For Better and for Better: The Case for Abolishing Civil Marriage

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I. NOT FOR BETTER, BUT FOR WORSE

Happy families are all alike; every unhappy family is unhappy in its own way.\(^1\)

I explore in this article whether extending the protections and benefits of marriage to more groups is the appropriate solution for attaining a more egalitarian society or whether it would be better to simply abolish civil marriage in order to achieve such a goal. The project examines why we still adhere to the unequivocal definition of the family\(^2\) as a bureaucratized,\(^3\) monogamous, sexuated,\(^4\) married couple with children, and how 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).\(^5\)

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\(^1\) **LEO TOLSTOY, ANNA KARENINA** 1 (Wordsworth Ed., 1999) (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 Section IV-B *infra* pp. ____, 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* Section IV-B *infra* pp. ____.  

\(^5\) Alice Ristroph & Melissa Murray, *Disestablishing the family*, 119 YALE L.J. 1236, 1251 (2010).
disestablishment is vital for addressing the three main problems we presently experience with our current legal regulation of the family.

First, that our legal system procures to dictate how intimate relationships should be lived and arranged by signaling and channeling people into a particular arrangement, foreclosing the door for a large group of people to explore other types of possible arrangements. Second, that we possess an inconsistent body of law that does not protect the real interests it claims to promote because it is premised on the marriage proxy. And finally, that such an 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 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 to move away from the narrative of rights to the narrative of power; and instead use a Neo-Marxist approach, which is more akin to the nature of the problems with familial establishment. Specifically, I employ Gramsci’s ideas of hegemony and hegemonic contestation, and Luckas’ idea of reification. 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 project has produced three main contributions in the struggle toward familial disestablishment.

First, I conclude that our 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 a proxy.

Secondly, in order to really 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 making reference without really naming it or establishing its contours. That
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hegemonic discourse is family-normativity. Family-normativity procures 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.

I conclude that 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 that we embark in dialectical thinking. I sustain that 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 we disengage the state from defining the family and we face the question of what proxies are better suited for substituting the marriage one, 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. Such an approach would open the doors to a better way of facing our more pressing issues, which will reach all corners of our legal system.

II. A VOW TO INEQUALITY: FAMILIAL ESTABLISHMENT

Mrs. Madrigal: He's a sweet boy, Mona. I approve of him wholeheartedly.
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.⁶

Family Law seems to have undergone a dramatic transformation in the past half-century. Rules promoting the subordination of women have largely been abolished,⁷ domestic violence has been adopted as a valid state concern,⁸ and the recognition of non-heterosexual couples is now a trend.⁹ 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.¹⁰ Some scholars have gone so far as to argue that “[r]edefining the family has become all the rage in the legal academy.”¹¹

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 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.¹² The idea of the family has remained over the past millennia one of a bureaucratized,
monogamous, sexuated married couple with children.\textsuperscript{13}

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. If we dig a little into our legal and philosophical history, we would realize the family evolved from the proprietary idea of the 	extit{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.\textsuperscript{14}

Since its inception into our culture, the term 	extit{family} has been tied to a hierarchical system and to the subordination of certain individuals. The voice 	extit{family} comes from the Latin voice 	extit{famula}, which is a derivate of 	extit{famulus}. The meaning of the latter is servant,\textsuperscript{15} a concept imbedded with the ideas of inequality and property. In addition, linguistic studies contend that the voice 	extit{family} has a remote connection with the word 	extit{vama} from Sanskrit, in which it signified a home or dwelling place.\textsuperscript{16} 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 – today non-existent for most parts of Western society – to constitute families not based on sexuated relationships or in blood kinship. For instance, the Romans defined the family as the social organism whose master (the man) had under his power (under the 	extit{patria potestas}) his wife, his sons and daughters, and a certain number of slaves, to all of whom he had the right of life.\textsuperscript{17}

\begin{footnotes}
\item As we will discuss in section IV-B, \textit{infra} pp. \____, 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 section IV-B \textit{infra} pp. \____. We introduce the concept at this moment to facilitate to the reader the connection between this discussion of familial establishment and hegemonic discourses, and as a way to refer with more ease to the current established definition of the family throughout the footnotes.
\item 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 surrounds it. \textit{See} Jill Elaine Hasday, \textit{The Canon of Family Law}, 57 \textit{STAN. L. REV.} 825, 829 (2004).
\item \textit{EMILIO MENÉNDEZ, LECCIONES DE DERECHO DE FAMILIA} 121 (1981).
\item \textit{Id.}
\item \textit{Id} at 124.
\end{footnotes}
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.\(^\text{18}\) 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 monogamy, sexuated couples and 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.\(^\text{19}\) 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.\(^\text{20}\) That vision was later reproduced into the laws of the new Nations-States that took the regulation of the family from the Canon Law and poured it into their civil codes and


\(^{19}\) See Witte, *supra* note 18. We can see how this idea is embodied in Canon Law. For instance, Canon 1055.1 states that:

> The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptized, been raised by Christ the Lord to the dignity of a sacrament.


\(^{20}\) See Witte, *supra* note 18. 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 section IV-B, *infra* pp. ___, 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.
common law. The same succession of events happened in the Protestant Nations-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.

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.

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 U.S. 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

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21 See id.
23 Universal Declaration of Human Rights, Art. 16 (emphasis added).
to a specific conception of the family has been denominated as *familial establishment*, as there is a *de facto* official conception of the family being imposed by the state to the detriment of all the other family arrangements. Surprisingly, the United States 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 family 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.” 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 U.S. 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 the United States. 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 thus far 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 establish a legally recognized family. . . .”

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24 See Ristroph & Murray, *supra* note 5.
25 *Id.* at 1251 (2010).
not the only area which 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 sustains that “marriage itself conveys a message, a message of commitment, a message of family.”

Ristroph and Murray have been a couple of the scholars to start pointing out how the family is regulated using marriage as a proxy in the United States. They support their positions 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 the cases 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*, the Court has permitted unmarried fathers to exercise wed fathers’ prerogatives, such as not declaring automatically the children ward of the state upon the death of their mother. However, in cases in which the 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* and *Lehr v. Robertson* respectively, the Court has refused even to recognize biological parents’ prerogatives like the right to challenge a petition of adoption. The climax in this line of cases is, for Ristroph and Murray, *Michael H. v. Gerald D.* 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 he was regarded by the child equally as a father figure as her legal father (her mother’s husband). 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

28 Ristroph & Murray, *supra* note 5, at 1252.
29 405 U.S. 645 (1972).
33 See Ristroph & Murray, *supra* note 5, at 1254.
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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 that 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

Yet, 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; it also percolates to other far corners of the family life and the political one. 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.

In Griswold v. Connecticut, 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” which is a “sacred” institution that holds “a right of privacy older than the Bill of Rights.” 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

34 Gerald D. 491 U.S. at 123 (emphasis added).
35 381 U.S. 479 (1965).
36 Griswold at 486.
37 Id. (emphasis added).
38 Id. (emphasis added).
involved a married couple, otherwise the intrusion would have been permitted. It took almost a decade for that right to be extended to individuals.\textsuperscript{39} However, even when we read \textit{Eisenstadt} – the case that extended that right to individuals – we can observe how the Court was promoting marriage and family privacy.\textsuperscript{40} 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.\textsuperscript{41}

Participating in the established definition of the family represents a special protection: less intervention from the state.\textsuperscript{42} 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 give people incentives to engage in the behavior deemed normal by preventing interference in their private and familial lives.\textsuperscript{43} This \textit{privacy perk} compels people to abandon engaging in alternative family arrangements for entering into the preferred marriage relationship.\textsuperscript{44}

Similarly, \textit{Troxel v. Granville}\textsuperscript{45} – a case in which a set of grandparents sought visitation privileges with the children of their deceased son – illustrates how the marital relation is promoted as a superior version of the family and as the only one possible. The Supreme Court decided that

\textsuperscript{40} It might be argued that \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), signals the end of the Supreme Court’s trend of recognizing privacy and liberty rights predicated on the institution of marriage since in the case the Court recognizes the right of adults to engage in the consensual sexual conduct of their preference. Yet, it is the opposite. \textit{Lawrence} reaffirms the Court’s inclination to channel people into the established definition of marriage. The decision in \textit{Lawrence} was possible only because the Court separated the question of the constitutional right to engage in consensual sodomy from the question of same-sex marriage. \textit{Id.} at 2484. If the Court merged the two of them, it would 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. Moreover, the story of this right is inexorably linked to marriage. In \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), the Supreme Court refused to recognized 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”. \textit{Id at} 191.
\textsuperscript{41} \textit{Eisenstadt}, 405 U.S. at 453.
\textsuperscript{43} See \textit{id.} at 99-114.
\textsuperscript{44} See \textit{Knouse, supra} note 22 at 369; Ruthann Robson, \textit{Assimilation, Marriage, and Lesbian Liberation}, 75 TEMP. L. REV. 709, 734 (2002).
\textsuperscript{45} 530 U.S. 57 (2000).
State courts must apply "a presumption that fit parents act in the best interests of their children"\textsuperscript{46} 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 family [synonym of the marital couple] model over claims for alternative family structures in which extended family might play a larger role in children’s lives"\textsuperscript{47}. 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* evidence 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.

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.\textsuperscript{48} 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;\textsuperscript{49} instead it has led to the perpetuation of the established definition of the family in a more subtle and diffuse manner.

\textsuperscript{46} Id. at 68.
\textsuperscript{47} Ristroph & Murray, supra note 5 at 1255.
\textsuperscript{48} See JANET DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE, 15-17 (1997).
\textsuperscript{49} Id. at 1255-56.
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.\textsuperscript{50} 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.\textsuperscript{51} Courts first evaluate the longevity, commitment, economic cooperation, and participation in domestic relationships of the non-marital family. If they find that the family fits more or less the mold of the marital family, the courts then proceed to treat the non-marital family as a marital one.\textsuperscript{52} However, this is not the recognition of alternative families or the plurality of the family, but a way of rewarding — sometimes unconsciously others consciously — these families for fitting into the established definition of the family despite not being a marital couple.

The epitome of these kinds of cases is Braschi v. Stahl Associates\textsuperscript{53}. In Braschi, the New York Court of Appeals deemed two unmarried gay men as 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.\textsuperscript{54} Although the court 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 recognize them as such.\textsuperscript{55} Moreover, the Court used the institution of marriage to inform their decision as to whether they were a family. The Court insisted in “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”\textsuperscript{56}. In sum, they based their decision on the similarities between the two men’s bureaucratized, monogamous relationship and the marital couple. The two men fit for the most part the established definition of the family, and thus were rewarded for it.

This line of cases shows also how the marriage proxy creates a hierarchy of family arrangements and promotes social inequalities. At the

\textsuperscript{51} Id. at 1646 (1991).
\textsuperscript{52} Id. at 1641.
\textsuperscript{53} 74 N.Y.2D 201 (1989).
\textsuperscript{54} Id. at 213.
\textsuperscript{55} See id.
\textsuperscript{56} Id. at 212-13.
top of the hierarchy is the marital family. As Tamara Metz points out “[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.”57 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.58 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 in 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, such as 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 scale 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.59 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.60 As

57 TAMARA METZ, UNTYING THE KNOT 43 (2010).
58 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).
60 See Knouse, supra note 22, at 417-19; Robson, supra note 44.
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. 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.

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. 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. The law is not looking at the children but instead at 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

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the family. This creates a regulatory scheme that does not make any sense. 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 for being in an extramarital relationship with their abusers. 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. 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 for society. First, it procures to dictate how intimate relationships should be lived and arranged by signaling and channeling people into the marital family. This forecloses the door for a large group of people to explore other types of possible arrangements. Furthermore, by actively benefiting the established family, the state has created an unfair society by negating rights to people outside the marital arrangement merely because they decided to engage in an alternative family arrangement. Similarly, the state has created a caste system based on family arrangements that disrupts society in profound ways. 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


64 See Flores, 181 D.P.R. at 229-50 (Kolthoff Caraballo, J. conformity opinion). This is the same reasoning that was often asserted to not interfere 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).

65 See Nussbaum, supra note 58 at 683.
unfair society.

III. 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."66

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 section. Some scholars even have been sincere enough to recognize the limitations of the liberal framework.67 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, 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.68 Nussbaum recognizes how marriages creates an undemocratic society that sieves and grants packages of rights to people based on who has access to the institution of marriage.69 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.70

67 See Knouse, supra note 22, at 417-19.
68 Nussbaum, supra note 58, at 683.
69 Id.
70 Pamela S. Karlan, Let’s Call the Whole Thing Off: Can States Abolish the Institution of Marriage?, 98 CAL. L. REV. 697, 698 (2010).
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 intend to challenge it.

Nussbaum argues that marriage has multiple meanings: a civil rights aspect, an expressive aspect, and a religious aspect. She finds the second dimension to be highly problematic in this day and age as 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. She is aware also 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. 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 just 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.” Furthermore, as long as the new established definition does not challenge the idea of the bureaucratized, monogamous, sexuated married couples 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, on giving the same rights that married couples have to other people in similar arrangements. As long as that is the approach, there will 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 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

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71 Nussbaum, supra note 58, at 669.
72 Id. at 672.
73 Id. at 695.
74 Karlan, supra note 70.
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 the state by promoting an unequivocal version of marriage in a nation where (a) there is a strong disagreement about its definition, and (b) there are diverse forms of families co-existing, threatens formal and substantive equality through favoring one arrangement over the others. 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. Metz is also concerned with putting the state in a position of reproducing “deeply contested cultural, social and religious norms and relations” through marriage. However, Metz believes in the regulation of familial arrangements. Her objection is merely that the State under the current regime is securing inadequately important public welfare goals.

Metz sustains that even under liberalism the State should be involved in regulating relationships of care. However, since care giving “no longer takes place within the marital walls” her contention is that 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 exacerbate existing inequalities.” 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.

Her proposal is to broaden the kind of family arrangements that can

75 Although she does not explicitly talk about the marriage as a proxy for defining the family, her analysis departs from an understanding of the existence of the family-marriage dyad.
76 Metz, supra note 57, at 7.
77 Id. at 7.
78 Id. at 32.
79 Id. at 14.
80 Id. at 10.
81 Id. at 11.
82 Id. at 13.
83 Id. at 12.
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) – is founded on the notions of bureaucracy, monogamy, sexuated relations and child rearing that characterize the definition of the family. Although Metz does not proffer any concrete definition of the ICGU, bureaucratization must be an integral part of them 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. 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.

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.

Thus, we are not confronting a proposal which seeks to defy the elements of the unequivocal definition of the family, but which looks, like Nussbaum’s, for a way to impose them into a broader range of family arrangements. Hence, 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.”

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

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84 Id. at 13.
85 Id. at 127.
86 Id. at 135.
87 Id. at 141, 147.
88 Id. at 134.
regulatory scheme. Her proposal does not oblige 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. As we discussed, as long as there is an established definition, the inequality problems would still remain the same. Then again, 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.

Liberal scholars, on the other hand, who 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, which render society less democratic, will never disappear by merely replacing civil marriage with another relationship-centered institution such as a civil union regime.\textsuperscript{89} Her reasoning reproduces the same contentions we 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.”\textsuperscript{90} 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 the Due Process, Equal Protection, Establishment, and Free Speech Clauses.\textsuperscript{91} She sustains 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”\textsuperscript{92} 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.”\textsuperscript{93}

\textsuperscript{89} Id. at 369.
\textsuperscript{90} Id. at 362.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 369.
\textsuperscript{93} Id. at 362.
Inasmuch as civil marriage cannot be democratized, she advocates for its abolition.\textsuperscript{94} Knouse boldly proposes the removal of the state from the business of affirming sexual partnerships through marriage or any other similar institution.\textsuperscript{95} 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.\textsuperscript{96} 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.\textsuperscript{97}

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.

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

\begin{quote}
\textbf{Michele}: È solo un po’ di nostalgia.
\textbf{Serra}: E di che?
\textbf{Michele}: Forse di una banale e stupida vita normale.
\textbf{Serra}: Ma quella c’è l’hai già.\textsuperscript{98}
\end{quote}

\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 368.
\textsuperscript{97} \textit{Id.} at 419.
\textsuperscript{98} Le fate ignoranti, R&C Produzioni, Films Balenciaga, Les, Programme MEDIA de la Communauté Européenne & Ministero per i Beni e le Attività Culturali 2001. The following is the translation of the quote: Michele: I’m just a bit nostalgic.
The problem with all these liberal proposals is their focus on rights. In order to open the bundle of rights to new groups, liberal scholars are forced to define the family in a particular manner, which 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 for us to find a way to successfully do so, 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 us to abandon the liberalist paradigm and move to a paradigm more akin to power allocations. Such paradigm is hegemony.

A. Current Understanding of Hegemony

The concept of hegemony was primordially coined and 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 were often its strongest supporter. 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

Serra: For what?
Michele: Maybe for a stupid and trivial normal life.
Serra: But that you already have.

components of a larger structure of subordination: the historical bloc. \(^{100}\)
The historical bloc, according to Gramsci, forms a giant system that is
internalized as “common sense” after which domination ensues. \(^{101}\)

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; \(^{102}\) he had a more nuanced
understanding of the reasons that belies domination. His explanation
encompassed instead all productive structures of hegemonic discourses,
such as cultural and political institutions.

By incorporating into his analysis the role of civil society, Gramsci
expanded as well 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”. \(^{103}\)
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’”. \(^{104}\)

For Gramsci, domination is accomplished and maintained in two
axes. 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.

Gramsci referred to the first axis in multiple ways: physical force,

\(^{100}\) Antonio Gramsci Selections from the Prison Notebooks of Antonio Gramsci
\(^{101}\) Id.
\(^{103}\) Kapur & Mahmud, supra note 102, at 415.
\(^{104}\) Id. at 414-15 (citations omitted).
authority and violence. In contrast, he referred to the second axis as: consent, hegemony and civilization. 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.

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.105

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.”106 The consent axis is based on the creation of an 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 taking control of what Marx and Hegel denominated “civil society.”107 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 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 that no one in society dares to defy or could challenge; it is almost impossible, for it requires a

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105 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 supra note 99, 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 102, at 419.

106 Litowitz, supra note 99, at 519.

107 This corresponds to what Althusser denominated “the ideological state apparatuses”.

counter-hegemonic act that would unveil the institutionalization of practices of domination which, albeit being 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…” 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.

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,” since it preserves the status quo. The establishment of that ruling worldview requires, according to Gramsci, the mechanisms of universalization, naturalization and rationalization. This three-step mechanism attempts to

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109 To illustrate this sense of resignation that hegemony produces and how difficult it renders to disestablish “the family” by creating a pervasive and an unequivocal idea of the family, I would like to share the genesis of this project. In 2006, I was teaching in Puerto Rico 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 La fata ignorante (His Secret Life) portrays a very peculiar family composed of a widow, the gay lover of her husband, an ex-prostitute, an immigrant, a transsexual and an HIV patient. All these characters came up together under the same building, helped and took care of each other, and shared religiously the dinner table every Sunday. The cover for the DVD and the poster for the film include, 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. This highlights the legal and social conflict addressed in the paper: we are able to recognize the existence of diverse family arrangements 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.
111 Litowitz, supra note 99, at 515.
explain the process by which the dominant group through the law and other social institutions such as the media, the schools and the church forge an ideology that is embraced by the subordinate groups as the only one possible. This view is internalized for everyone in society as the “right one” since it is rationalized as natural and upheld to be in the interest of all the people, even though is in detriment of the dominated class and favors only the ruling groups.

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.”112 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.”113 In this second step, by naturalizing certain conduct, the dominant group prevents the subordinate groups from defying their power, 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.”114 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

112 Id. at 525.
113 Id. at 526.
114 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).
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 contested.”\(^{115}\) 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.\(^{116}\) Since the mechanism by which this acquiescence to being dominated takes place is hidden from the consciousness of the masses, it can be said that hegemony refers to a “power that maintains certain structures of domination but that is ordinarily invisible.”\(^{117}\) The mechanisms of domination remain invisible, since their foundations are naturalized under a hegemonic discourse perpetuated by various social institutions.\(^{118}\)

Gramsci’s formulation of hegemony being intrinsically linked 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.

\(^{115}\) Fiori, supra note 110, at 238

\(^{116}\) That is the reason why – as we will see in Section IV-A, infra pp. ____ – 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.


\(^{118}\) As Susan F. Hirsch and Mindie 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.

\textit{Id.} at 6-8 (citations omitted).
First, instead of referring to class/exploitation, subsequent thinkers formulate domination in terms of discourse/marginalization.\footnote{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, supra note 99, at 534.} In addition, the idea that there is only one 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.\footnote{Id. at 536.} 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.\footnote{Id. at 540.} Instead of utilizing the class label he argues for its substitution for that of a code.\footnote{Id.} According to Litowitz, in the current state of society subordination does not come from the submission “to the will of the dominant class but rather to perpetuate a code [(legal institutions and informal norms of conduct)] that enables a dominant set of institutions and principles.”\footnote{Id. at 541.} Notwithstanding the importance of this discussion,\footnote{Even if we accept Litowitz’s point, form 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 paper will adhere to the theory that there are various hegemonic discourses co-existing but concentrate in one of them: family-normativity. In addition, instead of talking about class/exploitation this paper will refer to the domination in terms of discourse/marginalization.} 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 our next section, the formulation of hegemony as the conflation of various hegemonic discourses will help us understand 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

In order for us to achieve familial disestablishment and avoid going back to the loop of defining the family, we must first identify the hegemonic discourse(s) that are securing an unequivocal definition of the family. Since hegemony is mostly a hidden process, the only way for us to do that 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 up until this day. 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.\textsuperscript{126} As we discussed, scholars, such as Martha Nussbaum, have been referring to that added value of the family-marriage dyad as the epicenter of familial establishment.\textsuperscript{127} 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.\textsuperscript{128} Similarly, thinkers and activists of alternative family arrangements could not understand why most people in society seem not to be willing to defy such conferment even when it directly affects them.\textsuperscript{129} Family-normativity is the

\textsuperscript{125} This section 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.

\textsuperscript{126} \textit{In re Marriage Cases}, 183 P.3d 384 (Cal. 2008).

\textsuperscript{127} Nussbaum, supra note 58, at 669.

\textsuperscript{128} Id. at 669-70.

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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 countering familial establishment.

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 the 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) family arrangement.130

Although family-normativity and its characteristics as a whole have eluded scholars, some of its traits have been previously isolated. For

130 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.
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. She clustered these characteristics under the concept of doctrine of exclusivity. 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.\textsuperscript{131}

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 – is for having children and for educating them. For instance, in \textit{In re Marriage Cases} the Court stated that: “the role of the family in educating and socializing serves society’s interest by perpetuating the social and political culture and providing continuing support for society over generations”\textsuperscript{132}. Likewise, the Supreme Court of the United States in \textit{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.”\textsuperscript{133} 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 offspring producing roles as well as with 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.\textsuperscript{134} 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,\textsuperscript{135}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{131} Kavanagh, \textit{supra} note 42 at 88-89.
\item \textsuperscript{132} \textit{In re Marriage Cases}, 183 P.3d 384, 423 (Cal. 2008).
\item \textsuperscript{133} 431 U.S. 494, 503-04 (1977).
\item \textsuperscript{134} \textit{See FRIEDRICH ENGELS, EL ORIGEN DE LA FAMILIA, LA PROPIEDAD PRIVADA Y EL ESTADO} (New York, Ocean Sur ed., 2007) (1884).
\item \textsuperscript{135} \textit{See Okin, supra} note 59.
\end{itemize}
\end{footnotesize}
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 we 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”. \(^{136}\) Cornell’s comment is of 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. \(^{137}\) 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 it can be concluded from the above discussion, 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. \(^{138}\) Courts still today follow the same formulation. \(^{139}\) 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. \(^{140}\) For instance, as Murray and Ristroph correctly conclude, the Supreme Court of the United States in Reynolds v. U.S. was 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 constitutional challenge to it on premises of infringing the freedom of religion. \(^{141}\)

Moreover, monogamy is such a strong element of family-

\(^{137}\) Knouse, supra note 22, at 362.
\(^{138}\) See Witte, supra note 18.
\(^{140}\) 98 U.S. 145 (1878).
\(^{141}\) Ristroph & Murray, supra note 5, at 1262.
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;\textsuperscript{142} and in the case of those states that do not criminalize it, adultery has serious legal consequences.\textsuperscript{143}

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.\textsuperscript{144}

The personal experience of Kavanagh illustrates how family


\textsuperscript{144} Kavanagh, \textit{supra} note 42, at 85 (2004).
normativity is embodied in the law. Kavanagh states that had his family come in contact with that system, their story would have been drastically re-written. “From a cast of several children, multiple parents, and innumerable other caregiving adults, the state would have stepped in to rewrite my family’s story [Kavanagh’s] to meet its formal model. We would have been a family with two children and two divorced parents.”

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 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.

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, the only way to fulfill the requisite of a sexuated was by having two heterosexual sexuated beings, because sexuated meant being capable of reproduction. However, with technological advances, today it is possible for the sexuated beings not to be

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145 Id. 146 Id. 147 Id. 148 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).
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.\(^\text{149}\) In that way, they would have eased their road into the family-marriage dyad and in turn participating into the power of 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 the end only require (a) having parents exercise their “duties” as guardians and (b) children to be the subject of the custodian efforts.\(^\text{150}\)

Thus, once gay couples were started to be seen as normal (monogamous parents) and not any more as queer (promiscuous individuals) the group was capable of fitting into the family-normativity discourse and to be in a position to start contesting other discourses such as hetero-normativity that have been preventing them access to other centers of power. Yet, they have never contested the hegemonic discourse of family-normativity, and have not ever intended to do it. 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 Nussbaum’s proposal does not at all challenge family-normativity.

The experience with gay marriage reveals another interesting feature of family-normativity. For most part 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


\(^{150}\) Olsen, supra note 7, at 8-9.
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 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 our analysis on familial disestablishment that we proffer a theoretical approximation of the phenomena that ensues during this period.

First, we must envisioned hegemonic discourses 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. . . .”151 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.\textsuperscript{152} 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 bore. 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.

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 and to some point being in harmony with the dominant group’s culture what enables them to displace the established system of beliefs.\textsuperscript{153} The effectiveness of this strategy strives on the fact that the “dominant group is more willing and able to accept influence and change from those subordinate groups that have ‘accepted’ dominant ideology”.\textsuperscript{154} Otherwise, the dominant group would activate all the means at their disposal to reinforce both the hegemony and the physical axes of their


\textsuperscript{153} \textit{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”. \textit{Id.} However, even though it is true that the “culture that it is developed by counter-hegemonic social movements is necessarily influenced by hegemony ideology”, \textit{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.

\textsuperscript{154} \textit{Id.} at 15.
hegemonic discourses.\textsuperscript{155}

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 sustains, “[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”\textsuperscript{156}. In that way, they would gain as adepts 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 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.”\textsuperscript{157} 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.

\textsuperscript{155} 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”. \textit{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 \textit{supra} note 117, at 8.

\textsuperscript{156} Carnoy, \textit{supra} note 152, at 13.

\textsuperscript{157} \textit{Id.}
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 produced and brought into the political light that lead 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 Section IV-A, so we will not go into further details.

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 adepts by the counter-hegemonic discourse and the loss of adepts 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 subtly imposed upon them are nothing less than a social construct that can be changed. As we will discuss in the next section, 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

158 See supra pp. ______.
axes and the phase of resistance would begin. If the latter are successful, the next stage would not take place; but if that does not happen, the debunking of the hegemonic discourse would occur, and the last stage of the cycle would 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 if we intend to uncover the reasons why family-normativity has not faced any successful contestation and to 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. 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

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between people.” 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. On the objective side, the social constructs that we create are taken as natural and inevitable. 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, but instead sees himself as a mere commodity to be bought and sold by others. 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 our capacity to see that there are other possibilities to the social constructs promoted by dominant groups, and with that 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…” It was precisely this loss of

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161 Litowitz, *supra* note 159, at 408.
162 *Id.*
163 *Id.*
164 PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF A REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 89 (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
dialectical thought that was Lukács’ main concern with reification. The decisive question when it comes to reification is whether one can still remain aware to the fact 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.” 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”. Lukács argued reification can be overcome by engaging in dialectical thinking. By dialectical thinking, Lukács 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; and moreover, that we should transcend those givens and even negate them. “If one realizes this, one returns to oneself as an active agent and the reified institutions are turn back into social relationships.”

To arrive to those conclusions, we must compare our reified notions to alternative arrangements, both real and imagined. 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 making us less comfortable with our established institutions and practices.” In other words, the solution for overcoming reified social constructs is to engage in a critical project of demystification. This project of 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”. This would unleash “a feeling or irony towards one’s local practices and discourses to be disrupted.

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165 Litowitz, supra note 159, at 409.
166 Id. at 409.
167 Id.
168 Id. at 411.
169 Id.
170 Id.
171 Id. at 410.
172 Id. at 403.
173 Id. at 406.
174 Id. at 419.
institutions"\textsuperscript{175} and a willingness to be pragmatic and try new arrangements.\textsuperscript{176}

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, we 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 we discussed in Section II,\textsuperscript{177} 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 [referring to the family-marriage dyad] is the natural and fundamental group unit of society….”\textsuperscript{178}

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. Our discussion in Section III\textsuperscript{179} 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”\textsuperscript{180} and that the family “is entitled to protection by society and the State.”\textsuperscript{181} 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

\textsuperscript{175}Id. at 414.
\textsuperscript{176}Id.
\textsuperscript{177}See supra pp. ______.
\textsuperscript{178}Universal Declaration of Human Rights, Art. 16 (emphasis added).
\textsuperscript{179}See supra pp. ______.
\textsuperscript{180}Universal Declaration of Human Rights, Art. 16 (emphasis provided).
\textsuperscript{181}Id.
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 section III\(^{182}\), 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.”\(^{183}\) 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.\(^{184}\) 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.”\(^{185}\) 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.”\(^{186}\)

Our contention, however, is that such a desire could only be the by-product of a successful past strategy to shield and strengthen a particular hegemonic discourse by means of the law as a defense mechanism against some type of contestation. The success of the defense mechanism strives on the fact that during such a reification process both the shielded 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.

\(^{182}\) See supra pp. ______.
\(^{183}\) Litowitz, supra note 159, at 402.
\(^{185}\) Litowitz, supra note 159, at 401.
\(^{186}\) Gabel, supra note 164, at 45.
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.” 187 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 section, 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 operate only to get them through the system without questioning the rationality of the system.” 188 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 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-referential, self-legitimating and difficult to subvert because it forms a closed system any given time,” 189 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 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.” 190 When hegemonic discourses are so enmeshed with the

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187 Litowitz, supra note 99, at 540-41.
188 Litowitz, supra note 159, at 410-11.
190 Litowitz, supra note 159, at 419.
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 make 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 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
families as the center of all political activities. For him, the family is the example of the first model of political societies. He even justified the political subordination of women based on the political nature of the family. Rousseau sustained 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.

In the same manner, Locke takes the family as the starting point for his formulation of a political society. In Locke’s conception, the man appears again as the center of power over the wife, the children and the slaves. 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. 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.

For pre-liberal thinkers, thus, the family was conceptualized as an “unequivocal natural event” which 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 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. That shift meant, thus, that under liberalism the family was also discarded as a political entity.

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191 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 18, at 47-63.


193 Okin, supra note 59, at 33-35. This explains why the family-marriage dyad has been the epicenter of patriarchy contestation.

194 John Locke, ENSAYO SOBRE EL GOBIERNO CIVIL (México, Fondo de cultura económica, eds. 1941) (1660–1662).

195 Id.


197 See id.

198 See id.
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. In reality, for him the family most of the time is an obstacle in the project of justice. Rawls envisioned the family as a place where citizens learn their moral duties but only in the most rudimentary way, and also where is not possible to apply the principle of fair equality of opportunity since the benefits of inheritance disrupt the principle of meritocracy. 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 exercise 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.

Thus, under liberal theories, even in the rare instance that the family is deemed to possess some political dimension, the family is never capable of being a political entity by itself. These ideas permeate current Family Law jurisprudence, as 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, 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

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199 See JOHN RAWLS, A THEORY OF JUSTICE 74, 103 (1971).
200 See id.
201 See Baumgarth supra note 196.
202 See ROBERT NISBET, THE QUEST FOR COMMUNITY (1953).
family.\textsuperscript{204} 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.\textsuperscript{205} 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 what makes the decision worth examining, as 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 \textit{Belle Terre} states:

\begin{quote}
My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First 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
\end{quote}

\textsuperscript{204} 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. \textit{Belle Terre} is so a unique case because in this case, unlike \textit{Griswold}, \textit{Loving}, \textit{Reynolds}, \textit{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 the explicitly defined the family.

\textsuperscript{205} 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”. \textit{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, \textit{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”. \textit{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 status. 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.
selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.\textsuperscript{206}

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 require recognizing the family as a political entity, which would contravene the system’s internal structure.

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, recognizing the family as a political institution is not cognizable in our legal structure, because it has been internalized since liberalism as non-political. This liberal notion is precluding the 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, just as it happened in the decision of \textit{Belle Terre}. Liberalism itself is part of the reason why we have not been able to 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; and 2. the juridification of the family.

\textsuperscript{206} \textit{Belle Terre v. Boraas}, 416 U.S. at 15 (citations omitted).
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 subvert manner. Anne C. Dailey identified the beginning of this period in the United States jurisprudence in the 1920’s when the Supreme Court decided the cases of *Meyer v. Nebraska*\(^{207}\) and *Pierce v. Society of Sisters*\(^{208}\). Those cases symbolize the birth of the practice of not intervening with the marital family as a way to benefit it and channel people into it. The Court recognized the rights of parents to decide about the education of their children without the state’s intervention.\(^{210}\) They based their decision on the rationale that the family was not a political entity but a private institution. This liberal conception of the family as non-political started to be replicated in the law. For instance, decisions such as *Griswold* and *Eisenstadt*\(^{211}\) copied that rationale and reinforced the notion of the family as a private entity that is beyond state intervention.

That legal change brought as well a shift in the mentality of the citizens, who felt confident the State would not interfere with the privacy of the family. With that assurance, enforcing family-normativity in the physical axis became easier, since there was no political accountability for doing so. Moreover, as the family was pushed into the private realm, this era was accompanied also by a scarce theorization of the family that made it easier as well to enforce family-normativity in the consent axis, as there was no class producing any theoretical work capable of counteracting the hegemonic discourse. This led to 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.

\(^{207}\) 262 U.S.390 (1923).
\(^{208}\) 268 U.S.510 (1925).
\(^{210}\) 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 as a way channel people into it.
\(^{211}\) See the discussion of these two cases in Section II-C *supra* pp. ____.
3. The Juridification of the Family

A crucial event in the above process was the creation of the constitutional right to marry. 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 axe of family-normativity and the tools to enforce a unique worldview of the family.

With individuals resting 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 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. 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.

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212 This constitutional right was recognized in the United States in the decision of Loving v. Virginia, 388 U.S. 1 (1967).
other words, reification ensues.\textsuperscript{214}

As a result of reification, individuals 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”.\textsuperscript{215} 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 it has been noted in footnote 141, up to 1997, in the federal system alone there were more than 1,049 statutes regarding marriage. As the legal regulations exploded, the legal system gained more prominence in the promotion of the family-normativity discourse under the guise 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 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.

\textsuperscript{214} See section IV-D, supra pp. _____, for a discussion on how reification works.
\textsuperscript{215} Litowitz, supra note 159, at 410-11.
As we have seen in section III, this reification and its effects has 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.\textsuperscript{216} For instance, Metz’s proposal still has at its core the State regulating family arrangements through the ICGU.\textsuperscript{217} The same happens with Knouse’s proposal to \textit{abolish marriage}, as she advocates at the end for the State to regulate the family through the provider proxy.\textsuperscript{218} 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.\textsuperscript{219} 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.

V. A VOW TO EQUALITY: ABOLISHING CIVIL MARRIAGE

\textbf{Samantha}: Why does everybody want to get married and have children? It’s so cliché!\textsuperscript{220}

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

\textsuperscript{216} See Knouse, \textit{supra} note 22; Metz, \textit{supra} note 57; Nussbaum, \textit{supra} note 58.
\textsuperscript{217} See Metz, \textit{supra} note 57.
\textsuperscript{218} See Knouse, \textit{supra} note 22.
\textsuperscript{219} See Jill Hasday, \textit{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).
\textsuperscript{220} \textit{Sex and the City: Just Say Yes} (HBO cable television broadcast Aug. 12, 2001).
The Case for Abolishing Civil Marriage

could be eradicated.

Since in order to engage in dialectical thinking we must transcend the discourses that we have taken as given and negate them, the best way to do it would be abolishing civil marriage. This would give us 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 section III — is not that 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”.

Abolishing civil marriage, as Tamara Metz notes, could mean a shift in the control of marriage to cultural and social authorities. The proposed regime could benefit marriage by invigorating its hegemonic status. As we discussed in section III, Metz’s proposal did not challenge family-normativity. 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.

Precisely this is the objective of Edward Zelinsky in abolishing

221 Litowitz supra note 99 at 411.
222 See supra pp. ______.
224 Id. at 144.
225 Id. at 144.
226 See supra pp. ______.
227 Metz, supra note 57, at 10.
marriage. He advocates for deregulating marriage on a pro-marriage basis. Zelinsky would like to strengthen marriage through its deregulation.\(^{228}\) His claim is that marriage “should become solely a religious and cultural institution with no legal definition or status.”\(^{229}\) The main argument Zelinsky presents is that “eliminating civil marriage will strengthen marriage by encouraging competition among alternative versions of marriage.”\(^{230}\) 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.”\(^{231}\)

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.\(^ {232}\) 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 for which Zelinsky’s proposal should not be taken 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 we have seen, 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

\(^{228}\) Zelinsky, supra note 27, at 1163.

\(^{229}\) Id.

\(^{230}\) Id. at 1173.

\(^{231}\) Id.

\(^{232}\) See Stephanie Coontz, Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage (2005);
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.”\(^{233}\) 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 kind 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.”\(^{234}\) In the case of marriage, he believes that reducing political friction would bolster marriage,\(^{235}\) 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 in other “more pressing political issues.” \(^{236}\) However, as our discussion of reification shows, that part of breaking from hegemonic ideas is precisely engaging in dialectical thinking, which requires an active political discussion.\(^{237}\) A proposal to disestablish the family cannot intend to reduce political friction, because it is precisely political friction what 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

\(^{233}\) Id. at 1182.
\(^{234}\) Id. at 1164. This argument is mainly elaborated to convince the proponents of same-sex marriage to embrace his proposal. Zelinsky sustains that a gay couple who is interested in the social approval of their sexuality should not have any repairs 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.
\(^{235}\) Id. at 1164.
\(^{236}\) Id.
\(^{237}\) See supra section IV-D pp. ______.
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. 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.\(^{238}\)

Crane intends to stop this alleged erosion of the definition of marriage by giving back to religious institutions the exclusive faculty to regulate it.\(^{239}\) He believes privatizing marriage would “restore religion to marriage, and marriage to religion.”\(^{240}\) 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 an hegemonic discourse is to be preserved, the government and legal institutions cannot be completely out of the picture. Under his proposal, the State must recognize the marriages celebrated by religious communities and legally sanction them.\(^{241}\) His proposal is a multi-regulating scheme just as Zelinsky’s, and thus fails in the same aspects.

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\(^{238}\) For instance, Crane points out how this reified idea that family arrangements must be legally regulated is making 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, Catholic tradition regards marriage as a spiritual estate or sacrament, and hence a 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 Jewish nor the Catholic tradition is marriage understood as primarily the province of the state.


\(^{239}\) *Id.* at 1259.

\(^{240}\) *Id.* at 1253.

\(^{241}\) *Id.* at 1252.
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 other.

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-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 family arrangements but rather on the 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.

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 pertaining 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
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 we 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 that we discussed in section II, 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 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; and at the same time it would avoid stigmatizing people equally situated who today does 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 could be one of such issues. 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 facing the question of 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 dialectical thinking is a better way of facing our more pressing issues, as it precludes treating differently equally situated people. 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.

242 The post-marriage landscape will be the topic of a future article.
243 See Section II-C supra pp. ______.
VI. 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.244

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 who withhold 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 establishment because they depart from the liberal 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.

244 Olsen, supra note 7, at 4.
Since all responses to the established definition of the family up to this date ultimately bring us back to the problem of familial establishment, we 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 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 any 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 some final answers to our inquiries.

This analytical inquiry produced the three main contributions of this paper. First, our 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.

Albeit 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.