuries ago (see Gough 1959: 26).

Mandatory fidelity in marriage and optional fidelity in free union is a prime example of the all-too-human confusion that results when, as is often the case in matters of culture, univocal decisions cannot truly solve a problem. Whereas legislators made a distinction in rights for the purpose of conferring greater prestige on monogamous certified marriage, ironically, it is this very aspect of the law that allows for true polygamous marriage under free union. At any rate, we have noted that legislators could hardly have done otherwise. Had they allowed only one single free union at any given time, they would have had to create a new category of bastard for children born from a second, third, or fourth, and so on, concurrent free union.

In France, it took close to 40 years for the reform of the illegitimate child's birth-status rights to reach its final terms, or, rather, to get very close to its ultimate horizon (e.g., the incestuous child). That nation gives the impression that the reformers and the people they served could not readily adopt changes that would have totally eradicated the notion of the bastard child out of fear that the resulting outcome would have been vehemently opposed on cultural ground if made legally too visible. Some jurists sensed that it was half-opening the door to polygamy, and as their thinking was too firmly entrenched in very ancient Western values, they refused to cross the Rubicon. And indeed, the reform remains an unfinished business: a child from an incestuous relation is still denied half the normal birth-status rights of all other children, and remains a bastard of a kind. It will take that one step beyond the incestuous threshold for *all* children to be born with equal rights and for *all* mothers to be treated decently—incestuous partners, regular mistresses, and certified spouses alike.

People tend to prejudge non-marital parents, believing that they should know what they are getting into, that they deserve their lot and the fate of their children. But the advantage of exo-anthropology resides precisely in that it reveals how such thinking arises from a cultural blind spot that is inane and unacceptable for the condition of children and women when seen through the eyes of some *others*. It also shows just how much cultural change proceeds from its own internal logic. In this case, the only way of escaping the bastard conundrum is to abandon an antique reform that was instituted centuries ago precisely to prevent society from turning into what it is actually becoming (polygamous).

The awareness produced by exo-anthropology or exotopy is derived from a knowledge that is always culturally *positioned* and *dislocating*. It is positioned in that it rearranges many pieces or aspects of the cultural patterns under consideration, such rearrangements resulting from queries made by the exo-observer on the basis of that which, in these patterns, is unfamiliar or strange to him or her. This

rearranging activity is itself determined in part by the particular cultural gap that separates the observer's governing paradigms or epistematics—automatic thinking patterns specific to a cultural universe—from those of the *other* being the observed. Maillu (1988) offers a good example. The rearrangement itself is dislocating in that this restructuring takes pieces of the cultural pattern out of their accepted place in the locally perceived model and assigns them a different weighting than they have among those being the observed. What was up may be over on one side, a side might turn up in a corner, what was down placed in the center but in the back, and so forth, all this to reveal what had been hitherto invisible or concealed in the self-presentation of the culture concerned.

That is why an African such as Maillu focuses primarily on that aspect of our marriage system that is foreign to him, which makes him ponder and which surprises him: our nonacceptance of polygamy, or rather our turning a blind eye to it, and the resulting category of the bastard child. Pushed to an extreme, Maillu's logic would lead him to reorganize the classification of societies based on the categories of bastards they produce: *a patre* bastard cultures, *a matre* bastard cultures, *a patre* and *a matre* bastard cultures, *a patre* semi-bastard cultures, and so on. For him, his task, as an exo-anthropologist, would consist of depicting marriage systems not as they present themselves, but instead in the terms of the various systems of legitimate/illegitimate births associated with them. Along the same lines, that is also why Western anthropologists living in a regime of socially imposed universal monogamy make much ado about polygamy and distort the reality of societies that permit it by classifying them as "polygamous" (despite the fact that those societies are overwhelmingly monogamous) as opposed to societies that do not permit it and which they call "monogamous" (but which are also polygamous in practice but refuse to make this explicit in legal terms). By proceeding in this manner, Western researchers do not realize that, like Maillu, what they retain from their study of *others* are the cultural traits that intrigue them the most. By placing polygamy in the foreground, even though it might have only been a marginal aspect of the societal system being observed, they lend far more substance to what surprises them, and depict *others* in "paintings" that are more cubist than realistic.

Knowing full well that her society is principally monogamous, but also wise enough to legitimate unions that become polygamous, a person in such an observed society would be startled to read, in her observer's ethnography, that polygamy (the exceptional) is retained as its main distinguishing feature. She would be startled by a foreign observer's dislocation of a social practice and policy that goes without saying for her. The gaze of this foreigner would prompt her to wonder about herself, and lead her, in turn, to look upon this other person's culture (the observer's) in a manner that is equally exo-anthropological and distant. *And it is precisely this conflict of differently dislocated and differently positioned perceptions that leads to the most revealing anthropological understandings*.

Once again we are reminded of the differences between Dora Maar's photograph and Dora Maar painted by Picasso. We should also keep in mind that Dora's photograph is also an artifact and not the real Dora Maar. And we are struck again by how much Picasso's deconstruction/reconstruction of her actual face, the one he saw, teaches us about suffering and pain.

A Western feminist—Florence Thomas from Colombia, for instance—could still legitimately maintain that societies allowing polygyny are unfair to women, especially when they do not allow polyandry. Yet, she could no longer propose to return to European-style strict monogamy as a solution without admitting, from the same feminist viewpoint, that such a system inevitably produces serious injustices for whole cohorts of innocent children and their mothers (also women). In Western societies, when people seek to put an end to what they consider to be injustices done to those born bastard, illegitimate, natural, adulterine, and even incestuous, they must understand that the introduction of a degree of true polygamy in the social body will be a by-product of any remedy they devise.

Well advised were some indigenous peoples such as the Tutchone Athapaskan in the Yukon (Canada) with whom I work and from whom I derive the binocular vision that helped inspire this essay. Before colonization, they had never fallen prey to any form of matrimonial "fundamentalism"; they acknowledged polygyny, polyandry, and monogamy as equally legitimate marriage options. A spirited great grandmother who had been married to two husbands all her life talked to me, a younger 45-year-old man, with the straightforwardness of a Nayar woman. She would burst out laughing while recounting the most provocative aspects (provoking for me, not her) of her having "married" her two men (Legros 2004: 582). And if the Tutchone's longstanding reluctance to opt for one matrimonial system over another seems reminiscent of postmodern society and polyamory, it is because that is precisely what this reluctance amounts to, but without any angst. It should remind us of the vanity of postmodernism: humans' intellectual capacities for thinking out very complex issues pre-existed Tutchone society, our society, and are still informing both, and all others.

The final key point is that the conclusions we have just drawn are based on a British definition of marriage grounded in descent theory. Could alliance theory have been used to determine the possibilities of polygamous marriages introduced through the reform of French legislation with respect to illegitimate children? Would it have been possible to show, as Paul Rabinow encourages us to do, how Western ways of living are as culturally contingent as are those of other societies? Definitely not, as those who penned the 1972 reforms introduced a minor clarification that has not been discussed so far—it being totally irrelevant from the Anglo-Saxon perspective we have adopted. However, now we need to spell it out as it is of fundamental importance if marriage is considered to be mainly an alliance between groups. This detail stipulates that under free union a man's father and mother (as well as their respective relatives), are not, from a legal standpoint, to be regarded as the in-laws of that man's female partner, and *vice versa* (Weill and Terré 1983: 590). There are reciprocal rights only between that man's relatives and the children he has with his female partner. Within the paradigm of alliance theory, this point of law prohibits jurists and regular French folks from treating free union as a true matrimonial alliance, and *a fortiori* from viewing multiple concurrent free unions as true polygamous marriages. Why was such a legal point made? Probably because alliance theory is in the French context an *endotic* (as opposed to *exotic*) problematics grounded in the French indigenous folk model of marriage. For instance, the noun "in-law" has no literal equivalent and translates as *parent par alliance* or *alliés* ("relative through alliance or allied").

Because the authors of the 1972 reform most likely thought in terms of this local native model (even though they might not all have been aware of its theoretical expressions in either Saint Augustine or Lévi-Strauss), they introduced a small legal detail that, *within the framework of that model*, would provide native French folks and elites the means to turn a blind eye to any talk of actual mainstream polygamy being allowed in their country. Yet, this applies *only to this local framework*. It is *untrue* in the Anglo-Saxon anthropological perspective based on descent. Are we to say then that mainstream polygamy exists only in Anglo-Saxon nations where the emancipation of the illegitimate child has also taken place? Fortunately not, for we have seen with the case of the incestuous child that the French folk paradigm clearly also refers to an underlying native sub-model (not taken into account in alliance theory *per se*) that uses the absence of full birth-status rights either to prevent a marriage from occurring (even in the absence of a wedding ceremony), or to prove its absence. It also selects the presence of such rights as the defining criterion of a marriage having taken place (neither a marriage ritual nor the consent of anyone, legal or otherwise, being necessary). We are again coming face to face with the heuristic value of taking an exotic perspective in anthropology.

At the same time, this issue introduces a very different problem. What status should we attribute to anthropology if its theories produce conflicting truths about a single subject? Can its finding have the status of empirical facts? Bakhtin helps to provide a provisional answer. Let me paraphrase his point: I always see and know something that the observed, from his place outside and over against me, cannot see himself—parts of his body that are inaccessible to his own gaze, the world behind his back. In any of our mutual relations, much that is accessible to me is not to him (1990: 23). The man may turn his head around and see all the space that surrounds him but he will never see himself in that space; while he turns his head to capture what I see as a whole, he can only see it in a sequence of distinct glances (ibid. 37). Correlatively, that "which only I see in the other is seen in myself, likewise, only by the other" (ibid: 23, n. 2). Even though these few words cannot do justice to Bakhtin's essay, they are sufficient to make our point.

These phrases nicely illustrate how a unique and single reality ("I and him and the world that surround us") may contain at least two equally valid truths (and more if we were to introduce Bakhtin's inner realities of "him" and "I" in the act of seeing—inner processes that feel distinct from what either of us has been seeing (ibid: 47–52). The different truths yielded by alliance and descent theory are of a like nature in that they may be equally valid in their own right. Their confrontation yields the fact that "full birth-status rights" remains, even under alliance theory, a central defining criterion for the existence or non-existence of a marriage. In turn, paradoxically, alliance theory reveals, when confronted with itself, that there may be some marriages without alliance.

Bakhtin best captures the relevance of such dialogism. For him, "It is only in the eyes of an other culture that the alien culture reveals itself more completely and more deeply." Yet, as he warns, what is revealed in this case can never be exhaustive, "because there will come other cultures, that will see and understand even more" (in Todorov 1984: 109–110). In a many-sided research, truth cannot but be

polyphonic—a composition of mutually related, equally important parts, but which *share a melody* among them, like a choral work which must constantly struggle against ever possible cacophonic hiatuses.

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[1] Free access for research scholars and students at http://www.tc.gov.yk.ca/publications/tutchone_athapaskan_part1_2007.pdf for vol. 1, and http://www.tc.gov.yk.ca/publications/tutchone_athapaskan_part2_2007.pdf for vol 2.

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