FOR BETTER AND FOR BETTER: THE CASE FOR ABOLISHING CIVIL MARRIAGE

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ABSTRACT

Non-traditional family arrangements are currently denied legal and social recognition as families. This lack of recognition comes from their failure to meet the standard of the prevailing matrimonial-family model. As a result, these families face a very inequitable society that discriminates toward them in every turn. Furthermore, the legal fixation to promote a specific model of the family has produced a very incoherent legal scheme. This article explores whether a more egalitarian society and a more sound legal system may be achieved by extending the protections and benefits of marriage to more groups or, alternatively, whether it would be better to abolish civil marriage in order to achieve such a goal. Instead of following a liberal framework, the article examines the problem from a Neo-Marxist perspective; specifically, Gramsci's ideas of hegemony and

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hegemonic contestation, and Luckas' idea of reification. By doing so, the article unveils two principles that explain why the conception of the family has remained unaltered and non-traditional family arrangements *are still not recognized as families. These two concepts are: (1) the hegemonic discourse of family-normativity and (2) the reified idea that family arrangements must be legally regulated. The article argues that if we truly seek that the state recognizes the existence of diverse family arrangements and does not favor one of those arrangements over the others, the most viable way to do so is by unmasking the reified legal regulation of the family as the social construct that it is. The only way to do so is by abolishing civil marriage and eradicating all the marriage proxies that exist in the law. As soon as the state disengages from the practice of defining the family and redirects its regulatory efforts to identify proxies that are truly related to the social goods it intends to promote, we would be on the path of recognizing and granting rights to the multiplicity of family arrangements that exist and the members thereof.*

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I. NOT FOR BETTER, BUT FOR WORSE

> All happy families are alike; each unhappy family is unhappy in its own way.[1]

I explore in this article whether a more egalitarian society may be achieved by extending the protections and benefits of marriage to more groups or, alternatively, whether it would be better to abolish civil marriage in order to achieve such a goal. Currently, *non-standard family arrangements* are denied legal protections and benefits as well as social recognition because their failure to meet the paradigms of the matrimonial-family model. Furthermore, in our fixation with promoting a specific model of the family we have produced a very incoherent legal scheme. Consequently, answering this inquiry requires examining why we still adhere to an unequivocal definition of the family[2] as a bureaucratized,[3] monogamous, sexuated,[4] married couple with children. It also requires examining how as society we could achieve what Professors Alice Ristroph and Melissa Murray have denominated as familial disestablishment: requiring the state to recognize the existence of diverse family arrangements and prohibiting the state from favoring one of those arrangements over the others.[5] Attaining familial disestablishment is vital for addressing the three main

1. LEO TOLSTOY, ANNA KARENINA 1 (Richard Pevear & Larissa Volokhonsky trans., Viking, 1st American ed. 2001) (1873–1877).

2. Although the best term to refer to all familial arrangements should be *families*, due to considerations of custom and usage I will employ *the family* as the term for doing so.

3. As it will be explained in *infra* Part V.B, the term *bureaucratized* in this paper is used to denote the creation of function-specific roles within a pre-determined hierarchy in the family.

4. This term encapsulates the general understanding that adults in a family arrangement are united in such an arrangement because of a sexual relationship. If they are not engaging or are not capable of engaging in a sexual relationship, then they have not come together in a family arrangement. In other words, the adults in a family arrangement are thought through the lens of sexuality and their bodies are nothing less but sexual bodies. *See infra* Part V.B. *See* DRUCILLA CORNELL, AT THE HEART OF FREEDOM 7 (1998).

5. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1251 (2010).

problems we presently experience with our current legal regulation of the family.

First, our legal system prevents a large group of people from exploring alternative ways to arrange intimate relationships by signaling and channeling people into a particular arrangement. Second, an inconsistent body of law that does not protect the real interests it claims to promote because it is premised on the marriage proxy, or simply put, on using the institution of marriage as a synonym for family when granting legal rights and benefits Finally, this inconsistent body of regulation has generated profound legal and social inequalities that oppose the basic tenants of our society.

I survey the answers given thus far to these problems by contemporary liberal scholars—such as Martha Nussbaum, Tamara Metz and Jessica Knouse—using the discourse of rights, and conclude that such a theoretical framework is insufficient to encompass the multiple dimensions of familial establishment. These responses that are based on the discourse of rights ignore the use of the marriage proxy, its pernicious effects, and intend only to broaden who is covered under the current established definition of the family. Consequently, they ultimately bring us back to familial establishment and reinstate the same inequality problems we face today.

Thus, I propose moving away from the narrative of rights to the narrative of power; instead, I will take a Neo-Marxist approach, which is the best theoretical framework to understand the nature of the pheonema that gave rise to familial establishment and its detrimental effects. Specifically, I employ Gramsci's ideas of hegemony and hegemonic contestation,[6] and Luckas' idea of reification.[7] This framework will help us understand how Family Law and various discourses related to the family have changed while the conception of the family has remained unaltered. It will also help us in comprehending why religious disestablishment has been possible in the United States while family disestablishment has not.

By analyzing the established definition of the family from this perspective, this article draws three conclusions. First, I conclude that our

6. An abridged description of hegemony is the institutionalization of hidden practices of domination through the establishment of a worldview by the ruling class. The hegemonic contestation is the process whereby that worldview is brought to the political arena to be challenged and transformed. *See infra* Part V.A.

7. Reification refers to when a social construct is treated as something fixed and unchangeable. *See infra* Part V.D.1.

subject of study should be the family-marriage dyad—a social and legal conflation of marriage and family as one unequivocal institution. We should not be talking about marriage and family separately, since our current legal process of granting rights to family arrangements is premised on using marriage as a proxy.

Second, in order to really understand the legal and social ramifications of that dyad, we must acknowledge that there is a hegemonic discourse to which courts, scholars and people in general have been making reference without really naming it or establishing its contours. That hegemonic discourse is family-normativity. Family-normativity attempts to dictate how family relationships should be lived and arranged as well as to signal which affectionate relations are of social importance and which are not. It encompasses the bureaucratization of family relations, the promotion of two-person sexuated relationships, a monogamous ethic, and the establishment of child rearing as essential to the human families.

Finally, the reason why we are not able to move from an unequivocal definition of the family and to familial disestablishment is because the hegemonic discourse of family-normativity has not been contested yet. The reified idea that family arrangements must be legally regulated and the removal of the family from the political realm have precluded that contestation from ensuing.

If we truly seek familial disestablishment, the most viable way to achieve it is by unmasking the reified legal regulation of the family as the social construct that it is, so that family-normativity could be actually contested. In order to do so, it is essential to engage in dialectical thinking. The only way to do so is by abolishing civil marriage and eradicating all the marriage proxies that exist in the law. This would bring the family back to the public domain and permit individuals to defy family-normativity. As soon as the state disengages from the practice of defining the family and directs its regulatory efforts to identify proxies that are truly related to the social goods it intends to promote, we would be on the path of recognizing and granting rights to the multiplicity of family arrangements that exist and the members thereof. This would eradicate social inequalities and create a more coherent body of law that truly protects the interests it contends to protect.

II. WHEN THE COURTSHIP ENDS . . .

> SOPHIA: Kristen, you are just upset. We all are. But you have to know: These two women love her like a sister. And I love your mother as she was my own.

> KRISTEN: But you are forgetting one thing though. I'm her daughter. You are not her family.
>
> DOROTHY: Why does everybody keep saying that? We share our lives together.
>
> KRISTEN: You share a house together.[8]

To illustrate better my argument, I would like to share the genesis of this project. In 2006, I was teaching a seminar on current issues in Family Law. To start the conversation with my students, I screened an Italian film which raises the issue of what constitutes a family. The film entitled *Le Fate Ignoranti* portrays a very unconventional family.[9] The family was composed of a widow, the gay lover of her husband, an ex-prostitute, an immigrant, a transsexual, and an HIV patient. These characters shared occasionally or on a permanent basis a common living space, helped and took care of each other, and shared religiously the dinner table every Sunday. The United States cover for the DVD and the poster for the film included, as part of their promotion, the slogan: "Some of the best families are made of friends." After the screening, I asked my students whether the people in the film were a family and were entitled to any rights. Their answer was striking. My students all agreed that those characters look more like a family than theirs do, but they were not a family and therefore should not have any protections.

Their responses highlight poignantly the legal and social conflicts addressed in this paper: we are able to acknowledge the existence of unconventional family arrangements and recognize them as a family unit, but we are not willing to give them the title of a family and the social and legal recognition that such title entails. We are not even willing to engage in a debate over the legality of such a possibility, and the reason for such reluctance—even after years of Family law reform—strives in the hegemonic discourse of family-normativity and our obsession with the narrative of rights.

III. A VOW TO INEQUALITY: FAMILIAL ESTABLISHMENT

> MRS. MADRIGAL: He's a sweet boy, Mona. I approve of him wholeheartedly.

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8. *The Golden Girls: Home Again, Rose: Part 2* (NBC television broadcast May 2, 1992).

9. LE FATE IGNORANTI [THE IGNORANT FARIES], *distributed in the United States as* HIS SECRET LIFE (R&C Produzioni 2001).

> MONA RAMSAY: You make it sound like we're married or something.
>
> MRS. MADRIGAL: There are all kinds of marriages, dear.
>
> MONA RAMSAY: I don't think you understand the trip with me and Michael.
>
> MRS. MADRIGAL: Mona, lots of things are more binding than sex. They last longer too.[10]

Family Law seems to have undergone a dramatic transformation in the past half-century. Rules promoting the subordination of women have largely been abolished,[11] domestic violence has been adopted as a valid state concern,[12] and the recognition of non-heterosexual couples is now a trend.[13] In addition, the growing use of new reproductive practices has triggered legal reforms to the extent that some jurists believe that the United States is currently struggling with the scope and the meaning of *the family*.[14] Some scholars have gone so far as to argue that "[r]edefining the family has become all the rage in the legal academy."[15]

However, if we were to take a closer look into the legal reforms and scholarly work devoted to the family, we would observe that such a redefinition of the family has not really taken place. In fact, it has not even started. In spite of a century of continuous legal reforms, the pivotal institution in Family Law—the family itself—has remained intact.[16] The

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10. *Tales of the City* (Channel 4 television broadcast 1993).

11. *See* Fran Olsen, *The Politics of Family Law*, 2 LAW & INEQ. 1, 4 (1984); Simeone v. Simeone, 581 A.2d 162 (Pa. 1990); Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990).

12. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000); JEFFREY FAGAN, NATIONAL INSTITUTE OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS (1995).

13. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Martinez v. Cnty. of Monroe, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008); Kerrigan v. Comm'r of Public Health, 957 A.2d 407 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Varnum v. Brien, 763 N.W.2d 862 (Ia. 2009); Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Gill v. Office of Pers.l Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Massachusetts v. U.S. Dep't of Health and Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010).

14. *See* JANET DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 15–17 (1997).

15. John DeWitt Gregory, *Redefining the Family: Undermining the Family*, 2004 U. CHI. LEGAL F. 381, 381 (2004).

16. *See generally* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007); Ristroph & Murray, *supra* note 5.

idea of the family has remained, over the past millennia, one of a bureaucratized, monogamous, sexuated, married couple with children.[17]

A. Familial Establishment: A Historical Account

A diachronic inquiry about how the family has been defined reveals that the current social construct of the family is a product of the theological work of the Catholic Church. Tracking out legal and philosophical history, the family evolved from the proprietary idea of the *pater familias* to a concept intrinsically linked to the institution of marriage; from the subordinated relationships of master-slave to the idea of conjugal, legal or blood kinship; from people living under one roof to the bureaucratized, monogamous, sexuated couple with children.[18]

Since its inception into our culture, the term *family* has been tied to a hierarchical system created to ensure subordination. The voice *family* comes from the Latin voice *famula*, which is a derivative of *famulus*. The meaning of the latter is servant, a concept imbedded with the ideas of inequality and property.[19] In addition, linguistic studies contend that the word *family* has a remote connection with the word *vama* from Sanskrit, in which it signified a home or dwelling place.[20] This philological history tends to indicate that in its original conception the family was not associated as it is today with notions of kinship—legal or blood—but that it included as well persons not related by those bonds who lived together under the same roof in bureaucratized arrangements. Under that original understanding of the family it was possible to constitute families not based on sexuated relationships or in blood kinship—an understanding non-existent for most parts of Western society today. For instance, the Romans defined the family as the social organism whose master (the man) had under his power (under the *patria potestas*) his wife, his sons and daughters, and a certain number of slaves, and over all of whom he had the right of life.[21]

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17. This unequivocal definition of the family is the embodiment of the hegemonic discourse of family-normativity. For a full discussion on family-normativity, please refer to *infra* Part V.B. The concept is introduced here to facilitate the discussion of familial establishment and hegemonic discourses, and as a way to refer to the current established definition of the family throughout the footnotes.

18. The profound divergences between these two conceptions illustrate how the concept of the family is nothing less than a construct that responds to the societal forces that surround it. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 829 (2004).

19. EMILIO MENÉNDEZ, LECCIONES DE DERECHO DE FAMILIA 121 (1981).

20. *Id.*

21. *Id* at 124.

However, with the fall of the Empire into Christian hands, that conception started to shift to an idea more similar to our current one. Once Christian ideas percolated the Roman Empire, *the family* then came to be associated with conjugal unions.[22] The Church and its thinkers promoted the idea that the marital family was the only arrangement deserving of the title of *the family*. With that association, the other elements of our current conception of the family entered the scene. The addition of marriage to the concept of the family meant the addition as well of monogamous sexuated couples with children as essential to the idea of the family. Catholic theologians conceptualize marriage as the exclusive social union of two beings with the sole purpose of reproduction.[23] The rhetoric surrounding the idea of the conjugal family in which marriage is seen as a way to get closer to God and to contribute to the well-being of the spouses was just created to promote the activity of reproduction and assured child-rearing would remain exclusively in the hands of the spouses. One of the first people who argued for the hierarchical, child rearing, monogamous conjugal family was Saint Augustine of Hippo, whose vision was later reiterated by Saint Thomas Aquinas and enacted into Canon Law.[24] That vision was later reproduced into the laws of the new Nation-States that took the regulation of the family from the Canon Law and poured it into

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22. *See* John Witte, Jr., *Retrieving and Reconstructing Law, Religion and Marriage in the Western Tradition*, *in* THE FAMILY TRANSFORMED: RELIGION, VALUES AND THE FAMILY IN MODERN AMERICA 244–68 (Steven M. Tipton & John Witte, Jr. eds., 2006); Lyla H. O'Driscoll, *Toward a New Theory of the Family*, *in* THE AMERICAN FAMILY AND THE STATE 81–101 (Joseph R. Peden & Fred R. Glahe eds., 1986).

23. *See* Witte, *supra* note 22. We can see how this idea is embodied in Canon Law. For instance, Canon 1055.1 states that:

> The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.

1983 Code c. 1055, § 1 (1983). *See also* John Bingham, *Government's Marriage Document Makes No Reference to Children, Husbands Or Wives*, THE TELEGRAPH (June 13, 2012), http://www.telegraph.co.uk/news/religion/9327724/Governments-marriage-document-makes-no-reference-to-children-husbands-or-wives.html (discussing how under the teachings of the Catholic Church "marriage joins husband and wife in a life-long bond that is ordered essentially, if not in every instance, to their roles as father and mother and recognises their responsibilities related to procreation and generational care-giving.").

24. *See* Witte, *supra* note 22. This formulation of the family was originally restricted to heterosexuality, and continues to be associated under Catholicism and other Christian religions with heteronormativity. However, as we will show in *infra* Part V.B, family-normativity and heteronormativity are two separated hegemonic discourses that—albeit having been historically conflated in the regulation of the family—are not necessarily kept together in the regulation of the family. That is the reason why our system has been able to recognize gay marriage and not siblings, elderly people living together, or polygamous and polyamorous groups as families.

their civil codes and common law.[25] The same succession of events happened in the Protestant Nation-States. Even through the schism with the Catholic Church, this formulation of the family was preserved by the Protestants and passed along to their corresponding legal traditions.[26]

This conception of the bureaucratized, monogamous, sexuated married couple with children has remained in place up to this date as the unequivocal definition of the family. This idea is so settled into our legal conscience that it was even elevated to a fundamental right status. Article 16 of the Universal Declaration of Human Rights (Declaration) states that:

> (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[27]

The Declaration links the beginning of the family with the celebration of a marriage, as if marriage was a *sine qua non* requisite for the establishment of a family. That link also connects the family with the idea of a monogamous, sexuated couple with children. However, by asserting that the family (in this case the marital one) deserves the protection of the state, the Declaration legally ostracizes other family arrangements by not affording them any protection. Notwithstanding this contradiction, this definition of the family has not only been incorporated into International Law, but has evolved to the point of becoming a fundamental tenant of the United States legal system.

The bureaucratized, monogamous, sexuated, married couple with children has been incorporated into our system of law as the sole definition of the family to be followed and promoted. That type of state endorsement to a specific conception of the family has been denominated as *familial establishment*, as there is a *de facto* official conception of the

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25. *See id.*

26. *See id. See also* Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1136, 1162 (1999); Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361, 409 (2012).

27. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Art. 16 (1948) (emphasis added).

family being imposed by the state to the detriment of all the other family arrangements.[28] Surprisingly, the United Sates has embraced familial establishment without much opposition. However, we should question whether there should be a single definition of the family when there are numerous types of familial arrangements that deserve political recognition and protection, and whose members are citizens just like those individuals who have decided to arrange their families following the established definition.

B. Familial Establishment and the Marriage Proxy

As Professors Ristroph and Murray note, it is puzzling how "the liberal commitment to religious disestablishment [in the United States] has never led to any similar call for familial disestablishment."[29] Even though the United States has shown an amazing capacity to accommodate religious plurality and other forms of societal diversity, it keeps denying family plurality. The United States also recognizes and promotes an unequivocal version of the family, although such conception has not been the only one in the history of humankind and is not followed by a large group of people today in this country. Familial disestablishment—understood as the recognition of the existence of diverse family arrangements and the State's preclusion from favoring one of them—has not been part of any significant political discussion or legal reform in the United States. The main reason for this lack of commitment to transform the socio-legal understanding of the family is that it has not yet been acknowledged that the United States is, in fact, a state with an established definition of the family.

The lack of recognition of this fact comes from the subtle way in which familial establishment has been imposed. Familial establishment has been crafted by making use of the marriage proxy, and not by directly enacting the established definition into law. We can see how the marriage proxy works by looking again at Article 16 of the Declaration of Human Rights. Marriage embodies the established definition of the family; and the state, instead of legally defining the family, uses marriage as a way to determine what arrangement constitutes *a family*. Courts have been explicit as to how the marriage proxy works. For instance, the California Supreme Court has recognized that "[t]he right to marry represents the right of an individual to

28. *See* Ristroph & Murray, *supra* note 5.
29. *Id.* at 1251.

establish a legally recognized family. . . ."[30] Jurisprudence is not the only area that reflects the understanding that family and marriage are deeply intertwined; scholars currently writing in topics related to the family are also often blinded by the marriage proxy. For instance, Edward A. Zelinsky argues that "marriage itself conveys a message, a message of commitment, a message of family."[31]

Ristroph and Murray are among the scholars who have begun to point out how the family is regulated using marriage as a proxy in the United States.[32] They support their position by reviewing the jurisprudence concerned with unmarried fathers. The professors contrast how the United States Supreme Court treats unmarried fathers differently in function of how much their presence in the lives of their children resembles that of married fathers.

For instance, in situations in which the unmarried fathers have cohabited with the children and provided them with the emotional support a married father would, as in *Stanley v. Illinois*,[33] the Supreme Court has permitted unmarried fathers to exercise wed fathers' prerogatives, such as not declaring automatically the children wards of the state upon the death of their mother.[34] However, in instances in which the Supreme Court has found that there is a marital relationship to protect over the biological one or the unwed father has not behaved in a manner similar to a married one, such as in *Quillon v. Walcott*[35] and *Lehr v. Robertson*[36] respectively, the Supreme Court has refused even to recognize biological parents' prerogatives like the right to challenge a petition for adoption.[37] The

30. *In re* Marriage Cases, 43 Cal. 4th 757, 814–15 (2008).

31. Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1209 (2006) (emphasis added).

32. Ristroph & Murray, *supra* note 5, at 1252.

33. 405 U.S. 645 (1972).

34. Following the same rationale, other courts have permitted unwed fathers to exercise married fathers' rights. For instance, in *Lewis v Roberts*, 495 N.E.2d 810 (Ind. Ct. App. 1986), the court decided that an imprisoned unmarried father retained parental rights to his daughter since he wrote to her frequently and made continuing efforts to obtain visits with her thereby precluding her adoption by her new stepfather. Likewise in *Estate of Scheller v. Pessetto*, 783 P.2d 70 (Utah Ct. App. 1989), the court opined that in order for an a biological father to inherit from his illegitimate child, it must be shown that the father has openly treated the child as his own and has not refused to support the child before; since it promotes the legitimate state interest of providing efficient estate administration and promoting development of meaningful relationships between illegitimate children and their fathers.

35. 434 U.S. 246 (1978).

36. 463 U.S. 248 (1983).

37. Other courts, for instance, have denied visitation rights to biological fathers following the same rationale that there is a marital relationship to protect over the biological one. *See* Ruggles v. Riggs, 477 A.2d 697 (Del. 1984); Steglich v. Guerrero, 437 So. 2d 209 (Fla. Dist. Ct. App. 3d Dist.

climax in this line of cases is, for Ristroph and Murray, *Michael H. v. Gerald D.*[38] In that case the Supreme Court did not recognize the parental rights of a biological father who was the lover of the mother but who was not the legal father of the child, even though the child regarded both the biological father and her legal father (her mother's husband) equally as father figures.[39] The Supreme Court refused to recognize this *unconventional* two-fathers-one-mother arrangement as a family, and went even further to assert that that the family unit to which our society *traditionally* has accorded respect is the unit "typified, *of course*, by the marital family."[40]

These expressions evidence how the family is legally defined through marriage. They also illustrate how powerful the proxy of marriage is in promoting the unequivocal definition of the family as a bureaucratized, monogamous, sexuated couple with children. Moreover, it exposes how the marriage proxy is used to deny rights to a large sector of society whose familial arrangements are not the conventional one. In this way, family plurality's visibility is diminished, and the exclusion of non-conventional arrangements is secured. In addition, the deep contradictions of (a) failing to grant biological parents their biological rights because they are not married and (b) including a definition that denies rights to individuals in a declaration of rights show how the negative effects of familial establishment pass for the most part—as the established definition itself—unnoticed.

C. The Effects of Familial Establishment

Though unnoticed, the negative effects of familial establishment are far-reaching. The marriage proxy does not only manifest itself in matters closely related to the traditional family structure like paternal relations and paternal rights, but extends to other corners of familial and political life. A line of cases relating to the right of privacy reveals how pervasive the use of the proxy of marriage is in regulating familial arrangements and excluding people from accessing certain rights. In this group of cases, we can see how the Supreme Court promotes the idea of the marital couple as the natural familial arrangement superior to any other.

1983); LeHew v. Mellyn, 475 N.E.2d 913 (Ill. App. Ct. 1st 1985); *In re* Connolly, 332 N.E.2d 376 (Ohio Ct. App. 10th 1974).

38. 491 U.S. 110 (1989).

39. *See* Ristroph & Murray, *supra* note 5, at 1254.

40. *Gerald D.*, 491 U.S. at 123 (emphasis added).

In *Griswold v. Connecticut*,[41] the Supreme Court found unconstitutional a statute that criminalized providing or using any contraceptive methods or services since such intrusion "is repulsive to the notions surrounding the *marriage relationship*,"[42] which is a "*sacred*" institution that holds "a right of privacy older than the Bill of Rights."[43] The language of the Court suggests that marriage is a natural institution that precedes even the state, and it should be promoted by privileging it over other family arrangements through curtailing state intervention into the institution. Indeed, the case was decided in such a way precisely because it involved a married couple; otherwise the intrusion would have been permitted. It took almost a decade for that right to be extended to individuals in *Eisenstadt v. Baird*.[44] However, even in *Eisenstadt* the Court was promoting marriage and family privacy.[45] The Supreme Court sustained the decision on the basis that the right of the married couple would mean nothing if the individuals who conform the married couple do not hold that right.[46]

Moreover, as the history of sodomy shows, the right to privacy to express one-self sexually has been intrinsically link to marriage. In *Bowers v. Hardwick*,[47] the Supreme Court refused to recognize the right of individuals to engage in homosexual anal and oral sex. The Court did so in part because such a right had no connection with "family, marriage, or procreation."[48] While some might argue that *Lawrence v. Texas*[49] signals the end of the Supreme Court's trend of recognizing privacy and liberty rights predicated on the institution of marriage since the Court recognizes the right of adults to engage in the consensual sexual conduct of their preference without taking into account their marital status. Yet, it is the

41. 381 U.S. 479 (1965).
42. *Id.*at 486.
43. *Id.* (emphasis added).
44. 405 U.S. 438 (1972).
45. The Court extends the privacy to individuals only after it conceptualizes the marital couple as a pair of individuals, and therefore promoting the privacy of the spouses would promote the privacy of the couple. The Court opined:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.

Id. at 453.
46. *Id.*
47. 478 U.S. 186 (1986).
48. *Id.* at 191.
49. 539 U.S. 558 (2003).

opposite. *Lawrence* reaffirms the Court's inclination to channel people into the established definition of marriage. The decision in *Lawrence* was possible only because the Court decided to separate the question of the constitutional right to engage in consensual sodomy from the question of same-sex marriage.[50] If the Court merged the two of them, it would probably be still constitutional to outlaw sodomy, since the Court was not prepared to depart from their understanding that compulsory heterosexuality was part of the established definition of the family. The Court never intended to address and transform the connection between privacy and marriage.

Thus, participating in the established definition of the family represents a special protection: less intervention from the state.[51] If we analyze the case law about the state's intrusion into family arrangements, we observe that being categorized under the established definition of the family signals which relations are good ones, and it tries to provide people incentives to engage in the behavior deemed normal by preventing interference in their private and familial lives.[52] This *privacy perk* compels people to abandon engaging in alternative family arrangements and instead to enter into the preferred marriage relationship.[53]

Similarly, *Troxel v. Granville*[54]—a case in which a set of grandparents sought visitation privileges with the children of their deceased son—illustrates how the marital relation is not only promoted as a superior version of the family, but as the only version possible. In *Troxel*, the Supreme Court decided that state courts must apply "a presumption that fit parents act in the best interests of their children"[55] when considering non-parent visitation petitions even if those petitions come from members of the biological extended family of the children. This decision entails the protection of the unequivocal definition of the family as it curtails any claims to create or defend family arrangements beyond the family-marriage dyad. As Ristroph and Murray assert, "[t]hough *Troxel* has been understood as pertaining solely to the question of parental rights, it might also be understood as endorsing the primacy of the nuclear [marital] family model over claims for alternative family structures in which

50. *Id.* at 578.

51. Matthew Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J. L. FEMINISM 83, 115 (2004).

52. *See id.* at 99–114.

53. *See* Knouse, *supra* note 26, at 369; Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 734 (2002).

54. 530 U.S. 57 (2000).

55. *Id.* at 68.

extended family might play a larger role in children's lives."[56] Hence, the proxy of marriage reinforces the unequivocal formulation of the family, even when the decisions taken by the Court are not directly asserting it.

Decisions like these are creating inequality not only in aspects of Family Law, but in other areas of the law as well. By refusing to give legal recognition, rights and social power to the members of *unconventional* family arrangements, the legal system is promoting the creation of a marginalized group of people. Moreover, decisions like *Troxel* are evidence of how entrenched the familial establishment is in our system. Not only Family Law, but the whole system (including social relations) is geared by this conception. Ristroph and Murray were referring precisely to this inequality problem and the pervasiveness of family-normativity when they spoke of familial establishment. Yet, familial disestablishment does not seem to be in our immediate future.

Moreover, contrary to what some jurists have argued, an alleged legal recognition of *unconventional familial arrangements* has not started to bring familial disestablishment to the legal reform and scholarly agendas.[57] Conversely, it has pushed even further the possibility of familial disestablishment. As Ristroph and Murray assert, the alleged departure from the marital family ideal by supposedly recognizing the diversity of family life through (a) bestowing constitutional and statutory protections to non-marital children and same-sex couples, and (b) conferring rights of cohabitation, has not meant the abandonment of the proxy marriage;[58] instead it has led to the perpetuation of the established definition of the family in a more subtle and diffuse manner.

The cases that seem to promote an alternative way of defining the family fall into what has come to be known as the *functional approach*.[59] Under the *functional approach*, courts recognize non-marital families and grant rights to their members as long as those family arrangements exhibit the characteristics of marital families.[60] The court first evaluates the longevity, commitment, economic cooperation, and participation in domestic relationships of the non-marital family.[61] If the court finds that

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56. Ristroph & Murray, *supra* note 5, at 1255.

57. *See* JANET DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 15–17 (1997).

58. *Id.* at 1255–56.

59. *See* Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640–41 (1991).

60. *Id.* at 1646.

61. *See Matter of T.L.*, 1996 WL 393521 (Mo. Cir. Ct. 1996) (declaring that the courts should re-examine the theory that a child could have only biological parents and adopt a more flexible functional

the *unconventional* family fits the marital family mold, the court then automatically treats the non-marital family as a marital one.[62] However, this is not the recognition of alternative families, but a way of rewarding these less *unconventional* families—sometimes even unconsciously—for fitting into the established definition of the family despite not being a marital couple.

The epitome of this kind of cases is *Braschi v. Stahl Associates*.[63] In *Braschi*, the New York Court of Appeals deemed two unmarried gay men a family for the purposes of a rent control statute that protected the surviving members of the family of the deceased from being evicted from the house.[64] Although the New York Court of Appeals recognized that the same-sex couple was not an actual couple of spouses, the court treated them as one and stated that they conducted their lives as spouses and everyone recognized them as such.[65] Moreover, the New York Court of Appeals used the institution of marriage to inform their decision as to whether they were a family. The New York Court of Appeals relied upon "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."[66] In sum, they based their decision on the similarities between the two men's bureaucratized, monogamous relationship and that of the marital couple. The two men fit, for the most part, the established definition of the family, and thus were rewarded for it.

Braschi and other similar cases show how the marriage proxy creates a hierarchy of family arrangements and promotes social inequalities. At the top of the hierarchy is the marital family. As Tamara Metz points out

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approach, which defined a family by determining whether a relationship shared the essential characteristics of a traditionally accepted relationship, such as economic cooperation, participation in domestic responsibilities, and affection between the parties); Graves v. Estabrook, 818 A.2d 1255 (N.H. 2003) (concluding that a couple engaged to be married and that had lived together for seven years in a mutually dependent and emotionally supportive relationship was sufficient to permit bystander recovery for emotional harm); Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (deciding that engaged cohabitants in a sound and strong relationship providing both parties emotional security sufficient for bystander recovery—family relationship is not limited to those related by blood or marriage); James D. Esseks, *Recent Development, Redefining* The Family-Braschi v. Stahl Associates, 74 N.Y.2D 201, 543 N.E.2D 49, 544 N.Y.S.2D 784 (1989), 25 HARV. C.R.-C.L. L. REV. 183 (1990); Note, *supra* note 59.

62. Note, *supra* note 59, at 1641.
63. 74 N.Y.2d 201 (1989).
64. *Id*. at 213.
65. *Id.*
66. *Id.* at 212–13.

"[t]he marital label designates a unique kind of 'respect and dignity'. . . [it] conveys a social meaning and power that domestic partnership [and other relationships] never can."[67] This power, respect, and dignity emanates from the outmost protection and enjoyment of rights given to this arrangement. As a result, the state fosters the marital couple's dignity, and they enjoy a higher status in society while the other family arrangements are treated as less valuable and are socially marginalized.[68]

A step below, we find the arrangements that resemble the marital couple but for some reason do not fit fully under the rubric of the established family. The individuals that comprise these types of families enjoy some of the legal rights of the marital couple as well as some of the social recognition, but they are never on the same level as the marital family.

At the bottom of the pyramid are those relationships that do not resemble in any aspect the married couple. Examples include siblings, elderly people living together, polygamous and polyamorous families, or friends in a family arrangement.

The state conveys with this hierarchy the existence of different kinds of persons and families in society and ranks them on a scale of goodness. Married families are at the top of the pyramid and all the others are underneath it. The individuals from the arrangements at the bottom of the hierarchy are ostracized, made invisible and deprived of most rights.

In turn, this hierarchy has a direct negative impact on the lives of the people who decide to conduct their family lives in an *unconventional* way. The hierarchy generates inequalities between the different family arrangements, which are translated later into society and the political life, in the same manner as Susan Okin argues that gender inequalities in the private sphere of the family are translated into the public sphere.[69] Consequently, the hierarchy produces alienation and domination; it ultimately subverts political and social equality, which results in an unfair society.

Out of fear of that alienation, a large group of individuals opt for the marital arrangement and do not enter into other family arrangements.[70] As

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67. TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE 43 (2010).

68. *See* Martha C. Nussbaum, *Reply*, 98 CAL. LAW. REV. 731, 741 (2010). This is the reason why courts have begun to find that it is unconstitutional to grant the same rights to civil unions and marriages while denying the title of marriage (of family) to the former. Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Lewis v. Harris, 188 N.J. 41 (2006); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

69. SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 90–134 (1989).

70. *See* Knouse, *supra* note 26, at 417–19; Robson, *supra* note 53.

Carl Schneider argues, one of the major functions of the legal regulation of the family is to channel people into a specific type of relationship.[71] The state dictates how intimate relationships should be lived and arranged by signaling which family arrangements are of social importance. This is accomplished by providing benefits and protections to the married family; which in turn creates alienation. Yet this process of bestowing benefits on a particular arrangement does not only produce an inherent unjust society and infringe on people's liberty by channeling them into a particular type of family; it produces as well an incoherent group of norms. Furthermore, it has led the state to ignore, in many cases, the real principles that should guide legal regulation.

The incoherent legal system that we have today is the byproduct of the state: (a) ignoring the social goods that are supposed to be protected in favor of benefiting the established family arrangement; (b) finding new ways to implicitly define the family; and (c) using the marriage proxy to channel people into this arrangement. Two types of regulation stand out in this respect: child support and domestic violence.

With regard to the first type of regulation, for instance, if a child is seeking support from his parents to pursue a postsecondary education, in some states he would be able to sue them for support if they are divorced, but not if they are married.[72] The offspring from married couples and those from divorced couples are treated differently, even though the law should treat them equally as the interest the statute should be protecting is the welfare of the children. There is no logical explanation to treat differently these two types of offspring who are equally situated in terms of the good to be promoted. However, since the state is trying to incentivize people to stay married or get married, the legislation is obscured by its channeling function.[73] The law is not looking at the children but instead at the

71. *See* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

72. LeClair v. LeClair, 624 A.2d 1350 (N.H. 1993) (superseded by statute); Curtis v. Kline, 542 Pa. 249 (1995); *In re* Marriage of Kohring, 999 S.W.2d 228 (Mo. 1999); Johnson v. Louis, 654 N.W.2d 886, 889–91 (Iowa 2002). *See also* Monica Hof Wallace, *A Federal Referendum: Extending Child Support for Higher Education*, 58 U. KAN. L. REV. 665 (2010); Anna Stępień-Sporek & Margaret Ryznar, *Child Support For Adult Children*, 30 QUINNIPIAC L. REV. 359, 377 (2012); Douglas Walker, *Indiana's child-support law to change in July*, THE STAR-PRESS: MUNICE, May 13, 2012.

73. For instance, we see in *LeClair* how the court incentivizes people to stay married by granting them the *privacy perk* or the non-intervention in marital affairs while at the same time granting a second perk by protecting the marital couple from an adverse economic obligation. The court articulates its rationale in the following fashion: "[d]espite our limited insight into the legislature's intent, we observe that heightened judicial involvement over the financial and personal lives of divorced families with children may be warranted, although similar involvement may not be necessary with intact families." *LeClair*, 624 A.2d at 1357. Rather than assuring the welfare of the *children*, the

established family arrangement. The state benefits the marital family by not meddling in the decisions of the married couple. So instead of protecting the welfare of the children—the real interest to be protected—the law just furthers the established definition of the family. This creates an illogical regulatory scheme. Furthermore, it creates legal and social inequality between citizens equally situated. In that manner, we end up with an incoherent and unfair regulatory scheme that is not based on adequate reasoning.

Similarly, domestic violence laws and their application have been obscured by the channeling function. In the case of domestic violence, victims have been denied protection or recourse solely because they were in an extramarital relationship with their abusers.[74] The few courts that still today act in this way rely on the flawed reasoning that domestic violence laws have been enacted to prevent family disruption and preserve the institution of marriage, and those interests are not advanced by sanctioning and protecting someone having an extra-marital relationship.[75] Yet again, the state sacrifices the real interest at stake and the harm to be avoided—the physical and emotional integrity of the victims—in favor of channeling people into the established definition of the family. The state continues to create an incoherent and unfair regulatory scheme in which equally situated people are not treated equally and instead are ostracized and marginalized.

Thus, familial establishment is detrimental to society for a variety of reasons. First, it prevents a large group of people from arranging their intimate relationships in alternative ways by signaling and channeling people into the marital family. Furthermore, by actively benefiting the established family, the state has created an unfair society by negating rights to people who decided to not follow the marital arrangement and arrange their family life in an alternative way. Similarly, the state has created a caste system based on family arrangements that disrupts society

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court is more concerned with stressing how the marital couple is a better family arrangement, because allegedly the marital couple does not warrant any intervention as the children will not face any inconveniences with their married parents, while the children from divorced or single parents will always face such inconveniences.

74. Pueblo v. Flores Flores, KLCE06 1118, 2006 WL 4062036 (P.R.TA Dec. 5, 2006), *aff'd*, 181 D.P.R. 225 (Court equally divided); *Woman in Extra-marital Affair Denied a Protection Order in New York*, WOMENSLAW BLOG, July 9, 2010, http://www.womenslaw.org/blog.php.

75. *See Flores*, 181 D.P.R. at 229–50 (Kolthoff Caraballo, J. conformity opinion). This is the same reasoning that was often asserted to avoid *interference* in cases of wife beating when chastisement laws were abandoned. Courts permitted the aggressions in order to protect the privacy of the marriage relationship and to promote domestic harmony. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996).

in profound ways.[76] This kind of involvement from the state has generated an incoherent and unfair system of regulation, which sacrifices the real common goods to be promoted and the real harms to be avoided. In turn, familial establishment subverts political and social equality, generating an unfair society.

IV. THE LIBERAL PROMISE: A BROKEN VOW

> "What's in a name? That which we call a rose by any other name would smell as sweet."[77]

Contemporary liberal scholars are well aware of all these problems caused by familial establishment. They have also shown a great understanding of how familial establishment infringes upon the basic tenants of liberalism. Yet, their proposals to tackle the problem of familial establishment do not fully eradicate its pernicious effects. In fact, their proposals generate the same problems discussed in the previous part. Some scholars even have been honest enough to recognize the limitations of the liberal framework.[78] Yet, they have not been able to abandon this paradigm and explore other solutions.

There are various reasons why liberalism is insufficient to encompass the multiple dimensions of the problem of familial establishment. The main reason is that the narrative of rights constrains the scope of the proposals. Second, some of the proposals have obviated the fact that the subject of the proposed reform cannot be marriage or the family by themselves. Since our current legal process of granting rights to family arrangements is premised on using marriage as a proxy,[79] we should not be talking about marriage and family separately. Instead, we should be focusing on the family-marriage dyad.

These two limitations are precisely the problems with Martha Nussbaum's proposal to disengage the state from granting marital status to a particular set of people. She challenges the regulation of marriage because it violates the ideals of liberalism.[80] Nussbaum recognizes how marriage creates an undemocratic society that sieves and grants packages of rights to people based on who has access to the institution of marriage.[81]

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76. Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. LAW. REV. 667, 683 (2010).
77. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.
78. *See* Knouse, *supra* note 26, at 417–19.
79. *Supra* Part III.B.
80. *See* Nussbaum, *supra* note 76, at 685–89.
81. *Id.*

Yet, since she focuses exclusively on the problem of two-person same-sex relationships not having access to the marital label, she proposes as a solution offering civil unions for both same-sex and opposite-sex couples.[82] Nussbaum recognizes how the current regulation of marriage lessens equality in today's society, but does not weave into her theory how that regulation of marriage is linked to the regulation of the family and how it disaggregates other family arrangements. Due to her agenda, she instead assumes that link as a given and does not in any way attempt to challenge it.

Nussbaum argues that marriage has multiple meanings: a civil rights aspect, an expressive aspect, and a religious aspect.[83] She finds the second dimension to be highly problematic in this day and age since the state endorses one marital arrangement over others (meaning opposite-sex over same-sex marriages), and this contradicts the pluralistic ideals of the liberal state.[84] She is also aware that the first dimension is problematic as the state administers benefits that are often given only to heterosexual marriages. Her solution to this inequality problem is for the state to back out of the expressive domain and offer civil unions for same-sex couples as well as to opposite-sex couples.[85] Yet her solution only creates a new caste system; one that includes now bureaucratized, monogamous, sexuated gay married couples with children at the top. Nussbaum's solution is merely a name substitution that includes more people into the definition of marriage and the family without really changing either.

As Professor Pamela S. Karlan correctly points out, "to the extent that reform simply substitutes some other word for 'marriage' while continuing to provide special benefits to specified familial structures or organizations, over time the state will reenter the precise expressive domain from which Professor Nussbaum hopes to remove it."[86] Furthermore, as long as the new established definition does not challenge the idea of the bureaucratized, monogamous, sexuated married couple with children, we would still have the same unequivocal definition of the family.

The problem with Nussbaum's proposal is that its focus is on rights—specifically, on giving the same rights that married couples have to other people in similar arrangements. As long as that is the approach, there will

82. Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CAL. L. REV. 697, 698 (2010).

83. Nussbaum, *supra* note 68, at 669.

84. *Id.* at 672.

85. *Id.* at 695.

86. Karlan, *supra* note 82, at 698.

be some people equally situated to the married couple who will not receive the same benefits, and the problem of inequality will still persist. Moreover, there will always be a vast range of familial arrangements that will never receive any rights just because they are a step below in the marital/non-marital hierarchy. More than neglecting the powerful effects of the expressive nature of defining the family, Nussbaum disregards in her analysis that the problem of inequality has its origin in the use of a proxy marriage to grant rights to family arrangements. That proxy obscures the real common goods the law should be promoting and hence, if the proxy is not eliminated, the inequality problem could never be solved. Addressing the issue from a rights perspective overlooks this essential fact.

This is also Tamara Metz's flaw in her proposal to disestablish marriage. Metz's argument is that the establishment of marriage violates liberalism's most basic values, and thus it must be abandoned if the state intends to have a coherent ideology. She claims that, by promoting an unequivocal version of marriage[87] in a nation where (a) there is a strong disagreement about its definition, and (b) there are diverse forms of families co-existing, the state threatens formal and substantive equality through favoring one arrangement over the others.[88] She believes this jeopardizes liberty because the state becomes enmeshed in the intimate lives of its citizens, and it imperils stability since both liberty and equality are endangered.[89] Metz is also concerned with putting the state in a position of reproducing "deeply contested cultural, social, and religious norms and relations" through marriage.[90]

However, Metz believes in the regulation of familial arrangements. Her objection is merely that the state, under the current regime, is inadequately securing important public welfare goals.[91] Metz argues that even under liberalism the state should be involved in regulating relationships of care.[92] However, since caregiving "no longer takes place within the marital walls,"[93] her contention is that "[t]he State must recognize and regulate intimate caregiving units to insure against the inherent risks of care, but it must do so in ways that neither undermine their norms of reciprocity nor

87. Although she does not explicitly talk about marriage as a proxy for defining the family, her analysis departs from an understanding of the existence of the family-marriage dyad.

88. METZ, *supra* note 67, at 7.

89. *Id*. at 7.

90. *Id*. at 32.

91. *Id*. at 14.

92. *Id*. at 10.

93. *Id*. at 11.

exacerbate existing inequalities."[94] Metz foresees that if this scheme of regulation is achieved, then freedom of expression, intimate association, and cultural pluralism would be protected, and equality between and within intimate associations would be enhanced.[95]

Her proposal is to broaden the kind of family arrangements that can be regulated by the law. Yet, her proposal does not entail a shift in the conception of the family. In fact, the model with which she would replace marriage—which she denominates *Intimate Care Giving Unions* (ICGU)[96]—is founded on the notions of bureaucracy, monogamy, sexuated relations and child rearing that characterize the definition of the family. Her approach is basically the same functional approach courts have taken and that I have criticized in Part III.C.[97] Although Metz does not proffer any concrete definition of the ICGU, bureaucratization must be an integral part of it, since the idea of intimate care giving departs from the understanding that in any family arrangement there would always be a bureaucratization of activities: someone to be cared for and someone who cares for another person. Thus, she does not defy the first pillar of the established definition of the family. Likewise, she does not defy the idea of child rearing. Even though Metz proffers an example of ICGU relationships in which there are not any children involved, in reality the only instances in which she offers specific examples about the inherent risks of care giving that serve as a basis for the state intervention are when she talks about relationships in which children are in fact involved.[98] Similarly, the elements of monogamy and sexuated relationships are left pretty much intact. For instance, the legal recognition that Metz seeks for non-sexuated intimate relations is based on making available the kinship presumptions available to sexuated relationships, not in creating a new system that recognizes these types of relationships for what they are.[99] Monogamy is also left untouched. Metz envisions this regime as one in which the monogamous ethic would be strong enough as to sanction politically polygamous relations.[100]

Thus, her proposal does not seek to defy the elements of the unequivocal definition of the family, but, like Nussbaum's, it looks for a way to impose them into a broader range of family arrangements. Hence,

94. *Id*. at 13.
95. *Id*. at 12.
96. *Id*. at 13.
97. *See supra* Part III.C.
98. *Id*. at 127.
99. *Id*. at 135.
100. *Id*. at 141, 147.

what Metz proposes is not at all untying the knot (as she argues on her book), but changing the name of the knot. Instead of marriage, she proposes to change the name of what would represent the family-marriage dyad to ICGU. As Metz maintains "[i]n many ways, an ICGU status would look like marital status today."[101]

Furthermore, even if Metz's proposal was to accommodate families beyond the bureaucratized, monogamous, sexuated married couples with children, her proposal is inadequate to bring about a coherent legal regulatory scheme. Her proposal does not require society to look into its norms and decide the real reasons for having a particular legal regulation instead of merely using the marriage proxy as substitute for the analysis. Instead, she would just replace the proxy marriage with the ICGU proxy and increase the number of people covered under the established definition of the family. Again, as it was discussed, as long as there is an established definition, the inequality problems would still remain the same. And once again, as it was discussed, what is missing from this liberal approach is the analysis of how marriage is used as a proxy to grant rights and exclude people from power.

On the other hand, those contemporary liberal scholars that do not ignore this fact recognize that a conservative liberalist approach will never help to disestablish the family since all it can offer is mere name changing. For instance, Jessica Knouse insists that these rights and social deprivations that render society less democratic will never disappear by merely replacing civil marriage with another relationship-centered institution such as a civil union regime.[102] Her reasoning reproduces the same contentions I have been articulating thus far. As long as the proposals do not stop privileging any of the elements of the current established definition of the family, familial disestablishment could not be achieved. Knouse focuses on the privileging of the sexual dimension of the definition. She points out that "[w]hen governments privilege sexual partners, they effectively deprive their citizens of liberty by encouraging them to enter sexual partnerships rather than self-determining based on their own preferences; they effectively deprive their citizens of equality by establishing insidious status hierarchies."[103] She further argues that civil marriage, and in turn the current unequivocal definition of the family, privileges not only sexual partners but also religious, patriarchal, and heterosexist ideologies that diametrically oppose the democratic values of

101. *Id*. at 134.
102. Knouse, *supra* note 26, at 369.
103. *Id.* at 362.

the Due Process, Equal Protection, Establishment, and Free Speech Clauses.[104] Her contention is that while the replacement of marriage with a new system like civil unions or ICGU "might succeed in rendering the institution less undemocratic, they will not succeed in rendering it affirmatively democratic"[105] since "[e]ven if American civil marriage could be stripped of its religious, patriarchal, and heterosexist aspects, it would remain an essentially undemocratic institution due to its inherent privileging of sexual partners."[106]

Inasmuch as civil marriage cannot be democratized, she advocates for its abolition.[107] Knouse boldly proposes the removal of the state from the business of affirming sexual partnerships through marriage or any other similar institution.[108] She believes that in order to foster equality, the government must not pass laws that establish hierarchies and must instead enact laws that affirmatively prohibit discrimination based on the traits associated with those hierarchies.[109] Notwithstanding her radical approach, she foresees a post-marriage landscape in which the state does precisely so. Although her proposal is not so clear, she asserts that she envisions the state allocating benefits to individual providers rather than to sexual partners and allowing sexual partners to enter private contracts that would be enforceable to the same extent that pre-marital agreements are currently enforceable.[110]

Although Knouse intends to get rid of the marriage proxy by only giving sexual partners access to enforceable pre-marital agreements, her proposal seems to require the creation of a new proxy: the provider proxy. Even if that proxy would not be necessary, her proposal still departs from an understanding that the law should have a definition of the family. In her case that definition is that of a provider. However, family arrangements are diverse, and there is a universe of arrangements in which being a provider does not play a part. Her unequivocal definition merely brings us back to the problem of familial establishment and the state privileging one particular arrangement over others; creating the same inequality problems as today. Thus, not even Knouse's radical liberal approach to the problem brings us closer to a possible solution to the problems of familial establishment.

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104. *Id.*
105. *Id.* at 418.
106. *Id.* at 362.
107. *Id.*
108. *Id.*
109. *Id.* at 368.
110. *Id.* at 419.

V. A NEW PROMISE: HEGEMONY & REIFICATION AS A NEW FRAMEWORK

MICHELE: È solo un po' di nostalgia.

SERRA: E di che?

MICHELE: Forse di una banale e stupida vita normale.

SERRA: Ma quella c'e l'hai già.[111]

The problem with all these liberal proposals is that, because of their focus on rights, they are forced to define the family in a particular manner that creates a loop back to familial establishment and its problems. Moreover, they take for granted that the family must be legally regulated or defined in order for people in particular family arrangements to have legal protection. In doing so they ignore the pernicious effects that establishing a definition of the family creates.

However, it is not necessary to have a definition of the family in order for people to be protected in their family relationships. The law can grant protections and rights based on the real interests that society wishes to protect, instead of doing so based on a proxy that allegedly embodies such interests. This would avoid familial establishment and preclude all the inequality problems.

However, in order to find a way to successfully do this, we must shift our focus from the narrative of rights to the power struggles and inequalities associated with familial establishment. If we do so, we would be able to isolate the problems that keep channeling us back into familial establishment, and we would be able to break free from it and find a solution that will stir us in the direction to a more egalitarian society. That requires the abandonment of the liberalist paradigm and a move to a paradigm more akin to power allocations. *Hegemony* is such a paradigm.

A. Current Understanding of Hegemony

The concept of *hegemony* was coined and primordially elaborated by Antonio Gramsci. He formulated the idea of *hegemony* as an attempt to understand why the proletariat did not rebel against capitalism but instead

111. LE FATE IGNORANTI, *supra* note 9. The following is the translation of the quote:
Michele: I'm just a bit nostalgic.
Serra: For what?
Michele: Maybe for a stupid and trivial normal life.
Serra: But that you already have.

was often its strongest supporter.[112] It seems only fitting that we use it to understand why we have not rebelled against the idea of familial establishment and are often its greatest promoter.

Gramsci developed the idea of hegemony by expanding the meaning and application of the Marxist ideas of ideology and false consciousness. Specifically, Gramsci contended that the base and the superstructure, which Marx envisioned as two separate entities, were in actuality the two components of a larger structure of subordination: the historical bloc.[113] The historical bloc, according to Gramsci, forms a giant system that is internalized as "common sense" from which domination ensues.[114]

In addition, Gramsci surpassed the Marxist determinism of historical materialism (economic analysis) by conceptualizing supremacy as a multi-leveled phenomenon. For Gramsci, domination is never merely an epiphenomenon of the economic structure;[115] he had a more nuanced understanding of the reasons that belies domination. His explanation encompassed instead all productive structures of hegemonic discourses—that is, all the narratives that the dominant group uses to ensure domination, such as cultural and political institutions.

By incorporating into his analysis the role of civil society, Gramsci expanded on Marx's notions as to why and how supremacy is achieved. In fact, "[t]he most striking aspect of Gramsci's formulation is his abolition of a strict distinction between state and civil society."[116] According to Gramsci, domination is not only attained by making use of the governmental apparatus, but also by promoting ideas and values through non-governmental institutions. Gramsci included in his analysis "the entire complex of institutions and practices through which power relations are mediated in a social formation to ensure the 'political and cultural hegemony of a social group over the entire society.'"[117]

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112. Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 522 (2000) [hereinafter Litowitz, *Gramsci*].

113. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 137 (Quintin Hoare. & Geoffrey Nowell eds., 1971).

114. *Id.*

115. James P. Hawley, *Antonio Gramsci's Marxism: Class, State and Work*, 27 SOC. PROBS. 584, 588 (1979–80). "Rather, it is posited as work, resulting from [the] permanent and pervasive efforts of the dominant classes, secured through their control of the state, to create solidarity among the powerful and supra-party consensus." Ratma Kapur & Tayyab Mahmud, *Hegemony, Coercion, and their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco's Spain*, 33 U. MICH. J.L. REFORM 411, 416 (1999–2000).

116. Kapur & Mahmud, *supra* note 115, at 415.

117. *Id.* at 414–15 (citations omitted).

For Gramsci, domination is accomplished and maintained in two axes.[118] These axes are not isolated from each other. To the contrary, under Gramsci's formulation of hegemony, interaction between them is indispensable. Furthermore, in order for supremacy to ensue, not only both axes must interact with each other, but domination must take place also at both axes simultaneously.[119]

Gramsci referred to the first axis in multiple ways: physical force, authority and violence.[120] In contrast, he referred to the second axis as: consent, hegemony and civilization.[121] The physical force axis is associated with the army, the police, the militia, the judiciary and the penal system, whereas the consent axis is associated with social institutions related to education, religion, political parties, the media and cultural systems.[122]

The first axis works under a very simple premise: the subordinate groups' conduct must be maintained by exercising physical power over them through the governmental structures of the military and the law. Yet, that premise does not mean that the coercion axis exists merely as a conditioning mechanism with no effects on the psyche of the individuals or that it only impacts the "public sphere." The activities within the coercion axis move between the *private* and *public* realm. Likewise, such actions encompass dimensions of pragmatism as well as of symbolism.[123]

On the other hand, the dimensions of the second axis are more complex. "It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group's perspective as universal and natural, to the point where the dominant beliefs and practices become intractable component of common sense."[124] The consent axis is based on the creation of a hegemonic discourse that would pave the way to the dominated group's embrace of the coercive actions of the ruling group orchestrated through the state. That hegemonic discourse is articulated by

118. Litowitz, *Gramsci*, *supra* note 112, at 519.

119. *Id*.

120. *See* GRAMSCI, *supra* note 113, at 170.

121. *See id*.

122. Kapur & Mahmud, *supra* note 115, at 412; Litowitz, *Gramsci*, *supra* note 112, at 519.

123. As mentioned, both levels of domination complement each other. In fact, "every instance of hegemony in the private sphere is backed by physical force on some level, and every act of physical force is also a symbolic performance and a hegemonic statement about the legitimacy of the state." Litowitz, *Gramsci*, *supra* note 112, at 527. The interplay of coercion and ideology as well as of force and persuasion is one of the vital insights of Gramsci's work. Kapur & Mahmud, *supra* note 115, at 419.

124. Litowitz, *Gramsci*, *supra* note 112, at 519.

taking control of what Marx and Hegel denominated "civil society."[125] Through science, religion, the media and the law, the dominant groups subtly promote an unequivocal vision of how people should live their lives. The unequivocal definition of the family is a perfect example of how this axis works. With the help of, for instance, bathroom signs, theologian formulations, and familial establishment, a specific version of the family is planted in our minds as the only one possible and the one to achieve.

In other words, the basic premise of the hegemony axis is the creation and establishment of a ruling worldview to which everyone in society unconsciously subscribes and that no one even considers to defy or could actually challenge; for it requires a counter-hegemonic act that would unveil the institutionalization of practices of domination which, while illegitimate, are widespread even if hidden. "This explains why hegemony appears as a vague sensation of loss and resignation instead of a feeling of moral outrage: the structures that give rise to hegemony are not immediately visible and thus cannot be directly confronted until they are made manifest. . . ."[126] That is the reason why the proletariat was not able to rebel against capitalism. It explains as well why it has been so difficult to advocate for familial disestablishment, because even though familial establishment violates the basic philosophical assumptions of our political system, it has remained for the most part hidden. The unequivocal definition of the family has only found a quiet voice of discontent, evading for the most part any political debate as people have taken for granted that this is the way it should be. It is precisely in this sense of resignation where the effectiveness of the system lies.[127]

Indeed, for Gramsci the power of hegemony lies in the successful attainment of a dominant worldview by means of hidden mechanisms. "[T]he real system's strength does not lie in the violence of the ruling class or the coercive power of its state apparatus, but in the acceptance by the ruled of a conception of the world which belongs to the rulers,"[128] since it preserves the *status quo*. The establishment of that ruling worldview requires, according to Gramsci, the mechanisms of universalization, naturalization, and rationalization.[129] This three-step mechanism attempts

125. This corresponds to what Althusser denominated "the ideological state apparatuses." *Id*. at 531.

126. *Id.* at 514–15.

127. The account from my class discussion in *supra* Part II, vividly illustrates this sense of resignation hegemony produces and how difficult is to disestablish those narratives or hegemonic discourses that assured the ruling class' domination.

128. GIUSSEPPE FIORI, ANTONIO GRAMSCI: LIFE OR A REVOLUTION? 238 (1970).

129. Litowitz, *Gramsci*, *supra* note 112, at 515.

to explain the process by which the dominant group, through the law and other social institutions such as the media, the schools, and the church, forges an ideology that is embraced by the subordinate groups as the only one possible.

The three-step mechanism functions as follows. First, "[b]y universalism, the dominant group manages to portray its parochial interests and obsessions as the common interests of all people."[130] By universalizing the needs and goals of society, the dominant group tries to bring the possible dissenting voices of the subordinate class into its agenda. Second, "[i]n the strategy of naturalism, a given way of life becomes 'reified' to the point where 'culture' is confused with 'nature' at every turn, which induces quietism because there is no point in fighting against nature."[131] In this second step, the dominant group prevents the subordinate groups from defying their power by naturalizing certain conduct, since power allocation is internalized as the way things are and should be. "As for the strategy of rationalization, Gramsci points out that every ruling group gives rise to a class of intellectuals who perpetuate the existing way of life at the level of theory."[132] Through this last step, the ruling class legitimizes its conduct. By utilizing science, law, and the media, the dominant group elaborates "sound" theories that justify the actions taken by the state and by civil society.

Yet, it is pivotal for these processes to be successful that they be executed in subtle, invisible, hidden ways, so that the subordinated groups could not contest the hegemonic discourse and instead would consent to the exercise of physical force upon them. Hence, if the law is to be used to further control in either the physical or the hegemony axis, it is crucial that the law appears to be not only legitimate but also just, sound and predicated on rational foundations. This explains the use of the marriage proxy as a way of rationalizing the denial of rights and the imposition of a particular worldview with regard to the family, as well as the doctrine of the functional approach.

Hegemony is then, "something that is largely unconscious as opposed to ideological belief structures that can be consciously articulated and

130. *Id*. at 525.

131. *Id*. at 526.

132. *Id.* As E.P. Thompson has mentioned: "If the law is evidently partial and unjust, then it masks nothing, legitimizes nothing, contributes nothing to any class's hegemony. The essential precondition for the effectiveness of law in its function as ideology is that it shall display an independence from gross manipulation and shall seem to be just." EDWARD PALMER THOMPSON, FROM WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 436 (1973).

contested."[133] It is so deeply entrenched that hegemony is rarely brought out in the open and challenged, to the extent that it is voluntarily accepted and consented to by the subordinated class.[134] Since the mechanism by which this acquiescence to being dominated takes place is hidden from the consciousness of the masses, hegemony refers to a "power that maintains certain structures of domination but that is ordinarily invisible."[135] The mechanisms of domination remain invisible, since their foundations are naturalized under a hegemonic discourse perpetuated by various social institutions.[136]

Linking Gramsci's formulation of hegemony to the productive dimension of social institutions has brought light into how domination ensues and power is exercised. Yet, his adherence to the Marxist ideas of class and a single hegemonic discourse, ruling group, and subordinate class could not account for the intricate power dynamics that are in play in familial establishment.

Fortunately, this limited view of power relationships has been surpassed by subsequent thinkers. First, instead of referring to *class/exploitation*, subsequent thinkers formulate domination in terms of *discourse/marginalization*.[137] In addition, the idea that there is only one

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133. FIORI, *supra* note 128, at 238.

134. That is the reason why—as we will see in *infra* Part V.A—people whose family arrangement does not fit under the rubric of family-normativity accept the hegemonic discourse and try to find a way to fit into it rather than challenge it.

135. Mindie Lazarus-Black & Susan F. Hirsch, *Introduction*, *in* CONTESTED STATES 6 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).

136. As Susan F. Hirsch and Mindle Lazarus-Black put it:

> Hegemony refers to power that "naturalizes" a social order, an institution, or even an everyday practice so that "how things are" seems inevitable and not the consequence of particular historical actors, classes and events. It tends to sustain the interest of a society's dominant groups, while generally obscuring these interests in the eyes of subordinates. Hegemony functions in talk, silences, activities, and inaction. In other words, it is "that order of signs and practices, relations and distinctions, images and epistemologies—drawn from a historically situated culture field—that come to be taken-for-granted as the natural and received shape of the world and everything that inhabits it. . . . In a quite literal sense, hegemony is habit forming." Hegemony operates in institutions that educate and socialize such as schools, the press and churches. Furthermore, . . . the educative function of law operates within and around legal arenas to perpetuate hegemony but also to test it limits.

Id. at 6–8 (citations omitted).

137. Laclau and Mouffe are the two that best embody this view.

> For . . . [them] there is no single hegemonic center (such as class) from which all forms of oppression can be derived. . . . Further, there is no necessary connection between the marginalization experienced by various subaltern groups, so oppression can occur independently on several fronts along lines of gender, race, age, physical ability, and so on. Finally, oppression does not flow downhill from a single dominant group, but is constructed in a struggle of articulation between divergent forces, as each group forms its identity.

Litowitz, *Gramsci*, *supra* note 112, at 536.

overarching hegemonic discourse or center of oppression has been replaced with the vision that there are various hegemonic discourses as well as various ruling and subordinate groups co-existing.[138] The discussion of hegemony has become the question of multiple hegemonies and multiple oppressors and dominated groups.

This approach has been criticized for not echoing the overarching effect of hegemony in Gramsci's work. Litowitz, for instance, has argued in favor of returning to the monist approach (one overarching hegemonic discourse formulation).[139] However, instead of using the class label he argues for its substitution for that of a code—legal institutions and informal norms of conduct.[140] According to Litowitz, in the current state of society subordination does not come from the submission "to the will of a dominant *class* but rather to perpetuate a *code* [(legal institutions and informal norms of conduct)] that enables a dominant set of institutions and principles."[141] Notwithstanding the importance of this discussion,[142] the truth is that there is consensus that subordination arises from the conflation of various hegemonic discourses promoted through multiple social institutions by numerous dominant groups.

As it will be discussed in the next part, the formulation of hegemony as the conflation of various hegemonic discourses helps explain why the hegemonic discourse behind familial establishment has been so hard to isolate. Likewise, the insight attained by these later thinkers on the relationship between hegemony and the law is crucial for understanding the hegemonic forces behind family establishment and its effects.

B. The Contours of Family-normativity[143]

In order to achieve familial disestablishment and avoid going back to the loop of defining the family, we must first identify the hegemonic

138. *Id*.
139. *Id*. at 540.
140. *Id*.
141. *Id*. at 541.
142. Even if we accept Litowitz's point, from a more practical perspective we cannot adhere to it. There is no way to study today hegemony effectively if we do not isolate some instances of domination from others. Thus, this article will adhere to the theory that there are various hegemonic discourses co-existing but concentrate on one of them: family-normativity. In addition, instead of talking about class/exploitation this article will refer to the domination in terms of discourse/marginalization.
143. This part intends only to describe the hegemonic discourse of family-normativity and its current effects of society. An explanation of how this hegemonic discourse was created, which were the historical conditions that favored it and which were the dominant groups in charge of originating it is beyond the scope of the present work.

discourse(s) that are securing an unequivocal definition of the family. Since hegemony is mostly a hidden process, the only way to do so is by examining specific occurrences where individuals or social institutions have actively participated in preserving, promoting or reproducing the hegemonic discourse(s) behind familial establishment. By studying those instances, we would be able to uncover that there is at least one unidentified hegemonic discourse behind familial disestablishment: family-normativity.

This hegemonic discourse that is embodied by the family-marriage dyad and promoted by the marriage proxy has not been, up to this project, formally studied. In fact, it has not been named. However, scholars, judges and activists have been hinting to it without naming or even recognizing its existence.

For instance, courts dealing with same-sex marriages have recognized that there is a special value in the label of marriage.[144] As it was discussed, scholars, such as Martha Nussbaum, have been referring to that added value of the family-marriage dyad as the epicenter of familial establishment.[145] However, they have not been able to identify exactly what grants married people the *special kind of dignity* that is not transferable to gay couples by granting civil unions with all marital rights.[146] Similarly, thinkers and activists of alternative family arrangements could not understand why most people in society do not seem to be willing to defy such conferment even when it directly affects them.[147] Family-normativity is the key for understanding that puzzle.

Family-normativity is that added value, that special dignity that marriage confers to individuals. That superiority or higher position in the hierarchy comes as people gain social power by participating in or embodying the discourse of family-normativity that propels the established definition of the family. The new status stems from becoming part of the ruling group that promotes the reigning hegemonic discourse. As people embrace unconsciously the hegemonic discourse of family-normativity, they then hesitate in challenging the institutions that embody it. Instead, they try to fit their behavior under the rubric of hegemonic discourse or accept the inevitability of being ostracized. This is at the heart of the liberal approach's failure in counteracting familial establishment.

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144. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).
145. Nussbaum, *supra* note 68.
146. *Id*.
147. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 281 (2004).

Family-normativity has the four distinguishing characteristics that define the established family today: (a) the bureaucratization of family relations; (b) the promotion of two-person sexuated relationships; (c) a monogamous ethic; and (d) the establishment of child rearing as essential to human families. The bureaucratization of family relations refers to the idea that everyone in the family arrangement has a role to fulfill with specialized functions within a pre-determined hierarchy. On the other hand, sexuated family relations refer to the fact that the two persons at the top of the family hierarchy (the parents) should have a sexual relationship or be in position to have one. That sexual relationship should be a "committed" one, in the sense that it ought to be monogamous. Finally, the focus of the family arrangement should be raising children, independently of whether they are the natural product of the couple. Thus, under family-normativity, a community of siblings, a polygamous marriage, a polyamorous family, or a community of persons that came together as a family for non-sexual reasons (such as group of college students or a group of elderly persons) would not constitute a valid, true, or real family arrangement.[148]

Although family-normativity and its characteristics as a whole have eluded scholars, some of its traits have been previously isolated. For instance, Katharine Bartlett in an article published in 1984 identified some of these characteristics while trying to describe the main characteristics of Family Law in the United States.[149] As Kavanagh points out, Barlett clustered these characteristics under the concept of *doctrine of exclusivity*.[150] Under that doctrine, family law in the United States appoints two defining features to the family: (1) children have only two parents, and (2) parents have exclusive control over and access to children, without the possibility of some access, or limited control or input by other parties.[151]

148. This is not an exhaustive list of family arrangements, but an example of some of the relationships that are excluded today from the label of family because of the hegemonic discourse of family-normativity. Moreover, most of the arrangements above mentioned have been granted some rights or some type of recognition either by legislatures or courts. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Turner v. Lewis, 749 N.E.2d 122 (Mass. 2001); Sanderson v. Tryon, 739 P.2d 623 (Utah 1987). However, none of these arrangements has received the same recognition or has been granted the same rights as the marital family.

149. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 897 (1984).

150. Kavanagh, *supra* note 51 at 88–89.

151. *Id. See also* Bartlett, *supra* note 149, at 890–99, 917–18, 936.

Bartlett's theory shows how the law has incorporated the elements of bureaucratization, sexuated family relations, monogamy and child rearing of family-normativity. First, family is thought of in terms of children. Indeed, family for the courts in the United Sates—no matter which kind of family—exists to have and educate children. For instance, in *In re Marriage Cases* the court stated "the role of the family in educating and socializing children serves society's interest by perpetuating the social and political culture and providing continuing support for society over generations."[152] Likewise, the Supreme Court of the United States in *Moore v. City of East Cleveland* stated that its jurisprudence "establish[es] that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[153] Hence, the mission and reason of being of the family is child rearing.

In order to fulfill the mission of child rearing, the members of the family should each have a role; otherwise, the task could not be accomplished. That implies the bureaucratization of the family with both offspring producing roles as well as teaching and learning roles. Although the contours of the hierarchy have been transformed throughout the years, the hierarchy has been an indispensable element of the definition of the family since its inception. Like Engels argued, the meaning of the family has in its origins the germ of subordination and hierarchy.[154] And even though the bureaucratization has changed from one associated with ownership to one connected with patriarchy to finally one linked to the power of the married couple over the children or a mix of the last two,[155] the idea of specialized roles and hierarchy is at the heart of family-normativity.

Since children are a given in the family arrangement, there should exist a couple capable of producing them. This is distant from the early formulations of the family discussed, under which it was possible to constitute families not based on sexual relationships or in blood or legal kinship. However, as Drucilla Cornell points out, today marriage enforces and conveys standards of a "sexuated being."[156] Cornell's comment is of

152. 183 P.3d 384, 423 (Cal. 2008).
153. 431 U.S. 494, 503–04 (1977).
154. *See generally* FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE (1884).
155. *See* Okin, *supra* note 69.
156. CORNELL, *supra* note 4, at 7.

importance because it shows how the idea of sexuated family relations is embedded in the discourse of family-normativity. Jessica Knouse was so aware of this fact that she noted how the liberal approach to substitute marriage with another family arrangement could never eradicate the requirement of a sexuated couple.[157] Yet, she ignored that the reason lies in the hegemonic discourse of family-normativity. Family-normativity is thought of through the lens of sexuality, and thus only sexuated beings are believed to be capable of engaging in the creation of family arrangements.

As the discussion above indicates, the elements of bureaucratization, sexuated family and child rearing are imbricated in the discourse of family-normativity. Monogamy is not the exception. Monogamy has been incorporated into the scheme of family-normativity since the early Catholic formulations of this model by claiming that it is needed for the welfare of the children and for a successful child rearing.[158] Courts still today follow the same formulation.[159] This element is so essential that the legal system reinforces and promotes it even at the expense of political pillars such as freedom of religion.[160] For instance, as Murray and Ristroph correctly conclude, the Supreme Court of the United States in *Reynolds v. U.S.* was so worried that children raised in polygamous relationships would be ignorant of the social relations, obligations and duties that the monogamous arrangement teaches them that they upheld a conviction of bigamy even on the face of a challenge premised on the freedom of religion.[161]

Moreover, monogamy is such a strong element of family-normativity that it has not been transformed yet as has happened with the other three. Polyamorous people, for instance, have not been able to modify the strict meaning of monogamy to include themselves under the rubric of monogamy and thus under the established definition of the family—as gay people have been able to do by including themselves under the rubric of parents, or even as women have done by shifting the allocation of power in the hierarchy. Indeed, monogamy is so vital for family-normativity that up to this date, in spite of a recognized fundamental right of sexual privacy, the federal government and some states criminalize adultery.[162]

157. Knouse, *supra* note 26, at 362.
158. *See* Witte, *supra* note 22.
159. *See* Reynolds v. U.S., 98 U.S. 145 (1878); Sanderson v. Tryon, 739 P.2d 623 (Utah 1987).
160. 98 U.S. 145 (1878).
161. Ristroph & Murray, *supra* note 5, at 1262.
162. *See* Ala. Code § 13A-13-2 (2004); Ariz. Rev. Stat. § 13-1408 (2005); Colo. Rev. Stat. § 18-6-501 (2003); Fla. Stat. ch. 798.01 (2003); Ga. Code Ann. § 16-6-19 (2004); Idaho Code § 18-6601 (Michie 2004); 720 Ill. Comp. Stat. 5/11-35 (2011); Kan. Stat. Ann. § 21-3507 (2003); Mass. Gen.

And in the case of those states that do not criminalize it, adultery has serious legal consequences.[163]

All of these components of family-normativity help to create a specific narrative of what the family-marriage dyad must look like. That narrative is an essential part of the law. As Matthew Kavanagh notes,

> [f]amily law both reflects and helps create an ideology of the family—a structure of images and understandings of family life. This ideology serves to deny and disguise the way that families illegitimately dominate people and fail to serve human wants. Embedded within the ideology of the family are notions of (1) the kinds of roles that individual members should serve within the family and what they should get out of these roles, (2) the kinds of bonds that hold families together, (3) the actual and the proper role of families in society, and (4) what the state or law can and should do to encourage desirable family life.[164]

The personal experience of Kavanagh illustrates how family-normativity is embodied in the law.[165] Kavanagh states that had his family come in contact with that system, their story would have been drastically re-written.[166] "From a cast of several children, multiple parents, and innumerable other caregiving adults, the state would have stepped in to rewrite my family's [Kavanagh's] story to meet its formal model. We would have been a family with two children and two divorced parents."[167]

This type of rewriting has been implemented by imposing family-normativity through the physical force axis by different means such as: (a) criminalizing adultery and polygamy; (b) the enforcement of heart balm suits; (c) imposing penalties or not giving benefits to families which do not fit the hegemonic model of the family like divorced couples; and (d) not affording legal protections in cases such as domestic violence to

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Laws ch. 272, § 14 (2004); Mich. Comp. Laws § 750.29 (2004); Minn. Stat. § 609.36 (2003); Miss. Code. Ann. § 97-29-1 (2004); N.H. Rev. Stat. Ann. § 645: 3 (2003); N.Y. Penal Law § 255.17 (Consol. 2004); N.C. Gen. Stat. § 14-184 (2004); N.D. Cent. Code § 12.1-20-09 (2003); Okla. Stat. tit. 21, § 871 (2004); R.I. Gen. Laws § 11-6-2 (2004); S.C. Code Ann. § 16-15-60 (2003); Utah Code Ann. § 76-7-103 (2004); Va. Code Ann. § 18.2-365 (2004); W. Va. Code § 61-8-3 (2003); Wis. Stat. § 944.16 (2003); 10 U.S.C.A. § 934 (2006).

163. *See* Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1 (2012); Ira Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010).

164. Kavanagh, *supra* note 51, at 85.

165. *Id.*

166. *Id.*

167. *Id.*

family arrangements that fall outside the family-marriage dyad. In the same way, family-normativity rewrites the lives of the individuals through the hegemony axis by the legal and religious regulation of marriage, the depiction of the "traditional family" in the media and in works of art, the institutionalization of the traditional family in the curriculum of the school system, and by bestowing with privileges those who follow and conform to the hegemonic model.[168]

A better example to understand how family-normativity operates in the law by not only dictating its content but also the actions of individuals is the battle for same-sex marriage. Part of the gay community has been looking to access the power that the family-marriage dyad bestows, and correctly identified the special value of marriage as the place to start. However, a quick glance into family-normativity would reveal that they did not quite fit under the components of the hegemonic discourse. Notwithstanding this, they have been trying to fit the group under the four components of family-normativity, so that they are no longer part of the subordinated class but of the ruling one.

First, until recent advances in technology, only heterosexual persons could meet the sexuated couple requirement because "sexuated" meant being capable of reproduction. However, with technological advances, today it is possible for sexuated couples not to be heterosexual. Yet, they must be sexuated to some extent because otherwise their role in the bureaucratized structure would not hold. Gay groups took advantage of these advancements to start shifting their position in the power hierarchy.

The strategy was to demonstrate first that gay people were fit for parenting.[169] In that way, they would have eased their road into the family-marriage dyad, and in turn gain access to the societal and legal power associated with family-normativity. The second step was to show that they have monogamous relationships, and by so doing to demonstrate that they fit the model of family-normativity. Bureaucratization for gay couples was not a transcendental issue, since as Fran Olsen has shown, the hierarchy of bureaucratization of the family has experienced multiple changes that in

168. For instance, in 1997 there were at least 1,049 federal statutes that made reference to marriage in one way or the other. The great majority of that legislation conferred benefits to married couples. U.S. Gen. Accounting Office, Defense of Marriage Act 3, 6 (1997).

169. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010); William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, THE FUTURE OF CHILDREN Vol. 15, No. 2, 2005, at 97–115; Richard E. Redding, *It's Really about Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127 (2008); Alice Park, *Study: Children of Lesbians May Do Better Than Their Peers*, TIME MAGAZINE, June 7, 2010, http://www.time.com/time/health/article/0,8599,1994480,00.html.

the end only require (a) having parents exercise their "duties" as guardians and (b) children to be the subject of the custodian efforts.[170]

Thus, once gay couples started to be seen as *normal* (monogamous parents) and not any longer as queer (promiscuous individuals) the group was capable of fitting into the family-normativity discourse and in a position to start contesting other discourses such as hetero-normativity that have been preventing gays to gain access to other centers of power. Yet, the LGBT community has neither contested the hegemonic discourse of family-normativity nor ever intended to do so. In fact, they were looking for its protection in order to defy other discourses under which they would not ever be able to fit. That is how the narrative of embracing diversity and queerness was transformed to the narrative of *we are just like you*. This is also why, as it was discussed, Nussbaum's proposal does not at all challenge family-normativity.[171]

The experience with gay marriage reveals another interesting feature of family-normativity. For most of our history, family-normativity has been conflated or hidden behind other hegemonic discourses such as patriarchy and hetero-normativity. That is the reason why its contours have been mostly ignored. Its existence helps us comprehend why the members of certain familial arrangements such as same-sex couples have looked into the law for the recognition of their familial arrangement as family. While at the same time, they have not challenged the basic premises of that concept of *family*, but instead have conformed or modified the narrative of their discourses to conform to it. It also helps us understand that the real hegemonic force the gay communities have been trying to defy have been hetero-normativity and nothing else. Thus, family-normativity could lead us to a better understanding of other events of hegemonic contestation. It could also help us in understanding why family disestablishment has not been achieved and we still have an unequivocal formulation of the family even though family law has been transformed drastically in the past fifty years.

Familial establishment exists today in part as a result of family-normativity not being challenged. Therefore, before we propose a way to challenge this hegemonic discourse so that all the prejudicial effects of familial establishment could be amended, we need to understand why this hegemonic discourse has remained uncontested. In order to do so, we must

170. Olsen, *supra* note 11, at 8–9.
171. *See supra* Part IV.

understand how hegemonic discourses are contested and replaced. This presents a true challenge.

C. Understanding the Interregnum

The interregnum of hegemonies—the period in which the hegemonic discourse has started to lose its supremacy and the counter-hegemonic discourse has started to become a real antagonistic force—has not been up to this day an object of study or theoretical formulation. Although the present work does not intend to fill this theoretical void, it is imperative for the analysis on familial disestablishment to proffer a theoretical approximation of the phenomena that ensues during this period.

First, hegemonic discourses must be envisioned as time-specific occurrences. For Gramsci, hegemony meant a sociopolitical situation; "a 'moment' in which the philosophy and practice of a society fuse or are in equilibrium; an order in which a certain way of life and thought is dominant, in which one concept of reality is diffused through society in all its institutional and private manifestations. . . ."[172] Yet, that moment is not everlasting.

Gramsci acknowledged the capacity for hegemonic discourses to shift. He contemplated the capacity of people to defy such discourses and produce counter-hegemonic discourses, which under certain circumstances would become the new ruling paradigm.[173] Gramsci denominated that period during which the subordinate groups create a sufficient revolutionary culture that is capable of producing a counter-hegemonic discourse powerful enough to displace the prevailing hegemonic discourse as the interregnum of hegemonies.

Yet, he did not posit any account of what happens during such interregnum. Gramsci's only contention regarding this issue was that during the interregnum, a crisis of authority ensues, which leads the way to a concentration of power and to unexpected behavior. He did not expand on these ideas. He did not explain how counter-hegemonic discourses are born. Gramsci did not expand either on what events lead to the interregnum of hegemonies or how that period ends with a new hegemonic discourse in power. Fortunately, other scholars have worked on this topic.

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172. Gwyn Williams, *The Concept of "Egemonia" in the Thought of Antonio Gramsci: Some Notes on Interpretation*, 21 J. HIST. IDEAS 586, 587 (1960) (emphasis added).

173. Martin Carnoy, *Education, State, and Culture in American Society*, *in* CRITICAL PEDAGOGY, THE STATE, AND CULTURAL STRUGGLE 3, 16 (Henry A. Giroux & Peter McLaren eds., 1989).

For instance, Martin Carnoy has untangled some of the paradoxes that pave the way toward the hegemonic shift. The first paradox he notes is that we think of the subordinate groups as being alienated and in full conflict with the prevailing hegemonic discourses; in reality, it is precisely being immersed in, and to some point being in harmony with, the dominant group's culture what enables subordinate groups to displace the established system of beliefs.[174] The effectiveness of this strategy results from the fact that the "dominant group is more willing and able to accept influence and change from those subordinate groups that have 'accepted' dominant-group ideology."[175] Otherwise, the dominant group would activate all the means at their disposal to reinforce both the hegemony and the physical axes of their hegemonic discourses.[176]

In addition, the strategy to code the counter-hegemonic discourse in the prevailing hegemonic ideology serves to recruit forces from other subordinate groups who are not necessarily in line with the emerging counter-hegemony ideology. As Carnoy mantains, "[i]n order to appeal to the mass of a subordinate group, counter-hegemonic movements must usually couch their message in some version of hegemonic ideology, and must use the means of hegemonic ideology."[177] In that way, they would gain as supporters those subordinate groups that are affected by the prevailing hegemonic discourse, but who have accepted blindly the hegemonic ideology and are not capable of defying the prevailing system of beliefs.

Thus, this period is characterized, just as the hegemonic period, by a continuum of resistance and power. In other words, it is a period in which

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174. *Id.* at 15. Carnoy goes even further as to suggest that the subordinate groups who never accept the dominant worldview are not capable of achieving a shift in hegemonic discourses. As he stresses, "[i]t is the members of subordinate groups that accept the ideological form of culture who end up forcing an alienated form of their influence on the business class." *Id.* However, even though it is true that the "culture that is developed by counterhegemonic social movements is necessarily influenced by hegemonic ideology", *id.* at 13, that does not mean that in order to produce a counter-hegemonic discourse capable of displacing the prevailing one the new discourse must be couched in some version of the hegemonic ideology. Counter-hegemonic groups who do not buy into the hegemonic ideology can also be successful in bringing their counter-hegemonic discourse into power as long as their counter-hegemonic discourse is capable of producing a massive engagement in dialectical thinking, and that dialectical thinking is later translated into political force.

175. *Id.* at 15.

176. As Carnoy rightly points out, "[w]hen challenged, dominant groups will attempt to avoid giving in, or at least will try to absorb the challenge in a way that sharply reduces the potential effect of compromise on the dominant group's capacity to make history." *Id.* at 19. Thus, it is much better if the revolutionary message is coded in terms of the prevailing hegemony, since as Hirsch argues the most successful dominant group is the one whose ideology disappears the most in the domain of the hegemonic. Lazarus-Black & Hirsch, *supra* note 135, at 8.

177. Carnoy, *supra* note 173, at 13.

there is an ongoing interplay between coercion and ideology. Therefore, it is crucial in order for the hegemonic discourse to change that both dominant and subordinate groups engage themselves politically in "the arena of the contested state."[178] If for whatever reason or by whatever means hegemonic discourses are removed from political discussion, then the contestation of hegemony would not happen. In turn, the interregnum of hegemonies would not come into fruition and the shift in hegemonic ideology would not occur.

Another conclusion that can be drawn from the scarce literature on the interregnum of hegemonies or the contestation of hegemonic discourses is that the process is a cyclical one. As Gramsci stresses, hegemony requires that the philosophy and practice of a society be fused or in equilibrium. Since a society is not a static body, but a constant array of ever-changing practices and beliefs, in order for the both of them to be in equilibrium hegemonic discourses need to be contested, transformed or replaced. Otherwise, the hegemonic discourse would not be in tune with the societal practices and beliefs, and confusion would reign over the hegemonic axes.

While we have some insights into how counter-hegemonic discourses are produced, we still have not devised what the events are that take place once the counter-hegemonic discourse is brought into the political light and leads to the displacement of the prevailing hegemonic discourse and the establishment of a new one. Neither Gramsci nor subsequent thinkers posited any descriptions of this phenomenon. However, if we intend to elucidate how familial establishment has secured the privileged position it has in our society and legal system, we must proffer a tentative description of the processes of contestation of hegemonic discourses and shifts in hegemonic discourses.

Since hegemonic discourses are time-specific occurrences, and the interregnum exists within a continuum of resistance and power, the events in the interregnum must be cyclical incidences. The first stage is the *Establishment of the Hegemonic Discourse* or as it is a cyclical process the *Establishment of New Hegemonic Discourse*. This stage is made up of two phases: (1) the creation of the hegemonic discourse, and (2) the establishment of the discourse as hegemonic by setting up mechanisms to institute domination as well as to maintain in place that domination. The mechanisms that operate during this stage have been already discussed in Part IV.A,[179] so we will not go into further details.

178. *Id.*
179. *See supra* Part IV.A.

The second stage is the *Contestation of the Hegemonic Discourse*. This stage has also various phases: (1) the creation of the counter-hegemonic discourse; (2) the emergence of the counter-hegemonic discourse into the political arena; (3) the gaining of supporters by the counter-hegemonic discourse and the loss of supporters from the hegemonic discourse; (4) the contestation of the hegemonic discourse; and (5) the resistance to the contestation by the dominant groups. The first phase comes about as the oppressed groups start to feel the strain of the hegemonic power and realize that the reified notions that have been subtlety imposed upon them are nothing less than a social construct that can be changed. As I will discuss in the next part, in order for that to happen, subordinate groups must have the opportunity to engage in dialectical thinking. Otherwise, the second stage would not begin. After dialectical thinking has taken place, subordinate groups must bring their counter-hegemonic discourse to the political realm and attack the hegemonic discourse. The dominant groups would then try to strengthen the axes and the phase of resistance would begin. If the latter are successful, the next stage would not take place; but if the dominant group is unsuccessful in strengthening the axes, the debunking of the hegemonic discourse would occur. The last stage of the cycle would then begin.

The last stage of the process of contestation of hegemony is the *Debunking of the Hegemonic Discourse*. The phases of this stage overlap to some extent with the ones of the first stage. During this stage, four events take place: (1) the overcoming of the resistance by the counter-hegemonic forces; (2) the total loss of supremacy by the prevailing hegemonic discourse; (3) the replacement of the previous hegemonic discourse with the counter-hegemonic discourse as the new hegemonic discourse; and (4) the institution in power of the new discourse by setting up mechanisms to put in place and maintain the new found power. After the process of resistance starts, the counter-hegemonic groups need to regroup and gather more forces in order to overcome the strategies of the dominant group to preserve their hegemonic power. Once they have eradicated the institutions that reinforce the previous hegemonic discourse or have changed the reified notions that those institutions used to promote, they are able to establish their counter-hegemonic discourse as the new hegemonic discourse. After that, the phases of the first stage are repeated.

As it can be reckoned, two mechanisms operate at the center of the interregnum: political discussion and reification. These two feed into each other and act also independently. It is vital to understand their relationship to uncover the reasons why family-normativity has not faced any

successful contestation and thereby move toward familial disestablishment.

D. Current Understanding of Reification

1. Reification and Political Discussion

The concept of reification was developed by Georg Lukács to explain the process by which we confuse the natural world with the social world.[180] Lukács theorized that the basis for reification is "that a relation between people takes on the character of a thing and thus acquires a 'phantom objectivity', an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people."[181] A simple way to put it is that reification occurs when a social construct is treated as something fixed and unchangeable.

Lukács envisioned two sides to reification: an objective one and a subjective one.[182] On the objective side, the social constructs that we create are taken as natural and inevitable.[183] Conceptualizing marriage as something natural instead of as a social construct is the epitome of the objective side of reification.

Whereas on the subjective side the individual is estranged from himself and is no longer a free creative person, instead he sees himself as a mere commodity to be bought and sold by others.[184] Transcending this narrow Marxist formulation, the subjective aspect of reification is nothing less than the loss of individual agency as we "willingly" become subjects of the reified idea. In other words, in the subjective side we lose our capacity to contest the institutions that promote and preserve the reified ideas. This aspect of reification shows itself when the groups that have been denied the opportunity of participating of the family-marriage dyad, such as gay couples or polyamorous families, instead of contesting the hegemonic ideas have sought to be legally legitimized under the rubric of marriage by conforming to what the discourse of family-normativity demands.

Reification, thus, aids the dominant group to conceal hegemonic discourses and its unequal power allocation. Once that happens, we lose

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180. Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CAL. INTERDISC. L.J. 401, 401 (2000) [hereinafter Litowitz, *Reification*].

181. Georg Lukács, *Reification and the Consciousness of the Proletariat*, *in* HISTORY AND CLASS CONSCIOUSNESS 83 (Rodney Livingstone trans., MIT Press 1971) (1968).

182. Litowitz, *Reification*, *supra* note 180, at 408.

183. *Id*.

184. *Id*.

our capacity to see that there are alternatives to the social constructs promoted by dominant groups. In turn, we lose our ability to contest the reified notions hidden in the hegemonic discourses. In other words, "[r]eification implies that man is capable of forgetting his own authorship of the human world, and further, that the dialectic between man, the producer, and his products is lost to consciousness."[185] It was precisely this loss of dialectical thought that was Lukács' main concern with reification.[186] Thus, the decisive question when it comes to reification is whether one can still remain aware that our social institutions are a human creation and, therefore, can be reinvented.

Since reification is an unconscious process, it can only be overcome if it "is brought into full view of the critical, conscious mind."[187] The first step in the process of overcoming reification is to identify that there is a reified notion being taken for granted. After we acknowledge that fact, then "reification must be unlearned."[188] Lukács argued reification can be overcome by engaging in dialectical thinking.[189] By dialectical thinking, Luckács meant that we should be "consciously active participant[s] in the construction of a social world" by refusing to reconcile our analysis with what is given in our culture;[190] moreover, that we should transcend those givens and even negate them.[191] "If one realizes this, one returns to oneself as an active agent and the reified institutions are turned back into social relationships."[192]

To arrive to those conclusions, we must compare our reified notions to alternative arrangements, both real and imagined.[193] This would reveal "the artificial nature of the world that has become our home, pulling back the veil on the seeming naturalism and universality that surrounds us, by

185. PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF A REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 82 (1966). Another helpful formulation is that of Gabel. He envisions reification not as a "simple a form of distortion but also a form of unconscious coercion which, on the one hand, separates the communicated or socially apparent reality from the reality of experience and, on the other hand, denies that this separation is taking place." Peter Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC'Y 25, 26 (1980). This notion also points out to the unconscious or unintended nature of the process that has to be overcome if reification is to be challenged and the hegemonic discourses to be disrupted.

186. Litowitz, *Reification*, *supra* note 180, at 409.

187. *Id*.

188. *Id*.

189. *Id.* at 411.

190. Anthony J. Fejfar, *An Analysis of the Term "Reification" as Used in Peter Gabel's Reification in Legal Reasoning*, 25 CAP. U. L. REV. 579, 603 (1996).

191. Litowitz, *Reification*, *supra* note 180, at 411.

192. *Id*. at 410.

193. *Id*. at 403.

making us less comfortable with our established institutions and practices."[194] In other words, the solution for overcoming reified social constructs is to engage in a critical project of demystification. Demystification "involves identifying and questioning the models of selfhood and human nature that lay unannounced and below the law, but which nevertheless define the narrow parameters of legal doctrine."[195] This would unleash "a feeling or irony towards one's local practices and institutions"[196] and a willingness to be pragmatic and try new arrangements.[197]

However, before we could engage in that demystification project we must correctly identify what is the discourse that has been reified and has made us lose our agency and prevent us from achieving familial disestablishment. Thus far, I have identified family-normativity as one of those reified discourses. The monogamous, sexuated, hierarchical, child-producing family has been taken as natural when in fact it is merely a social construct. As it was discussed in Part III,[198] Article 16 of the Universal Declaration of Human Rights shows how entrenched this notion is in our society when it states that "[t]he family[-marriage dyad] is the *natural and fundamental* group unit of society. . . ."[199]

Yet, family-normativity by itself could not account for our loss of agency when it comes to defying familial establishment. There must be something else besides the notion of family-normativity making us feel that we should not challenge the idea of the monogamous, sexuated, hierarchical, child-producing family. As the discussion in Part IV[200] seems to suggest that something else lies within the law. We seem not to be able to think of family arrangements without their legal regulation or definition. It is as if we not only take for granted family-normativity but also that it is natural for family arrangements to be legally regulated.

Article 16 of the Declaration of Human Rights confirms this notion. Article 16 emphasizes the reified idea that familial arrangements must be legally regulated when it states that we "have the right to marry and *to found a family*"[201] and that the family "*is entitled to protection by society*

194. *Id*. at 406.
195. *Id*. at 419.
196. *Id*. at 414.
197. *Id*.
198. *See supra* Part III.
199. Universal Declaration of Human Rights, *supra* note 27 (emphasis added).
200. *See supra* Part IV.
201. Universal Declaration of Human Rights, *supra* note 27 (emphasis added).

and the State."[202] This idea that familial arrangements must be legally regulated is what is precluding us from contesting family-normativity. Since we believe that it is natural for the family to be legally regulated and that family-normativity is a given, people in alternative arrangements only attempt to find a way to fit into the rubric of the law instead of defying the current scheme of regulation. The perfect example is the same-sex marriage movement. This reification of the law is precluding us also from really engaging into radical proposals such as truly abolishing civil marriage. The idea that family arrangements must be legally regulated is what doomed to failure all the liberal proposals discussed in Part IV,[203] including Knouse's bold one of abolishing civil marriage.

2. Reification and the Law

If we intend to challenge the notion that family arrangements ought to be legally regulated, we must first understand how reification works within the law. This presents a challenge, since "[l]ittle scholarship has been devoted exclusively to reification as a problem within the law."[204] Nonetheless, some scholars have started to make some conceptual approximations into the phenomenon.

For instance, Ewik and Silbey maintain that reification of the law occurs when the individual develops a mistaken perspective that the law is transcendent, objective, and neutral.[205] On the other hand, Litowitz maintains that reification as applied to law is a "kind of infection within legal doctrine and legal theory because it is essentially an error, a delusion, and a mystification that blinds people to alternative legal arrangements by 'naturalizing' the existing legal system as inevitable."[206] Thus, reification of the law is basically the belief that having a legal system or a particular legal regulation is inescapable. Gabel, on his part, contends that such a particular belief about the law "derives not from mere indoctrination, but from a desire to reify, a desire to believe that the abstract is concrete, that the imaginary is real."[207]

My contention, however, is that such a desire could only be the by-product of a successful past strategy to shield and strengthen a particular

202. *Id.* (emphasis added).
203. *See supra* Part IV.
204. Litowitz, *Reification*, *supra* note 180, at 402.
205. PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 77–82 (1998).
206. Litowitz, *Reification*, *supra* note 180, at 401.
207. Gabel, *supra* note 185, at 45.

hegemonic discourse by means of the law as a defense mechanism against some type of contestation. The hegemonic discourse and the law become so uncontested that individuals cannot seem to be able to operate outside the legal system and the hegemonic discourses. The shielded hegemonic discourse becomes so entrenched in the law that individuals cannot imagine a life without the conduct linked to it being legally regulated.

As Litowitz points out "[w]hen a legal system has developed to the extent that it is not only repressive but productive, the individual's submission no longer takes the form of simply cowering before a punitive state apparatus, but instead takes the milder form of working within the existing legal framework through everyday operations."[208] In other words, when the law is part of the hegemony axis, individuals are forced into the idea that any transformation of the hegemonic discourse must occur within the law. However, by doing so the dominant groups ensure, as it will be shown in the next part, that the hegemonic discourse is never contested.

This type of reification of the law can be a significant hurdle in the process of contestation. Since all the answers are to be found in the law, the process diminishes our sense of agency and capacity for contestation. Reification of the law makes people unable "to see an alternative to the current arrangement, with the result that their reasoning capacities operated only as an instrument for getting from point *A* to point *B* within the system, without questioning the rationality of the entire system."[209] The individuals overestimate the role of the law and perceive the legal system as the most viable option for the transformation of the hegemonic discourses. This perspective overlooks the fact that certain behavior is beyond the scope of the law. Yet, the hegemonic discourses that need to be contested remain hidden by the very condition that they are attached to the law, and the individuals believe that life cannot exist without legal regulation and that the solution for transforming the hegemonic discourses lies within the law.

Since "[l]aw is a code that is self-referring, self-legitimating and very difficult to subvert because it forms a closed system any given time,"[210] the legal system serves to cover the hegemonic discourses; disassociating individuals from the ideas that control them. As a result, hegemonic discourses are no longer seen as human products but merely as by-products of the law washing away our accountability with regard to the inequalities generated by the former. The process consequently diminishes

208. Litowitz, *Gramsci*, *supra* note 112, at 540–41.
209. Litowitz, *Reification*, *supra* note 180, at 410–11.
210. Litowitz, *Gramsci*, *supra* note 112, at 545–48.

our sense of agency and capacity for contestation, since changes are no longer seen as challenges to ideological enterprises but merely as trivial legal reforms.

As Litowitz points out, when this happens we are confronting deep-structure reification. "Deep-structure reification is particularly insidious because it lies below the law, so it cannot be detected simply by looking at legal doctrine."[211] When hegemonic discourses are so enmeshed with the law like this, it is difficult to break away from them. Hegemonic discourses remain hidden by the reification of the law and all the efforts are directed only to making legal changes. This forecloses dialectical thinking, as it removes the hegemonic discourse itself from the political debate which is required for hegemonic contestation.

Family-normativity has been the subject of this process of deep-structure reification. The reified idea that family arrangements must be legally regulated has removed family-normativity from political debate, and consequently from contestation. In turn, we have been left with familial establishment.

E. The Contours of the Reified Idea that Family Arrangements Must Be Legally Regulated

The reified idea that the family must be legally regulated is the by-product of the contestation of the hegemonic discourse of patriarchy conflated in the family-marriage dyad. As the coercion and hegemony axes were weakened from the multiple contestation processes defying the subordination of women, the dominant groups were forced to come up with strengthening strategies to reinforce such hegemonic discourses. The dominant groups chose as one of their strategies to reinforce the consent and physical axes in the family-marriage dyad.

1. Depoliticizing the Family

The strategy was to depoliticize the family—notwithstanding its inherent political nature—as an attempt to remove the hegemonic discourse of patriarchy from the political discussion and shield it from contestation. Yet, the dominant groups were only able to remove family-normativity from the political debate, since the core hegemonic discourse in the dyad is family-normativity and not the subsidiary hegemonic

211. Litowitz, *Reification*, *supra* note 180, at 419.

discourse of patriarchy. The strategy, thus, failed with respect to the latter. However, it effectively shielded family-normativity from contestation.

This strategy was possible with the advent of liberalism. Liberalism started transforming the family-marriage dyad from a political entity into a non-political one. This change brought the most profound event of subordination and exclusion associated with the family: the reification of the legal regulation of family arrangements.

Before liberalism, the family-marriage dyad was conceptualized as an essential element of political life. For instance, Rousseau conceptualized the family as the center of all political activities.[212] For him, the family is the example of the first model of political societies.[213] He even justified the political subordination of women based on the political nature of the family. Rousseau asserted that women could be governed within the family by their husbands and that they can be denied the opportunity to participate in the political sphere since their husbands can serve as their representatives; their participation in the family replaced the political participation that women were missing.[214]

In the same manner, Locke takes the family as the starting point for his formulation of a political society.[215] In Locke's conception, the man appears again as the center of power over the wife, the children and the slaves.[216] The idea of the father being the center of political power is also the notion behind Robert Filmer's theory of the patriarchal state and the justification for the natural authority of the sovereign.[217] Lastly, we can see also in the works of Hobbes and Marx how the formulations of a political state are inherently linked to the idea of the family.[218]

For pre-liberal thinkers, thus, the family was conceptualized as an "unequivocal natural event" that bore relations of subordination. With time those relations became highly contested, as patriarchy was defied publicly. Likewise, the idea of the family as a natural political event was rejected with the emergence of liberalism. The coincidence of these two

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212. The political nature of the family has been recognized since the Classical era. For instance, Aristotle stated that all the states are conformed by families. Witter, *supra* note 22, at 47–63.

213. *See* JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

214. Okin, *supra* note 69, at 33–35. This explains why the family-marriage dyad has been the epicenter of patriarchy contestation.

215. JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 45–50 (Barnes & Noble 2004) (1660)

216. *Id*.

217. *See* William Baumgarth, *The Family and the State in Modern Political Theory*, *in* THE AMERICAN FAMILY AND THE STATE 19, 19–47 (Joseph R. Peden & Fred R. Glahe eds., 1986).

218. *See id*.

last events brought a profound conceptual shift with regard to the family-marriage dyad: the removal of family-normativity from political debate.

First, liberal theorists discarded from their political theories the idea of *the natural*. However, it was precisely because the family was thought of as a *natural event* that the family was recognized as a political institution by pre-liberal thinkers.[219] That shift meant, thus, that under liberalism the family was also discarded as a political entity.

The dominant groups during the advent of liberalism foresaw in this philosophical shift an opportunity to counter the ongoing contestation of patriarchy. By removing from the political debate what they thought to be the central institution to patriarchy (the family-marriage dyad), they sought to strengthen the hegemonic discourses that were losing terrain through a re-conceptualization of the power relations within the family. As a consequence, the family became depoliticized, privatized, and its regulation reified.

The family was so depoliticized by liberal thinkers that most of them do not even speak of it. Those who do, move basically between two positions. The zenith of those two positions is that the family has merely a subsidiary political role. Whereas the nadir is that the family does not have any political dimension.

Rawls, for instance, regarded the family in the best of cases as merely tolerable.[220] In reality, for him the family most of the time is an obstacle in the project of justice.[221] Rawls envisioned the family as a place where citizens learn their moral duties, but only in the most rudimentary way. For Rawls, it is not possible to apply the principle of fair equality of opportunity within the family since the benefits of inheritance disrupt the principle of meritocracy.[222] For him, the family had no-political dimension.

On the other hand, Nisbet considered the family to be a buffer for the citizens with regard to the powers the state exercises over them. Hence, the family has political value but only as long as it serves citizens to resist interventions from the state. In other words, the family is not an independent political entity but a subsidiary one that serves the isolated individual to achieve one of his political goals.[223]

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219. *See id*.
220. *See* JOHN RAWLS, A THEORY OF JUSTICE 74, 103 (1971).
221. *See id*.
222. *See* Baumgarth, *supra* note 217.
223. *See* ROBERT NISBET, THE QUEST FOR COMMUNITY (1953).

Thus, under liberal theories, even in the rare instance that the family is deemed to possess some political dimension, the family is not capable of being a political entity. These ideas permeate current Family Law jurisprudence. They are the motor behind the reified notion that family arrangements must be legally regulated. For instance, the Supreme Court of the United States seems to struggle with the political dimension of the family in its decision in *Village of Belle Terre v. Boraas*,[224] as the Court takes for granted the idea that the family must be legally regulated.

Belle Terre is one of those rare instances in which the Supreme Court has had the opportunity to examine a law explicitly defining the family.[225] Even though the case is very telling with regard to family-normativity, it is not Justice Douglas' decision to uphold the constitutionality of the law on grounds of family-normativity what makes this case notable.[226] Rather, it is the undertones of the majority's decision and the dissent of Justice Marshall with regard to the family not being a political institution that makes the decision worth examining. It serves to illustrate how the depoliticized family is behind the reified notion that the family must be legally regulated.

Justice Marshall in his dissent in *Belle Terre* states:

> My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First

224. 416 U.S. 1 (1974).

225. As it has been discussed, the family has been defined socially, legally, politically and philosophically in a very diffuse manner, usually by making reference to marriage. *Belle Terre* is so a unique case because in this case, unlike *Griswold*, *Loving*, *Reynolds*, *Pierce* and the rest of the cases cited in this article that touch upon the definition of family, the Court was confronted with a statute that explicitly defined the family.

226. The case was about a zoning ordinance that restricted land use to one-family homes. The statute had two definitions of family: (1) "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants"; and (2) "[a] number of persons but not exceeding two living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage". *Id.* at 2. The constitutionality of the statute was challenged by the owners of a house in Belle Terre that was being occupied by six college students. The main contention of the plaintiffs was that the statute was arbitrary since it only recognized as a family of non-related persons a household comprised of a maximum of two persons. In the voice of Justice Douglas, the Court decided that the case did not involve any fundamental right guaranteed by the Constitution, *id*. at 6, and that it was within the power of the State to make distinctions between family arrangements in order to preserve "family values". *Id*. at 9.

Thus, the case tells us something very interesting about the dominant worldview of the family. It seems for the Court that the definition proffered by the ordinance embodies what they think to be the hegemonic view of the family. That hegemonic view is the idea of two sexuated individuals capable of entering into a procreative or child rearing relation. That is the reason why Justice Douglas upholds the constitutionality of the statute. His justification for the decision is the reified reasoning of "family values", which are to be taken as natural and not open to contestation, and that means that the statute fitted the model of family-normativity.

> Amendment freedom of association and their constitutionally guaranteed right to privacy. Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates. Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members. The selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.[227]

Justice Marshall attempted in his opinion to advocate for a broader conception of the family, but if we read his opinion carefully we would be able to see that he failed in doing what he needed to do in order to disestablish the family. He timidly suggests that people should have the freedom to decide who their family is, yet he never advocates for a deregulation of the family or a broad recognition of family arrangements. He could never do such a thing, because it is impossible to do so when his argument shares all the assumptions in the current legal discourse of the family. To do so would contravene the system's internal structure as it requires recognizing the family as a political entity.

This contradiction in Justice Marshall's dissent surfaces when he states that the Constitution protects associations that are not political in the usual sense, which implies that the family is a political entity of some sort. Yet, he recognizes the lack of logical coherence in his argument and decides to abandon this point of the family as a political entity, and starts to present equal protection claims, privacy concerns, and to point out fallacies within the statute in order for him to further his argument for a broader conception of the family. Presenting the family as a political entity contravenes an internal dogma of the law. If Justice Marshal were to be able to make the argument that the family was a political entity, it might have been possible for him to contest the hegemonic discourse of family-normativity.

However, the liberal, non-political, conception of the family precludes contestation because it is the basis for the reified notion that family arrangements must be legally regulated; which in turn, has allowed family-normativity to remain hidden and has not permitted to bring to the political arena any counter-hegemonic discourses. *Belle Terre* is the perfect example of that lack of counter-hegemonic discourses and its pernicious effects. Liberalism itself is part of the reason why we have not been able to

227. *Belle Terre*, 416 U.S. at 15 (Marshall, J., dissenting) (citations omitted).

contest familial establishment as it paved the way for the reification of the idea that family arrangements must be legally regulated. The reification process that was triggered by depoliticizing the family in liberal thought and the resistance to the contestation of patriarchy was executed in two stages: (1) the privatization of the family;[228] and (2) the juridification of the family.[229]

2. The Privatization of the Family

During the first stage, the liberal ideas of the family were incorporated into the law. The family started to transition from a public institution in which the state was openly involved to a private institution in which the state continued to be heavily involved, but in a subversive manner. Anne C. Dailey identified the beginning of this period in the United States jurisprudence in the 1920s[230] when the Supreme Court decided the cases of *Meyer v. Nebraska*[231] and *Pierce v. Society of Sisters*.[232] Those cases symbolize the birth of the practice of not intervening in the marital family as a way to benefit it and channel people into it.[233] The Court recognized the rights of parents to decide about the education of their children without the state's intervention.[234] They based their decision on the rationale that the family was not a political entity but a private institution.[235] This liberal conception of the family as non-political started to be replicated in the law. For instance, decisions such as *Griswold* and *Eisenstadt* copied that rationale and reinforced the notion of the family as a private entity that is beyond state intervention.[236]

That legal change brought a shift in the mentality of the citizens, who felt confident that the state would not interfere with the privacy of the

228. The privatization of the family comprises two dimensions: (1) the conceptualization of the family as a private institution; and (2) its formulation as a non-political entity.

229. The juridification of the family refers to the increased use of the law to resolve issues related to the family as well as to the exclusive control the law exercises over defining the family.

230. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 62 TUL. L. REV. 955, 970–71 (1992).

231. 262 U.S. 390 (1923).

232. 268 U.S. 510 (1925).

233. Although the privatization of the family could be traced in the United States to the Reconstruction Era when jurists began "justifying the new regime of common law immunity rules in languages that invoked the feelings and spaces of domesticity," Siegel, *supra* note 64, such privatization of the family was never intended to benefit the marital family or as a way to channel people into it.

234. *See Meyer*, 262 U.S. at 400; *Pierce* 268 U.S. at 534–35.

235. *See Meyer*, 262 U.S. at 400; *Pierce* 268 U.S. at 534–35.

236. See the discussion of these two cases in *supra* Part III.C.

family. With that assurance, enforcing family-normativity in the physical axis became easier, because there was no political accountability for doing so. Moreover, as the family was pushed into the private realm, this era was also characterized by a dearth of theory on the family that made it easier to enforce family-normativity in the consent axis. With no class producing any theoretical work capable of counteracting the hegemonic discourse, there was an increment in subordinating legal practices. Dominant groups started creating legal rules to defend and strengthen the family-marriage dyad and its hegemonic discourse of family-normativity.

3. The Juridification of the Family

A crucial event in the above process was the creation of the constitutional right to marry.[237] By doing so, dominant groups achieved familial establishment. As those groups are the ones who control the state apparatus, they guaranteed with the right of marriage the promotion of an unequivocal definition of the family. The right to marry strengthened family-normativity and cut the possibilities for its contestation by giving dominant groups exclusive control over how to legally define the family-marriage dyad. In turn, the constitutional right to marry gave them control over both the hegemonic and physical axes of family-normativity and the tools to enforce a unique worldview of the family.

With individuals relying on the idea of the family being a private institution and the constitutional right of marriage embodying such notion, familial establishment passed almost unnoticed and without any contestation. Individuals embraced the alleged non-interventionism in family matters that the constitutional right of marriage represented without realizing that they were embracing the parochial interest of the dominant groups. Moreover, the possibilities to challenge familial establishment and family-normativity were further diminished as the constitutional right to marry opened up as well the door for the juridification of the family. And with that final event in the legal history of the family, the reified notion that the family must be legally regulated was finally set.

The term juridification refers to a multiplicity of actions associated with the legal regulation of certain situations or conducts. Among those actions figure an increase on solving political problems utilizing legal norms; the proliferation of statutes or court decisions; the prominence of the legal system to resolve a greater amount of problems; the expectation

237. This constitutional right was recognized in the United States in *Loving v. Virginia*, 388 U.S. 1 (1967).

to conform to legal norms both in public and the private sphere; and the attribution of greater power to the legal system and its actors.[238] When any of those events happen, individuals come to think of themselves as mere legal subjects and start giving value to the social practice of the Law and value themselves only when they are engaged in the practice of law. In other words, reification ensues.[239]

As a result of reification, individuals overlook the fact that certain behavior is beyond the scope of the law. Instead they operate exclusively through the law, and in turn their agency is diminished. Since all the answers are to be found in the law, the process diminishes our sense of agency and capacity for hegemonic contestation. Reification of the law makes people unable "to see an alternative to the current arrangement, with the result that their reasoning capacities operate only to get them through the system without questioning the rationality of the system."[240] The individuals overestimate the role of the law and perceive the legal system as the most viable option for the transformation of the hegemonic discourses. Yet the hegemonic discourses that need to be contested remain hidden by the very condition that they are attached to the law, and the individuals believe life cannot exist without legal regulation and that the solution for transforming the hegemonic discourses lies within the law.

This loss of agency in regard to family-normativity started with the creation of the constitutional right of marriage. After marriage was constitutionalized, a real explosion in the regulation of the family ensued. As noted, up to 1997, in the federal system alone there were more than 1,049 statutes regarding marriage.[241] As the legal regulations exploded, the legal system gained more prominence in the promotion of the family-normativity discourse under the disguise of the regulation of the family-marriage dyad. The family became jurified.

After such a juridification of the family, individuals from all walks of life started to believe that the family must be legally regulated and defined. We are not able to imagine a world in which the family is not legally defined. In turn, we look to the law as a way to eradicate the inconsistencies and inequalities created by family-normativity, but which have been perpetuated through the same institution we believe must be

238. Lars Chr. Blichner, L. & Anders Molander, *Mapping Juridification*, 14 EUROPEAN LAW JOURNAL 36 (2008); Davina Cooper, *Local Government Legal Consciousness in the Shadow of Juridification*, 4 J.L. & SOC'Y 506 (1995).

239. See *supra* Part V.D, for a discussion on how reification works.

240. Litowitz, *Reification*, *supra* note 180, at 410–11.

241. *See supra* note 168.

used to achieve equality. The regulation of the family has become so reified that we are unable to engage in dialectical thinking and consider the existence of family arrangements outside a legal scheme. Instead we are stuck in a vicious circle perpetuated by the reified idea of the legal regulation of family-arrangements that lead us to propose an unequivocal definition that would create the same problems of the current one. This idea is what has most affected our capacity to contest family-normativity and has led to failure all the attempts to create equality.

As it was pointed out in Part IV, this reification and its effects have reached even the proposals to transform the legal concept of marriage made by legal scholars. Their proposals exist within the realm of the law; they cannot conceive the existence of family arrangements outside of a legal scheme.[242] For instance, Metz's proposal still has at its core the state regulating family arrangements through the ICGU.[243] The same happens with Knouse's proposal to *abolish marriage*, as she advocates at the end for the state to regulate the family through the provider proxy.[244] Thus, they do not challenge the idea of family-normativity as the latter is imbricated in the notion that family-arrangements must be legally regulated. So, familial establishment and inequality are left untouched.

Even those scholars who recognize that the legal regulation of the family focuses on the two canonical relationships of marriage and parenthood (in other words family-normativity) cannot break away from the idea that there must be a legal regulation and definition of the family.[245] Therefore, they too fail in their attempt to disestablish the family. The reified idea of family arrangements needing to be legally regulated is so pervasive that we are left in every attempt to challenge familial establishment with a new version of it and the perpetuation of inequality.

VI. A VOW TO EQUALITY: ABOLISHING CIVIL MARRIAGE

> SAMANTHA: Why does everybody have to get married and have kids? It's so cliché![246]

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242. *See* Knouse, *supra* note 26; METZ, *supra* note 67; Nussbaum, *supra* note 68.

243. *See* METZ, *supra* note 67.

244. *See* Knouse, *supra* note 26.

245. *See* Jill Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012) (recognizing that legal regulation of the family focuses on two canonical relationships: marriage and parenthood, but advocating for the same type of regulation for non-canonical family relationships).

246. *Sex and the City: Just Say Yes* (HBO cable television broadcast Aug. 12, 2001).

A. The Solution to Familial Establishment

The only way to transform our current fixed and unequivocal conception of the family and move toward a more egalitarian society is to transcend the two unacknowledged phenomena of family-normativity and the reification of the legal regulation of family arrangements. In order to do so, we must engage in dialectical thinking. That would enable the emergence of a counter-hegemonic discourse in the political arena, so that the contestation process could be set in place and familial establishment could be eradicated.

Since in order to engage in dialectical thinking we must first overcome the worldview we have taken as given and negate it,[247] the best way to do so would be abolishing civil marriage. This would provide us with the opportunity to imagine a world in which all family arrangements are valued. People would feel free to experiment and engage in new family arrangements. That in turn would bring the family into the political discussion as people would begin to seek legal protection for their arrangements or their personas in function of their membership to those arrangements. As a result of this dialectical and right-seeking process, family-normativity would be for the first time challenged.

B. The Perils in Abolishing Marriage

However, due to the reified idea that family arrangements must be legally regulated, disestablishing the family by completely abolishing civil marriage—even in theory, as we have seen with Knouse's proposal in Part IV[248]—is not simple. Yet, the most complicated part of abolishing civil marriage lies in making sure that its banishment from the legal realm does not represent in the end a new way to strengthen marriage and in turn family-normativity. As Nancy J. Knauer observes "the abolition of civil marriage invites the possibility that existing inequities will be reproduced in the continuing legal interface required to enforce and monitor the newly privatized arrangements."[249]

Abolishing civil marriage, as Tamara Metz notes, could mean a shift in the control of marriage from legal authorities to cultural and social ones.[250]

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247. Litowitz *supra* note 112, at 411.

248. *See supra* Part IV.

249. Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1266 (2006).

250. METZ, *supra* note 67, at 144.

The proposed regime could benefit marriage by invigorating its hegemonic status.[251] Metz's proposal does not challenge family-normativity.[252] Moreover, under her proposal the institutions that led us to family-normativity and the established family-marriage dyad would retain the power to keep doing so.[253]

Precisely this is the objective of Edward Zelinsky in abolishing marriage. He advocates for deregulating marriage on a pro-marriage basis. Zelinsky would like to strengthen marriage through its deregulation.[254] His claim is that marriage "should become solely a religious and cultural institution with no legal definition or status."[255] The main argument Zelinsky presents is that "eliminating civil marriage will strengthen marriage by encouraging competition among alternative versions of marriage."[256] He believes that "once [we are] free of the constraints inherent in a legal definition of civil marriage, additional, presently unforeseeable, models of marriage will emerge as entrepreneurial energies are focused on the deregulated market for marriage."[257]

Although this might sound like opening the door for dialectical thinking, we should remember two things: (1) that the hegemonic discourse of family-normativity was created and maintained by these religious institutions; and (2) that a free market for marriages with religious and secular institutions leading the way existed—and still exists in some parts of the world—and what it has brought is familial establishment.[258] Moreover, new forms of marriage like same-sex marriage do not represent a departure from the current conception of the family, but a challenge to other hegemonic discourses conflated in the family-marriage dyad. Thus, family-normativity under his proposal remains untouched.

Another reason not to take Zelinsky's proposal as a model is that it is not truly a deregulating scheme, but rather a multi-regulating one. Instead of having the state regulate the family, Zelinsky has multiple social institutions establishing multiple versions of the family-marriage dyad. Yet, that does not guarantee that dialectical thinking will ensue. As it has

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251. *Id*.
252. *See supra* Part IV.
253. METZ, *supra* note 67, at 10.
254. Zelinsky, *supra* note 31, at 1163.
255. *Id*.
256. *Id.* at 1173.
257. *Id*. at 1177.
258. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE (2005).

been discussed, we can have multiple versions of the family-marriage dyad reinforcing the same hegemonic discourse of family-normativity. On the contrary, we could end up strengthening the family-normativity hegemonic discourse since we would have more institutions infusing reified notions, and our capacity to contest those notions would be more easily diminished as we would be under the mistaken impression that dialectical thinking is occurring.

Moreover, his scheme does not mean that the law would be out of the business of regulating the family. Zelinsky notes that "a deregulated marital regime would require default rules for those couples who fail to contract and for those couples whose contracts fail to address particular issues."[259] Those rules will make use of the marriage proxy in order to regulate the effects of coming into a marital relationship. As long as the law uses the marriage proxy, we will not be able to move away from family-normativity and toward a more coherent legal scheme. In addition, Zelinsky not only intends the state to retain the faculty to regulate the effects of coming into a family arrangement, but also he envisions the state preserving the power to decide who can enter into marital arrangements by regulating the age of consent to contract and also preserving the faculty to determine which kinds of family arrangements are acceptable under the public policy exception. Thus, Zelinsky's proposal is not truly a deregulating scheme.

Moreover, Zelinsky's proposal to abolish marriage posits a real dangerous outcome. He intends to abolish marriage as a way to minimize political friction. His main point is that the best way "for a diverse polity to resolve contentious issues with minimum strife is to decentralize and privatize those issues."[260] In the case of marriage, he believes that reducing political friction would bolster marriage,[261] since it would make it recede from the public discussion and the energies used in the struggle to control the state definition of marriage would be used for other more pressing

259. Zelinsky, *supra* note 31, at 1182.

260. *Id.* at 1164. This argument is mainly elaborated to convince the proponents of same-sex marriage to embrace his proposal. Zelinsky maintains that a gay couple who is interested in the social approval of their sexuality should not have any objections in accepting the deregulation of marriage since they are "uninterested in the pluralistic regime that will emerge. . . ." *Id.* at 1180. Likewise an individual opposed to homosexuality will be uninterested in the new deregulated marriage regime. He makes the same argument for those who are looking to establish their idea of marriage, be it same-sex or heterosexual; since they will be able to find a social institution that would allow and recognize their type of marriage, they would not need to engage in a political discussion about what is the right definition of marriage or the family.

261. *Id.* at 1164.

political issues.[262] However, as the discussion of reification shows, that part of breaking from hegemonic ideas is precisely engaging in dialectical thinking, which requires an active political discussion.[263] A proposal to disestablish the family cannot intend to reduce political friction, because it is precisely political friction that is needed in order to generate hegemonic contestation. Thus, his proposition for deregulating marriage is not a step forward in diversifying the conception of the family, but a big leap backwards.

Another step backwards is Daniel Crane's proposal to privatize marriage as a way to break away from the reified idea that family arrangements must be legally regulated.[264] His proposal shows how solely demystifying the reified idea of family arrangements being legally regulated does not necessarily entail familial disestablishment, but could instead reinforce family-normativity. Crane points out how by advocating for a uniform legal definition of marriage in order to *save* the institution of marriage, religious groups are promoting the reified idea that marriage should be legally regulated, which is contrary to the Christian and Judeo traditions.[265]

Crane intends to stop this alleged erosion of the definition of marriage by giving back to religious institutions the exclusive faculty to regulate it.[266] He believes privatizing marriage would "restore religion to marriage, and marriage to religion."[267] Privatization is the key concept in his proposal. The hegemonic discourse of family-normativity cannot be contested or transformed if the family-marriage dyad is still sanctioned by the state, albeit its official regulation is being exercised by other social institutions than the legal system. Crane is aware that if a hegemonic discourse is to be preserved, the government and legal institutions cannot

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262. *Id*.

263. *See supra* Part V.D.

264. Daniel Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L REV.1221 (2006).

265. For instance, Crane points out how this reified idea that family arrangements must be legally regulated makes religious conservatives of Christianity and Judaism forget how their own traditions and theologies oppose state intervention in the definition and regulation of marriage. For instance,

> [c]atholic tradition regards marriage as a spiritual estate or sacrament, and hence the province of the church, not the state. Protestant tradition, while expressing skepticism about the sacramentality of marriage, asserts that marriage has a highly spiritual dimension that requires mediation by the church. Jewish tradition regards Jewish marriage as the province of Jewish law—*Halakhah*—and not of civil law. In neither the Jewish nor the Catholic tradition is marriage understood as primarily the province of the state.

Id. at 1221–22 .

266. *Id*. at 1259.

267. *Id*. at 1253.

be completely out of the picture. Under his proposal, the state must recognize the marriages celebrated by religious communities and legally sanction them.[268] His proposal is a multi-regulating scheme just as Zelinsky's, and thus fails in the same respects.

C. An Effective Proposal to Abolish Marriage

If we truly strive to disestablish the family by abolishing civil marriage, we should seek to avoid the elements of these proposals that reinforce family-normativity and facilitate the establishment of definition of the family. Such a proposal should adhere to the following 10 objectives or parameters.

1. The family must be brought to the political arena. The proposal cannot intend to reduce political friction, because such friction is needed in order to generate hegemonic contestation.

2. Our focus must be the family-marriage dyad.

3. This dyad must be banished from our legal system.

4. It is imperative to uncover the unacknowledged hegemonic discourse of family-normativity and bring it to the political discussion.

5. The promotion of the values embodied in the hegemonic discourse of family-normativity must be evaded.

6. The proposal could not entail a mere name substitution of one unequivocal definition of the family for another.

7. Trying to contest the other hegemonic discourses associated with the family-marriage dyad should be avoided. The focus must remain on family-normativity.

8. The proposal should avoid sanctioning the involvement of the state and legal institutions in the business of recognizing which family arrangements are of social importance.

9. Likewise, the proposal cannot rely on a privatization scheme that will yield the regulation of family arrangements in the same institutions that created the problem of familial establishment in the first place.

10. Finally, the proposal should demystify the reified idea that family arrangements must be legally regulated.

Abolishing marriage thus implies discarding the label of marriage and removing the state from the business of giving recognition to a specific set of family arrangements based solely in the marriage proxy. It requires that all the laws that make reference to the family-marriage dyad must be re-

268. *Id.* at 1252.

examined in terms of their purposes so that the reference to marriage is removed and the real purposes for which the law was supposedly enacted are followed. That requires the creation of new proxies not based on definitions of what family arrangements should be but rather proxies narrowly tailored to the actual common goods and harms that society would like to promote and prevent. In order to create those new proxies we would be forced to have conversations about what are those common goods that we as a society would like to promote and how is the best way to do so, which would promote dialectical thinking. Today, those conversations have been obscured by the marriage proxy.

If this model to abolish marriage is followed, we would be able to recognize the plurality of family arrangements and give protection to all of them since the new proxies that would have to be created would truly embody the common goods intended to be promoted, which should apply in the same way to everyone equally situated unlike the marriage proxy. It would also permit the contestation of the hegemonic discourse of family-normativity as it would be generating dialectical. As dialectical thinking occurs, more people would be able to start to create and establish their own family arrangements and would not fear being subjected to a regulatory scheme that would ostracize them. That in turn would allow true counter-hegemonic discourses against family-normativity to appear in the public discussion with possibilities of contesting the hegemonic discourse. Once we are free from all the reified notions associated with family-normativity, legal regulation in Family Law as in other spheres of the law such as Property, Torts, Estates, Taxes, Contracts and Immigration would be re-examined to see if they serve any legitimate purposes other than supporting the hegemonic discourse of family-normativity. In that way, legal regulation would be more coherent. In addition, people who do not have access now to the court or the law for their domestic disputes would be heard. Finally, social and political inequalities would be diminished, as well as inequalities between people arising from different family arrangements. Consequently, we would be on the path to a more just and fair society.

D. A World Without Marriage

Describing the post-marriage landscape is beyond the scope of this project. The intention of this paper is to open the door to dialectical thinking, so family-normativity could be contested and familial disestablishment eradicated. Prescribing what the new proxies that should substitute the marriage proxy without an extensive discussion on the

reasons why that should be the new legal scheme contradicts the very spirit of dialectical thinking. Therefore, although I have a clear idea of what those proxies should be and the reasons why they should be adopted, I will not proffer a list of them.[269] I do not wish to close that discussion by just offering my ideas, but instead ignite it with the possibilities that abolishing marriage represents. The proposal of abolishing marriage is valuable by itself precisely because it forces those discussions about the common goods we would like to promote through the law. There is no need to offer an exhaustive account of the post-marriage landscape to appreciate the benefits of the proposal to abolish civil marriage. However, a glimpse into the world without marriage is necessary to understand the practical implications of our proposal.

As it was just discussed, in a world without civil marriage, we would have to come up with new proxies and re-evaluate the interests we are allegedly protecting through the law. In the cases of the incoherent legislation discussed in Part III,[270] that would mean that no matter the status of the relationship of the couple, their offspring would be treated equally in terms of child support. In the case of domestic violence, victims would not be denied protection because they are not a member of an established family arrangement. Instead, we would have to create a proxy such as "a victim is a person that is having or has had a romantic or sexual relationship with her or his aggressor." That would prevent the real harm the law seeks to avoid, which is a lesion to the physical integrity of a person in a susceptible position. At the same time, this proxy would avoid stigmatizing people equally situated who today do not receive such protection.

Finally, abolishing civil marriage would mean the re-examination of current controversial issues as it would force us to look to the entire law system that is premised on the marriage proxy. For instance, health insurance coverage would need to be reexamined. In a world without a family arrangement proxy and an established definition of the family, we would need to determine how we establish who will be covered under the health policy of an individual. That conversation could go from what is the new proxy—simple designation of beneficiaries, biological ties or household ties—to the hard question of why people need to be covered. If we really would like people to be well off in terms of their health, then why not posit the issue in terms of universal health coverage. That type of

269. The post-marriage landscape will be the topic of a future article.
270. *See supra* Part III.C.

dialectical thinking is a better way of facing our more pressing issues, as it precludes treating equally situated people differently. Taking into account that the marriage proxy is used in all spheres of the law, abolishing it and bringing dialectical thinking to the table will impact positively all corners of our legal system.

VII. LET'S CALL THE WHOLE THING OFF!!!!!!!

> By advocating only minor reforms in family law, they [most family law scholars] convey the message that family law is basically fair. Because they discourage us from considering more radical change, their work contributes to the apologetic project of legitimating the status quo.[271]

In this project, I have aspired to depart from the apologetic agenda that has legitimated familial establishment and facilitated the current unfair and incoherent legal regulation of the family. By examining the historical development of the established definition of the family, I have uncovered that at the heart of this undemocratic and unjust system is the institution of marriage. Marriage has been used as a proxy to promote and preserve through the law the unequivocal conception of the family as a bureaucratized, monogamous, sexuated married couple with children.

Through the marriage proxy, our legal system seeks to channel people into the marital family at a very high cost. First, the state dictates how intimate relationships should be lived and arranged, which undermines the liberty rights of a large group of people because they are withheld from exploring other types of possible arrangements. Second, it has created an inconsistent body of law that does not protect the real interests it claims to protect. Finally, that inconsistent body of regulation has created a caste system that has generated profound legal and social inequalities that oppose the basic tenants of our society.

These pernicious consequences of familial establishment have not passed unnoticed to scholars. Yet, the most prominent proposals that attempt to tackle them fail in coming up with a solution that would not sanction an unequivocal definition of the family and would legally protect all types of family arrangements. At the end, all of the proposals surveyed reinstate the same inequality problems we face today with our current established definition of the family. These proposals failed in bringing forth familial disestablishment because they depart from the liberal

271. Olsen, *supra* note 11, at 4.

discourse of rights, which either ignores the marriage proxy, its effects or only intends to broaden the current established definition of the family without challenging the idea that family arrangements must be legally defined or regulated. Since all responses to the established definition of the family up to this date ultimately bring us back to the problem of familial establishment, I decided to approach the problem from a different theoretical perspective.

I have proposed to move from a narrative of rights to a narrative of power by adhering to a Neo-Marxist approach. Such a philosophical framework encompasses the multiple dimensions of the problem that include a power struggle and the creation of a ruling worldview. Specifically, I took on Gramsci's ideas of hegemony and hegemonic contestation, and Lukács' idea of reification. Even though these two frameworks served as a platform for proposing a feasible solution to the problem of familial establishment, they did not come without challenges. First, both philosophical perspectives required the articulation of a new language that could account for the lack of one with regard to the phenomena under study. Second, I was forced to fill some gaps within their theories in order to find final answers to our inquiries.

This analytical inquiry produced the three main contributions of this paper. First, the subject of study should be the family-marriage dyad. We should not be talking about marriage and family separately, since our current legal process of granting rights to family arrangements is premised on using marriage as proxy.

Second, in order to fully understand the legal and social ramifications of that dyad, we must acknowledge that there is an hegemonic discourse to which courts, scholars and people in general have been referencing without really naming it or establishing its contours. That hegemonic discourse is what I have denominated as family-normativity. Family-normativity encompasses all the elements of our current definition of the family. This hegemonic discourse naturalizes the established definition of the family and makes individuals seek refuge under the rubric of that definition instead of challenging it in order to have a more egalitarian system.

While family-normativity makes it harder to challenge familial establishment, that is not the reason why we have not been able to achieve familial disestablishment. Most hegemonic discourses are being continuously challenged. The final contribution explains what is really behind our incapacity to move toward familial disestablishment even though we have challenged other hegemonic discourses in Family Law and we have disestablished other institutions such as religion. This is due

to the reified idea that family arrangements must be legally regulated. Our uncontested understanding that the law should offer an exhaustive account of what a family should be is the floodgate holding family disestablishment from coming to fruition.

In order to break from it, we must embark in dialectal thinking. If we do, we would realize that the most viable option is to abolish civil marriage. Yet, the proposal to abolish marriage must entail a true obliteration of the institution. Otherwise, the proposal would reinforce familial establishment as the proposals to abolish marriage have done thus far. In order to avoid that, we must discard the label of marriage and remove the state from the business of giving recognition to a specific set of family arrangements based solely in a proxy. Once we do that, we will be forced to re-examine all the laws that make reference to the family-marriage dyad, so that the reference to marriage is removed and the real purposes for which the laws were supposedly enacted are finally followed.

If this model to abolish marriage is followed, we would be able to recognize the plurality of family arrangements and give protection to all of them. People would be able to establish their own family arrangements since they would not fear being subjected to a regulatory scheme that would ostracize them. Consequently, contestation of the hegemonic discourse of family-normativity would ensue, since true counter-hegemonic discourses would appear in the political debate. Finally, abolishing civil marriage would create a more egalitarian society as we would be forced to rethink the entire legal system in order to come up with proxies related to the common goods and harms we wish to promote and avoid, and not in proxies based on family arrangements that treat equally situated people differently.