

# The Cardozo Electronic Law Bulletin

Una possibile teoria unitaria per il  
risarcimento del danno non patrimoniale  
alle persone giuridiche

Davide Gianti

We Are Family: A Queer Legal  
Analysis of non Conjugal Relationships

Antonio Vercellone  
Veronica Pecile

«Al di sopra della mischia»:

Diritto e degenerazioni del Politico

Emanuele Ariano

## The Cardozo Electronic Law Bulletin

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ANTONIO VERCELLONE

VERONICA PECILE

**WE ARE FAMILY<sup>1</sup>:**

## **A QUEER LEGAL ANALYSIS OF NON- CONJUGAL RELATIONSHIPS<sup>2</sup>**

### **Abstract:**

This article develops a queer critique of the notion of family that is predominant in Western legal systems by exploring the category of non-conjugal relationships. Rather than extending the scope of the marriage institution to subjects previously excluded from it, we argue that the legal conceptualization of *de facto* relationships can help moving beyond the mainstream equal rights discourse focused on non-discrimination and formal equality and achieve a form of protection for LGBTQ+ lives that fosters substantial equality. Case law and legal practice will be analyzed to show how the marginalization of individuals on grounds of their sexual behaviors and practices can be not only perpetuated, but also fought through a tactical use of existing legal arrangements. In the conclusion, we argue that legally reinventing family can provide an emancipatory path to question the predominant norms concerning sexuality that ultimately reproduce socioeconomic imbalances.

**Keywords:** family law, critical theory, queer legal theory, sociology of law

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### *1. Introduction*

The juridical morphology of family envisaged by the Western legal tradition mimics a certain structure of family, founded on the idea of the nuclear straight couple, having sexual intercourses, living together, and possibly with children. This is the institutional result of a legal regime that puts marriage – an institution

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<sup>1</sup> The title of this paper is a tribute to the iconic song by Sister Sledge, which we believe joyfully represents the ideas we wish to convey with this work.

<sup>2</sup> This paper is the result of a shared reflection and analysis carried out together by both authors, who consider it not only as a common work but rather as a commons. However, Antonio Vercellone wrote paragraphs 1, 3 and 4 while Veronica Pecile wrote paragraphs 2 and 5.



connecting a certain bundle of rights and duties to a rigid structure – at the cornerstone of its theoretical construction. Such a regime has been strongly criticized by scholars and activists highlighting the heteronormative nature of the concept of family at the core of the Western legal tradition. This notion is indeed very exclusionary since a large number of families do not fit within this paradigm: in an era of pluralism of family models, many people choose to develop their familiar bonds in ways that significantly diverge from the model of the married couple living with its children<sup>3</sup>.

An example of this pluralism is offered by polygamist and polyamorous families. Scholarship highlights how models of family exceeding the concept of the couple are becoming widespread in Europe and North America, and how this phenomenon poses serious issues with respect to their integration and legal recognition<sup>4</sup>. Another example can be drawn from the so-called “mutual aid families”, namely unions composed of two or more people deciding to share their lives to ensure one another mutual aid and support (think, for instance, of two adult siblings living in the home of their elderly mother, one of them taking full-time care of her, the other pursuing a job in the market to provide the trio with the necessary means of sustenance). Mutual aid unions do not only impair the centrality of the couple as the pivotal unit of the family, but also dismiss the idea that the couple needs to be sexualized and impliedly meant for reproduction. These traits can also be found in the phenomenon of “kinships of choice”, particularly diffused in the LGBTQ+ community, in which two or more friends live together and share their lives as a family to ensure care and constant support to each other<sup>5</sup>. Of course, the most relevant portion of unions falling outside the scope of the mainstream notion of family are *more uxorio* cohabitants, namely those (straight or same-sex) couples living together out of wedlock.

In sum, the idea is that one size does not fit all. The politically powerful suggestion of a queer approach to family law is that of finding a notion of family flexible enough to welcome all *ménages* as a way to achieve substantial equality. In this perspective, the role of legal theory is of finding a path for the conceptualization of such a notion. To do that, we shall rely on the queer and feminist critique of same-sex marriage.

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<sup>3</sup> SCOTT E., SCOTT R., *From Contract to Status: Collaboration and the Evolution of Novel Family Relationship*, in *Columbia Law Review* 115: 293–374, 2015; MARELLA M.R., MARINI G., *Di cosa parliamo quando parliamo di famiglia*, Bari, Laterza, 2015

<sup>4</sup> GRANDE E., PES L., *Più cuori e una capanna. Il poliamore come istituzione*. Turin, Giappichelli, 2018; RIZZUTI M., *Il problema dei rapporti familiari poligamici*. Naples, Edizioni Scientifiche Italiane, 2016.

<sup>5</sup> WESTON K., *Families we Choose: Lesbians, Gays, Kinship*. New York, Columbia University Press, 1991.



## 2. *Queer legal theory: caring about the materiality of queer lives*

Queer theory emerges in opposition to the institutionalization of sexual orientations and identities promoted by the identity-based policies of the North-American liberal left during the 1980s. The normalization of the claims originally made by the sexual liberation movement results in prescriptive indications establishing which sexual behaviors are allowed and which are deviant in the public sphere<sup>6</sup>. Against these disciplinary attempts, queer theory reclaims the multiple, fluid character of sexual identities and their entrenchment in the negotiations and conflicts of everyday life<sup>7</sup>. This position implies a radical refusal of all institutions perpetuating the State-led discipline of sexual practices along heteronormative lines. On such grounds, marriage – and its extension to same-sex couples – is rejected as embodying the State interference in the sphere of sexuality<sup>8</sup>, underpinned by a false hetero/gay dichotomy<sup>9</sup> and by a conception of sexual identities – which are constantly produced by identity politics<sup>10</sup> – as pre-determined and fixed.

The perspective of queer theory has been fruitfully deployed within the field of legal analysis. Criticizing the focus on non-discrimination and formal equality typical of mainstream equal rights discourse, queer legal scholarship looks at the concrete legal situations in which individuals are interwoven and produced as marginal because of their sexual practices and behaviors. Adopting a queer approach to law means considering LGBTQ+ people not as a homogenous identity group, but as a set of vulnerable “subpopulations” looking for the best bargaining options available in a world in which their everyday decisions are deeply influenced by the law<sup>11</sup>. “Queer”, in this sense, refers to “forms of love and intimacy with a precarious social status outside the institutions of family, property and couple form”<sup>12</sup>.

Queer legal theory pays attention to the materiality of queer lives, that is, on how income as well as access to services – such as housing, health, and education – are

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<sup>6</sup> Marella, Maria Rosaria, «Queer eye for the straight guy». *Sulle possibilità di un'analisi giuridica queer*, in *Politica del diritto*, 3, 2017, pp. 383-414.

<sup>7</sup> BINNIE J., *Queer Theory, Neoliberalism and Urban Governance*, in *Queer Theory. Law, Culture, Empire*, ed. Robert Leckey and Kim Brooks, London, Routledge, 2010, pp. 21-36.

<sup>8</sup> DE LAURETIS T., *Queer Theory: Lesbian and Gay Sexualities*. Bloomington, Indiana University Press, 1991; BERSANI L., *Is the Rectum a Grave? AIDS: Cultural Analysis/Cultural Activism* 43, 1987 pp. 197–222.

<sup>9</sup> SEDGWICK E., *Epistemology of the Closet*. Berkeley (CA), University of California Press, 1990.

<sup>10</sup> HALLEY J., «Like Race» Arguments. In *What's left of theory*, ed. Judith Butler, John Guillory, and Kendall Thomas, London, Routledge, 2000, 40-65.

<sup>11</sup> ADLER L., *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform*. Durham (NC), London, Duke University Press, 2018.

<sup>12</sup> CHITTY C., *Sexual Hegemony: Statecraft, Sodomy, and Capital in the Rise of the World System*. Durham (NC), London, Duke University Press, 2020, p. 26.





distributed among LGBTQ+ subpopulations<sup>13</sup>. This implies that desired legal reform in a queer perspective is one carrying out positive distributive impacts for all those who are marginalized on grounds of sexuality and gender<sup>14</sup>. Reform projects informed by a queer legal approach aim at fighting patterns of substantial inequality left intact by a focus on formal equality and equal rights. On this aspect, queer legal theorists resort to the thesis elaborated by Critical Legal Studies in the 1980s on the language of rights as bearing a potentially dangerous legitimizing function<sup>15</sup>. Such language “is a mammoth concession to the logic of the legal regime and it carries the risk that after one’s formal rights have been vindicated, remaining inequities will seem fair, as if they are the result of natural inequalities rather than legally created ones”<sup>16</sup>. In other words, even in a world in which anti-discrimination law is globally enforced and same-sex marriage is introduced in every jurisdiction, substantial inequality may still ravage. For this reason, queer legal theory suggests looking at the material conditions experienced by queer people, while aiming at reform possibilities lying beyond the horizon of the equal rights regime. At the basis of this is the conviction that the marginality of individuals on grounds of their sexual behaviors and practices can be not only perpetuated but also fought through the law.

In the context of Western modernity, minority religious groups are frequently targeted as “deviant” also because of their non-conforming sexual behaviors. In broad terms, the “sexual Other” is any individual or group that does not fit into a strictly defined arena of allowed sexualities, in a world in which “pleasure, desire and agency are assumed to be associated with the West”. Those who occupy a

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<sup>13</sup> ADLER L., *op. ult. cit.*

<sup>14</sup> ADLER L., *The Gay Agenda*, in *Michigan Journal of Gender & Law*, 16, 2009, pp. 147-216; ADLER L., *Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform*, in *Harvard Civil Rights-Civil Liberties Law Review* (Amicus Online Supplement) 46, 2011; RAJ S.S., *Feeling Queer Jurisprudence: Injury, Intimacy, Identity*, London, Routledge, 2020. In opposition to feminist legal theory, queer legal theory considers sexuality as not bound to gender, and criticizes the extension to all people identifying as women the point of view of white middle-class women; in this perspective, sex is politics beyond any male/female or straight/gay frameworks. Despite some later convergences between queer and radical feminist approaches, queer legal theory will continue to denounce the tendency of majoritarian feminism of producing normative narratives of sexuality through specific uses of the law, and criminal law in particular. For a critique of essentialism in legal feminism, see HARRIS A.P. *cit.*, for an analysis of sex as politically productive beyond male/female or straight/gay dichotomies, see KENNEDY D., *Sexy Dressing Etc. Essays on the Power and Politics of Cultural Identity*, Cambridge (MA), Harvard University Press, 1993; for an exploration of the diatribe between feminist and queer theory, see HALLEY J., *Split Decisions: How and Why to Take a Break from Feminism*. Princeton (NJ), Princeton University Press, 2006.

<sup>15</sup> TUSHNET M., *An Essay on Rights*, in *Texas Law Review* 62, 1984, pp. 1363-1403; CRENSHAW K., *Race Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *Harvard Law Review* 101, 1988, pp. 1331-1387; KENNEDY D., *A Critique of Adjudication (Fin de Siècle)*. Cambridge (MA), Harvard University Press, 1997.

<sup>16</sup> ADLER L., *Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform*, 46, *Harvard Civil Rights-Civil Liberties Law Review* (Amicus Online Supplement), 2011.



position of otherness from this allowed perimeter of behaviors are represented through narratives of “violence, victimization, impoverishment and cultural barbarism”<sup>17</sup>. Postcolonial scholarship provides important insights on the orientaling character of Western discourses on sexuality and stresses how the mainstream LGBTQ+ political terminology is incapable of grasping the range of non-Western sexual behaviors and practices<sup>18</sup>. Not only the hegemonic gay rights model but also the queer idealtype are criticized for their alleged characters of universality and exportability while being essentially white, North American, and middle-class<sup>19</sup>.

The populations of “sexual others” who do not fit into such normative models of gayness and queerness are very broad, not only when looking outside Western societies but even within them. It has been underlined how religion-informed reforms in family law could offer a potential legal basis for building up queer legal spaces<sup>20</sup>. Indeed, the legal recognition obtained by religious groups of expansive family notions – not based on the majoritarian institution of marriage, but rather disrupting its structure – can provide a useful point of departure for LGBTQ+ movements seeking legal protection for their multiple forms of families, kinships and bonds.

In this paper, we analyze how case law and legal practice on *de facto* unions developed in Western legal systems can provide a cornerstone for the protection of family constellations deviating from the dominant Western conception of the family. The functional recognition of alternative family structures can be beneficial not only for LGBTQ+ lives but also for religious groups living in conditions of structural socio-economic exclusion in Western contexts.

### 3. *Applying the queer legal critique to marriage*

Applying the critique set forth above, it is possible to argue that the extension of marriage (or institutions alike, such as civil unions) to same-sex couples ends up

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<sup>17</sup> KAPUR R., *De-radicalising the rights claims of sexual subalterns through ‘tolerance’*, in *Queer Theory: Law, Culture, Empire*, ed. Robert Leckey and Kim Brooks, London, Routledge, 2010, pp. 37-52.

<sup>18</sup> On the idea of a queer female diasporic subjectivity, see GOPINATH, G. *Impossible Desires: Queer Diasporas and South Asian Public Cultures*. Durham (NC), London, Duke University Press, 2005. On the relations between queerness, neoliberalism and Islam beyond the traditional/modern and East/West dichotomies, see SAVCI, E. *Queer in Translation: Sexual Politics Under Neoliberal Islam*. Durham (NC), London, Duke University Press, 2021.

<sup>19</sup> MASSAD J. A., *Desiring Arabs*, Chicago, University of Chicago Press, 2007; LECKEY R., BROOKS K., *Introduction*, in *Queer Theory. Law, Culture, Empire*, ed. Robert Leckey and Kim Brooks, London, Routledge, 2010, pp. 7-8.

<sup>20</sup> REDDING J., *Queer-religious potentials in US same-sex marriage debates*, in *Queer Theory. Law, Culture, Empire*, ed. Robert Leckey and Kim Brooks, London, Routledge, 2010, p. 123.





reinforcing the most traditional patterns of the legal notion of family<sup>21</sup>. In other words, consistently with the Marxian notion of “capitalist caption”, gay marriage can be seen as the result of an assimilationist process which allows only the relationships that can be normalized within the accepted paradigm – which is thus re-confirmed – to be accepted by the law. The traditional paradigm of the sexualized married couple has not yet been overcome in favor of a more flexible notion of family able to welcome all unions. On the contrary, such a paradigm has been extended to the same-sex unions conforming to it. As a result, in the field of family law the modification of legal regimes in light of an ever-changing society has merely assumed the form of a slow broadening up of its traditional structure (marriage) to encompass some situations historically excluded from it.

We thus need to investigate whether another path is possible to achieve systemic change in the field of family law. With this respect, the reflections of Critical Legal Studies in the realm of private law, and property law in particular, may be helpful. For a long time, the academic debate and political struggle concerning the allocation of property rights were structured in ways that are similar to the ones we are witnessing in family law. In the last decades of the 20<sup>th</sup> century, the allocation of property interests in favor of those excluded from ownership was deemed as the solution to social exclusion and marginalization (i.e. poverty). After the 2008 economic crisis, theoretical reflections and political practices challenged this approach and attempted to reduce inequality not by increasing the number of owners, but rather by radically deconstructing the notion of property<sup>22</sup>. Legal theories and social practices have thus emerged to enact new sophisticated models of ownership paving the way for a new conceptualization of property, one based on inclusion (rather than exclusion) and distribution (rather than maximization) of wealth<sup>23</sup>.

It is worth wondering if a similar approach could be applied to family law<sup>24</sup>. In

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<sup>21</sup> BARKER N., *Not the Marrying Kind: a Feminist Critique of Same-Sex Marriage*, London, Palgrave, 2012; FRANKE K., *The Curious Relationship of Marriage and Freedom*, in *Marriage at a Crossroads: Law, Policy and the Brave New World of Twenty-First-Century Families*, ed. Marsha Garrison and Elizabeth Scott, Cambridge, Cambridge University Press, 2012, pp. 87-106; ETTLEBRICK P., *Domestic Partnerships, Civil Unions or Marriage: One Size does not Fit All*, in *Albany Law Review* 64, 2001, pp. 905-914; WARNER M., *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life*. New York, The Free Press, 1999.

<sup>22</sup> OSTROM E., *Governing the Commons. The Evolution of Institution for Collective Actions*. Cambridge, Cambridge University Press, 1990; DE SHUTTER O., BALAKRISHNAN R., *Property Rights from Below: Commodification of Land and the Counter-Movement*, London, Routledge, 2019; DARDOT P., LAVAL C., *Commun: Essai sur la révolution au XXI<sup>e</sup> siècle*, Paris, La Découverte, 2014.

<sup>23</sup> An example of these models with reference to urban property is the Community Land Trust. See VERCELLONE, A. *Il Community Land Trust. Autonomia privata, conformazione della proprietà, distribuzione della rendita urbana*. Milan, Giuffrè, 2020.

<sup>24</sup> MARELLA M.R., *Critical Family Law*, in *Journal of Gender, Social Policy and the Law*, 2, 2011, pp. 721-754.



other words, instead of working to broaden the scope of marriage to those excluded from it, without questioning its structural features, it may be worth looking for a notion of family flexible enough to welcome all different types of unions. To do that, our analysis will investigate whether in the matrix of existing law any “recessive” notion can be found, one coexisting with the mainstream notion of family based on marriage and bearing transformative potential.

#### 4. Queering marriage through *de facto* relationships

Within European legal systems, a transformative notion of family can be found in the discipline of *de facto* unions, namely those *ménages* carried out by the parties out of wedlock. In these legal regimes, the protection of *de facto* families is not enshrined in any statute but developed in case law and legal practice.

The Italian legal system is a paradigmatic example of this trend<sup>25</sup>. In Italy, *de facto* families have only recently been subjected to specific statutory regulation – a discipline that is mostly the crystallization of rules and principles elaborated by case law<sup>26</sup>. Although the new statute entails specific provisions concerning the scope of application, legal scholars and practitioners agree that the national regulation of *de facto* families has to be found in case law prior to the enactment of the statute<sup>27</sup>.

The scope of application that can be drawn from case law helps sketching a legal notion of family which is relevant for our purposes. One of the first rights recognized by Italian case law to a *de facto* family member was the one of being compensated for damages in case of partner’s death. Before this overruling, such a right was only guaranteed to spouses. Applying the general principles on torts, the Italian Supreme Court upheld that the right to be compensated for damages originates from two situations<sup>28</sup>. The first one is a relationship entailing the economic support and cooperation between the parties, whose stability creates an expectation of its lasting in the future (economic loss). The second case is the one of a strong personal bond between the parties, so that the death of one of them

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<sup>25</sup> For a deeper account of this interpretation of the Italian law on *de facto* unions, see VERCELLONE A., *Più di due. Verso uno statuto giuridico della famiglia poliamore*, in *Rivista critica del diritto privato* 4, 2017, pp. 607-637.

<sup>26</sup> See Law 20th May 2016, n. 76, article 1, paragraphs 36 and following. The first part of the same law (paragraphs 1-35) regulates “civil unions”, namely a specific type of marriage accessible to same-sex couples.

<sup>27</sup> LENTI L., *Convivenze di fatto. Gli effetti: diritti e doveri*, in *Famiglia e diritto*, 10, 2016, pp. 931–938; BALESTRA L., *La convivenza di fatto. Nozione, presupposti, costituzione e cessazione*, in *Famiglia e diritto* 10, 2019, pp. 919-930; PERFETTI U., *Autonomia privata e famiglia di fatto. Il nuovo contratto di convivenza*, in *Nuova Giurisprudenza Civile Commentata* 12, 2016, pp. 1749.1765.

<sup>28</sup> Italian Court of Cassation, judgments: n. 2988/1994; n. 8828/2003; n. 12278/2011.



would cause in the other(s) severe emotional and psychological pain (non-economic loss). These elements are not an exclusive feature of spouses, but of any “stable relationship based on mutual moral and economic support”, which is the relevant definition envisaged by the Court. This is not only compatible with forms of *de facto* families shaped as couples living together and bearing sexual intercourse, but with any kind of union. Even a polyamorous union, a polygamist family or a mutual aid family can fulfill this definition.

A similar reasoning was carried out by the Court to allow protection to a member of a *de facto* family living with their partner and not bearing any formal title on the common household<sup>29</sup>. To protect the right to housing of the “untitled” partner, the Court stated that the latter cannot be considered as a host, and so cannot be suddenly evicted by the titleholder and without adequate notice. What differentiates the member of a *de facto* family from a host is the type of relationship existing between them and the title holder of the household, namely a stable relationship of mutual economic and moral support in which the shared household is a paramount element. In such a relationship, the untitled partner cannot be considered as a host and needs to be granted the legal protection of the possessor. Again, in this case, the notion of *de facto* family is a “stable relationship based on mutual moral and economic support”, without any reference to the number, gender and sexual behaviors of its components.

Another rule set forth by the statute on *de facto* relationships is the partner's right to abstain from testifying against the other partner in a criminal proceeding. This rule too mirrors a principle already enacted by case law prior to the enactment of Law n. 76 of 2016. According to the court, the law cannot put someone in front of the odious moral choice between committing a crime – the one of perjury – and contributing to the incarceration of a loved person. The rule does not only respond to the need for protecting individual dignity. Indeed, even the existence of a close bond of shared life may jeopardize the reliability of the witness, especially in cases in which the choice to bear testimony is not the result of the party's free will. Again, the court's legal reasoning revolves around the existence of a stable relation, independently of its structure, the number and gender of people involved, the existence of a formal lien of marriage.

Similarly, case law has often affirmed the principle according to which *de facto* partners have to be qualified as “family members” with respect to the rules and rights governing the penitentiary system (e.g. right to meet, phone, etc.). The rationale of this is that the rules allowing inmates to maintain a relationship with

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<sup>29</sup> See Italian Court of Cassation, judgment n. 7214 of 2013.



family members serve the purpose of not isolating the person during incarceration. In fact, it is proved that those who keep a relationship with family during the time they spend in jail are more likely to be re-integrated in society and less likely to commit another crime. However, as noted by the Court, this rationale imposes to welcome a more flexible notion of family, encompassing those situations qualified by a close relationship of shared life with the detained person, including *de facto* partners.

This is the notion of family we find in the Italian case law on *de facto* relationships and that has shaped the construction of their legal prerogatives, from the possibility of entering a cohabitation agreement, of bearing rights on the common familiar enterprise or of applying as a family to social housing facilities. Elements recalling such an approach can be found in other European legal systems<sup>30</sup>. This does not mean that the following legal frameworks undisputedly embrace a broad notion of *de facto* families, but rather that in some of their legal formants such a notion is starting to emerge.

For example, according to the case law of the German Federal Constitutional Court, a *de facto* union shall be defined as a “community of life” (*Lebensgemeinschaft*) established with a permanent purpose (*auf Dauer*) characterized by inner ties of commitment with a reciprocal responsibility between the partners which is more than a pure accommodation and economic community. This approach was then adopted even by the Federal Supreme Court in civil, administrative and social security matters. German case law also clarified that the essential element for a *de facto* family to exist is the presence of a mutual commitment to a shared life. Other elements, such as sexual intercourses between the parties or the existence of a common household, are to be considered as mere indicators of a common life.

A similar approach – although much grounded on the notion of the couple – was adopted by case law in Luxemburg. In this framework, the core of a *de facto* union shall be identified in the existence of a common and stable shared life. A similar ruling can be found in a famous case of the Spanish Supreme Court<sup>31</sup>.

Besides, it is worth noting that in some legal systems the idea of family as an inclusive structure based on mutual support and commitment stems from the application of general principles and rules of private law to *de facto* unions. In Austria and Switzerland, for example, under certain conditions and with respect

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<sup>30</sup> BOELE-WOELKI K., MOL C., VAN GELDER E., *European Family Law in Action. Vol. V. Informal Relationships*. Cambridge, Intersentia, 2015; MILES J., *Unmarried Cohabitation in a European Perspective*, in *European Family Law Volume III*, ed. Jens M. Scherpe, Northampton (MA), Edward Elgar Publishing, 2016, pp. 82-115.

<sup>31</sup> Spanish Supreme Court, judgement of 18 May 1992.



to specific disciplines, *de facto* unions are considered as “civil law associations” established through an implied contract. This is very relevant for our purposes, as combining the association as legal institution with *de facto* unions highlights the idea of family as a community of people cooperating for a common aim. From a theoretical viewpoint, this challenges the notion of the couple as a structural cornerstone of family: as private law scholars know, the contract of association is the archetype of “multilateral contracts”, that is, it belongs to a category of agreements morphologically structured on a plurality of parties. The same analysis applies to the so-called “cohabitation contracts”, namely contracts that the parties to a *de facto* relationship can conclude to regulate the patrimonial aspects of their common shared life. In light of this, it is not surprising that in countries where the regulation of informal relationships still relies on general rules of private law, the doctrine started emphasizing the idea that *de facto* unions shall not be limited to couples, but may also concern households beyond the couple. This is, for instance, the case of Belgium<sup>32</sup>.

Finally, a similar legal notion of family developed at the EU level and especially in the interpretation of Article 8 of the European Charter of Human Rights drafted by the European Court of Human Rights. In the 2020 edition of the Guide on Article 8 of the Convention issued by the Court, at paragraph III A, we read:

The notion of family life is an autonomous concept (*Marckx v. Belgium*, § 31). Consequently, whether or not “family life” exists is essentially a question of fact depending upon the real existence in practice of close personal ties (*Paradiso and Campanelli v. Italy* [GC], § 140). The Court will therefore look at *de facto* family ties, such as applicants living together, in the absence of any legal recognition of family life (*Johnston and Others v. Ireland*, § 56). Other factors will include the length of the relationship and, in the case of couples, whether they have demonstrated their commitment to each other by having children together (*X, Y and Z v. the United Kingdom*, § 36).

It is worth recalling that this interpretation is part of the body of EU law. According to Article 52, Paragraph 3 of the Charter of Fundamental Rights of the European Union, the rights enshrined in the charter “which correspond to rights guaranteed by the Convention for the protection of human rights and fundamental freedoms” shall be given “the meaning and scope as those laid down by the said Convention”. The provision of Article 8 of the ECHR substantially

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<sup>32</sup> SWENNEN F., *Het personen- en familierecht. Identiteit en verwantschap vanuit juridisch perspectief*. Antwerp, Intersentia, 2015.





overlaps with the one of Article 7 of the Charter, both providing for the respect of private and family life.

### 5. Conclusion

In this article, we showed that obtaining legal protection for individuals and groups who do not fit into the mainstream Western definition of the family is an achievable goal that does not lie outside of the law and is available within existing legal systems. Our critique demonstrates the possibility of “queering” legal analysis, that is, how close attention to the disciplinary aspects of family law – such as the control of sexual identities in heteronormative terms and the normalization of sexed and gendered subjectivities – can reveal how legal institutions function in regulating sexuality. In such a governmental perspective, the dominant legal conception of marriage appears as ultimately aimed at producing and reproducing citizenship along specific lines – gendered, heteronormative, and racialized<sup>33</sup> – and at crystallizing the latter in the form of the nuclear family.

Our critique is also accompanied by an imaginative proposal. As Critical Legal Studies showed, there is no legal system that is intrinsically consistent, devoid of “cracks”<sup>34</sup> – an intuition that is quintessentially queer, as it reveals the potential openness of the legal system and the fluidity of its definitions. Our political and legal work of reinvention starts from these cracks, opened up by the negotiations and conflicts of everyday life. Following the lesson of legal realism, we found it useful to focus our attention on how family law is used – on what judges “actually do”<sup>35</sup> – to find out that every legal rule has exceptions, blurred contours, zones of indeterminacy<sup>36</sup>. Family law – and law more generally – is not simply a technique for freezing existing power relations and dynamics of subordination into legal rules and institutions, although it can easily be deployed to reinforce the status quo. Rather, it provides a battleground in which conflicts for a more just distribution of resources between groups can be articulated.

A queer analysis of family law provides a decisive step in this direction, as it focuses on the distributive impact produced by different legal arrangements on those who are marginalized on the basis of their sexual conduct, such as LGBTQ+ and minority religious groups. This approach is based on the thesis that inequality and

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<sup>33</sup> BRANDZEL A. L., *Queering Citizenship? Same-Sex Marriage and the State*, in *GLQ: A Journal of Lesbian and Gay Studies* 11, 2005, pp. 171-204.

<sup>34</sup> KENNEDY D., *op. cit.*, 1993.

<sup>35</sup> SHINER R. A., 1999. *Legal realism*, in *The Cambridge Dictionary of Philosophy (2nd edition)*, ed. Robert Audi, Cambridge, Cambridge University Press, 1995, pp. 490-491.

<sup>36</sup> LLEWELLYN K. *Some Realism about Realism: Responding to Dean Pound*, in *Harvard Law Review*, 44, 1931, pp. 1222-1264.





subordination are neither “mere facts” nor “negative externalities” to be accepted in the context of late capitalism, but are the result of specific legal arrangements that could be designed differently to disrupt the patterns of inequality they foster. Even what appears to be a “minor adjustment” to existing legal frameworks could significantly improve the lives of vulnerable populations<sup>37</sup>.

In sum, a queer critical approach expands the scope of legal analysis in a twofold sense, both a critical and a transformative one. On the one hand, it allows to grasp the legal arrangements that enact the normalization and the discipline of sexual identities peculiar to the neoliberal phase of capitalism<sup>38</sup>. On the other hand, it shows the existing legal tools that subjects who do not fit into the Western modern concept of the family can already use to resist cooptation and exclusion and achieving substantial equality. This resistance can only be strengthened by building politically fruitful coalitions among excluded populations, such as LGBTQ+ and minority religious groups.

A transformative legal notion of marriage would be a useful political weapon for all movements engaged in practices of resistance to hegemonic conceptions of family. Indeed, it would provide a unifying element for the struggle of sexual subalterns and a crucial tactic for turning their peripheral position vis-à-vis the hegemonic sexual, cultural, and family assumptions into a source of strength<sup>39</sup>. Living on the margins of the realm of permissible sexual practices provides sexual subalterns with a unique view of reality – one that understands both the center and the margins of power – and with a space of radical possibility for building communities of resistance<sup>40</sup>.

In recent decades, social movements have partly abandoned their distrust of the law and their view of the latter as a mere instrument of capitalist domination and reproduction of existing power relations. In contrast to this skepticism, which equated the law with its repressive function, activists have increasingly turned to legal tools as a means to achieve social justice and wealth redistribution in contexts of growing socio-economic inequality<sup>41</sup>. For instance, the global movement for the

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<sup>37</sup> ADLER L., *op. cit.*, 2008, p. 179.

<sup>38</sup> DUGGAN L., *The new homonormativity: the sexual politics of neoliberalism*, in *Materializing Democracy: Toward a Revitalized Cultural Politics*, ed. Russ Castronovo and Dana D. Nelson, Durham (NC), London, Duke University Press, 2002, pp. 175-194; RICHARDSON D., *Desiring Sameness? The Rise of a Neoliberal Politics of Normalization*, in *Antipode*, 37, 2005, pp. 515-535.

<sup>39</sup> KAPUR, *op. cit.*

<sup>40</sup> HOOKS B., *Choosing the margin as a space of radical openness*, in *Framework: The Journal of Cinema and Media* 36, 1989, pp. 15-23.

<sup>41</sup> RAJAGOPAL, B. 2005. *Limits of law in counter-hegemonic globalization: the Indian Supreme Court and the Narmada Valley Struggle*, in *Law and Globalization from Below: Towards a Cosmopolitan Legality*, ed. Boaventura de Sousa Santos and César Rodríguez-Garavito, Cambridge, Cambridge University Press, 2005, pp. 183-217;



commons has carried out a contestation “on the field” of the individualistic, absolute vision of property dominant in the Western legal tradition, introducing “new ways of possessing” beyond the public/private dichotomy. Just as property has been reimagined as a political and a legal category to obtain social change, so too a rethinking of the family can be achieved through a counter-hegemonic use of the tension between marriage and non-conjugal relationships – a dichotomy mirroring the dualism between property and possession that is crucial to the theory of the commons<sup>42</sup>. If it is true that family law (and law as a whole) has an apologetic aspect – justifying the patterns of oppression that take place in the family by making them legal – and a utopian aspect – striving to reshape the forms of human association to respond to our needs and hopes<sup>43</sup> – our effort is definitely in the second direction and is sustained by a belief in the importance of legal struggle for advancing projects of reform.

Finally, it should be stressed that the effort to extend the legal category of the family to situations arising from concrete needs goes beyond the scope of a mere critique of the heteronormative character of the concept of the family that prevails in Western liberal constitutionalism, firmly sealed by the institution of marriage. Indeed, the legal reinvention of the family allows us to combine a queer critique of hegemonic regimes of sexuality with a struggle against socio-economic inequalities made possible by the attention to legal rules, institutions, and regimes as they operate in society and inform LGBTQ+ lives<sup>44</sup>. When embraced as an emancipatory tactic, alternative legal notions of the family can shake the dominant norms of sexuality reproducing socio-economic inequality that Christopher Chitty has defined as “sexual hegemony”:

A relationship of sexual hegemony exists wherever sexual norms benefiting a dominant social group shape the sexual conduct and self-understandings of other groups, whether or not they also stand to benefit from such norms and whether or not they can achieve them. Sexual norms operate at the level of aspirational fantasy and as a form of social status. [...] Groups have achieved sexual hegemony with force and consent, repression and persuasion. At certain crucial points in its

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CUMMINGS S., EAGLY I., *A Critical Reflection on Law and Organizing*, in *UCLA Law Review*, 48, 2001, pp. 443-517.

<sup>42</sup> MATTEI U., ALBANESE R. A., FISHER R. J., *Commons as Possession. The Path to Protection of the Commons in the ECHR System*, in *European Law Journal*, 25, 2019, pp. 230-250.

<sup>43</sup> OLSEN F., *The Politics of Family Law*, in *Law & Inequality: A Journal of Theory and Practice*, 2, 1984, pp. 12-19.

<sup>44</sup> MARELLA M.R., «*Queer eye for the straight guy*». *Sulle possibilità di un'analisi giuridica queer*, in *Politica del diritto*, 3, 2017, pp. 383-414.



history, sexuality has provided a weapon for the strong and the weak in struggles for legitimacy and power<sup>45</sup>.

Whether sexual hegemony is achieved primarily by force or consent, by repression or persuasion, the law plays a crucial role in crystallizing it into institutions that replicate subordination and exclusion, such as the hegemonic form of marriage. Within the cracks of the law that we have analyzed lies the potential for rethinking the family, not through one-size-fits-all solutions imposed from above, but on the material basis of real needs.

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<sup>45</sup> CHITTY C., *op. cit.*, p. 25.