

FRACTURED IDENTITIES AND FRAGMENTS OF POWER: THE INFLUENCE OF THE
EUROPEAN UNION ON THE ITALIAN JUDICIAL SYSTEM AS SEEN THROUGH THE
LENS OF THE STRUGGLE FOR RIGHTS ON BEHALF OF SAME-SEX COUPLES

BY

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DISSERTATION

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ABSTRACT

In this dissertation, I describe the ongoing struggle over legal recognition of rights for same-sex couples in Italy and demonstrate how in Italy, a nation where (for a myriad of historical, social, and political reasons) there is little faith in the ability of state institutions to reckon with societal change, European Union (EU) law offers a means for circumventing national politics to create policy change in an area of law long subject to political impasse. I use the topic of the struggle for same-sex marriage in Italy as a lens through which to conduct an ethnographic investigation of the globalizing effects of the EU, and more specifically of EU law and policy, on Italian society and the Italian legal system. I argue that recent legal and policy changes with respect to the treatment of same-sex couples in Italy are a direct consequence of the stimulus of the EU on the national judicial system and evidence a burgeoning judicial activism. Such activism occurs at the expense of national politics in Italy and this is therefore a story about compromised sovereignty and the judicialization of politics, but it is also about something more; i.e., the formation of new post-national identities in the face of an emergent supranational entity.

As a supranational entity, the EU exists in constant tension with its member states, and relations between the EU and its nation-states are continuously negotiated. Much of this happens through law in general and the courts in particular, where conflicts are presented for resolution. The account I present here is based on participant-observation, interviews, and over four and a half years of tracking online discussions and media sources dealing with LGBTI rights in Italy and in Europe between May 2009 and February 2014. Between July 2009 and February 2011, I spent over a year in Italy, living first in Rome and later in Turin, and working with various Lesbian, Gay, Bisexual, Transsexual, and Intersex (LGBTI) rights advocates in Italy and the EU. In an effort to provide a holistic account of the contemporary struggle for recognition of rights on

behalf of same-sex couples in Italy, I approach the subject from the perspectives of the main protagonists: the activists, the Italian courts, and the EU and Europe.

I begin with a description of the problem (Chapter 2), looking closely at the activities of Italian LGBTI activist groups currently fighting for marriage equality, and focusing specifically on the *Affermazione Civile* campaign initiated by Italian LGBTI activist groups, *Associazione Radicali Certi Diritti* (*Certi Diritti*) and *Avvocatura per i Diritti LGBT* (*Rete Lenford*). Due to particularities in the Italian constitution, the desired goal of the *Affermazione Civile* campaign is marriage equality, and anything less will prove discriminatory with respect to same-sex couples. Because much of the resistance to same-sex marriage is due to opponents' perceived need to protect the so-called "traditional" family, I consider the relevance of "the family" as a central institution and the role of marriage in structuring family relationships in Italy (Chapter 3). While the Italian family has changed significantly, Italian family law has not, and this is problematic for "non-traditional" families who are denied the full plethora of rights made available to alleged traditional families. Despite substantial changes in family structure, Italian politicians have been unable to reform Italian family law, and the Italian courts have stepped in to fill the void. The Italian Constitutional Court, Italy's Supreme Court of Cassation (*Corte Suprema di Cassazione*), and several lower-level courts have recently issued historic decisions recognizing certain rights on behalf of same-sex couples residing in Italy. In their decisions, Italian courts are displaying signs of a flourishing judicial activism and attendant judicialization of politics (Chapter 4). The decisions of the Italian courts in this area are important not only to the advancement of LGBTI rights in Italy, but also to the further delineation of a transnational EU citizenship and processes of European integration. For this reason, I also look closely at the EU, and explore how various institutions within the EU structure and generate contemporary debate over marriage equality in

the member states (Chapter 5). I devote special attention to the activities of the European Court of Justice, as well as to the European Court of Human Rights, because it is the European courts, more than any other European or EU institution, which have influenced and advanced the recognition of rights for same-sex couples in Europe and Italy (Chapter 6). I return to the struggle over recognition of rights for same-sex couples in Italy, and look specifically at the relationship between Church and State in contemporary Italian politics and its role in the struggle over recognition of rights for same-sex couples (Chapter 7). In the Conclusion, I tie everything together to show how recent changes with respect to the treatment of same-sex couples in Italy are the direct result of the EU's influence on the nation-state in general and its judicial system in particular. This points to larger issues regarding sovereignty and territoriality, and demonstrates how profound changes in the status of the nation-state occur through often unintended and peripheral post-national identity formations in which the state itself is implicated.

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Chapter 1: Introduction

In its broadest terms, this is a dissertation about the life of laws and laws of life. It delves into a very specific, very intimate, and (at the present moment) much contested area of family law that is undergoing reconsideration in many parts of the world: that is, what is/ought to be the legal definition of “marriage”? As will become clearer, while the topic of this dissertation is the struggle for same-sex marriage in Italy, the dissertation is not only about same-sex marriage. Rather, I use this topic as a lens through which to conduct an ethnographic investigation of the globalizing effects of the European Union (EU) and, more specifically, of EU law and policy, on the Italian legal system and Italian society more broadly. I argue that recent legal and policy changes with respect to the treatment of same-sex couples in Italy are a direct consequence of the stimulus of the EU on the national judicial system and are evidence of a burgeoning judicial activism. Such activism occurs at the expense of national politics in Italy and this is, therefore, a story about compromised sovereignty and the judicialization of politics, but it is also about something more, that is, the formation of new post-national identities in the face of an increasingly emerging supranational entity.

As a supranational entity, the EU exists in constant tension with its member states, and relations between the EU and the nation-states are continuously negotiated. Much of this happens through law in general and the courts in particular, where conflicts are presented for resolution. This dissertation considers the effects of the EU on the “nation-ness” of Italy while simultaneously exploring how social actors in Italy are helping forge a European identity. I will show how EU law governing free movement of persons is given new life in the context of the struggle over recognition of rights for same-sex couples, as Italian activists invoke the free movement provisions to assert rights as EU citizens in Italian courts. Due in large part to the

efforts of such activists, the Italian Constitutional Court, Italy's Supreme Court of Cassation (*Corte Suprema di Cassazione*), and several lower-level courts have recently issued historic decisions recognizing certain rights on behalf of same-sex couples residing in Italy -- rights that before now have been denied by the majority of political actors in the Italian nation-state. In the process of using EU law to advance recognition of rights for same-sex couples, Italian courts are reinforcing a transnational Europe citizenship. The legal maneuverings of Italian activists, and the resulting court decisions, carry consequences for the (related) projects of European integration and Europeanization, as the lives of those subject to the law assume new legal and social identities.

In the following chapters I describe the ongoing struggle for legal recognition of rights on behalf of same-sex couples in Italy and demonstrate how in Italy, a nation where (for a myriad of historical, social, and political reasons) there is little faith in the ability of state institutions to reckon with societal change, EU law offers a means for circumventing national politics. I illustrate how the EU has created an opening for Italian LGBTI¹ (Lesbian, Gay, Bisexual, Transsexual, and Intersex) activists, previously skeptical about the law's ability to generate social transformation, to embrace law as a mechanism for change, with several significant results. First, through their activities Italian activists are demonstrating a new degree of faith in the rule of law. Second, the Italian courts are increasingly *making law*, something that civil law courts are generally not deemed to do. And, finally, through the use of EU law and the resultant

¹ There are various forms of this acronym in circulation and one's choice of acronym has political implications. For example, one could use GLBTI (Gay, Lesbian, Bisexual, Transsexual, Intersex), GLBTQ (in which the "Q" stands for "Queer"), or any variety of combinations and orderings of these letters. In truth, I choose to privilege "LGBTI" over "GLBTI" mainly because this is what I am used to doing; however, I recognize that placing the "L" first can be seen as a symbolic attempt to undo the privileging of gay men over lesbians. In places where I drop the "B," "T," or "I" it is to accurately reflect the constituency to which I am referring.

recognition of rights as EU citizens, Italian activists and courts are helping further to delineate a European citizenship and forge a European identity.

Arriving in Italy

Like so many who come to Italy from the United States, I harbored romantic notions. I had (somewhat) deliberately chosen a research site reputed to be replete with all that I hold dear: friendly people, striking scenery, good food, good wine, and good coffee. A friend's gift, I had recently finished reading *Eat, Pray, Love* (Gilbert 2006). The protagonist of my own adventure, I was going to have a similar experience, minus the ascetically challenging weeks in a Sangha that followed Elizabeth Gilbert's time in Italy. Notwithstanding the vast amount of reading, studying, writing, and thinking about Italy and its history that I had done in preparation to begin fieldwork, part of me still clung to the idealistic vision portrayed in films and novels. Perhaps this was because, underwriting much of the anthropological literature on Italy, one senses a love of the place, despite its foibles, imperfections, and convoluted history. Why should it be different for me?

My relationship to Italy, however, has been much like a marriage, which is perhaps an appropriate analogy considering that this dissertation is, in part, about the institution of marriage. I have experienced highs and lows, love and hate, joy and frustration and, in-between, a lot of tedium. I am better for the relationship, although I am not quite sure yet in what way(s). Like me, my partner (Italy) is a diehard Type A personality who at times attempts to masquerade as a Type B (and sometimes succeed in fooling self and others that this is the case). Although not divorced, I have been separated from Italy for over a year now and, with distance, I find that I tend to remember the good more than the bad, harbor a huge fondness in my heart, and long to return.

My first visit to Italy was a solo trip in late May 2008. I had received a bit of grant money from my department to conduct “pre-dissertation” research. I decided to go to Rome, mainly because I thought this is where everything major “happened” in Italy. I flew from Chicago through London and into Rome. I left one day and arrived the next. After I picked up my bags, I had little trouble locating the train and purchasing a ticket that would allow me to travel to Termini Station, the main railway station and hub for public transportation in Rome. I was feeling a bit smug because I even knew about the yellow machines and had properly “validated” my ticket before boarding the train. I was not prepared for Termini: crowded, frenetic, and *hot*.

I lugged my bags off the train (of course, I had packed too much – so much for romantic ideals of “traveling light”) and worked my way to the front of the station and the exits to Rome. The blinding sunlight, noise and heat, combined with jetlag, left me feeling dazed. Before leaving the U.S., I had booked a room within walking distance of Termini and had MapQuested the route. Much of the front of the station, however, was under construction, and I was unable to orient myself. I stopped to ask a police officer where I could find the street that would lead me to the Bed and Breakfast where I was staying and was brushed off with a curt “*Non lo so*” (translated: “I don’t know”). I wandered aimlessly for what seemed like hours but in reality were mere minutes.

As it turned out (and as I discovered 15 minutes and a couple of false starts later), the street I was looking for ran right up to the station. Getting to the place where I was staying was simply a matter of departing the station through the correct exit and walking straight down the street approximately 4 blocks, turning right at the end of the street, walking another 2 blocks, and crossing the street to the gate. I walked up to the gate. Jet-lagged, sweating, and frustrated (Why

was I wearing a black “traveler’s” jacket from Chicos? Why did I think this looked smart? Why had I brought so much luggage?), I approached the entrance, located the correct buzzer and pushed firmly. I glanced at my surroundings. Set back from the rather busy street, a couple of buildings peeked out over a wall. Pretty vines and flowers (do not ask me to name these, because I can barely identify a daisy) clung to the walls. “I can do this,” I thought.

A gruff male voice spoke to me through the intercom. “*Si?*” said the voice. “*Sono* Lauren Anaya. *Ho una prenotazione*” (translated: “I am Lauren Anaya. I have a reservation.”), I replied. The voice responded in English, directing me to enter and head to the left to the interior entrance. I was buzzed through the first gate, wandered a bit to the left and then (for reasons I cannot fathom or explain) headed to the right, searching for the building entrance. “I said left!” I was startled to hear the gruff voice from the intercom coming from behind me, this time accompanied by a body. I turned to see a striking man, middish-30’s, approximately 6 feet tall and of slender (although not skinny) build. I could see that he was handsome with his dark hair, brown eyes, and Roman nose, his features buried beneath a mound of facial hair. He took off ahead of me and I followed like a chastised puppy, feeling even more self-conscious in my ridiculous outfit with my ridiculous amount of luggage, grungy, sweaty and in desperate need of a shower and a nap.

We walked through a tranquil courtyard shaded by a large tree – it was not the most elegant or beautiful garden but at this point the restfulness of its ambience appealed to me. Using a key, he opened a door and ushered me in. He grabbed my large bag, noting that it was “broken” (one of the wheels had come askew during my voyage), directed me into the world’s smallest elevator, pressed the button, and sent me with my purse and “smaller” bag on my way. He proceeded to use the stairs, lugging my large broken bag up. I was not convinced I would

ever see him again but was relieved to meet him at the floor to the entrance of the Bed and Breakfast (B&B). Using another key, he opened a door which led to the wing that housed the B&B. The door opened into a long, wide hallway, with rooms on either side. He pointed to a cushy leather loveseat on the left and told me to sit. There was a computer screen hung on an arm and he whipped out a keyboard and told me that I could use the Internet to let my family know I had arrived. He then offered me some juice. The juice, a blend of mango and pear, served its purpose and I knew I was in good hands. I noticed a woman rushing around, cleaning the rooms. It was at this point that the man introduced himself as T. T sat on a chair on the other side of an open door to one of the rooms. He told me my room would be ready in a few minutes and suggested that I relax a bit. I did not know it at the time, but this was the beginning of my friendship with T, one of the most warm-hearted, interesting, funny, and talkative people I would meet during the course of my fieldwork. Throughout my time in the field, T was an incredibly generous consultant. He introduced me to many of his attorney and other friends and from there, my contacts snowballed.

Through T and his friends and business acquaintances, I learned a lot about what life is like in Italy for Italians. In the months that followed, T and I enjoyed many long talks over coffee, lunch, and dinner, on the telephone and via Skype. When I first met T, he and his long-term girlfriend had recently broken up. T was selling his Bed and Breakfast business, and was uncertain about what to do next. At that time, T could not have predicted that the person who bought his business would swindle him out of the money owed for the sale, a substantial sum that T would need to begin a new business venture. T was forced to pursue recompense through the Italian court system and, although he eventually prevailed (almost two years later) in the court case, when I last spoke to him he was still trying to find a way to collect the money owed

to him. Since losing his business, T has been managing a hotel outside of Rome, and earns a salary of around € 1,000 per month. He is well-educated, having attended university, and speaks fluent English. While there is nothing "ordinary" about T, he is in many ways typical of young Italians: he is educated, middle-class, underemployed and, at the time I am writing this, cohabitating with his now not-so-new girlfriend. He is caught in the economic cross-fire of a nation-state that has been unable to adequately adapt to globalizing forces yet he (like Italy) remains, if not exactly filled with hope, resilient.

The Anthropology and Modern Historiography of Italy

Previous studies dealing with the anthropology and modern historiography of Italy have addressed a plethora of themes, including: Sicily and Sardinia, pastoral life and peasants, the mafia, immigration, fascism, politics, the "Southern Question," and modernity. Some examples include the work of Anton Blok on behavior codes in Sicily, the Mafia, and honor and violence (2010, 2008, 2001, 2000, 1974); the work of Jeffrey Cole and Sally Booth on immigrants in Italy (2007, 2006, 1999); works by Ben-Ghiat (2001), Corner (1993), De Grazia (1992), Doumanis (1997) and Forcucci (2010) on themes related to fascism; and projects by Kertzer (1996, 1980) and Muehlebach (2012, 2009) dealing with subjects related to Italian politics.² In recent years

² For additional examples, please see:

1. Themes related to Sicily: Cole (2007, 2006, 1997); Saitta (2010); and Schneider and Schneider (2003, 1996, 1994, 1975);
2. Themes related to Sardinia: Angioni (2000); Magliocco (2005); Mientjes (2010, 2004, 1998); Satta (2001); and Sorge (2009, 2008);
3. Themes related to pastoral life: Carlestål (2011); Krause (2005a); and Mientjes (2010, 2004, 1998);
4. Themes related to the Mafia: Gambetta 1996 and Schneider and Schneider (2003, 1994);
5. Themes related to the "Southern Question": Schneider, ed. (1998); Moe (2002); and Rota (2011);

there has also been a surge of scholarship focused on issues concerning Italian reproduction/fertility and the family, as well as on the subject of neoliberalism and its effects. Elizabeth Krause (2007, 2005a, 2005b, 2001) has been especially prolific in producing scholarship dealing with themes related to reproduction, fertility and the family in Italy. Other noted scholars writing on these subjects include Bernini (2008), Buratta and Boccuzzo (2001), Cole and Booth (2006), Dalla Zuanna (2006), Forcucci (2010), Horn (1994), Kertzer (1993, 1984), and Seymour (2005). Anthropologists of Italy who have taken an interest in the subject of neoliberalism and its effects on Italian society include Herzfeld (2010), Molé (2012, 2010), Muehlebach (2012, 2009), and Stacul (2007).

The most recent studies depict Italy as a geopolitical space besieged by and responding to globalizing forces. These key domains intersect and influence one another in dialogical fashion, making it difficult to distinguish between rhetoric and reality, to the extent that such a distinction exists. Philosopher Remo Bodei (2006) talks about Italy's locus as a Mediterranean society strategically positioned between North Africa and the East. He observes that, over the past decade, Italy has experienced an influx of undocumented immigrants who, for many Italians, seem to threaten Italian sovereignty and also the rights, prerogatives and privileges of its citizens. Similarly, in his examination of Senegalese immigration to Italy, Donald Carter (1997) describes how processes occurring in the developing world have affected the constitution of modern Italy. Carter approaches this problem from both the perspective of the immigrants and in terms of the role immigration plays in Italian imaginings of the State, observing that the Senegalese are

6. Themes related to the subject of modernity: Ben-Ghiat (2006, 2001); Horn (1994); and Krause and Marchesi (2007); and

7. Themes related to immigration: Ben-Yehoyada (2011); Carter (1997); Cole (2007, 2006, 1997); Dalla Zuanna (2006); Faedda (2012); Giordano (2008); Grillo (2002); and Saitta (2010, 2005).

relegated to the position of “Other” in Italian society and thereby placed into a preexisting “north/south” narrative, whereby they now occupy the position previously held by Italians from the rural south. But many Italians view the Senegalese immigrants with contempt and resentment, and the Senegalese have been racialized in a much more explicit way than southern Italians ever were. In Italian discourse about the State, social problems such as health care and housing are deflected as an “immigrant” problem, which in turn leads to a silencing of the actual immigrants and their problems. According to Carter, Italian discourses concerning immigrants and immigration play a central role in the imagining of the modern Italian state.

Gerard Delanty (1996) has a similar, but slightly different, interpretation of the immigration issue and contends that hostility toward immigrants in Europe is related to the rise of a new nationalism in Western Europe, which is itself a product of social fragmentation wrought by the neoliberal attack on the welfare state (1996). In this vein, hostility against immigrants is more a function of the imagined implications of multiculturalism for the welfare state than it is about cultural superiority. In a situation of limited resources, there is a sense in the population that the national model of the welfare state is in serious jeopardy due to its incapacity to meet the social demands of all groups (Delanty 1996:3.5). Delanty asserts, however, that the threat of immigrants is for the most part a construction of the media.

Antipathy toward immigrants is exacerbated by the increasing precariousness of the work situation in Italy, and a feeling that there are not enough resources to go around. Noelle Molé recently explored the phenomenon of workplace mobbing.³ According to Molé, mobbing exists as a gendered cultural discourse that has to do with the increased precariousness of the

³ “Mobbing,” according to Molé (2007:1), is defined as work harassment or the marginalization, hostility, and isolation of workers by colleagues and superiors with the hope of coercing the worker to resign.

workplace during a period of neoliberal reforms where government programs intended to expand Italy's neoliberal economy frequently conflict with welfare state laws designed to protect the worker (2012). The phenomenon of mobbing points to a critical historical moment that began in the late twentieth century when labor rights, health care, and job protections came into conflict with social, economic, and political risks.

Although the phenomenon of mobbing is a negative consequence of neoliberal reform, Italians have also responded to the effects of neoliberalism in positive ways. Italians (contrary to assertions that they do not "do" collective action) are increasingly adopting voluntarism as a coping mechanism to deal with the State's inability to provide necessary social welfare programs. In *The Moral Neoliberal*, Andrea Muehlebach maps the rise of voluntarism in the Lombardy region of Italy (2012). Muehlebach perceives a competing ideological division between Catholic and Socialist groups and explains how socialist volunteers interpret their volunteer work as an articulation of social solidarity, whereas Catholic volunteers see their unpaid work as a manifestation of charity and love. Regardless of the specific framing of the volunteer activities, by nurturing a spirit of selflessness, the volunteers' interpretations make the mobilization of an "ethical" citizenry possible, a deployment that enables the State to solidify some of its most controversial neoliberal reforms by substituting volunteer forms of collective caretaking for public social welfare systems. But, as Muehlebach also shows, the inclusion of an anti-capitalist narrative into the heart of the neo-liberalizing State leads to some unexpected consequences. The volunteers Muehlebach describes are not complacent members of a new mass consumption society but instead negotiate within a social dynamic that is both ethically and politically indeterminate.

The unsettled social dynamic brought about by neoliberal forces has had and continues to have consequences for the contemporary Italian family as well. Italy is a country where young people often live at home until they marry in their thirties. This is often due to economic necessity: young people have difficulty finding jobs where they will make enough money to support themselves and, as a result, many depend on their parents for support well into early adulthood. The precariousness of the workplace and the lack of social services described by Molé and Muehlebach are significant factors in Italians' delaying of marriage and child-bearing, which in turn has led to the perception of a "fertility crisis" in Italy.

The perceived "fertility crisis" is seen as especially dire in light of the declining welfare state and the aging population. As an antidote to the crisis, Italian policymakers passed a "baby-bonus" law in 2003, which offered money to Italian or European citizens who gave birth to, or adopted, a second child. This was the country's first pro-natal policy since the Fascist regime's legislation encouraging women to have more children. Interestingly, however, in 2004, Italian lawmakers turned around and passed an "anti-natalist" law that substantially limited access to assisted reproduction technologies. Various authors have classified regulatory schemes for assisted reproduction in Western Europe as permissive or conservative in orientation (Fenton 2006). Within the larger context of Europe, Italy suddenly went from a system of almost total regulatory permissiveness to having the most restrictive access to reproductive technologies in Western Europe. Under the new provisions, only stable heterosexual couples of a fertile age are able to use their own (and not donor) gametes to assist reproduction. Elizabeth Krause and Milena Marchesi argue that, together, these paradoxical policies demonstrate a project of "national rejuvenation" that defines desirable and undesirable populations (Krause and Marchesi

2007). In the eyes of Italian politicians, married, heterosexual Europeans (and, more specifically, Italians) are desirable, whereas non-Europeans, singles, and LGBTI persons are not.

Italy and the EU

Italy has been profoundly transformed as a result of its membership in the European Union (EU), especially in terms of its economy.⁴ Despite the relationship between EU membership and many of the dramatic changes occurring in Italy, recent anthropological studies of modern Italy have for the most part ignored the *significance* of this connection, especially with respect to the ways in which the EU structures and affects (both directly and indirectly) the making of national law and public policy outside the economic realm. Like it or not, however, Italy is a part of the EU and the EU is a part of Italy. Consequently, the relationship between the two warrants consideration in general, and anthropological consideration in particular.

In *We, the Divided: Ethos, Politics and Culture in Post-war Italy, 1943-2006* (2006), Remo Bodei offers an account of Italian politics and culture from the beginning of the Italian Republic to the present day. His account begins where Fascism ends: at the conclusion of World War II when Italy was forced to rebuild itself. Bodei shows how the Italian people's sense of national identity, which had always been somewhat insecure, came to be divided between competing political ideologies presented by Catholicism and Communism. Italians were forced to reconcile these differences in the context of the onset of the Cold War, which pitted the prosperity and consumerism of the United States against a utopian vision of a more egalitarian society allegedly represented by the Soviet Union.

⁴ In Italy, neoliberal reform is closely related to Europe's "market-radical variant of neoliberalism" (Bohle 2005: 58) and such reform has been largely governed by Italy's membership in the EU (Bosia 2005; Kierzkowski 2002; Van Apeldoorn 2002).

Bodei investigates the process of cultural negotiation and analyzes the ethos of the Italian people in the spheres of family, military, politics, religion, the judiciary, and organized crime.⁵ The ethos of a people is not a monolithic entity devoid of fracture; rather, it encompasses various articulations and stratifications. Bodei views each institution or group as an issuer and trader of ethical values, as well as a mechanism to control and stabilize the stresses to which these values are continuously subjected. These groups and institutions, partial in nature, are in constant competition with one another. Bodei notes that the messy diversity of these distinct points of view is rendered even more fragmentary by the complexity of history.

Bodei situates the roots of the ethos of the Italian Republic in the death of Fascism when all official points of reference suddenly disappeared and Italian citizens were confronted with a conflict of values that stuck at the heart of the social structure. The obligations toward the state imposed by Fascism were no longer available to orient individual behavior. Bodei lays out the implications of this and explains the significance of the end of Fascism to the Italian psyche during the first years of the Republic. In more recent work, Bodei expresses a pessimistic view of an “increasingly uncertain, uncontrollable, and threatening” future that, thanks to a series of factors, turns politics into “an activity of risk management” (2010:163).⁶ The lack of a solid organizing principle and therefore lack of credible ideology in national and international politics exacerbates this uncertainty (Bodei 2010:163).

In the post-script to *We, the Divided* (written eight years after the book was originally published in Italian), Bodei emphasizes the fact that Italy has become increasingly subsumed by

⁵ Bodei defines “ethos” as “the set of customs, norms and models of behavior (not always conscious or always commendable) that guide the actions of individuals within a determinate historical community” (2006:12).

⁶ Bodei lists these factors as including “the depletion of resources, the financial crisis, temporary employment, global warming, famine for hundreds of millions of people, and terrorism” (2010:163).

processes of economic globalization and expresses fear that political uses of new forms of technology will enable new forms of planned subjugation of the masses. He sees the risk of creating a new breed of human whose legitimate primary and secondary needs are satisfied and who lives (through the aid of commercial television) to consume. Bodei asserts that the EU evolved from a “Hobbesian” project aimed at deterring war between European nation-states to a “Kantian” entity that defends human rights, but he expresses concern that the EU may be falling back into a Hobbesian state of being brought about by the decline of the guarantees of the welfare state and the military policies of the former Bush administration.

As I will show, while there are recognizable similarities between Bodei’s Italy and the Italy I experienced, there are also marked differences, many of which are at least enabled by, or are even a direct consequence of, Italy’s status as a member of the EU. While Bodei adequately explores the Cold War context and the influence of the United States and the Soviet Union on the Italian Republican ethos, for the most part he ignores the more positive consequences of Italy’s entry into the EU. Thus, in order to more fully explain the recent emergence of an Italian ethos that orients individual behavior and demonstrates a new degree of faith in public institutions, I situate this project within a historical trajectory that takes account of Italy’s status as a member of the EU, and demonstrates the continued salience of the “Kantian” version of the EU as a defender of rights, albeit in a perhaps more roundabout and unintentional way that emanates from the bottom-up instead of the top-down.

This project is also an attempt to move beyond the type of inquiry that results in the repetition of stereotypes of Italians as lacking public spirit, as the victims of their own “amoral

familism."⁷ The Italian LGBTI activists I worked with demonstrate a high degree of solidarity and, as observed by Loredana Sciolla, are not so much “amoral familists” or lacking in civic-mindedness as they are cynical and suspicious of institutions. (1997:48, 62-64). In the Italian context, LGBTI activists are (following Bodei) but one group, partial in nature, competing with other groups and institutions as a trader of ethical values.⁸ Their vision for the future of Italy is one amid many; however, as I will demonstrate here, theirs is a vision that is slowly gaining traction, with real-world consequences. Of course, theirs is a vision made possible by the continued salience of the "Kantian" version of the EU.

Becoming European?

Recent transformations in Italy wrought by the interrelated spheres of a changing composition of the population due to immigration, the precariousness of the individual's economic life, and major demographic shifts in family life call former ways of being into question, thereby creating an opening to imagine new possibilities. The LGBTI activists I

⁷ The term “amoral familism” was first used in 1958 by American anthropologist Edward Banfield to describe the behavior of villagers from a small, impoverished town in southern Italy. Banfield defined “amoral familism” as “the inability of the villagers to act together for their common good, or indeed, for any good transcending the immediate, material interest of the nuclear family (1958:10).” Although Banfield's thesis has been heavily criticized, the term “familism” has continued to be used in reference to not only Southern Italy, but Italy as a whole. In his attempt to adapt the term to the realities of contemporary Italy, Paul Ginsborg, a British historian and scholar with over 30 years' experience in Italy, and the well-known author of *History of Contemporary Italy* (1990) and the updated *Italy and its Discontents* (2003), has suggested that “famililism” should be seen as a particular form of relationship between family, civil society and the state (2003:97). In this view, “familism” is a form of relationship where the values and interests of the family take precedence over the relatively weak civil society and compensate for a profound distrust in the state. Ginsborg sees the relatively high percentage of Italians who live with their parents until marriage, and often within the same building or within a few blocks from their parents after marriage, the relatively low divorce rates in Italy, and the fact that 83% of Italian businesses are family-owned, with less than 50 employees (and are places where family loyalty, patriarchal control, and distrust of government prevail) as evidence of the continued salience of Italian “familism” (2003). To the extent that one can say “familism” is still a factor in Italy, I submit that it signals a response to the failure of the nation-state to meet the needs of its citizens rather than the inherent inability of citizens to join together for the common good.

⁸ Of course, LGBTI activists in Italy are not a single, cohesive group. While there is frequent overlap and communication, there are a multitude of organizations working on a range of issues relevant to LGBTI persons in the various regions and cities throughout Italy. I provide more detail on the history and current status of LGBTI activism in Italy in the following chapter.

describe here, like Muehlebach's volunteers, are not complacent mass consumers. They operate within an indeterminate political world that bespeaks an uncertain future and carries unanticipated consequences.

As I will illustrate in chapter 5, the fragmentation of the nation-state is evident in quotidian conversations and events, and corresponds to a nation-state beleaguered by political impasse that continues to delegitimize and demoralize state institutions, creating a chasm in the (following Bodei) ethos of the Italian people. Italian Historian Emanuel Rota asserts that the crisis of the nation-state has become common sense in Italy and that the inability of Italy to solve specific historical problems (of which the "Southern Question" is an example) has undercut the ideological basis for the nation-state (2011). In light of the weakness of the Italian state, the failure of the nation-state in Italy is no surprise and the future of Italy is already post-national (Rota 2011). This does appear to be the case. Rota writes:

In the past few decades the intellectuals who have been discussing globalization have predicted the demise of the nation-state. Italy is probably the first western country where such predictions have become common currency. Given the fragility of Italian national identity and the weakness of the Italian state, the foundering of the nation-state in Italy should not be a surprise. The celebrations for the 150th anniversary of political unification and their limited and controversial success in capturing the Italian political imagination should serve as reminder that nation-states are, despite their efforts to appear timeless and transcendental, recent, historically-specific creations (2011:1).

In the struggle over recognition of rights for same-sex couples, the crisis of the nation-state manifests as a crisis of Italian identity. A fragile national identity renders the nation-state vulnerable to outside influences. And while its influence may be waning, a substantial part of

Italy remains beholden to the Roman Catholic Church (hereinafter "Church"). Due in large part to historical contingencies such as those mentioned by Rota, Italy lacks a strong national identity, which has heretofore enabled the Church to assert its social will in a manner that is disproportionate to its popular support by taking advantage of the fragmented nation-state. Conservative politicians in Italy enlist the Church (and vice-versa) as an ally to provide a vision of national identity based on the patriarchal family and Catholic social values.

The EU, however, calls into question the status of the nation-state, and brings the possibility of new national and supranational identity formations to the forefront. And while uncertainty has its downside, it also generates opportunity: to state it bluntly, the EU has made it possible for Italians to imagine an Italy that is no longer beholden to the Vatican in matters concerning family life and law. Through its provision of legal tools that empower activists to advance the recognition of LGBTI rights in Italy, the EU enables a fissure in the Vatican's stronghold over national politics, thereby paving the way for new identity constructions that serve to further the cause of European integration and, in the process, alter the Italian ethos.

Several anthropological studies of the EU have focused on EU identity formation.⁹ To date, there have been three basic anthropological approaches to EU identity construction (Wilken 2012). The first approach looks at attempts to bring about this identity through various cultural policies such as the adoption of EU symbols and the launching of campaigns designed to foster popular awareness of an EU identity. For example, anthropologist Cris Shore argues that European integration is a project of the elite that is best understood as a cultural project designed to create a "European" people for a "European" state (2004, 2000, 1993). This is because in

⁹ Here, I mean the EU as a discrete entity and do not intend to conflate the EU with "Europe." The distinction will be taken up in more detail in Chapter 5.

most political systems, especially democratic systems, “culture” is the fundamental building block upon which legitimacy is established (Shore 2000:3). In its attempts to develop a European identity to buttress processes of integration, and thereby strengthen itself, the EU has increasingly relied on cultural politics, which include the creation of EU symbols, invented traditions, and a rewriting of history, as well as the development of Euro-statistics, EU citizenship, and a single currency in the form of the Euro (Shore 2000). Shore questions whether the EU’s supranational ideal can ever be realized in the absence of a popular European consciousness.¹⁰ As his work evolves over time, Shore expresses greater skepticism about this possibility. Early on, Shore is guardedly optimistic: anthropological theories stress that political realities are symbolically constructed and “it is reasonable to assume that with a steady consolidation and expansion of the European tier of authority the more recently created European political reality will herald a gradual but steady undermining of authority of existing nation states” (1993:790-791). Later he claims that the people of Europe are unlikely to ever embrace the EU’s cultural policies. According to Shore, the factors that give substance and legitimacy to the nation-state are not only social and historical, but are also embedded in everyday culture:

¹⁰ Shore queries:

[C]an conditions be created for shifting popular loyalties and transcending the nation-state, as some theorists and EU enthusiasts predict? Can love of Europe as a *patria* be engineered? And if so, how might this be achieved? What factors could precipitate the creation of “Europeanness” as a new category of subjectivity, or self-awareness? It has become fashionable to conceptualise nation-states as “imagined communities,” to use Anderson’s (1983) phrase, invented through print capitalism, mass communication, mass education, historiography, conscription and other nation-building technologies. But what insights does the history of nation-state-formation offer for understanding the invention of Europe as a geopolitical category? (2000:3-4).

Because of its history, and because its institutions have been adapted and reformed by successive generations, it has succeeded (where the EU has signally failed) in getting closer to its citizens and winning their consent to be governed. That process took many decades to achieve (2004:40).

But what if the institutions of the nation-state have never been fully adapted and reformed? What if the nation-state itself has a weak identity? This is the scenario that exists in contemporary Italy and I contend that, while Italians are not any more likely to embrace the EU's cultural symbols than, for example, the French or the English, they are perhaps more susceptible to the idea of a pan-EU identity that is capable of compensating for the nation-state's inadequacies.¹¹

The second approach to the formation of an EU identity focuses directly on EU institutions themselves, and looks at how officials within these institutions work to bring about EU integration (Wilken 2012:133). Since the 1990s several anthropologists undertook fieldwork inside EU institutions. The team of Marc Abélès, Irène Bellier, and Maryon McDonald looked at the EU Commission and European Parliament.¹² Abélès, Bellier, and McDonald were specifically asked by then-President of the Commission Jacques Delors to determine whether or not there existed a specific Commission culture and to assess the impact of different languages and national cultural traditions on working relationships and how a European identity might materialize in this context (Cini 2001). Other anthropological work in the area of identity construction in EU institutions includes the work of Danish anthropologist Signe Ejersbo (1993), the work of American anthropologist Stacia Zabusky (1995, 2000), and the work of Swedish

¹¹ Or, I submit, more willing to make use of a pan-European identity when necessary and/or convenient.

¹² Cris Shore also conducted fieldwork in the European Parliament and the Commission; however, as noted above, his work was primarily focused on EU cultural policies as opposed to the identity and construction of EU institutions.

anthropologist Renita Thedvall (2006, 2007). Early work following this approach focused predominantly on identification with EU institutions. More recent work looks at the increasing correspondence between national and European institutions, and considers the possibility of framing identity in reference to a transnational political space (Wilken 2012).

While the foregoing are “from above” approaches, the third approach adopts a “bottom up” perspective and looks at the way that European integration provides a new framework for identity construction as persons and organizations increasingly define themselves in relation or opposition to the EU (Wilken 2012:126). Anthropologist Lisanne Wilken observed that autochthonous minorities were among the first groups studied by anthropologists looking at the construction of European identity “from below” (2012:137). Such groups include “kin-state minorities” that ended up on the wrong side of the national border following centuries of war in Europe, stateless “micronations,” and linguistic minorities that have struggled to keep their languages alive in the face of nation-states’ attempts to eradicate them. European unification provides an opportunity for these groups to reframe their culture and identity. Through their engagement in various forms of political cooperation with the EU, many of these groups have been able to reposition themselves vis-à-vis the nation-state and reframe their identities in a European context. Wilken notes, “In a European Union stressing unity in diversity as the cultural ideal for cooperation and integration, autochthonous minorities have the opportunity to become co-creators of a new political reality. They can reconstruct themselves as ‘Welsh Europeans’ or ‘Catalan Europeans’ and gain cultural recognition within a broader European context” (2012:137). Representatives of autochthonous minorities cooperate with the EU in a variety of ways, including the setting up of EU-wide, NGO-like institutions and through the

creation of a European-wide political party (the European Free Alliance) that represents their interests in the European Parliament.

Anthropologists who adopt a “from below” approach to the study of EU identity construction have also been interested in radical nationalists who frequently define themselves in opposition to the EU (e.g. Holmes 2000, 2008; McDonald 2006). Radical nationalist groups seek to protect national or regional cultures against perceived threats from immigrants, “Eurocrats,” and elites, and emphasize intercultural incompatibilities between “natives” and “foreigners.”¹³ In doing so, such groups express a belief in a common foundation for European cultures and view European nations as belonging to an imagined “family of cultures” that share a common heritage based in Greek and Roman civilization and in Christianity (Wilken 2012:138). While the “imagined Europe” of radical nationalists is quite different from the “imagined Europe” of the EU, such groups nevertheless contribute to the real-world and discursive construction of European identity. Recently, anthropologists have begun to investigate how various immigrant groups residing in EU member-states position themselves in relation to integration processes and sometimes end up creating European identities. By way of example, Christina Moutsou (2006) has studied the relevance of the EU to the identity construction on the part of Turkish and Greeks immigrants living in Brussels, and Máiréad Nic Craith (2009) has looked at how immigrant intellectuals interpret their lives in Europe and as Europeans.

The intervention that I make here adopts a hybrid approach. It is top-down in its analysis of how EU law acts on the legal system of a member state and how that in turn promotes an EU identity. At the same time, it is bottom-up in its exploration of the ways in which social actors in

¹³ “Eurocrat” is an informal, pejorative term used to describe a bureaucrat in the EU's European Civil Service.

Italy are making use of EU law to gain recognition of rights and in the process resituating their Italian identity within a larger EU identity. What is a bit different from the scenario that I describe is the fact that, while there is in general cooperation between LGBTI activist groups in Italy and the EU, in this particular situation, Italian LGBTI activist groups are acting on their own, unsolicited by any EU institution or official. The processes I describe here are not part of a larger cultural project initiated by the EU. In fact, the EU has been generally reluctant to interfere with the family law of its member states, applying principles of “subsidiarity” and asserting that family law is a matter best left to the states’ discretion. And while there is a stated interest in becoming more “European,” at least in terms of the recognition of rights for LGBTI persons, EU identity formation largely occurs as a side-effect (rather than as a goal) of the activists’ activities. In addition, the delineation of an EU citizenship that overrides the interests of the nation-state in this particular area of law (and thereby fosters European identity) requires the cooperation of the Italian courts. While the activists play a fundamental role in carving out a transnational citizenship, in the end it is the Italian courts that are largely responsible for advancing processes of European integration.

The Judicialization of Italian Politics

While this study contributes to both the anthropology of Italy and anthropology of the EU in the area of EU identity construction, it also contributes to themes of judicial activism in civil law courts and to the increasing judicialization of Italian politics. Over the past several years, the evolving role of the Italian judiciary as policy-shaper and policy-maker has become a topic of interest for scholars (Marmo 2007; Pederzoli and Guarnieri 1997a, 1997b). Although the increasing importance of court decisions and the role that they play in the formulation of public policy is one of the major trends characterizing contemporary democracies (Tate 1995; Vallinder

1995), the degree to which judicial activism has manifested in Italy is arguably unique (Pederzoli and Guarnieri 1997b). While judicial activism in Italy is partially explained by the fact that EU membership has resulted in a modification of Italian hierarchical legal sources that positions EU law at a national constitutional level (and leads to the subrogation of national law in certain areas), in the case of the struggle over rights for same-sex couples, it is obvious that something more is at stake. As will be seen in Chapters 2 and 4, the decisions coming out of the Italian courts go well beyond the mere invocation and enforcement of EU law and evidence an increased judicialization of Italian politics.

In Italy, the rise in judicial activism and the increasing judicialization of politics is related to what Jürgen Habermas and others have described as a crisis of legitimation (Plant 1982). When the authority of legislatures, presidents, prime ministers, civil servants, and other political actors is undermined and the political process is deadlocked or otherwise blocked, the courts provide an alternative avenue for the formulation of policy choices.¹⁴ Judicial activism in Italy in this case is largely a response to the failure of the legislative and executive to adapt to changing social conditions.

Scholars who have studied the Italian situation have, for the most part, focused on what it is about the internal structure of the Italian legal and political systems that make for a unique case of judicial activism in Italy. Such scholars attribute increased activism to the creation and development of Italy's Constitutional Court following World War II (Del Duca and Del Duca 2006; Volcansek 1991), as well as to changes in the institutional setting that now guarantee a

¹⁴ Although not particularly relevant in the context of recognition of rights for same-sex couples in Italy, it should be mentioned that judicial activism can also serve to legitimize policies enacted by the legislature, thereby fostering political stability.

larger measure of judicial independence (Pederzoli and Guarnieri 1997a). Scholars also view Italian judicial activism as a response to political corruption, terrorism, and widespread organized criminality, which in turn led to granting strong powers to public prosecutors (Clark 2003; Del Duca and Del Duca 2006; Pederzoli and Guarnieri 1997a, 1997b).¹⁵ Still other scholars have opted to frame the judicialization of Italian politics as concomitant with processes of "Americanization" (Newell 2005). It is worth noting that the studies I have just referred to have all dealt specifically with the Italian *criminal* law system. This is because the criminal system has been where judicial activism, at least in its most negative sense, has been regularly alleged, largely in response to the inadequacies of the Italian criminal justice system and perceived overreaching on the part of judges. Few, if any, studies have dealt with the subject of judicial activism in Italy outside the criminal justice system as I do here.

Making Italians Means Making Families?

It is important to point out that the battle over recognition of rights for same-sex couples (and the more specific fight for marriage equality) takes place in the context of a larger demand for family law reform in Italy.¹⁶ Family law plays a central role in establishing norms, influencing opinion, and reinforcing a particular vision of social organization (Bradley 2004). Laws defining who is a family member often determine levels of social entitlement, and thus

¹⁵ Although there was a wholesale reform of Italy's criminal justice system in 1989, and the new code now advocates the adversarial arrangement of Anglo-American systems, the Italian judiciary still exhibits the interventionist attitude of the *pretore d'assalto* (assault judge) and the revised criminal justice system continues to grant the judiciary extraordinary power in that the same body has the authority (in full independence) to select the cases to be filed and to adjudicate them, thereby limiting the passivity of the judge as a check on his/her lack of political accountability (Pederzoli and Guarnieri 1997b).

¹⁶ Family law is defined here as the multi-faceted area of law that deals with family relations and governs matters such as inheritance, marriage, reproduction, divorce, spousal maintenance, the division of marital assets, child custody, and child support.

have direct bearing on the material well-being of entire categories of people. The principles of social order that are implicit in a national family law reflect the degree to which the state is willing to intervene in the autonomy of the family: “[a]t issue will be [the state’s] approach to gender equality and commitment to pluralism, not least in relation to ethnic groups and sexual orientation” (Bradley 2004).

As a nation-state, Italy remains deeply divided regarding how “family” should be defined. It is no secret that, as an institution, the family occupies a special position in Italy. In 1948, after the fall of the fascist state, Italy enacted a new Constitution. Unlike the U.S. Constitution, which has never mentioned “family” or any of its traditional parts (i.e., “husband and wife,” “spouses,” “marriage,” “parent and child”), the Italian Constitution of 1948, Article 29, explicitly recognizes the rights of the family “*come società naturale fondata sul matrimonio*” (translation: “as a natural society founded on marriage”).¹⁷ Marriage is based on the moral and legal equality of husband and wife, within the limits laid down by law for ensuring the unity of the family. Article 30 provides that it is the duty and right of parents to raise and educate their children, even if born out of wedlock. Finally, in Article 31, the State is charged with assisting, by economic and other provisions, the formation of the family and fulfillment of its duties, with particular consideration for large families. The State is also charged with establishing the necessary institutions for the protection of mothers, infants, and children.¹⁸

¹⁷ In Italian, Article 29 reads as follows: “*La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. Il matrimonio è ordinato sull'eguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unità familiare*” (translation: “The Republic recognizes the rights of the family as a natural society founded on marriage [matrimony]. Marriage [Matrimony] is based on the moral and legal equality of the spouses, within the limits laid down by law to guarantee the unity of the family”).

¹⁸ Article 31 (in Italian): “*La Repubblica agevola con misure economiche e altre provvidenze la formazione della famiglia e l'adempimento dei compiti relativi, con particolare riguardo alle famiglie numerose. Protegge la maternità, l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo*” (translation: “The Republic shall encourage family formation and the fulfillment of related duties, with particular consideration for large families,

The 1948 Constitution is a product of compromise that was shaped by Christian democratic, liberal (understood as the heir of 19th Century liberalism) and socialist-communist ideologies. During the Constituent Assembly, each group fought to influence the final text to reflect its values. As a result the parts of the Constitution relating to family and marriage (which were heavily influenced by Christian democrats) reflect Roman Catholic-oriented natural law themes, whereas other parts such as those dealing with workers rights' are more indicative of socialist thought. Interesting, however, is the fact that, while the Italian Constitution explicitly mentions marriage, it does not specifically define marriage or recognize a particular type of marriage as valid. Further, there is no mention of gender in the provision regarding marriage. LGBTI activists have seized on this in support of their claims for marriage equality to argue that same-sex marriage is not contrary to the constitution.¹⁹

Since World War II, the "liberalization" of standards on sexuality and family life has played a significant role in Italy's so-called "modernization" (Gilbert 2007). By "liberalization," I simply mean the reform and loosening of strictures. Despite the fact that most Western European nation-states introduced laws providing for divorce during the second half of the nineteenth century, Italy refused to do so. In December 1970, the Italian Parliament introduced a law legalizing divorce. The divorce law forced the renegotiation of the relationship between a husband and wife, which led to a reassessment of the rights of the family in 1975, and to the establishment of the principle of equal rights for married couples, as well as the rejection of the

through economic measures and other benefits. The Republic shall protect mothers, children and the young by adopting the necessary provisions").

¹⁹ While the Constitution does not explicitly prohibit same-sex marriage, several articles of the Civil Code do reference individuals of opposite sex in relation to marriage. For example, Articles 107 and 108 refer to the "wife" and "husband" as actors of the celebration and Articles 231 and ff refer to "filiation."

absolute power of the husband and disparity in the treatment of adultery cases (Bodei 2006). Italians saw these changes in law as a pivotal moment in the nation's history. Not only did the divorce law involve a rethinking of the relationship between husband and wife, it also shifted the relationship between Church and State. The law's enactment signaled a State victory for jurisdiction over the institution of the family. This victory was subsequently reinforced in May 1980, when 67.9% of the Italian population approved a referendum legalizing abortion.

Perhaps because these reforms came upon the heels of the social movements of the 1960s, historians of Italy have tended to view it as a late twentieth century issue, "as an indicator that the nation had finally shed the last vestiges of medievalism and become fully 'modern'" (Seymour 2005:298). However, as Mark Seymour points out, the debates over divorce in the 1960s and 1970s were the grand culmination of a sporadic but significant series of deliberations that began with Italian reunification in 1860 (Seymour 2005:298). Most scholars who have studied the debates leading to the legalization of divorce and abortion in Italy ignore the broader historical trajectory and instead focus on politico-institutional aspects of the debates. In this vein, the history and development of Italian family law is often read as a clash between two worldviews: "the struggle between a conservative concept of human nature, underpinned by Catholicism, in which marriage constrains sexual urges for the benefit of society, against a more liberal ideal of marriage as the product of the continuing exercise of individual free will" (Seymour 2005:298). While this struggle between opposing worldviews within the nation-state is intrinsic to the development of family law in Italy, I choose here to adopt a broader framework in order to capture the present dynamic in which the push to reform Italian family law occurs. I position Italy, not as a nation-state performing sovereignty in the area of family law, but rather as

a viable member of a supranational entity negotiating its status as a nation-state in an increasingly globalized world.

The focus of this project could have been different. For example, anthropologists working on gender and sexuality might opt to frame the study in terms of rights or, more explicitly, what Italian activists' invocation of certain rights says about what it means to be LGBTI in contemporary Italy. Other scholars may have decided to look at this as a study of contemporary social movements, perhaps implicitly or explicitly comparing the struggle over rights for same-sex couples in Italy to "social movement" theory in other parts of the world such as Latin America. Still others may have wanted to approach this as a study about Italian modernity and urbanity. Any of these framings could make sense. I, however, have chosen to talk about the social engineering role played by law in the construction of gender and identity in the context of a nation-state's relationship to a supranational entity. I am fascinated by the interplay between law and society, and the ways that law can be used to maintain the status quo and to create new ways of being in the world. Using the struggle over recognition of rights for same-sex couples as a window on larger processes of Europeanization and European integration, this dissertation provides insights regarding the effects of internationalization on the legal system of a nation-state.

Fieldwork

The account I present here is based on participant-observation fieldwork, interviews, and over four- and-a-half years of tracking online discussions and media sources dealing with LGBTI rights in Italy, and in Europe more broadly, between May 2009 and February 2014. Between July 2009 and February 2011, I spent over a year in Italy, living first in Rome and later in Turin, and working with various LGBTI rights advocates in Italy and the EU. When I first

conceptualized this project, I did not speak Italian. I applied for and received summer and academic year Foreign Language Area Studies (FLAS) Fellowships. I spent the summer of 2008 at the University of Virginia Summer Language Institute in a near-immersion accelerated language program. I continued my study of Italian during the following academic year, preparing for my first trip to Italy. Thereafter, I continued to study, read, and practice speaking Italian in an effort to improve my ability to communicate in the field. For me, learning Italian was one of the most challenging aspects of the project.

Part of the challenge arose from the fact that I was not a “traditional” graduate student. I was thirty-nine when I began graduate school. I am a single parent to a (now) eleven year old boy. My son was two-and-a-half years old when I began graduate school, and has played an integral part in my PhD journey. At various times, he has been forced to attend classes, lectures, meetings, and social engagements with me. Finding time to read, study, work, and live up to the expectations of a PhD program while parenting an active, intelligent child with a mind and preferences of his own has been an exhilarating, exhausting, and sometimes fraught experience. The fact that I also had to learn a foreign language (to which I had no previous exposure) placed me well outside my comfort zone.

The PhD program in anthropology was a complete shift in career for me. I graduated from college in 1988, with a degree in business, and thereafter attended law school. Upon graduation from law school in 1991, the United States Department of Justice hired me as part of the Attorney General’s Honors Program. I spent the bulk of my career (over ten years) working as an Assistant United States Attorney (AUSA), first in New Mexico, and then in Arizona. As an AUSA I was in federal court several times each week and represented the United States in a multitude of criminal cases dealing with immigration, drug trafficking, firearms offenses, fraud,

tax evasion, sexual assault, domestic violence, physical assault, child abuse, child pornography, and juvenile justice. While I generally enjoyed this work, it has been a lifelong dream to pursue a PhD in anthropology so I decided to apply to graduate school.

My return to graduate school constituted a significant lifestyle change. Not only was I abandoning a relatively secure career path, at mid-life I suddenly found myself supporting a child on a graduate student's stipend/salary. Most of my cohorts were 7-14 years younger than me. I went from being a relatively autonomous, successful, attorney to the role of student. It was disorienting at best. To become an anthropologist, I had to learn to let go of "thinking like a lawyer," and this was not easy. Initially, I intended to make a complete break from the law but as I progressed through graduate school, I found myself increasingly drawn to legal anthropology, and became especially interested in the role judges and courts play in shaping law and society. In addition, I had always been fascinated by the EU and interactions between EU law and the law of its member states. In particular, I was aware of and excited by the prospect of the EU as an imagined community at the forefront of human and civil rights.

Originally, I planned to do my dissertation on the harmonization of EU family law; however, as I began working in this area, I became aware of the ongoing struggle over rights for same-sex couples in Italy. Compared to other long-term members of the EU, Italy seemed to be an anomaly in terms of recognizing rights for same-sex couples. The subject combined all of my pet interests, including law, religion, human rights, courts, judges, activism, and notions of justice. Consequently, I decided to focus on the struggle for recognition of rights for same-sex couples in Italy. My choice of topic seemed odd to some of my friends outside the academy. I identify as a heterosexual and am also Roman Catholic. Some of my Catholic friends, especially, wondered how I reconciled my religious identity with my adamant support for

LGBTI persons and engagement with LGBTI activism. My response was and continues to be that I do not see the two as at odds with each other; hence, there is no need for reconciliation.

During the first part of my six month stay in Rome, I was accompanied by my son, who was seven years old at the time. My mother and my father (who had agreed to accompany me to help with the care of my son) also came along. The original plan was that my family would remain with me for the entire six months; however, several events conspired to lessen the time my family stayed with me in Italy. Shortly before we were due to leave, my father was diagnosed with frontal lobe dementia. My mother, son, and I were struggling to come to terms with this horrible condition that robbed my father of his short-term memory and many of his social graces. Immediately prior to the diagnosis, he was functioning same as always. He had successfully tiled the bathrooms in our house and completed a number of other household improvement projects. Seemingly overnight he was unable to recount what had been said or done from one hour to the next.

The second thing that altered our plans was the difficulty in obtaining a visa for my son. My first encounter with the Italian Consulate in Chicago was a disaster. After carefully reading the information presented on their website, making the requisite appointment, completing the visa application form, gathering and photocopying (and double-checking) what the website told me were the necessary supporting documents, and sitting (somewhat) patiently in the waiting area of the Consulate for most of the morning, I learned from the Consulate worker at the office window that it would be near-impossible to obtain a visa for my son. To acquire the visa, I would first need to obtain a *permesso di soggiorno* (a residence permit) from the local police where we would be living (in Italy) and then return (to the United States) to initiate the visa application process. This would take several months as there was no guarantee regarding the

processing time for the *permesso di soggiorno*. I was incredulous. As a graduate student, I could not afford (financially or time-wise) to travel back and forth for the visa.

Fortunately, my mother offered to return to the U.S. with my son and father at the end of the three (3) month time period allowed for U.S. passport holders without a visa to stay in Italy, leaving me so I could finish the initial round of fieldwork in Rome on my own. I did not relish the idea. At this point, the longest period I had been away from my son was one time for two weeks. As a single parent, I felt especially guilty. My son depended on me. In addition to the day-to-day activities and interaction, I was going to miss being with him on Halloween, Thanksgiving and his birthday. As it turned out, in addition to the over 3 months in Rome without my son, the following year, I spent approximately six months in Turin on my own without my family. I survived, but not without a lot of angst and guilt.

In Italy, the organization I was most involved with was *Associazione Radicale Certi Diritti* (*Certi Diritti*), a civil rights organization, with multiple objectives, including, but not limited to: preventing and combating of all forms of violence, abuse, and discrimination based on gender identity and/or sexual orientation; assisting victims of violence; promoting the freedom and sexual responsibility of the person; instigating and supporting initiatives to fight discrimination; and helping and defending individuals, couples, and other organizations and institutions in the advancement and protection of rights associated with gender identity and/or sexual orientation. While in Italy, I was able to interview several leaders and activists, and to participate in *Certi Diritti's* national conferences. Over the past couple of years, I have assisted *Certi Diritti* with the translation of numerous press releases and other documents from Italian into English. In chapter 2, I explain in detail how and why I came to be involved with *Certi Diritti*. I also spent time on the streets with LGBTI activists in Turin, assisting with and

participating in grassroots events designed to bring public awareness to issues confronting LGBTI persons in Italy.

My first experience with LGBTI activism at the European level came about in a somewhat fortuitous manner. It just so happened that ILGA-Europe was holding its 15th Annual Conference in Turin during the time I was there doing fieldwork. ILGA-Europe is the European Region of the International Lesbian, Gay, Bisexual, Trans & Intersex Association, a non-governmental umbrella organization comprised of approximately 408 organizations from 45 of the 49 countries in Europe. The theme of the 15th Annual Conference, which was held October 27-30, 2011, was "Human Rights and 'Traditional Values': Clash or Dialogue?," which was directly relevant to my research on the struggle over rights for same-sex couples in a Catholic country. Thinking it would be a good way to meet a lot of people and make relevant contacts for the future, I decided to volunteer to help out with the conference. I did not know what to expect when I sent off an e-mail to the local organizers introducing myself and offering assistance; however, I received a quick response and was put into contact with the "two V's." Both Vs are attractive, intelligent, Italian women in their late 20s, committed to LGBTI activism. Before I knew it, I was part of the "local staff" for the conference. In the weeks that followed, I bonded with several members of the local staff and forged valuable relationships that were vital to my research. I also began to realize the labyrinth of LGBTI activism at the European level, a relatively organized web of relationships and activities that in many ways mirrors the EU and Europe.

I was fortunate to have generous contacts at the University of Rome "La Sapienza" who introduced me to members of the law faculty. I was invited to sit in on law classes and observe the teaching of law in Italy, which I learned differs in fundamental ways from the way that law is

taught in U.S. law schools. This helped me to better apprehend the roles of law and legal practitioner (including judges) in Italian society. Members of the law faculty, along with practicing attorneys I met, helped me better understand the development and current status of family law in Italy. I also spent time in Italian civil and criminal courts, speaking with and shadowing attorneys. I observed a variety of proceedings and it was here that I was able to glimpse firsthand the role played by the Italian courts in the larger legal area and better appreciate Italian skepticism about the ability of law to accomplish anything.

In order to gain a broader perspective, I reached out to members of the Roman Catholic Church hierarchy as well, and was able to meet and speak with some of its active members. Being “on the ground” in Italy, I was able to see how the Church mobilizes its political power through politicians and the activities of key affiliates such as *Alleanza Cattolica* (AC), an Italian civic and cultural organization made up of Catholic lay people whose ultimate goal is to realize the social doctrine of the Catholic Church in society (i.e., establish a Christian temporal order).²⁰ *Alleanza Cattolica* has become increasingly vocal in its opposition to proposed legislation in Italy that would grant recognition to same-sex cohabitating couples. In Rome, I participated in a six week seminar sponsored by the Lay Center at Foyer Unitas. The sessions provided an overview of the teachings of the Church on Christian discernment and decision-making, and touched on Church teachings related to issues of human sexuality and marriage. During the course of this seminar it became apparent to me that I needed to know more about canon law,

²⁰ *Alleanza Cattolica* works to follow the papal teachings and periodically offers instruction to its members. One of its main goals is to provide formation in the face of the predominant secularization of Europe. The association organizes conferences, meetings, and workshops on Christian and “natural” political culture, and on historical events or news items, interpreting them in light of the “changeless social moral.” It publishes a magazine titled *Cristianità*. (See http://www.alleanzacattolica.org/languages/english/ac_attivita.htm).

especially as it pertains to issues of human sexuality and the marriage law of the Church. As a result, during the summer of 2011, I spent time as a visiting scholar in the Faculty of Canon Law at a prestigious European university. This visit proved to be an ideal environment in which to test my interpretation of the socio-legal challenge presented by Church and State relations in the EU in general and Italian family law in particular. I used this time to study and consult with faculty members in order to gain a better understanding of what is at stake, from the perspective of the Church, in the worldwide battle over marriage equality for same-sex couples as well as the more specific question of family law reform in Italy.

What is to Follow

In an effort to provide a holistic account of the contemporary struggle for recognition of rights for same-sex couples in Italy, I have opted to approach the subject from the perspectives of the main protagonists: the activists, the Italian Courts, and the EU. In the following chapters, I “twist the dial,” so to speak, looking specifically at the struggle through the lens of the relationship between the respective protagonist and the law. I ask specifically what each protagonist *does with* the law and what in turn *is done to* each protagonist in the name of law. I look at the points of conflict as well as points of harmony within and between each group. My goal is to help readers better understand this phenomenon and the conditions under which it is unfolding

In chapter 2, I provide a description of the problem, looking closely at the activities of Italian LGBTI activist groups currently fighting for marriage equality, and focusing specifically on the *Affermazione Civile* campaign initiated by Italian LGBTI activist groups *Associazione Radicali Certi Diritti* and *Avvocatura per i Diritti LGBT (Rete Lenford)*. Through the *Affermazione Civile* project, *Certi Diritti* and *Rete Lenford* have deliberately embraced court

action as a mechanism for change in an area of law that has long been subject to political impasse. By framing the relevant issues in terms of “rights,” these groups are able to take advantage of the opening created by the EU and use law to access the national legal system. Not only do the activities of *Certi Diritti* and *Rete Lenford* demonstrate unprecedented faith in the ability of state institutions and the rule of law to serve as societal transformers, they also reinforce a (notion of) European citizenship based on rights that originate in secular humanistic notions of social justice. Albeit not necessarily intentional, the activities of these activist groups also further the formation of a European identity and thereby carry consequences for the project of European integration.

I begin chapter 2 with a short discussion concerning some of the different legal statuses used to recognize same-sex relationships to make clear what I mean by rights for same-sex couples. I do this in order to better explain the significance of marriage equality (as opposed to some other recognition for cohabiting same-sex couples) in Italy. One of the points I make is that, due to particularities in the Italian Constitution, any result less than full marriage equality will ultimately prove discriminatory with respect to same-sex couples. In this same chapter, I offer a brief history of the struggle over recognition of rights (in general) for LGBTI persons in Italy, noting the main players, their strategies, and some of their historical achievements. This is necessary not only to illuminate connections and disconnections between the major protagonists, but also to explain the shifting nature of Italian LGBTI activism over the years and how it has come to be what it is at the present moment. I then focus specifically on the struggle for recognition of rights for same-sex couples, looking primarily at *Certi Diritti*, *Rete Lenford*, and the *Affermazione Civile* campaign.

As will be made clear in chapter 2, much of the resistance to same-sex marriage is due to the opponents' perceived need to protect the so-called "traditional" family. For this reason, in order to better understand the struggle over recognition of rights for same-sex couples in Italy, one must know something about the role(s) of family in contemporary Italy. In chapter 3, I consider the relevance of "the family" as a central institution in Italy. I begin with an overview of family life in contemporary Italy, highlighting the role of marriage in structuring family relationships. I then show how, despite all of the stereotypes and posturing, the so-called "traditional" family has lost substantial ground in Italy. Today, in Italy, as in the rest of the EU, there exists a plethora of family arrangements. Despite this, the family retains an important support role that makes up for the State's inability to deal with the ongoing economic crisis in Italy. One of the points that I make in this chapter is that, while the Italian family has changed significantly, Italian family law has not. I explain why this is problematic and illustrate how certain politicians make use of notions of the traditional family in an attempt to foster a sense of Italian nationalism based on Catholic social values. This in turn prevents politicians from taking action and adopting much-needed reforms in area of family law, including the recognition for families headed by same-sex couples.

I turn my attention to the response of the Italian courts in Chapter 4. In recognizing certain rights for same-sex couples, Italian courts display signs of a flourishing judicial activism and attendant judicialization of politics. I begin this chapter with an overview of the Italian judicial system and follow up in the subsequent sections with discussions regarding the education, selection and training of judges, as well as the role(s) played by judges in the Italian system. This background is necessary to fully appreciate the character and degree of judicial activism manifested in response to the *Affermazione Civile* project. After an exploration of the

meanings of “judicial activism” and “judicialization,” I apply these terms to the Italian context in order to explain the significance of the court decisions in the *Affermazione Civile* campaign. The courts’ decisions are important not only to the advancement of LGBTI rights in Italy, but also to the further delineation of a transnational EU citizenship and processes of European integration.

In chapters 5 and 6, I move away from Italy and take a closer look at the EU. In chapter 5, in conjunction with a brief discussion of what the EU is, I explore how various institutions within the EU structure and generate contemporary debate over marriage equality in the member states. In Chapter 5 I also make the point that the fragmented nation-state in Italy renders its citizens more susceptible to the influence of the EU. In the case of Italian LGBTI activists seeking recognition of rights for same-sex couples, “Europe” is frequently invoked as a trope of progressivism to advance the recognition of rights they possess as citizens of the EU. This is in large part due to the failure of lawmakers in the nation-state to adequately meet the demands of a changing society and to recognize (through law) the existence of contemporary family formations. Through their activities, and with the cooperation of the Italian and European courts, Italian LGBTI activists reinforce and further delineate an EU citizenship that serves the project of European integration in its “Kantian” mode as a defender of rights.

In chapter 6, I devote special attention to the activities of the European Court of Justice, as well as to the European Court of Human Rights. I do this because it is the European courts, more than any other European or EU institution, which have influenced and advanced the recognition of rights for same-sex couples in Europe and Italy. In this chapter, I also briefly discuss efforts to “harmonize” family law in the EU and offer a statement of the current legal situation. While there have been attempts to “harmonize” the family law of the member states, to date such efforts have made little progress. The EU continues to invoke notions of

subsidiarity to declare family law as a matter best left to the discretion of the member states. This is problematic as it affects the free movement of European citizens and their “family” members, and creates disparate categories of EU citizenship that privilege allegedly traditional hetero-normative families and all-too-often disenfranchise so-called alternative families. Through the case law articulated by the European courts, one can see a piecemeal attempt to create a more unified system of recognition for same-sex couples in the face of the unwillingness of the legislative bodies to take on the task of harmonizing the substantive family laws of the EU member states.

Chapter 6 is a bit of an anomaly. In general, this project is situated within a much larger milieu of studies dealing with relationships between law and society and legal anthropology. To this end, it is indebted to the work of legal anthropologists and other social scientists that has come before it. As with preceding anthropological work of this nature, this dissertation investigates a specific setting to get at larger issues such as power, control, and justice. It looks at how rules and laws are normalized, as well as at who establishes the rules, who can overrule them, and the possibilities for intervention (see Moore 2005). I follow a trend in legal anthropology that attempts to reckon with transnational processes and uses law as a means to study fields of action that are not always amenable to direct observation.²¹ In chapter 6, however, I move away from the typical anthropological approach and embrace a method that is usually undertaken by legal scholars. Here I use doctrinal analysis to get at what is going on in recent European and Italian court decisions dealing with rights for same-sex couples.²²

²¹ E.g., Coutin (2000); Merry (1992, 1997), Ong (1999).

²² In general, “legal doctrine” is composed of judicial decisions. To this end, “doctrinal analysis” consists of analyzing court decisions to see how they create rules or standards and establish legal precedents.

By the time s/he has reached chapter 7, the reader will no doubt have noted that LGBTI activists in Italy see the Church as their major opponent and as the primary obstacle to the recognition of rights for same-sex couples. I, however, am not convinced that the struggle in Italy is really between the Church and proponents of marriage equality. In Chapter 7, I return to the struggle over recognition of rights for same-sex couples in Italy, and look at the particular relationship between Church and State in contemporary Italian politics. The point I make here is that, while the Church has been a thorn in the side of LGBTI activists fighting for rights, and has definitely influenced political processes in Italy, in many ways the Church has been reified in the discourse surrounding the struggle over recognition of rights for same-sex couples in Italy. I take this up in this chapter and talk about recent Church events (most notably the unexpected resignation of Pope Benedict the XVI and his replacement by Pope Francis) that perhaps signal a change in Church attitudes and responses to same-sex couples, as well as to the future of the EU.

In the Conclusion, I tie everything together to illustrate how recent changes with respect to the treatment of same-sex couples in Italy are the direct result of the EU's influence on the nation-state in general and its judicial system in particular. This points to larger issues regarding sovereignty and territoriality, and demonstrates how profound changes in the status of the nation-state occur through often unintended and peripheral post-national identity formations in which the state itself is implicated.

I conclude the dissertation on an optimistic note. Law and policy with respect to same-sex couples in Italy and the EU continue to develop, even as I write this. There can be little doubt that law and policy with respect to same-sex couples in Italy will have changed again by the time this is finished. At the moment, Italian politicians are debating the possibility of civil unions, while *Certi Diritti* activists are demanding full marriage equality. A little over four years

ago, when I began my research, recognition in the form of a civil union seemed unobtainable and full marriage equality was practically unthinkable. Now, both are a remote possibility.

Chapter 2: A Description of the Struggle over Rights for Same-Sex Couples in Italy

In this chapter I describe the contemporary struggle over recognition of rights for same-sex couples in Italy, and demonstrate how LGBTI activists are taking advantage of opportunities made possible by Italy's membership in the EU to successfully advance the recognition of certain rights. A thorough analysis of the struggle requires an investigation of the relationships between an array of phenomena, and one of my ultimate goals is to show the different perspectives from which the struggle emerges and is sustained. However, while this chapter is intended in part as a general overview and introduction to the struggle, its main focus is on the Italian activists involved in the ongoing battle. I will elaborate other relevant perspectives in the following chapters.

Although there are additional LGBTI organizations fighting for the rights of same-sex couples in Italy, *Associazione Radicale Certi Diritti* (*Certi Diritti*) is currently leading the charge, in collaboration with *Avvocatura per i Diritti LGBT* (*Rete Lenford*), most notably through an innovative national campaign titled "*Affermazione Civile*," which seeks to promote rights through the deployment of judicial initiatives. The ultimate goal of the *Affermazione Civile* campaign is marriage equality in Italy. The *Affermazione Civile* campaign's success, while arguably limited (especially according to the activists involved), is unprecedented in Italy. For the first time, activists have been able to move the battle over recognition of rights for same-sex couples beyond theoretical abstraction and political debate into the realm of concrete action.

LGBTI activism in Italy arose from the revolutionary militant struggles of the 1968 students' revolts and demonstrations of organized workers. Early Italian LGBTI activists (a number of whom are still active and leaders in the LGBTI movement today) sought to overthrow the traditional structures of the capitalist class system, including heteronormative structures such

as the traditional family. As will be seen, however, in the current struggle for marriage equality, certain LGBTI activists are now embracing and seeking participation in the very structures their predecessors sought to do away with. By framing their demands in terms of “rights,” these groups are able to take advantage of the opening created by the EU and use law to access the national legal system, which (as I illustrate in Chapter 4) has been undergoing a transformation of its own due in no small part to the influence of the EU. How all of this happened is one of the topics I address in this chapter.

I begin the chapter with a short discussion about some of the different legal statuses used to recognize same-sex relationships in order to make clear what I mean by rights for same-sex couples. The recognition of rights for same-sex couples can take various forms, and it is important to understand some of the key differences between them. I continue the chapter with an abbreviated history of the struggle over recognition of rights (in general) for LGBTI persons in Italy, noting the main players, their strategies, and some of their historical achievements. I do this to demonstrate specific connections and disconnections between the leading players, as well as to explain the shifting nature of Italian LGBTI activism over the years. I spend considerable time discussing one organization in particular, *FUORI!*, because of its direct links and continued influence on *Certi Diritti* (*Certi Diritti*).

I then focus specifically on the struggle for recognition of rights for same-sex couples in Italy, looking primarily at *Certi Diritti*, *Rete Lenford*, and the *Affermazione Civile* campaign. I note that the *Affermazione Civile* campaign is taking place alongside a broader campaign by *Certi Diritti* for comprehensive family law reform in Italy. This is important to know in order to better contextualize the *Affermazione Civile* campaign in the broader scheme of Italian family law. My aim here is to explain the significance of marriage equality (as opposed to, for example,

civil unions or some other form of recognition for cohabitating couples) as the driving objective of the *Affermazione Civile* campaign. I contend that due to particularities in the Italian Constitution that simultaneously echo and influence Italian notions of the “family” as an institution based on marriage, any result less than full marriage equality will ultimately prove discriminatory against same-sex couples. *Certi Diritti* activists are well aware of this and in the past couple of years have ramped up calls for marriage equality, decrying other forms of recognition.

Another point I make in this chapter is that, by choosing to locate the struggle in the Italian courts, LGBTI activists have been able to effectively circumvent national political processes and the authority of the Church, in part by shifting focus from the nation-state to the supranational context. While wholesale family law reform has not occurred, EU perspectives are beginning to creep into Italian law through judge-made law in the courts. Why and how this occurs in a civil law country where judges are generally not deemed to make law, is the subject of Chapter 4. I will conclude this chapter with a discussion and analysis of the preliminary results of the *Affermazione Civile* campaign.

“Rights” for Same-Sex Couples

In a documentary made about the founding of *FUORI!*, Italy’s first gay liberation movement (2011), Italian actress Anna Cuculo notes that, when people talk about “rights,” about “gay” rights and “women’s” rights, there is great confusion. They mix things up. According to Cuculo, human rights should be the same for all human beings, regardless of gender or sexual orientation. While I agree with the sentiment behind Cuculo’s statement, this is not how such rights have come into being with respect to same-sex couples. Instead, a plethora of specific legal schemes have developed, in part to preclude having to grant full marriage equality to same-

sex couples and in part to fill the legal void created by couples who reside together, share in the care of a child, or are otherwise connected in some way that, while not currently recognized as marriage, necessitates legal protection for the parties involved. In addition to full marriage equality, forms of legal recognition for same-sex couples may include civil unions, registered domestic partnerships, and limited-rights statuses such as reciprocal beneficiary relationships. Each legal status has its own benefits and its own set of legal rights and responsibilities for those who choose to enter into such a relationship, and the benefits and rights that attach to each status vary (often in substantial ways) from one jurisdiction to the next. In the following paragraphs I will attempt to bring some clarity to the most common forms of legal status enjoyed by same-sex couples.

A civil union is a legally recognized form of partnership that in many cases is similar to marriage in terms of the rights, benefits, and responsibilities associated with the arrangement. The terms used to designate this type of relationship are not standardized and vary from jurisdiction to jurisdiction. Although sometimes conflated with registered partnership, domestic partnership, reciprocal beneficiary relationship, or some other status that provides fewer rights, benefits, or responsibilities, used here, civil union indicates a status akin to marriage in all things except name. Critics of civil unions in the United States argue that having autonomous laws for marriage and civil union results in a “separate but (un)equal” scheme that forces same-sex couples to use a separate institution that in turn encourages substandard treatment of same-sex couples and their families. In Italy, this is what leads to what many LGBTI activists refer to as a “Serie B” family.²³ Proponents of civil unions assert that they provide a practical solution for

²³ This is a reference to the Italian soccer league. The best soccer teams play in “Serie A,” composed of Italy’s professional clubs (similar to the for-profit NFL, NBA, or MLB in the United States). Smaller Italian cities often

same-sex couples by offering a mechanism to negotiate areas requiring legal recognition such as transfer of property, hospital visitation rights, and insurance, while avoiding the religious significance of marriage.

A registered domestic partnership is a legal relationship between two persons who reside together and share a domestic life but who are not married or in a civil union. Again, the rights, benefits, and responsibilities associated with this status vary between jurisdictions. In some places a domestic partnership is practically the same as a civil union, while in others a domestic partnership indicates lesser rights than a civil union but more than *de facto* cohabitation. Perhaps one of the major differences between domestic partnerships and civil unions is that domestic partnerships often involve different-sex couples as well as same-sex couples. This arrangement enables couples to agree contractually on issues regarding property ownership, support obligations, and other matters of concern to domestic partners. One of the main purposes of a domestic partnership is to formally acknowledge the contribution of one partner to the property of another.

In addition to civil unions and registered domestic partnerships, there are various partnership statuses that confer more limited rights and responsibilities such as reciprocal beneficiary relationships. As with civil unions and domestic partnerships, the specific benefits, rights, and responsibilities entailed in a reciprocal beneficiary relationship differ by jurisdiction. In general, reciprocal beneficiary relationships can be made between two consenting adults, both of whom must be competent to enter into a contract and not be a party to another reciprocal benefits relationship, civil union, or marriage. In some jurisdictions, this status is used by those

have their own clubs, which, depending on their ability, compete in Serie B (the second tier), Serie C, and so on. The point is that Serie B designates a lesser, not quite as good as Serie A, type of relationship or family.

who are prohibited from marrying or entering into a civil union, and in some cases the status *requires* that the two parties also be related by blood or adoption. In these situations, the reciprocal beneficiary relationship is used by close relatives (such as parent, grandparent, sister, brother, niece, nephew, aunt, and uncle) to confer certain rights, benefits, and responsibilities upon each other.²⁴ Usually, the rights granted to reciprocal beneficiaries are much more limited than those granted to married couples or conferred by a civil union law.

What should be evident at this point is the fact that a multitude of legal statuses have developed as alternatives to marriage. These legal regimes vary not only by status (i.e., civil union, domestic partnership, reciprocal beneficiary relationship) but also by jurisdiction, and offer different sets of benefits, rights, and responsibilities. A civil union recognized in one part of the world may differ from what counts as a civil union in another.²⁵ As I will detail below, a

²⁴ For example, hospital visits/health care decisions, disposition of remains, durable power of attorney/terminal care document, inheritance, and joint ownership of property.

²⁵ Using the United States as an example, the following requirements must be met to establish a reciprocal beneficiaries relationship in the State of Vermont: both parties must be at least 18 years of age; both must be competent to enter into a contract; neither can be a party to another reciprocal beneficiaries relationship, marriage, or civil union; the parties *must be related by blood or adoption* to each other; the parties must be prohibited from establishing a marriage or civil union with each other; and both must consent to the reciprocal beneficiaries relationship without force, fraud or duress. Once entered into, the reciprocal beneficiaries relationship, gives the parties the same rights as a spouse with respect to hospital visits and making health care decisions for the patient; enables one party to make an anatomical gift of all or part of the other's body for an authorized purpose upon that party's death (unless the party legally refused to make an anatomical gift and has never revoked the refusal); gives a party the same rights as a spouse regarding disposition of remains in the event of the death of the other; a person's reciprocal beneficiary cannot serve as a witness to the person's durable power of attorney or health care or terminal care document; if the patient consents or is unable to consent or understand, his or her reciprocal beneficiary has the right to obtain complete and current information regarding the patient's diagnoses, treatment, and any known prognosis and has the right to stay with terminally ill patients 24 hours a day; a reciprocal beneficiary is entitled to certain benefits under the Nursing Home Residents' Bill of Rights; and a reciprocal beneficiary is considered a "family member" under Vermont's Abuse Prevention Law.

The Vermont situation can be contrasted to Hawai'i, which is similar in terms of requirements except for one important factor: the parties entering into the reciprocal beneficiary relationship do not have to be related by blood or adoption. This means that, unlike Vermont (where same-sex couples now have full marriage equality and are not entitled to enter into a reciprocal beneficiary relationship), same-sex couples in Hawai'i have the option to enter into a reciprocal beneficiary relationship. This relationship confers hospital visitation rights, the ability to sue for wrongful death, property and inheritance rights, and the extension of family health insurance benefits to one's partner.

variety of these options have been introduced in the Italian Parliament; however, to date none of these proposals have actually been given due consideration by the Italian Parliament, and there is nothing akin to same-sex marriage, civil union, or domestic partnership in Italian law

Clash or Dialogue?

The LGBTI activists I worked with in Italy were vibrant, fun-loving, creative people, and were concerned about raising public awareness of LGBTI issues in constructive ways. As the following scenario demonstrates, raising awareness can be an effective strategy toward change. One evening in October 2011, a couple of weeks before the ILGA-Europe Conference being held in Turin, V1, a local LGBTI activist I met during the course of fieldwork, invited me to go out with her to distribute materials about the conference and related events to some of the local clubs. We had not yet met in person and made arrangements to meet a few blocks from my apartment, where V1 picked me up in her car. While distributing materials, V1 told me about the pre-conference events they had planned to bring awareness of the ILGA-Europe conference and LGBTI issues to the community. V1 told me that, in preparation for the conference, a group of activists from the conference organizing committee, along with other members from the community, had worked together to develop what they titled a “Clash or Dialogue?” night. The event was scheduled for the following Friday evening (October 21).

One of goals of the “Clash or Dialogue?” night was to bring attention to LGBTI issues in traditionally non-LGBTI spaces in order to engage a part of the public not usually encountered by the LGBTI community. To this end, the event was to be held in Piazza Vittorio Veneto, a large square in the center of Turin located near the River Po. With a size of almost 40,000

square meters, Piazza Vittorio Veneto is one of the largest squares in Europe. Lined on both sides with clubs, restaurants and shops, partially obscured by arcades, it is a popular spot for big events and a common meeting place, especially among youths. It is not known as a usual meeting place for LGBTI persons, which is part of the reason that it was selected as the venue for the “Clash or Dialogue?” event. The “Clash or Dialogue?” organizers recruited seventeen organizations and seven bars and clubs in the area of the piazza to propose various themes and host specific events. The themes included LGBTI families, homophobia and violence against LGBTI persons, “coming out,” AIDS awareness and prevention of sexually transmitted diseases, relationships between racism and homophobia, and transgender visibility. Each theme was represented through cultural projects such as photo and art exhibitions, theater performances, the showing of videos, and music. Tables were set up at several of the venues with representatives from the host organizations on hand to answer questions and provide theme-related written and other materials. On the square itself, organizers set up a “living library” and a popular exhibit entitled “*Guarda in Faccia la Violenza*” (“Look at the Face of Violence”). The “Clash or Dialogue?” night also promised a “flash mob” pillow fight on the piazza and was to be capped off with a disco dance party at the Jam Club.

On the evening of October 21, I left my apartment and headed for the tram at approximately 9 p.m. The weather was cool, but not bitter cold, and there was no sign of rain – a good omen. As I disembarked from the tram, I noticed that the piazza seemed relatively quiet. I spotted a group of people milling around a party tent pitched outside *La Drogheria* and wandered over. V1 and a few of the people I had met the previous weekend while distributing materials were standing in a circle, talking, and planning the strategy for the evening. I walked

toward them and was greeted and invited into the circle. We seemed to be the only presence on the square. I stood with fellow activists and took a look around.

To my left, I observed that what I had thought were people from my vantage point across the piazza was in fact a grouping of silhouettes, each approximately 7-8 feet in height, spaced 2-4 feet apart. Each figure represented the likeness of an actual person who had suffered violence or discrimination due to his or her sexual orientation. Attached to each figure was a brief report, relaying the individual's story. The *Guarda in Faccia la Violenza* exhibit is the creation of Barbara Marzocchi and Catia Campo. Born of collaboration between *ReteDonne Arcigay* and *ArciLesbica* on the occasion of the 2008 Bologna Pride, the exhibit is intended as a visceral display of the daily violence frequently encountered by those perceived as "different" due to sexual orientation. The diversity of figures is striking. From "Maria," who at age 27 decided to leave her convent after discovering that she was a lesbian and enduring psychological violence, to "Giulio," a 43-year-old gay man who was physically attacked and beaten in a pizzeria while out with friends, the exhibit personalized the debate.

To date, Italy has failed to pass legislation providing enhanced penalties for acts motivated by homophobic prejudice.²⁶ Perhaps even more frustrating is the fact that there are no statistics regarding violence based on sexual orientation or gender identity to shed light on the situation. As M, one of the LGBTI activists standing near me stated, "We have only our stories." I took some time and read each of the "stories." I was struck by the variety and extent of violence inflicted. Although I am not "LGBTI," I have many close friends who are gay, lesbian, bisexual, and transsexual. Most of them are open about their sexuality. It struck me that I had

²⁶ I must point out that one of the arguments against such legislation is that "everyone is equal" in the eyes of the law. In this vein, to single out a specific category of people for special treatment, such as through the enactment of "hate crimes" legislation designed to protect LGBTI persons, constitutes a juridical absurdity.

never asked any of them about violence they may have encountered due to their sexual orientation. I realized how, in addition to being insensitive, I was also naïve about what life may be like for many LGBTI persons, especially in places such as Italy where there is no law or law enforcement to offer protection. This type of awareness-raising was, of course, the point of the exhibit. I also realized that even in Italy, a place where people have little faith in the ability of law to change anything, there is a sense of urgency in the LGBTI community that laws are needed, not only to ensure equality, but also to guarantee protection.

After viewing the exhibit, I joined M and L, two LGBTI activists I had met the previous week at the Turin Youth Center while conducting fieldwork. Next to the *Guarda in Faccia la Violenza* exhibit, the "Clash or Dialogue?" event organizers had set up a "*biblioteca vivente*" ("living library") under the tent. The idea behind the living library was so event-goers could "talk" to someone they might not have the courage to approach in everyday life. Volunteers served as "living books" that could be "checked out" for a half an hour of conversation. The "books" were listed in a catalog from which event goers could choose and the catalog offered titles such as "drag queen," "young lesbian," "Muslim boy," and "Romanian girl." The person checking out the "book" was free to ask questions in order to learn more about the person represented in the living book. During the time I had been looking at the *Guarda in Faccia la Violenza* exhibit, a number of people had come into the tent area and several appeared to be waiting to "check out books." This surprised me. The living library was a nifty idea, but I could not imagine many of my friends and acquaintances availing themselves of an opportunity like this when out for a drink or dinner on a Friday night.

I asked L about the people under the tent. I wanted to know if they were mostly living library volunteers and/or members of the LGBTI community supporting the event. L assured me

that most of them were random people from the street who had stumbled upon the event. I expressed my amazement at the success of the “living library” and told L that I was not sure that a similar event would meet with the same success in my home community. L said, “Italians love to talk.” She told me that living libraries had been set up in other parts of Europe with less success but that, in Italy, it was different because people “needed” to talk. (I always thought that I, too, enjoyed talk but I am not sure I would feel compelled to “check out” a living book and interrogate the person, even though it is quite similar to what anthropologists do.)

As the evening wore on, the piazza became increasingly filled with revelers. People were spilling out of the venues lining the piazza, and everywhere there were groups of people talking and laughing and otherwise enjoying the evening. I walked around to the other “Clash or Dialogue?” venues to take a look at the information they were offering and to chat with different people. Everyone appeared to be having a good time and I, too, enjoyed myself. While I did not make it to the disco dance party at the Jam Club, I did get in on the flash mob pillow fight, which drew a huge crowd and was a lot of fun.

Throughout the evening, I was reminded of Jürgen Habermas' (1989[1962]) conceptualization of the “public sphere” as a space where meanings are articulated, disseminated, and negotiated. In the “public sphere,” private individuals come together as a public to identify and discuss societal problems, and to debate the general rules governing social relations. Through this discussion, participants in the public sphere influence political action. Gerard Hauser further developed the notion of “public sphere” by emphasizing its rhetoricality. Hauser defines the public sphere as a:

discursive space in which individuals and groups congregate to discuss matters of mutual interest and, where possible, to reach a common judgment. Public spheres are discursive

sites where society deliberates about normative standards and even develops new frameworks for expressing and evaluating social reality. It presupposes that active members of society who lack official status may form as publics through their participation in rhetorical encounters that define a public sphere. It understands public opinion to be a discursive judgment made by social actors and an inference by those who are investigating what a public thinks (1998:85).

According to Hauser's view, the public sphere is formed by active members of society around issues rather than by the identity of the population engaging in the dialogue (1998). Rhetorical public spheres are created by any interactions whereby the public engages each other, and such interaction can take the form of a basic "street rhetoric" that creates a space for dialogue between competing publics. More importantly, this rhetorical model of the public sphere depends on active members of society, rather than survey researchers or public spokespersons, to establish the terms for public opinion (Hauser 1998:86).

The "Clash or Dialogue?" event was a deliberate attempt to create just such a public sphere, and a seemingly successful effort at that. I was surrounded by dialogue. Everywhere I looked on the large piazza, people were talking to one another: asking questions, seeking information, and debating. While I do not want to overstate the event's achievements, for the most part, the dialogue was respectful and there were no signs of protest or violence. People in Turin wanted to talk about LGBTI issues. The "Clash or Dialogue?" event would not have met with such success 10-20 years ago. As will be seen in the following sections, the approach, projects, and activities of Italian LGBTI activists have changed dramatically in recent years.

A Brief History of LGBTI Activism in Italy

FUORI!

Italy's first gay liberation movement came to life on April 15, 1971. Following the publication in *La Stampa* of the review of a book written by a psychoanalyst who claimed to have secretly recorded sessions with one of his patients and to have "cured" the patient of homosexuality, Italian activist Angelo Pezzana began calling his friends, telling them that they needed to do something.²⁷ Pezzana had information on other LGBTI movements in other parts of the world such as Canada, France, and the United States, and he also had contacts with several journalists throughout Italy. He called a meeting of his friends and they decided to organize. Referring to the U.S. experience, they named the organization "FUORI!," which translates to "Out!" or "Come Out!" in English. Next they had to find a meaning for the acronym and they settled on *Fronte Unitario Omosessuale Rivoluzionario Italiano*, which translates roughly to "Italian United Homosexual Revolutionary Front." In a documentary detailing the founding and history of *FUORI!*, Pezzana admits that "revolutionary" might not have been the precise word to describe the organization; however, it was appropriate because changing society required a revolution in thought (2011).

In order to get the word out, the *FUORI!* founders published a magazine (also titled "*FUORI!*") and distributed it in person around Italy at places where LGBTI persons were known to congregate. Within a few months, twenty groups had been formed throughout Italy (*FUORI!* 2011). For its first public demonstration *FUORI!* members wanted to do something that would garner interest outside of Italy. In April 1972, the *Centro Italiano di Sessuologia* (Italian Center

²⁷ *La Stampa* is an Italian newspaper published daily in Turin, and distributed throughout Italy and other European nations.

of Sexology) sponsored a conference on sexual deviance in Sanremo that was partially funded by Catholic groups. The conference followed the introduction of a law to criminalize homosexuality in Italy and the organizers included a group of psychiatrists in favor of the law. This was to be an international meeting and attracted the attention of gay activist groups from other European countries. The events surrounding the conference became later known as the Italian Stonewall (Consoli 2000).

The conference featured British psychiatrist Philip Feldman who announced a new form of electroshock therapy that promised to “cure” homosexuality. Shortly thereafter, a group of forty protestors (from the FHAR,²⁸ *FUORI!*, the MHAR,²⁹ the IHR,³⁰ and the British Gay Liberation Front) stormed the room with posters and flyers, shouting “Normal” and “Psychiatrists, we have come to cure *you!*” The police were called and arrested several of the demonstrators after beating them in front of television cameras (Consoli 2000; Malagrecia 2006; Rossi Barilli 1999). The protest attracted the interest of the media, including Italy’s national broadcaster RAI and, for the first time, the Italian press spoke about homosexuality. As Pezzana observed, the subject of homosexuality moved from the crime news to the national news in the Italian media (*FUORI!* 2011).

²⁸ *Front Homosexuel d'Action Révolutionnaire*, or Homosexual Front for Revolutionary Action in English. The FHAR was a Parisian movement founded in 1971, and known for having given radical visibility to LGBTI activism in the 1970s. Its informal leaders included Guy Hocquenghem and Françoise d'Eaubonne. FHAR eschewed the bourgeois heterosexist patriarchal state. It dissolved in 1976, when members began to disassociate due in part to the increasing prevalence of men that obscured feminist and lesbian issues.

²⁹ *Mouvement Homosexuel d'Action Révolutionnaire*, or Homosexual Movement of Revolutionary Action in English. The MHAR was a radical Belgian group inspired by the French FHAR that made a brief appearance in the 1970s.

³⁰ *International Homosexuelle Révolutionnaire*.

In 1974, *FUORI!* joined forces with *Partito Radicale*, a liberal non-Marxist group founded in May 1968. Until that time, *FUORI!* existed as a political outcast. As Pezzana recalls, “We were considered lechers by the right, sinners by the center, and a petty bourgeois movement by the left” (*FUORI!* 2011, my translation). The partnership between *Partito Radicale* and *FUORI!* was, however, not without internal controversy. There were many members of *FUORI!* who did not agree with the “reformist”³¹ agenda advanced by *Partito Radicale*. One such person was Mario Mieli, a leading intellectual figure at the forefront of the Italian gay liberation movement throughout the 1970s. Mieli combined a radical theoretical viewpoint with an often provocative public persona (he once ate his own excrement and that of a dog in public), and is known for his Marxist account of homosexuality and homosexual oppression, *Elementi di Critica Omosessuale* (1977), which was subsequently translated into English as “Homosexuality and Liberation: Elements of a Gay Critique” (1980). This work is widely considered one of the most important texts from the Italian gay community. In it, Mieli combines Freud’s notion of “polymorphous perversion” with Marxist economics to argue that homosexual liberation is a necessary part of a wider human emancipation, one which depends on a revolution allowing the full expression of a natural human transsexuality.

Mieli was present at the founding of *FUORI!*, and helped organize additional memberships in Rome, Padua, Venice, and Milan. He participated in the April 1972, demonstration at Sanremo against the psychiatric condemnation of homosexuality and the use of

³¹ In Italy, “reformist” is a word with negative connotations. A reformist agenda is one that seeks to make gradual change or changes to certain aspects of society, as opposed to rapid fundamental changes. It is distinguished from radical social movements, of which revolutionary movements are an example. Generally speaking, reformist ideas are based in liberalism, a political philosophy based on ideas of liberty and equality.

aversion therapy to “cure” homosexuals. When, however, *FUORI!* united with the *Partito Radicale*, Mieli was critical and condemned the move as “counter-revolutionary.” According to Pezzana, at that time there was a fundamental disagreement among members of *FUORI!*. Some considered Mieli’s views extreme. Mieli argued that they should fight against heterosexuality and destroy its rule. Pezzana, on the other hand, held more moderate beliefs. He thought LGBTI persons should live as such in a society that also includes heterosexuals. The internal debates became heated. Mieli believed the gay movement should remain independent of political parties and, with others, staged a secessionist congress that fragmented *FUORI!* Mieli subsequently left *FUORI!* and helped organize the *Collettivi Omosessuali Milanese* (Homosexual Collectives of Milan), which produced *La Traviata Norma: ovvero, Vaffanculo... ebbene sì!*,³² a parody of heterosexuality that used audience engagement to deconstruct the minute signs of heteronormativity.³³ Others who disapproved of the relationship with *Partito Radicale* left with him (*FUORI!* 2011).³⁴

³² One possible, but flawed, translation: “The Misguided Rule, that is: Fuck Off... Well, Yes!” The title’s numerous puns make accurate translation difficult.

³³ By 1981, Mieli became increasingly pessimistic about his cause and, in 1983, he told friends about a book that was to be published titled *Il Risveglio dei Faraoni* (“The Awakening of the Pharaohs”), which he described as an autobiographical novel featuring the risen Christ. As evidenced by a letter to a friend, Mieli feared adverse reaction to his book and believed that its publication might lead someone to cause him harm. On March 11, 1983, he wrote a letter to a friend stating that he had decided not to publish the book. On March 12, 1983, Mieli took his own life at the age of 30, dying from asphyxiation caused by inhaling gas in his apartment in Milan. Shortly after Mieli’s death, the largest gay organization in Rome (itself founded in 1983 by the merger of the pre-existing organizations *FUORI!* and *Collettivo Narciso*) changed its name to *Circolo di Cultura Omosessuale Mario Mieli* (Homosexual Cultural Circle “Mario Mieli”) in his honor. Since 1989, *Circolo Mario Mieli* has offered home care services for persons living with AIDS, counseling services, legal assistance, and self-help groups for people living with HIV. It also manages a home for the homeless.

³⁴ Another issue that worked to divide *FUORI!* was its perceived lack of response to the needs of lesbians and feminists. Lesbian feminist Anna Siciliano has stated that she felt there was no breathing room in *FUORI!* for women in part because the issues of concern to lesbians were assimilated into those of the male gay groups. A women’s branch, “*FUORI! Donna*,” was subsequently established.

In 1976, LGBTI rights entered the Italian political agenda. *Partito Radicale* became the first political party to run women and LGBTI candidates for parliament, and was subsequently dubbed the party of “faggots and whores.” Despite this, the political elections of 1976 were pivotal: *Partito Radicale* was the “novelty” party and this presented the opportunity to get its message out. The party received a great deal of media coverage and articles about homosexuality, divorce, and abortion began to appear with greater frequency. Uniting with *Partito Radicale* gave *FUORI!* political legitimacy. Pezzana, along with Carlo Sismondi, led efforts to emulate the “pride” strategies imported from the United States and Northern European gay movements, and directed resources toward uniting Italian LGBTI activists for purposes of cultural interventions as opposed to interminable theoretical abstractions. The new gay political motto was “*abassando il tiro*,” which can be translated as “down to earth” (Malagrecia 2006:142). In the words of Sismondi, “Between the danger of a shallow pragmatism and that other one, terrible, of an escape into abstraction or mysticism, I clearly prefer the former one” (Malagrecia 2006:142, citing Rossi Barilli 1999:102). As a result, they were able to create a structure of social services and cultural programs that included health care centers, entertainment sites, and information offices.

Many of the divisions that plagued *FUORI!* and were partially responsible for its eventual demise were related to the language of political struggle and representations of difference. Over time, *FUORI!* began to adopt strategies developed by the gay liberation movement in the United States, and its revolutionary ideals began to shift. By the end of the 1970s some parts of Italian gay activism had surrendered the radical politics of the 1970s in favor of a “politics of identity” imported from the United States (Merlini 1977). “Being gay” became more important than the production of a “revolutionary subject,” and the claiming of

identity followed a three-step process: first, acknowledge yourself as gay; second, come out in public; and third, take pride in your identity (Malagreca 2006). Miguel Malagreca notes: “This line of self-inquiry gave rise to a new form of political activism, less oriented towards the factory and more interested in the celebration of the ‘individual,’ more oriented towards the constituency of a new ‘gay’ identity and less interested in the previous project of universal liberation (2006:129).”

This shift in the language of politics and representation of difference produced mixed consequences. On the one hand, the revolutionary potential of the early Italian movement subsided. Instead of remaking of society, efforts were directed to becoming an accepted participant in the prevailing society. On the other hand, the comparison of the Italian gay framework with others enabled the advancement of a critique of civil, social and human rights in Italy. It was the enabling of this critique of civil, social and human rights that, in later years, created an opening for the EU to insert itself. The shifting language of politics and representation of difference in Italian LGBTI activism also paved the way for the founding of Italy’s first all-encompassing national LGBTI organization: *Arcigay*.

*Arcigay Arcilesbica*³⁵

When I first arrived in Italy to conduct dissertation research, I fully expected to work with *Arcigay Arcilesbica* (*Associazione lesbica e gay italiana*, hereafter referred to as *Arcigay*), Italy’s largest national gay organization. *Arcigay* was founded in 1985 as a non-profit organization with the goals of combatting homophobia, heterosexism, prejudice, and anti-gay

³⁵ At a conference in Rimini held April 1994, the Association changed its name to “Arcigay Arcilesbica,” and became the only association in Italy that elects its executive on the basis of a 50% quota for each sex.

discrimination.³⁶ As an organization, it is committed to achieving equal status and equal opportunities for all individuals, regardless of sexual orientation. *Arcigay* serves as an umbrella organization for over one hundred political/cultural and recreational centers throughout Italy, and by 2007, its membership exceeded 160,000.³⁷ *Arcigay* strives to promote the visibility of LGBTI persons in society, and works to set up social initiatives and welfare services, frequently operating alongside other civil rights movements. According to its stated values and principles:

Arcigay believes in a secular, democratic society where individuals' liberties, human and civil rights are recognized, promoted and guaranteed without discrimination based on sexual orientation, gender identity or other personal and social condition, and where the personality of every individual can be achieved within a framework of peaceful relationship with the social and natural environment.³⁸

To this end, *Arcigay* is independent of “any government, political ideology, economic interest or religion.”³⁹

Arcigay came into being during the beginning phases of the AIDS epidemic. No doubt, this influenced the nature and strategies of its early activities. Following their counterparts in the

³⁶ The first *Arcigay* club was *informally* founded in 1980 in Palermo by Don Marco Bisceglia, a Catholic priest who disagreed with the Church hierarchies, as a reaction to the suicide of two young Sicilian lovers who had taken their own lives after being ostracized by their families and the community in their small city of Giarre. Farmers found the bodies of the two lovers, embracing each other under a lemon tree in a grove, fifteen days after the suicide. A twelve-year old nephew of one of the victims later stated that he had killed them at their insistence by shooting them with a family gun in order to put an end to their suffering. Next to the bodies lay a letter in which the young lovers assumed full responsibility and explained their reasons. The event received extensive media coverage in the Italian press.

³⁷ For the sake of reference, the July 2013 population estimate for Italy is 61,482,297 (CIA World Factbook 2013).

³⁸ *Arcigay* website, <http://www.arcigay.it/who-we-are/>, accessed December 5, 2013.

³⁹ See note 38 above.

United States, *Arcigay* activists strove to “degay” AIDS.⁴⁰ This meant that *Arcigay* activists purposely withdrew from the liberationist maneuvers and criticism of heterosexist structures of the previous decades and chose instead to focus on removing homosexuality from discussions about AIDS. This in turn enabled the development of a national alliance across various gay groups in Italy. In the few existing histories of the gay rights movement in Italy, there are several references to the “pragmatics” of the 1980s (Rossi Barilli 1991; Grillini 1990). These references further point to the shift (mentioned above in the discussion of *FUORI!*) from the radical leftist politics of the 1960s and 1970s (with their corresponding ideological basis for political action) to a quest for real-world solutions to concrete problems.

Arcigay has an extensive network of affiliated clubs (which include discos, bars, and saunas) that are sometimes a source of consternation when a patron is required to purchase a temporary *Arcigay* membership card in order to gain admission. These enable social interaction and foster a sense of community among the LGBTI population. The rapid growth of *Arcigay* at the turn of the 21st century demanded organizational and management changes. In order to keep up, *Arcigay* established national working groups for specific areas such as health, law, foreign affairs, communication, education, and immigration. These structural changes enabled *Arcigay* to diversify and work on an entire range of LGBTI issues.

Among *Arcigay*’s stated objectives are marriage equality and civil unions. At the present moment, same-sex couples residing in Italy have no shared rights to property, social security or

⁴⁰ The word “degaying” was first used by activists Ben Schatz and Eric Rofes to refer to the conscious decision of LGBTI activists in the United States in the 1980s to focus on AIDS rather than other issues of importance to the community such as homophobia (Vaid 1995).

inheritance. While many of the Italian regions⁴¹ have passed resolutions in support of a French-style PACS (a civil solidarity pact that constitutes a form of civil union) and several municipalities⁴² have passed laws providing for civil unions, these actions are essentially symbolic as the regions do not have legislative power over the issue. In 1986, *Arcigay*, along with the Inter-parliamentary Women's Communist group, presented the first Italian proposal for legally registered partnerships to the Italian parliament. In 1988, after lobbying by *Arcigay*, Socialist Deputy Alma Cappiello Agate introduced the first bill (PDL N. 2340, Directive on the de facto family, 12 February 1988), which called for the acknowledgement of cohabitation between "persons." The bill subsequently failed, but only after receiving extensive press coverage where journalists wrote about "second class" marriage and debated the possibility of same-sex unions for the first time in Italian history.

In the following years, *Arcigay* continued to fight for recognition of rights on behalf of same-sex couples, and its legal team presented several other legal proposals to parliament, including those related to civil unions.⁴³ Encouraged by the discussion in the European Parliament concerning equal marriage and adoption rights for LGBTI persons, the 1990s witnessed the presentation of a series of civil union bills in the Italian parliament. During the

⁴¹ These regions include Tuscany, Umbria, Emilia-Romagna, Campania, Marche, Veneto, Puglia, Lazio, Liguria, and Abruzzo.

⁴² As of 2013, 150 Italian municipalities and cities had introduced civil union registries formally recognizing same-sex couples. Major cities offering civil union registries include Bologna, Padua, Florence, Pisa, Bolzano, Palermo, Naples, Milan, and Genoa.

⁴³ *Arcigay* has used several strategies in its attempts to advance recognition of rights for same-sex couples. For example, in February 1996, *Arcigay* collected 90,000 signatures in the space of a few months (15,000 of which were from Bologna alone) on a petition for the "*Unioni Civili*" (Civil Unions). In March 1998, a legislative project on legally registered partnerships initiated by *Arcigay* was presented to the Chamber of Deputies. Among those who signed the proposal were the former President of the Chamber Nilde Iotti (PDS party) and the philosopher Lucio Colletti (Forza Italia party). On May 22, 1999, *Arcigay* organized a national rally in Como in support of legally registered partnerships.

XIIIth parliamentary session alone, ten such bills were presented. None of the proposed bills, however, ever made it as far as discussion on the house floor. This was due in large part to the opposition and influence of the Catholic hierarchy on the ruling Christian Democrat coalition. It was much the same throughout the first decade of the new millennium, culminating in the government approval of a draft bill to recognize same-sex partnerships that went by the name DICO (*Diritti e Doveri delle Persone Stabilmente Conviventi*, translated: “Rights and Duties of Stable Co-Habitants”) in February 2007. I contend that the introduction of the DICO constituted a pivotal moment in the battle over rights for same-sex couples in Italy. The proposed bill propelled national debate to a new level, and its subsequent failure forced LGBTI organizations to pursue alternative strategies and goals. Two Italian filmmakers, Gustav Hofer and Luca Ragazzi, followed the debate to its bitter end and produced an award-winning documentary titled *Improvvisamente l’inverno scorso* (English: *Suddenly, Last Winter*) (2008), which details the events that occurred in the aftermath of the DICO’s introduction.⁴⁴

The Film *Suddenly, Last Winter*

Suddenly, Last Winter tells the story of Luca and Gustav, two young gay men in their 30s living together in Italy. The crux of the film begins in April 2006. Prime Minister Silvio Berlusconi has recently been ousted for the second time, and a center-left coalition has seized a slim majority. Luca and Gustav are excited because the new center-left coalition has promised legislation that will provide civil unions and other rights to same-sex couples. In February 2007,

⁴⁴ The film has won awards, including the 2008 Berlin International Film Festival “Manfred Salzgeber Award” (Special Mention), a “Silver Ribbon” from the 2009 Italian National Syndicate of Film Journalists for “Best Documentary,” and “Special Mention” for the category “Best Documentary” at the 2008 Milan International Lesbian and Gay Film Festival.

following the introduction of laws recognizing same-sex unions in Great Britain, the Netherlands, and Spain, Italian Prime Minister Romano Prodi partially delivers on the promise by introducing a modest piece of legislation commonly referred to as the DICO. The DICO proposes to give cohabitating partners inheritance rights after nine years of living together, and alimony rights after three. It will also allow one partner to make decisions regarding funeral arrangements and organ donation if the other should die. According to the proposed law, cohabitating partners would be required to go to the registry office to declare their *de facto* union, but no ceremony akin to marriage would be celebrated.

Despite the fact that the legislation 1) attempted to maintain a clear distinction between the status of marriage and status of cohabitation, 2) represented a far cry from the civil partnership legislation introduced in other EU member states, and 3) was supported by a majority of Italians, its introduction prompted a wave of outrage on the part of the Roman Catholic Church (Church) and its allies in Italy. The Vatican and political conservatives were quick to challenge the proposed law, asserting that recognition of rights for same-sex and heterosexual cohabitating couples would signal the end of the “family” and morality. Then-Pope Benedict XVI (now Emeritus Pope Benedict XVI) stated that such legislation goes against “natural law” and that it weakens the family and penalizes children. According to the Pope at the time, “No law can subvert the Creator’s law without damaging society.” The President of the CEI (Italian Episcopal Conference), the official assembly of the Italian bishops of the Catholic Church, issued a letter firmly reminding Catholic politicians of their moral duty to vote against the proposed law, and the Vatican subsequently supported the letter. Opposition to the DICO continued to mount and Italian Catholic traditionalists mobilized the Church’s organizational power to stage a massive “Family Day” demonstration in Rome. The manifesto published for

the demonstration warned that the Italian family was at risk from the “crisis of the West,” defined as “the reduction in the number of marriages and demographic decline” (Gilbert 2007). In an attempt to understand this fervent response, Luca and Gustav decide to make a documentary.

The documentary, which focuses on the meaning of family and Italy’s particular entanglement of Church and State, shows Luca and Gustav following the weekly Senate proceedings, attempting to interview politicians, attending anti-DICO rallies, and asking questions of the people they meet in the street. One anti-DICO rally depicts participants shouting “no children, no family.” At another rally Luca and Gustav speak with Roberto Lastel, the leader of *Militia Christi*, a non-partisan Catholic political movement and one of the first groups to protest against the DICO. Lastel states that he is in favor of a family founded on nature: “A man and a woman. A mother and a father.” According to Lastel, “Our future depends on this.” When pressed about his stance on same-sex parenting, he responds, “It’s a perversion. A gay couple is a deviation.” The documentary viewer gets a front-row seat to the intolerant homophobic attacks launched from the pulpits and Italian national TV talk shows on a daily basis. Maria Chiara Acciarini, the then-Undersecretary for the Italian Ministry of the Family, is seen imploring fellow-politicians, “We worked hard to enter the economic Europe. Don’t we want to enter the political and civil Europe as well?”

One of the most revealing scenes in the documentary comes in the interview with MP and Honorary President of *Arcigay* Franco Grillini. Luca and Gustav ask Grillini if he is surprised by the negative response to the DICO. Grillini remarks: “They demand that the Italian Parliament follows the directives of the Vatican State. Nothing like this takes place in any other European or Western country. This dynamic exists only in Islamic countries.” Grillini also notes that

LGBTI persons should not have to go to the courts for recognition of their rights. According to Grillini, “justice takes an endless amount of time here.” Later, after I had spent time working with various LGBTI rights advocates in Europe and Italy, I realized these are commonly held sentiments.

Due to considerable opposition in the Senate, the bill was stopped before reaching the floor for a vote. Later in 2007, the bill was merged with other civil union proposals and the Senate Judiciary Committee looked at a new draft referred to as *Contratto di Unione Solidale* (Solidary Union Contract). This also failed, however, when in February 2008, an early election was called and dissolved the sitting Parliament. In May 2008, Italians put the Berlusconi government back in power. Berlusconi and his allies were notoriously opposed to the recognition of rights for same-sex couples.⁴⁵ Further, despite the brief Prodi interlude, Berlusconi’s return signaled a decisive shift in Italian political culture toward neoliberalism, and the directing of governmental powers by mass media and corporate interests (Malagrecia 2006).

This was the situation when I arrived in Italy during the summer of 2010, to commence fieldwork. Italian LGBTI activists appeared to have hit a political wall and, while *Arcigay* has done much to advance LGBTI interests in Italy and was continuing to fight for recognition on behalf of same-sex couples, in truth there was not much I could do in terms of participant-observation with the organization.⁴⁶ As a consequence, during my initial months in Italy, I

⁴⁵ For example, in response to critics who called for his resignation after it was revealed that a teenage belly dancer had spent the night at his home, Berlusconi stated, “I work extremely hard and if every now and then I look at the face of a beautiful girl, then it is better to be passionate about beautiful girls than gay” (METRO, Nov. 3, 2010, “Silvio Berlusconi’s Gay Jibes Spark Disbelief,” <http://metro.co.uk/2010/11/03/silvio-berlusconis-gay-jibes-spark-disbelief-in-italy-570180/>, accessed November 6, 2013).

⁴⁶ From the beginning, *Arcigay* has worked with the Italian Ministry of Health and the “Superior Institute for Health” to organize AIDS (and other STD) awareness and prevention campaigns, including hosting training courses, providing autonomous advisory services, and sponsoring telephone helplines, street campaigns, and research projects. *Arcigay* has also been active in offering training courses for social workers and health counselors, as well

spent some time researching and trying to figure out what was going on, activism-wise, in this area. Throughout this period, I became aware of and interacted with several other LGBTI rights organizations in Italy.⁴⁷ It was also during this time that I came across *Certi Diritti*.

Certi Diritti

I first encountered *Associazione Radicale Certi Diritti* (*Certi Diritti*) at one of their annual meetings.⁴⁸ This particular meeting was held in Rome, at the Hotel Palatino on November 27-28, 2010. The theme was “*Cittadini in Europa, Fantasmi in Italia: Fermiamo La Peste Italiana!*” (Citizens in Europe, Phantoms in Italy: Stop the Italian Plague!) The agenda looked promising and included lectures by leading Italian experts and activists on a range of topics such as “*Laicità e progresso*,” (Secularism and Progress), “*Cultura di genere e diritti glbt*” (The Culture of Gender and LGBT Rights), “*L’intersessualità nella società Italiana*” (Intersexuality in Italian Society), and “*Omofobia e Omogenitorialità: prospettive liberali*” (Homophobia and Same-Sex Parents: Liberal Perspectives). There were also workshops on topics ranging from gay marriage and civil rights in Europe and the world to the legal recognition of transgendered persons.

as school staff. *Arcigay* has worked with student unions, teachers associations, and parents of LGBTI persons, and since 1999, *Arcigay*’s training course for secondary school teachers on sexual orientation have been recognized by the Italian Ministry of Education. *Arcigay* organizes political events such as pride marches and national and local initiatives to increase awareness and lobbying activity in Parliament. *Arcigay* is also a member of the Forum for Youth Associations promoted by the Ministry for Social Policy. It has been involved in various European projects in the fight against discrimination based on Article 13 of the European Union Treaty, and is a member of the International Gay and Lesbian Association (ILGA).

⁴⁷ These organizations include, but are not limited to: *Famiglie Arcobaleno*, an association of families headed by same-sex parents; *AGEDO* (*Associazione di Genitori Omosessuali*), an association of parents, relatives and friends of LGBTI persons; and *Rete Genitori Rainbow*, a network of gay, lesbian, and transgender parents, with children from heterosexual unions.

⁴⁸ That is, the 4th Congress of the *Associazione Radicale Certi Diritti*

I had little trouble locating the hotel and signs posted inside the entrance directed me to the specific area where the meeting was being held. A handsome young man in his early thirties was seated behind the registration desk. He smiled warmly as I approached the table and asked if he could help. I told him I was interested in participating in the meetings and we introduced ourselves. Y and I ended up chatting for a bit. I told him about my research project and Y told me that he had recently finished his PhD and was working on similar issues to mine. We exchanged e-mail addresses. He then asked me if I wanted to “join” *Certi Diritti* and, after completing a short form and paying my membership dues, I became a card-carrying member of *Associazione Radicale Certi Diritti*.

I found a seat toward the back of the main room where the joint session of the Congress was taking place. I noticed that there were between 80-100 other people in the room. Yet, despite the number of people, there was a feeling of intimacy. The speakers addressed their audience with passion, without appearing to rely on note cards or prepared statements. With one exception, there were no PowerPoint slides or other visual aids to draw the audience’s attention from the speaker presenting. The audience showed approval or dismay by clapping and shouting comments in response to the speakers’ remarks. One gentleman in particular, seated in the front row, frequently commented by shouting out to the speakers as if he were the only participant in the room and was engaged in a personal conversation with them.

One of the recurring refrains at this meeting was vexation with the Italian political process. The organization was frustrated by its inability to maneuver within the Italian political world. As previously discussed, in Italy the state is perceived as possessing a low degree of legitimacy and Italian citizens react to it with distrust (Ginsborg 2003). *Certi Diritti* is no exception, and much of the annual meeting was devoted to discussing how best to disrupt and/or

circumvent the impasse over recognition of rights for same-sex couples created by the Italian state. *Certi Diritti* members expressed dissatisfaction that Italy was unable to join other EU member states in recognizing some form of same-sex civil union or marriage. The general perception was that Italy was somehow backward and “outside” of Europe. There was an express desire to “join” Europe.⁴⁹

Certi Diritti was founded on March 1, 2008, as a non-profit organization. The association was established “in the wake of indignation” caused by the failure of the Italian Parliament to address many unsolved problems relating to sexual freedom and responsibility, including the recognition of rights for LGBTI persons. In part, *Certi Diritti* was a response to the failure of the DICO discussed in the first chapter. *Certi Diritti* has active members scattered throughout Italy and depends on volunteers for its continued existence. The organization describes itself as “radical” because of its objectives and methods of non-violent civil disobedience. While this chapter is mostly about *Certi Diritti*’s activities in the battle for recognition of rights for same-sex couples, it is important to point out that *Certi Diritti* is a civil rights organization, with multiple objectives, including, but not limited to: preventing and combating of all forms of violence, abuse, and discrimination based on gender identity and/or sexual orientation; assisting victims of violence; promoting the freedom and sexual responsibility of the person; instigating and supporting initiatives to fight discrimination; and helping and

⁴⁹ Activists were mainly referencing the EU here and, more specifically, the Western European member states that have adopted legislation recognizing rights on behalf of same-sex couples. The subject of Europe and the EU is taken up in detail in Chapter 5 but, for purposes here, it can be noted that the “Europe” being referred to by activists primarily includes Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the UK. Generally, it does not include many of the other European countries, especially those in Central and Eastern Europe that lag behind the aforementioned countries in terms of recognizing rights on behalf of same-sex couples.

defending individuals, couples, and other organizations and institutions in the advancement and protection of rights associated with gender identity and/or sexual orientation. In addition, *Certi Diritti* makes a point of adding an “E” (for “*eterosessuali*,” meaning “heterosexuals”) to the end of the LGBT acronym because the organization believes in the equality of *all* persons.

Certi Diritti is actively involved in several projects of specific concern to LGBTI persons, including political and cultural initiatives against homophobia and participation in pride parades and conferences, as well as projects involving the extension of sexual freedom such as campaigns for condoms in schools, sexual education, and protections for sex workers. Although much of its work is focused on improving conditions for LGBTI persons in Italy, the organization has substantial transnational ties and ambitions. *Certi Diritti* participates as part of the Intergroup on LGBT rights to the European Parliament and is an active participant in ILGA-Europe (the European arm of the International Lesbian and Gay Association). *Certi Diritti* also collaborates with various non-governmental organizations, including Global Rights, Amnesty International, and AllOut.org, and has a network for the exchange of information with correspondents in all continents.

Certi Diritti is a descendant of *FUORI!* As discussed above, *FUORI!* joined forces with the *Partito Radicale* in 1974. From the beginning, *Partito Radicale* positioned itself as opposed to the Italian political establishment, which it viewed as both corrupt and conservative. For the most part, the party enjoyed close relationships with other parties on the Italian left, frequently working to unite them, although it was often rejected by the Communists due to its belief in both social and economic libertarian policies. *Partito Radicale* was also known for its belief in direct democracy, which it frequently expressed through the *introduction* of referenda. In 1989, the *Partito Radicale* became the Transnational Radical Party, the current incarnation of which is the

Radicali Italiani, founded in 2001. It is worth knowing something about the *Radicali Italiani* because *Certi Diritti* works closely with the party on many of its initiatives.

Like its predecessor, *Radicali Italiani* is an atypical party for Italy that has never managed to capture substantial popular support. The following data illustrates this point. In the 2008 general election, the *Radicali Italiani* stood for re-election in list with the *Partito Democratico* (PD). Pursuant to an agreement with the PD's then-leader Walter Veltroni, six deputies and three senators were elected. In the 2009 European Parliament election, the *Radicali Italiani* ran separately from the PD, received only 2.4% of the vote, and failed to return any members of parliament. More recently, in the 2013 Italian general election, the *Radicali Italiani* contested on a stand-alone electoral list called *Giustizia, amnistia e libertà* (Justice, Amnesty, and Freedom), and ultimately received 0.2% of the vote, returning no senators or deputies. Finally, due to inadequate funds, the party was unable to take part in the 2014 European elections.

The party is generally viewed as leftist by those on the right, and as right-wing by those on the left. It is the only Italian party with an explicitly anti-clerical agenda (most of the other Italian parties either support the Church or remain ambivalent toward it). The party is an ardent supporter of human and civil rights, which for the party includes support for abortion, same-sex marriage, euthanasia, and the elimination of capital punishment, artificial insemination, the legalization of "soft" drugs, and stem cell research. The party's strong support for libertarian policies (including policies supporting the free market, low taxes, and privately funded health care), however, puts it at odds with other Italian center-left parties. The *Radicali Italiani* are pro-American and pro-European, and propose an American-style reform of the Italian political

system. They are a constituent member of the Nonviolent Radical Party, Transnational and Transparty (PRNTT).⁵⁰

Since December 2011, *Certi Diritti* has also been a constituent member of the PRNTT, “a nonviolent organization following Gandhian principles.”⁵¹ The PRNTT is a political body but does not participate in national, regional, or local elections; instead, it strives to engage with and increase awareness about various political policies and it encourages its members to pursue nonviolent actions that inspire transnational and international institutions to comply with laws and principles. Since 1995, the PRNTT has been registered as an NGO with “consultative status” with the United Nations Economic and Social Council (ECOSOC). In this capacity, the PRNTT has been able to facilitate the presentation of claims by a large number of people and organizations working in the arena of democracy and human rights to diplomats, international media, and other non-governmental organizations, and has been able to secure representation on behalf of many such organizations at the UN Human Rights Commission.

PRNTT embraces the rule of law and principle of legality as stated in international law, and proclaims “the respect of justice and law as the insuperable source of the legitimacy of

⁵⁰ In addition to *Certi Diritti*, a few of PRNTT’s constituent members include: Hands Off Cain (*Nessuno tocchi Caino*), a coalition of citizens and parliamentarians fighting to abolish the death penalty worldwide; No Peace Without Justice, an association fighting to end female genital mutilation; and the Luca Cosconi Association (*Associazione Luca Coscioni*), an organization dedicated to affirming the freedom of scientific research, promoting the teaching of the scientific method, asserting self-determination in health care, and implementing the UN Convention on the Rights of Persons with Disabilities, especially in less developed countries. PRNTT’s projects also include the fight against drug prohibitions, preservation of the environment, universal access to reproductive healthcare (including family planning), and the enabling of international jurisdictions to allow for supranational protection of democratic rights.

⁵¹ Website of the Nonviolent Radical Party Transnational and Transparty, <http://www.radicalparty.org/en>, accessed January 2, 2014. PRNTT uses the following adjectives to describe itself on the main page of its website under the heading and logo: Gandhian-Nonviolent, Transnational, Cross-Party, Democratic, Environmentalist, Ecologist, Democratic Federalist, Secular, European Federalist, Liberal Democratic, Liberal Socialist, Libertarian, Anti-Authoritarian, Anti-Prohibitionist, Anti-Partycratic, Anti-Militarist, Anti-Clerical, International Language.

institutions.” The PRNTT is actively concerned with maintaining a transnational character and is cognizant of the effects of globalization on democratic institutions. An aspect of PRNTT’s work that bears special mention here because it has influenced the work of *Certi Diritti* is the organization’s promotion of “real democracy,” not just in places generally held to be undemocratic, but also in nation-states such as Italy, where there is allegedly a long tradition of democracy.⁵² PRNTT observes that the deterioration of “real democracy” must be dealt with as a “real disease” affecting the democratic ideal, and sees the supranational protection of

⁵² In the general motion adopted by the 39th Congress of the PRNTT held in Rome on December 8-11, 2011, the PRNTT notes:

that the Radical Party, over twenty years after its evolution into party transnational and transparty to tackle the dramatic global challenges that increasingly arise, still represents the only political subject that anybody can join all over the world, with the only constraint of the exercise of one’s full freedom of civil conscience ...

that the breach of constitutional principles and fundamental freedoms more and more often occurs even in those Countries that have been relying upon formally democratic structures for a longer period of time:

that therefore the degeneration of [“real democracy”] through the constant and multi-decade violation of the principle of the rule of law and the hollowing-out of institutions, shows a legal pathology of democratic ideals ...

PRNTT then specifically singles out Italy in the ensuing paragraphs of the motion:

that this is a striking phenomenon in Italy, where the party decided to increase its commitment in the last few years so that the Country may be able to be defined as democratic and enforcing the rule of law;

that the situation of unlawfulness of the State as regards the administration of justice and the conditions of prisons is a phenomenon that does not only concern Italy alone but ... concerns the entire world

PRNTT goes on to state that it considers amnesty “a precious tool able on the one side to bring the Italian State back to the respect for the principle of legality and, on the other side, to lay the basis for structural reform of the judicial system, in a country where nearly 10 million people are involved in pending civil and criminal proceedings”

(Website of the Nonviolent Radical Party Transnational and Transparty, <http://www.radicalparty.org/en/content/39th-congress-nonviolent-radical-party-transnational-and-transparty-summoned-rome-8th-11th-d>, accessed January 6, 2014).

democratic rights (which the organization defines as “universal rights historically acquired as ‘natural’”) as one of its main goals. PRNTT views the protection of democratic rights as the guarantee that people have access to democratic order and legal institutions in order to advance their political and social situations. These ideas and principles no doubt continue to influence the choice and execution of *Certi Diritti*’s projects.

In a recent motion arising from its annual meeting held April 5-7, 2013, in Naples, *Certi Diritti* explains the decision to become a constituent member of the PRNTT and notes that membership in the PRNTT is consistent with the more complex evolution of the association as represented by motions passed at the last two annual Congresses. These motions commit *Certi Diritti* to work toward being more present in the political and judicial protection of the sexual rights of all, as well as more active in the transnational dimensions of campaigns directed toward this goal, at both the level of the nation-state in places where homophobia and sexual phobia are more serious and at the level of international organizations that have the means to intervene (e.g., the UN and the EU). *Certi Diritti*’s mission also coincides with the objectives of the PRNTT in promoting legal action at the European courts for the assertion of rights denied in some EU member states and in actively promoting and participating in meetings, conventions, and conferences on the issues of civil and human rights, with special reference to the sexual freedom of the person. One of *Certi Diritti*’s major initiatives is the recognition of rights for same-sex couples in Italy. As mentioned in the introductory paragraphs to this chapter, *Certi Diritti* has initiated a specific campaign, *Affermazione Civile* (translation: "Civil Claim"), which aims to achieve recognition of rights for same-sex couples by pursuing cases in the Italian courts.

At the 2010 meeting, as well as in later conversations, the *Certi Diritti* activists I worked with frequently voiced the belief that Italian politics remains beholden to the Roman Catholic

Church, and that this is what marks Italy as different from other European states. There can be little doubt that the Church's views on marriage and family prevail in Italy, at least for the moment. As I will discuss in the following chapter, Church influence inhibits politicians from enacting a less burdensome divorce law and has led to adoption in Italy of one of the most restrictive laws on assisted reproduction in Europe. The position of the Church and the relationship between the Church and Italian politicians is taken as a foregone conclusion among LGBTI activists in Italy. At their meetings, *Certi Diritti* posted signs and handed out refrigerator magnets with the slogan "No Vatican, No Taliban." There were constant references to Italy as a "clerical" state in need of secularization.

The vehemence against the Church was ramped up at *Certi Diritti's* Fifth Congress, which was held in Milan, on December 3-4, 2011. In fact, a big banner hung from the table where the speakers sat, stating "*Preservativo? Sì Grazie. Vaticano? No Grazie*" (translation: "Condom? Yes, thank you. Vatican? No, thank you"). I also noticed more frequent references to Europe. The theme of the 2011 Congress was "*Più Diritti. Più Democrazia. Più Sviluppo. Nuove alleanze contro vecchie discriminazione*" (translated: "More Rights. More Democracy. More Development. New alliances against old discrimination"). It just so happened that this meeting came on the heels of the ILGA-Europe meeting held in Turin. Many of the *Certi Diritti* activists had attended and were active participants in the ILGA-Europe meeting, and there was carry-over from the European meeting.

The 2011 meeting emphasized the fight for marriage equality and was preceded by a one-day conference at the *Università degli Studi di Milano* that discussed a comparative law approach to judicial recognition of rights for same-sex couples. At this conference, several attorneys who are active in the struggle and members of *Rete Lenford* presented talks on same-

sex couples in Europe, differences between the French and German models recognizing cohabitation rights for same-sex couples, the jurisprudence of the European Court of Human Rights, and cross-border aspects of recognition for same-sex couples. The end of the day featured a roundtable where attendees heard directly from some couples who had been involved with judicial projects. One of the representatives of the "couples" was Gian Mario Felicetti. Felicetti has been actively involved in coordinating the *Affermazione Civile* project since its inception. Along with his partner, he filed an action with the European Court of Human Rights, asking for recognition of their right to marry. He is also the author of *La Famiglia Fantasma: DiCo, Pacs e Matrimoni Omosessuali. La Politica Italiani in Crisi* (2007) (translation: "The Phantom Family: DiCo, Pacs and Same-Sex Marriage. Italian Politics in Crisis").

The cover of *La Famiglia Fantasma* features a map of the EU that indicates in shades of green (for "yes") and red (for "no") the member states that recognize rights on behalf of same-sex couples. Italy is front and center and colored red. According to Felicetti, hundreds of thousands of same-sex Italians live in stable, loving partnerships as if they were apparitions: without history, without law, and without a future. They are there, but cannot be seen. This is because Italy refuses to grant institutional recognition to their relationships. In the book, Felicetti offers a "path" to these unmarried couples, leading them from invisibility to the public sphere of civil society. He argues that Italy must first redeem its history by recognizing that unmarried and same-sex couples are an indispensable part of the nation's cultural identity and that censorship in this area leads to a weak civilization. The second step is to gain recognition in the law. This requires people to first know the laws and institutions of the state. Felicetti argues that the Italian Constitution does not establish marriage as a union between a man and a woman, and explains that marriage between persons of the same-sex is not forbidden by Italian law. The

final step on Felicetti's proposed path is to conquer the future. This requires Italians to build their own vocabulary with respect to LGBTI issues in order to free themselves from the fear of difference and open a peaceful and honest dialogue. Felicetti, like other Italian LGBTI activists, blames the current situation on the undue influence of the Church over Italian politicians:

I segretari dei partiti del centrodestra ripetono come pappagalli ciò che poche ore prima ha detto il papa o il cardinale di turno. I partiti del centrosinistra hanno paura, tanta paura di essere democratici, come i loro colleghi del resto della UE, schiavi di una morale che hanno preso in prestito dalla religione, incapaci di affermare la loro identità politica, la loro etica di politici laici (2007:backcover).⁵³

At the actual congress, many of the presentations centered on the topic of rights for same-sex couples, and the congress featured a session on the test cases initiated pursuant to the *Affermazione Civile* project. The *Affermazione Civile* campaign is a deliberate attempt to circumvent national politics by moving the battlefield from the legislature to the judiciary, and, to the extent necessary, from Italy to the EU. The campaign began with a call for same-sex couples residing in Italy who were willing to go public and request registration of their relationships at the appropriate government offices. *Certi Diritti* and the parties who participated in the campaign fully expected and were not disappointed when the relevant government offices refused to issue official documents recognizing their respective relationships. Once the documents were denied, volunteer attorneys from *Rete Lenford* were assigned to assist the couples in pursuing their matters in court. So far, approximately 30 same-sex couples in Italy

⁵³ Translation: "The secretaries of the parties of the center-right repeat like parrots what the pope or cardinal on-duty said a few hours before. The center-left parties are afraid, so afraid to be democratic, like their colleagues in the rest of the EU, slaves of a morality that they have borrowed from religion, unable to assert their political identity, their ethic of secular politics."

have been involved with this project. Before I tackle the specific details of the *Affermazione Civile* project and its preliminary results, however, I must point out that the fight for marriage equality occurs within a larger push for comprehensive reform of Italian family law, which includes the laws governing divorce, access to reproductive technologies, and recognition of rights for non-married cohabitating couples, among other things.⁵⁴

The *Amore Civile* Project

Convinced of the need for comprehensive reform, *Certi Diritti* worked with other associations, legal and other experts such as sociologists and psychologists, and politicians from different parties, to draft a proposal for the comprehensive reform of Italian family law. The substance of the proposed law was published in a book entitled *Amore Civile: dal Diritto della Tradizione al Diritto della Ragione* (translation: “Civil Love: From the Law of Tradition to the Law of Reason”), edited by Italian attorneys and experts in family law Bruno de Filippis and Francesco Bilotta.⁵⁵ The proposed reform addresses what the working group sees as the most pressing issues in relation to the family: the recognition of *de facto* unions and multiple models of marital union, speedier divorce (including the unification of the processes of separation and divorce), access to medically assisted reproduction, allowing adoption by single persons, provisions for living wills, equality between men and women with respect to the transmission of the surname, changes in the system of inheritance, the declaration of “children’s rights,” and, last but not least, marriage equality. The reform proposal was submitted to the House and Senate by

⁵⁴ In Italy, almost all divorces require a continuous three (3) year legal separation. The present status of divorce law in Italy creates a somewhat paradoxical situation where certain LGBTI rights activists are simultaneously fighting for marriage equality and speedier divorce.

⁵⁵ Bilotta is also a founding member of *Rete Lenford*.

Radicali Italiani parliamentarians with the hope that the proposed reform would become a Bill and initiate debate in Parliament. To date, nothing significant has happened, and the family law remains essentially the same as it did in the mid-1970s.

In the blurb about *Amore Civile* posted on the *Certi Diritti* website, the editors are compelled to call attention to the fact that the work is based on the principle of a *secular* state. The *Amore Civile* project deliberately attempts to move away from a family law premised on a particular religious (Catholic) ideology to a family law that addresses the actual needs of contemporary Italians. One of the main arguments advanced by proponents of this project is that the traditional family is no longer the “natural order of society.”⁵⁶ Further, the family’s existence is no longer premised on reproduction. According to proponents of *Amore Civile*, the institution of family has been irrevocably altered due to an increase in civil marriages, the cohabitation of couples, children born out of wedlock, single-parent families, stepfamilies, adoption, and assisted reproduction technologies: socially and culturally the family no longer exists as an instrument for reproduction of the species. Humans are by nature cultural beings and family forms have always adapted to changes in society. In order to progress, for example, Italy must reform its bureaucratic and hetero-normative divorce law, and adopt a law that does away with the requirement of a three-year separation and favors mediation and self-determination.

The *Amore Civile* perspective on what constitutes a family is not only in sharp contrast to the Catholic vision of family, but also represents a departure from the nation-state’s view of the family as a “natural society founded on marriage” enshrined in Article 29 of the Italian Constitution of 1948. The “family” envisioned in *Amore Civile* is one created by free choice and

⁵⁶ I take up this subject in depth in the next chapter.

love, and one that warrants protection as a private right. But, as the proponents of *Amore Civile* point out, Catholic Italy (with its so-called “Family Day” demonstration calling for protection of the traditional patriarchal family), is also the same country that lags behind the rest of Europe with respect to its lack of childcare, unequal distribution of housework between men and women, low female participation in the workforce, low fertility rates, and low rates and speeds for adoption.

Some LGBTI activists in Italy believe that the Italian "backwardness" in the area of family law can be used to an advantage. As Yuri Guiana, the current secretary of *Certi Diritti*, noted in a *Huffington Post* blog spot published online, the present legal landscape presents an almost "virgin land" on which to build a comprehensive reform of family law that can meet the needs of society.⁵⁷ Such reform would clear up the matter of "illogical and anachronistic" provisions that haunt the Civil Code, such as the norm that automatically gives a child to the mother (and consequently to the woman's husband) if the child is born within 180 days of the celebration of marriage and before the expiration of 300 days after the dissolution of a marriage. In addition, such reform would enable couples to make their relationships as they fit, and allow couples to enter into pre-marital agreements with a possible view toward divorce (something that is not allowed under Italian family law at the moment).

Why Marriage?

In the past couple of years *Certi Diritti* has increasingly called for full-blown marriage equality. In a press release dated November 28, 2013, *Certi Diritti* uses the National Council of Notaries declaration of a day of "Cohabitation Agreements" to shame politicians. *Certi Diritti*

⁵⁷ Guiana, Yuri, 2012, “*Per un amore civile*,” *L'Huffington Post*. Electronic document, http://www.huffingtonpost.it/yuri-guiana/per-un-amore-civile_b_2282585.html, accessed January 10, 2014.

points out that initiatives such the National Council of Notaries' declaration call attention to the legislature's failure to act. Moreover, while cohabitation agreements are great, they are not enough. Simply put, they do not resolve all of the legal issues same-sex couples must contend with such as rights to inheritance and pensions. *Certi Diritti* calls on the legislature to recognize marriage equality for same-sex couples and refers to marriage as the most significant institution in the life of a couple.

One of the questions I am frequently asked when I explain or present a paper about my research is, “Why marriage?” To paraphrase an acquaintance who works for ILGA-Europe: there is something lost when an LGBTI couple “buys into” marriage, because marriage constitutes an acceptance of heterosexist norms that erases the specialness of being queer.⁵⁸ The institution of marriage assumes the structure and role of the state: it requires asking the state for its approval of the relationship. This is potentially dangerous because it is an accommodation of the state that may result in further assimilation in other areas of life. Nancy Polikoff contends: “[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism” (1993:1536). Moreover, the “right” to marry will not automatically lead to greater acceptance of same-sex couples by society, and such couples will continue to face discrimination from and be ostracized by those who do not approve of same-sex relationships.

⁵⁸ In his comment, my acquaintance was using the word “queer” to reference a political position, as well as a sexual orientation. The political position he references is one that advocates an escape from binary thinking by recognizing sexual orientation and gender identity as potentially fluid.

There is an abundance of scholarly literature on this theme (e.g., Polikoff 1993; Thompson 2004; Warner 2000) and, while I do not wish to discount it, my overriding focus is on relationships between law and society as seen through the lens of the struggle for same-sex marriage, rather than on queer theory or social activism *per se*. For my purposes, it is sufficient to note that marriage equality is essential to the thousands of couples who want or require a legal instrument recognizing their relationship. The legal benefits of marriage are numerous, to both the couple and to society, and there is no legitimate reason why same-sex couples should not partake of these benefits if they so desire.⁵⁹ Further, one can argue that anything short of marriage is an inadequate substitute: “Marriage is a deal between a couple and society, not just between two people: society recognizes the sanctity and autonomy of the pair-bond, and in exchange each spouse commits to being the other’s nurse, social worker and policeman of first resort. Each marriage is its own little society within society” (Rauch 2004[1997]:180). This

⁵⁹ One of the ways marriage benefits societies is through the creation of legal kin. Society has an interest in kin-creation because family members frequently serve as caretakers for one another, thereby reducing state responsibility for this function. As will be made clear in the next chapter, this is important in Italy, where the family functions as a significant safety net in the absence of adequate state services.

Some of the obvious benefits to the couple include access to a loved one in case of an emergency, the sharing of insurance policies at reduced rates, co-ownership of property, tax benefits, inheritance rights, and mutual support obligations. In Italy, the legal inability to marry denies same-sex couples many things, not least of which is dignity of affect. Same-sex couples are also barred from access to the marital property regime, inheritance, social security and reversibility of pension, protections and guarantees for the weaker partner in case of separation, equality with other couples in employment rankings and public competitions, the right to family leave at work, creation of family businesses, access at hospital or prison, decision-making ability in the case of incapacitation of one of the partners, succession of lease and the right to remain in the shared house in the case of death of the contracting partner, and family discounts.

In the U.S. context, Nancy F. Cott observed in her testimony before the Vermont House Judiciary Committee on January 17, 1997, that the word “marriage” appeared 1,034 times in federal statutes and there were 1,034 different kinds of benefits, responsibilities, rights, and so forth associated with marriage in the federal code.

statement is especially true in Italy, where the “family” occupies a special position enshrined within the national Constitution.

As mentioned in the introduction, in 1948, after the fall of the fascist state, Italy enacted a new Constitution. Unlike the United States Constitution, which has never mentioned “family” or any of its traditional parts (i.e., “husband and wife,” “spouses,” “marriage,” or “parent and child”), the Italian Constitution of 1948, Article 29, explicitly recognizes the rights of the family as a natural society founded on *marriage*. In Article 31 of the Constitution, the State is obligated to support the formation of the family and the “fulfillment of its duties” through economic and other forms of assistance. Although potentially problematic for heterosexual couples who choose not to wed, this constitutional ordering of Italian society is especially untenable for those couples who do not even have the option to marry. The problem is in part the constitutional language that recognizes the rights of the family as a society founded on *marriage*. The language of Article 29 rules out the possibility of constitutional protection as a “family” for those couples who are legally incompetent to enter into marriage. Thus, even if a same-sex couple in Italy were able to enter into a legally valid civil union, registered domestic partnership, or some other similar arrangement, the couple and any offspring would not be considered a “family” according to Article 29 of the Italian Constitution of 1948, and would not be entitled to the “rights” of the family referenced therein. In some contexts, the label may not be important; however, in Italy societal references and symbolic representations of the family based on heterosexual marriage are so prevalent as to be overpowering. Miguel Malagrecá explains:

One of the sad lessons of queer Italy is that heteronormativity is so overwhelming at so many levels of everyday life and so omnipresent that it vertebrates culture providing a totalizing backbone of experiences, language, rituals and history that is difficult to

overcome. In the presence of a historically impermeable heterosexist matrix where the heterosexual family occupies a cultural central role, Italian GLBTQs are prevented from breaking out from the language and rituals of heterosexuality (2006:272).

I submit that these factors are also what make marriage equality the ultimate goal of the *Affermazione Civile* campaign: anything less than full marriage equality will doom same-sex relationships to “Serie B,” and will ultimately fail to satisfy the mandates of European law prohibiting discrimination based on sexual orientation. I take this up with more vigor in the following chapters.

The *Affermazione Civile* Project

The *Affermazione Civile* project is an example of a type of activism that is geared toward the pragmatic, or practical, rather than the theoretical. Stefania Bernini, a European historian, has argued that critical engagement of the family stimulated by the social movements of the late 1960s culminated in a series of legal reforms in Italy that redefined individual rights vis-à-vis the family in the 1970s and 80s (2008). The introduction of divorce and legalization of abortion were thereby the result of a “far-reaching critique of the family as an institution and its relationship with the state” that was actively pursued by the social movements of the 1960s and the women’s movement in particular (Bernini 2008:305). The end of the reform process coincided with the dying out of the social movements of the 1960s. In the *Affermazione Civile* and *Amore Civile* projects, however, one can see a resurgence of interest in the reform process on the part of Italian activists. This type of activism was made possible by the shift in the language of politics and representation of difference that abandoned the revolutionary potential of the early Italian LGBTI movement (with its goal of remaking society) in favor of directing efforts toward becoming accepted participants in the prevailing society. By consciously linking the

Italian LGBTI framework with other existing frameworks around the world, most notably the U.S. framework, activists have been able to capitalize on the language of "rights" (civil, social and human) and use this as an entry into the justice system to advance recognition.⁶⁰ As I show in Chapter 4, adopting the language of "rights" gives Italian LGBTI activists access to "Europe," which is used as a trope to call attention to Italy's "backwardness" in light of European progressiveness.⁶¹ The *Affermazione Civile* project represents a shift from the political to the judicial, and is best explained through an examination of the cases initiated pursuant to the project. While it has taken time, the first results have been encouraging.

First Results

On March 23, 2010, Italy's Constitutional Court considered whether restricting civil marriages to "husband and wife" rather than "spouses" discriminates against same-sex couples and therefore infringes on principles of equality and non-discrimination protected by the Italian Constitution.⁶² These issues were referred to the Constitutional Court from four separate lower courts with pending cases (all initiated as part of the *Affermazione Civile* campaign) concerning the denial of marriage banns (a necessary step for being permitted to marry in Italy) to same-sex

⁶⁰ The notion that change happens by people adopting a legalistic approach is not without controversy. Critiques see it as an "American" (as in "U.S.") approach that flies in the face of a very liberal and anti-American pre-existing culture in Italy that is both unique and worth preserving.

⁶¹ Again, this is not without controversy. Here, Italy is judged from a Northern European legalistic approach that is arguably obsessed with notions of modernity versus non-modernity, and that creates a traditional time-line where to be modern is to be better.

⁶² The Italian Constitutional Court was the creation of the Italian Constitution of 1948, and was in part a response to the high priority placed on protecting human rights in the wake of the post-World War II Fascist era. The constituent assembly that approved the Constitution rejected the U.S. system under which an ordinary court can refuse to apply a law that it considers to be unconstitutional. The constituent assembly thought it necessary to concentrate constitutional matters in one court and to create a separate body with authority to nullify a law *erga omnes* (a Latin legal term meaning "in relation to all" that refers to rights and responsibilities that can be enforced against anyone, rather than against a specific person or party). Its principal function is the abrogation of unconstitutional laws.

couples by their respective city halls.⁶³ Through the parties involved in these cases, *Certi Diritti* and the attorneys from *Rete Lenford* with which it collaborated argued that there is no legal impediment to marriage equality in Italy. They were able to do so because, under Italian law, there is neither a legal definition of marriage nor an express restriction on same-sex marriage. Moreover, there is no specific legal requirement that the parties seeking to marry be of opposite sex.

On April 14, 2010, the Constitutional Court issued its judgment. Although the court did not immediately recognize a right to civil marriage as requested by *Certi Diritti*, it did not rule out the possibility. More importantly, for the first time, the Court recognized the constitutional dignity of same-sex partnerships, and urged the Italian Parliament to take action. Further, it called for judicial protection of rights for same-sex couples in the absence of action on the part of Italian politicians to recognize such rights. In its decision, the Constitutional Court clearly indicated that if reform is not forthcoming the Court may opt to act more forcefully in the next case. Encouraged by the dicta in the decision of the Constitutional Court, *Certi Diritti* has continued with the judicial campaign in other types of cases.

Approximately two years later, on February 2, 2012, the First Instance Court in Reggio Emilia (*Il Tribunale di Reggio Emilia*) recognized the right to family reunification of a same-sex spouse. The court ruled in favor of a Uruguayan man and his Italian husband, granting the Uruguayan partner the right to obtain a residence permit in Italy. The couple was legally married in Spain and had moved to Italy. The application for residence was initially denied by the local police, but the couple appealed to the court. The court found that denial of the permit violated

⁶³ These courts included the Tribunal of Venice, Tribunal of Ferrara, the Court of Appeal of Trento, and the Court of Appeal of Florence.

EU norms governing freedom of movement and based its decision on the application of the EU Freedom of Movement Directive (Directive 2004/38/EC). The court stated that the object of the decision was not the recognition of the status of the Uruguayan citizen under Italian family law but, rather, only the right to free circulation under EU law recognizing such persons as “family members.”

Thus, while the court did not recognize the couple as “married,” it did recognize the Uruguayan partner as a “family member” that entitled him to certain rights under EU law. The granting of a residence permit to a non-EU citizen same-sex spouse of an Italian citizen was the first of its kind in Italy. This is an important recognition, even if it is only for purposes of legal residence in Italy, because it is the first time a body of the Italian state has been required to issue a document that recognizes same-sex couples. Of course, the fact that the Reggio Emilia court is a court of first instance meant that the decision was appealable. However, a subsequent Italian Supreme Court case renders a successful appeal unlikely.

A month after the Reggio Emilia decision, in March of 2012, Italy’s Supreme Court of Cassation (*Corte Suprema di Cassazione*) determined that, while a same-sex couple who married outside of Italy could not be considered legally wed in Italy, same-sex couples legally married abroad have the right to “a family life” and, “in specific situations,” to “be treated the same as couples married by law.”⁶⁴ The court further recognized the inviolable right of same-sex couples to live freely as a couple. The court did not go so far as to require municipalities to register

⁶⁴ The Court of Cassation is the court of last resort in the Italian judicial system. While it does not have authority to overrule the trial court’s interpretation of evidence, it can correct a lower court’s interpretation of law. The role of the Court of Cassation is to make sure that lower courts correctly follow legal procedure and to harmonize the interpretation of laws by the lower courts. Although its decisions are binding only on the case being considered, the lower courts find the Court of Cassation’s judgments persuasive.

same-sex marriages contracted abroad and reiterated that this is a matter of family law left to the exclusive competence of the EU member state. Instead, the Court (similar to the Reggio Emilia court) relied on application of the rules governing the free movement of EU citizens and their families, which were ratified in Italy and therefore, according to the Court of Cassation, must be given effect.

Further, there are indications that the Italian judiciary is taking this call seriously. In a subsequent case also initiated as part of the *Affermazione Civile* campaign, the Court of Appeal for Milan cited the Court of Cassation case and the 2010 judgment of the Constitutional Court for the proposition that the court will guarantee certain rights for same-sex couples, treating them in some circumstances as married couples.⁶⁵ Based on references to these cases, the Court of Appeal for Milan found that a mutual fund could not deny benefits to the same-sex partner of one of its members in a situation where the two are permanently residing together.

There is evidence that these court decisions are being noticed and enforced by state actors, thereby demonstrating their salience as public policy. As of May 4, 2013, over 70 same-sex couples have come forward, asking *Certi Diritti* for information or assistance in obtaining a residence permit for a non-Italian partner, and at least fifteen couples have obtained residence permits (recognizing the partner as a "family member" of a European citizen) pursuant to the *Affermazione Civile* campaign. These couples have been diverse: some were married in an EU member state that recognizes same-sex marriage, some were married outside of Europe, and others were subject to a civil union. The inquiries prompted *Certi Diritti* to publish guides for obtaining a residence permit on behalf of a same-sex partner ("*Informazioni per ottenere la*

⁶⁵ Judgment 7176, August 31, 2012.

'Carta di soggiorno per familiari di cittadini europei' (Decreto Legislativo 30/2007) per coppie miste dello stesso sesso") and for marrying in Portugal, the only nation in Europe (besides Norway) that does not require residence to celebrate marriage.

Some of the local *questura* (the police departments that handle the issuance of residence permits in Italy) are now issuing permits on their own without requiring court action. On August 30, 2012, the police in Milan issued a residence permit to the Serbian same-sex spouse of an Italian-Canadian citizen. The permit was issued on the same day for which it was applied, and was approved pursuant to the EU provisions granting free movement to EU citizens and their families. The couple had been married in Canada in 2009, but had been living in Italy for some time. Yuri Guiana, the current Secretary of *Certi Diritti*, observed in a press release about the incident that the decision of the police headquarters in Milan strengthens the judgment of the Court of Reggio Emilia.

Another recent case involved a woman from the Seychelles who entered into a valid PACs with an Italian citizen in France. Prior to this case, all of the applications submitted for permission to reside in Italy involved same-sex couples who had married abroad. According to the position advanced by *Certi Diritti*, European legislation is clear and includes recognition of any type of valid union duly attested by the state. Therefore, under the EU free movement provisions, the couple is legally entitled to live as such in Italy. The police in Milan agreed, and granted the residence permit on September 28, 2012. *Certi Diritti* celebrated this victory by noting that the couple had become part of the historical path being undertaken by LGBT persons to bring about marriage equality in Italy.

Government agencies in Italy also recognize this development. In November 2012, a circular of the Ministry of Home Affairs in Italy was made public. The circular indicated that, in

accordance with the rulings of the Reggio Emilia court, the Constitutional Court, and the Court of Cassation, the *questura* are required to issue a residence permit to the foreign same-sex partner of an EU citizen. The circular further stated that, although Italian law does not recognize civil unions or provide for the protection of the rights of same-sex couples, recent decisions of the Italian courts have recognized certain rights on behalf of same-sex couples as the judiciary has taken action to fill the legal void in this area of law.

Certi Diritti cites the *Affermazione Civile* cases as a clear example of the ways in which European law is increasingly becoming part of the Italian legal system with respect to the protection of the fundamental rights of the citizen. I submit that these cases also demonstrate a degree of boldness on the part of the Italian judiciary that points to an acceleration of judicial activism and demonstrates the ways in which the EU is influencing the judicial making of public policy in Italy. This, however, is the subject of Chapter 4. While at the present time the laws governing free movement in Europe remain the primary means for same-sex couples to gain recognition (at least in terms of residency) in Italy, the fact that there *has* been movement is significant because this expansion has occurred without and despite the participation of the legislature. Also, as can be seen in the decision issued by the Court of Appeal in Milan, there is some indication that the lower courts are aware of and responding to the Constitutional Court's and the Court of Cassation's call to action to treat same-sex couples married abroad in similar fashion to those deemed married under Italian law. It remains to be seen how far the Italian courts will take this. For example, will the Italian courts recognize parental rights in gay adoptions conducted abroad? There is a sense among activists working on this project that these recent victories are fragile and preliminary, and that clerical backlash is to be expected.

In the meantime, encouraged by its successes, the *Affermazione Civile* campaign has been rebranded "*Affermazione Civile 2.0*," and is continuing in several directions. On one front, the campaign will continue to make demands pursuant to the Court of Cassation's promise to treat same-sex couples in stable relationships the same as married couples in certain circumstances. To this end, *Certi Diritti* and *Rete Lenford* will pursue actions in the Italian courts, seeking recognition of rights such as pension entitlements and inheritance rights for the children of same-sex couples. *Certi Diritti* will also continue to seek registration in Italy of marriages and civil unions contracted abroad. Finally, *Certi Diritti* will continue to push for full marriage equality in the Italian and European courts. On yet another front, *Certi Diritti* commits to the continued pursuit of family reunification for same-sex couples in those situations where one partner is a citizen of the EU and the other is not.

In early March 2014, I was asked by *Certi Diritti* to translate a "LGBTI Roadmap" for a national strategic litigation project. The "Roadmap," which was made possible due to a grant of money from ILGA-Europe, identified several areas that are ripe for the introduction of test cases. These areas range from the affirmation of the principle of non-discrimination and the reform of family law to the adoption of procedures for the registration of gender reassignment that are more respectful of human dignity. The proposed "Roadmap" is ambitious in that it represents a first attempt to coordinate an overall strategy involving many different Italian LGBTI associations at the national level. While *Certi Diritti* is not completely abandoning legislative reform as a means to achieving the recognition of rights, its current focus on a national strategic litigation plan indicates a relatively newfound confidence in the courts as arbiters of justice and agents of change.

The *Affermazione Civile* campaign is remarkable in its reliance on the Italian courts to effect the advancement of rights for same-sex couples. As mentioned, it is no secret that Italians see the state as lacking legitimacy and respond to it with distrust (Ginsborg 2003; Barański 2001), and social activism in Italy has historically been characterized as cynical toward state institutions and lacking faith in the rule of law (Sciolla 1997:48, 62-62), mirroring the larger society's perceptions of government and governmental entities. As I will talk about in Chapter 4, Italian distrust of government and governmental entities extends to the legal profession and law, and the judiciary is no exception. Consequently, by deliberately embracing court action as a mechanism for change in an area of law that has long been subject to political impasse, Italian LGBTI activists are demonstrating new faith in the ability of state institutions and the rule of law to serve as societal transformers.

The *Affermazione Civile* project attempts to circumvent national politics by moving the battlefield from the legislature to the courts. In addition, through their invocations of Europe and EU law, *Certi Diritti* and *Rete Lenford* seek an intervention that ultimately redefines relations between the EU and its member states. By demanding recognition for same-sex couples as rights-bearing citizens, they further delineate a European identity, while simultaneously forcing the nation-state to recognize them as citizens with rights. These groups attempt to undermine the Church's influence over politics in Italy through the creation of a stronger European citizenship based on rights that originate in secular humanistic notions of social justice. The legal maneuverings of Italian activists and the resulting court decisions therefore carry consequences for the [related] projects of European integration and Europeanization as the lives of those subject to the law assume new legal identities embedded within a supranational framework. In a

commentary on the Milan Court of Appeals case, *Rete Lenford* attorney Massimo Clara writes, “Clearly it is not over, but we are on the right path (author’s translation).”⁶⁶

In the next chapter, I want to back up and look at the role and place of family in contemporary Italy. I will describe some of the processes that have altered the institution of family in Italy and the EU in recent years. I will also look at the current status of the family in Italian law and talk about attempts to reform Italian family law so that it is more responsive to the actual needs of families in Italy. Along with this, I will look at how Italian politicians mobilize notions of the traditional family in an attempt to foster a sense of national identity based on Catholic social values.

⁶⁶ Massimo Clara, “*La coppia more uxorio è sia etero sia omo: un nuovo passo della giurisprudenza*,” *Certi Diritti* website, April 8, 2012, <http://www.certidiritti.it/notizie/comunicati-stampa/item/1442-la-coppia-more-uxorio-%C3%A8-sia-etero-sia-omo-un-nuovo-passo-della-giurisprudenza>, accessed March 6, 2014.

Figures



Figure 1. Photo of "Maria" from *Guarda in Faccia la Violenza* exhibit (photo by author).



Figure 2. *Certi Diritti* logo.



Figure 3. *Certi Diritti* protest signs. (Personal Collection).⁶⁷

⁶⁷ The signs read (from left to right and top to bottom): “No Vatican No Taliban,” “Legalization of Prostitution,” “Marriage!,” “A New Law for Trans Persons. Model Spain,” “Equality!,” and “Reform of Family Law.”



Figure 4. Badge from *Certi Diritti* IV Congress in Rome, held November 27-28, 2010, with the meeting theme “*Cittadini in Europa, fantasmi in Italia. Fermiamo la peste italiana!*” (translated “Citizens in Europe, Phantoms in Italy: Let’s Stop the Italian Plague!”) (Personal Collection).



Figure 5. Paraphernalia from *Certi Diritti* meetings. (Personal Collection).



Figure 6. Cover of Gian Mario Felicetti's book *La Famiglia Fantasma* (2007).

Chapter 3: The (Not So) Traditional Family and the Failure of Italian Family Law

On October 2, 2013, I was half-watching late-night television's Daily Show with Jon Stewart when a segment caught my attention. It was Lewis Black's "Back in Black" piece poking fun at the "Barilla Pasta" scandal. By way of background, the "Barilla Pasta" scandal arose from comments made by Guido Barilla, the 55-year-old chairman of the Barilla company, asserting that he would never feature a gay couple in ads for his firm's pasta. "I would never do [a commercial] with a homosexual family, not for lack of respect but because we don't agree with them," Reuters reported Barilla as saying during an interview on Italian radio program *La Zanzara* that aired on September 25, 2013.⁶⁸ "Ours is a classic family where the woman plays a fundamental role," Barilla stated, adding that if gays "like our pasta and our advertising, they'll eat our pasta. If they don't like it, then they will not eat it and they will eat another brand." Barilla's comments sparked outrage and gay-rights activists throughout the world announced a boycott. Users of social media labeled Barilla "horrendously sexist and homophobic" and renamed the brand, "hate pasta." Barilla quickly posted a statement on the company's Facebook page, apologizing for hurting anyone's "sensitivity," but maintained that "traditional families" have always been identified with the Barilla brand. The apology was deemed insufficient by many, and Forbes contributor Laura Heller reported in a blog that Luca Di Leo, the head of media relations for Barilla, had requested that she post a more detailed video apology from Barilla seeking to make amends with customers who were offended. In the video, Barilla states:

I have heard the countless reactions around the world to my words, which have depressed

⁶⁸ Golding, Bruce, and Post Wires, "Barilla: 'Gays Can Eat Someone Else's Pasta,'" *New York Post*, September 26, 2013, <http://nypost.com/2013/09/26/barilla-chairman-gays-can-eat-someone-elses-pasta/>, accessed February 27, 2014.

and saddened me. It is clear that I have a lot to learn about the lively debate concerning the evolution of the family. In the coming weeks, I pledge to meet representatives of the group that best represent the evolution of the family, including those who have been offended by my words.

While the “Barilla Scandal” is interesting in and of itself for what it says about notions of family in Italy, Lewis Black’s segment made it all the more so.

Black took aim at the pasta maker and drew laughs when he pointed out that it was not just Barilla’s anti-gay rhetoric that was so reprehensible, but also the fact that he had opened the door to terrible “hot water” puns. Two things in particular struck me when watching the segment. The first was Black’s lead-in that anyone who has ever been to Italy would “have good reason to believe it is the most gay-friendly country in the world” because “it’s basically nothing but beautiful men in neckerchiefs and fitted suits riding around on Vespas and kissing each other on the cheek.” Although clearly intended as comedy, I had to wonder if people outside Italy (mainly people in the United States, who are Black’s primary audience) really do think of it as a “gay friendly” country, or whether it was Black’s way of pointing out certain stereotypes regarding Italian culture that could be seen as ironic in light of Italy’s poor record with respect to treatment of LGBTI persons. I was also struck by the representations of the “classic Italian family” chosen for the segment. Black argues that it would be foolish to think that the “classic Italian family” would be so nice and sweet and traditional if it were not for the “gays.” He shows a montage of “Italian” families (which are actually “Italian-American” families) fighting at the dinner table. The families depicted are mostly U.S.-based representations from film and reality television. Black then takes a look at the families depicted in some of Barilla’s past commercials and discovers that, instead of “traditional families,” the ads feature “horny women

ready to bang the first handsome stranger who knows how to throw a handful of twigs into a pot of boiling water.” According to Black, “It’s *Fifty Shades of Tortellini*.”⁶⁹

I use the Barilla Pasta scandal as a lead-in to this chapter because it demonstrates an important point: misconceptions about the “classical” or “traditional” Italian “family” abound. While some of the representations circulating in the popular media are exaggerated typecasts presented for our amusement, others, like Barilla’s “classic family,” cannot be so easily laughed off. In the preceding chapter, I noted how the Catholic Church launched a forceful and effective campaign against the proposed DICO. The Church asserted that passage of the DICO would signal the end of the family and of morality, and vowed to use its power to protect the “traditional” family based on marriage between a man and a woman. The Church lived up to its promise when lay Catholic groups and family associations organized a huge “Family Day” demonstration in Rome, which was attended by hundreds of thousands of mothers, fathers, sons, and daughters.⁷⁰ The demonstration succeeded in making a point about the allegedly traditional Italian family, and the point made was this: regardless of the various types of familial arrangements present in Italian society, the notion of the “traditional” family is salient and there are large numbers of Italians who are willing to “*scendere in piazza*,” or “take to the streets,” to protest perceived threats to its continued existence (even if its existence is primarily as an ideal rather than reality).

It should be obvious by now that, in order to better understand the struggle over recognition of rights for same-sex couples in Italy, one must know more about the role(s) of

⁶⁹ Here, Black is spoofing *Fifty Shades of Gray*, a 2011 erotic romance novel by British author E. L. James.

⁷⁰ Organizers claimed that as many as 1.5 million people attended the rally. See Falconi, Marta, “Italians Rally Against Marriage Bill,” *Washington Post*, May 12, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051200460_pf.html, accessed February 27, 2014.

family in contemporary Italy. Protection of the "traditional" family is, after all, what the opposition claims its objection to same-sex marriage is all about. The family remains a (if not "the") central institution in Italian society. At the same time, the Italian family continues to exist within a legal framework that defines it as a "natural society founded on marriage" (Art. 29, Italian Constitution of 1948). As revealed in Chapter 2, societal references and symbolic representations of the family based on heterosexual marriage in Italy are so prevalent as to render any other way of being a family practically unimaginable. I submit that legal representations of the family as a "natural society founded on marriage" also contribute to the ideological domination of the so-called "traditional" family. In Chapter 2 we saw how some parts of Italian LGBTI activism surrendered the radical politics of the 1970s (aimed at changing society) in favor of identity politics (aimed at gaining acceptance as participants in society through recognition of rights, which include the right to form a family and recognition for same-sex couples).

Political discourse in Italy, however, continues to reject the notion of same-sex families, especially the idea of same-sex couples as parents, alleging that the children of "homosexual families" would suffer from discrimination (Danna 2011). This perspective is aligned with Catholic social teachings of the family as an institution that supports procreation and the raising of children. The alleged "natural" foundation of the family is the married heterosexual couple. In this view, the purpose of marriage is filiation. According to Catholic doctrine, because same-sex couples cannot produce children, they are "unnatural" and "sterile" and therefore incapable of entering into marriage.

One of the points I make in this chapter is that, while family life in Italy has changed dramatically in recent years, family law has not. Family law plays a central role in the

structuring of society. Family law accompanies taxation and labor market policies, and laws defining who is a family member frequently determine social entitlements. Family law thus carries repercussions for income and equality, and has a direct bearing on the welfare of entire categories of people. The Italian Constitution, in Article 31, promises to support family formation through economic measures and other benefits. Of course, constitutional protections and entitlements depend on how "family" is defined. Discord between what families *are* and what the law *says they are* is therefore problematic, not just for same-sex couples, but for all "non-traditional" families who are effectively erased by the State and as a consequence live as "ghost" or "phantom" families (following Felicetti 2007) in the eyes of the law.

The second point I make in this chapter concerns the use of the family as a major site of political contestation in Italy. As I will demonstrate, some of the most fundamental changes in family structure are not so much the result of shifting moral or ethical perspectives, but rather one of the consequences of neoliberal reforms put into play by the State to deal with economic crises. A prime example of this is the large percentage of adult children in Italy who continue to reside in the parental home well into their 30s and 40s. The precariousness of the workplace and lack of social services described by Molé (2012) and Muehlebach (2012) lead to a postponement of independent living and are significant factors in Italians' delaying of marriage and child-bearing. Because of delays in marriage, Italians tend to be in their thirties when they marry, which means less time for having children. This translates into fewer children. Lower fertility, when combined with longer life expectancies, leads to "longer, thinner" multi-generational family formations in place of the nuclear family (mother-father-children) construction.

I do not mean to suggest that the State bears total responsibility for recent shifts in family structure nor that these shifts are based exclusively on economics. Instead, my intent following

Bernini (2008) is to point out how certain political actors within the Italian state use the family as a site of contestation to distract and influence voters, and to provide a vision of Italian national identity based on Catholic social teachings. The result is an impasse that prevents politicians from taking action and adopting much-needed reforms in areas of family law, including the recognition for families headed by same-sex couples. By framing the issue as one of moral or ethical concern rather than as a matter of economics or citizen well-being, politicians are able to transfer blame to the individual, and to use calls to protect the so-called traditional family to deflect attention from the state's impotence and failure to live up to the ideals of the Italian Constitution. The "smoke and mirrors" tactics deployed by Italian politicians create an impasse that frustrates the efforts of those seeking change. In response, individual families and advocates of family law reform (similar to LGBTI rights activists) are forced to resort to other avenues such as the courts. As seen in Chapter 2, such strategies work to undermine the state.

I begin this chapter with an overview of family life in contemporary Italy, emphasizing the role of marriage in structuring family relationships. I will show how, despite all of the stereotypes and posturing, the so-called traditional family (to the extent that it ever existed) no longer exists *en masse*.⁷¹ This does not mean the family is no longer important. As I will also show, the Italian family continues to be a central pillar of society, occupying a critical support

⁷¹ According to Mario B. Mignone, "the traditional Italian family has usually been defined by the following characteristics:

- extended and patriarchal;
- unbreakable and relatively large;
- largely determined by agrarian conditions;
- structured vertically;
- built on Catholic faith and values
- highly suspicious of the outside world" (2008:296).

Here, I take the "traditional family" to be one that is founded on heterosexual marriage and includes children.

role that compensates for the state's inability to deal with high unemployment rates (especially among youth) and provide necessary services. In the following section of this chapter, I offer a synopsis of the development of family law in Italy in order to explain its current status, as well as the discontinuity between what families are and what the law says they are. Next, I look at how politicians mobilize notions of the traditional family to influence voters and effectively "erase" non-traditional families. I conclude with a discussion of three recent cases involving child custody issues to further illustrate how change with respect to recognition of same-sex couples continues to be advanced by the Italian courts, even outside the *Affermazione Civile* campaign.

The (Not So) Traditional Neoliberal Italian Family

The family is one of the pillars of Italian society. Indeed, the Italian family frequently serves as a metaphor and role model for society and the state (Mignone 2008). As discussed in the introduction to this dissertation, over the past few decades Italy has experienced considerable political, social, and cultural transformation due to several factors, which include changes in the composition of the population resulting from immigration (Carter 1997; Colatrella 2001; Cole and Booth 2006, 2007; Faedda 2012; Grillo 2002; Tossutti 2001), the erosion of the welfare state in favor of a neoliberal state that is no longer able to guarantee workers' rights and social well-being (Blim 2002; Ginsborg 2003; Molé 2012; Muehlebach 2012; Sassen 1998) , and major demographic changes in family life (Bernini 2008; Dalla Zuanna 2006; Ginsborg 2003; Krause 2001, 2005a, 2005b; Krause and Marchesi 2007). Many of the demographic changes in family life are not peculiar to Italy but typical of the EU as a whole -- for example, the aging society linked to declining fertility rates and longer life expectancies. Within the EU it is common knowledge that although the aging population is partially attributable to the fact that people are living longer, it is compounded by low levels of fertility. Low fertility levels throughout the EU

are resulting in a decreasing share of younger people in the population. Other demographic phenomena, such as the large number of adult children residing with their parents, are more specific to Italy.

Although many of the demographic trends found in Italy mirror what is going on in the EU in general, there is a sense among Italians that recent developments are more extreme in Italy. For example, life expectancies are especially high in Italy (the nation ranks 11th in the world in terms of life expectancy), and the average Italian can expect to live 81.95 years (2013 CIA World Factbook Italy). This is an increase of almost 10 years (from a total life expectancy of 72.08) since 1972.⁷² Over the past decades, Italy has simultaneously experienced record-low fertility rates, measured as the number of live births per woman. In 1972, the total fertility rate in Italy was 2.38. A little over twenty years later (by 1995) it reached a world-record low of 1.19.⁷³ In recent years, the fertility rate has shown signs of rising slightly, and the estimated fertility rate for 2013 is 1.41 (CIA World Factbook Italy 2013). Fertility rates in Italy and the rest of the EU remain, however, well below population replacement levels. Low fertility in Italy is commonly framed as a “crisis,” and perceived as especially dire in light of the aging population and declining welfare state (Krause 2005b).

The crisis of the nation-state in Italy is made to appear even grimmer when one looks at “age-dependency ratios.” Age-dependency ratios measure the age structure of a population and are used to study the level of support given to young and/or older persons by the working population. These ratios are expressed in terms of the relative size of young and/or older

⁷² Index *Mundi*, Health Indicators, Mortality, Life Expectancy at Birth, <http://www.indexmundi.com/facts/italy/life-expectancy-at-birth#SP.DYN.LE00.IN>, accessed February 25, 2014.

⁷³ ISTAT, *Noi Italia*, Total Fertility, http://noi-italia2013en.istat.it/index.php?id=55&user_100ind_pi1%5Bid_pagina%5D=717, accessed February 25, 2014.

populations in relation to the size of the working age population. The old age dependency ratio is the ratio of the number of people at an age when they are generally economically inactive (usually defined as age 65 and older), compared with the number of people of working age (usually those in the 15-64 year range). By way of example, in 2011, the old-age dependency ratio for the EU member states considered as a whole was 26.2. This means that there were approximately four persons of working age for every person aged 65 and older. For Italy, the same ratio was 30.9. In terms of the old-age dependency ratio among EU member states, Italy was second only to Germany (with an old-age dependency ratio of 31.2).⁷⁴

The combination of young and old age dependency ratios is called the total age dependency ratio. It relates to the total number of individuals who are likely to be dependent on the support of others for their daily living. In 2011, the total dependency ratio for the 27 EU member states considered together was 49.6, meaning that there were approximately two working age persons for every dependent person. By contrast, the total dependency ratio for Italy was 52.3. By 2050, the total age-dependency ratio is projected to exceed 100 in Italy, Japan and Spain.⁷⁵ This means that, by 2050, the number of “dependents” will exceed the number of people capable of providing support to them in these countries. This, of course, carries major consequences for the future of the welfare state, in large part because the increase in the old-age dependency ratio will contribute to increased public expenditures in health, long-term care, and pensions.

⁷⁴ European Commission, Eurostat, File: Population age structure indicators, 2011.png, online document, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Population_age_structure_indicators,_2011.png&filetimestamp=20130129113545, accessed February 26, 2014.

⁷⁵ OECD (2007), “Age-Dependency Ratios,” in *Society at a Glance* 2006: OECD Social Indicators, OECD Publishing, http://dx.doi.org/10.1787/soc_glance-2006-4-en, accessed February 27, 2014.

None of the above is anything new, and scholars have addressed the issue of demographic decline in Italy, especially in terms of low fertility (Krause 2005b; Krause and Marchesi 2007; Schneider and Schneider 1996, 1995). Anthropologist Nicholas Townsend (1997) argued that studies dealing with fertility decline should look at reproduction as a cultural construction of a biological process rather than a universal given. Anthropologists Jane and Peter Schneider (1995) did just that in their adoption of a historical and political economy approach to the issue of fertility decline in a rural village in Sicily. The Schneiders observed that Sicily was one of the last places in Western Europe to experience fertility decline and sought to position Sicily within the overall structure of fertility decline in Europe. The Schneiders found that peasants and workers in Sicily were largely at the disposal of and dependent on the elites for their livelihood. This in turn led to a loss of agency on the part of the peasants and workers, and “[t]he result was the interdependent reproduction of the two classes” (Schneider and Schneider 1995:200). “Situational powerlessness made members of [the working class] slower than the others to respond to imbalances that emerged between people and resources once mortality rates began to decline” (Schneider and Schneider 1995:200).

In *Festival of the Poor* (1996), the Schneiders note that there was a stigma associated with having a lot of children that attached to the poor. “Instances where the peasant and working classes continued to exhibit high fertility, even as their large families seemed to make them more impoverished, raised the spectre of irrational demographic behavior” (Schneider and Schneider 1996:7). The poor, with their numerous children, were thought to lack control and respectability. By contrast, the upper classes had fewer children and “it became axiomatic to award respectability to families with four or fewer children, while disparaging the parents (or the mothers) or large birth cohorts, especially when they were poor” (Schneider and Schneider

1996:9). In Sicily, as well as the rest of Italy, Italians began to associate smaller families with fewer children with being modern.

In *A Crisis of Births* (2005b), Elizabeth Krause offers a critique of demography's tendency to seek mono-causal explanation of fertility decline (namely in "modernization") and its devotion to statistics at the expense of other considerations (such as cultural factors). Her book is an attempt to explain fertility decline in terms of culture. Similar to the Schneiders, Krause claims that underlying Italy's low fertility there lies a silent revolution against the patriarchal family, a rejection of the rural past, and an embracing of the small family as a symbol of decency. In the discourse surrounding the "crisis of births," Krause sees the creation of panic over immigration that embodies a subtle racial politics. Krause asks readers to consider, "Why, when much of the Western world is clinging to the (albeit vanishing) menace of overpopulation, are Italy and its European counterparts so bent on describing the demographic situation as a crisis?" (2005:184). According to Krause:

To frame low fertility as a crisis erases a host of histories that explains why family-making among Italians has come to take on its current form. This book [*A Crisis of Births*] reminds people that low fertility is the outcome of a deep, horizontal, quiet revolution that began nearly a century ago against the rigid pecking order of the patriarchal family. It is a consequence of society's embrace of an egalitarian model of the family, and of a generation's grappling with the implications for the cultural politics of gender in a context where the so-called culture of responsibility weighs most heavily on women (2005:184).

My reason for elaborating on the work of Krause and the Schneiders in this section is to reinforce what I see as a larger point underlying Townsend's (1997) argument, that is, the so-

called traditional family is but a cultural construction. This is something that anthropologists have argued for years and I will take this up in more depth in Chapter 7 when I discuss anthropological perspectives on marriage and kinship in relation to the Church's ideology of the so-called traditional family. My contribution to the anthropological conversation regarding contemporary kinship and family is to show how the law both structures and is structured by changing family formations.

Regardless of the prognosis for the welfare state, the rapid increase in life expectancy combined with low fertility has resulted in a dramatic change in the composition of Italian families. The most notable change is that the family has become smaller in size and chronologically extended. Over the past decades, the extended family has become significantly "longer and thinner" in terms of the increased longevity and contact between generations and the substantial decrease in the number of children (Bernini 2010). Family structures have been further altered by a dramatic decline in the number of marriages, a significant increase in the number of babies born outside of marriage, and a rise in the number of divorces and separations.

As noted, in Italy, marriage denotes the formation of the family unit. Yet, increasingly, Italians are foregoing marriage. In Italy the crude marriage rate (defined as the number of marriages per 1,000 inhabitants) plunged from 7.7 in 1960 to 3.4 in 2011.⁷⁶ Also significant is the fact that the median age at which Italians first marry has risen from 32.1 years for males and 28.9 years for females in 2000, to 35.1 years for males and 31.8 years for females in 2010 (according to the most recent government statistics).⁷⁷ This is an increase in average age of

⁷⁶ European Commission, Eurostat, Marriage and divorce statistics, [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Crude_marriage_rate,_seleted_years,_1960-2011_\(per_1_000_inhabitants\).png&filetimestamp=20130130111229](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Crude_marriage_rate,_seleted_years,_1960-2011_(per_1_000_inhabitants).png&filetimestamp=20130130111229), accessed February 26, 2014.

approximately 3 years in a ten-year period. While divorce rates in Italy are among the lowest in the EU, between 1970 (divorce was not possible in Italy before 1970) and 2010, the crude divorce rate tripled from 0.3 to 0.9.⁷⁸ The divorce to marriage ratio, an indicator of the number of divorces relative to the number of marriages in a given year, was 25 in 2010, which means that roughly 1 in 4 marriages in Italy ended in divorce.⁷⁹

Italy has also witnessed a sharp rise in the number of live births outside of marriage. In 1970, 2.2% of babies born in Italy were born outside of marriage. By 2011, the percentage had grown to 26.3%, meaning that more than 1 in 4 babies born in Italy are now born outside of marriage.⁸⁰ Recent demographic data show that fewer marriages, more divorces, more children born outside of marriage, and increasing mean age at first marriage represent the overriding trends in the EU member states. So, despite the fact that Italy is tied for fourth among the EU member states in terms of lowest crude marriage rate, Italy is not unique with respect to these recent developments.⁸¹

Sociologist Anna Laura Zanatta argues that Italian society is undergoing a “transition from the golden age of marriage to the dawn of cohabitation,” along with a shift from so-called

⁷⁷ Istat, Italian National Institute of Statistics, Italy in Figures 2012, p. 6, <http://www.istat.it/en/archive/30344>, accessed February 27, 2014.

⁷⁸ European Commission, Eurostat, Marriage and divorce statistics, [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Crude_divorce_rate,_selected_years,_1960-2011_\(1\)_per_1_000_inhabitants.png&filetimestamp=20130130111212](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Crude_divorce_rate,_selected_years,_1960-2011_(1)_per_1_000_inhabitants.png&filetimestamp=20130130111212), accessed February 26, 2014.

⁷⁹ By comparison, the 2010 divorce to marriage ratio was 61 for Spain and 68 for Portugal.

⁸⁰ European Commission, Eurostat, Marriage and divorce statistics, [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Live_births_outside_marriage,_1960-2011_\(%25_share_of_total_live_births\).png&filetimestamp=20130130111239](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Live_births_outside_marriage,_1960-2011_(%25_share_of_total_live_births).png&filetimestamp=20130130111239), accessed February 26, 2014.

⁸¹ European Commission, Eurostat, Marriage and divorce statistics, [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Crude_marriage_rate,_selected_years,_1960-2011_\(per_1_000_inhabitants\).png&filetimestamp=20130130111229](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Crude_marriage_rate,_selected_years,_1960-2011_(per_1_000_inhabitants).png&filetimestamp=20130130111229), accessed February 26, 2014.

traditional family structures (represented by the nuclear family, consisting of a husband, wife, and their offspring) to a plurality of family arrangements (1997:7). Interestingly, a 2010 poll by American Consumer Opinion of adults in 11 leading nations showed that Italy ranked last in terms of the percentage of couples who were satisfied with their marriage.⁸² Italian women were the most dissatisfied of all. By contrast, Canada, the United States, and the U.K., all countries with historically higher divorce rates than Italy, had the highest percentage of happily married couples.⁸³ Commenting on the poll results, Jerry W. Thomas stated: “It seems that all the unhappy couples are getting divorced in the U.S., but not in Italy. It may be that social and religious pressures force unhappy couples to stay married in Italy, compared to countries where attitudes are more accepting of divorce.”⁸⁴

While social and religious pressures are a reality, the fact remains (as previously discussed) that divorce is relatively difficult to come by in Italy. In order to divorce, a couple must undergo a preliminary three-year legal separation, and would-be reformers’ calls for speedier divorce have been largely ignored by the political class.⁸⁵ This may explain in part the reluctance to marry and, once married, the low divorce rates among Italian couples, even in cases

⁸² American Consumer Opinion, “Italy has the Lowest Percentage of Happily Married Couples, while Canada has the Highest, According to Study by American Consumer Opinion,” October 2010, http://www.acop.com/press/2010/10/married_couples/, accessed February 27, 2014..

⁸³ Canada (2004): 2.2; United States (2008): 3.5; U.K. (2007): 2.4; and Italy (2006): 0.8.

⁸⁴ American Consumer Opinion, “Italy has the Lowest Percentage of Happily Married Couples, while Canada has the Highest, According to Study by American Consumer Opinion,” October 2010, http://www.acop.com/press/2010/10/married_couples/, accessed February 27, 2014.

⁸⁵ In Italy, almost all divorces require a continuous three-year legal separation. The separation decree may be granted when the facts support a finding that continued cohabitation has been rendered intolerable or the situation is such that continued cohabitation would be adverse to the mental health or physical well-being of any children residing in the home. It may also be granted upon the request of both spouses. In only very rare cases (e.g., final criminal conviction on the part of one of the spouses, sex change by one of the spouses, divorce obtained abroad by a foreign spouse) is divorce granted without the previous separation decree.

of proclaimed unhappiness. Increasingly, couples in Italy are opting to live together without marrying.

Italian sociologists now prefer the term “families” to “family” to highlight the variety of new ways of living and new family experiences (Zanatta 1997:9). These dramatic changes in the Italian family have been accompanied by the appearance of a new vocabulary used to describe the variety of family arrangements now present in contemporary Italy. Laviosa writes:

The *famiglia unipersonale* is the smallest unit. It consists of a single person, of any age, living alone. It is often an option open to individuals who are without children and have never married, or are divorced, or widowed. The *famiglia monoparentale* offers a solution to the single parent who finds him/herself in a situation of independent single parenthood, *monogenitorialità*. The recent wave of couples without children constitutes an example of the micro-nuclear family, *famiglia micronucleare* (Laviosa 2003:542).

In addition to the family structures noted above, there is the long family, or *famiglia lunga*, which consists of two or more generations living in the same household (for example, parents with their adult children as in the *bamboccione* situation described below). There are also the reconstituted step family (*famiglia ricostituita* or *famiglia ricomposta*), expanded family (*famiglia allargata* or *nuova famiglia estesa*), and the open family (*famiglia aperta*). These types of families frequently consist of parents with children from previous relationships who live together with their own newborn children. These arrangements add social parents (*genitori sociali*) to the mix and such families struggle to define roles and share the responsibilities of co-parenthood (*co-genitorialità*) (Pocar and Ronfani 1998:171). Families confronted with these situations may also explore plural parenthood (*pluri-genitorialità*), a type of family structure characterized by multiple father and or mother figures cohabiting with siblings and half-siblings

(Pocar and Ronfani 1998:193). “The effort to function as an operational family in a new kind of kinship is the challenge that contemporary Italian society faces” (Laviosa 2003:542). For this reason, Laviosa argues, it makes more sense to talk about the decline of a particular family *archetype* as opposed to a crisis of the family (Laviosa 2003).

The Curious Case of *Bamboccione*

One of the more distinctive aspects of family life in Italy is the large percentage of adult children who live at home well into their thirties or forties. In most cases, these are young adults who have been unable to secure suitable employment that would enable them to maintain a separate household, but there are also a significant number of families where older adult children reside with and care for elderly parents, as well as cases of the more clichéd *mammone*, or “mamma’s boy,” a man attached to his mother’s apron strings and incapable of being independent or making a life for himself. A 2012 report undertaken by social and market research firms Coldiretti and Censis claims that almost one-third of Italian adults (31%) live with their parents. Of those between the ages of 18 and 29, 60.7% reported living with parents.⁸⁶ The percentages decrease as the age brackets rise, with 25.3% of those between the ages of 30 and 44 and 11.8% of those between the ages of 45 and 64 reporting living with parents.

In 2007, then-Minister of the Economy, Tommaso Pado Schioppa, caused an outrage when he referred to adults who live at home with their parents as *bamboccioni* (big babies).⁸⁷ The term, which suggests that young adults remain at home to take advantage of free room and

⁸⁶ Andrea Vogt, “Third of Italian Adults Live with their Parents, Report Finds,” *Guardian*, September 12, 2012, <http://www.theguardian.com/world/2012/sep/19/third-italians-live-with-parents>, accessed February 27, 2014.

⁸⁷ *Corriere della Sera.it*, “Mandiamo i bamboccioni fuori di casa,” October 4, 2007, http://www.corriere.it/politica/07_ottobre_04/padoa_bamboccioni.shtml, accessed February 27, 2014.

board and other services provided by a doting mother, subsequently gained currency. A huge billboard at street side below the Parioli hill in Rome depicting a young adult male stretched out and dozing on a comfortable-looking sofa declares, “for your bamboccione,” implying that that everyone has one (a “*bamboccione*,” that is) and that s/he (mostly “he”) deserves the best care. More recently, in his first public appearance at a conference on apprenticeship organized by the Lazio Region held January 24, 2012, Michel Martone, Deputy Minister for Labor and Welfare from November 29, 2011, to April 28, 2013, referred to young adults who fail to graduate from university by age 28 as “*sfigati*” (“losers”). Labor Minister Elsa Fornero argued that young people should not be afraid of looking for work far away from home, suggesting that they should be prepared to cut family ties and move abroad if necessary to find suitable work opportunities. Fornero was subsequently criticized when it was pointed out that her own daughter works at the same university where she and her husband are employed.⁸⁸ While the phenomenon of adult

⁸⁸ Judith Harris, “Moms, Jobs and *Bamboccioni*,” *I-Italy*, February 21, 2012, <http://www.i-italy.org/bloggers/19880/moms-jobs-and-bamboccioni>, accessed February 27, 2014. Nepotism within the Italian university system is an interesting aside. Gian Antonio Stella points out that, like other sectors in Italy, the university system is not immune from extreme nepotism. In 2009, Nina Luca, a journalist with *Corriere della Sera.it*, published a book entitled *Parentopoli. When University is a Family Affair*, which offers an uncompromising report on the controversial selection procedures employed by universities in Italy. Luca points out that, far too often, university jobs go to wives, children, in-laws, friends or “friends of friends.” In many cases, the instances Luca references border on the absurd. For example, Luca mentions the Massari family, which “earned the University of Bari a place in the Guinness Book of Records” by placing eight members of the family in the economics faculty and Luigi Frati, the rector and dean of the faculty of medicine at *La Sapienza*, who shares his workplace with his wife Luciana Angeletti, his son Giacomo, and his daughter Paola, who celebrated her wedding in the great hall of the pathology department. Equally interesting are the justifications offered by the faculty who engage in such practices. According to Pasquale Mistretta, the rector of Cagliari, “many famous children have gone off the rails because of inferiority complexes towards their parents. Some have even ended up taking drugs. ... [so] when a father retires, it is logical to give preferential treatment” to his children. Professor Giuseppe Nicotina is quoted as stating: “The children of university teachers are cleverer because they have minds shaped by the family atmosphere typical of us professors.” The attitude expressed here is that extreme nepotism is justified as a birthright. Gian Antonio Stella (English translation by Giles Watson), *Corriere della Sera.it*, Italian Life, “Shame of Family Appointments at Universities,” March 19, 2009, http://www.corriere.it/english/09_marzo_19/university_445d6c14-149e-11de-9dd5-00144f02aabc.shtml, accessed September 9, 2013.

children living with their parents is real, what it says about Italian families and society is not so straightforward.

Italians have used multiple generations living together in one household as a means of caring for children and the elderly. In an environment of precarious employment, it is predictable that this practice would extend to unemployed adult children. In November 2013, Italy's unemployment rate hit 12.7%, its highest level in 37 years. Youth unemployment was significantly greater, and jumped to an all-time high of 41.6%.⁸⁹ Italy's employment rate (a measure of the proportion of Italians in work as a proportion of the population) is among the lowest in the industrialized world. In 2012, it fell from 56.5% to 56.3%, its lowest level in 13 years.⁹⁰ The Italian government provides unemployment benefits in the form of cash transfers based on contributions. As in most countries, however, only those who have previously been employed are eligible for unemployment benefits, and the system is threatened due to persistent high unemployment rates. Over the past 30 years, most of the increases in social security spending have been the direct result of rising unemployment and public debt rose substantially in the 1980s due to the government's efforts to meet demands for services without raising taxes (Niero 1996).

Living with one's parents is often a necessity in a country where jobs are hard to come by, especially among the nation's youth. Many young adults have no real choice: unemployment is high and welfare benefits are nonexistent. They cannot find a job and they

⁸⁹ Ian Silvera, "Italy's Youth Unemployment at 42% as Jobless Rate Hits 37-Year High," *International Business Times*, January 8, 2014, <http://www.ibtimes.co.uk/italys-jobless-rate-hits-37-year-record-high-youth-unemployment-reaches-41-6-1431445>, accessed February 27, 2014.

⁹⁰ Ian Cumming, "Italy Jobless Rate Jumps to Record High of 11.7 Percent in January," *CNBC.com*, March 1, 2013, <http://www.cnbc.com/id/100510658>, accessed February 27, 2014.

cannot turn to the state for help so they are forced to remain in their parents' homes. "Young people in Italy no longer represent the future," lamented commentator Ilvo Diamonati in an Op Ed piece that appeared in *La Repubblica* on February 13, 2012. Long gone are the days of lifetime employment contracts. Perhaps this is what motivated the judge in the recent case of an Italian father who was ordered to pay €12,000 in arrears and resume paying a monthly living allowance to his 32-year old student daughter.⁹¹ Gianmario Mariniello, the national coordinator for the youth wing of the center-right Future and Freedom Party says that the *bamboccione* phenomenon reflects a degrading society that has failed to provide sufficient opportunities for its young.⁹²

In contemporary Italy, the phenomenon of *bamboccione* has less to do with failure on the part of parents or children than with the failure of the nation-state. Analysts argue that the real challenge for Italy is to increase participation in the labor market, especially among women, the young, and the elderly. This was in fact a big issue in the 2013 general election. According to CNN Journalist Tim Hume, this was the *only* issue on the agenda: "[Italy] The eurozone's third largest economy is hurting, with unemployment surpassing 11% -- and hitting 37% for young people. Voters are weighing the question of whether to continue taking Monti's bitter medicine of higher taxation and austerity measures, while a contentious property tax is also proving a subject of vexed debate."⁹³ In the latest round of political confrontation, so-called

⁹¹ Tom Kington, "Italian Father Ordered to Pay Allowance to 32-Year-Old 'Big Baby,'" *Guardian*, January 17, 2010, <http://www.theguardian.com/world/2010/jan/17/italian-adults-living-at-home>, accessed February 27, 2014.

⁹² Andrea Vogt, "Third of Italian Adults Live with their Parents, Report Finds," *Guardian*, September 12, 2012, <http://www.theguardian.com/world/2012/sep/19/third-italians-live-with-parents>, accessed February 27, 2014.

⁹³ Tim Hume, "Italy's Election: What are the Issues? And Will Anyone Win a Majority?" *CNN*, February 20, 2013, <http://www.cnn.com/2013/02/20/world/europe/italy-election-explainer/>, accessed January 16, 2014.

“*bamboccione*” offer a convenient scapegoat for government officials, who seem to have little problem attributing blame for the failure of the state to the “big babies” and “losers” who allegedly prefer to nap on the couch rather than move far away from home (and away from their support network) to seek employment.

While none of my consultants in Italy could be labeled as actual *bamboccione*, a couple of their individual family situations warrant mention because they offer a glimpse into what life is like for young and not-quite-so-young adults in Italy. I will begin by noting that all but three of the 40 or so friends, acquaintances, and consultants that I met or hung out with on a semi-regular basis in Italy were single (never married) and did not have children. Most were in their thirties and early forties, although I did have a few contacts who were over fifty and some who were in their twenties. Some of this had to do with the subject of my dissertation and the fact that many of the people I came into contact with and befriended were LGBT, and some of this was probably also due to the fact that, both times I was in Italy, I lived in a big city. However, many of my contacts were not LGBT, and when I take into consideration the even larger number of neighbors, contacts I met through participant-observation work, academic affiliations, friends, and lawyer consultants I met in Rome and Turin, the low percentage (around 15-20%) of married couples (or couples with children) I encountered in Italy is rather extraordinary, especially since most of these individuals were in their thirties and forties. Only two of my close contacts had children: one (a woman in her late-thirties) had a son who was six at the time, and the other (a man in his fifties) had two teenage sons. In what follows, I will discuss the family situations of two of the individuals I met during fieldwork. Their respective family lives, which I choose to highlight because they are typical of many of my unmarried Italian contacts, provide interesting insight into contemporary family arrangements in Italy.

D is an attorney living in Rome. She has her own practice and lives in a small apartment that doubles as her office. I met my friend D through our mutual friend T. Initially, I was somewhat intimidated about meeting her. T had described her to me on more than one occasion as the Italian version of “Lara Croft,” referencing the video game adventuress who comes to life in a movie (the part of Lara Croft is played by U.S. actress Angelina Jolie) where she races against time and fights villains to recover important artifacts.⁹⁴ I need not have been apprehensive, however, because D turned out to be incredibly warm and kind.

D is an attractive woman in her early forties. She is adventurous. She is skilled in the use of firearms and has trained police officers and other government officials in the use and the laws surrounding the use of firearms in Italy. She likes to kickbox and one cannot help but notice the large practice bag standing off to the side of the door leading into her law office. She also sky dives. I reference these facts because they point to D’s status as an independent woman.

D is not, nor has she ever been, married. She has no children. She does, however, maintain a close relationship with her parents, who also live in Rome. D has two younger sisters, both in their late thirties. One is married and one is not. They also both live in Rome and maintain a close relationship with their parents and with D. D talks to her parents several times a day and has dinner with them one or more times each week. Her parents frequently babysit her black Labrador and keep him overnight at their house.

I visited and had dinner with D and her parents (and sisters and brother-in-law) at their home on several occasions. I enjoyed going to their home because it was cozy and her mother was an excellent cook. The dinner conversation was always lively and I was made to feel

⁹⁴ See e.g., *Lara Croft: Tomb Raider*, directed by Simon West (2001; London: British Film Institute).

welcome. One thing I noticed was that D never offered to help her mother with the dinner preparations, preferring to hole up in her father's attic office speaking business with him while her mother bustled around downstairs, setting the table and preparing the food. Once dinner was finished, D would again retreat upstairs with her father, while her mother was left to clean up the mess. After the first time I had dinner at her parents' house, I felt guilty and volunteered to help with the clean-up despite her mother's polite protests that it was not necessary. D's sisters acted in much the same way, preferring to relax in the living room while their mother prepared dinner. I do not know whether this was unusual or particular to D's family but I was struck by the amount of work undertaken by D's mother, a woman in her early sixties, to maintain the house and keep everyone, including her adult children, well-fed. I also know that D's apartment was much too small to reciprocate the dinner and, judging by the dust that covered the pots and pans lying on the open shelves of her kitchen, D was not inclined to prepare an elaborate meal for herself, much less anyone else.

As I got to know D better, I learned that she identified more with her father than her mother. I also noticed that when D needed something her father would often produce a credit card, especially for bigger ticket items. I do not point this out as a criticism of D, her father or their relationship. Rather, I draw attention to this because I know that even as a relatively successful attorney with her own private practice, D did not make enough money to cover all of her living expenses. Also, it cannot be said that D lived an extravagant lifestyle. Her apartment and clothes, while nice enough, were very modest by U.S. standards and her car was at least seven years old. She relied on her family for financial support to fill in the gaps and provide for certain necessities such as car repairs and expenses related to the care of her dog that she would otherwise not be able to afford. D's father was a prominent academic who, while not wealthy,

made enough money to support his family and, in addition to providing support for D, provided similar financial support for D's sisters.

One thing about D's family that is increasingly typical of Italian families is the lack of children. At the time I was doing fieldwork in Italy, neither D nor her sisters had children and only one was married. After a lengthy visit to the U.S. and a romantic encounter, D returned to Italy and experienced a late menstrual cycle. She confided in me that she feared she might be pregnant and that this would be okay with her because a baby would bring "something different" to her life. I was surprised at how calm she was about the situation but, as a single mother myself, I must confess to feeling excited about the prospect of D having a baby. She was, after all, in her early forties and it was becoming increasingly unlikely that she would find someone, marry, and have a child in the so-called "traditional" way. I was even more surprised by D's desire to have a baby. In the months that I had known her she had never expressed an interest in babies or children. Was this a longing that she had buried within herself, or was she simply trying to make the best of what she thought might turn out to be a tricky situation? I never did find out because, as it turned out, D was not pregnant. Three months later, however, D's married sister (who had sworn up and down that she was never going to have children) *was* pregnant. D was thrilled at the prospect of becoming an aunt.

My consultant and friend T is allegedly more "traditional" in his outlook on life and approach to family than D. T served for a short period of time in the Italian military and has also worked as a security officer at the Vatican. He once confessed to me that he had voted for Berlusconi and that his political leanings were toward the right. He wanted to marry and have children but was not in a position financially to do so. He was fascinated by the fact that I had abandoned a solid career practicing law to go back to school for a PhD, especially in

anthropology, and could not believe that I had traveled to Rome (the first time) by myself to begin fieldwork without really knowing anyone in the city. I think this is why he took an interest in and befriended me.

When I first met him, T was in his late thirties and residing with his parents in an apartment in Rome. As mentioned in the introduction, he had recently ended a long term relationship and was selling his Bed and Breakfast business. He intended to live with his parents temporarily, until he got back on his feet. Unfortunately, the person to whom he sold the Bed and Breakfast never paid him, and T suddenly found himself in a precarious financial position. He had little choice but to turn to his family for support. Fortunately for T, he was able to find work managing a hotel. Even so, he earns about 1,000 Euro a month and, based on his skills and talents, is grossly underpaid and underappreciated. He is one of the few (if not the only) people on staff who speaks fluent English, can mix a cocktail, and is handy with a toolkit.

Shortly after beginning work at the hotel, T developed a romantic relationship with the owner's daughter, E. In the latter half of 2009, T and E moved in together. One evening over dinner T and I were discussing his relationship with E. He was telling me about the great mini-vacation in Barcelona from which they had just returned. He indicated that he was serious about E and I asked him if he thought they might get married. He told me he definitely wanted to, but could not until he recovered his life savings from the sale of the Bed and Breakfast. I pressed him. "But you are already living together, what difference does it make whether you have that money or not?" I asked. T then explained to me that he did not feel "right" about getting married until he had the rest of his life (meaning his financial life) in order. He went on to state that, before bringing a child into the world, he needed to make sure he could support a family. It did

not matter to him that E and her family had money. He felt very strongly that it was his responsibility to support any family he brought into being.

Neither D nor T could be considered “young” adults. Although certainly not old (D was in her early forties and T in his late thirties), both were past the average age for marrying and having a first child in Italy. Both depended on their parents for economic and other support during times of need. With respect to forming their own respective families, both were at a crossroads of sorts. As a woman in her early forties, D was facing down her alleged “biological clock.” This is what I suspect was behind her calm acceptance of the fact that she “might” be pregnant when she experienced a late menstrual cycle. D had expressed to me that she knew her parents would support her (emotionally, physically and financially) and would be more than happy to welcome a first grandchild into their home. T, on the other hand, did not have the same issues with respect to his “biological clock.” While not significantly younger than him, his partner E was in her mid-thirties and felt she could wait a couple of years before having a child. Neither D nor T, despite having college degrees and being exceptionally reliable and hard-working, was able to support him/herself financially. This, I discovered, was not uncommon in Italy.

In Italy, the nation-state is no longer able to provide a secure safety net for those who have fallen victim to neoliberal globalizing forces. It is easier for politicians who stand to benefit from further deregulation of the market to seek a scapegoat for the increasing disparities between the “haves” and “have-nots,” thereby absolving themselves of responsibility for finding solutions to the existing situation. Italian families have retained a strong social role and continue to serve as the main provider of individual welfare. As evidenced by the large number of adult children who reside with their parents (or receive substantial financial support from them), in a

nation-state where social institutions leave much to be desired, the Italian family has functioned and continues to function as a bulwark against adversity.

The Legal Fiction of the Italian Family

The loosening of strictures regarding sexuality and family life in Italy played a major role in Italy's "modernization" in the post-fascist era (Gilbert 2007). Divorce was introduced for the first time in December 1970, forcing the renegotiation of the relationship between a husband and wife, which led to a reassessment of the rights of the family in 1975. In addition to declaring the equality of husband and wife, the 1975 reform of family law (Law 151, *Riforma del Diritto della Famiglia*) recognized the contribution of the wife's domestic labor and the equal contribution of partners to the maintenance of the family, asserted the duty of holding property in common, and abolished dowry payments, along with the view of marriage as an exchange between two groups entered into through the person of the woman (Passerini 1996).⁹⁵ Even with these changes, commenters have observed that elements of inequality still remain in family law. For example, the new law still required the wife and any offspring to adopt the husband's last name (Fortini 1981). Nonetheless, Italians saw these changes in law as signaling a critical moment in the nation's history. The reforms, especially the divorce and abortion laws, altered the Church-State relationship and indicated the secularization of Italian society. For the first time, the State had power over the institution of the family.

Secularizing reforms in family law were bolstered by two separate but related modernizing forces. Pollard notes that, following World War II and the onset of the Cold War,

⁹⁵ Prior to this the usual financial regime applicable to marriage was the separation of assets of the spouses. After the 1975 reform, civil marriage results in co-ownership of property pursuant to Article 159 of the Civil Code, unless the spouses agree to some other arrangement such as a Separation of Estates contract (that cannot be challenged or rendered void by any court at any time, for any reason).

Italy suddenly experienced an influx of U.S. cultural influences through various media such as film and television that Catholic Italy eschewed (2008:134-35). He further points to the economic "miracle" of the 1950s and 1960s as the second modernizing force that led to increased industrialization and mass migrations from south to north and from rural areas to cities as workers sought jobs in the new industries (Pollard 2008: 132-34). Pollard is convincing. Both processes unsettled the relationship between Church and State. This disruption was further intensified by the Second Vatican Council of 1962-65, which emphasized the role of the laity as "the people of God," and upheld the importance of individual conscience, provoking a crisis of authority within the Church (Pollard 2011). In the 1960s and 1970s Italy experienced a sharp decline in membership in Catholic lay associations, and personal religious observation dropped substantially.⁹⁶ Yet, despite these secularizing forces, the Church remains a major player in Italian politics:

Despite a decline in the number of vocations and subsequent ageing of the clergy, the network of diocese and parishes in the peninsula works effectively, supplemented by the activities of male and female members of religious orders and congregations. New forms of lay associationalism like the *Focolarini*, Catholic Charismatics, the *Comunità di Sant'Egidio* and *Comunione e Liberazione* have emerged to supplement the old. Italian Catholicism still possesses 100 publishing houses, nine radio and television stations and a network of periodicals: *Famiglia Cristiana* and *Il Messaggero di Sant'Antonio* have nearly two million subscribers between them. In addition, the Italian Catholic Church

⁹⁶ Adult Sunday mass attendance in Italy dropped from 69% in 1956 to 35% in 1972. It has since fallen more, but not as much (Clark 1996:371).

remains a substantial provider of health, welfare and educational facilities. All of this ensures that Catholicism remains a major force in Italian civil society (Pollard 2011:455).

In addition, to this day the Church remains an interested presence in the institution of marriage. Prior to the *Concordato* entered into between the Italian State and the Church in 1929, civil marriage was not recognized by the Church and Church marriages were not recognized by the State. This meant that the vast majority of marriages in Italy, which were religious in nature, were not recognized by the State. Children born to such couples were baptized in the Church, and there was no record of their births with state officials. The *Concordato* resolved this situation. Although religious marriage still has no value for the State, separate marriage ceremonies are no longer required. Upon request of the couple, the State Registrar may record a Catholic marriage. Today, the most frequent form of marriage in Italy (taking place in approximately 66% of all marriages) is the so-called *Matrimonio Concordatario*, in which the ceremony is celebrated in Church but registered by the State Officer upon request.

As Stefania Bernini (2010) points out, an understanding of the relationship between politics, family and the Church helps to explain some of the current issues plaguing Italian society, including the political deadlock evident in the struggle over recognition of rights for same-sex couples. Following World War II, the Church found itself in the precarious position of having to reinstate itself within a new democratic polity. The Church was able to reassert its power by establishing its authority over ethical issues, which gave it substantial footing in Italian decision-making processes. Today, "the legitimacy of the Church's involvement on policy making in ethically sensitive areas seems to have become a *fait accompli*, while the fields open to such involvement have multiplied" (Bernini 2010). Conservative politicians in Italy continue to enlist the Church (and vice versa) as an ally to provide a vision of national identity based on

the patriarchal family and Catholic social values. Italian politicians fear offending the Vatican and, although the Vatican does not campaign on behalf of political candidates, the influence of the Church hierarchy pervades so many levels of society that lawmakers are reluctant to challenge Church positions.

Not surprisingly, Italian politicians have been vocal in their opposition to same-sex couples and same-sex marriage. In a September 7, 2010, debate before the European Parliament on the rights of same-sex couples under the EU's freedom of movement provisions, three Italian members of the European Parliament (MEPs) (joined by a Polish MEP) spoke out against the European Commission's monitoring of the resolution's implementation. One in particular, Oreste Rossi (from Italy's Northern League party), stunned the European Parliament with a theological speech on the "natural" family. According to reports, the speech was so poor in terms of argumentation and so full of anger against same-sex couples that it was reminiscent of speeches made by the most homophobic religious leaders.⁹⁷

In May 2012, then Minister for Equality Elsa Fornero wrote a letter to *Avvenire*, a Catholic newspaper, in which she condemned the extension of marriage to same-sex couples. Fornero stated, "Same-sex marriage could lead to a social crisis, which could worsen the debt and economic crisis. We must defend individual people's rights, but we cannot make gay marriage equal to the traditional one." What is interesting about Fornero's letter is the fact that a week prior to writing the letter Fornero had defended same-sex marriage on the International Day of Families. However, following an attack from *Avvenire*, Fornero not only reversed her

⁹⁷ ILGA-Europe Press Release (submitted by *Arcigay* International), "Italy is Again the Laughing Stock of Europe," August 9, 2010, http://www.ilga-europe.org/home/guide_europe/country_by_country/italy/italy_is_again_the_laughing_stock_of_europe, accessed February 27, 2014.

position but was compelled to write a letter for publication in the Catholic newspaper. In August 2012, 173 members of the Italian Parliament from the right-wing PDL party signed a document against marriage equality. Although Matteo Renzi, the fast-rising secretary general of the left-leaning Democratic Party promised to take up the issue of civil unions in his party's next electoral platform, he is destined to encounter resistance. Maurizio Sacconi, a senator with one of Italy's center-right parties, warned that it would be risky to take up the issue of same-sex relationships at this point in time, arguing that the divisiveness of the issue would risk further disunity in Parliament at a "politically delicate" time.⁹⁸ "For us, the priority is the family, which is formed by marriage between a man and a woman," Sacconi is quoted as stating. "Principles of ethics are not negotiable for those who believe in them."⁹⁹

In some cases, political speech is virtually indistinguishable from hate speech. In July 2012, Santino Bozza, a member of the regional parliament of Veneto, described LGBTI people as "ill and perverted" and "in need of a cure." That same month, journalist and politician Marcello Veneziani wrote: "with gays humanity is committing suicide" and "homosexuality has been invented by nature for the destruction of human kind." In August 2012, *Forza Nuove*, a far-right party, hung posters in Pescara that read: "Italy needs children, not homosexuals," and followed up in October 2012 by hanging a sign on a wall outside the *Cassero* in Bologna (the site of a popular gay venue and the location of *Arcigay's* offices) reading: "perversions must be

⁹⁸ At the present moment, it is unlikely that the Italian Parliament will go any farther than the hate-crimes legislation that is currently under consideration. The legislation, which covers anti-gay speech and violence, was introduced in 2013 and approved by the lower house of Parliament. It is now with the Senate and may be blocked. Much of this has to do with the fact that the governing coalition is barely hanging on by a thread and cannot afford to risk a contentious split.

⁹⁹ Henry Chu, "For Gays in Italy, Rights and Acceptance are Still Elusive," *latimes.com*, January 6, 2014, <http://www.latimes.com/world/la-fg-italy-gay-20140106,0,504437.story#axzz2rG0HtLKr>, accessed January 23, 2014.

cured." In response to a question regarding a political disagreement with openly gay politician Nichi Vendola, Rocco Buttiglione, a conservative politician and professor of political science at St. Pius V University in Rome, asserted that he has "the right of saying that morally homosexuality is wrong in respect to what is the true good of the person."¹⁰⁰ This statement was made during a live radio show broadcast on Radio 2. That same month, Andrea Di Pietro, a town councilor in Vigevano tweeted: "Vendola is as slimy as the Vaseline he uses!" The attitudes expressed by the political parties and politicians quoted above carry over into general society and circulate widely among self-proclaimed Catholics. An example of this is the recent popularity of a book written by "devout" Catholic journalist Costanza Miriano.

When I was conducting fieldwork in Italy, I heard through my connections with *Alleanza Cattolica*¹⁰¹ about a book, *Sposati e sii Sottomessa: Pratica Estrema per Donne Senza Paura* (2011) (translated "Get Married and Be Submissive: An Extreme Practice for Women without Fear"), written by a woman named Costanza Miriano. Miriano was born in 1970, in Perugia, Italy. She majored in classical literature at the university in Perugia and then studied journalism. Later, she moved to Rome and began working for public television, where she worked on the state-owned television news channel TG3 (*TeleGiornale 3*) for fifteen years. Now, however, she handles religious information on RAI Vatican. Miriano is a self-avowed devout Catholic, is

¹⁰⁰ In 2004, Buttiglione was nominated for a post as European Commissioner. The post would have included a civil rights portfolio. The nomination resulted in controversy as some groups, including many activist LGBTI associations, opposed him for his views against homosexuality, despite his claims that these were personal convictions and would not affect his job performance. His nomination was subsequently withdrawn by the Italian government.

¹⁰¹ *Alleanza Cattolica* is an Italian Catholic lay association. The purpose of the organization is to study and spread Catholic social doctrine.

married, and has four children (2 boys and 2 girls). She is an avid runner and has completed several marathons.

The book is made up of a series of letters, written by Miriano to her mostly female friends about what it means to be a man and a woman, and delves into topics such as engagement, marriage, family life, bearing and raising children, and talks about sex as a gift from God. According to Miriano, the title of the book was inspired by the letter of St. Paul to the Ephesians, wherein Paul calls on women to be submissive. Miriano embraces this and argues that such submissiveness does not emanate from a place of weakness; rather, it is rooted in women's strength and stability, in the "fact" that women are soft and comfortable, in touch with their deep nature, able to put people in relationship, and can give life, both biologically and spiritually. The book has sold around 70,000 copies in Italy, which is a respectable number by Italian standards, and has been translated into Spanish, French, Portuguese, Polish and Slovenian. It has been printed sixteen times and when first published, the book received a very positive review from the Vatican's official newspaper, *L'Osservatore Romano*. *Zenit*, a non-profit news agency that reports on the Catholic Church and issues important to the Church from the perspective of Church doctrine, referred to the book as the "literary event" of 2011 in non-fiction.

While the book caused a bit of a media stir in Italy, it was nothing like the response it received in Spain. Since its translation into Spanish and publication by *Nuevo Inicio*, three parties of the Spanish parliament have called for its withdrawal from circulation, alleging that the book incites violence against women. The United Left party in Spain initiated a petition with the Spanish Public Prosecutor's office to block the sales of book. The deputy of the PSOE (*Partido Socialista Obrero Español*), Angeles Alvarez, announced that his party will also bring an

initiative to block the book, stating: "We cannot allow organizations like the Church, who receive money from the state, to devote themselves to proselytize on inequality, discrimination, and sexism."¹⁰² The controversy over the book's release in Spain drove its sales to the top of the charts, making it a bestseller on Amazon.com in Spain.

The publicity generated by the book has turned Miriano into a celebrity of sorts. She has her own website and blogs frequently.¹⁰³ Since writing the book, Miriano has been invited to speak in all sorts of venues throughout Italy. She has granted several interviews, appearing as the quintessential "modern" woman on television with her make-up, high heels, and low-cut black suits that reveal a bare back. She speaks of repealing the abortion law and supports Putin's anti-gay propaganda law. She is willing to "crusade" to prevent babies from being given up for adoption to same-sex couples and forcefully decries the arrest of Franck Talleu, father of six, by French authorities for wearing a *Manif pour Tous* (translation: "Demonstration for All") sweatshirt with a stylized logo depicting a mom and dad with two children holding hands.¹⁰⁴ Miriano is an embodied example of what Italian LGBTI activists are up against: a well-educated, working mother who dresses stylishly and runs marathons and who has become an outspoken advocate for traditional family values by advocating submission on the part of women.

¹⁰² *Tempi*, Editorial, "La Spagna non vuole 'Sposati e sii Sottomessa,'" November 13, 2013, <http://www.tempi.it/la-spagna-non-vuole-sposati-e-sii-sottomessa-miriano-e-la-dittatura-dellideologia-di-genere-siccome-e-falsa-va-imposta-con-forza#.UtlwIxDnbIU>, accessed February 27, 2014.

¹⁰³ Costanza Miriano's website and blog can be found at <http://costanzamiriano.com/>.

¹⁰⁴ *Manif pour Tous* is a French anti-gay organization made up of men known for staging ironically homoerotic protests. The organization recently caught the attention of John Oliver, from the U.S.-based late-night television's *Daily Show*. In a piece titled "GayWatch: International Edition" that aired on June 13, 2013, Oliver queried: "How is it that France's anti-gay protests look even gayer than our pro-gay protests?"

As noted in Chapter 2, the introduction of divorce and legalization of abortion were the result of a “far-reaching critique of the family as an institution and its relationship with the state” that was actively pursued by the social movements of the 1960s and the women’s movement in particular (Bernini 2008:305). While the end of the reform process coincided with the dying out of the social movements of the 1960s, the lack of critical engagement with the family on the part of social movements has not prevented Italian politicians from using the family as a tool of propaganda (Bernini 2008). Today, the Italian family serves as a privileged site of political confrontation. Politicians, aligned with the Church, have used controversies surrounding ethical issues such as medically assisted procreation, cohabitation, and marriage equality to establish a dominant Italian agenda regarding morality (Bernini 2010). Over the past several years, conservative forces in Italy have rejected calls for recognition of *de facto* relationships and shorter divorce. Unfortunately, the prevailing strategic approach to the family deployed by Italian politicians is oversimplified and dualistic, and thwarts the possibility of constructive engagement regarding the complex ways in which the Italian family has changed over the past years. The result is that the actual transformations that characterize contemporary family life have been given short shrift, and politicians have failed to promote policies based on the actual needs of contemporary families. The “families” that actually exist in Italy do not coincide with the “family” that continues to thrive in the imaginings of the Church, its followers and law-makers. It is unfortunate that the “imagined” family is the only family that continues to be recognized in Italian law.

At the present moment, the question of how to adopt an agenda of modernization and expansion of individual rights without being declared an enemy of the family poses a dilemma to Italian political parties on the left (Bernini 2008). In the political sphere the family is treated

more as an ideal than a social reality and confrontations regarding what the family “should be” do not coincide with what the family has become (Bernini 2008). To this end, any effective reconceptualization of the relationship between family and society in Italy is most likely to emerge from the growing number of people whose family lives diverge from the ideal prescribed by Italian family law. As I will show in the final section of this chapter, it is the Italian courts rather than politicians that have taken the lead to fill in gaps between what the law *says* families are and how they actually *exist* in society.

The first of these cases involves a recent decision by the Court of Cassation on January 11, 2013 (*Corte di Cassazione Prima Sezione Civile, S.E.T. v. I.B.*, No. 631/2013). In this case, a father challenged the award of exclusive custody to the mother of the child granted by the Court of Brescia on July 11, 2011.¹⁰⁵ The mother was residing with her female partner and the father had, on a previous occasion, assaulted the mother's partner. The father argued that living with the lesbian couple would harm the child. In support of this argument, the father cited Article 29 of the Italian Constitution, referencing the family as a “natural society founded on marriage.” He also argued that the mother's sexual orientation was contrary to Constitutional norms that protect the family and marriage and that the child must be educated according to the father's religious views.¹⁰⁶ The lower courts had previously denied the father's claims and ruled that sexual orientation was not a factor to be taken into consideration when determining issues regarding child custody and visitation. The Court of Cassation dismissed the appeal, finding that

¹⁰⁵ By way of background, Article 30 of the Italian Constitution proclaims that to be a parent is both a right and a duty. The notion of right is based on the idea that to be a parent is a commitment that an adult takes on *with respect to his or her children*, rather than to the other parent. For this reason, parental rights and duties cannot be undermined by the separation of the parents.

¹⁰⁶ The father happened to be Muslim and residing in Italy as a resident (rather than a citizen). There is no way to determine if and to what extent the father's religious affiliation influenced the Court's decision.

the father's justifications for denying the mother custody were simply irrelevant as the father was exploiting them to conceal his prejudice and violence against the mother's partner.

This was the first time that an Italian court legally recognized the mother's same-sex relationship as a "family" in a child custody case. Previous cases limited analysis to the parent and never qualified the parent's relationship. Here, the Court specifically mentioned a "family centered on a same-sex couple" and went on to examine whether a family headed by a same-sex couple is harmful to the child's development. The Court established that the father's claims were not based on scientific evidence or experience, but instead constituted "mere prejudice" in their assumption that a child raised by a same-sex couple would suffer developmental harm. This perspective ignores what is to be determined, that is, that living in a family centered on a same-sex couple would harm the child.

The case represents an additional step toward recognition of rights for same-sex couples. This is not insignificant. Italian professor and attorney Matteo Winkler, who is part of *Rete Lenford*, commented on the Court of Cassation decision, stating: "Nevertheless, as a reaction to a Parliament which does not seem to take this task seriously, Italy is moving toward a court-created regime, articulated in general principles according to a case-by-case approach."¹⁰⁷ The case is also significant when one considers the fact that adoption is regulated by *Legge* 184/1983, which allows only married heterosexual couples (who have been married for at least three years or have been a stable couple for at least three years, taking into account the period of pre-marital cohabitation) to adopt children. Nonetheless, as the following two cases show, the Italian courts appear to be inching toward recognizing the validity of families headed by same-sex couples.

¹⁰⁷ Matteo M. Winkler, "The Italian Supreme Court Rules on Gay Parenting," *Lesbian/Gay Law Notes* 69 (March 2013), https://www.academia.edu/2970299/The_Italian_Supreme_Court_Rules_on_Gay_Parenting, accessed February 28, 2014.

In a decision reached in November 2013, the Juvenile Court of Bologna awarded temporary custody of a three-year-old child to a middle-age, same-sex couple. While same-sex couples are prohibited from adopting children in Italy, the rules for temporary foster care are less strict. This has to do with the fact that, while adoption severs the ties to the so-called “natural” family, foster care does not. The purpose of foster care is protection of the child and, in many cases, the child continues to have a relationship with his or her parents during the period of fostering, with the goal of family reunification. In the Bologna case, the judge's ruling was in line with the recommendation of the social services agency handling. The agent assigned to the case took the position that the couple offered the child a home with "prosperity and peace." Social services noted that the men are friends with the child's family and the child is reportedly very fond of the men and calls them her "uncles."

In yet another case brought before a court for minors in Palermo, Sicily, on January 14, 2014, the court awarded temporary custody of a 16-year-old to a gay couple. The gender of the teen was not made known. The couple, however, both in their 40s, is in a stable relationship and sought custody of the teenager, who is alleged to come from a deprived family. The case is believed to be the first of its kind in Sicily. Again, while under Italian legislation only married couples are eligible to adopt children, temporary foster care can be awarded to any “family community” constituted by two persons who act as parents or by a single person.

As with the *Affermazione Civile* cases, the child custody cases described above evidence the increasing importance of court decisions in the formation of public policy regarding the treatment of same-sex couples in Italy. In awarding custody to a lesbian mother and her partner, and temporary custody as foster parents to two gay couples, the Italian courts are slowly supporting the idea of same-sex parents in Italy. This is a marked shift in a country that has

heretofore been zealous in its efforts to prevent same-sex couples from adopting children or availing themselves of assisted reproductive technologies. Yet, families headed by same-sex couples continue to find themselves living with a lot of uncertainty. A child born to a same-sex couple is deemed under Italian law to have only one legal parent: that is, the biological parent. This continues to present problems.

Giuseppina La Delfa, President of *Famiglie Arcobaleno*, a national association of families headed by homosexual parents in Italy, describes the precariousness of her situation in a blog posted on *Huffington Post* in March 2013.¹⁰⁸ La Delfa is a language teacher at the University of Salerno and lives with her same-sex partner and two children in southern Italy. The eldest child, a girl, is La Delfa's biological offspring and the youngest, a boy, is the offspring of her partner, Raphaëlle. La Delfa observes that, even though her day-to-day life is peaceful and happy, she never forgets that her family is not recognized by the state *as a family* and therefore has no legal protection in Italy. Despite the fact that she and Raphaëlle have lived together for 30 years, if she were to die tomorrow, Raphaëlle would be considered a complete stranger under the law and would not be able to inherit anything from La Delfa without paying exorbitant inheritance taxes. La Delfa states:

Sometimes I wake up anxious and stressed, like I did last Sunday, when I woke up thinking about a dramatic situation that could happen but which I hadn't really focused on before. I turned to Raphaëlle and said, "What would happen if you and I both died in a car accident? Who would take care of [our son]?" [Our son] doesn't have any blood relatives. Raphaëlle is an only child, and her parents have passed away. ...

¹⁰⁸ La Delfa, Giuseppina, "A Day in a Queer Life in Italy: Being a Lesbian Mom when Families like Mine Still Aren't Recognized." *Huffington Post*, March 28, 2013, http://www.huffingtonpost.com/giuseppina-la-delfa/a-day-in-a-queer-life-in-italy_b_2965290.html, accessed March 6, 2014.

...

As soon as it was late enough in the morning – 9 o’clock – I called my sister in France and asked her, “If Raphaëlle and I were both to die together in an accident, will you promise me that you’ll take [our son] along with [our daughter], that you won’t separate them, and that you’ll tell them the whole story of our family?”

La Delfa’s sister reassured her that both children were part of the family. La Delfa, however, soon had another uneasy thought. Her sister is not legally her son’s aunt and there are no guarantees that an Italian judge would trust her with the child.

This most recent line of Italian jurisprudence dealing with same-sex couples and children suggests that it is only a matter of time before the court intervenes in recognizing same-sex couples as co-parents. Once the court acknowledges the existence of a “family centered on a same-sex couple,” as the Court of Cassation did in the child custody case discussed above, it becomes increasingly difficult, from a (legal) doctrinal perspective, to deny parental recognition to both partners in a situation where there is not a second biological parent involved (such as the case of La Delfa and her partner). This position is reinforced by the Court of Cassation’s finding that it is “mere prejudice” to assume that a child raised by a same-sex couple will suffer developmental harm. In the next chapter, I will look more closely at the role of the Italian courts in advancing recognition of rights for same-sex couples.

Figure



Figure 7. Satirical image of a Barilla pasta box stamped with "Bigotini" instead of "Rigatoni" that made rounds on the Internet following the Barilla Pasta Scandal. Photo: Courtesy of @peacevehicle/Twitter, pic.twitter.com/w17Nz3rcOE.

Chapter 4: Policy-Making in the Courts and the Judicialization of Italian Politics

In Chapter 2, I explored how activists from *Certi Diritti* and *Rete Lenford* are using the Italian courts to achieve significant policy changes in the recognition of rights for same-sex couples and in Chapter 3 I offered examples of three recent cases involving the award of child custody to same-sex parents to show how the courts continue to push recognition outside the *Affermazione Civile* campaign. Here, I want to shift focus from the LGBTI activists to the Italian courts. I will show how recent policy changes with respect to the treatment of same-sex couples emanating from the Italian courts have been made possible due in large part to the influence of the EU on the national judicial system. As I will demonstrate, however, the decisions coming out of the Italian courts go well-beyond the mere invocation and enforcement of EU law. I contend that the activities of the Italian courts in recognizing certain rights for same-sex couples constitute evidence of burgeoning judicial activism and follow a trend that began post-World War II toward the increased judicialization of Italian politics, a trend which has been accelerating due to the stimulus of the EU on the national judicial system. Through the lens of the *Affermazione Civile* project, it is possible to trace the effects of judicial policy-making into Italian society and shed light on how the Italian legal and political systems (and ultimately, Italian culture) are being incrementally transformed through such processes.

I begin this chapter with an overview of the Italian judicial system (in which I also talk about my own introduction to the Italian courts) in order to delineate what *Certi Diritti* and *Rete Lenford* were up against when they decided to pursue the *Affermazione Civile* project. I follow up with two shorter sections in which I discuss legal training, selection, and the role(s) of the judge in Italy, background that is necessary to more fully appreciate the extraordinariness of the manifestation of judicial activism in Italy in general, and with respect to the *Affermazione Civile*

project in particular. Next, I briefly interrogate the terms "judicial activism" and "judicialization" to explain how I am using the concepts here. I conclude the chapter by reanalyzing the *Affermazione Civile* cases discussed in Chapter 2, in order to show how the activities of the Italian courts in this area demonstrate judicial activism and evidence an increasing judicialization of Italian politics that serves to reorient the nation-state in the supranational realm that is the EU.

"May It Please the Court": An Introduction to the Italian Judicial System

While I was living in Turin, something extraordinary happened: an Italian appeals court overturned the murder convictions of American student Amanda Knox and her former Italian boyfriend, Raffaele Sollecito. Given my interest in the Italian court system, I had been casually following the case and had observed, along with many others, that the U.S. media portrayal of the case was very different from the way the case was depicted in the Italian media. In fact, whereas the U.S. media generally portrayed Amanda as an innocent young student caught up in a labyrinth of incompetent prosecutors and a criminal justice system that leaves much to be desired, several of my Italian friends believed her guilty. My Italian friends were not outliers with respect to this view: polls in Italy disclosed that the majority of Italians believed Knox and Sollecito were guilty. After the 2011 verdict acquitting Knox and Sollecito was pronounced, demonstrators outside the court directed chants of "Shame! Bastards!" at the exiting judges and lawyers, expressing their displeasure with the judicial system. After Knox and Sollecito were acquitted in 2011, *Il Giornale* ran a story titled "*Amanda e Raffaele assolti. Da condannare sono i pm*" ("Amanda and Raffaele acquitted. PM are to be condemned").¹⁰⁹ "PM" is an acronym for

¹⁰⁹ Vittorio Macioce, "*Amanda e Raffaele assolti. Da condannare sono i pm*," *Il Giornale*, October 4, 2011, <http://www.ilgiornale.it/news/amanda-e-raffaele-assolti-condannare-sono-i-pm.html>, accessed July 8, 2014. *Il Giornale* is a daily newspaper published in Milan. The paper, founded in 1974 by Indro Montanelli (considered one

“*Pubblico Ministero*,” and references the Public Prosecutor. In the Italian system, public prosecutors are, like judges, judicial officers. Their job description requires them to *promote justice*, which may mean asking the judge for an acquittal if they become convinced of a defendant’s innocence, or agree that there is insufficient evidence to find a defendant guilty beyond a reasonable doubt.

Eighteen months after the appeals jury acquitted Knox and Sollecito, Italy’s Supreme Court of Cassation (*Corte Suprema di Cassazione*) overturned the acquittals and ordered a new trial.¹¹⁰ In an article discussing the Knox case, Associated Press writer Victor L. Simpson observed that “[the Italian justice system] is a system where people cleared of serious crimes can have the threat of prison hanging over them for years, while powerful politicians such as former premier Silvio Berlusconi can avoid jail sentences almost indefinitely by filing appeal after appeal until the statute of limitations runs out.”¹¹¹ “It’s one of the many failings of Italian justice that it never delivers conclusive, door-slamming certainty,” wrote journalist Tobias Jones in an

of the greatest Italian journalists of the twentieth century), has always been deemed to have a conservative slant. In 1987, Silvio Berlusconi purchased the newspaper and then resold it to his brother Paolo in 1994, in order to neutralize accusations of a conflict of interest. Needless to say, the paper remains visibly loyal to Silvio Berlusconi. Montanelli, who was no fan of Silvio Berlusconi, founded a new daily, *La Voce* (The Voice) and spent his last years voicing opposition to Silvio Berlusconi’s politics.

¹¹⁰ The Court of Cassation is the court of last resort in the Italian judicial system. While it does not have authority to overrule the trial court’s interpretation of evidence, it can correct a lower court’s interpretation of law. The role of the Court of Cassation is to make sure that lower courts correctly follow legal procedure and to harmonize the interpretation of laws by the lower courts. Although its decisions are binding only on the case being considered, the lower courts find the Court of Cassation’s judgments persuasive.

¹¹¹ Victor L. Simpson, “Knox Case Means More Scrutiny for Italian Justice System,” *Salon*, March 27, 2013, http://www.salon.com/2013/03/27/knox_case_means_more_scrutiny_italian_justice_system_ap/,” accessed February 28, 2014.

article for *The Guardian* following the 2011 acquittal verdict.¹¹² “What usually happens is that the door is left wide open to take the case to the next level, first to appeal and then to the *cassazione*, the supreme [appellate] court.”¹¹³ Jones asserts that there are several reasons for the inability of the Italian justice system to resolve cases. He points out that, in part, it is a matter of meritocracy. In Italy, government appointments are regularly made through nepotism rather than competence. For this reason, argues Jones, it is inevitable that investigations are flawed and any decent lawyer can use this to his or her advantage. In addition, juries are not properly sequestered, rendering them vulnerable to public opinion. There is no doubt, according to Jones, that Italy’s courts are in urgent need of reform.¹¹⁴

As I mentioned earlier, I spent several weeks in Italian civil and criminal courts in Rome, speaking with and shadowing attorneys. During my fieldwork in Rome, I became especially close to two attorneys. One, my friend D mentioned in the previous chapter, had her own criminal law practice. The other, F, was part of a general practice firm, consisting of four attorneys and a small support staff. Both took me to court and introduced me to other practicing attorneys. Both took the time to explain what was going on and to offer their insights into the presiding judges, opposing attorneys, and other participants in the cases I observed. This experience was invaluable to understanding legal process in Italy, as well as to better

¹¹² Tobias Jones, “Amanda Knox Case is Typical of Italy's Inconclusive Justice,” *Guardian*, October 4, 2011, <http://www.theguardian.com/commentisfree/2011/oct/04/amanda-knox-case-italy-justice>, accessed February 28, 2014.

¹¹³ See note 112.

¹¹⁴ As one of my Italian contacts pointed out, this is a very “U.S.-based” take on the Italian judicial system. On the flip side, one can argue that a criminal defendant in the Italian system remains innocent through three stages of judgment.

appreciating *Certi Diritti* and *Rete Lenford's* decision to pursue policy change through the courts. In what follows, I describe two of my first encounters with the Italian judicial system, one involving a civil matter and the other a matter in criminal court. Both were typical of my subsequent encounters with the Italian judicial system.

Although my Roman friend and consultant T had warned me what to expect, I did not completely believe that things could be as *bad* as he described. I thought for certain that he was exaggerating. When I first told T I planned to go to the court to see what was going on, he laughed and told me that there was nothing really to see, that it was not like going to court in the U.S., and that I would be appalled by how things are done. T told me that it takes *forever* for a case to move through the system. There is a seemingly insurmountable backlog of cases and an endless appeals process. He explained to me that nothing was computerized and that court files existed in hard copy only. Further, everything was hand-written. He could not quite grasp why I would want to go and stand around and watch people write a bunch of stuff on paper. I told him that, as an anthropologist, these were precisely the kinds of things I needed to see and understand. He agreed to help by introducing me to some of the local attorneys he knew.

After I returned to Rome to begin my fieldwork in earnest (and after I got to know him better), T confided in me that the new owner had never paid him for the sale of the Bed and Breakfast, and that he (T) was now in the unenviable position of trying to collect the money owed to him through the court. The amount of money at issue was substantial and, as I mentioned in Chapter 1, T had planned to use it as seed money for another venture. T had filed a case in court in an attempt to recover the money owed to him, but was doubtful he would see the money any time soon. Until such time, his hands were tied. I could tell that the situation was getting to him.

As far as the case itself was concerned, the facts were in T's favor. Still, T did not trust the judge presiding over his case to do the right thing. His distrust did not stem from anything in particular (he did not personally know the judge assigned to his case, nor had he heard any rumors about this particular judge). In fact, it was the *lack of relationship* and lack of knowledge that concerned him. T was convinced that he needed an "in" with the judge in order to prevail. He did not subscribe to the adage "justice is blind," and desperately needed to win the case. He did not want to take any chances.

T thought it would be good for me to meet and speak with his attorney, and maybe accompany his attorney to court. They had an appointment to meet to discuss T's case and T invited me to tag along. T picked me up in his beat-up Smart Car and we navigated to the Vatican area. It took us a while to find parking and, when we did, we had to walk several blocks to his attorney's office. The office was located inside a five-story stone building with a single locked door for an entrance. The building was rather nondescript and, according to the buzzer, housed several small businesses. T rang the buzzer and announced the purpose of our visit when prompted. We were admitted into the building and took the stairway to the third floor where we entered another door on the left into a tiny reception area. A young woman dressed in a business suit came from behind a desk and introduced herself. She told us to make ourselves comfortable while we waited for F. I assumed she was employed as the law firm's receptionist or legal assistant but later learned from F that she was a recent graduate from law school and was apprenticing with the firm as part of her requirement to become a full-fledged practicing attorney.

We waited about five minutes and F came out to greet us. T made the introductions, and F asked if I would mind waiting in the reception while he discussed T's case with him in private.

Then, we could all talk in his office. I continued to wait and F came out to retrieve me approximately 15 minutes later and escorted me to his office. The office was not large but it was cozy and had a huge window that overlooked the street. It was comfortably furnished with heavy wooden furniture. Floor-to-ceiling book cases filled with law books lined the wall to the right side of the office entrance. F invited me to sit down in one of the chairs facing his desk and T proceeded to tell F about my research. T told F that he thought it would be interesting for me to follow F to court in order to get some sense of the Italian legal system. Both F and T chuckled as if this was some sort of inside joke. F looked at me and said, “You will need to take a Valium before you accompany me to court.”

According to F, cases take years to resolve. I asked him the reason for the delays and he told me that much of it has to do with the fact that the judges show up only two hours twice a week, and work from home the rest of the time. The judges are organized in a sort-of “judges union” and if someone tries to tell them they have to work, they will strike.¹¹⁵ F explained that going to court in Italy would be nothing like what I was used to in the United States. He told me that the procedures were antiquated and that going to court involved a lot of waiting around in crowded spaces. Like T, he told me that nothing is computerized and that Court orders are written in longhand and signed by the judge. F pulled out his agenda and gave me several dates to choose from. We settled on a day later that same week and agreed that I would meet him at his office and we would walk over to court. He reminded me again to “take a Valium” before the meeting.

¹¹⁵ As will be discussed in more detail below, the Italian Magistracy is organized into a national magistrates association known as the “ANM,” which is further divided into factions (known as “*correnti*”), each with its own organizational structure. The factions arose due to conflicts within the judiciary over the career. Through the factions, ANM expresses its demands to the Parliament and government.

T and I left F's office and discussed the prospects for T's case. T told me that F is a straight shooter and, while T appreciated this, he had discussed the possibility of bringing in a second attorney who has an "in" with the judge on his case with F. T has a friend who has a friend who is a young attorney just out of law school. Apparently, this young attorney just out of law school has an uncle who is a magistrate and knows the judge assigned to T's case. T told me he mentioned this to F and suggested bringing the second attorney onboard if it did not look like things were going to go T's way. According to T, F had not been overly keen on the idea and, for now, the case was going to go forward with F as the only attorney. I could sense that T was not entirely comfortable with this arrangement and asked him why. T told me he was worried that the defendant might know someone on the bench and be using his contacts to secure a favorable order from the judge. While I do not know the extent to which these sorts of things happen in Italy, it was obvious that T fervently believed that civil cases were decided based on whom one knows rather than the merits of the case. I was worried for T. I knew he was miserable and depressed about his current situation and felt bad for him. I told him I hoped he was wrong about the court case and that it would be resolved soon.

On Thursday I arrived as planned at F's office. F invited me to sit and explained to me the nature of the court case. He was being asked to appear on behalf of another attorney who he did not particularly like. The purpose of today's hearing was to take the testimony of two witnesses and the witnesses were going to meet us at the courthouse. F continually referred to today's hearing as a "trial." I learned from F that civil trials like the one scheduled that day do not happen all at once. Instead, several hearings are scheduled for the taking of testimony and evidence and these hearings are often spread out over substantial periods of time, which is part of the reason it takes so long to reach a resolution.

F and I walked over to the courthouse and F talked to me about the opposing attorney's position with respect to the case en route. We arrived at the courthouse, an ugly building that, judging by the architecture, had likely been erected in the 1960s. As a former federal prosecutor who has spent her share of time in various courthouses, I was taken aback by the fact that there was no security check. We simply walked in: no one asked us for identification, there were no metal detectors, and no one was stationed at the door to search us. Inside the building, the ceilings were low and paneled. The floors were laid with a brown speckled industrial tile. The effect was downright dreary and claustrophobic. We began to seek out the courtroom where the hearing was to be held. We were about 10 minutes early. After a couple of false starts we went upstairs and searched the paper schedules taped outside the courtroom doors until we located the correct room. Waiting outside, F found A2, his opposing counsel, and quickly introduced me. A2 was affable and appeared to be on good terms with F. We noticed that there were four (4) hearings on the court's docket, all scheduled for the same time. There were several people (I counted ten) already crowded in the "courtroom."

Everyone was standing in small clusters, talking. I looked around the courtroom and noticed that it was actually an office, and not much of one at that. The room was long and narrow, approximately 14 feet long by 10 feet wide. The brown speckled industrial tile found in the halls gave way to a yellowish-cream colored industrial tile in the courtroom. The walls were painted a nondescript color (if one could even classify it as "color"). A cracked black leather loveseat lined the wall to the left of the entrance toward the front of the room. (Later, I had the opportunity to sit in that loveseat and observe the "proceedings." When I sat, I sank and was almost swallowed by the cushions.) I noticed as I entered that there were two judges assigned to this space. One of the judges sat toward the middle of the room on the right-hand side. Our

judge's desk was further back along the left wall, situated just past the loveseat. The two desks faced toward each other. Both were cement-colored metal desks. In front of each desk sat bright blue plastic chairs of the type that were popular in government offices and schools in the U.S. throughout the 1970s. On each desk sat a computer (*circa* late-1990s) and a telephone dating to about the same time period. The "courtroom" also housed two two-drawer metal file cabinets (one for each judge), a Formica cabinet that likely held the judges' personal items, and a bookcase embellished with a plastic top. The room was decorated with two smallish (16" x 20" at best) dark oil paintings (one on the left wall and one on the right) that cast a certain heaviness to the décor -- the attempt to "decorate" the room only made it worse, somehow bleaker.

After a short while, our judge called for quiet and eventually, we were ordered back into the hall while the judge heard the first case on her docket. Before we left the office, F grabbed a file off the judge's desk. I asked him what it was and he told me it was the court's case file. F told me that, as far as this case was concerned, it was the only file in existence: there were no copies and nothing was stored electronically. Handwritten notes made up the bulk of what was contained in the file. I wondered what would happen if there was a fire or if the file met with water. The entire file was vulnerable. I also wondered about fading ink and poor handwriting: it was well within the realm of possibility that someone in the future may not be able to decipher what had previously transpired in the case. The record, or at least that part of it, would be lost. It also seemed odd to me that the attorneys could take the file from the judge's desk and walk with it out of her office. There was no system for "checking out" the file and it seemed to me that the file could easily be altered by an unscrupulous attorney.

This was very different from my experience as a practicing attorney in the United States where, in addition to the court, the parties' representatives maintain files. The court also

maintains a log of what is in the file, and these days many of the documents are preserved in electronic form. When I left the U.S. Attorney's Office in 2005, the court where I worked was in the process of switching to an electronic filing system, which meant that all pleadings would be filed electronically instead of in hard copy as had been the previous practice. Pleadings and court orders were, with rare exception, typed using a computer-based word processing program (and usually had to conform to certain rules regarding format). At a given time, there were usually multiple copies of a document in existence. Further, the court clerk would affix a stamp on the document to record the time and date of filing. Record-keeping is a critical part of legal practice in the United States.

F, A2, and I found a tall table in the middle of the hall and gathered around it with the case file. Like the courtroom, the hall was filled with lawyers, witnesses, and parties to the various cases that were being heard that day. Many were standing at tables similar to the one we had located. F and A2 began discussing the case and F began to write in the case file. I asked what he was writing and he told me it was a record of what they were talking about. After F and A2 finished their discussion of the case, the three of us chatted a bit and then walked back toward the courtroom, where we hovered outside awaiting our turn before the judge.

The hearing had been set for 10:00 am but it was close to 1:00 pm before we were summoned back into the judge's room. While we were waiting, I asked F why the judge did not schedule the four hearings each for a specific time. I mentioned that this would go a long way toward easing the crowding in the court house, something that surely added to everyone's stress level. F stated wryly that would be "too easy," that it made too much sense, and that Italians are "too intelligent" to find the easy solution. After all, he said, they (Italians) have been doing this for 1,000 years. F then theorized that part of it had to do power issues and that making people

wait made the judges feel powerful. According to F, the judges have no respect for the attorneys' time and never think twice about making everyone wait around for them. While F was telling me this, A2 was nodding in agreement. While F's assessment may or may not be completely accurate, like T's comments, it evidenced an underlying cynicism and lack of faith in the judicial system.

After waiting for what seemed like another hour, we were invited into the judge's office. F, A2, and I entered, along with two additional people I had not met. I learned from F that these were the witnesses who were going to give their testimony at today's trial. They had been waiting outside the entire time but I had not observed either F or A2 speak with them. After a brief consultation with the judge, one of the witnesses was banished from the courtroom and asked to wait until called to offer testimony. The remaining witness was asked to sit in one of bright blue chairs facing the judge's desk. F then introduced me to the judge, explaining to her that I was an anthropologist and an attorney from the United States doing research on the Italian legal system. F had been concerned that the judge might be uptight about my presence, but she simply nodded in my direction and invited me to sit on the loveseat with the hungry cushions.

A2 asked the judge for permission to ask questions of the first witness, which she granted. He then proceeded to ask a series of questions. Because there was no secretary, court transcriber, courtroom clerk, or recording equipment, F was tasked with making a written record (by writing longhand in the case file) of everything that was being said. I observed that the witness was not placed under oath prior to giving testimony, nor was he reminded of having previously been placed under oath. This was an interesting deviation from the way that testimony is secured in U.S. courts and made me pause to think about the role of the oath in court. While A2 questioned the witness, the judge absently leafed through her agenda. Every

now and then, F would ask for clarification of something that was said. F noted aloud that he was running out of paper but there was no response from the judge or anyone else in the room. I wondered what would happen if he did run out of paper: the judges' courtroom did not appear to be equipped with additional office supplies. A2 finished asking questions. F shared what he had written and A2 agreed that it accurately reflected what had just transpired and signed the record. The second witness was then called in and the first witness removed from the courtroom. The same procedure was repeated. The entire process took about 45 minutes.

I noticed that the judge did not ask questions of either witness, nor was there any cross-examination of the witnesses by F. Later I asked F about this. I wanted to know how the court was able to determine the credibility of a witness if there is no cross-examination. He explained that the judge can tell by the person's demeanor, what the witness says, what other witnesses say, and what the physical evidence shows. The judge in this case, however, had appeared to be giving the case half her attention at best. Throughout both examinations, she sat at her desk looking through her agenda and rarely, if ever, glancing at the attorneys or witnesses. It was not clear that she heard anything the witnesses said, much less that she was able to judge their demeanor. All of this was both foreign and fascinating to me, coming from the U.S. system where witnesses are prepped to withstand vigorous cross-examination and lawyers frequently strategize how to present a witness in his or her best light to appear credible to the fact-finder.

Hungry and worn out, F and I walked across the street to a small *trattoria* for lunch. Outside it was still blustery and, as we crossed through traffic, F noted that I should be wearing something warmer. Fortunately, the restaurant was as warm and cozy as the courthouse was sterile and dingy. The walls were lined from floor to ceiling with bottles of wine and, after my experience at the courthouse, all I could think about was the pleasure of sipping a glass of wine

from one of those bottles. I expressed this to F who agreed and then proceeded to tell me that eating is a “serious business.” I must have smiled at his comment because he looked at me again (quite earnestly) and repeated, “I am serious: eating is a serious business.” We enjoyed a leisurely lunch and then parted ways after making arrangements for me to accompany F and another attorney to court the following week. As it turned out, my first experience with the Italian judicial system was fairly typical of the experiences to follow.

After spending time in civil courts, I decided it would be worth the time to visit the criminal court for purposes of comparison. D, who as mentioned is a criminal defense attorney, agreed to take me to court in Rome with her. The criminal court was more similar in appearance to what I was used to in the United States. The judges hearing the case sat at the head of the courtroom on an elevated platform, facing the entrance. Slightly in front of and to the left of the judges sat the witness, also facing the entrance to the room. Directly in front of the panel of judges and to the left of the middle of the room was the plaintiff/government attorney’s table, which faced the judges, and to the right of the middle of the room was the defendant’s table, which also faced the judges. The jury box was located on the right wall and faced the plaintiff/government’s and defendant’s tables. There were a few rows of seats in the back of the courtroom, immediately to the left and right of the entrance that faced the judges. The actual courtroom area was demarcated by a low wall that resembled the back of a church pew. The back of the courtroom (behind the pew-like wall) was crowded with attorneys. A member of the court staff was going around, trying to figure out who was who and inform them about the order of the proceedings. It was chaotic. Those involved with the pending court matter in the front of the courtroom paid no attention to what was happening in the back.

A few things worth noting, however, were quite different from the courtrooms I am used to. For starters, a large crucifix hung conspicuously on the wall. Behind the judges hung a plaque that stated “*La legge è uguale per tutti*” (translated: “The law is equal for all”). D pointed this out to me and sniggered, stating, “Of course, this is not really true.” There were no computers in the courtroom and, as with civil court, there was no recording equipment. I noticed, however, that a person was sitting directly to the right of the judges and in front of the jury box. This person was busy writing and I asked D about her. D told me that this was the court reporter, the person tasked with making a record of what transpired in the courtroom. D and I sat and watched the proceedings, which were a bit difficult to follow because of the volume of chatter in the back of the courtroom.

Through my direct experience with the Italian courts I learned that much of the criticism of the Italian judicial system is justified. I could not understand why anyone would deliberately choose to pursue something as important as the recognition of rights through the Italian courts. To this end, the *Affermazione Civile* campaign baffled me. Record-keeping processes are abysmal and, for the most part, the Italian courts do not enjoy conveniences such as updated computers, data storage systems, and courtroom technology that their counterparts in the U.S. take for granted. It takes a long time for cases to move through the courts, and a judicial decision is often (as in my friend T’s case, where he ultimately won his case but then had to try to recover the money from the defendant) only the beginning of the remedy. The Italian judicial system has a reputation for being painfully slow and unreliable. In 2009, after U.S. financier Bernie Madoff was sentenced to 150 years in prison for turning his wealth management business into a huge Ponzi scheme and defrauding thousands of investors of billions of dollars, Italy’s *Corriere della Sera* (one of the leading national newspapers) ran a front-page cartoon mocking

Italy's justice system. One side depicted a U.S. courtroom with a judge issuing a 150-year sentence after a six-month trial. The other side showed an Italian courtroom with a judge handing down a six-month sentence after a 150-year trial.

Italy is a place where it can take years (if ever) to finalize a divorce or obtain reparation from a fraudulent business deal. A recent *Reuters* analysis of the Italian judicial system presents an even more dire picture. At the present time, there is a backlog of around nine million cases, of which 5.5 million are civil and 3.4 million criminal. In 2011, the state paid € 84 million in compensation for miscarriages of justice and legal delays. Between 2003 and 2011, the number of such claims rose from 3,500, to 50,000. Another € 46 million was paid out to people who had been unjustly imprisoned (Khazan 2013). On average, civil cases take more than seven years to resolve and criminal cases take five years to work their way through the system (Moody 2013). Italians are angered by the compromised court system. A 2009 poll taken by Euromedia research group revealed that Italian public trust in the Italian justice system had fallen to an all-time low of 16 percent (Momigliano 2009).

Given the realities of the Italian judicial system, it is no wonder that Italians are frequently characterized as cynical toward the judicial system and as lacking faith in the rule of law (Sciolla 1997: 48, 62-64). The fact that groups like *Certi Diritti* and *Rete Lenford* are now using the Italian courts in an attempt to achieve their goals is striking. It is even more striking when one considers the structure of the Italian judicial system. Unlike the situation in the U.S., until recently, litigation has rarely been undertaken in Italy as a means for advancing a political movement or cause. This has to do with the structure and history of the Italian judicial system. In the following section, I provide a description of the structure of the Italian judiciary to better explain why, in the past, activists in general and LGBTI activists in particular have not looked to

the courts to advance the recognition of their rights. Much of this has to do with the relationship between the ordinary courts (especially Italy's Court of Cassation) and the Italian Constitutional Court, which is a relatively recent (post World War II) creation.

The Structure of the Italian Judicial System

The structure of the Italian judicial system differs from that of the U.S. system, partly in terms of organization but also in terms of the role(s) played by “judges.” Unlike the United States, Italy has a unified national court system (meaning that there are no regional, provincial or municipal courts), with different categories of jurisdiction: the constitutional court, “ordinary” courts, and courts of special jurisdiction.¹¹⁶ The ordinary courts are overseen by judges who are competent for general civil and criminal matters, with the exception of those matters reserved for the jurisdiction of special judges. The basic structure of the ordinary courts is split into three levels or tiers: inferior courts of original and general jurisdiction (“Courts of First Instance”); intermediate appellate courts (“Courts of Second Instance”), which hear cases on appeal from

¹¹⁶ The “Special Courts” include:

1. Courts of Administrative jurisdiction, exercised by the *Tribunali Amministrativi Regionali* – TAR (Regional Administrative Courts). These courts are really part of the executive department rather than the judiciary. Decisions rendered by TAR may be appealed before the *Consiglio di Stato* (Council of State).
2. Courts of Auditing jurisdiction, exercised by the *Corte dei Conti* (State Auditors' Department) for matters concerning public accounts.
3. Courts of Military jurisdiction, exercised by the *Tribunali Militari* (Military Courts), the *Corti Militari di Appello* (Military Appeal Courts), and the *Tribunali Militari di Sorveglianza* (Military Surveillance Courts), for military offences committed by members of the Armed Forces.
4. Courts of Fiscal jurisdiction, exercised by the *Commissioni Tributarie Provinciali* (Provincial Fiscal Commissions) and the *Commissioni Tributarie Distrettuali* (District Fiscal Commissions), for matters concerning taxes.
5. *Tribunale Regionale delle Acque Pubbliche* (Regional Court of Waters) and the *Tribunale Superiore delle Acque Pubbliche* (High Court of Waters), competent for controversies on waters which are property of the State.

inferior courts; and “Courts of Last Resort,” which hear appeals from the intermediate appellate courts on the interpretation of law. Courts of First Instance include:

1. *Tribunali* (“Tribunals” or “Courts”): default courts of general jurisdiction for all civil and criminal disputes, as well as disputes that do not have a determinable value.

Generally, only one judge will preside over a case, but for matters of particular importance, a panel of three judges may hear the case. *Tribunali* may also act as appellate courts for decisions made by the *Giudici di Pace*.

2. *Giudici di Pace* (“Justices of the Peace”): honorary judges with jurisdiction over less significant matters including minor civil claims, motor vehicle accidents, real estate boundaries, minor rental and co-habitation disputes, and minor criminal matters.

Decisions of the *Giudici di Pace* may be appealed before the *Tribunali*.

3. *Tribunali per i minorenni* (Juvenile courts): courts with civil and criminal jurisdiction over all disputes and proceedings concerning minors (defined as under the age of 18), such as adoptions and emancipations.

4. *Giudici del Lavoro* (Labor Tribunals): courts that preside over cases that involve disputes between employers and employees and that do not fall within the jurisdiction of administrative courts.

5. *Sezione specializzata agraria* (Land Estate Court): a specialized section of the judiciary that hears all agrarian disputes.

6. *Corti d’Assise* (Courts of Assizes): courts with jurisdiction over felony offenses.

Corti d’Assise are composed of 2 professional judges and 6 lay judges. Decisions of *Corti d’Assise* can be appealed to the *Corte d’Assise d’Appello* (Appeals Court of Assize) (see below).

The Courts of Second Instance include:

1. *Tribunali*, when acting as an appeals court for decisions of the *Giudici di Pace*.
2. *Corti di appello* (Courts of Appeal): courts with jurisdiction over appeals from the Courts of First Instance, as well as jurisdiction over enforcement proceedings of decisions rendered by foreign courts and arbitrators and jurisdiction over proceedings for nullity or damages in competition matters. It is divided into criminal, civil and labor divisions.
3. *Corte d'assise d'appello*, for appeals against decisions of the *Corte d'assise*. This court is composed of 2 professional judges and 6 lay judges.

The *Corte di Cassazione* (Court of Cassation) is the highest court in Italy with competence over appeals on issues of law arising from second-instance court judgments and challenges raised regarding the jurisdiction of the Italian judges. The Court of Cassation is the only court that functions at the nation-state level and is the court of last resort for civil and criminal cases. Its job is to ensure the correct application of law in the lower and appellate courts through its review of decisions taken by the lower courts to determine whether points of law have been correctly decided by them. It is the Court of Cassation that is responsible for consistent interpretation and application of law throughout Italy. Located in Rome, it is housed in the *Palazzo de Giustizia* (Palace of Justice), which is often referred to as the “*Palazzaccio*,” or “Ugly Palace,” by Romans. The Court of Cassation is divided between civil and penal sections. Judges usually sit in panels of five; however, a special panel of nine judges, known as the *Sezioni Unite*, decides matters concerning issues of jurisdiction, conflicting cases arising from the ordinary chambers, and cases of special importance. At the present moment, the Court of

Cassation is comprised of approximately 400 professional judges who are neither elected nor chosen but rather appointed based on rank.

As a matter of constitutional principle, all judgments issued by Italian courts must include an opinion setting forth the reasons justifying the decision. Consequently, decisions rendered by the Court of Cassation contain a section devoted to developing the arguments that support the final judgment. After a decision has been reached by the panel of judges presiding over a case, a member of the court is charged with writing the opinion of the court. The assigned judge will then write the opinion stating the arguments that he or she believes demonstrate that the judgment is based upon good and lawful reasons. After the judgment is signed by its author and the chairman of the chamber or of the panel, it becomes the opinion *of the court*. Dissenting opinions are not allowed.

The Italian Constitutional Court is a separate court created by the Italian Constitution of 1948, and was in part a response to the high priority placed on protecting human rights in the wake of the post-World War II Fascist era.¹¹⁷ The constituent assembly that approved the Constitution rejected the U.S. system under which an ordinary court can refuse to apply a law that it considers to be unconstitutional. In Italy, *stare decisis* is not a recognized principle.¹¹⁸ Consequently, the Court of Cassation might strike a law as unconstitutional only to have the lower courts (or itself in a subsequent case) refuse to follow the decision. In addition, the

¹¹⁷ Because Italy formally switched sides in 1943, it was not a conquered nation at the end of the war. Consequently, Italy was not required to dismantle its old law. By writing a new constitution that provided for judicial review, Italy was able to avoid the task of completely replacing its existing (Fascist) statutory law all at once. Instead, the Constitutional court was able to *deal* with these laws on a case-by-case basis over time.

¹¹⁸ *Stare decisis* (a Latin phrase meaning “to stand by things decided”) is a legal principle by which judges are obligated to respect the precedent established by prior decisions. This is understood to mean that courts should generally abide by precedent and not disturb that which is settled.

framers were concerned to maintain separation of powers. For these reasons, the constituent assembly thought it necessary to concentrate constitutional matters in one court and to create a separate body with authority to nullify a law *erga omnes*.¹¹⁹ The framers also considered that the ordinary judiciary in Italy lacked the prestige and importance of its U.S. counterpart, and that many of the incumbent Italian judges had been designated, trained, and promoted under the Fascist regime and were unlikely to interpret the new Constitution in a progressive fashion (Cappelletti 1967). Mainly due to the difficulty of selecting judges during an unsettled political period, the Constitutional Court was not realized until 1956.

According to Article 134 of the Italian Constitution, the Constitutional Court has jurisdiction over:

1. Controversies on the constitutionality of laws and acts having the force of laws issued by the State and Regions – when the court declares a law unconstitutional, the law is void and ceases to have effect the day after the publication of the Court’s ruling;
2. Conflicts between the various divisions of the central government, between the State and Regions, and between the Regions; and
3. Charges brought against the President of the Republic.

The Constitutional Court is made up of 15 justices who are appointed for a nonrenewable term of nine years.¹²⁰ Unlike the selection of ordinary court judges, which is based on competitive examination, election procedures in the selection of Constitutional Court justices ensure a close relationship with the political arena: five of the justices are appointed by the President of the

¹¹⁹ *Erga omnes* is a Latin legal term meaning “in relation to all.” It refers to rights and responsibilities that can be enforced against anyone, rather than against a specific person or party.

¹²⁰ Originally the tenure was twelve years but it was shortened to nine years in 1967.

Republic, five are elected by the Italian Parliament according to special voting procedures that require an enhanced 3/5 majority (and thereby ensure a degree of pluralism), and five are elected by the ordinary magistracy. The limited tenure and special election procedures are designed to “democratize” the Court. Although the nonrenewable limited tenure should ensure a measure of independence, the fact is that the justices’ aspirations for post-Court careers may influence decision-making processes. The Constitutional Court always sits as one court and never in panels. Decisions are made based on majority vote; however, the vote is always in secret. The judgment is, therefore, deemed to be the judgment of the *court as a whole* and it is impossible to know if the decision was unanimous or by a majority. Any differences among members of the court in the decision-making process are never made public. After a decision is made, one of the justices is charged with preparing a draft of the opinion, which is then examined and discussed by the other justices. When agreement of the whole court is reached, the draft becomes the opinion of the court. Dissenting or concurring opinions are never allowed. Compared to their counterparts in Anglo-Saxon systems, Italian Constitutional Court decisions are very short.

The Constitutional Court initially met with resistance from the executive branch, which repeatedly failed to enforce its decisions, as well as from the ordinary courts, which rebuffed its authority. Cooperation on the part of the ordinary courts is essential to the Court’s proper functioning because cases involving questions of constitutionality can only reach the Court through indirect access, by referral from an ordinary or administrative court. The ordinary courts thereby serve as a filter through which cases flow to the Constitutional Court. By 1975, suspicion and resentment on the part of the ordinary courts had subsided and the flow of cases through indirect access increased.

As it has turned out, and despite the fact that its principal function is the abrogation of unconstitutional laws, when compared with the Parliament and Council of Ministers, the Constitutional Court appears to be the entity that has done the most to render the Constitution of 1948 a living document. This is in part because the Court determined that it had the power to strike down laws enacted prior to the 1948 Constitution. Political inertia prevented the Parliament from repealing and replacing much of the Fascist era legislation and the Court stepped in to declare many of these laws unconstitutional. As a result, the Constitutional Court has been critically dubbed as the “third Chamber [of the Parliament]” or the “omnipotent legislature” (Laurenzano 1983:5, 39).

That said, scholars have argued that the contemporary role of the Italian Constitutional Court is limited (see e.g., Mandel 1995). According to Michael Mandel, this is because Constitutional litigation in Italy has a low political profile (1995:267). The “test case” system, whereby a legal action whose outcome is likely to set a precedent or test the constitutionality of a statute is undertaken, does not exist. In addition, Constitutional litigation rarely becomes the symbol for a political movement or cause, as it does elsewhere.¹²¹ Finally, while the position of Constitutional Court judge is prestigious, it is a relatively low profile position compared to its counterpart in the United States, and is effectively a part-time job that one holds as a stop in the course of a longer career in public service. And, as noted above, the fact that the position is a one-time, nine-year assignment means that post-Court aspirations potentially influence a

¹²¹ A good example of this is the relationship between the movement for marriage equality in the United States and the recent Supreme Court decision, which found that the Defense of Marriage Act (DOMA) was unconstitutional. Over a relatively short period of time public opinion on same-sex marriage rights has changed dramatically in the United States, with a majority now stating that they favor legal recognition of marriage rights for same-sex couples. This relatively sudden shift in opinion is no doubt tied in part to the publicity surrounding the recent case.

justice's decision-making. This can be contrasted to the U.S. case where the position of Supreme Court Justice is held at the pinnacle of a distinguished legal career, and justices are granted life tenure, absent resignation, retirement, or impeachment.

LGBTI activist groups in Italy are well-aware that, in other places, the courts have been successfully used to advance the rights of a minority population or disenfranchised group. As I explained in Chapter 2, LGBTI activist groups in Italy function within a larger network of LGBTI activism in Europe and the world. *Certi Diritti*, in particular, is associated with the *Radicali Italiani*, a party that is generally pro-American and pro-European. In addition, *Certi Diritti* is a constituent member of the PRNTT, an organization that embraces the rule of law and strives to promote “real democracy” in state institutions. The *idea* of using the courts to advance the recognition of rights is, therefore, nothing new.

Of course, LGBTI activist groups in Italy such as *Certi Diritti* would likely abandon this strategy absent encouragement from the courts. In fact, although *Certi Diritti* activists were confident of the legal positions put forth in the *Affermazione Civile* cases (thanks in large part to the legal expertise of the attorneys from *Rete Lenford*), they fully anticipated having to push their way through the Italian judicial system into the European courts to obtain satisfaction. However, despite the history and structural features of the Italian judicial system that discourage the use of the courts to advance political causes, and despite problems with respect to how the system functions in contemporary Italian society, the *Affermazione Civile* cases have been moving through the judicial system to resolution. Not only are the cases being resolved in the Italian courts, they are also having a visible effect on public policy regarding the treatment of same-sex couples in Italy. Further, whereas on average civil cases in Italy take seven years to resolve (see

above), the *Affermazione Civile* cases seem to be moving through the system at a reasonable pace of 2-3 years between initiation of the case and resolution.

This begs the question: “What is going on with the Italian judicial system?” In Italy, lawyers and judges are trained to be “legal scientists,” and judges are expected to *interpret* and *apply*, rather than *make*, law. Yet, as seen in the context of the *Affermazione Civile* cases, Italian judges are doing more than merely interpreting and applying the law. Something has happened to enable a shift in Italian judges’ perceptions of their role in society. As I will show in the following sections, the particular set-up that leads to this shift in perception and makes for an active judiciary in Italy cannot be explained by the way that judges are educated, trained, and selected in Italy. However, these factors contribute to the creation of a judicial structure in Italy that enjoys substantial independence from the other branches of government, and the independence of the judiciary *does* partially explain the shift in perception regarding the role of judges in Italy. For this reason, I devote the following sections to a discussion of these subjects.

Educating “Legal Scientists”

Law is seen as a science with its own methodology in Italy. Law school is not viewed as a professional training program but is instead understood as a “cultural institution where law is taught as a science” (Cappelletti 1965:89). This perspective of law as science is systematically indoctrinated in every student of the law, whether he or she goes on to become an academic, a judge, or to practice law. “Legal science” is pursued by legal scholars, not judges. The scholar is responsible for elaborating the systematic, scientific legal structure and it is the scholar who is creative and held in high esteem.

In Italy, as in other civil law countries, the professional divide is largely between practicing lawyers (i.e., those who choose to practice law by advising clients and representing

them in court if needed) and magistrates (i.e., judges).¹²² Those who opt to practice law, unlike their counterparts in common law countries, eschew the possibility of ever becoming a judge. In Italy, the magistracy form a distinct professional class of (essentially) civil servants that includes those who occupy the familiar role of judge (and preside over cases in court) as well as those who work in the *pubblico ministero* (public prosecutor), the investigating magistrates who look into crimes and initiate and prosecute criminal matters. (There are further divisions within the practicing profession not relevant here.)¹²³

The view of "law as science" continues after law school when one becomes a judge. Like other judges in European continental civil law systems, the role of Italian judges is theoretically limited to interpreting laws enacted by the parliament.¹²⁴ Italian judges, like practicing lawyers, are expected to accept and apply the interpretations articulated by legal scholars. Judges thereby serve as the "mouth of the law," faithfully consulting the codes and writings of the legal scholars to find the correct answer in a given case.¹²⁵ In this vein, judges are technicians whose aim is to

¹²² Academics form yet another class; however, many academics in Italy also work as practicing attorneys.

¹²³ Practicing lawyers may be procurators (who represent clients in the development of proceedings and performs functions of a procedural, non-discretionary nature) or advocates (who actually defend clients by making oral or written arguments and thereby perform functions that require the exercise of expert discretion), or both. To become a procurator, the law graduate must join the law office of a qualified procurator, where he or she will remain for at least two years and possibly longer until ready to take the law examination required for admission to the profession of *procuratore*. Upon successful completion of the examination, the procurator must either spend six years in practice as a procurator or, after two years of practice, successfully complete additional examinations in civil, criminal, and administrative procedure, in order -to become an advocate, or *avvocato*. In practice, the position of procurator is a stepping stone to becoming an advocate and it follows that most advocates are also registered as procurators and perform a dual function in handling cases. A third category of practicing legal professional that should be mentioned is the notary. Notaries are primarily responsible for conferring legal certainty (in the form of certification) upon legal facts and, in a sense, upon legal transactions, as well as pre-constituting the means of their legal proof (documentation).

¹²⁴ "The role of the judge is to apply the law to resolve conflicts" (Alpa and Zeno-Zencovich 2007:10).

¹²⁵ As observed by Cappelletti:

This attitude, fundamental to the folklore of interpretation, has some interesting by-products. The literature of interpretation, produced out of the abstractness, conceptualism, and cultural agnosticism that

perfect knowledge. They have little discretion to resolve everyday disputes and are not supposed to make policy or law. As I will show in the last section of this chapter where I discuss the *Affermazione Civile* cases in more detail, this is not what happens in actuality.

Although divided along autonomous career paths, practicing lawyers and magistrates share a number of common qualifications for entry into the legal profession, and all must have earned a law degree from a recognized Italian university. To obtain a *laurea in giurisprudenza* (an Italian law degree), a student must spend four years in study at the law faculty of an Italian university. Teaching occurs in large lecture classes, and students are not required to attend lectures. The lecturer usually gives three one-hour lectures in a week and, while he or she may be available immediately prior to and after class to assist students with problems, the lecturer is usually not available to see students at other times. Indeed, because many are also leading practitioners of law (university teaching does not prohibit the practice of law), the lecturer is unlikely to be at the university other than when giving a lecture. In Italy, the student studies a total of twenty-seven subjects, the last of which is a thesis on a legal topic. After studying each subject the student must pass an oral exam, conducted by two to three examiners wherein the student is questioned on the subject for ten to fifteen minutes. The examination, which is based on assigned textbooks, is focused primarily on the explanation and organization of definitions and concepts. Italian legal education is not concerned with teaching students critical thinking or the techniques for problem-solving; rather, it is about the indoctrination of fundamental concepts and principles.

characterize Italian legal science, is rendered even more unreal by the fact that it is produced by persons who have no experience in the business of deciding cases. The scholars having, so to speak, occupied the field, the judge, who might be able to supply useful insights into the judicial process, abandons it to them on the theory that they are better qualified than he (1967:245).

X, a lawyer/professor acquaintance of mine, had recently shared his views over lunch at a mutual friend's home on what he perceived to be the fundamental difference between the training of lawyers in Italy and the United States. According to X, the university system in the United States is all about the student. The student is seen as a paying client the university strives to keep satisfied. By contrast, in Italy, the system centers on the professor. The students come to the professor to learn and, for the most part, occupy a passive role as receptors of knowledge. While I was aware of the formal differences in the teaching and training of legal professionals in Italy and the United States, the anthropologist in me was interested in experiencing law school in Italy.

My attorney consultant D's father happened to be a well-known professor at *La Sapienza*. One night while having dinner with D's parents at their home, D's father asked me about my research project. He offered to arrange a meeting with Professor B from the law school with whom I might be able to connect and whose classes I might be able to observe. Thereafter, I made contact with Professor B and arranged to meet him before his class on Wednesday afternoon. I had a difficult time finding the building. It was far from the *Città Universitaria* main campus and located in a part of Rome I had never been before. The building itself turned out to be a huge industrial building with high sets of windows that clearly were designed to let light in but were far too high to be useful for looking in or viewing the outside world from inside. I had to search for the entrance and after I found it, was still uncertain because it resembled the entrance to a factory. I walked through a garage where I encountered a security guard who walked past me without seeming to notice and down a ramp to what appeared to be an entrance booth. I asked the man on duty how to get inside and he told me to continue through the garage and I would find the entrance on the right.

Inside, the classroom was an immense warehouse-like area with lofty ceilings that rendered the room even more cavernous, and a rubber floor of the type usually found in garages where cars are repaired. I counted five sets of chair groupings, each 10 chairs deep with 10 chairs in a row, set in parallel lines. The chairs were plastic, maroon and white in color, with metal legs. Each had its own “writing” tray, which could be folded neatly away to the side of the chair when not needed. The front, back, and right side walls were painted white and the wall to the left of the room was painted maroon, as if there had been an attempt to decorate the room through the introduction of an “accent” wall and coordinated seating. Three massive screens hung on the wall facing the seating area. In front of the screens (also facing the seating area) sat a long desk, raised on a platform approximately eight inches above the floor. Behind the desk were two office-type chairs. A big backboard on a pedestal, longer than the long desk, was situated under the middle screen.

I waited for Professor B to arrive. The class was scheduled to begin at 4:00 pm. Professor B arrived just after 4:10 pm. I observed that he was likely in his mid-sixties, bald with tufts of grayish-white hair on each side above his ears. He wore a navy suit with a light blue shirt and a navy tie. He walked up to the front of the room and was approached by a couple of students who had been lingering near the front of the room, apparently awaiting his arrival. Professor B talked with a female student for approximately five minutes and then to a male student for another five minutes. Then, without fanfare, he stepped onto the platform, took a seat in one of the office-type chairs behind the long desk, pulled up the microphone and began to speak, launching into his prepared lecture. The lecture was on bioethics and living wills.

I looked around the room and observed that students were scattered throughout the seating area, many apparently preferring to sit in the outer reaches of the seating area. I counted

approximately 30 students, of whom 9 were male and the rest female, ranging in age from 20-something to possibly 40 years old. I noticed that, for the most part, the students were sitting and listening to the lecture, but not taking a lot of notes. No one was using a laptop, and the man sitting directly behind me was reading what appeared to be a newspaper. Throughout the lecture, students entered and exited the classroom. Professor B did not seem to notice. At one point there were 60-70 students in the room, some standing in a group at the back, chatting among themselves. At approximately 4:52, a huge pack of students entered the classroom and waited at the back. The lecture concluded a few minutes before 5:00, and the students who were seated packed up and exited while the students lingering in the back assumed the vacated seats. There were now approximately 150 students in attendance.

During the transition, I walked up and introduced myself to Professor B. We chatted for a bit about my project. He seemed to find it interesting that my project involved law and anthropology and explained that, while there are a number of sociologists of law, there are not many anthropologists who do legal anthropology in Italy. He went on to explain that, in his view, a lot of law professors in Italy are very narrow-minded in their approach to law, especially in the area of family law. He suggested a couple of scholars in Italy with whom I might want to speak about my project, and we discussed meeting up again in the near future for further discussion. I noticed that there were several students lined up behind me waiting to speak with Professor B so I thanked him and returned to my seat.

After speaking with the waiting students, Professor B launched into his second lecture, again without fanfare. He continued to lecture for the next hour about the Italian Civil Code, specifically about the “rights of the person.” I noticed that the vast majority of students had brought books with them: the “*Codice Civile*” (“Civil Code”) and “*Manuale di Diritto Privato*”

(“Manual of Private Law”). Also, unlike the students attending the previous lecture, most of the students here were taking notes. At one point during the lecture, Professor B referenced a specific provision as the “grand invention in new rights” and the students scrambled to locate this provision in their books. Based on their ostensible eagerness, I assumed that these were first-year students. The lecture finished at 6:03 pm.

At no time during either lecture did Professor B refer to notes or make use of the blackboard and screens available in the classroom. There was no attempt on his part to “entertain” the students with a joke or visual aid. His demeanor was solemn. Even more striking was the fact that he neither directed questions to the students nor elicited questions from the students at any point during either lecture. In fact, the only interaction he had with the students was during the short time period before class and during the transition between lectures, when individual students approached to speak with him.

The inaccessibility of law school professors to their students in Italy seemed odd to me. For example, in Professor B’s classes, he neither arrived early nor stayed late to talk with students. The time he spent assisting students with questions or problems actually took time away from the lecture. While the lack of contact between professor and student outside the lecture hall was different from my experience in the U.S., the more striking dissimilarity was the “lecture” format used in Italian law school classes. Although law professors in the U.S. do lecture at times, most also employ some version of the so-called “Socratic method,” a dialectical method of teaching that (broadly conceived) involves the asking and answering of questions to stimulate critical thinking and bring ideas to light.¹²⁶ Of course, in a system where law is taught

¹²⁶ Perhaps because of its exaggerated portrayal in the 1973 movie *The Paper Chase*, the use of the Socratic Method in U.S. law schools is something that is frequently discussed and serves as a cause of anxiety for many first-year law students. In fact, the method has become so infamous that the University of Chicago School of Law felt compelled

as a “legal science” and is based on codes, there is no real need for the so-called Socratic method. One would not expect, for example, a physics class to be taught by Socratic method. The lecture method of instruction thus trains legal professionals to approach law as something to be mastered rather than as a tool for advocacy.

Due in large part to the lack of professor-student contact, the Italian system forces the student to be self-reliant (this is one of its advantages). In addition, oral exams require the student to acquire a level of verbal fluency in discussing complex concepts and principles (another advantage). One of the principal disadvantages of the Italian system, however, is the fact that the learning process is mainly passive, with an emphasis on memorization that leaves little space for individual thinking. Further, other than the thesis project, which is written under the supervision of a professor or professorial assistant, the student receives little training in the area of legal research.

to offer the following explanation/disclaimer of the Socratic Method on its website providing information for “Prospective Students”:

Socrates (470-399 BC) was a Greek philosopher who, despite being considered one of the greatest and most important philosophers who ever lived, left no writings at all. Much of what we know about his life and work comes from the writings of his disciples, Xenophon and Plato. ... Socrates engaged in questioning of his students in an unending search for truth. He sought to get to the foundations of his students' and colleagues' views by asking continual questions until a contradiction was exposed, thus proving the fallacy of the initial assumption. This became known as the Socratic Method, and may be Socrates' most enduring contribution to philosophy.

Perhaps because of its over-the-top portrayal in the 1973 movie *The Paper Chase*, the very mention of the Socratic Method strikes fear in the hearts of those considering attending law school. John Houseman may have won an Oscar for his impressive performance, but if anyone ever did teach a law school class like his Professor Kingsfield, no one at Chicago does today. Instead, our students discover quickly that the Socratic Method is a tool and a good one at that used to engage a large group of students in a discussion, while using probing questions to get at the heart of the subject matter. The Socratic Method is not used at Chicago to intimidate, nor to “break down” new law students, but instead for the very reason Socrates developed it: to develop critical thinking skills in students and enable them to approach the law as intellectuals.

See University of Chicago Law School Website, Prospective Students, Studying Law at Chicago, The Socratic Method, <http://www.law.uchicago.edu/prospectives/lifeofthemind/socraticmethod>, accessed July 1, 2013.

For all of the above reasons, legal education in Italy is not likely to produce judges who are activist in orientation. In other words, legal education does not explain the relatively recent emergence of judicial activism in Italy. In addition, recent activism such as that seen in the *Affermazione Civile* cases cannot be explained by judicial selection processes. The selection of judges in Italy is not by political process as it is in some parts of the world such as the U.S., where most judges are elected or selected by a form of political appointment (and are thus more likely to be beholden to political forces).

The Selection of Judges in Italy

Selection to the magistracy is based solely on a competitive public examination taken upon completion of the *laurea in giurisprudenza*.¹²⁷ To ensure that clientelism does not play a role in the selection of judges, Article 106 of the Constitution requires that “judges are appointed by means of competitive examinations,” and that all employment decisions, including assignments, promotions, and disciplinary actions, are the responsibility of the *Consiglio Superiore della Magistratura* (Superior Council of the Magistrature, or “CSM”).¹²⁸ The written part of the exam is marked anonymously. No consideration is given to recommendations, which

¹²⁷ A noteworthy factor in the selection process is who chooses to take the examination. Until 1963, women were prohibited from all public civil service positions but since then their participation in the magistracy has consistently increased. In 1987, more women than men sat for the examination and, since this time, about half of the new magistrates have been women. By 1999, approximately one-third of the magistracy consisted of women, and 85% of them were under the age of forty-five. In 1997, Massimo Morisi, a professor of Administrative Science in Italy, conducted a study of the magistracy to determine why people entered the Italian judiciary and how they viewed their positions. Morisi sent questionnaires to all of the (at that time) approximately 8,500 magistrates, and received responses from 893, or 10.5%. While self-selection arguably skewed the resulting sample, Morisi’s study portrayed a magistracy that is committed to its work and peopled by those who chose the career for altruistic reasons (i.e., “to serve the state” – 42.7% cited this as a major factor and another 41.8% cited it as a factor, and “to serve the collective” – 70.2% cited this as a major consideration for entering the magistracy and another 18.5% cited it as a consideration).

¹²⁸ The CSM was prescribed by the Italian Constitution of 1948 in order to ensure total independence of the Italian judiciary, and as a response to the abuses of power and derogation of citizen rights that occurred during the Fascist period.

in Italy are seen as politically motivated and all too frequently used for political patronage. These factors create a situation where the professional socialization of judges is left almost entirely to the law faculties:

Law students enter the university directly from the equivalent of an American high school, but study only within a single discipline. At the conclusion of approximately four years of study, a thesis is written and defended. Law faculty curricula are strictly juridical, focusing on law and legal theory without any significant presence of attendant disciplines, such as economics, political science, or sociology that might inform a judge's decision. There is, moreover, no attention to philosophy or ethics in Italian legal studies. Thus, a new judge or prosecutor would enter the magistrature around age twenty-three to twenty-five, with no practical experience or training, and receive his or her entire professional socialization from within the established ranks of the judiciary (Volcansek 2006:163).

Another interesting aspect to the selection of judges in Italy is the fact that, once admitted to the magistracy, promotion is *not* based on worthy performance. Instead, it is based primarily on seniority, defined as time in career and grade. A new magistrate beginning a career in his or her mid-twenties can therefore expect to steadily advance and eventually reach the highest level (at least in terms of remuneration) without ever being subjected to any form of positive selection, and a forty- to forty-five year career is practically guaranteed. By placing such substantial emphasis on seniority, the system discourages further professional development. After being selected to the magistracy, there is little incentive to distinguish oneself. In comparison to their common law system counterparts (who are recruited from the ranks of distinguished, experienced, and mature practicing lawyers and tend to begin the occupation of judging toward

the end of their careers), “Roman law magistrates tend to have the mentality of civil servants, rather than that of superintendent over government” (Holland 1991:8).

Arguably, given the de-politicization of the process, the way that judges are selected in Italy should further discourage judicial activism. However, the selection process has to be considered in conjunction with the extraordinary structural independence Italian judges enjoy. Judges in Italy are public officials, meaning that they exercise one of the sovereign powers of the state. The judiciary is given special constitutional protection from the other branches of government and, once appointed, judges serve for life. Article 101 of the Constitution states that “judges are subject only to the law” and in Article 104 the Constitution declares that “the judiciary is an order that is autonomous and independent of all other powers.” They can only be removed pursuant to special disciplinary proceedings conducted before the CSM. Because the CSM has total responsibility for the appointment, discipline, and administration of magistrates, the Italian judiciary is guaranteed independence from outside forces.

In the Italian political system there is no provision of institutional checks and balances between the judiciary and other branches of government. Because there is no formal mechanism for balancing the power of the judiciary, there is in theory no limitation set on a magistrate’s prerogatives by other governmental powers (Zannotti 1995:200; see also Guarnieri 1995:247). Italy’s judges thus enjoy both internal and external independence and are arguably the most independent of any liberal-democratic nation. The internal and external independence of judges in Italy creates a situation that encourages judicial activism:

[Italian judges] recruit themselves (through bureaucratic exams); they determine their [own] career pattern, through the Higher Council of the Judiciary and they are irremovable. The minister of justice has no chance of influencing their performance,

even in an indirect way. They have a monopoly of prosecution and through it they determine criminal policies, with no control exercised by the executive. The judges determine the inputs of the constitutional review of laws to the Constitutional Court. ... With these structural features, how is it possible to imagine self-restraint on the part of the Italian judiciary that places limitations on its creative activity as policy maker? (Zannotti 1995:201).

Despite the fact that the Italian judiciary is selected through apolitical process and enjoys a high degree of structural independence it still tends to act according to a logic that is heavily influenced by the political milieu. This is due in part to the fact that the bureaucratic mode of selection and lack of controls exercised by the judicial hierarchy do not foster the development of professional competence and values by Italian judges (Di Federico 1981). Instead, these factors encourage judges to affiliate with factionalized unions (within the organized magistrature) that reflect varying political and judicial ideologies. Divided along political lines and lacking a strong commitment to a professional culture, various interactions with politicians are tolerated and Italian judges are susceptible to influence from the value systems of outside groups (Della Porta 2001; *see also* Morisi 1999).

All of these factors lead to a situation that encourages judicial activism. Indeed, as seen in the context of the *Affermazione Civile* campaign, judicial activism is alive and well in Italy. In fact, the phenomenon is so prevalent that it is plausible to speak of the “judicialization” of Italian politics. Before I get to this, however, I need to explain what judicial activism is, and what I mean when I talk about politics becoming “judicialized.”

Judicial Activism and the Judicialization of Politics in General

Kenneth Holland, a U.S. political scientist whose research has focused on judicial process, notes that judicial activism occurs when judges go beyond the adjudication of legal conflicts in the case at hand and begin to make social policy, thereby affecting many more people and interests beyond the dispute being decided (1991). According to this view, “[t]he activism of a court ... can be measured by the degree of power that it exercises over citizens, the legislature, and the administration” (Holland 1991:1). While I like much about Holland’s definition of judicial activism, I would be remiss if I did not note that Holland’s definition is but one among several. “Judicial activism,” much like beauty, is somewhat “in the eye of the beholder” and has been defined in a number of dissimilar and even conflicting ways.¹²⁹ Nevertheless, I choose to adopt Holland’s definition because it is fairly straightforward and relatively easy to apply in the Italian and other civil law contexts. This is because it is a definition that focuses on judicial *outcomes*, something that is more easily discerned than judicial *motivations*. Judicial activism does not have to be inherently good or bad; it can be useful to describe a certain type of judicial activity and points to essential questions about the role of the judiciary in a democratic order, which is what I am exploring here.

¹²⁹ Instead of cataloging all of the possible definitions, I will (paraphrasing Yung 2011) list the essential elements that, according to the scholarship in this area, have been held to be indicative of judicial activism: striking down the actions of other federal branches or state governments, ignoring textual meaning, failing to follow tradition or history, issuing expansive (rather than tailored) holdings, using broad remedial powers, deciding cases based on partisan politics, failing to adopt an “originalist” view of the Constitution (the degree to which constitutional provisions are interpreted in ways that are clearly contrary to the language used or the intentions of their drafters), failing to follow precedent, exercising a power beyond the court’s competence, creating new rights or theories, altering established doctrines or interpretations, making substantive policy, failing to use accepted interpretive methodology; and the degree to which a judicial decision supersedes consideration of the same problems by other (usually duly elected) political actors (Yung 2011:10; *see also* Lindquist and Cross 2009; Cross and Lindquist 2007; Green 2009; Marshall 2002; Young 2002; Kmiec 2004; Cannon 1983).

By judicialization, I here mean that the courts are politically relevant or, in other words, that the courts are performing a political role or doing something that one might expect the legislature or executive to do. In general, “to judicialize” means “to convert or integrate into a judicial system; to bring under the remit of the law.”¹³⁰ To “judicialize” is thus “to treat judicially,” and “judicially” means “in the way of legal judgment, or in the office or capacity of judge; in, by, or in relation to, the administration of justice; by legal process; by sentence of a court or justice,” or in “the manner of a judge; with judicial knowledge and skill.”¹³¹ The judicialization of politics simply means that the domain of the judiciary has or is expanding at the expense of politicians, political appointees, and civil servants, and that there has been a transfer of decision-making power from the legislature, the cabinet, or the civil service to the judiciary (Vallinder 1995:13). It is “the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives” (Tate 1995:28).

Several conditions facilitate the expansion of judicial power, many of which appear to be present in Italy, including: the existence of democracy; a system that evokes the notion of separation of powers; the presence of a “politics of rights” (an acceptance of the principle that individuals or minorities have rights that can be enforced against the alleged majority); interest group use of the courts (this is something that seems to be just now occurring in Italy, in the context of the struggle over recognition of rights for same-sex couples and the *Affermazione*

¹³⁰ Wiktionary, “Judicialize,” <http://en.wiktionary.org/wiki/judicialize>, accessed February 28, 2014.

¹³¹ Oxford English Dictionary. 1989. 2nd ed. Prepared by J. A. Simpson and E. S. C. Weiner, Vol. 8, p. 297. Oxford: Clarendon Press.

Civile project); opposition use of the courts (as in use by the political opposition to obstruct the functioning of the government); ineffective majoritarian institutions (definitely present in Italy); perceptions of the policy-making institutions as self-serving, halted, ineffective, or corrupt (definitely present, especially in the context of the struggle over rights for same-sex couples); and willful delegation by majoritarian institutions (that is, the deliberate transfer of controversial policy decisions to the courts to avoid political fall-out) (Tate 1995:28-33). Of course, the presence of these conditions does not guarantee the judicialization of politics and judicialization is unlikely to occur absent the presence of judges with the suitable personal attitudes and policy preferences and values (Tate 1995). For the judicialization of politics to occur judges must decide that they *should* participate in making policy decisions that could be made by the legislature or executive and (at least on occasion) be willing to replace policy solutions rendered by the legislature or executive with their own. Thus, while certain structural features of the Italian system noted above make judicial activism possible, the structure itself does not explain why judges in Italy have suddenly decided to advance the recognition of rights for same-sex couples in Italy.

The concept of judicialization can be best explained by reference to two decision-making models, each of which exemplifies a different principle and corresponding role, and both of which are essential to the functioning of a democratic state (Vallinder 1995:14). The first model emphasizes the role of reason and of principle in decision-making processes and is typically associated with the courts. Following this model, it is up to the courts to *protect* the fundamental rights of citizens. By contrast, the model typically associated with the legislature or executive highlights the appraisal of conflicting values (Wechsler 1959-1960:16). In this vein, the legislature is responsible for taking care of the rights and duties of the majority. The

judicialization of politics signifies the prioritization of the first principle at the expense of the second.

In the past, Italy has subscribed to the second model and, for the most part, the political class continues to follow this model. This can be seen in political debates surrounding marriage and family where Catholic social values compete with secular notions of rights. In the interim, the EU has continued to develop as a protector of rights and this has direct bearing on the member states. In Italy, where the legislature and executive have failed to live up to EU standards, the courts have been encouraged to step in and fill the void. As I stated in the introduction to this chapter, judicial activism in Italy is largely a response to the failure of the legislative and executive to adapt to changing social conditions and is encouraged by the influence of the EU law on the national legal system.

Italian Judicial Activism

The term “*attivismo*” began appearing in relation to the Italian judiciary a little over 25 years ago. As is the case elsewhere, the term when used in reference to Italian courts lacks a coherent definition, although its connotation is usually pejorative in Italy.¹³² In general, judicial activism in Italy is tied to policy-making by the judiciary through processes of judicial review or interpretation (Volcansek 1991). As set forth above, the postwar constitution resulted in an independent self-governed judiciary, in part through the creation of the CSM, which oversees the

¹³² In these cases, however, the public expression of displeasure appears to be more about judicial abuses of power and more specifically, abuses of power on the part of *public prosecutors*, than a critique of judicial activism *per se*. Few, if any, scholarly studies have dealt with the subject of judicial activism in Italy outside the criminal justice system. The situation I describe here enables one to approach the subject of Italian judicial activism from outside the criminal justice system and from the broader perspective of the relationship between the EU and Italy, without sacrificing appreciation for the internal workings of the Italian political and legal systems.

recruitment, transfers, promotions, and discipline of Italian judges. The insularity and independence of the Italian judiciary has encouraged judges to render fresh interpretations of the laws in order to remedy perceived problems or to realize personal ideals of the proper political order (Volcansek 1991). The significance of this independence and insularity cannot be overemphasized.

Many Italian judges see themselves as part of a larger civic mission with a responsibility to the citizenry (as opposed to aligned with the State) (Della Porta 2001). To this end, judges more readily seek to assert the principle of “equity” and take account of their own moral convictions and collective consequences in decision-making.¹³³ This professional culture encourages “role substitution”: “Especially when the political class appears to have failed, many of the judges tend to perceive themselves as the last line of defence for the community ...” (Della Porta 2001:16).

In the *Affermazione Civile* cases discussed in Chapter 2, the Italian courts are using provisions of EU and European law as a starting point to advance the recognition of rights for same-sex couples in Italy. In the process of recognizing rights for same-sex couples, the Italian courts are creating new policy in an area of law where Italian politicians have deliberately failed to act. As observed by the ILGA-Europe:

Positive developments in Italy result mainly from court decisions rather than legislative initiatives, in large part because of unwillingness from the political class to respond to calls from the LGBTI community to open the discussion around marriage equality or other rights (ILGA-Europe Annual Review 2013 on Italy).

¹³³ "In its broadest and most general signification, this term denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men" Black's Law Dictionary Free Online Law Dictionary, 2nd ed., <http://thelawdictionary.org/equity/#ixzz2qE3EARrx>.

This occurs within a nation-state that continues to face a crisis of legitimation and where, as shown in Chapter 3, politicians on the right frequently invoke notions of the "traditional" family to bolster a sense of Italian national identity based on Catholic social values. By contrast, the Italian courts are looking to the EU, and in the process, increasing Italian support for a more integrated "Kantian" version of the EU through the delineation of an EU citizenship. In the struggle over recognition of rights for same-sex couples, the increased political significance of judicial activity in Italy must be understood in the context of profound transformations of the citizen-state relationship (Pederzoli and Guarnieri 1997a), which occur in the face of an emergent supranational entity that serves to disentangle this relationship and provides new opportunities for the assertion of rights.

Italy's status as a member of the EU renders the Italian judiciary disposed to extra-political influences beyond the nation-state. Due to its membership in the EU, Italian hierarchical legal sources have been modified, repositioning the Italian judiciary in a wider EU context that locates EU law at the national constitutional level. Marinella Marmo, a Lecturer at Flinders University School of Law, argues that, by granting EU law constitutional effect, the Italian legal system has created a situation whereby EU law is not subject to Italian legislation. The result is that in certain areas the sovereignty of the Italian nation-state is effectively subrogated to the EU. The implementation of EU provisions requires their harmonization with the Italian legal system, and the setting aside or elimination of conflicting provisions of domestic law is left to Italian judges who are duty bound to interpret Italian law in accordance with EU provisions. Marmo explains that the Italian judiciary plays an increasingly important role in politics due to its responsibilities for integrating new legislation at both the national and supranational (i.e., "EU") levels into a coherent whole. She states:

The consequence of such activism is that judges are no longer fulfilling a mere interpretative role within the law, but are examining a more dynamic system and are choosing and selecting sources and instruments with which to pilot the system in directions not necessarily in line with the national legislative intention. ... In pursuing different aims and in selecting means and sources, Italian senior judges are shaping internal policy and introducing relevant changes (2007:115).

As I will show in the last section of this chapter, the Italian courts have consistently used EU law when relevant to advance the recognition of rights for same-sex couples. Although not a foregone conclusion, this is not particularly surprising given the fact that the implementation of EU law requires a harmonization with the Italian legal system that in situations of conflict leads to the subrogation of Italian laws. What is unexpected is not only the general direction the courts seem to be taking in those cases where EU law does not specifically apply, but also the relative speed and force with which such decisions are being rendered by the Italian courts. In what follows, I will discuss the aspects of these cases that demonstrate judicial activism and explain how the *Affermazione Civile* cases, considered in aggregate, reveal the increasing judicialization of politics in Italy.

The *Affermazione Civile* Project and the Judicialization of Italian Politics

As discussed in Chapter 2, over the past few years, several domestic courts, including the Italian Constitutional Court (*Corte Costituzionale*) and Court of Cassation (*Corte di Cassazione*), have issued historic decisions recognizing limited but expanding rights on behalf of same-sex couples. In the first of the *Affermazione Civile* cases, Italy's Constitutional Court upheld the existing ban in the Italian Civil Code against same-sex marriages, finding that the constitutional definition of marriage neither imposes nor opposes the introduction of a law providing for same-

sex marriage.¹³⁴ Although the decision was controversial and confusing in parts, the Court made several important statements regarding the constitutional status of same-sex couples in Italy. For the first time, an Italian court recognized that same-sex relationships fall within the "social groups where humanity is expressed" mentioned in Article 2 of the Italian Constitution, thereby entitling such couples to some form of legal recognition.¹³⁵ The Court was not willing, however, to take the next step and judicially create a legal status. Instead, the Court indicated that it was up to the Parliament to enact legislation introducing some form of legal recognition for same-sex relationships, and that the Parliament should take action to guarantee same-sex couples the enjoyment of their constitutional rights.¹³⁶

It is important to note that the Italian Constitutional Court looked to European policy and jurisprudence in reaching its decision, most notably to the European Court of Human Rights (ECtHR). At the time of the Italian Constitutional Court's decision, *Mata Estevez v. Spain* (ECtHR No. 56501/00 May 2001), was the leading ECtHR case on the issue.¹³⁷ In *Mata Estevez*, a Spanish man whose same-sex partner of more than 10 years died in a road accident, was denied a surviving spouse pension and filed a case. The ECtHR declared the complainant's

¹³⁴ Decision No. 138/2010, decided April 15, 2010.

¹³⁵ Translated into English, Article 2 of the Italian Constitution provides: "The Republic recognizes and guarantees the inviolable rights of man, as an individual, *and in the social groups where he expresses his personality*, and demands the fulfilment of the intransgressible duties of political, economic, and social solidarity" (emphasis added).

¹³⁶ This type of decision constitutes a "*monito*," or warning, where the Constitutional Court does not declare a provision unconstitutional but "warns" the Parliament that legislative reform is necessary to cure the unconstitutionality of a provision. This is not something that is not done in U.S. courts, but is commonly used by the Italian Constitutional Court to signal to the Italian Parliament that it needs to take action or the Court will step in and act instead.

¹³⁷ The Italian court reached its decision two months before the ECtHR decision in *Schalk and Kopf*, which will be discussed in more detail below and again in Chapter 6.

case inadmissible. Although the court recognized that a same-sex relationship related to a person's "private life," the ECtHR found that the Spanish authorities' refusal to pay the complainant a survivor pension did not violate his right to a private life and was, therefore, not discriminatory. The ECtHR relied on consensus analysis to validate its position that same-sex relationships do not constitute a form of "family life" cognizable under the European Convention on Human Rights.

The second *Affermazione Civile* case of import was the February 2012 decision by a court of first instance in Reggio Emilia, which recognized the right of an Italian citizen's Uruguayan same-sex husband to live in Italy as a "family member" of an EU citizen entitled to certain rights under EU law. As noted in Chapter 2, this was the first time an Italian court recognized a right to family reunification on behalf of a same-sex spouse. In the case, the lower court relied on EU law to overturn the action of the Italian state in denying a residence permit to the Uruguayan husband of an Italian citizen of the same-sex.¹³⁸ In prioritizing EU law over Italian law, the court demonstrated a willingness to act in a political manner at the expense of the nation-state.

A month after the Reggio Emilia decision, in March 2012, the Court of Cassation delivered a judgment in the case of an Italian same-sex couple who had married in the Netherlands and were subsequently denied transcription of their marriage into the local Public Registry by municipal authorities in Italy.¹³⁹ Although the Court affirmed the refusal on the part of the Italian authorities to allow the applicants to register their marriage in Italy, it was compelled to correct the legal justification for the refusal put forward by the courts of first and

¹³⁸ In reaching its decision, the court relied specifically on the EU's freedom of movement directive (Directive 2004/38/EC). I discuss the EU's free movement provisions at length in Chapter 5.

¹³⁹ Court of Cassation, I Civ. Sect., Judgment no. 4184/2012.

second instance. The Court of Cassation stated that it is not the "inexistence" of a same-sex marriage (caused by the lack of a necessary requirement of the difference of sex between the two partners) that enables the refusal, but rather the inability of a same-sex marriage to produce legal effect in Italy under existing legislation. In doing this, the Court overruled previous Italian jurisprudence that considered the heterogeneity of the partners as a necessary condition of marriage.

More surprisingly, however, was the Court's further statement that, although a same-sex couple married abroad could not be considered "married" under Italian law, the couple did have the right to "a family life" and, in certain circumstances to be treated the same as married couples under Italian law. Here, the Court of Cassation created a new category in the recognition of foreign legal acts regarding family status. In addition, the Court went on to state that it will serve as the guarantor of these rights in the absence of the Italian Parliament to recognize such rights.

In articulating its argument, the Court of Cassation mobilized European law in significant ways, making extensive references to the European Court of Human Rights (ECtHR) case law, the Charter of Fundamental Rights of the European Union (CFREU), and to the European Convention on Human Rights (ECHR). I will discuss this in detail in Chapter 6 where I take up the subject of the European Courts and their role in advancing recognition of rights for same-sex couples. Although the Court of Cassation was ultimately unwilling to change the laws governing marriage in Italy, it did indicate its readiness to ensure that similarly-situated individuals are treated fairly in terms of benefits and rights under the law, and promised to do so in the case of Parliamentary inaction. The decision was clearly an indication of the willingness on the part of the judiciary to move toward further recognition of rights for same-sex couples in Italy in the absence of political action on the part of the Italian Parliament.

As discussed in Chapter 2, in a subsequent case also initiated as part of the *Affermazione Civile* campaign, the Court of Appeal for Milan cited both the Court of Cassation case and the 2010 judgment of the Constitutional Court for the proposition that the court will guarantee certain rights for same-sex couples, treating them in certain circumstances as married couples. The Court of Appeal for Milan then found that the cohabitating same-sex partner of a beneficiary of a mutual fund could not be denied benefits. Significantly, this case did not involve the EU free movement provisions or EU law; rather, it involved an issue that was within the competence of the nation-state. It is also important to note that the Court cited the decisions of the Italian Constitutional Court and Court of Cassation in support of its conclusion that, in this case, the couple had the right to be treated the same as a couple legally married under Italian law.

What the Italian courts are ultimately doing in recognizing the “constitutional dignity” of same-sex partnerships, asserting that such couples have the right to be treated as “married” couples in certain circumstances, urging the Parliament to take action, and stating that they will serve as the guarantor of rights in the absence of action on the part of Italian politicians to recognize such rights, goes well-beyond the simple prioritization and interpretation of EU law. Through the *Affermazione Civile* cases, the Italian courts are demonstrating boldness in the face of the legislature's unwillingness to take action. These cases point to an acceleration of judicial activism and demonstrate the ways in which the EU is influencing the judicial making of public policy in Italy. In the *Affermazione Civile* cases, the Italian courts are taking advantage of the limited tools they have at their disposal (most notably, the EU free movement provisions) to initiate an advancement in the recognition of rights for same-sex couples in Italy. The Italian courts are conspicuously changing public policy with respect to the treatment of same-sex

couples. The activity of the Italian courts follows the idiom: "Give an inch, take a mile." The EU creates an opening and the Italian courts are taking full advantage of this opportunity.

In the process of using EU law to advance recognition of rights for same-sex couples, Italian courts also simultaneously reinforce a transnational European citizenship based on a secular notion of rights. In doing so, they bolster the "Kantian" vision of the EU. Such changes, however, occur at the expense of the nation-state, which finds itself confronting an increasingly powerful supranational context. The judicial activism present in the *Affermazione Civile* cases arises from the activities of Italian citizen activists, not from the state or judicial system as in previously referenced studies. Here, social actors in Italy ultimately make use of EU law in an attempt to gain recognition of rights denied by elected officials in Italy and, as a by-product, resituate Italian identity within a larger EU identity. Through the lens of the *Affermazione Civile* project, it is possible to trace the effects of increased judicial activism in Italian society and shed light on how the Italian legal and political systems (and ultimately, Italian culture) are being incrementally transformed through such processes.

In the following chapter, I turn my attention to Europe and the EU. Although the EU and Europe are frequently conflated, there are differences, and a more complete understanding of the struggle over rights for same-sex couples in Italy necessitates an appreciation of these differences. When LGBTI activists in Italy invoke "Europe," they are, for the most part, appealing to a "Kantian" vision of the EU as a progressive defender of human rights based on secular notions of justice. The same is true of the Italian courts, albeit to a lesser extent. In both cases, "Europe" is frequently (over-)infused with meaning, and used as a trope to support taking action at the expense of the nation-state.

Figure

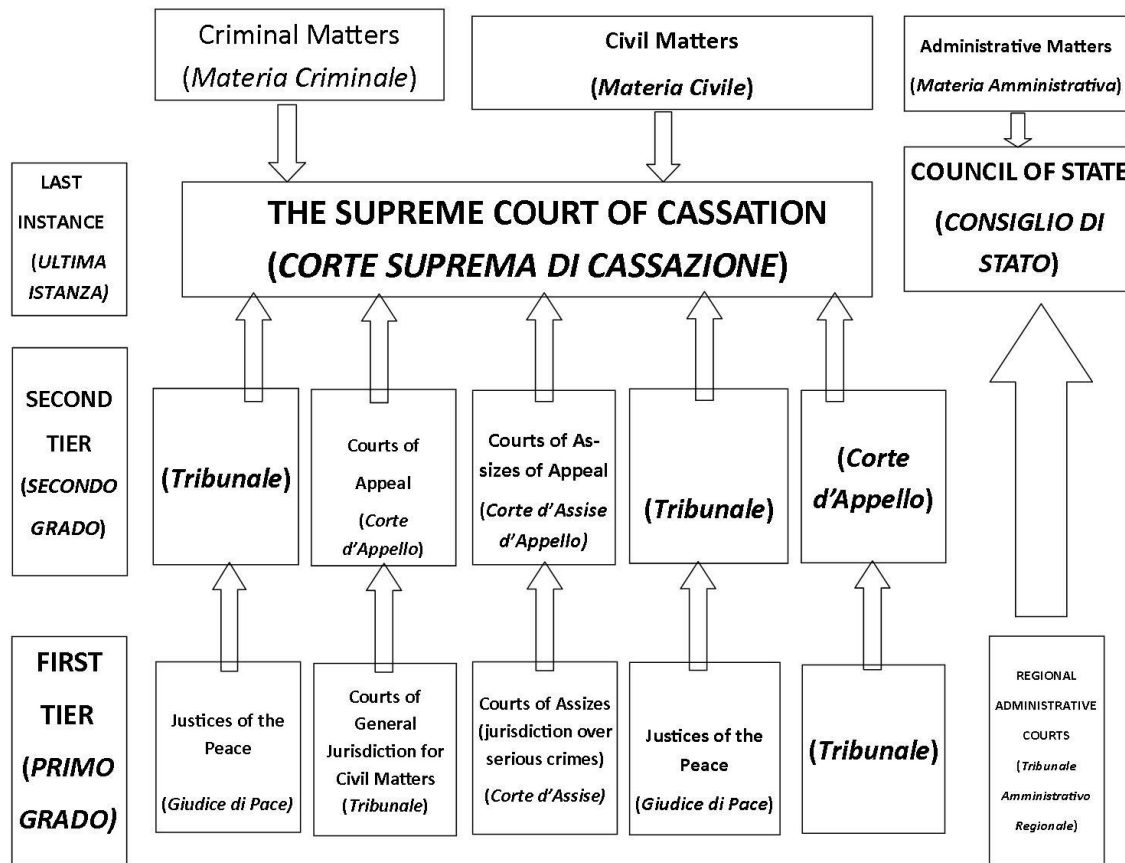


Figure 8. Structure of the Italian Judiciary. Adapted from http://en.wikipedia.org/wiki/Judiciary_of_Italy.

Chapter 5: The EU and Italy: Living Outside Imagined Borders

In the foregoing chapters, I have often referred to Europe and the European Union (EU) as if they are self-evident entities. They are not. Because the struggle for recognition of rights for same-sex couples in Italy occurs in the larger context of the relationship between Italy and the EU, in order to better understand the circumstances in which the Italian struggle transpires, one must know about the EU's position(s) and undertakings with respect to rights for same-sex couples. For this reason, I now move away from Italy to take a closer look at the EU. In this chapter, I deal with the EU as a conception, set of institutions, and arrangement of expectations, focusing specifically on the governing bodies, associations, laws, and ideas that influence or directly affect the struggle for recognition of same-sex unions in Italy. One of the points I make in this chapter is that, while Italy is very much a part of the EU, it is simultaneously conceptualized by Italian LGBTI activists as "outside" the EU. I explore this paradox and what it means in terms of the struggle over rights for same-sex couples.

While some of the information I provide in this chapter may read as descriptive "meta" data, the material is necessary to ground the central thesis of this dissertation. As stated, the argument that I make is that advancement in the recognition of rights on behalf of same-sex couples in Italy is a consequence of the influence of the EU on the Italian nation-state in general and the Italian judiciary in particular. This carries implications for the nation-state and its subparts, especially for Italian lawmakers and the national judicial system, and speaks to the changing role of the nation-state in the face of an emergent supranational entity. Although it has not become irrelevant, one can see the decreasing importance of the nation-state through the lens of LGBTI activists' struggle for recognition of rights in Italy. For the most part, in the specific case of the struggle over recognition of rights for same-sex couples in Italy, the EU's influence is

neither direct nor intentional. It occurs as a by-product of larger processes of personal, political, national, and supranational identification. In order to better understand how EU identity formation comes about in the context of the struggle over recognition of rights for same-sex couples in Italy, it is necessary to first tease out relationships between Italy and the EU in this domain.

In what follows, I show how the EU structures and inspires LGBTI activism in Italy. I also point out particularities inherent in the Italian nation-state that render it especially susceptible to EU influence. I begin this chapter with a discussion of what Europe and the EU are (and are not), and identify the various institutions within the EU that have been active in promoting rights for same-sex couples in the EU member states. Two institutions in particular have played an important role in the advancement of rights for same-sex couples and warrant special consideration: the Council of Europe (mostly through the work of the European Court of Human Rights [ECtHR] and the European Court of Justice [ECJ]). Because of the direct influence these institutions have had on the Italian courts in recognizing rights on behalf of same-sex couples, I have devoted a separate chapter to their discussion.

As mentioned in the introduction, I first became acquainted with LGBTI activism at the European level through my involvement with ILGA-Europe at their Annual Conference held in Turin October 27-30, 2011. ILGA-Europe is the European Region of the International Lesbian, Gay, Bisexual, Trans & Intersex Association, a non-governmental umbrella organization comprised of approximately 408 organizations from 45 of the 49 countries in Europe.¹⁴⁰

¹⁴⁰ The following is a list of Italian LGBTI organizations that are part of ILGA-Europe: Arcigay; Arcigay Catania; Arcigay Frida Byron Ravenna; Arcigay Gioconda Reggio Emilia; Arcigay il Cassero; Arcigay La Giraffa; Arcigay Piacenza; Arcigay Pisa; Arcigay Roma Gruppo Ora; ArciLesbica; ArciLesbica Bologna; Associazione Genitori di Omosessuali AGEDO; Associazione InformaGay; Associazione Omosessuale Articolo 3 di Palermo; Associazione Radicale Certi Diritti; Centro Risorse LGBT; CUBE – Centro Universitario Bolognese di Etnosemiotica; Circolo di

Established as a separate region of the International Lesbian and Gay Association (ILGA) and an independent legal entity in 1996, ILGA-Europe's mission has been to work for equality and human rights for lesbian, gay, bisexual, transsexual, and intersex people at the European level before entities such as the EU, the Council of Europe (CoE), and the Organisation for Security and Cooperation in Europe (OSCE).¹⁴¹ ILGA-Europe works closely with European institutions and engages in strategic litigation efforts before the ECJ and ECtHR. Some of its other activities include providing training events and support to its member organizations and other LGBTI groups on lobbying, advocacy, fundraising, litigation, organizational development, and communications. ILGA-Europe enjoys both participative status at the Council of Europe (since 1997) and consultative status at the Economic and Social Council of the United Nations (ECOSOC) (since 2006). Much of its work is done in cooperation with national and regional LGBTI organizations throughout Europe.

Certi Diritti is one of the non-governmental organizations that is part of ILGA-Europe. In fact, *Certi Diritti* has worked to strengthen its ties to ILGA-Europe since the ILGA-Europe Annual Conference held in Turin in 2011. In October 2013, Yuri Guiana, the current Secretary for *Certi Diritti*, was elected to the board of ILGA-Europe. In his election bid, Guiana was supported by several Italian LGBTI associations in Italy in addition to *Certi Diritti*. At the

Cultura Omosessuale Mario Mieli; Circomassimo – Associazione gay e lesbica; Comitato Provinciale Arcigay di Rimini "Alan Mathison Turing"; Comitato Provinciale Arcigay Bergamo Cives; Comitato Provinciale Arcigay CIG – Milano; Comitato Provinciale Matthew Shepard – Arcigay Modena; Coordinamento Torino Pride GLBT; Di'Gay Project: Famiglie Arcobaleno; Fondazione FUORI; Ireos – Centro Servizi Autogestito Comunita Queer; Lambda; Omphalos Gay and Lesbian Life; and Rete Genitori Rainbow.

¹⁴¹ ILGA was founded in 1978, with the goal of working for the equality of gay men, lesbians, and bisexuals around the world. The mandate was later expanded to include transgender and intersex people. ILGA maintains an office in Brussels, Belgium.

present moment, *Certi Diritti* is working to formulate a strategic Roadmap for Italy in conjunction with ILGA-Europe.

In its 2012 report on the status of LGBTI rights in Europe, ILGA-Europe notes that achieving family recognition is a primary concern of LGBTI communities in Europe. For this reason, one of ILGA-Europe's Strategic Objectives for 2011-2013 was to work for full equality in particular relation to the family. In order to secure equal and social recognition for the diversity of LGBTI families and family relations, ILGA-Europe adopted several strategies, including engagement with the European courts through strategic litigation, supporting national LGBTI organizations working to increase legal recognition of partnerships and parental rights at the national level, working to improve the application of the EU freedom of movement laws and the recognition of family relationships in national legal contexts, and working to achieve explicit inclusion of matters of importance to LGBTI families in the areas within EU competence (for example, cross-border social security schemes and freedom of movement).¹⁴²

The demand for recognition of same-sex partnerships has extended southward and eastward and family issues have become a visible symbol of struggle for equal rights. In recent years there have been many positive developments.¹⁴³ However, not all recent developments

¹⁴² See "Standing Stronger. Building on Achievements. Progressing towards Equality." ILGA-Europe Strategic Plan 2011-2013.

¹⁴³ For example, the positive developments noted by ILGA-Europe in 2012 included: "(i) Denmark's introduction of gender neutral marriages; (ii) the Spanish Constitutional Court's affirmation that the marriage equality law introduced in 2005 is constitutional; (iii) the introduction of marriage equality bills in the Parliaments of France, Finland, the United Kingdom and Scotland; (iv) the tabling of bills in the Belgian and Dutch Parliaments providing the non-biological co-mother in a lesbian couple with automatic legal parent recognition, and the discussion of the issue in Sweden; (v) continued progress towards the adoption of the marriage equality bill in Luxembourg; (vi) Ireland's opening of a Constitutional Convention aimed at discussing key chapters in the Constitution that may need to be revised prior to allow for the opening up of marriage to same-sex partners in the country; (vii) Switzerland's Council of State's approval of a motion opening the right to adoption by same-sex partners; (viii) German Courts' narrowing down of differences between same-sex registered partnerships and heterosexual marriages; and (ix) a growing political support towards the legal recognition of same-sex partners in Croatia, Estonia, Italy, Malta and Montenegro" (ILGA-Europe Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and

have been so positive. For example, a new Family Code in Slovenia that could have provided greater recognition of same-sex couples and their children was rejected in a popular referendum. In Hungary, the Family Protection Act entered into force, weakening the legal status of same-sex couples, and the Parliament in Portugal rejected proposals to grant access to medically-assisted reproduction and adoption entitlements to same-sex couples. In most of Europe, the rights of LGBTI persons to sexual and reproductive health remain generally disregarded or actively restricted by national laws. And while the EU has stepped in on certain matters such as the Employment Directive mentioned below, with respect to issues like recognition for same-sex couples, the EU has indicated an unwillingness to involve itself in what it deems to be an area of family law that falls under the domain of the member states. In order to better understand the quagmire of LGBTI activism and recognition of rights that exists now in Europe (and where Italy fits in) it is necessary to know something about the differences between Europe and the EU, as well as the legal frameworks of each. In the following section, I seek to clarify what the EU *is* and what it *is not*, in order to better explain the significance of Europe and the EU to the rights of same-sex couples and to the struggle for marriage equality in Italy.

What the EU is *not*

Although much effort has been put into delineating what is meant by the term “European Union,” a quick survey of EU publications on the subject reveals that the EU is as often defined by what it is *not* as by what it *is*, and many of the attempts to demarcate it fall short.¹⁴⁴ On the

Intersex People in Europe 2013, p. 16, https://www.ecoi.net/file_upload/90_1369137411_ilga-europe-annual-review-2013.pdf, accessed March 7, 2014).

¹⁴⁴ In his “Ambassador’s Welcome,” João Vale de Almeida, EU Ambassador to the United States, attempts to clarify what the EU *is* in the following statement: “The European Union is the most successful experiment in economic and political integration in the world. It is a community of law and values, and an area of cooperation and solidarity” (European Union, External Action, The European Union: A Guide for Americans, 2013, Ambassador’s

website of the Delegation of the European Union to the United States, the EU is described as follows:

The EU is unlike anything else – it isn't a government, an association of states, or an international organization. Rather, the 28 Member States have relinquished part of their sovereignty to EU institutions, with many decisions made at the European level.¹⁴⁵

In the EU External Action publication titled “The European Union: A Guide for Americans,” the EU is similarly introduced as follows:

The European Union is not a federation like the United States. It is neither a state intended to replace existing states, nor an organization for cooperation between governments, like the United Nations. It is much more than any other international organization.

The EU is, in fact, unique. Never before have countries voluntarily agreed to set up common institutions to which they delegate some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at a higher, in this case, European level, and are directly applicable to citizens of all the countries.

Welcome, p. 1, http://www.euintheus.org/wp-content/uploads/2012/12/GUIDE_UPDATE_2013_DECEMBER_HIGH_RES.pdf, accessed March 2, 2014).

¹⁴⁵ Website of the Delegation of the European Union to the United States, <http://www.eurunion.org/eu/What-Is-the-European-Union/What-Is-the-European-Union.html>, accessed March 2, 2014. Also, by way of reference, the 28 Member States include: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

All EU decisions and procedures are based on the treaties agreed to by all EU countries, under which sovereignty is shared in specific areas. The result is a union of 28 Member States covering 1.7 million square miles with more than half a billion people producing almost a third of the world's gross national product and speaking dozens of languages, bound together by a desire to promote peace, democracy, prosperity, stability, and the rule of law.¹⁴⁶

The EU is not “Europe”

“Europe” and “the EU” are frequently used interchangeably. While I understand the convenience of this practice, Europe and the EU are not one and the same. It is generally agreed that “Europe” is one of the world's seven conventional continents; however, it is also sometimes seen as a peninsula or subcontinent of “Eurasia”:

Europe is geologically and geographically a peninsula or subcontinent, forming the westernmost part of Eurasia. Europe is conventionally considered a continent; this is more of a cultural distinction than a geographic one. Europe is bounded to the north by the Arctic Ocean, to the west by the Atlantic Ocean, to the south by the Mediterranean Sea, and to the east its boundary is culturally determined and unclear. However, the Ural Mountains are considered by some to be a geographical and tectonic landmark separating Europe and Asia. When considered a continent, Europe is the world's second-smallest continent in terms of area, with an area of 10,600,000 km² (4,140,625 square miles). In

¹⁴⁶ European Union, External Action, The European Union: A Guide for Americans, 2013, Chapter 1: Introducing the European Union, p. 2, http://www.euintheus.org/wp-content/uploads/2012/12/GUIDE_UPDATE_2013_DECEMBER_HIGH_RES.pdf, accessed March 2, 2014.

terms of populations, it is the third-largest continent. The population of Europe is roughly 700,000,000: about 11% of the world's population.¹⁴⁷

The eastern borders of Europe remain somewhat arbitrary, and Europe is *imagined* in cultural and political terms as often as it is thought of geologically and geographically. Europe and in particular ancient Greece, is seen as the birthplace of Western culture and has played a major role in the world order since the 15th century. In an opinion article published in the *New York Times*, author Frank Jacobs asks, "Where is Europe?" He notes that, for the ancient Persians, Europe represented the stepping stone that separated them from Greece. There is also the "Europe" that emerged in the 13th century in response to the Russian Tatars' (or Tartars') and (later) the Ottoman Empire's attempts to invade Europe. It was during this time period (and in opposition to the invading "others") that Europe became identified with western Christendom. Here, Europe is perceived as ending where Turkey begins, and when the Ottoman Empire controlled the Balkans, these areas were also considered outside Europe.¹⁴⁸ This is a notion that continues to this day and is invoked by those who wish to deny Turkey entrance into the EU. Finally, there is a relatively recent (although generally unaccepted) theory that views Europe as spanning half of the globe, ranging from Iceland to the Bering Strait, and stopping just short of Alaska.

Perhaps surprisingly or perhaps not, the British seldom see themselves as part of Europe. To the British, Europe is the "Continent," the large, contiguous landmass that sits (at its closest

¹⁴⁷ Greenwichmeantime.com, "Europe," <http://wwp.greenwichmeantime.com/time-zone/europe>, accessed March 2, 2014.

¹⁴⁸ Jacobs, Frank, "Where is Europe?" The Opinion Pages, Opinionator, *New York Times*, <http://opinionator.blogs.nytimes.com/2012/01/09/where-is-europe/>, accessed March 2, 2014.

point) a mere 22 miles off its southeast corner separated only by the English Channel (never mind the fact that Great Britain and Ireland are situated on the continental shelf of Europe, making both so-called continental islands of Europe, thereby rendering them part of Europe according to some definitions of “continent”). Today, attempts on the part of Britain to distinguish itself from “Europe” generally have more to do with anti-EU sentiment than geographic accuracy. By contrast, Cyprus, Malta, and Iceland all consider themselves part of Europe, even though none of them is located entirely on Europe’s continental shelf. And most would agree that Switzerland and Norway are firmly entrenched in and part of Europe, although neither is a member of the EU. This, of course, has little to do with geography and much to do with historical, political, and cultural ties.¹⁴⁹ Although sometimes conflated, it is important to note that the EU is *not* coterminous with the Schengen Area, the Eurozone, or the Council of Europe.

The EU is not the “Schengen Area”

While there is substantial overlap, the EU is not the same thing as the Schengen Area. The Schengen Area consists of the twenty-six European countries that have implemented the Schengen Agreement, which was signed in 1985, in the town of Schengen, Luxembourg. The point of the agreement was to create a geographic space that acts like a single state for purposes of international travel, meaning that, while there is an external border, there are no internal border controls when traveling between the Schengen countries. The Schengen rules were incorporated into EU law in 1999, with the signing of the Amsterdam Treaty; however, the area officially includes the non-EU member states of Iceland, Liechtenstein, Norway, and

¹⁴⁹ See note 9 above.

Switzerland. It also effectively includes the “micro” states of Monaco, San Marino, and the Vatican. Two EU member states, Ireland and the United Kingdom, are not required to implement the Schengen rules and three member states, Bulgaria, Cyprus, and Romania, have yet to comply. The agreement requires parties to eliminate internal border controls and simultaneously strengthen external border controls. In addition, the Schengen rules include provisions on a common policy on the temporary entry of persons, the harmonization of external border controls, and cross-border police and judicial cooperation.

The EU is not the Eurozone

The eurozone, officially known as the euro area, is an economic and monetary union comprised of the 17 EU member states that have adopted the euro as their common and exclusive currency. While one must be a member of the EU to be part of the eurozone, there are members of the EU that are not (yet) part of the eurozone. The European Central Bank (ECB) is responsible for setting the monetary policy of the eurozone. The ECB is administered by a president and by the heads of the respective national central banks and its most important task is to keep inflation in check. Although there is no common representation, governance or fiscal policy for the euro area, the Euro Group provides an arena for cooperation and makes political decisions about the eurozone and euro. The Euro Group is made up of the finance ministers from the respective eurozone states. In emergencies, national leaders are also involved with the Euro Group.

At present, the eurozone includes Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. Ten EU member states do not use the euro: Bulgaria, the Czech Republic, Denmark, Hungary, Latvia, Lithuania, Poland, Romania, Sweden, and the United Kingdom.

Denmark and the United Kingdom opted out of the euro and are legally exempt from joining the eurozone, and Sweden gained a *de facto* opt-out through use of a legal loophole. Otherwise, most of the remaining EU member states are bound to join the eurozone once they have met the requisite criteria. Monaco, San Marino, and the Vatican City have all concluded formal agreements with the eurozone to adopt the euro as their official currency. In addition, Kosovo, Montenegro, and Andorra have adopted the euro unilaterally but are not formally part of the eurozone and do not have representation in the ECB or Euro Group. To date, no state has left, and there are no provisions for doing so or for expelling a state.

Since the financial crisis of the late-2000s, the eurozone has created and utilized provisions for granting emergency loans to member state in exchange for certain economic reforms. It has also begun to implement limited fiscal integration. For example, the members now conduct peer reviews of one another's national budgets. At the present moment, due to the continuing crisis, the issue is highly charged and in a state of flux.

What the EU is

Something that becomes increasingly clear as one begins to study the EU is the fact that it is very much a work-in-progress. The EU that exists today is far removed from the EU as originally envisioned. A predecessor of the EU was created following World War II, and began its existence as the European Coal and Steel Community. It was initially imagined as an economic union: the idea being that countries that trade with each other are economically interdependent and therefore more likely to avoid war. In 1957, the Treaty of Rome was signed, creating the European Economic Community. The Treaty of Rome allowed people and products to move throughout the signatory nation-states. The European Economic Community (EEC) was a cooperative venture with six members: Belgium, Germany, France, Italy, Luxembourg and the

Netherlands. Over the past 55 years, what began as an economic union has morphed into an unwieldy organization traversing all policy areas, from human rights to the environment to foreign policy. In 1993, the name was changed from EEC to the European Union (EU) to reflect this evolution.

The EU acts as a single market, enabling most goods, services, people, and money to move freely between its member states. Increasingly, however, the EU has taken the promotion of human rights (both within and outside the EU) as one its main goals. The EU sees “human dignity, freedom, democracy, equality, the rule of law and respect for human rights” as its core values.¹⁵⁰ With the signing of the Treaty of Lisbon in 2009, the EU’s Charter of Fundamental Rights brings all of these rights together in a single document, legally binding the EU’s institutions and member state governments (when they are applying EU law) to uphold the rights set forth in the charter. In addition to the 28 official Member States of the EU, there are several “candidate countries,” for whom an EU membership application has been accepted by all relevant EU institutions and who have begun to negotiate accession. These include Macedonia, Iceland, Montenegro, Serbia, and Turkey. Finally, there are the “potential candidate countries” from the rest of the Western Balkan nations, some of whom have applied for EU membership and others who have not: Albania, Bosnia-Herzegovina, and Kosovo. In order to join the EU, member states must (in principle) embrace certain fundamental values, which include: a belief that democracy is the best form of government; a belief in societies that embrace pluralistic political thought, freedom of speech, and freedom of religion; support for free market economies; a belief that prosperous nations have a duty to assist poorer, less developed nations;

¹⁵⁰ *Europa* website, Treaty of Lisbon, The Treaty at a Glance, “A Europe of Rights and Values,” http://europa.eu/lisbon_treaty/glance/rights_values/, accessed March 7, 2014.

living together in peace; and a desire to promote these tenets globally. To gain admission, a candidate country must satisfy the so-called “Copenhagen Criteria” by proving that the country has a stable democratic government that supports the rule of law and respect for minorities and human rights, as well as a functioning market economy and the capacity to adopt and implement the body of EU laws, regulations and policies enacted to ensure cooperation between member states (known as the *acquis communautaire*).¹⁵¹

The EU operates through a system of supranational independent institutions and intergovernmental decisions negotiated by the member states. In general, the EU’s priorities are set by the European Council, which is made up of leaders from the member states and EU. The European Council does not, however, have authority to pass laws. The EU’s decision-making processes operate through three main institutions: the European Parliament (EP); the European Commission; and the Council of the European Union. Together, the EP, European Commission, and the Council of the European Union produce the policies and laws that apply throughout the EU, usually through co-decision processes. Three other institutions that play a vital role in the EU are the ECJ, tasked with upholding the rule of EU law, the Court of Auditors, which is responsible for checking the financing of EU activities, and the European Central Bank, which is the central bank for the Eurozone and controls monetary policy within that area. The European Central bank is tasked with maintaining price stability and it is at the center of the European System of Central Banks, which includes all EU national banks. The powers and responsibilities of all EU institutions are set forth in relevant treaties, which form the foundation for everything the EU does and also lay down the rules and procedures that must be followed by EU

¹⁵¹ European Commission website, “Conditions for Membership,” http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm, accessed March 7, 2014.

institutions. The treaties are agreed to by the presidents and/or prime ministers of the EU member states, and ratified by their respective parliaments.¹⁵²

A Rule of Law

The EU relies exclusively on the rule of law to achieve European unification.¹⁵³ EU "law" is an independent legal system consisting of the body of Treaties and legislation (regulations, directives, and decisions) that have either direct or indirect effect on the laws of the member states. The three sources of EU law are primary law (consisting mainly of the Treaties of the EU), secondary law (the regulations, directives and decisions enacted by the law-making bodies of the EU to pursue the objectives set forth in the Treaties), and supplementary law (which includes ECJ case law, international law, and general principles of EU law). The EU also issues non-binding recommendations and opinions, and rules that govern the functioning of EU institutions and programs. Treaties and other agreements with similar status (as well as any

¹⁵² As noted, the main institutions of the EU include: the European Council; the European Parliament (EP); the European Commission; the Council of the European Union; the European Court of Justice; the Court of Auditors; and the European Central Bank. In addition, the EU has a number of other institutions and inter-institutional bodies that perform specialized functions. These include: 1) the European Economic and Social Committee, which represents civil society, employers and employees; 2) the Committee of the Regions, which represents regional and local authorities; 3) the European Investment Bank, which finances EU investment projects and assists small businesses through the European Investment Fund; 4) the European Ombudsman, which investigates complaints about EU institutions and bodies; 5) the European Data Protection Supervisor, which safeguards the privacy of people's personal data; 6) the Publications Office, which publishes information about the EU; and 7) the European Personnel Selection Office, which recruits staff for EU institutions and bodies; the European School of Administration, which provides training in specific areas for members of EU staff; 8) the European External Action Service, which assists the High Representative of the Union for Foreign Affairs and Security Policy (currently Catherine Ashton); and 9) a host of specialized agencies and decentralized bodies that handle a range of technical, scientific, and management tasks.

¹⁵³ The "rule of law" is a tricky concept that (in general) refers to the authority of law within society and stands for the proposition that no one is above the law, including the government and government officials (i.e., a government of laws rather than of men and women). In the case of the EU, this means that actions taken by the EU are founded on treaties that have been voluntarily and democratically approved by all of the EU member states. (See *Europa.eu*, European Union, "EU Treaties," http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm, accessed March 7, 2014.)

amendments to such treaties and agreements) are determined through direct negotiation between member state governments, and are subject to ratification by national parliaments.

Regulations are the most direct form of EU law, and are on par with the national laws of the member states. They are passed jointly by the EU Council and EU Parliament and by the Commission on its own. EU regulations have a binding legal effect throughout the member states from the moment they are passed and member states do not have to take action to implement them. By contrast, directives set forth end results that must be achieved by the member states. National governments must take action to make them a part of national law by a certain date, but they have discretion regarding how to accomplish the desired end result. Directives may apply to one or more or all of the member states and are used to harmonize different national laws. Decisions are EU laws that relate to specific cases. A decision is binding upon those to which it is addressed and may be addressed to individuals, enterprises or any or all member states. The EU Council (sometimes in conjunction with the EP) and the Commission issue decisions, which confer rights and require individuals, enterprises, and authorities in member states to do or refrain from doing something.

EU law takes precedence over national laws and is therefore binding on national authorities. In general, EU law is applied by the courts of the member states. In situations where the laws of the member state provide lesser rights than the laws of the EU, the courts of the member states can step in to enforce EU law. In cases where EU law should have been transposed into the laws of the member states (such as in the case of Directives), the European Commission can initiate proceedings against the non-complying EU member state. The ECJ is the highest court with jurisdiction to interpret EU law.

Bringing the EU to the People

In its institutional formations, the EU has made a concerted effort to bring the EU into the lives of its citizens, to explain its existence, functions, processes, and decisions. I was astounded by the plethora of information available in multiple languages on the Internet. There is an almost overwhelming abundance of information explaining the EU and its institutions, much of it participatory in nature.¹⁵⁴ The EP, for example, has dedicated an entire webpage to “visiting” that explains options available to individuals, families, and groups when in Brussels or Strasbourg. Interested parties can spend time at the “Parlamentarium,” the Parliament’s Visitors’ Center in Brussels, and partake of its “[d]ynamic, interactive, multimedia displays [that] will guide you through the journey of European integration and its impact on our everyday lives.”¹⁵⁵

¹⁵⁴ By way of example, the EP’s welcoming webpage states:

This is your assembly, the only directly-elected European Union institution. On these pages you will find a short introduction to how the parliament works. We present its powers and functions, explain how Members of Parliament organise their work and explain how you can contact us. A last chapter is devoted to past events that have shaped the Parliament's role in the EU.

At your service

Strasbourg and Brussels seem remote from where you are? **Stay informed** about what is happening in the Parliament through our information pages and document services and via the information office in each EU country, where you find everything in your language.

You have something to say? Then make **your voice** heard. Petition the Parliament if you think that EU laws are being breached where you are. Or contact the European Ombudsman if you need a mediator. From 2012, EU citizens will also be able to start pan-European initiatives and call for new laws themselves with the new citizens' initiative.

You want to get personally involved in our work, or experience the Parliament first hand? Check out the possibilities of **working with us** as a trainee, during a study visit or as a new colleague. (Website of the European Parliament, European Parliament/About Parliament, “At Your Service,” <http://www.europarl.europa.eu/aboutparliament/en/00b3f21266/At-your-service.html;jsessionid=B4539892A69BFD1F75B7D7FEF96A322F.node1>, accessed March 7, 2014 [bold in original]).

¹⁵⁵ Website of the European Parliament, European Parliament/Visiting, Homepage, <http://www.europarl.europa.eu/visiting/en/>, accessed March 7, 2014.

Another option is the Chamber Tour: “Are you in Brussels? Then why not get one of our handheld media guides to take you around the European Parliament's plenary chamber. This portable guide will take you on a one-hour journey through EU democracy from past to present.”¹⁵⁶ Other activities include a “role play game for schools” that enables students to “step into the shoes” of a Member of the European Parliament (MEP).¹⁵⁷ A 2007 edition of the newsletter *EU Focus* published by the Delegation of the European Commission to the United States discusses the EU role in building a European consciousness:

What is it that is making many Europeans *feel* more European today? In large part, and not always acknowledged, it is the role of the EU in bringing the citizens of Europe closer together by breaking down barriers, ensuring fundamental rights, and helping foster an enduring peace that indeed makes war between European nations unthinkable for EU citizens today (2007:2).

The article goes on to note that chief among the fundamental rights guaranteed to EU citizens are the free movement provisions, which make it possible for people, goods, services, and capital to move freely throughout the EU. The issue of free movement is something I will return to later in the chapter. According to the Delegation of the European Commission to the United States: “The changing face of Europe today is not about geography as much as a new way of living for all Europeans” (2007:1). In the following section, I turn my attention to the relationship between the EU and LGBTI persons, with an eye to parsing the ways in which the struggle over recognition of rights supports this vision of the EU as a “new way of living for all Europeans.” I assert that the current struggle over rights for same-sex couples in the EU is a key

¹⁵⁶ See note 16 above.

¹⁵⁷ See note 16 above.

part of a larger struggle that pits the vision of a unified EU based on its "Christian" roots against those who see the EU as a role model in the recognition of rights based on secular notions of social justice.

LGBTI in the EU

The EU as the EU

Acceptance of LGBTI persons varies throughout the EU member states. The principles of non-discrimination and equal treatment are found in the Charter of Fundamental Rights of the European Union, which has the same legal status as the EU treaties following the entry into force of the Treaty of Lisbon in 2009. Article 21 prohibits discrimination based on "sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation." The right to marry and found a family is enshrined in Article 9: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Although Article 9 is notably gender-neutral, it leaves it up to the national laws of the member states to define marriage and family.

Discrimination on the basis of sexual orientation is also prohibited by the Treaty on the Functioning of the EU (TFEU, Articles 10 and 19).¹⁵⁸ Article 19 of the TFEU states that:

"Without prejudice to other provisions of this Treaty and within the limits of the powers

¹⁵⁸ Initially, there was uncertainty over whether the general non-discrimination principle set forth in the TFEU applied beyond the single market objectives relating to employment and industrial relations; however, the inclusion of a new Article 13 into the Treaty of Amsterdam (now Article 19 of the TFEU) erased this uncertainty. The Amsterdam Treaty was signed on October 2, 1997, and went into force on May 1, 1999. The treaty made substantial changes to the Maastricht Treaty and placed greater emphasis on citizenship and the rights of individuals. It represented an attempt to achieve more democracy and increased powers for the European Parliament, among other things.

conferred by it on the Community, the Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." This provision has led to specific directives to combat discrimination on the bases of religion, belief, disability, age or sexual orientation in employment (Article 1 of Directive 2000/78, November 27, 2000) and discrimination on the bases of racial or ethnic origin in and beyond employment and occupation (Articles 1 and 3 of Directive 2000/43, June 29, 2000, also known as the "Race Directive").¹⁵⁹ On July 2, 2008, the European Commission proposed a directive that would expand the employment directive and ban discrimination on the bases of age, disability, religion or belief, and sexual orientation in all areas of EU competence, including areas of social protection, social advantages, and access to goods and services. If enacted, this directive would eliminate the hierarchy of rights that currently exists by extending the protections guaranteed under the Race Directive to all protected classes.

The directive, however, has been stalled in the Council, despite the strong support of the EP. The Charter of Fundamental Rights of the EU preserves certain political, social, and economic rights for EU citizens and residents. As mentioned above, the Charter was given full legal effect with the entry into force of the Treaty of Lisbon on December 1, 2009. The Charter gives the EU courts the power to strike down legislation adopted by EU institutions that violates

¹⁵⁹ The Employment Directive, also known as the Employment Equality Directive, established a general framework for equal treatment in employment and occupation. The Directive, which was unanimously adopted by the Member States in 2000, compelled member states to adopt, within 3 years, minimum requirements prohibiting discrimination on the bases of religion and belief, age, disability, and sexual orientation in employment and occupation, vocational training, and membership and involvement in organizations of employers or workers or organizations with members of a particular profession. As of today, all of the Member States have transposed the Directive into law. In practice, this protects EU citizens from being denied a job or losing a job due to their sexual orientation. It also protects them from harassment by a work colleague. It does not cover the refusal of medical services or treatment, refusal of a double room in a hotel, protection against bullying in a school, or refusal of social security schemes (for example, survivors' benefits or financial assistance to careers). These protections are extended under EU law, however, on the bases of race and gender.

the provisions of the Charter. While the Charter applies to member states when they are implementing EU law, it does not extend the competences of the EU to the legislative efforts of the member states when acting within their purview.

For the most part, the EU institutions noted above have played a part in advancing the recognition of rights for LGBTI persons in the member states and in the world at-large.¹⁶⁰ In October 2012, the EP released a study on a potential EU roadmap for LGBT equality.¹⁶¹ The proposed roadmap would consolidate new laws and policies to combat discrimination and increase equality for LGBT persons. The EP also has an "Intergroup on LGBT Rights," which is an informal forum for members of the European Parliament who are interested in issues that affect the lives of LGBT people, as well as their families and employers. At the moment, the LGBT Intergroup is the largest of the EP's 27 Intergroups, with over 150 members. Its work involves monitoring the work of the EU and the situation of LGBT people in the EU member states and beyond, as well as liaising with civil society groups to make sure their concerns are heard at the European level. One of the intergroup's priorities is to advance the freedom of movement of LGBT people in the EU.

¹⁶⁰ Another EU agency that warrants mention because of its involvement in promoting the rights of LGBTI people is the European Union Agency for Fundamental Rights (FRA). FRA was established in 2007, to provide independent, evidence-based advice on fundamental rights. It has 90 staff members, which include legal experts, political and social scientists, statisticians, and communications and networking experts. FRA takes the place of the European Monitoring Centre on Racism and Xenophobia (EUMC), and was granted a much broader mandate to promote advice on a wide range of fundamental rights, in accordance with the EU Charter of Fundamental Rights.

In 2012, FRA carried out an extensive survey of approximately 93,000 LGBT people living in the EU to collect data on LGBT experiences of hate crime and discrimination, as well as levels of awareness about their rights. The survey results were published in May 2013, and showed that many LGBT persons hide their identity and avoid certain locations due to fear. Others have experienced discrimination and violence and most do not report these incidents to the police or other authorities. The purpose of the report is to assist in the development of effective and targeted EU and national legal and policy responses to address the needs of LGBT persons and to protect their fundamental rights.

¹⁶¹ Roadmaps are policy documents that summarize and provide a plan for EU action in a given area.

The European Commission has also played a part in advancing LGBT interests through its establishment of an action program (entitled "A Community Action Programme to Combat Discrimination), which resulted in the expenditure of 100 million Euro between 2001-2006, in support of concrete measures to combat discrimination in a number of areas, including sexual orientation. The program was designed to supplement the (mostly legislative) activities of the EU and the member states. In January 2007, the program was replaced by the PROGRESS Community program, a financial instrument that supports the development and coordination of EU policy in the areas of employment, social inclusion and protection, working conditions, anti-discrimination, and gender equality. The program is open to EU member states, candidate, and potential candidate countries, and the EFTA/EEA countries of Norway, Iceland, and Liechtenstein.

To facilitate a proactive response to violations of the human rights of LGBT people and to address the structural causes leading to such violations, the European Council's working group on human rights (in cooperation with ILGA-Europe) adopted the "Toolkit to Promote and Protect the Enjoyment of Human Rights by Lesbian, Gay, Bisexual and Transgender (LBGT) People" on June 8, 2010.¹⁶² The "toolkit" is designed to provide EU institutions and their staff, member states, EU Delegations, Representations, and Embassies with an operational set of tools that can be used to promote human rights for LGBT persons in external contacts with countries outside the EU, as well as with international and civil society organizations. The Council upgraded the toolkit in June 2013, instructing EU diplomats to defend the human rights of LGBTI persons in the world.

¹⁶² The "toolkit" is available on the Council's website at <http://www.consilium.europa.eu/uedocs/cmsUpload/st11179.en10.pdf>.

The Rainbow Map, Europe, and the EU: Is There a Place for Italy?

Although homosexuality is officially legal in all EU member states, LGBT rights are protected under the EU's treaties and laws, and discrimination in employment has been prohibited since 2000, the laws of the individual EU member states vary widely when it comes to additional protections, same-sex relationships, and LGBT adoption. Prior to the beginning of the ILGA-Europe annual conference, staffers (myself included) spent a great deal of time setting up a room with literature from various LGBTI interest groups throughout Europe. In addition to the "Delegate Packs" (which included an overview of the conference, detailed information regarding the workshops to be held, and information on the evening social programs, along with useful information about local transportation, etc.), "touristic" bags stuffed with goodies (including both male and female condoms and a DVD of the history of "*FUORI!*"), and the "Torino + Piemonte" card (granting free access to public transportation and admission to local museums and cultural sites) the participants received, conference attendees had access to the press room, which was stuffed with pamphlets, information sheets, posters, cards, reports, and other documents that detailed the work of various EU and European governmental agencies, NGOs and other groups and associations of interest to LGBTI activists. One of the items that circulated widely among participants was the "Rainbow Europe, May 2011," map produced by ILGA-Europe in cooperation with Transgender Europe.

The "Rainbow Europe" map provides a visual display of the legal and policy situation for lesbian, gay, bisexual, and transsexual people in 49 European countries with respect to six thematic categories: equality and non-discrimination; family; bias motivated speech/violence; legal gender recognition; freedom of assembly, association, and expression; and asylum. It reflects the various countries' legislation and policies that have a direct effect on the enjoyment

of human rights by LGBTI persons, and the main criteria is whether sexual orientation and gender identity (or its equivalent) are clearly referred to in the respective law or policy, or whether LGBTI people are treated equally under the law and by the state. It does not represent the social state of affairs of LGBT persons in Europe but is instead a reflection of the European countries' laws and administrative practices, which protect or violate the human rights of LGBT persons.¹⁶³

The first ILGA-Europe Rainbow Map was published in July 2009, and its simplicity made it a huge success among activists, as well as a useful benchmarking tool. The 2011 version was transformed to include gender identity for the first time (making the map inclusive of transsexual issues), and a color scheme was introduced to indicate which countries are moving toward full legal respect for the human rights of LGBTI persons (green), and which countries continue to lag behind (amber or red). The scale on the 2011 map ranged from 17 (indicating a state that provides full respect for human rights and full equality) to -7 (indicating a state that is guilty of gross violations of human rights and discrimination against LGBTI persons). Corresponding to each number on the scale was a color, with dark green representing a score of 17, through increasingly lighter green shades (indicating scores of 16 down to 4), to three increasingly lighter shades of yellow (corresponding to scores of 3 down to 1), to gray (indicating a score of 0) and then devolving into seven shades of red that increase in darkness as the state progresses down the scale (from -1 to -7).

¹⁶³ For a more detailed explanation of the map and to see a copy of the most recent version of the map, please go to http://www.ilga-europe.org/media_library/ilga_europe/publications/reports_and_other_publications/rainbow_map_2013.

The scores on the 2011 map ranged from 12.5 (the United Kingdom) to -4 (Ukraine).¹⁶⁴ As indicated in Table A, with respect to EU member states only, the scores ranged from 12.5 (United Kingdom) down to -2 (Cyprus). Just above Cyprus at the bottom of the scale, were Italy, Latvia, and Malta, all with scores of 0. Of the four states at the bottom, Italy was the only one that was one of the founding states of the EU. During the course of the ILGA-Europe conference, there was a lot of discussion regarding the Rainbow Map, and Italy's score. In addition to the general conversation, tittering, pointing at the map, and nodding of heads that I observed while working at the registration desk, which was situated next to a blown-up copy of the map on an easel, I was personally involved in at least four separate conversations regarding the Rainbow Map during the conference, of which the following is an example.

On the second day of the ILGA-Europe conference, V2 and I were working together at the registration desk. She pointed at the Rainbow Map and indicated disgust at the "0" that represented Italy. I used this as an opportunity to ask her why she thought Italy lagged behind most of the EU with respect to recognizing rights for LGBTI persons. She, like others before her I had queried, unhesitatingly blamed it on the Church. According to V2, the Church has the purse strings and uses its money and power to control the majority of politicians in Italy. The result is that nothing changes. On a surface level, V2's explanation made perfect sense. Yet, as I thought about it more I had to wonder *how* the Church manages such control over politicians in Italy but is not able to do so in other "Catholic" countries such as Spain, France, and Ireland. In my conversations with Italian activists the Church was presented as a united front, a huge wall or obstacle that needed to be overcome that did not completely reconcile with my personal

¹⁶⁴ Please refer to Table 1 at the end of this chapter for a summary of the Rainbow Europe Map scores for EU member states for the years 2011 and 2013.

experiences with Catholicism. This, however, is a subject I will table for now and take up again in chapter 7. The thing that struck *me* about the Rainbow Map was the "0" score (and the corresponding gray color) assigned to Italy. The only other country in gray with a "0" score was Latvia. Of the original six founding members of the EU (Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands) and the countries involved in the first enlargement (the UK, Denmark, Ireland, and Norway), Italy was the only "non-green" country.

For the most part Italian LGBTI activists feel left "outside" of the rest of Europe. As discussed in chapter 2, LGBTI activists in Italy frequently invoke the trope of Europe to garner credibility and shame Catholic politicians who adhere to Church dogma in their decision- and law-making duties. At the end of the ILGA-Europe conference, the local staff was given T-shirts as tokens of appreciation for our work. My T-shirt was from the May 21, 2011, Pride March held in Turin. The design on the T-shirt contains part of a ruler in pink print and states "*Quanto Dista il Piemonte dall'Europa?*" (translated: How far is Piedmont from Europe?).¹⁶⁵ Piedmont borders France and Switzerland, but is surrounded on three sides by the Alps. While Piedmont literally bumps up against "Europe," there is a sense that it is a world apart in terms of treatment of LGBTI persons. The idea conveyed in the T-shirt slogan is one of geographic proximity but vast social, cultural and political distance between Piedmont and Europe.

As mentioned above, throughout the ILGA-Europe annual conference in Turin, participants made repeated references the so-called "Rainbow Map" and Italy's "0" rating on the map, and bemoaned the fact that Italy is not like the rest of "Europe." Indeed, the map seemed to support this idea. The Rainbow Map is updated to reflect changing conditions, and ILGA-

¹⁶⁵ Piedmont is one of the 20 regions of Italy. Next to Sicily, it is the second largest region and covers a territory of 9,808 square miles. The population of Piedmont is around 4.6 million and its capital is Turin.

Europe decided to transform the index on the 2013 map to enhance its benchmarking aspect.

The 2014 version grades European states on a percentage scale, with 100% representing optimal support for human rights and full equality, and 0% reflecting gross violations of human rights and discrimination. The new index makes for easier readability and comparisons over time of the situation in different countries. This time Italy ranked dead last among the EU member states, with a score of 19%, indicating that Cyprus, Latvia, and Malta are showing more rapid signs of improvement than Italy.¹⁶⁶

Same-Sex Couples in the EU Member States

In many EU countries, same-sex couples can seek recognition of their unions. Recognition takes a variety of forms ranging from full marriage equality to civil partnership to regulation of cohabitation rights. In May 2013, France became the ninth European country to allow and recognize same-sex marriage. At the present time, ten European countries (eight of which are EU member states) specifically recognize (or will soon specifically recognize) same-sex marriage: Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain, and Sweden, and the United Kingdom (the law covers England and Wales only, and will take effect in 2014). Thirteen additional European countries (ten of which are EU member states) recognize some form of civil union or unregistered partnership: Andorra, Austria, Croatia, Czech Republic, Finland, Germany, Hungary, Ireland, Lichtenstein, Luxembourg, Slovenia, Switzerland, and the United Kingdom (Scotland and Northern Ireland, as well as England and Wales (which, as of 2014, will provide for same-sex marriage)).¹⁶⁷ Several other European

¹⁶⁶ Italy ranked 36th with respect to the 49 European countries considered by ILGA-Europe on the map.

¹⁶⁷ As mentioned, England and Wales have adopted same-sex marriage. While same-sex marriage is not recognized in Scotland and Northern Ireland, both provide for civil partnerships.

countries are in the process of considering some form of recognition for same-sex partnerships.

All-in-all twenty-two European countries (considering the United Kingdom as one entity) grant some form of recognition for same-sex couples, seventeen of which are EU member states. This means that eleven EU member states have no provision for the recognition of same-sex unions: Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania, and Slovakia. Of these, four have specific constitutional bans against same-sex marriage that define marriage as between a man and a woman: Bulgaria, Latvia, Lithuania, and Poland.¹⁶⁸ Unlike Italy, single LGBT persons can adopt children in Bulgaria and Poland.¹⁶⁹ Also unlike Italy, Bulgaria and Lithuania have both adopted equality and anti-discrimination provisions (providing for non-discrimination based on sexual orientation in delivery of goods and services and other spheres of life), as have Romania and Slovakia. Greece, Malta, and Romania all have hate speech or hate crimes laws on the books, prohibiting bias motivated speech and violence against LGBTI persons. This leaves Italy in the company of Cyprus, Latvia, and Estonia, as one of the four EU member states that provides no recognition for same-sex partnerships, no law against hate speech or hate crimes committed against LGBTI persons, and that does not prohibit discrimination in the provision of goods and services and other spheres of life for LGBTI persons. These factors indicate that Italy is, in fact, "outside" of Europe and the EU with respect to recognizing the rights of LGBTI persons in general, and of same-sex couples in particular. However, the point I want to make in the remainder of this chapter (and reinforce in the

¹⁶⁸ Croatia and Hungary also have constitutional bans against same-sex marriage, but both allow for other forms of recognition of same-sex unions.

¹⁶⁹ In Bulgaria, single men are rarely allowed to adopt regardless of sexual orientation but there is no prohibition against single LGBT women adopting.

following chapter) is that Italy is not so far "outside" of Europe and the EU as appears from the data set forth above.

Integrating the EU through EU Citizenship and the Civil Religion of "Rights"

While the foregoing helps to explain the EU in its institutional formations, it does not clarify what the EU means to those who live within and around it. A notion that is often associated with the EU is that of European integration, a term used to describe processes of economic, political, legal, social and cultural integration occurring in Europe, primarily under the auspices of the EU and the Council of Europe. The project of European integration is an ongoing project, evolving through the negotiations of various actors in an open-ended system (Bellier and Wilson, eds. 2000). According to anthropologists Irene Bellier and Thomas Wilson, "[T]he EU is a space which is built and imagined in processes which are simultaneously political and cultural" (2000:20). There have been attempts to carve out a common European identity, and the EU shapes European identity in part through the promotion of a typology of European features referred to by the European Commission as "a European model of society." The purported key features of this model include similar family structures, the democratic distribution of power, and the freedom of the individual vis-à-vis the state (Bellier and Wilson, eds. 2000). I submit, however, that these so-called "key features" lack significance in the absence of a clear understanding of the values that underlie them. For example, what do "similar family structures" look like in Europe? And, more importantly, what is it about "similar family structures" that would serve to identify one as "European"? In Spain, same-sex couples are allowed to marry and adopt children. In Italy they are not. Consequently, family structures in Spain may look very different from acknowledged family structures in Italy.

Another way that European integration occurs is through the development and adoption of a shared culture of “rights.” In *Culture and Rights*, anthropologists Jane Cowan and Richard Wilson, along with lecturer in law Marie-Bénédicte Dembour, observe that over the past few decades there has been a surge in negotiations between various groups of social actors and political institutions at the local, national, and supranational levels, all framed in terms of “rights” (2001:1-2). Due to processes of globalization, rights discourses have been picked up in many parts of the world, far from their original incarnation in the French and American revolutions. In order to understand the specificities of a particular struggle one cannot look only at the local scene. This is because in the process of seeking recognition of their rights, claimants are increasingly embroiled in legal and political processes that transcend the nation-state. Although the model of rights is today “hegemonic” and “imbued with an emancipatory aura,” the articulation of claims within this model is subject to a multitude of interpretations and inferences (Cowan, Dembour, and Wilson, eds. 2001:1).

Who Is an EU Citizen?

One of the main components of European integration is the provision of an EU citizenship status. EU citizenship signals an attempt to bring Europe closer to the people (i.e., to create a shared “identity” for Europeans). Maarten Vink argues, however, that this attempt has yet to meet with much success (2004). Part of the problem is that EU citizenship is derivative of member state citizenship: an EU citizen is a person who holds the nationality of a member state. The rights of EU citizenship are held in addition to national citizenship. EU citizenship falls short because it is not a status that arises out of a positive commitment on the part of its citizens. Instead, as Vink has noted, it is “a status that arises ‘by default’ after the hollowing out of national citizenship” (2004:30). Further, it is not obvious what the rights of EU citizenship

entail, much less the values upon which those rights are based. A 2010 Eurobarometer flash survey found that, while three-quarters of respondents were familiar with the term “citizen of the European Union,” only about 43% said that they know what it means to be a European citizen and less than one-third (32%) considered themselves to be well-informed about their rights as European citizens. Nevertheless, it is generally accepted that EU citizens have rights *as EU citizens* that are to be recognized and protected. It is the precise content and lack of consensus about the basis for such rights that is controversial.

In *We, the People of Europe? Reflections on Transnational Citizenship* (2004), Étienne Balibar asserts that there is no such thing as a “European people.” He observes that, although the EU has increasingly separated notions of citizenship from notions of nationhood, there are still formidable obstacles to the creation of a transnational European citizenship. According to Balibar, these obstacles arise because European unification brings into question the different means of laying a foundation for a democratic state and thereby reopens issues of sovereignty (2004:ix). Balibar talks about the formation of national identity as a dual process entailing both differentiation from groups situated outside the national body and the creation of internal homogeneity through the expulsion or alienation from the privileges of national citizenship of elements considered antithetical to the ethnic and cultural identity of the state. As a consequence, for “historical and structural reasons, a *European ‘constitution of citizenship’* can only emerge on the condition of being *more democratic* than the traditional constitutions of the ‘*national*’ states -- or it will be deprived of any legitimacy, any capacity to ‘represent’ the populations and solve (or mediate) their social conflicts . . .” (Balibar 2004:ix).

In *Symptoms of Modernity*, anthropologist Matti Bunzl similarly contends that nation-building depended on the “foundational construction of constitutive outsides” (2004:13). He

shows how Jews and queers in Austria functioned as social signifiers and were positioned outside the imagined “ethnically homogeneous and inherently masculine” contours of the nation-state (2004:13).¹⁷⁰ According to Bunzl, Jews and queers served as the “principal indices of a European modernity characterized by the homogenizing forces of nationalism and the nation-state” (2004:216). As such, Jews and queers constituted “symptoms of modernity,” and it is this notion that enables one to see the late twentieth century in terms of an “epochal shift” (Bunzl 2004:216). In the 1990s, Jews and queers in Vienna began to resist their respective positions as “Others” and subsequently emerged in the city’s public sphere. With the support of the state, they were subsequently celebrated as symbolic of a diversified polity. Bunzl reads this as an indication that Austria had transitioned to a kind of postmodernity. Bunzl writes:

For if we understand the abject creation and constitutive silencing of Jews and homosexuals as a specifically modern phenomenon for which the Holocaust served as the catastrophic telos, and if we understand the groups’ continued subordination in the postwar era as a function and indicator of late modernity, then we can comprehend the developments of the late twentieth century in terms of a social and cultural transition to a kind of postmodernity ... characterized by a constitutive pluralism (2004:216).

One can apply Bunzl’s ideas to the Italian situation. Although conservative politicians in Italy continue to support a vision of national identity based on the patriarchal family and Catholic social values, and thereby indirectly constitute LGBTI persons in general (and same-sex couples in particular) as imagined “Others,” there are indications that large parts of Italian society have moved on. In 2012, the Italian National Institute of Statistics published the results

¹⁷⁰ I am using Bunzl’s terminology here.

of its first survey entitled *La popolazione omosessuale nella società italiana* (translated: “The Homosexual Population in Italian Society”). The study revealed that 43% of the Italian general population supports full marriage equality, and that 62.8% are favorable to registered partnerships. Confronted with a political impasse that continues to alienate them from the full privileges of Italian citizenship, it is no surprise that LGBTI persons living in Italy look to Europe as better able to “represent” them. They look to Europe as an entity that can potentially resolve their social conflicts with the nation-state. This is conceivable because notions of EU citizenship have moved well beyond their original economic bases and are increasingly discussed and debated within the framework of “rights.”

In the struggle over recognition of rights for same-sex couples in Italy, the rights being sought by activists originate at the level of the supranational. In order to access these rights, Italian same-sex couples must achieve recognition in the context of a nation-state whose very identity is tied up in opposing notions of family formation. In chapter 3, I looked at the importance of family and the role it plays as a primary social institution in Italy. As discussed, political actors in the Italian state have successfully alienated same-sex couples from the full privileges of national citizenship by denying them recognition of the fundamental right to form a family. In Italy, relationships based on anything other than so-called traditional marriage are antithetical to the heretofore privileged Catholic cultural identity of the state. In other words, the ideal of the alleged traditional family is so entwined with privileged notions of national identity that those who do not subscribe to its structure are frequently left outside the state. The displacement of LGBTI families from the full enjoyment of citizenship in Italy creates an incentive to look beyond the nation’s borders for recognition, and leads to greater identification with Europe in general and the EU specifically.

What It Means to Be an EU Citizen in Italy

In the struggle over recognition of rights for same-sex couples, one can begin to see the instantiation of a more substantial EU citizenship in Italy. This is bolstered by the fact that national identity in Italy is weak and the nation-state has never really enjoyed a solid ideological basis for its existence. Most scholars agree that the Italian state is perceived as possessing a low degree of legitimacy and that Italian citizens react to it with distrust (Ginsborg 2003; Barański 2001). Patrick McCarthy argues that the appearance of Berlusconi on the political scene ushered in a “clan-like” age and evidenced an extension of the practices of clientelism and political corruption. According to McCarthy, Italians must create a new state “which is neither overbearing nor absent because it is no longer overworked, in which the market functions and public goods are not sold to the highest bidder but are distributed in a manner that is recognizably fairer and more efficient (1997:24).” I submit, however, that the issue is not really the creation of a new state but rather the making of what anthropologist Virginia Dominguez refers to as a “peoplehood” (1989). Dominguez’s notion of “peoplehood” reflects an interest in collective identities, in the socio-historical construction of an object (created by objectifying people into a collectivity) that requires continued creation, nurture, and legitimization. Italy has never enjoyed a real sense of “peoplehood.”

The political and social process that led to the unification of Italy is known as the *Risorgimento*, which means “Resurgence” or “Revival” in English. While it is difficult to identify precise dates for the beginning and end of the *Risorgimento*, most scholars hold that it began with the end of Napoleonic rule and the Congress of Vienna in 1815, and ended with the Franco-Prussian War in 1871. Unlike the French and American Revolutions, and even possibly German unification, the *Risorgimento* cannot be personified as a unifying set of ideals struggling

for realization. Any attempt to summarize the *Risorgimento* is necessarily messy and complex. Massimo Taparelli, Marquis d'Azeglio, an Italian statesman, novelist and painter, however, adequately summed up the outcome of the *Risorgimento* nicely in his famous phrase of 1861: "*L'Italia è fatta. Restano da fare gli italiani*" (translated literally as "Italy has been made. It remains to make Italians" but more commonly as "We have made Italy. Now we must make Italians"). In many ways, Italy has yet to "make Italians."

While I was in Italy, certain topics came up repeatedly in conversations with my contacts. One such topic was that of Italian national identity. This subject came up with so often that I began to take note. Many of my contacts in both Rome and Turin casually referred to Italians as having a "weak" national identity as if it were a foregone conclusion. The so-called weak national identity was commonly used to explain, for example, why the Church perspective on moral issues regularly prevails over popular will. The frequency with which my Italian contacts referred to the weak national identity indicated to me that this was a common notion that circulated among Italians. As the following examples from my fieldwork show, conversations about regional, national, and supranational identities indicate that identity is still up for grabs in Italy.

When I arrived in Turin in September 2011, I could not help but notice a number of Italian flags hanging from apartment balconies. While not every house displayed a flag, there were a noticeable number of such flags on display throughout the various residential areas of the city. I had not seen anything like this when I was in Rome the previous year. In 2011, Italy celebrated the 150-year anniversary of its unification. Because I had not noticed such flag displays when I was previously doing field work in Italy in 2009 and 2010, I suspected that the flags had something to do with this. One day, I asked M, one of the LGBTI activists I had met

during fieldwork, about the flags, and he confirmed my suspicions. The flags were indeed a show of support for Italy in honor of its 150 year anniversary. M then proceeded to tell me about the various events staged throughout the year in Turin to mark the anniversary. Curious, I asked him about his perceptions on Italian national identity: Did he think such a thing existed? I told him that I had not noticed so many flags on display before when I was in Rome. He scoffed a bit and said, “Of course we are all Italians. But in Rome you will not see anything like what we have done in Turin [to mark the 150-year anniversary]. In Rome, they do nothing.” He went on to state that, while sometimes there is talk from certain quarters about dividing Italy between north and south, most agree (including himself) that “we are all Italians” and that being Italian means something.

M’s response did not surprise me. It is no secret that in Italy, regional and local identities commonly trump national identity. Italians largely derive their sense of identity from associations with territorial and ideological communities (Malagreca 2006). In our conversation M expresses his opinion that, while everyone is Italian, there is something different about the attitudes of the *Torinesi* (i.e., the people from Turin) and contemporary Romans toward Italy. The *Torinesi* attempt to be patriotic where the Romans cannot be bothered to muster national enthusiasm. In his comments, M manages to differentiate himself from his fellow citizens in Rome while simultaneously attempting to embrace Italy as a united whole.

The conversation with M reminded me of a conversation I had with T in Rome the year before. One day at lunch, while chatting over bowls of soup, I asked T for his thoughts on how the Church was able to wield such power in Italy, given the fact that the majority of its citizens are not practicing Catholics and Italy is known for being a place where attitudes toward the EU tend to be more favorable than in some of the other member states. T responded by telling me

that in his opinion, the EU is not a union, at least not in any social sense. In a similar way, Italy is not a country. According to T, Italy is just a group of people who share a geographical space. But if forced to choose an identity, T explained, “In general people in Italy don’t see themselves as ‘European,’ they see themselves as ‘Italian.’” That said, T admitted that there is awareness in Italy that things are different in other parts of Europe. “In Spain, for example, the police function as police; they are not just a guy in a nice pair of Ray Bans,” T explained. By contrast, in Italy, everyone has his or her own agenda, his or her own pet social issues, and most people are unwilling to join together to support a cause that does not serve one’s personal interest or benefit the entire society. Everything is about having power and making money and working hard means nothing. It is always a matter of money and power: there are no principles. Instead, people rely on celebrities to guide them, to show them how to act. Also, according to T, there is so much money in being a politician in Italy that it becomes a career. The Vatican is very wealthy (and therefore powerful) and has money to throw behind its causes. Politicians who want Vatican support must follow its edicts.

All of this is, of course, complicated by the fact that there is no sense of competition in Italy, no way to maneuver. Everything is prearranged: jobs go to offspring and people who can do favors for the job provider. To the extent that there is any sort of system in Italy, it is an elaborate system made up of complex arrangements between many “somebodies.” There is no perception of anything moving forward or developing. According to T, this is because in Italy there exists a “You scratch my back, I’ll scratch yours” mentality that is carried to extremes. Everyone in public administration was put there by someone else with more power. Those with a little bit of power crave more power, and they use the power they have to make things easier or

more difficult depending on what is most convenient. In Italy, anything can be “arranged.” There is no solution because it is an issue of mentality.

“If this is the case,” I asked, “how do people manage to get by? How do they make enough money to pay taxes, buy a car, and afford auto insurance, housing, utilities, food, and the all-important cellular phone?”

“They are forced to adopt an ‘illegal mentality’ to get around the system,” he replied.

I do not know whether T’s assessment is entirely accurate but I do know that the sentiment he expressed was shared by several of my other friends in Italy.

The following incident is also illustrative of the sense of weak national identity that circulates in contemporary Italy. While I was in Turin, Professor Jane Desmond, one of my dissertation committee members and mentors, was invited to teach a two-week course entitled “Beyond Literature” at *La Sapienza* in Rome. She graciously invited me to visit one of her classes. There were approximately 13 students in the class and they were working in smaller groups on a project that involved pretending to be curators at a museum. They were tasked with designing an exhibit that captured the culture of the United States. During the class, I traveled among the groups and assumed the role of a “consultant.” Since I was an American working in Italy and trying to sort out Italian culture, I found the mirrored perspective educational.

One group was discussing how to define persons in the United States in terms of their music. One young woman mentioned the national anthem. The rest of the members in her group were quick to concur and there was much nodding and making note of this suggestion. They all readily agreed that the national anthem was something that is shared, revered, important, and common to all Americans in the United States. Initially, I was a bit taken aback. A certain rejection of the nation’s symbols (the flag, the pledge of allegiance, the national anthem) seems

to be in vogue, at least in the academic circles in which I frequently travel. This has to do in part with a sense that these symbols have been co-opted by the right and that nationalism is something to be moved past. My knee-jerk response was to explain that this is not really an accurate assessment but, as I thought more about it, I realized that the circles in which I travel, think, read, and write are not mainstream. I am one of the outliers. I resolved to pay more attention to the singing of the national anthem in the United States.

The students in the class unequivocally agreed that people in the United States are *much more* patriotic than Italians. They were of the opinion that Italians are not particularly patriotic and that people in the United States are much more united around a love of nation than their Italian counterparts. This, to me, has little to do with a love or fondness for a geographical location and everything to do with differing perspectives on nationalism. The U.S., by virtue of its size and the diversity of its people, requires national symbols to remain unified. Italy, too, may require such symbols and, of course, they do exist (take, for example, the green-white-red tricolor flag), but there is a difference in the degree to which such symbols are embraced in Italy and the United States.

Many elementary school students in the U.S. begin their school day by reciting the “Pledge of Allegiance” to the United States. In the U.S., sporting events at all levels of competition (including my son’s Little League play-off and 5th grade basketball games) begin with the national anthem. There is also an etiquette surrounding treatment of the nation’s flag that is taught to children in elementary school: there are certain times that the flag can/cannot be displayed, the flag must be taken down in bad weather, and there is a particular way to fold the flag. If this is also the case in Italy, one would never know: the flags that hung from the balconies in Turin remained hanging from the balconies in Turin, day and night, rain or shine.

Emanuel Rota talks about the “impotence of the Italian nation-state, which manifests itself daily in the transformation of politics into a spectacle” (2011). Regarding the phenomenon of Silvio Berlusconi and the current status of the Italian nation-state, he writes:

The majority of Italians who have repeatedly voted for him no longer expects solutions from the state in the spectacle of the struggle for power. Some of the most successful literary creations of the past decade openly present an anarchical situation presenting the impotence of the state in all of its nakedness and attributing to it a conspiratorial role (Rota 2011).

The “impotence of the Italian nation-state” has been keenly felt by LGBTI activists in the struggle over recognition of rights. Until recently there was no sense of movement or anything going forward in terms of recognition for same-sex couples. Now LGBTI activists in Italy are beginning to see progress. This, however, is due to the influence of the EU and the Italian judiciary, rather than to Italian lawmakers.

It is questionable whether EU citizenship emerges on the condition of being more *democratic* in Italy, especially if one defines “democratic” as something characterized by free and equal participation in government or in governmental decision-making processes. I say this because developments in this area have been (as discussed in the foregoing chapters) at the behest of the Italian courts and are a product of judicial law-making rather than politics. Further, the processes that have led to further delineation of a European citizenship in Italy have been neither direct nor necessarily intentional. Yet despite this, there is a palpable sense that the EU is competent to mediate or resolve the social conflict inherent in the contemporary struggle for recognition of rights on behalf of same-sex couples in Italian society.

Creating EU Citizens through Free Movement

As “rights” become increasingly attached to European citizenship, differences in member states’ recognition of rights become more pronounced. In response, there is a push to articulate and integrate a framework of rights for the EU, and much of this has been accomplished haphazardly through interpretation of EU laws concerning the rights of EU citizens. To date, much of the existing substance of EU citizenship is to be found in the “free movement” rights.¹⁷¹ EU citizenship confers the right to move and reside freely within the member states. The rights associated with free movement are essential not only for the functioning of the internal market but also to promote a shared sense of European identity.

The original underlying logic of the “free movement provisions” was of an economic nature: free movement of workers was the natural economic counterpart of the free movement of goods, services, and capital. Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of member states defines free movement of EU citizens and their “family members” as a basic right. Because it is a directive, its text is not

¹⁷¹ The Treaty on European Union (one of the two texts known as the Treaty of Lisbon) highlights the importance of freedom of movement:

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. Article 3, paragraph 2, Treaty on European Union.

The Charter of Fundamental Rights also stresses the importance of free movement:

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State. Article 45, Charter of Fundamental Rights.

directly applicable but has to instead be transposed into the national legislation of the EU member states. The member states were given a deadline of April 30, 2006, to transpose the directive but several states missed the deadline by a few months.¹⁷²

The increased economic interconnectedness of the EU countries means that more and more same-sex couples choose, or are required, to relocate to or live in another country that may not recognize their union. Due to substantial differences in the recognition of same-sex partnerships in the EU, married and cohabitating same-sex couples from EU member states that grant rights lose many of those rights when they move to Italy or another EU member state that does not recognize their partnership.¹⁷³ Same-sex couples in the EU thus face obstacles to free movement that married heterosexual couples do not, and this leads to a situation where differences between the national legal systems create barriers to the full attainment of a common European identity in the form of European citizenship. This is recognized as a problem. Viviane Reding, the current EU Commissioner for Justice, Fundamental Rights and Citizenship, has been quoted as stating:

If you live in a legally-recognised same-sex partnership, or marriage, in country A, you have the right – and this is a fundamental right – to take this status and that of your partner to country B. If not, it is a violation of EU law, so there is no discussion about this. This is absolutely clear, and we do hesitate on this.¹⁷⁴

¹⁷² In Italy, the directive was implemented into Italian legislation with Legislative Decree n. 30 of February 6, 2007. In order to obtain permission to reside in Italy, an EU citizen or family member of an EU citizen must submit an application to the *Questura* (the general headquarters of the local police) of the province where the applicant is residing.

¹⁷³ For example, two women legally married in Spain may lose pension, inheritance, next-of-kin, and/or child custody rights when moving to Italy.

¹⁷⁴ Viviane Reding, European Parliament, Discrimination of same-sex married or in civil-partnership couples (debate), September 7, 2010, European Parliament (Strasbourg). A summary of the debate is available here:

In reality, however, this is not always been the case. Several EU member states discriminate against same-sex couples who want to move or travel within their country, and the failure to harmonize recognition of family relationships among member states has resulted in the attribution of different statuses of EU citizenship linked to sexual orientation. Same-sex couples continue to be denied the full benefits of EU citizenship. Instead of “unifying” Europeans, this creates division by separating people into different classes of citizenship.

An EU of "Rights"?

The ongoing battle underlying discussions about “rights” in the EU is one that must be resolved if further integration is to occur. At its heart, this battle is not only about what constitutes a "right" but also about where they come from, who holds them, who does not -- a battle whose outcome has important repercussions for notions of European citizenship and the project of European integration. This clash pits those who look to Europe as a potential world leader in the recognition of human rights and see these rights as originating in secular, human-made rules against those who envision a united Europe founded on its “Christian” roots and see “natural law” as the legitimate source of rights.

In their book, *Religious America, Secular Europe*, authors Peter Berger, Grace Davie, and Effie Fokas briefly talk about the notion of civil religion (2008). Civil religion has to do with the search for a core of values around which a nation-state can be created and sustained (Bellah 1967; Ferrari 2010). When a particular religion or culture is unable to fulfill the unifying role, civil religion steps in and offers a set of values, symbols and rituals upon which the social

<http://www.lgbt-ep.eu/press-releases/european-parliament-debates-recognition-of-same-sex-unions/>, accessed March 7, 2014.

cohesion of the nation can be constructed (Ferrari 2010). According to professor of law and religion Silvio Ferrari, “This cluster of historically rooted values and principles constitutes the framework within which national identity is redefined, thus allowing changes to take place without breaking too sharply from the past” (2010:750).

Professor of American Studies at the University of Copenhagen Helle Porsdam queries whether human rights can be molded into a common set of transcendent principles that can form the basis of a civil religion for Europe (2012). She notes that, for some time now, one can see an attempt to develop a European version of a specific U.S. discourse on human rights that Mary Ann Glendon referred to as "rights talk." Glendon's "rights talk" is a perspective on human rights that grants law the status of a civil religion of sorts (1991). According to Porsdam, the counter-argument to "rights talk" requires Europeans to forego the legal and cultural discourse of right as "trumps" and focus instead on political discourse about conflicting conceptions of “the good,” regardless of whether such conceptions are expressed in terms of "rights" (2003).

The current struggle over rights for same-sex couples in Italy is indicative of this critical deadlock in the project of European integration, the resolution of which will significantly influence the future personality of the European Union (EU). By contextualizing the struggle over recognition of rights within the project of European integration, I expose the larger battle within the EU over “rights” and their foundations. This battle pits the vision of a unified Europe based on its “Christian” roots against those who see the EU as a potential role model in the recognition of rights based on secular notions of social justice. This represents a shift from a previous conception of European integration in the context of rights that viewed market integration as a means of securing the welfare state, and the development of rights as a side effect of this process. Although this battle over “rights” and their foundations can be seen in

other areas as well (for example, the arguments surrounding the new Hungarian Constitution), the struggle over rights for same-sex couples in Italy highlights many of the salient issues at stake in the resolution of this conflict and is, therefore, worth consideration.

These values and principles serve to distinguish who belongs from who does not belong, and it is in this way that civil religion relates to citizenship. Civil religion works to demarcate “full” citizens from “legal” citizens: it is understood that “full” citizenship is more than a matter of status and rights. It requires shared values. As Ferrari states, “[B]eing a good citizen . . . entails sharing a common narrative, partaking in some foundational myths, and developing a sense of belonging, solidarity, and commitment” (2010:750). According to this view, rights and their underlying values are situated at the beginning of a much longer and complicated process of nation-building. It is, therefore, important to determine such matters from the outset of the process or risk running afoul of the goal (which in this case is unification).

This also holds for the building of an entity such as the EU. In the case of the EU, however, the establishment of a common set of values, symbols and rituals around which a cohesive citizenry can form has proven elusive. Anything akin to a “civil religion” of the EU is subject to contestation, thereby continuously shifting and evolving. As I will discuss in Chapter 7, the Roman Catholic Church (henceforth, Church) is a major proponent of the latter vision. The absence of a unifying civil religion in Europe creates a space in which the Church is also able to insert itself. In the debates surrounding recognition of rights for same-sex couples in Italy, one can see the waging of this much larger battle for the soul of Europe. As I will illustrate, it is through processes such as this struggle that a “European” identity is nourished or refuted, that European integration is furthered or mired. In the fight over rights for same-sex

couples in Italy, the persistent division between a secular notion of the origins of rights and the idea of a transcendental “God” as the source of rights is crystallized.

In the next chapter, I consider two European institutions in particular: the Council of Europe and its European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). Both are central to the EU and have played an important role in the recognition of rights on behalf of LGBTI persons in Europe. The ECJ is an institution of the EU; the Council of Europe is not. Through the jurisprudence of the European courts, one can see an attempt to bring disparate national laws into “harmony” and the development of a European policy with respect to treatment of same-sex couples. Again, as in the Italian situation, these processes are occurring in the courts and indicate unwillingness on the part of the law-makers to take charge and articulate a comprehensive framework.

Figures

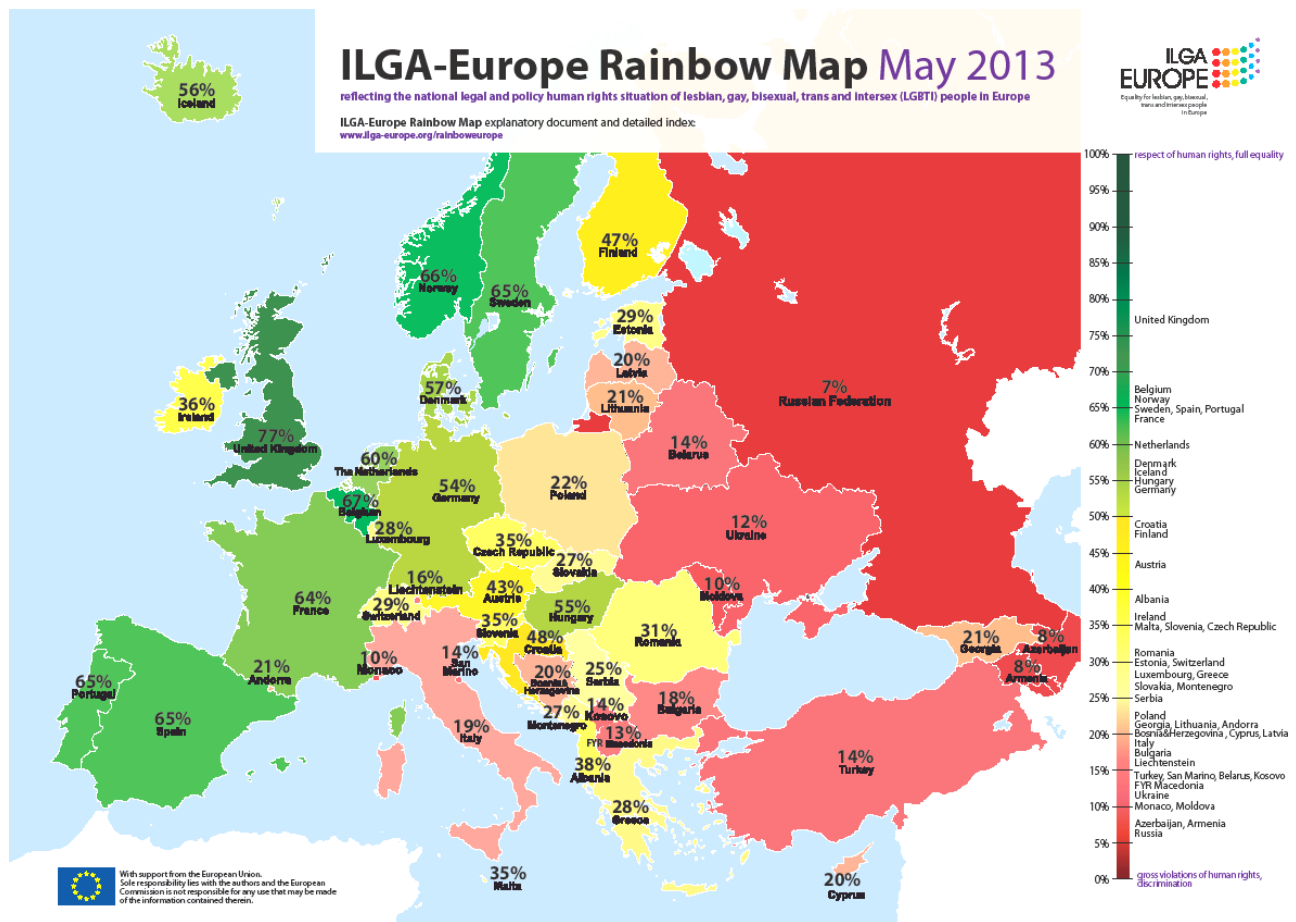


Figure 9. ILGA-Europe Rainbow Map, May 2013



Figure 10. Flag displays in Turin. (Author's photo, taken October 2, 2011.)



Figure 11. Signs outside *Officine Grandi Riparazioni "Fare Gli Italiani"* exhibit commemorating the 150 year anniversary of Italy's unification in Turin. (Author's photo, taken October 12, 2011.)

Table

EU Member State	Rainbow Europe, May 2011, Score	Rainbow Europe, May 2013
Austria	6	43%
Belgium	10	67%
Bulgaria	2	18%
Croatia	6	48%
Cyprus	-2	20%
Czech Republic	3	35%
Denmark	9	57%
Estonia	2	29%
Finland	6	47%
France	5	64%
Germany	10	54%
Greece	2	28%
Hungary	7	55%
Ireland	5	36%
Italy	0	19%
Latvia	0	20%
Lithuania	1	21%
Luxembourg	4	28%
Malta	0	35%
Netherlands	10	60%
Poland	1	22%
Portugal	10	65%
Romania	2	31%
Slovakia	1	27%
Slovenia	5	35%
Spain	12	65%
Sweden	10	65%
United Kingdom	12.5	77%

Table 1. Table showing Rainbow Europe Map scores for EU member states for years 2011 and 2013.

Chapter 6: The Council of Europe and the European Courts: Creating European Families

In the last chapter, I sought to distinguish between and parse out the roles played by Europe and the EU in advancing the recognition of rights for LGBTI persons in general and same-sex couples in particular. As I demonstrated, while Europe and the EU are often conflated, there are differences and these differences are important to understanding the legal framework that structures same-sex relationships throughout Europe. In this chapter I want to flip the inquiry to look at how Europe and the EU interrelate and influence one another in the articulation of this legal framework. More importantly, I will show how the European courts have and continue to influence the Italian courts in advancing rights for same-sex couples in Italy.

One of the points that I make in this chapter is that it is the European courts, more than any other European institutions, that have worked to advance the recognition of rights for same-sex couples throughout Europe and the EU.¹⁷⁵ Indeed, the Italian courts have relied extensively on the jurisprudence of the European courts to advance rights for same-sex couples in Italy. As I will illustrate, recent Italian court decisions commonly reflect the language and ideas of the European courts and demonstrate the relevance of European law to judicial decision-making in Italy.

As I broached in Chapter 1, there is something to be said about the practices, trends, and methodologies of legal anthropology and, to that end, this chapter is an anomaly of sorts. Unlike previous chapters where I have relied on ethnography and participant-observation to lend support to my claims, in this chapter I adopt an approach usually undertaken by legal scholars -- that is, doctrinal analysis. This is different from the customary anthropological approach to law, which

¹⁷⁵ By "European courts," I am referring specifically to the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) because these are the courts of relevance to the issue.

explores the social, political, economic, and intellectual context of enforceable norms (Moore 2005). From the lawyer's perspective, legal doctrine *is* the law. Comprised of judicial decisions that create rules or standards, legal doctrine is what is known as precedent. It "sets the terms for future resolution of cases in an area" (Tiller and Cross 2006:517). Doctrinal analysis seeks to explain, analyze, and criticize judicial decisions. For the most part, social scientists (including legal anthropologists) tend to ignore the importance of legal doctrine as conceptualized by lawyers (Tiller and Cross 2006).

In general, legal anthropologists attempt to explain the ordering of society and are likely to study a specific setting to find out about important issues such as "power, control and justice: who makes the rules, who can undo them, how they are normalized and enforced, and how they are morally justified" (Moore 2005:2). They also look outside the normative setting to see what the possibilities are for individual and group intervention. One of the ways legal anthropologists access this is by looking at "disputes," which provides a method for entering a contested arena and studying vast fields of action that are not amenable to direct observation (Moore 2001:95).¹⁷⁶ The status of the nation-state is a subject of particular interest to legal anthropologists today, and many contemporary studies reckon with transnational processes.¹⁷⁷ Up to this point, this is what I have tried to do. In what follows, I will look adopt the perspective of a legal scholar, tracing a series of judicial decisions from the European courts to the Italian courts in order to show how the European courts have influenced judicial decision-making in Italy.

In an essay published in *Anthropology News* entitled "Who is an Anthropologist," Professor Jane Desmond talks about her experiences as an "intellectual migrant" (2009:6). She

¹⁷⁶ E.g., Greenhouse (1986); Hirsch (1998); Lazarus-Black (1997); Merry (1990); Monahan and Just (2000).

¹⁷⁷ E.g., Coutin (2000); Merry (1992, 1997); Ong (1999).

argues for a future anthropology “that will proactively embrace cross-disciplinary interlocutors in the humanities, other social sciences, the arts, law and engineering” (Desmond 2009:6). One of the ways to do this is by building relationships and establishing partnerships with those in other intellectual arenas. Another way is by adopting suitable methodologies from other disciplines. I want to “push the envelope” here and borrow a method commonly embraced by legal scholars. I do this to supplement and “round out” my analysis of the struggle over recognition of rights for same-sex couples in Italy.

In 1994, legal anthropologist Annelise Riles critiqued the rigid opposition between the disciplines of law and anthropology in a piece titled “Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity.” In this article, Riles suggests that lawyers and anthropologists have learned little from each other, and that there is a sense of ambivalence among legal anthropologists with respect to the terrain they share with lawyers (1994:650). She concludes that the contribution of interdisciplinary scholarship to legal studies lies in its exposé of the tension between normative and reflexive approaches to legal problems (Riles 1994). My goal here is not to expose this underlying tension so much as to reckon with the normative aspects of my project. Many legal anthropologists have studied relationships between language and law (e.g., Conley and O’Barr [1990, 1998]; Mertz [1988, 1992]), but few take the time to confront the normative aspects of judicial decision-making by systematically analyzing how one court decision influences another, especially in a transnational perspective. In a study dealing with the ways in which the EU influences the judicial recognition of rights for same-sex couples in Italy, I would be remiss if I did not show how the case law has developed over time in Italy, and how it has been directly influenced by the legal doctrine of the European courts. I see this as an important piece of evidence.

I will begin this chapter with a general discussion regarding family law in Europe. I offer a brief history of efforts at family law reform in the EU and a statement of the current legal situation in terms of the relationship between the EU and its member states. While there have been attempts to “harmonize” the family law of the member states, to date such efforts have made little progress. The EU continues to invoke notions of subsidiarity to declare family law a matter best left to the discretion of the member states. This is problematic as it affects the free movement of European citizens and their “family” members, and creates disparate categories of EU citizenship that privilege traditional hetero-normative families and all-too-often disenfranchise so-called alternative families.

Despite the fact that the EU has been unwilling to *directly* involve itself in the formulation and implementation of a supranational family law, through piecemeal legislation and the activities of the CJEU and the ECtHR, the EU is increasingly embroiled in the national family laws of its member states. This frequently occurs *in addition to* the opportunities created in member states such as Italy where, as we saw in Chapter 4, the courts have taken it upon themselves to adopt creative solutions to the potentially problematic legal situations that arise due to differences between national law and EU law, especially with respect to the free movement provisions. Through the jurisprudence of the ECtHR and the CJEU, one can see the emergence of a “European family law” in the area of rights for same-sex couples.

The ECtHR is part of the Council of Europe. In order to properly situate the ECtHR, I will begin the following section with a discussion regarding the Council of Europe, its relationship to the EU, and some of its pertinent activities with respect to LGBTI persons. Although the ECtHR is not an institution of the EU, its decisions are binding on the EU member states, all of which are signatories to the European Convention on Human Rights. For this

reason, I will conduct a doctrinal analysis of recent case law from the ECtHR dealing with relationships between same-sex couples. The current trajectory of ECtHR case law shows that, as rights increasingly attach to opposite-sex unmarried couples, it is unlikely that the state will be able to deny those same rights to same-sex couples in Europe. This trend shows that, over time, same-sex couples can expect the ECtHR to function as an ally in the assertion of their rights. The particular relationship between the ECtHR and the EU will also be elaborated in this section dealing with the ECtHR.

In the last section of this chapter I will discuss the CJEU and the recent spate of jurisprudence emanating from the Court with respect to same-sex couples. I will relate this to ECtHR case law and show how the recent CJEU trajectory demonstrates an expansive understanding regarding the rights that attach to same-sex couples living together in legally recognized relationships other than marriage. While, according to ECtHR and CJEU jurisprudence, it is up to the member states to determine whether to provide legal recognition to same sex couples, once the state decides to do this, a panoply of rights attaches to the legal institution. If the member state, as in the case of Italy, refuses to grant recognition such rights do not necessarily attach. Nevertheless, CJEU case law has influenced Italian case law in this area. The finding by the Court of Appeals of Milan that the cohabitating same-sex partner of a beneficiary of a mutual fund could not be denied benefits (discussed in more detail in Chapters 2 and 4) is reminiscent of the recent line of CJEU cases in its treatment of same-sex couples as comparable to married couples.

A Family Law for the EU?

As people move around more, the potential for international relationships or marriages increases and this creates a need for harmonization of the laws governing these relationships

among member states. Within the EU, however, there is a notion that family law in general and the regulation of marriage in particular is something that is to be left to the discretion of the member states. As the EU has become increasingly integrated and EU citizens have become more mobile, this has led to all sorts of problems in the area of family law, including issues concerning the recognition of same-sex marriage, spousal maintenance, child support, parental responsibilities, divorce, and inheritance. And while the European Council of Ministers is empowered to pass regulations requiring cross-state recognition of marriages, it has yet to do so (Weiss 2007).

As it stands today in Europe, and more specifically in the EU, family law is a matter that is left to the nation-state. The EU can only make laws in areas where the treaties give it the specific competence to do so, and it has no specific competence to make laws regulating divorce, maintenance, or parental responsibility. Problems arise when the parties are not living in the same country or are not nationals of the same country. When this happens, it is not always clear which country's courts should make the decisions, which country's laws should apply, nor how a decision made in one country can be implemented in another. To further complicate matters, each country has its own rules about how this conflict of laws should be dealt with. These problems are not particular to the EU and fall within the domain of private international law.¹⁷⁸ Private international law encompasses the interrelated areas of jurisdiction, applicable law, and recognition and enforcement of decisions.

Fortunately, the EU does have competence to promote judicial cooperation in civil matters which have cross-border implications, and has enacted a number of regulations dealing

¹⁷⁸ These types of conflicts are also common in the United States, where family law is generally a matter left for the states.

with judicial cooperation in civil matters. In general, these regulations are based on the principle of mutual recognition, which is a fancy way of saying that decisions that are lawfully made in one member state should be recognized and enforced in other member states and that the procedures for accomplishing this should be as simple as possible. So, while there is no unified family law in the EU, the EU does have an interest in making sure that decisions made in one country can be implemented in another, and in determining which country has jurisdiction to hear a particular case. Since 2001, the EU has had rules in effect that govern the enforcement of matrimonial orders (i.e., divorce, separation, and annulment) and parental responsibility (mainly custody and access).

In fact, it can be argued that there has been an increased unification at the EU-level of rules governing conflicts of laws in family matters. However, although there may be increasing unification at the level of conflicts-of-laws, the same is not true for the substantive family law of the member states. At the EU level, there is no standard legal definition of "family" or "marriage." It is, therefore, within the discretion of the hosting member state to decide whether a same-sex marriage is recognized as "marriage" in that state.

While at the present moment, there is no unified EU family law, there is a movement to "harmonize" the family laws of EU member states. Over the past two decades, various political, professional and academic groups have been pushing for the development of a European Civil Code.¹⁷⁹ Those who advocate this position believe that the creation of a common European legal

¹⁷⁹ E.g., Resolution [of the European Parliament] on Action to Bring into Line the Private Law of the Member States, Off J EC 1989 C158/400 (May 26, 1989); Resolution [of the European Parliament] on the Harmonization of Certain Sectors of the Private Law of the Member States, Off J EC 1994 C205/518 (May 6, 1994). Both resolutions call for a "European Code of Private Law." See also Boele-Woelki (2005); Hartkamp et. al. (1994); Lando (1992); Smits (1998).

culture through a shared code in the areas of private law represents one of the last barriers to the realization of a common European identity (Boele-Woelki 2005; Marella 2006; Smits 1998).¹⁸⁰ There is also discernible “top down” pressure at the European level to harmonize the respective national family laws of the EU member states. The European Parliament has vocalized its support for a code of private law and there is growing concern within the Council that differences in family law between member states undermine the free movement of persons (Boele-Woelki 2005; Bradley 2004).

In 2001, a group of self-appointed scholars and experts on European family law from various EU member states got together and established the Commission on European Family Law (CEFL). One of the main reasons or justifications for the CEFL project is that laws regulating domestic relationships are a major component of political economy. Family law complements taxation, social and labor market policies, and therefore has implications for income and class equality. The main goal of the CEFL is to develop Principles of European Family Law that will establish the most suitable means for the harmonization of family law within Europe.¹⁸¹ What this means is that the CEFL is looking at the existing family laws of the EU member states and trying to identify a “common core” of legal policy among them and to suggest models of a “better” family law. This is a purely academic initiative and the CEFL has no recognized authority.

¹⁸⁰ Private law is that part of the law that deals with relationships between individuals and includes (for example) family law, contract law, torts, and property law. It is distinguished from public law which governs relationships between individuals and the state and includes constitutional law, criminal law, and administrative law.

¹⁸¹ Harmonization is not the same as “unification,” and refers only to reducing the differences between provisions, thereby making them more similar and therefore more compatible.

So far, the CEFL project has been very slow moving and it seems to take around 5-6 years to develop each set of principles. In December 2004, CEFL published its first and second sets of principles regarding divorce and maintenance between former spouses. The principles developed by CEFL were based on responses to a questionnaire submitted by family law experts in the respective member states. CEFL used these responses to prepare twenty-two national reports that set forth the laws governing divorce and maintenance as they existed in 2002, and then used this comparative material to formulate its principles for a harmonized family law in the areas of divorce and maintenance. On the basis of national reports, CEFL presented its third set of principles dealing with parental responsibilities in 2007, and a fourth set on property relations between spouses in 2013.

CEFL hosts a conference approximately every two years. I was able to attend its fourth conference "Commission on European Family Law: The Future of Family Property in Europe," which was held at Cambridge University in April 2010. The conference was designed to foster the exchange of ideas about international and comparative family law in Europe, and was well-attended by academics and practitioners from throughout Europe and elsewhere, including several academics from U.S. law schools. One issue that came up during the conference was the purely academic nature of the CEFL project.

During a panel presentation on the initial results of the CEFL project, one of the conference participants asked the panel to comment on the chances of implementation. The conference participant wanted to know whether CEFL was looking at the cultural acceptability of the principles being proposed. The point the conference participant was trying to make is that implementation requires consent and that this requires people to "buy into" the proposed principles. There was much hemming and hawing as the panel participants passed the

microphone down the line. No one wanted to answer this question and the microphone ended up with the CEFL Chair, Professor Katharina Boele-Woelki. An audible murmur went through the audience when she admitted that the CEFL project was a purely academic venture and that CEFL had not and did not intend to explore the sociological implications of the proposed principles.

The CEFL project largely ignores the wider historical, political, and social settings in which a nation's family law is embedded (see e.g., Jeppesen-de Boer 2008; Antokolskaia, ed. 2007; Boele-Woelki, et. al. 2007; 2004; Marella 2006; Antokolskaia 2003). By focusing on the law as something that is written and able to be universally transplanted into the respective EU member states, the CEFL project overlooks the cultural power of law by ignoring its capacity “to produce meanings, shape identities, and define relationships in the context of state power” (Goldstein 2003:23). Further, because the principles formulated by the CEFL are of an academic nature and not grounded in historical or ethnographic detail, it is likely that they will prove difficult to implement in a country such as Italy, where vital and organized resistance to change continues to thwart legislative efforts to change the law. So far, there is little evidence that the development of these principles is having any real effect on the family laws of the member states.

As noted in chapter 3, family law plays a special role in establishing and reinforcing a particular vision of the social order (Bradley 2004). At the present moment, the absence of a harmonized EU family law presents an obstacle to the formation of a unified legal space and the creation of a common European identity (Boele-Woelki 2005; Bradley 2004). Boele-Woelki argues:

Family law touches upon the very essence of people's daily lives as no other field of law does. The large-scale differences between the national legal systems within a Europe

without frontiers constitute a serious impediment to attaining a common European identity in the form of a European citizenship. It is generally acknowledged that to date in cross-border situations people cannot rely on the continuity of their family relationships when changing residence (2005:161).

This is especially true in the case of same-sex relationships, where differences between the national legal systems create barriers to the attainment of a common European identity in the form of European citizenship. The failure to harmonize recognition of family relationships among member states results in the attribution of different statuses of EU citizenship linked to sexual orientation and gender identity, and same-sex couples are all too frequently denied the full benefits of EU citizenship. Given the reluctance of lawmakers to develop a harmonized family law, persons living in the EU are forced to look to the European courts to resolve family law disputes with cross-border implications.

The Council of Europe

The Council of Europe is often confused with the European Council and the Council of the European Union. The European Council is made up of the heads of state or government of the member states along with its president and the president of the EU Commission. It is the institution responsible for defining the general political direction and priorities of the EU, and does not have a legislative function. By contrast, the Council of the European Union, also informally known as the EU Council, is the EU institution where the member states' governmental representatives (i.e., the ministers of each member state responsible for a given area) meet to adopt laws and coordinate policies. The frequency and composition of the Council of the European Union meetings vary depending on the issues under consideration. Although

there is overlap, the Council of Europe is not a body of the EU.¹⁸² What leads to confusion, perhaps, is the fact that the Council of Europe shares certain symbols, such as the flag and the anthem, with the EU.

The Council of Europe is an international organization headquartered in Strasbourg, France, with the goal of promoting cooperation among all European countries in the areas of legal standards, human rights, democratic development, the rule of law, and cultural cooperation. Founded in 1949, it now has 47 member states, which include all of the 28 EU member states.¹⁸³ The Council of Europe has no law-making authority but can and does make use of standards, charters, and conventions to facilitate its work.

The most well-known institutions of the Council of Europe are the ECtHR, which enforces the European Convention on Human Rights (ECHR), and the European Pharmacopoeia Commission, which is responsible for setting quality standards for pharmaceutical products in Europe. The Council of Europe's statutory bodies include the Committee of Ministers, which consists of the foreign ministers of each member state, the Parliamentary Assembly, which is made up of MPs from the parliament of each member state, and the Secretary General, who is in charge of the secretariat of the Council of Europe. Finally, the Commissioner for Human Rights is an independent institution situated within the Council of Europe tasked with promoting awareness of and respect for human rights in member states.

¹⁸² It is also separate and distinct from the International Court of Justice, which is a judicial body of the United Nations and is located in The Hague.

¹⁸³ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, United Kingdom

The Council of Europe has been proactive in monitoring the human rights situation of LGBTI persons throughout its member states. In 2011, the Commissioner for Human Rights published a comprehensive report based on the largest study to date regarding homophobia, transphobia, and discrimination on the grounds of sexual orientation and gender identity in the 47 member states of the Council of Europe.¹⁸⁴ The report, which is intended as a resource for dialogue with and between governmental authorities and other stakeholders, contains a socio-legal analysis of the situation of LGBTI persons in the Council of Europe member states. It is based on data and information made available by public authorities, national human rights agencies, non-governmental organizations (NGOs) and academic experts in the member states. Representatives from the Council of Europe disseminated copies of the report (in both print and USB formats) at the ILGA-Europe Annual Meeting in Turin, and held a special workshop to present the report and explore how it could be used by ILGA-Europe and other human rights and civil society organizations to achieve the recommendations set forth in the report.

In 2010, prior to the release of the Commissioner's report, the Committee of Ministers of the Council of Europe adopted the first ever international instrument dealing specifically with LGBTI issues: Committee of Ministers Recommendation (2010) 5 (CM/Rec(2010)5). The recommendation sets forth a range of measures to be undertaken by the member states to combat discrimination on the grounds of sexual orientation and gender identity. According to the general statement that corresponds with CM/Rec(2010)5 on the Council of Europe's website: "The purpose [of the recommendation] is not to create new rights, but to ensure that every person enjoys equal rights and dignity. CM/Rec(2010)5 affirms the principle that 'neither cultural,

¹⁸⁴ Commissioner for Human Rights, 2011, "Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe." Strasbourg, France: Council of Europe Publishing.

traditional nor religious values, nor the rules of a "dominant culture" can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity."¹⁸⁵ Of note in CM/Rec(2010)5 are the following specific recommendations related to right to respect for private and family life:

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

26. Taking into account that the child's best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a

¹⁸⁵ See Council of Europe website, Democracy, "Combating Discrimination on the Grounds of Sexual Discrimination or Gender Identity," http://www.coe.int/t/dg4/lgbt/default_EN.asp, accessed March 7, 2014.

child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.

27. Taking into account that the child's best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.

28. Where national law permits assisted reproductive treatment for single women, member states should seek to ensure access to such treatment without discrimination on grounds of sexual orientation.

Thus, while the recommendation stops far short of calling for marriage equality, it does ask member states to consider providing a means for same-sex couples to give legal order to their family lives, and includes consideration of the specific situation of same-sex families with children.

The European Court of Human Rights

The Relationship of the ECtHR to the EU

The most significant way that the Council of Europe influences the struggle for recognition of rights on behalf of same-sex couples in Italy and the rest of its member states is through the judgments of the ECtHR. As mentioned above, the ECtHR is the enforcement body of the ECHR, which offers protection of fundamental civil and political rights. Individuals who believe their rights have been violated in a member state can bring their case before the ECtHR upon exhaustion of domestic remedies. Although all of the EU member states are also parties to the ECHR, at the present time, the EU is not. The EU is, however, legally obligated under the

Treaty of Lisbon, which entered into force on December 1, 2009, to accede to the ECHR. This means that (for the moment) the ECHR and its judicial mechanism do not formally apply to acts undertaken by the EU. Proponents of the EU's accession to the ECHR believe that it will strengthen the protection of human rights in Europe by subjugating the EU's legal system to independent external control and by closing gaps in legal protection by giving European citizens the same protection against acts of the EU as they now enjoy from member states. In the interim, the member states of the EU, because they are parties to the Convention, are obligated to conform to the ECHR *even when they are applying or implementing EU law*.

Certain aspects of the EU's accession to the ECHR are complicated. For example, to ensure the proper functioning of the EU's judicial system (and to comply with the principle of subsidiarity inherent in the ECHR) requires a mechanism empowering the CJEU to hear and deal with questions concerning the validity of an EU act before the matter is brought before the ECtHR.¹⁸⁶ Nevertheless, as can and will be seen through its case law (discussed below), the CJEU habitually applies the ECHR and refers to the case law of the ECtHR in its decisions.

The ECHR and LGBTI Rights

The provisions of the ECHR that are most frequently invoked by LGBTI litigants to assert rights are Articles 8, 12 and 14, which provide as follows:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

¹⁸⁶ I.e., the idea that political power should be exercised by the smallest or least central unit of government – in this case that certain matters are best left to the member states.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 – Right to marry and found a family

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14 – Prohibition against discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Recognizing Same-Sex Couples as "Families": *Schalk and Kopf v. Austria*

The ECtHR's most notable case to date regarding the rights of same-sex couples is *Schalk and Kopf v. Austria*, which was decided on June 24, 2010. In the *Schalk and Kopf* case, the applicants were a same-sex couple in a stable partnership living in Vienna. In September 2002, they requested permission to marry from the Austrian authorities. Their request was denied by the Vienna Municipal Office, which took the position that marriage could only be contracted between two persons of the opposite sex. This position was upheld by the Austrian courts. After their case was dismissed by the Austrian Constitutional Court, the couple lodged an application with the ECtHR on August 5, 2004. In their complaint, the applicants argued that the refusal of the authorities to allow them to marry violated ECHR Article 12. In addition, relying on Article

14 in conjunction with Article 8, they asserted that they were discriminated against due to their sexual orientation because they did not have the right to marry and had no other possibility for having their relationship recognized under the law.

Before the case was heard by the ECtHR, the Registered Partnership Act entered into force in Austria, on January 1, 2010. The act provided same-sex couples with a formal mechanism for giving recognition and legal effect to their relationships. Many of the same rights and duties granted to married couples were extended to registered partners, but substantial differences remained. For example, registered partners are not allowed to adopt children. In addition, step-child adoption and artificial insemination are available only to married couples.

In its decision, the ECtHR first considered whether the right to marry granted to "men and women" under Article 12 of the ECHR *could* be applied to same-sex couples. The ECtHR found that the procreation of children is no longer a decisive element of civil marriage and considered that in another case it had held that the inability to conceive a child could not in itself remove the right to marry. The Court observed that, looked at in isolation, the wording of Article 12 does not prohibit marriage between two men or two women. However, when Article 12 is juxtaposed with other provisions of the ECHR, which grant rights and freedoms to "everyone" and state that "no one" is subject to certain types of prohibited treatment, the choice of wording in Article 12 must be regarded as deliberate, especially when one considers the historical context in which the ECHR was adopted (i.e., the 1950s, when marriage was understood in the so-called "traditional" sense of being between a man and a woman). The fact that the case law of the Court requires that the ECHR be interpreted in light of present day conditions was not enough, however, to save the applicants' claim. The ECtHR noted that, while there had been major social changes, among the Council of Europe member states there was no

consensus regarding same-sex marriage, and found that *present-day conditions* did not permit the conclusion that Article 12 should be interpreted as requiring member states to provide access to marriage for same-sex couples:

[I]t cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.

In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society. *Schalk and Kopf v. Austria* (ECtHR 30141/04 June 24, 2010), ¶¶ 61 and 62.¹⁸⁷

The Court also considered whether there was a violation of Article 14 in conjunction with Article 8. The Court noted that it has been established in case law that in order for there to be a violation of Article 14, there must be a difference in the treatment of person "in relevantly similar" situations, and that the difference in treatment is deemed discriminatory if it has no "objective and reasonable" justification. The Court first addressed the issue of whether same-sex relationships like that of the applicants' fell within the notion of "private life" and constituted "family life" within the meaning of Article 8. Because over the past decade there had been a rapid evolution of social attitudes toward same-sex couples and because a considerable number

¹⁸⁷ It is worth noting that the ECtHR referenced Article 9 of the Charter of Fundamental Rights of the European Union in its argumentation as support for the proposition that the right to marry protected in Article 12 of the ECHR is not necessarily limited to marriage between two persons of the opposite sex: "*Regard being had to Article 9 of the Charter*, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex."

of member states now granted such couples legal recognition, the Court concluded that the applicants' relationship fell within the notion of "family life." In previous cases, the ECtHR had held repeatedly that particularly serious reasons were required to justify different treatment based on sexual orientation. However, reading the ECHR as a whole, and considering the conclusion the Court had just reached that Article 12 did not require member states to grant same-sex couples the right to marry, the Court was unable to agree with applicants' position that such an obligation could be derived from Article 14 taken in conjunction with Article 8.

The Court considered the effects of the entry into force of the Registered Partnership Act in Austria, observing that the new act gave applicants the right to have their relationship formally recognized. The Court determined that it was not up to it to decide whether the lack of *any* means for legal recognition for same-sex couples (as is the case in Italy) would violate Article 14 taken in conjunction with Article 8. Further, the Court was not persuaded by the argument that if a State chose to provide legal recognition to same-sex couples, it was obligated to confer a status on them which corresponded to marriage in every respect. Although there were substantial differences between the Registered Partnership Act and marriage law in Austria, this corresponded to the trend in other member states and the Court did not have to examine each of these differences in detail. In light of these findings, the Court concluded (by a margin of four votes to three) that there was no violation of Article 14 taken in conjunction with Article 8.

While the results were disappointing to LGBTI activists fighting for marriage equality in Europe (including in Italy, where the results of the decision were discussed in detail at the *Certi Diritti* 4th Annual Congress held in Rome in November 2010), this was the first time that the ECtHR referred to same-sex unions as "families" in reference to Article 8. The decision therefore represented an important shift in the Court's reasoning. In addition, the ECtHR did not

foreclose the possibility of marriage equality in the future, stating that it "would no longer consider that the right to marry enshrined in Article 12 [of the ECHR] must in all circumstances be limited to marriage between two persons of the opposite sex." Although to date the ECtHR continues to refuse to recognize a right to marry on behalf of same-sex couples, in subsequent cases, the Court has found discrimination where same-sex couples are treated differently than similarly situated unmarried couples. This has led to some interesting results, which I will discuss below after a brief reconsideration of the Italian Court of Cassation case (n. 4184/2012). In the Italian Court of Cassation case, we see a direct link to the ECtHR's decision in *Schalk and Kopf*.

Schalk and Kopf Speaks to the Italian Court of Cassation

As noted in Chapter 4, in articulating its argument, the Italian Court of Cassation mobilized European law in significant ways, making extensive references to the European Court of Human Rights (ECtHR) case law, the Charter of Fundamental Rights of the European Union (CFREU), and to the European Convention on Human Rights (ECHR). *Schalk and Kopf v. Austria* played an integral role in the Court of Cassation's decision. As in *Schalk and Kopf*, the Italian case involved a same-sex couple who was refused registration of their marriage by Italian authorities and appealed. Although in *Schalk and Kopf* the ECtHR ultimately rejects the appeal and finds that marriage regulation is to be left to the member states, the European judges pave the way for the Italian Court of Cassation to find in favor of the existence and validity of same-sex marriages and make it possible for the Italian court to affirm that same-sex relationships fall within the notion of "family life."

To begin, *Schalk and Kopf v. Austria* makes it possible for the Italian Court of Cassation to read Article 12 of the ECHR as recognizing that the "right to marry" includes the "right for

same-sex couples to marry" (4184/2012:64). With respect to Article 14 of the ECHR, the ECtHR for the first time finds that same-sex marriages fall within the notion of "family life," making it conceivable for the Italian judges to interpret *Schalk and Kopf* as doing away with heterosexuality as a necessary condition of marriage. In this way, *Schalk and Kopf* generates the *possibility* of same-sex marriage in Italy. In its statements, the Court of Cassation goes well beyond what the EU provisions and jurisprudence require. In fact, in its interpretation of *Schalk and Kopf*, the Court of Cassation arguably calls into question Article 12 of the ECHR and Article 9 of the Charter of Fundamental Rights of the European Union (CFREU), both of which establish that marriage is to be regulated by national laws.

In its invocation of *Schalk and Kopf* the Italian Court of Cassation looks to "Europe" as a place of sexual emancipation and the locus of recognition for same-sex couples and, in doing so, the Court conflates "Europe" with certain European countries that denote a more progressive stance toward same-sex couples. This conflation is necessary to sustain its position. After all, if one considers "Europe" (or even the member states of the Council of Europe), there are many places like Italy that exist on the so-called periphery and cannot be said to embrace the recognition of rights for same-sex couples. One only has to look to Russia and its "anti-gay propaganda" law for an acute example. Although the Court of Cassation arguably over-infuses the *Schalk and Kopf* case with meaning, its decision to treat similarly-situated same-sex couples the same as married couples in certain circumstances is in line with subsequent ECtHR jurisprudence recognizing rights on behalf of same-sex couples.

Recent Case Law from the ECtHR

In *Gas and Dubois v. France* (ECtHR, Application No. 25951/07 March 15, 2012), two women who were living together in a stable relationship applied for a simple adoption order,

which would have allowed the non-biological parent to establish a second legal parent-child relationship in addition to the original parent-child relationship based on blood ties between the child and the child's mother. At the time of the application, simple adoption was open only to married couples and the French authorities denied the application. In finding no violation of Article 14 taken in conjunction with Article 8, the ECtHR maintained that the applicants' legal situation was not akin to that of married couples. In addition, it saw no evidence of discrimination based on sexual orientation because unmarried opposite-sex couples who had entered into a civil partnership were similarly prohibited from obtaining a simple adoption order.

In a factually similar case decided approximately one year after *Gas and Dubois v. France*, the ECtHR *did* find discrimination. In *X and Others v. Austria* (ECtHR, Application No. 19010/07 February 19, 2013), two women who lived together in a stable relationship applied for a second-parent adoption order, which would allow one of the partners to adopt the son of the other partner without severing the mother's legal ties with the child. The Austrian authorities refused and the women filed an application with the ECtHR, asserting a violation of Article 14 in conjunction with Article 8 and complaining that there was no reasonable and objective justification for allowing the adoption of one partner's child by the other partner in the case of opposite-sex couples (whether married or unmarried) while prohibiting second-parent adoption in the case of same-sex couples. The ECtHR agreed, holding that the Convention was violated on account of the difference in treatment of the applicants in comparison with unmarried opposite-sex couples. This was because the difference in treatment (between unmarried same-sex and opposite-sex couples) was based on sexual orientation, and the Austrian authorities had not presented convincing reasons to show that the difference in treatment was necessary for the protection of the family or the protection of the child's interests. The ECtHR reiterated that the

ECHR does not oblige states to extend the right to second-parent adoption to unmarried couples and distinguished the case from *Gas and Dubois v. France*. What both *Gas and Dubois v. France* and *X and Others v. Austria* make clear, however, is the fact that, once the state opens adoption, second-parent adoption, or any similar right to opposite-sex unmarried couples, it is unlikely that the state will be able to deny that same right to same-sex couples. Indeed, this has been the trend in subsequent cases.

Joint cases that deserve mention because they clearly demonstrate this new direction undertaken by the ECtHR are *Vallianatos and Mylonas v. Greece* (ECtHR, Application No. 29381/09 July 11, 2013) and *C.S. and Others v. Greece* (ECtHR, Application No. 32684/09 July 11, 2013). In those cases, the ECtHR determined that Greece violated the ECHR when it excluded same-sex couples from a "civil union" law that created an alternative legal form of recognition for opposite-sex couples. According to the position taken by the Greek authorities, the law had been enacted to protect women and their children born within cohabiting unions. It was intended to allow couples to register their relationship within a more flexible arrangement than that provided by marriage and was needed to assist women and their children who had been left without support after substantial periods of cohabitation and to deal with the social reality of single-parent families in general. In a Grand Chamber decision, the majority of judges (16 to 1) determined that same-sex couples should have the same access to civil unions as opposite-sex couples. The ECtHR observed that "same-sex couples are just as capable as different-sex couples of entering into stable committed relationships" and that they had "the same needs in terms of mutual support and assistance as different-sex couples." The Court also observed that "a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships." This trend is especially visible in the EU member states.

As noted in Chapter 5, ten European countries recognize marriage equality and, of these, eight are EU member states. An additional thirteen European countries recognize some form of civil union or unregistered partnership, of which ten are EU member states. This indicates that in the push for recognition of rights for same-sex couples, it is the EU rather than Europe in general that is leading the way. However, when it comes to the work of the judiciary and the development of case law, it is evident that the ECtHR has taken the lead and that the CJEU has adopted a more conservative approach to the recognition of rights for same-sex couples. In fact, in terms of recognition of rights on behalf of LGBTI persons in Europe, it can be argued that the CJEU will not act unless the ECtHR has already taken action to provide some protection (Wintemute 2011).

Robert Wintemute is a professor of human rights law at King's College London School of Law. In a summary of the case law of the ECtHR and ECJ regarding sexual orientation and gender identity discrimination, he offers several examples that support his position that the CJEU relies on the ECtHR to take action before providing recognition of rights (Wintemute 2011). For example, Wintemute shows that *P. v. S. and Cornwall County Council* (ECJ Case C-13/94 April 30, 1996), a case involving the dismissal of transsexual employee where the ECJ found that there had been sex discrimination, was made possible by *B. v. France* (ECtHR, no. 13343/87 March 25, 1992). In *B. v. France*, a male-to-female transsexual complained regarding the French authorities' refusal to amend the civil status register in accordance with her wishes. She argued that French authorities were required to change her legal sex on her birth certificate. The ECtHR agreed, and concluded for the first time that there had been a violation of ECHR Article 8 (right to respect for private and family life). The Advocate General in the *P.* case cited to *B. v. France*

in support of its position that the transsexual employee had been discriminated against and the ECJ agreed.

Another example offered by Wintemute is the case of *K.B. v. National Health Service Pensions Agency* (ECJ Case C-117/01 Jan. 7, 2004), which involved the denial of a survivor's benefit to the transsexual male partner of a non-transsexual female employee. The Pensions Agency asserted that it was not obliged to pay the survivor's benefit because the couple was not married. The ECJ found the agency's determination of ineligibility invalid. Because the couple was not legally able to marry, the denial of the survivor's benefit to the employee's partner constituted sex discrimination in violation of Article 141 of the EC Treaty. According to Wintemute, this decision was made possible by the ECtHR decision in *Christine Goodwin v. the United Kingdom* (ECtHR, Application No. 28957/95 July 1, 2002). In *Christine Goodwin*, the ECtHR found a violation of ECHR Article 8 (right to respect for private and family life) and Article 12 (right to marry and found a family) after the applicant complained about the lack of legal recognition of her changed gender.¹⁸⁸

Wintemute also offers examples of cases where the CJEU has demonstrated an unwillingness to recognize rights in the face of ECtHR inaction. In *Grant v. South-West Trains* (ECJ Case C-249/96 Feb. 17, 1998), the ECJ found that there had been no sex discrimination in a case where an employment benefit was denied to a female employee's unmarried female partner but a male employee's unmarried female partner qualified for that same benefit. Similarly, in *D. & Sweden v. Council* (ECJ C-122/99 and C-125/99 May 31, 2001), the ECJ found that the failure

¹⁸⁸ Another ECJ case cited by Wintemute that was made possible by *Christine Goodwin* is *Richards v. Secretary of State for Work and Pensions* (ECJ Case C-423/04 April 27, 2006). In the *Richards* case, the court found that EU Council Directive 79/7/EEC requires that a post-operative transsexual woman be granted a retirement pension at 60, like other women, not 65, as in the case of men.

to treat a Swedish registered partnership as equivalent to civil marriage for the purpose of an employment benefit was neither sex nor sexual orientation discrimination. The claim failed because there was not yet any favorable case law on couples that are factually and legally same-sex (as in, where neither partner has undergone gender reassignment).

The Court of Justice of the European Union

The CJEU is located in Luxembourg and is the EU institution that encompasses the entire judiciary. Its purpose is to make sure that "the law is observed" "in the interpretation and application" of the [EU] Treaties. The CJEU reviews the legality of acts undertaken by EU institutions, makes sure that member states comply with their treaty obligations, and interprets EU law at the request of the national courts and tribunals of the member states. It is comprised of two major courts, the European Court of Justice (ECJ) (established in 1952) and the General Court (established in 1988), as well as a number of specialized courts.¹⁸⁹ The specialized courts are set up as needed to deal with specific areas and hear and determine cases at first instance. The decisions of the specialized courts can be appealed to the General Court. Judges who preside over these cases are appointed by the Council, acting unanimously. The General Court, formerly known as the Court of First Instance, is an independent court attached to the ECJ. It is responsible for hearing actions taken against EU institutions by individuals and member states, although certain matters are reserved for the ECJ. Decisions of the General Court can be appealed to the ECJ, but only with respect to points of law. The General Court is made up of at

¹⁸⁹ Another integral part of the CJEU is the European Union Civil Service Tribunal, which rules on matters arising from conflicts between the EU institutions and their official or other civil servants.

least one judge from each member state, and a registrar. The judges are appointed for a term of six years that is renewable by agreement of the governments of the member states.

The supreme court of the European Union is the European Court of Justice (ECJ), and is made up of one judge from each member state who is appointed by consensus of the governments of the member states for a term of six years. In reality, ECJ and General Court judges are now appointed after consultation with a panel whose responsibility is to provide an opinion on each candidate's fitness to perform the duties of judge. The panel is comprised of seven persons selected from among former members of the two Courts, members of national supreme courts, and lawyers of recognized competence, one of whom is proposed by the European Parliament.

The ECJ is an important unifier in the articulation of a common legal framework for the EU. In a community made up of 28 member states it is likely that the rules adopted by EU decision-making bodies will be interpreted and applied differently if left solely to the devices of the national courts of the member states. For this reason, it is the general task of the ECJ and the General Court to make sure the EU law is observed in a uniform manner in the interpretation and application of the treaties, directives, and regulations. Although in theory EU law is a statutory law passed by legislative bodies, these laws are often elaborated or amended according to ECJ case law. The ECJ has played and continues to play an important role in European integration processes (Alter 1996; Dehousse 1998; Starr-Deelen and Deelen 1996; Stone Sweet 2004).

In addition to providing a coherent and uniform interpretation of EU law, the ECJ makes certain that member states and their citizens comply with EU law. While national governments may prefer to interpret EU law in the interest of their own nation, the fact remains that many EU laws are simply new and unknown. In these cases, the national judges, who are the judges of

first instance in cases involving rules and actions relative to EU law, may refer to the ECJ for a preliminary ruling, asking the ECJ to adopt a position on the interpretation or evaluation of the validity of an EU provision (TFEU Article 267). In its issuance of preliminary rulings, the ECJ's opinions are binding on the parties. The referral process stimulates cooperation between the national courts and the CJEU. In this capacity, the CJEU fosters a sense of community between itself and the judiciary of the member states.

The ECJ rules on actions brought before it by a member state, an institution or a natural or legal person; issues preliminary rulings at the request of courts or tribunals of the member states on the interpretation of EU law or the validity of acts adopted by EU institutions; and rules in other cases as provided for in the EU treaties. The ECJ is also responsible for reviewing the legality of legislative acts, of the acts of the Council, Commission and the European Central Bank (other than recommendations and opinions), and acts of the European Parliament and the European Council that are intended to produce legal effects vis-à-vis third parties. Finally, the ECJ also has jurisdiction to review the legality of acts of bodies, offices or agencies of the EU that are intended to produce legal effects vis-à-vis third parties. Under certain conditions, any natural or legal person may initiate proceedings against an act addressed to that person or if the act is of direct and individual concern to them. A natural or legal person may also initiate proceedings against regulatory acts which are of direct consequence to them and do not entail implementing measures (TFEU Article 263).

As discussed in Chapter 5, Article 9 of the Charter of Fundamental Rights of the European Union governs the right to marry and found a family and provides that "[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Article 9 is gender-neutral and, while it leaves it to the

member states to regulate marriage, it does not foreclose the possibility of same-sex marriage. I talked about the role of a developing "European international family law" in regulating cross-border relationships within the EU in the section dealing with European family law above. Here, we see a unification of conflicts-of-law provisions rather than harmonization or unification of substantive family laws or general agreement on concepts such as "marriage" or "family." At the same time, with respect to cross-border regulation of same-sex relationships, the ECtHR has spoken to this and made it clear that such relationships fall within the ambit of "family life" and must be treated accordingly. Problems arise when the law of the host state, or state where the couple resides, does not provide the same recognition as the state where the marriage, civil union, or partnership agreement was entered into. This creates legal uncertainty for such couples and their children and serves to divide Europe and the EU into camps where citizens hold different rights. Instead of taking the bull by the horns, so to speak, EU and member state legislators are instead leaving it largely to the courts (European and national) to sort out the factual and legal reality of same-sex couples.

Recent ECJ case law

Initially, ECJ jurisprudence appeared to secure a privileged position for heterosexual marriage.¹⁹⁰ At that time, however, EU law did not yet recognize discrimination based on sexual orientation. With entry into force of the Treaty of Amsterdam (Article 6a), this began to change.¹⁹¹ The Treaty of Lisbon and entry into force of the Charter of Fundamental Rights of the

¹⁹⁰ See e.g., Case C-249/96, *Grant v. South-West Trains* [1998] ECR I-621 and Cases C-122/99 P & C-125/99 P, *D. and Kingdom of Sweden* [2001], cases that are sometimes cited for the proposition that the CJEU upholds only "traditional" families.

¹⁹¹ Article 6a of the Treaty of Amsterdam states: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal

European Union, as well as the development of ECtHR case law (notably *Schalk and Kopf* discussed above) and rapid changes in the substantive family laws of several member states have secured this change and EU law now clearly recognizes discrimination based on sexual orientation. When read together, Article 9 of the Charter of Fundamental Rights of the European Union and Article 21 of the Treaty of Lisbon (prohibiting discrimination based on "sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation") can be argued to create a right to recognition of cross-border same-sex marriages. To hold otherwise could be seen as *direct* discrimination on the basis of sexual orientation (Vaigè 2012).

Directive 2004/38 governing the right of EU citizens to move and reside freely in the member states of the EU ensures the unconditional right to bring a "spouse" pursuant to Article 2(2)(a), and the European Commission has shown no-compromise on this position. In April 2011, the Commission threatened to bring action against Malta for refusing to interpret the directive as granting freedom of movement to same-sex spouses. While the member states are not required to adopt special rules regarding same-sex unions, they are required to respect the rights of free movement granted to EU citizens. Given this, although member states do not have to provide for same-sex marriage, it does not necessarily follow that they are not required to recognize marriages that are legally concluded in another member state.

According to CJEU case law interpreting the Employment Equality Framework Directive (Directive 2000/78/ EC), which established a general framework for the equal treatment in

from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

employment and occupation (and prohibits discrimination based on sexual orientation), employees who are in a same-sex civil partnership must be granted the same benefits as their colleagues who are married in situations where marriage is not possible for same-sex couples. In 2008, the ECJ issued a landmark decision in the case of *Maruko v. Vddb*.¹⁹² The case involved a same-sex couple who had entered into a registered partnership in Germany. Mr. Maruko was the life partner of a costume designer by the name of Mr. Hettinger. The compensation scheme for Germany's theaters requires employers to take out an old-age pension and a survivor's pension for the artists they employ. The institution responsible for insuring the employee was the *Versorgungsanstalt der deutschen Bühnen* (Vddb), which is deemed a legal person governed by public law. Certain provisions of the compensation scheme provide that a "wife" or "husband" is entitled to a "widow's" or "widower's" pension. In January 2005, Mr. Hettinger died, and the next month Mr. Maruko applied for a widower's pension. Vddb refused, asserting that the regulations make no provision for survivors' benefits to be paid to registered partners. Mr. Maruko appealed but was unsuccessful and brought an action before the Court arguing that the terms "widow" and "widower" must be interpreted broadly to include partners in the case of registered partnerships. The proceedings were stayed and the Court referred five questions to the ECJ regarding the interpretation of EU Directive 2000/78/EC.

The ECJ's judgment in the case constituted the first time the Court ruled against discrimination based on sexual orientation. The Court also provided concrete rights which were unforeseen by the national system: a same-sex "widower" was granted a pension denied to him under national law. The pension was not denied on the basis of the beneficiary's sexual

¹⁹² Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Buehnen* [2008].

orientation, which would have been direct discrimination; rather, on the basis of the fact that a registered partnership is not the same as marriage. However, since marriage is only open to opposite-sex couples, the refusal to grant a survivor's benefit to a surviving life partner is indirect discrimination. In essence, the ECJ is saying that once a member state creates a legal status for same-sex couples (in the *Maruko* case, a registered partnership) that is comparable to that of spouses (i.e., marriage), they have to provide both institutions with comparable benefits. If, in this case, Germany had no such scheme (as is the case in Italy) and did not recognize same-sex relationships, there would be no such requirement. All of this means that it remains with the member states to determine whether to provide legal recognition for same-sex couples. And if the member state refuses to do so, there is no protection against discrimination where it is arguably most needed.

In the subsequent case of *Jürgen Römer v. Freie und Hansestadt Hamburg*, the question of whether same-sex partners should have equal access to employment benefits was presented to the Court.¹⁹³ According to the position advanced by the Advocate General, discrimination cannot be justified on the basis of protecting marriage and the family because there are other means to protect family and marriage that do not involve discriminating against same-sex couples. The Court found that different treatment based on sexual orientation is *direct* discrimination and is therefore prohibited. Considered together, *Maruko* and *Römer* apply in cases where partnerships are reserved to same-sex couples, marriage is reserved to opposite-sex couples, and same-sex partnerships and marriage are comparable in fact and law.

¹⁹³ Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* [May 12, 2011].

The decisions articulated in *Maruko* and *Römer* have been further reinforced and extended by the recent decision in the matter of *Frédéric Hay v. Crédit agricole mutual de Charente-Maritime et des Deux-Sèvres* wherein the ECJ was asked to issue a preliminary ruling.¹⁹⁴ In this case, Mr. Hay, an employee of *Crédit agricole*, entered into a PACS with his same-sex partner on July 11, 2007.¹⁹⁵ Mr. Hay applied for the days of special leave and the marriage bonus granted to employees who marry that was provided by his employer in accordance with *Crédit agricole's* national collective agreement. *Crédit agricole* refused to give Mr. Hay those benefits, arguing that, under the collective agreement, the benefits were only available to those who marry. Mr. Hay brought action before the Labor Tribunal but it was dismissed. The Tribunal held that the bonus is linked to marital status and the French Civil Code differentiates between marriage and the PACS.¹⁹⁶ The French Court of Appeals upheld the judgment on the basis that the PACS is not comparable to marriage.

Mr. Hays brought another appeal before the French Court of Cassation. He argued that *Crédit agricole's* refusal to grant him the special leave days and bonus constituted discrimination based on his sexual orientation contrary to the French Labor Code, Article 14 of the ECHR, and Articles 1-3 of Directive 2000/78/EC. The Court of Cassation stayed the proceedings and referred the following question to the ECJ:

¹⁹⁴ Case C-267/12, *Frédéric Hay v. Crédit agricole mutual de Charente-Maritime et des Deux-Sèvres* [December 12, 2013].

¹⁹⁵ A PACS is a civil solidarity pact, a form of civil union recognized in France.

¹⁹⁶ The Tribunal noted, however, that the national collective agreement had been amended on July 10, 2008, to extend the benefits under that agreement (relating to the bonus and special leave for marriage) to people who entered into a PACS arrangement, but that extension could not be given retroactive effect.

Must Article 2(2)(b) of [Directive 2000/78] ... be interpreted as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement which restricts an advantage in respect of pay and working conditions to employees who marry, thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a [PACS]?

The Court noted that, in reaching a decision, it must consider whether persons who enter into marriage and persons who, unable to marry a person of their own sex, enter into a PACS, are in comparable situations. The Court found that, although there were general differences between the PACS system and the system governing marriage, at the time of the facts giving rise to the case, the PACS was the only possibility under French law for same-sex couples to obtain legal status for their relationship.

According to the ECJ, "Thus, as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings ... persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry."¹⁹⁷ In this context, a member state's rules which restrict benefits in terms of pay or conditions of work to married employees, and where marriage is only open to opposite-sex couples, gives rise to direct discrimination based on sexual orientation and can only be justified on the bases of public security, the maintenance of public order and the prevention of criminal offenses, the protection of health, and the protection of the rights and freedoms of others, none of which were relied on in the dispute at hand. The ECJ

¹⁹⁷ See note 194.

further found that the fact that the PACS is not limited to same-sex couples and may include heterosexual couples (who are legally capable of entering into marriage) was irrelevant and did not change the nature of the discrimination against same-sex couples.

Although the foregoing cases do not speak directly to the situation in Italy and other places where there is no legal recognition for same-sex partnerships, they involve an increasingly expansive interpretation regarding what constitutes a comparable situation to marriage. The relevance of this line of European cases to the Italian situation becomes apparent when one considers them in conjunction with the recent decision of the Court of Appeal for Milan where the court found that a mutual fund could not deny benefits to the same-sex partner of one of its members in a situation where the two were permanently residing together. Despite the fact that Italy does not have a scheme for the legal recognition of same-sex partnerships, the Italian court opted in this case to treat a same-sex couple in a stable relationship the same as a married couple. This decision of the Court of Milan was in line with the Italian Constitutional Court and the Italian Court of Cassation decisions calling for the courts to treat same-sex couples the same as married couples in certain situations.

The jurisprudence of the European courts, however, does not require this. When one looks closely at the relationship between European and Italian case law, recent developments in Italian judicial decisions regarding the rights of same-sex couples appear to be more of a *choice* than an *imposition*. This indicates that Italian judges are, at least in part, *electing* to look to European law as a source of law in this area rather than being obliged to do so by the existing legal structures that frame relationships between Europe, the EU, and Italy.

Looking to the Future

As more nation-states within Europe and the EU recognize same-sex partnerships, it will become increasingly difficult for the ECtHR to use "lack of consensus" as a basis for denying recognition to same-sex marriages. In December 2013, the Registry of the ECtHR announced that a set of consolidated appeals known as *Oliari and others v. Italy* had passed the first hurdle, establishing an adversarial proceeding against the Italian government. The case involves five same-sex couples from Italy who allege that the Italian government has done nothing to provide a legal instrument for the recognition of their rights as couples. Although the ECtHR has not yet expressed an opinion on the admissibility and merits of the appeal, it has opened the adversarial proceeding against the Italian state, requiring the parties to submit written comments on the merits of the appeal by March 26, 2014. For the first time, the ECtHR will be required to address the situation where a nation-state provides no legal recognition for same-sex partnerships.

In this case, the fight for recognition of rights on behalf of same-sex couples in Italy comes full circle back to Europe. It remains to be seen whether Europe as lived will live up to the trope of Europe invoked in Italian LGBTI activists' claims to rights. As it stands, much of the policy with respect to recognition of same-sex couples and their rights is being articulated on a piecemeal basis by the European Courts in a process reminiscent of slapping a Band-Aid on a severed artery.

Chapter 7: Church, State, and Marital Relations in Italy

In this chapter, I return to the struggle over recognition of rights for same-sex couples in Italy, and look specifically at how Church and State relationships in Italy shape the contemporary battle. Although I have discussed Church and State relationships in various sections throughout the preceding chapters, I have attempted to avoid the reification of the Church that all-too-frequently accompanies the discourse surrounding the struggle over recognition of rights for same-sex couples in Italy. While the Church is definitely an interested party and influences the struggle over rights for same-sex couples in Italy, I do not see the Church as the *primary* opponent. One of the points I want to make is that, while parts of the Church have served as a major opponent to the recognition of rights for same-sex couples in Italy, in many ways the Church is scapegoated. The Church is a multi-faceted entity that, while slow-moving, is subject to change. This creates possibilities for dialogue between LGBTI activists and the Church hierarchy. Given the unexpected resignation of Pope Benedict the XVI and his replacement by Pope Francis, an event that signals a change in Church attitudes and responses to same-sex couples, as well as to the future of the EU, these possibilities now seem ripe. I address this and talk about recent Church events that gesture toward a change in Church attitudes and responses to same-sex couples, as well as to the future of the EU.

The Reality of “Being Catholic” in Italy

Attending Mass

The first time I attended mass in Italy was a bit of a shocker. We were staying near C and exploring the nearby hill town of P. It was a Saturday evening and we checked the mass schedule at the local church and noticed that there was a mass starting at 5:00 pm. We decided to go to the Saturday evening mass so we would not feel compelled to get up and out of the

apartment so early on Sunday. The church was an imposing building in the middle of the town, surrounded by narrow brick streets. The doors were open and we entered and found a seat in the pews toward the back of the church.

Inside, the church was dark and stifling. The structure had thick stone walls and high ceilings that had never been penetrated by direct sunlight. The air was cloying and I began to sweat a bit. The mass began unceremoniously without an opening hymn. The priest got right down to business, reciting the litany that makes up the Catholic mass. At the beginning of the mass I counted the number of people present. There were approximately 35-40 women who appeared to be over 60 years of age, 3-4 women in the 30-50 year range, approximately 5 men over 60 years of age and one man who looked to be in his mid-40's. My son was the only child present. During the course of the mass up through the homily another 10-15 people filtered in. There were no ushers to greet or seat people and there was no collection of money during the mass. Instead, an *offrette* was positioned at the entrance to the Church and I noticed that most of the attendees dropped a euro into the *offrette*. The homily was about the Virgin Mary and motherhood and delivered by the priest in a monotone drone. Fortunately, it was relatively short. At communion, my son, who had not yet received his first communion, approached the altar with his arms crossed to receive the priest's blessing but none was forthcoming. Shortly after communion, the mass ended as abruptly as it had begun, marked by a quick blessing and the exit of the priest.

This experience stands in contrast to my experience of mass in the United States. My son attends a private Catholic school and, as a family, we attend mass on a regular basis. As someone who was raised Catholic, I have attended masses throughout the U.S., including in New Mexico, California, Arizona, Washington, D.C., Vermont, Massachusetts, Iowa, and Illinois.

One thing I have consistently observed is the number of families with children. When my mind wanders I often find myself looking to the children in the pew in front for entertainment. It is not unusual for children under a certain age (usually around five years old) to be facing toward the back or playing “cars” or coloring on the pew seat. Occasionally, one can overhear something funny being said by the child to the parent. More than occasionally, one can witness parental reprimands and the parents’ refereeing of a fight between siblings. Masses in the U.S. are invariably punctuated with the sound of crying babies and, at any given Sunday mass, at least one parent can be seen exiting the Church with a baby and diaper bag in tow.

This is very different from what I experienced attending mass at various churches in Rome and Turin over the course of the year I spent in Italy. I attended approximately 30 masses at no less than 15 different Italian churches. In the Italy I experienced the pews were not teeming with children. Mass attendance was heavily slanted toward the elderly and seemed to favor women. When I was growing up, mass attendance was non-negotiable. It was what we *did* as Catholics. This does not appear to be the case in Italy and indicates a waning interest in Catholicism and its rituals.

Italy is commonly perceived as a “Catholic” country: approximately 90% of Italians are nominally Catholic. In the past, the “exceptionalism” of Italy as a Catholic nation has been endorsed by the Popes who reside within its borders. John Paul II talked and wrote about this at length. In his self-titled “Great Prayer for Italy” (1994), John Paul II stated:

Italy as a nation has so much to offer all of Europe. [...] To Italy, in keeping with its history, is entrusted in a special way the task of defending on behalf of all Europe the religious and cultural heritage established in Rome by the apostles Peter and Paul.

And in a speech to the general leadership of the Italian Church that took place on October 19, 2006, in Verona, Benedict XVI is quoted as saying:

Italy constitutes a rather favorable terrain for Christian testimony. The Church, in fact, is here a very lively reality, which retains a grassroots presence among people of every age and condition. The Christian traditions are often still rooted here and continue to bear fruit. [...] The Italian Church and Italian Catholics are therefore called to seize this great opportunity. [...] If we are able to do this, the Church in Italy will render a great service not only to this nation, but also to Europe and to the world.

These statements, however, seem at odds with my experience of Catholicism in Italy, and recent surveys confirm my suspicions. Statistics show that only about one-third of Italians actually practice the religion (CIA 2011 World Fact Book - Italy). One of the numbers that would appear to prove the religiosity and vitality of Catholicism in Italy is Sunday Mass attendance. Two studies, in particular, demonstrate that actual Mass attendance is much lower than what the statements of the popes would lead us to believe.

In 2004-05, the Patriarchate of Venice conducted a study of Sunday Mass attendance. The results showed that approximately 22.7% attended Mass on a given Sunday, with only 15% attending regularly.¹⁹⁸ Another survey by Professor Paolo Segatti of the University of Milan published in the magazine *Il Regno* on May 15, 2010, found that Mass attendance was even lower among younger Italians. According to the Segatti, the results of the survey showed that among those born after 1981 Mass attendance, self-identification as Catholic, and adherence to

¹⁹⁸ Hilary White, "Italy's Last Catholic Generation? Mass Attendance in 'Collapse' among Under-30s," LifeSiteNews.com, August 8, 2010, <http://www.lifesitenews.com/news/italys-last-catholic-generation-mass-attendance-in-collapse-among-under-30s>, accessed July 8, 2014.

Catholic teaching are "in collapse." Given this scenario Segatti predicted a near future in which Catholicism holds mere "minority status" in Italy. Segatti remarks: "Catholicism's future minority status in Italy can already be glimpsed. It is imaginable that when the children of the younger generation become parents, they will make a further contribution to secularization."¹⁹⁹

"Voting Catholic?"

As noted in previous chapters, LGBTI activists frequently blame the Church for the failure of politicians to act in recognizing rights on their behalf. Despite what appears to be minority status, the Church remains an active participant in Italian politics, frequently wielding power disproportionate to its popular support. One day over lunch my consultant and friend T and I were discussing his experiences working security for the Vatican. I was asking him what he thought about Pope Benedict XVI in relation to Pope John Paul II (at this time, Pope Benedict XVI was still the pope), and whether he noticed any major differences between the two popes. The conversation turned to the broader subject of Church and State relationships in Italy. I asked him for his opinion on why the Church wielded so much power over the family and family law in Italy. "Given that so few people actually practice Catholicism in Italy, why does it seem like the Church has such control over policy issues concerning marriage, cohabitation and same-sex couples?" I asked. "Because Italy is controlled by the Vatican. Morals are based on Catholic values," he responded. I pressed him further: "Yeah, but *why* is this the case, and do you think Italy will ever recognize rights for same-sex couples?"

¹⁹⁹ Sandro Magister, "*Chi va a messa e chi no. L'incerto domani dell'Italia cattolica*," www.chiesa.espressoonline.it, August 6, 2010, <http://chiesa.espresso.repubblica.it/articolo/1344389?eng=y>, accessed July 8, 2014.

T sighed and explained (as he had on previous occasions) that everything has to do with money and power in Italy and this situation is no different. The Vatican has a lot of money and uses it to control politicians who want its support. Also, Italian politics is such a mess that the Vatican is able to insert itself and assume power disproportionate to its popular support in the larger society. T further explained that, with respect to certain social issues like rights for LGBTI persons, groups seeking recognition face staunch opposition from the Vatican. It becomes a daily war with the media, and the group with control of the media (i.e., the person/group with the most money in the case of Italy) wins out as the role model. T stated his belief that Italy would eventually recognize rights on behalf of same-sex couples. According to T, the Church knew it was losing the battle (especially in light of recent developments in Europe) but, in the interim, intended to continue to fight for the so-called traditional family. T observed that there is an “invisible tolerance” that goes both ways between the Church and the LGBTI community. He cited politician Nichi Vendola as an example.

Vendola is currently the president of Apulia, a region located at the southeastern tip of Italy (the part that forms the high heel of the boot). Born in the town of Terlizzi, near Bari on the Adriatic coast, Vendola joined the Communist Youth Federation when he was 14 years of age. He studied literature at the university and then worked as a journalist for *L'Unità*, a left-wing Italian newspaper founded in 1924 by Antonio Gramsci as the official paper of the Italian Communist Party. Vendola is openly gay and has been a leading gay-rights activist. He was one of the founding members of *Arcigay*. In 1992 he was elected to the Chamber of Deputies, where he served until 2005, and was a member of the Anti-mafia Commission. He became well-known as a major opponent of organized crime. In 2005, Vendola ran in the first primary election held by the center-left coalition, *L'Unione*, and beat opponent Francesco Boccia. Many of the

moderates in the alliance were critical of the choice of Vendola as their candidate. They did not see how Vendola, who was both communist and homosexual, could be elected president of a southern Italian region, especially one considered to be traditionally conservative and Catholic. This was the case despite the fact that Vendola claims his Catholic roots, and considers himself a “believer” (albeit of the *Pax Christi* type). He recalls growing up with a portrait of Pope John XXIII on his family’s wall, and has been quoted as stating that the Bible “is the most important book for a Communist like me.” Thus, Vendola, like much of Italy and its progeny, is a bit of a paradox. The election results were similarly paradoxical: Vendola narrowly defeated outgoing president Raffaele Fitto, the candidate for the center-right coalition, to become the first member of the Communist Refoundation Party (*Partito della Rifondazione Comunista*, PRC) to be elected president of an Italian region.

In the Italian situation, the religious neutrality of institutions and of the “rule of law” has been subsumed within a concordat system where the Church’s influence is consistently used for political ends (Ferrara 2009). At the EU level, Italy is usually among those member states defending Catholic moral and social values. Despite low mass attendance, approximately 94% of parents enroll their children in religious instruction provided in the public elementary schools and 84% of high school students voluntarily register for these courses. The fact that a vast majority of students opt to receive religious education in the Italian public schools and at the same time refuse to “practice” this religion indicates a disconnection between teaching and practice. I submit that much of this has to do with the fact that Church teachings on sexuality, marriage, and family do not resonate with the experiences of young Italians.

The Church's Teaching on Sexuality, Marriage, and Family

The Church attempts to justify its opposition to same-sex marriage based on values and norms derived from “natural law.” Natural law can be juxtaposed to legal positivism, which grounds rights in humanly-enacted rules (Dershowitz 2004). The tradition of legal positivism holds that the existence and content of law depends on social facts. In this view, law is not founded upon the eternal or the universal. By contrast, natural law finds the foundation for rights in external sources such as God, nature, reason, or some concept of objective reality. Natural law refers to moral norms that are: 1) "universal" (meaning that they apply in all times and places); 2) "objective" (as in, given in the nature of things and not created by social convention); and 3) "reasonable" (meaning that such norms can be arrived at through use of reason to discern the purposes, ends, or good of things given in nature). Generally speaking, the Church defines natural law as the rule of conduct prescribed to us by God in the constitution of the nature with which he has endowed us.

Catholic teaching is associated with a particular sexual ethic that deems it "natural" and "reasonable" that procreation is the main "end" or "purpose" of sexual intercourse. Natural law supports the claim that sex is proper only in life-long, monogamous, and heterosexual marriages. This is because this type of relationship ensures that parents will know their children and will be more likely to care for them and provide lifelong support and love, which is essential to their development. According to Catholic teaching, homosexual acts are “intrinsically disordered,” which means that they are unnatural and not a legitimate source of rights, because same-sex coitus cannot be procreative.

In 2003, four years prior to the introduction of the DICO in Italy, the Vatican released a 12-page document (signed by then-Cardinal Joseph Ratzinger, and approved by Pope John Paul

II) in which it condemned the legal recognition of unions between persons of the same-sex, and called on Catholic politicians to defend marriage as a social institution and to reject any and all attempts to extend marriage (or anything resembling marriage) to same-sex couples. The document reiterated the Church's teaching on marriage, affirming that marriage is not just any relationship between human beings; rather, it was established by God with its own nature, essential properties, and purpose. According to the Church's view, the three fundamental elements for marriage, as set forth in the Book of Genesis, are: 1) the requirement of one man and one woman (equal as persons and complementary as male and female); 2) marriage as an institution in which a communion of persons is realized involving the use of sexual faculty; and 3) the union of man and woman for the purpose of procreation. The Church further asserts that the marital union was elevated by Christ to the dignity of a sacrament. For these reasons, there are no grounds for considering homosexual unions as in any way analogous to God's plan for marriage and family. Simply put, homosexual acts go against the "natural" moral law.

Anthropological Perspectives on Sexuality, Marriage, and Family

The Church's teachings on sexuality, marriage, and family stand at odds with not only with those being advanced by LGBTI activists from *Certi Diritti* in the context of the *Amore Civile* project, but also with anthropological findings on these subjects. The study of kinship has long been a staple of anthropological analysis. There is a lengthy history extending back over 140 years of anthropologists who have been captivated by the varieties of understandings of kinship, family, marriage, descent, and parenthood that exist throughout the world.²⁰⁰ When it comes to kinship and the family, anthropologists have demonstrated that there are no universal

²⁰⁰ E.g., Morgan (1871); Davis and Warner (1937); Dumont (1953); Geertz and Geertz (1975); Goodale (1981).

rules that apply to all. There are radical differences in family organization and notions about the family's purpose. Ideas about birth and conception differ, as do ideas about the substances that link children to parents. There may or may not be larger structures such as descent groups based on certain ideas of relatedness. What these groups do and what these groups are established on (for example, relatedness through the sharing of some substance, co-residence, or a mixture of the two) varies. There is also considerable variation with respect to the purpose and form of marriage.

In *American Kinship* (1968), anthropologist David Schneider accused his predecessors and contemporaries of being mired in a genealogical way of thinking that ultimately rested on a Eurocentric view of kinship as based on biological reproduction. Schneider asserted that this view was essentially a Western folk model that failed to account for many indigenous views in other parts of the world. Schneider insisted on a cultural, “emic,” or “insider’s” account of kinship. Schneider’s view was not entirely novel. Rodney Needham (1971) had expressed a similar opinion in his assertion that kinship components such as marriage and incest rules were too ethnographically variable to make any generalizations. Largely because of Schneider, anthropologists reformulated kinship studies around themes of culture, human agency, and process.

In the twenty or so years following Schneider’s study, kinship, marriage, and the family experienced profound transformations in Europe and the United States. Rising rates of divorce, the prevalence of single-parent households, gay and lesbian movements, and advances in new reproductive technologies (e.g., surrogate motherhood, artificial insemination, in vitro fertilization) transformed notions of kinship in Europe, the United States, and Canada, and challenged cultural conceptions of kinship as based on biology. As the following examples

show, notions of kinship as something that is culturally constructed have been a common theme in anthropological studies over the past two decades.

In *Reproducing the Future: Essays on Anthropology, Kinship and the New Reproductive Technologies* (1992), Marilyn Strathern argued that the new reproductive technologies introduced the idea of “consumer choice” into the area of human reproduction. This in turn destabilized notions of “nature,” which could no longer be seen as independent of cultural construction. In her study of surrogate motherhood, Helena Ragoné investigated the tension between kinship as choice and older notions of kinship as grounded in biological reproduction (1994). In *Reproducing Jews* (2000), Susan Martha Kahn looked at sperm processing, egg donation, and IVF at an Israeli infertility clinic. She noted that Jewish identity is primarily transmitted matrilineally (and only secondarily through religious conversion), and she explored the ramification of this in Israel, including for questions of belonging and citizenship. In this work she shows how Israeli rabbis re-conceptualize new reproductive technologies in cultural terms to meet traditional notions of religious identity and kinship.

Additional anthropological studies dealing with relationships between nature and culture have been conducted in the area of infancy and child-rearing. In their book, *A World of Babies: Imagined Childcare Guidelines for Seven Societies* (2000), Alma Gottlieb and Judy DeLoache use fiction as a way to show that there are in fact many models of child-rearing and each model is shaped by particular values and widely varying social contexts. Similarly, in *The Afterlife is Where we Come From: The Culture of Infancy in West Africa* (2004), Gottlieb uses data gleaned from extensive ethnographic study with the Beng in West Africa to demonstrate how babies are “deeply constructed by culture” (xvi). She reintroduces social context and culture into studies of infants and infancy, something that Europeans, Canadians, and people from the United States

have largely constructed as universal. Gottlieb notes that babies raise fundamental questions about the “nature of nature and the nature of culture” (2004:60).

I point out these studies to highlight the fact that the Church’s teachings on sexuality, marriage, and family are in no way universal. Yet, arguments based on anthropological notions of kinship as culturally constructed have only recently begun to make their way into Italy. We see them alluded to in the *Amore Civile* project and hinted at in the recent decision of the Court of Cassation to award custody of a child to a lesbian mother when the Court declares that it is “mere prejudice” to assume that a child raised by a same-sex couple would suffer developmental harm. I have tried to demonstrate in this dissertation how kinship *structures* and is *structured by* law. In the case of Italy, attempts to reformulate the family law to meet the demands of changing patterns of kinship have met with much resistance. Italy has one of the more stringent laws regulating the use of new reproductive technologies and there is no formal legal recognition for same-sex couples. As I have shown, in the past, the Church has consistently been one of the main opponents of change, dating back to the divorce referendum. One of the questions that plagued me during the course of this study was related to the question that I asked my friend T about: namely, the Church’s disproportionate control over matters related to the family in Italy. I really wanted to know why the Church was so vested in controlling the policies of the nation-state in this area.

As part of my fieldwork (and as I stated in the introduction to this dissertation), I spent two weeks with the Faculty of Canon Law at a prestigious European University. I wanted to talk to the members of the faculty to get a better sense of the role of Canon Law in contemporary society, but I also really wanted to know why, in their opinion, the Church was so vehemently opposed to the recognition of rights for same-sex couples in civil society. I understood the

Church's views on sexuality, marriage and family, and why the Church would not sanction same-sex marriage for its adherents, but what about the rest of society? What about those who were not members of the Church? Why should they be subject to the Church's definitions of marriage and family? In other words, why is the Church so interested in maintaining a particular view of marriage and family in the world outside the Church?²⁰¹

Church and State in General and Church and State in Italy

While at the Faculty of Canon Law I was able to delve into these questions. My meetings with faculty members were instructive, and offered several plausible explanations of the Church's interest in civil society. I discussed sources of law with Professor I, who explained to me the Church view that natural law applies to everyone because it is a sign of God's will, and that divine positive law is "God's will" as formulated and expressed in texts. We discussed the fact that this can lead to interesting results. A person who is a member of the Church, for example, has an "obligation of canonical form," whereas a non-Catholic does not. For this reason, a Catholic who marries outside the Church and gets divorced is considered by the Church to never have married and is free to subsequently marry in the Church. By contrast, a non-Catholic who marries outside the Church and gets divorced cannot subsequently marry in the

²⁰¹ Under the direction of Pope Benedict, the Church elevated its opposition. For example, in April, 2012, the Vatican reprimanded a group of nuns opposing the Paul Ryan budget passed by the U.S. Republican-dominated House of Representatives for focusing too much of their work on poverty and economic justice, while ignoring abortion and same-sex marriage (the nuns opposed the Ryan budget because it appeared to favor wealthy U.S. citizens through tax breaks and disregarded those struggling to make ends meet). According to an article published by CBS news, the Vatican accused the Leadership Conference of Women Religious, a group representing approximately 80% of the U.S.'s Catholic nuns, of promoting "radical feminist themes." Nuns close to the Leadership Conference were "stunned" by the reprimand, stating that there is no evidence of the group being doctrinally out of line with the church. The group of nuns completed a bus tour through nine U.S. states to highlight the work of Catholic nuns, meet the people they serve, and learn about the harm that would be caused by the proposed federal budget cuts. The tour received a lot of publicity and highlighted a schism within the Church between "social justice" Catholics and more conservative Catholics who see the need to protect the allegedly traditional family from secularization.

Church: in this case, the marriage that occurred outside the Church is recognized by the Church and the subsequent marriage would result in polygamy because the Church does not recognize divorce.

According to Professor I, while [God's] law never changes, our understanding of it can and does. It is important to understand that canon law governing marriage has been heavily influenced by history. For example, since the 1960's the Church has adopted a more personal vision of marriage, which has not been entirely translated into the 1983 Code of Canon Law. Lurking behind all of this, according to Professor I, is the idea that the Church has the truth.

Another faculty member offered a more cynical vision of the Church's position. According to Professor U, Catholic seminaries are filled with gay men so it is not really about homosexuality. Marriage regulation has always been a source of earthly power for the Church. When the state began assuming responsibility for marriage regulation, the Church resisted in an attempt to retain some of its earthly power.

Yet another faculty member (Professor W) told me that the "fundamental structure" of society depends on natural law and divine law as set forth in the Bible. Without this structure, society lapses into relativism. According to Professor W, laws based on the mere agreement of men lead to atrocities such as the Holocaust. Professor W stated that the Church uses its influence for the common good, for the sake of human dignity, and the Pope has a duty to inform on moral issues.

Finally, Prof Y told me that marriage has always been the cornerstone of the Church. Personally, she believes that the Church's interest in marriage has to do with power; however, on a more positive note, she believes that the Church is trying to save marriage (as an institution)

against external corruption and is fighting against a “divorce mentality.” Marriage is, after all, a sacrament and this comes from divine law/natural law. It is not something we created.

Prof Y further stated that she has been disappointed with the results of the Code of Canon Law of 1983. Contrary to expectations, canon law has become more conservative than it was under the Code of 1917. The canon law system is a “top down” working system and Professor Y senses the Church has been retrenching in an effort to keep control and regain some of the power it lost due to the Church sex scandals.²⁰² The problem with each of these explanations is that, while they explain what the Church is trying to accomplish and why, they do not explain the “buy in” on the part of Italian politicians nor do they explain the voting patterns of Italian citizens.

When I posed this to Professor Y, I was taken aback by her response, not because of its novelty, but because of its adherence to cliché. In her opinion it had to do with a particular mentality said to exist in Italy. She repeated what I had so often heard and read: in Italy, you just have to accept the norm, and then can live as you want. According to her view, it was all about maintaining appearances, about “*la bella figura*.” One can dislike the Pope but, in Italy, one will still act “nice” to him.

This may or may not be the case, but does it really *explain* anything? It does not explain, for example, who sets the norm, how or why a norm changes or does not change, and why the Church is so influential in everything having to do with norms in Italy. Most of us have been “nice” or civil to a person with whom we disagree; it does not mean we would vote for that

²⁰² Professor Y is referencing the Catholic sexual abuse cases, which consisted of a series of allegations, investigations, trials, and convictions of child sexual abuse crimes committed by Catholic clergy against children. Many of the cases extended over several decades. Investigations revealed that, in many instances, the Church failed to report the sexual abuse and deliberately moved priests believed to be sexually abusing children to other parishes where the abuse sometimes continued.

person or vote in the same way as that person. Once one steps behind the curtain, one is free to exercise one's will. There is no censorship in the voting booth. One does not have to maintain "*la bella figura*."

Enter "*La Bella Figura*"

One day, I was walking down the street from my apartment to the bus stop in Turin when I noticed a new "cake" shop had opened. I was curious because, while there were a multitude of *pasticcerie* near my apartment and, while I had discovered a couple that sold what passed for cupcakes in Italy, I had never seen an entire shop devoted to cakes and cupcakes the likes of this. The window display was stunning. A literal bridal dream: beautiful layered cakes with white and pink icing, coordinating cupcakes, and huge sugar cookies iced in pastels intermingled with flowers taunted me each time I passed, which was at least twice a day (never mind that I intentionally walked on *this* side of the street to catch a glimpse of the display and make a mental note of what I might like to try). As I passed, my mouth watered, sending me into a virtual sugar coma. I made a promise to myself to stop in and sample the offerings.

Late one afternoon, about 10 days after I first noticed the shop, I decided to go in and pick up something to have for dessert. I entered the shop. The shop was set up like a cross between an English tea room and American ice cream shop, with bistro-style tables and chairs. A set of stairs led up to a loft, which provided additional seating and overlooked the main floor. To the left of the entrance were glass display cases and a long bar, set up for ordering and drinking coffee. The space behind the bar counter held the usual coffee-making apparatuses. A couple of middle-aged men were ordering coffee and I took advantage of the wait to decide what I wanted. I searched the glass display case for items that resembled those in the window display. My heart sank as I realized that the items in the window display were not also behind the glass

display cases from which one ordered. Gone were the beautiful cakes, cupcakes, and huge sugar cookies, replaced by the usual Italian pastries.

When it was my turn to place my order, I asked the woman behind the counter if the items in the window were available for purchase. Alas, they were not! As it turned out, the items in the window were not even edible. They were plastic. Disappointed, I settled on what appeared to be a miniature version of the sugar cookies and ordered three. They were the only thing being offered for sale that resembled something in the window display. The woman behind the counter placed them on a piece of cardboard wrapped in gold foil, then wrapped the foil-covered cardboard plate with the cookies in pretty floral paper and tied it up with a fancy bow. It took her several minutes to fuss with the bow but, when she finished, she handed me a beautifully wrapped package, I paid, and left.

Afterward, while enjoying my cookies (the relative merits of which I will not go into here), I could not help thinking about my experience at the cake shop. What was it about the shop that left me feeling so deflated, perhaps even a bit betrayed, like a person on the losing end of a used car purchase? I suspected that it had something to do with false advertising. As I thought more about it, I realized what annoyed me was the unabashed exhibition of “*la bella figura*.” Never mind the *substance*, what was important here was the *presentation*.

“*La bella figura*” means “the beautiful figure” and signifies a way of life that emphasizes beauty, one's image, aesthetics, and proper behavior. Italians tend to be well-dressed and groomed. They are known for their style, and there is an inherent appreciation for color, design, and form. It is about more than just what one wears, however, and involves knowing the rules of etiquette and presentation of oneself. *La bella figura* explains why my friend was made to feel like an inferior mother when she failed to wrap her five year old daughter in a scarf before

sending her to school in 50°F weather. It explains why I was compelled to put on make-up before leaving my apartment to take out the trash. *La bella figura* is also about loyalty to family, friends, neighbors, and co-workers. It involves behaving "properly," which means appropriately and respectfully.

Italy's Particular Form of Secularism

In his work *Nationalism and Sexuality: Middle-Class Morality and Sexual Norms in Modern Europe* (1985), George Mosse observes that, with the rise of nationalism, the nuclear family assumed a privileged position in society. The nuclear family's newfound status was inherently tied to the relationship between nationalism and respectability. According to Mosse, respectability indicates both "decent and correct" manners and the proper attitude toward sexuality (1985:1). A distinction between normal and abnormal is essential to the notion of respectability. These ideas were rooted in Romanticism and ideals of manliness that set forth an image of order against "the chaos of modernity" (1985:7). Society was looking for a means to cope with the changes that resulted from industrialization and political upheaval in a modernizing world. The nineteenth century attempt to control sex and regulate the family was part of this effort. Society sought to establish controls and impose restraint on modernization; however, in order to be effective, the methods deployed had to be informed by an ideal.

Nationalism fit the bill:

[Nationalism] absorbed and sanctioned middle-class manners and morals and played a crucial part in spreading respectability to all classes of the population, however much these classes hated and despised one another. Nationalism helped respectability to meet all challenges to its dominance, enlarging its parameters when necessary while keeping

its essence intact.... But however flexible, nationalism hardly wavered in its advocacy of respectability (Mosse 1985:9).

In the new relationship between nationalism and respectability, the nuclear family served as society's "policemen" of sexuality. Sexual acts for purposes other than procreation were viewed as contrary to the interests of the state and the state increasingly intervened in matters concerning sexuality and family life. What was once considered to belong to the private sphere became a matter of public policy.

Michel Foucault makes a similar argument in *The History of Sexuality* (1978). He asserts that the end of the eighteenth century saw the emergence of "population" as an economic and political problem. And at the heart of the "population" problem one found "sex." The state began to take the sexual conduct of the population as both an object of analysis and a target of intervention. "Sex" thus became a public issue between the individual and the state, and an entire web of discourses, specialized knowledges, analyses, and injunctions (all operating within different institutions) appeared. Prohibitions against sex were primarily juridical, and heterosexual monogamy became the accepted norm. The sexuality of children, the insane, criminals, and homosexuals was delineated as "unnatural." As Foucault notes, this new persecution of "peripheral sexualities" involved an incorporation of perversions and a new ordering of individuals that was manifested by the encroachment of a type of power on bodies.

Moreover, in this same work, Foucault identified four strategic unities that formed specific mechanisms of power and knowledge centering on sex: a hysterization of women's bodies, a pedagogization of children's sex, a socialization of procreative behavior, and a psychiatrization of perverse pleasure. Foucault saw this deployment of sexuality as an instrument of the bourgeois, a self-affirmation, defense, and exaltation employed as a means of

social control. By providing itself with a body that had to be cared for, protected, and cultivated, the bourgeois enabled it to retain its differential value. For Foucault, the body constituted the intersection of power and knowledge. This constitution of the body as an intersection of knowledge and power reveals itself in Italy as "*La bella figura*."

In *Formations of the Secular* (2003), Talad Asad explores the secularization thesis with reference to the formation of modern nationalism.²⁰³ As he notes, the secularization thesis has always been both descriptive and normative, and the following three elements of the thesis have generally been held essential to the project of modernization: 1) increasing structural differentiation of social spaces that create a separation of religion from politics, economics, and science; 2) the privatization of religion; and 3) the declining social significance of religion (in terms of its beliefs, commitments, and institutions). According to Asad, many contemporary observers see the increased incidence of politicized religion in the world as evidence that the thesis is false. Others have asserted that the explosion of politicized religion in recent years is simply indicative of widespread disillusionment with modernity. Asad argues, however, that both the critics and supporters of the secularization thesis fail to consider the concept of "the secular" in terms of the historical and particular way in which it emerged and was assigned specific practical tasks. He makes the point that de-privatized religion is placed in the position of having to appeal to those who do not necessarily share its values. Further, the possibility of negotiation depends on an agreement between the parties involved that the values in question are open to negotiation, which is not always the case in modern society. For these reasons, religious

²⁰³ The "secularization thesis" is the idea that nonreligious considerations overtake religious considerations in the course of social evolution.

leaders are forced to adopt the strategies of secular politicians in a liberal democracy. And when secular leaders cannot persuade others to negotiate, they attempt to manipulate the conditions in which others act or refrain from acting through deployment of various communicative devices that target their constituents' desires and fears.

Asad does not subscribe to the view of nationalism as a form of religion. He contends that, instead of looking for corresponding forms in the process we refer to as "secularization," we should look at the differential results. "We have to discover what people do with and to ideas and practices before we can understand what is involved in the secularization of theological concepts in different times and places (Asad 2003:190)." As Asad notes, even the most conservative Muslim relies on experiences in the modern world to give relevance to his theological interpretations. Islamism takes as a given the modern nation-state, and recognizes the need to work through it. "It is this *statist* project and not the fusion of religious and political ideas that gives Islamism a 'nationalist' cast (Asad 2003:198-199)." Whether Islamists are using religion for political ends is not what is relevant here; rather, what matters are the circumstances that require "Islamism" to emerge as a public political discourse, and whether (and if so in what ways) Islamism presents a challenge to the "deep structures" of secularism (Asad 2003:199).

Secularism holds that religion should either remain in the private sphere or enter into public dialogue without making any actual demands on life. This, however, is problematic for those who want to reform the idea of the secular state itself. This, according to Asad, is what drives modern Islamism's preoccupation with state power. It is not the result of its commitment to nationalist ideas but, rather, an objection to the modern nation-state's "enforced claim to constitute legitimate social identities and arenas" (Asad 2003:200). Any movement that wants to create change in the world cannot ignore state power in a secular world. Islam is no exception.

Although Asad is talking about Islam, his arguments hold for Catholic Italy as well. As Alessandro Ferrara has observed, in the case of Italy political secularization has occurred at a faster pace than social secularization (2009). Although the secular character of state institutions was declared a “supreme constitutional principle” by the Constitutional Court in 1989, crucifixes continue to be prominently displayed in state-owned buildings and religion continues to be taught in public schools. The particularity of the Italian situation results in large part from the fact that the religious neutrality of state institutions is based on their fitting the terms of a “concordat” between two powers: the state and the Catholic Church. Each reigns with full sovereignty within its separate realm yet both occupy the same geographical territory.

In Italy, religious neutrality is understood as a function of a “negotiating balance” realized by two powers. As Ferrara states:

In the case of Italy, furthermore, the effect of this “use of spiritual authority for political ends” is compounded by the newly emerging bipolar division of the political space, which assigns great influence to citizens, movements and organizations located at the centre of the bipolar division and susceptible of switching allegiance. These political forces are overwhelmingly Catholic and thus the spiritual authority of the Church can receive additional political leverage from the decisive influence of the addresses of its messages (2009:89).

At a conference at the American University in Rome held in November 2010, anthropologist Michael Herzfeld asserted that, in Italy, collective social alliances are fragile: the country as a whole merges and splits at different levels. As Bodei argues, contemporary pluralism in Italy borders on corporatism and even on a modern version of feudalism. Where mass individualism prevails, a perception of the general interest appears increasingly distant and

difficult (2010). I assert that it is in the crevices of these merges and splits that the Church inserts its power. The Church provides a ready-made vision of the general interest. The lack of a strong national identity thus enables the Church to assert its social will by capitalizing on the void left by the fragmented nation-state. The Church holds itself out as a pillar of certainty in an uncertain world. According to anthropologist David Kertzer:

Today there is little doubt in Rome who is the most powerful leader. One man alone is the object of great reverence, one man alone is seen as embodying society's deepest aspirations, a man whose every act is the object of adulatory front-page coverage in the press, even of the left (2004:295).

Of course, Kertzer is referring to the Pope, or "*il Papa*," as he is affectionately called by Catholics in Italy.

In 1999, the archbishop of Bologna, Cardinal Giacomo Biffi, published a small book on the Italian Risorgimento in which he argued that once Italy had achieved unification and political independence it lost its ability to teach something to everyone. According to Cardinal Biffi, "once they had achieved the hoped-for unity and political independence, they tried only to imitate a bit of everyone, especially the French and the English, up to the present day, when they have resigned themselves to being a cultural colony of the United States." Cardinal Biffi believed that the big mistake, made by both the leaders of the Risorgimento and liberals in general, was their failure to recognize Catholicism as the keystone of Italian national identity (Kertzer 2004:294-295). This battle over national identity continues to wage in Italy. And, as evidenced by the debates surrounding rights for same-sex couples, it is not likely to be resolved anytime soon.

In Italy, the nation-state is fragmented and this serves as a source of anxiety. As my Italian consultant I explained, “People in Italy want certainty. The Church provides this.” For those who need certainty and security, the Church’s perspectives on sexuality, marriage, and family tie well into larger notions of nationalism and respectability and serve as a reassuring source of identity. To maintain respectability, however, requires a distinction between what is “normal” and what is not. This in turn pits so-called “traditional” families against “non-traditional” families and leads to an overabundance of interest in what other people are doing in their private lives.

The Church, however, does not hold sway over the EU to the same extent that it wields power in Italy. Today, natural law doctrine has largely fallen out of vogue, especially among advocates of legal positivism.²⁰⁴ Notions of pluralism slip into claims of ethical relativism or ethical nihilism, which deny the existence of objective and universal moral norms. Skepticism refutes the possibility of objective, universal reason, and claims to it ring false. The autonomous modern individual, free to define her own morality, is arguably the quintessential existentialist. In shifting the battle site from Italy to the EU, members of *Certi Diritti* take advantage of this difference, seeking to further delineate a European identity, while simultaneously forcing the nation-state to recognize them as citizens with rights. These groups attempt to undermine the stronghold of the Church’s influence in Italy through the creation of a stronger European citizenship based on rights that originate in secular humanistic notions of social justice.

The Vatican is well-aware of this trend and of its implications and, under Pope Benedict XVI, became increasingly vocal in its response, framing the debate in terms of the proper

²⁰⁴ In general, legal positivists hold that the only legitimate sources of law are written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution.

foundation for law. In an address to the lower house of the German Parliament on September 22, 2011, Pope Benedict XVI urged politicians to seek justice over success and took up the topic of the foundation for law, stating that "it is evident that for the fundamental issues of law, in which the dignity of man and of humanity is at stake, the majority principle is not enough. Everyone in a position of responsibility must personally seek out the criteria to be followed when framing laws."²⁰⁵ The Pope acknowledged that it is not easy to know what is right and what is wrong. To this end, he offered some points of reflection on the development of natural law, and its place in modern society. "Unlike other great religions," he began, "Christianity has never proposed a revealed law to the state and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law -- and to the harmony of objective and subjective reason, which naturally presupposes that both spheres are rooted in the creative reason of God."²⁰⁶ Referring to the current situation in Europe, Benedict XVI noted that "there are concerted efforts to recognize only positivism as a common culture and a common basis for law-making, reducing all the other insights and values of our culture to the level of subculture."²⁰⁷ "In its self-proclaimed exclusivity," the Pope explained, "the positivist reason, which recognizes nothing beyond mere functionality, resembles a concrete bunker with no windows, in which we ourselves provide lighting and atmospheric conditions, being no longer willing to obtain either from God's wide world."²⁰⁸ Pope Benedict subsequently made similar

²⁰⁵ A full translation into English of then Pope Benedict XVI's speech to the German Parliament is available at *news.va*, the official Vatican Network, <http://www.news.va/en/news/pope-benedict-addresses-the-german-parliament-2>, accessed March 8, 2014.

²⁰⁶ *News.va*, <http://www.news.va/en/news/pope-benedict-addresses-the-german-parliament-2>, accessed March 8, 2014.

²⁰⁷ See note 206.

²⁰⁸ See note 206.

speeches on January 19, 2012, in an address to U.S. Bishops, and again on January 21, 2012, on the occasion of the opening of the judicial year in Italy.

For those seeking certainty, the Church provides a ready-made vision of a unified Europe based on its “Christian” roots and “natural law” as a foundation for human rights. As can be seen in the struggle over recognition of rights for same-sex couples in Italy, this vision excludes a large number of persons who, because of their sexual orientation, are denied all of the potential benefits of EU citizenship. If the project of European integration is to move forward, the issue of rights and where they come from must be resolved in a way that unifies Europeans. At the present moment, there is little consensus in Europe about the content and bases of such rights.

Moving Forward?

On February 28, 2013, something unprecedented happened: Pope Benedict XVI resigned after eight years as the head of the Catholic Church. In his resignation statement, the former Pope declared that his decision to step down was due to the nature of “today's world, subject to so many rapid changes and shaken by questions of deep relevance.”²⁰⁹ Pope Benedict XVI's resignation spurred a media frenzy, with the Italian press reporting that the Pope resigned after receiving the results of an internal investigation, delivered in a 300-page, two-volume file, that reported blackmail, corruption, and gay sex at the Vatican. According to well-respected Italian national newspaper *La Repubblica*, the report was based on countless interviews with bishops,

²⁰⁹ “Pope Benedict’s Resignation Statement in Full,” *Guardian*, February 11, 2013, <http://www.theguardian.com/world/2013/feb/11/pope-benedict-resignation-statement-in-full>, accessed March 8, 2014.

cardinals and lay members of the Church. Vatican spokesman, the Reverend Federico Lombardi, refused to comment on the reports, stating:

Neither the cardinals' commission nor I will make comments to confirm or deny the things that are said about this matter. Let each one assume his or her own responsibilities.

We shall not be following up on the observations that are made about this.

After his resignation, Pope Benedict XVI was replaced by Pope Francis. When asked about gay people in the Catholic Church, Pope Francis stated, "Who am I to judge?" signaling a change in Church rhetoric on LGBTI issues. Pope Francis has also shifted power away from Italy and Europe. Eleven of the 19 Catholic leaders he chose to become part of the newest class of cardinals come from outside Europe and the North Atlantic. As part of this same effort, Pope Francis removed Bishop Tebartz-van Elst, who was dubbed "Bishop Bling," after spending \$42.7 million on a new residence and renovations. In the United States, Pope Francis removed the ultra-conservative Cardinal Raymond L. Burke from the Congregation of Bishops, which is responsible for selecting bishops around the world, and replaced him with the more moderate Cardinal Donald Wuerl.

Unlike his predecessor, Pope Francis has shown little interest in debates surrounding rights for same-sex couples. Yet, despite Pope Francis' now-iconic statement "Who am I to judge?" and his declaration that the Church has become too "obsessed" with gay people and abortion, and his focus on economic equality, there is no real indication that there will be doctrinal changes regarding the Church's positions on homosexuality, same-sex marriage, or same-sex adoption. Pope Francis' words and actions, however, do point to a major change regarding Church involvement in the debate over recognition of rights for same-sex couples. Pope Francis seems to be "rendering unto Caesar the things that are Caesar's," so to speak. By

withdrawing from public debate on these issues, Pope Francis clears a space in Italian politics for the politicians to take action.

Chapter 8: Conclusion

In this dissertation I have shown how law acts on society and society acts on law. I have provided an analysis of the struggle over recognition of rights for same-sex couples in Italy, using this topic to explore how Europe and the EU shape law and public policy in Italy with respect to the treatment of same-sex couples and in the process shift the balance of power from the legislature to the judiciary. I have used the ongoing struggle over legal recognition of rights for same-sex couples as a window on larger processes of Europeanization and European integration. Specifically, I have argued that recent legal and policy changes with respect to the treatment of same-sex couples in Italy are a direct consequence of the stimulus of Europe and the EU on the national judicial system and evidence of a burgeoning judicial activism. Judicial activism in Italy occurs at the expense of national politics and in the context of a dysfunctional polity that evidences a crisis of legitimation. It also occurs at the expense of the nation-state in favor of the EU.

I have illustrated how social actors in Italy invoke "Europe" as a trope of progressivism to advance the recognition of rights they hold as EU citizens. In a similar fashion, the Italian courts look to "Europe" to justify acts of judicial activism. In doing so, the activities of the Italian activists and courts are helping forge a European identity – so while I have told a story about compromised sovereignty and the judicialization of Italian politics I have at the same time been telling a story about the formation of new post-national identities. One of the things that is new or novel about this situation is that Italy is a place where, in general, people have little faith in state institutions and are skeptical about the ability of law to transform society (Ginsborg 2003; Sciolla 1997). Through the *Affermazione Civile* campaign, Italian LGBTI activists

demonstrate a new degree of faith in the “rule of law,” a faith made possible by Europe and the EU.

In Chapter 2 (“A Description of the Struggle over Rights for LGBTI Persons in Italy”), I provided a description of the struggle for recognition of rights on behalf of same-sex couples and its history. I looked closely at the activities of Italian LGBTI activist groups currently fighting for marriage equality, and focused specifically on the *Affermazione Civile* campaign initiated by Italian LGBTI activist groups *Certi Diritti* and *Rete Lenford*. Through the *Affermazione Civile* project, *Certi Diritti* and *Rete Lenford* have embraced court action as a mechanism for change in an area of law that has long been subject to political impasse. By framing the relevant issues in terms of “rights,” and more specifically, “rights” they hold as EU citizens, these groups have been able to take advantage of the opening created by the EU and use European and EU law to access the national legal system. Not only do the activities of *Certi Diritti* and *Rete Lenford* demonstrate unprecedented faith in the ability of state institutions and the rule of law to serve as societal transformers, they also reinforce a (notion of) European citizenship based on rights that originate in secular humanistic notions of social justice. As a side effect, the activities of these activist groups further the formation of a European identity and thereby aid the project of European integration.

One of the points I made in Chapter 2 is that, due to particularities in the Italian Constitution, any result less than full marriage equality will ultimately prove discriminatory with respect to same-sex couples. This is because the Italian Constitution recognizes the “rights of the family” as a “natural society founded on marriage” (Article 29). In other words, “marriage” is the cornerstone of “family.” In Italy, resistance to same-sex marriage is in large part a response to the opponents’ perceived need to protect the so-called “traditional” family. As I demonstrated

in Chapter 3 (“The (Not So) Traditional Family and the Failure of Italian Family Law”), however, the “traditional” family has lost substantial ground in Italy. In contemporary Italy, as elsewhere, there exists an abundance of family arrangements. Despite the substantial changes to family structures resulting from delayed marriage, low fertility, longer life expectancies, and a declining welfare state, the family remains a central institution in Italy and fulfills an important social support role that compensates for the State's inability to deal with the ongoing economic crisis in Italy. Although the structure of the Italian family has changed dramatically in recent years, Italian family law has not. This is problematic because it leads to an erasure of alleged non-traditional families in the eyes of the State.

In Chapter 4 (“Policy-Making in the Courts and the Judicialization of Italian Politics”), I turned my attention to the Italian courts to show how in their recognition of rights for same-sex couples, they display signs of a flourishing judicial activism and attendant judicialization of politics. Although not unprecedented, this is unexpected in a civil law nation-state where judges are viewed as “technicians” and the law is presumably based on self-contained codes. According to this perspective, the job of the Italian judge is limited to interpreting laws enacted by the Parliament and judges are not authorized to make policy or law. As I illustrated in the context of the *Affermazione Civile* campaign, however, this is not what happens in reality. Recent Italian court decisions have significantly advanced the recognition of rights for LGBTI persons in Italy and are changing public policy with respect to the treatment of same-sex couples. The Italian court decisions are not only important to the advancement of LGBTI rights in Italy, but also work to further delineate a transnational EU citizenship and reinforce processes of European integration.

In chapters 5 and 6, I moved away from Italy to take a closer look at Europe and the EU. In chapter 5 (“The EU and Italy: Living Outside Imagined Borders”), I explained what “Europe” is and how it is different from the EU. I also talked about the EU, and explored how various institutions within the EU structure and generate contemporary debate over LGBTI rights in general and marriage equality in particular in the member states. I looked at the current status with respect to recognition of rights for same-sex couples in the EU member states. I explained how, in the struggle over recognition of rights for same-sex couples in Italy, one can begin to see the instantiation of a post-national identity that looks to Europe in the face of a feeble national identity. In chapter 6 (“The Council of Europe and the European Courts: Creating European Families”), I discussed efforts to harmonize family law in the EU. While there have been attempts to “harmonize” the family law of the member states, to date such efforts have made little progress. The EU continues to invoke notions of subsidiarity to declare family law as a matter best left to the discretion of the member states and this is problematic because it affects the free movement of EU citizens and their “family” members, and creates disparate categories of EU citizenship that privilege hetero-normative families and too often marginalize alternative families.

In chapter 6 I also devoted special attention to the activities of the ECtHR and the CJEU and to the development of a line of jurisprudence dealing with the rights of same-sex couples in Europe and the EU. So far, the European courts' attempts to deal with the legal and factual existence of same-sex families have been provisional and have resulted in a situation in the EU where same-sex couples in member states that recognize the rights of same-sex couples enjoy privileges that those in states with no recognition do not. The current situation is antithetical to processes of European integration and illuminates a split in the conceptualization of the EU.

As I mentioned in Chapter 5, this "split" is largely about the proper foundation for "rights," and divides those who subscribe to a secular, human-made notion of rights from those who see rights as emanating from "natural law." The idea that rights emanate from "natural law" is one that is shared and promoted by the Catholic Church. The Church is also seen as a major opponent to the recognition of rights for same-sex couples in Italy. For these reasons, in Chapter 7 ("Church, State and Marital Relations in Italy"), I looked specifically at the relationship between Church, State, and marriage in Italy. I explained how the Church uses values and norms derived from "natural law" to justify its opposition to same-sex marriage. I also pointed out how the Church's teachings on sexuality, marriage, and the family stand in contrast to over 140 years of anthropological research, analysis, and writing on the multiplicity of understandings about kinship, family, marriage, descent, and child-rearing that exist throughout the world. However, for those seeking certainty, the Church provides a ready-made vision of human rights based on "Christian" values, a vision that also excludes a large number of persons who are denied all of the potential benefits of EU citizenship due to their sexual orientation.

However, the resignation of Pope Benedict XVI and installation of Pope Francis signal a possible change in the Church's approach to public policy concerning same-sex couples. As stated in chapter 7, unlike his predecessor, Pope Francis has shown little interest in debates surrounding rights for same-sex couples. Although there has been no real indication that there will be doctrinal changes regarding the Church's positions on homosexuality, same-sex marriage, or same-sex adoption, Pope Francis' words and actions do point to a major change regarding Church involvement in public debate over recognition of rights for same-sex couples. By withdrawing from public debate on these issues, Pope Francis clears a space in Italian politics for politicians to take action.

Implications and Contributions

In the last section of this dissertation, I will devote attention to what all of this “adds up” to, and will explain some of the implications and potential contributions of this study. Writ large, this project is about sovereignty, extraterritoriality, and religion. It is about the relationship of a supranational entity to a nation-state in an emerging “post-national” situation. On a more modest level, this study also constitutes a contribution to several bodies of anthropological literature, the most obvious of which include: the anthropology of Italy, legal anthropology, and the anthropology of Europe and the EU. I will discuss each of these before concluding with an exploration of the dissertation’s more ambitious aims.

With respect to the anthropology of Italy, I have illustrated how Italy has been deeply transformed as a result of its membership in the European Union (EU). This can be seen in the struggle for rights on behalf of same-sex couples and the effects of recent European and EU court cases on both the Italian judicial system and domestic law and policy concerning same-sex couples in Italy. Yet, despite the relationship between EU membership and many of the dramatic changes occurring in Italy, recent anthropological studies of modern Italy have largely ignored the role played by the EU and Europe in shaping Italian society, especially in terms of the making of national law and public policy outside the economic realm (see e.g., Herzfeld 2010; Krause 2005b; Krause and Marchesi 2007; Molé 2012, 2009; and Muehlebach 2012). One reason for this, perhaps, is that transnational relationships are difficult to follow using more traditional anthropological methods (of which participant-observation is the most obvious example). However, Italy is deeply entrenched as a member of the EU. Consequently, in order to more fully understand the current situation in Italy, it is incumbent upon anthropologists who choose this nation-state as a field site to consider the relationship between Italy and the EU. One

way to trace transnational relationships is through the law. As previously noted, legal anthropologists have long used law as a means of reckoning with transnational processes that are not otherwise amenable to observation (Moore 2005). This is what I have done here.

In addition, I have borrowed a method often used by legal scholars (i.e., doctrinal analysis) to trace the influence of European court decisions on recent Italian judicial decisions. In doing so, I have been able to show how the Italian courts have mobilized European case law in significant ways, pushing Italian law and policy with respect to the treatment of same-sex couples beyond what the jurisprudence of the European courts requires. Consequently, when one analyzes the relationship between European and Italian case law, one sees that recent developments in Italian judicial decisions regarding the rights of same-sex couples appear to be more of a *choice* than an *imposition*. As stated in chapter 6, this indicates that Italian judges are, in the case of recognition of rights for same-sex couples, *electing* to look to European law as a source of law rather than being obliged to do so by the existing legal structures that frame relationships between Europe, the EU, and Italy. It also constitutes evidence of judicial activism on the part of Italian courts. This is data and evidence that would likely be overlooked if one did not pursue a doctrinal analysis of the case law in this area and, following Riles (1994), underscores the importance to legal anthropologists of confronting the normative aspects of judicial decision-making through doctrinal analysis to systematically analyze how one court decision influences another.

This study also contributes to and expands on previous anthropological studies of EU identity formation that have approached the subject by: 1) looking at attempts to bring about an EU identity through various cultural policies such as the adoption of EU symbols and the launching of campaigns to foster popular awareness (*e.g.*, Shore 2000); 2) focusing on EU

institutions and how officials within these institutions work to bring about EU integration (*e.g.*, Thedvall 2006; Zabusky 2000); and 3) adopting a “from below” perspective that explores how the EU provides a new framework for identity construction as persons and organizations increasingly define themselves in relation or opposition to the EU (*e.g.*, Holmes 2008; Nic Craith 2009).

In the first of the two “from above” approaches, anthropologists have looked at attempts to bring about an EU identity through various cultural practices that understand EU identity formation as a cultural project designed to create a “European” people for a “European” state (Shore 2004, 2000, 1993). Historically, “culture” has been viewed as a fundamental building block for establishing the legitimacy of a political system (Shore 2003:3). In its attempts to develop a European identity, the EU has increasingly relied on cultural politics designed to encourage a popular European consciousness or, to borrow Anderson’s language (1991), to create an “imagined community” of Europeans. Much of this has been done through the creation of EU symbols, invented traditions, rewriting history, developing Euro-statistics, forging an EU citizenship, and the adoption of a single currency in the form of the Euro (Shore 2000).

Anthropologist Cris Shore has become skeptical about the possibilities for a European identity, and sees it as unlikely that the people of Europe will ever embrace the EU’s cultural policies. This is because, according to Shore, the factors that give the nation-state its substance and legitimacy are not only social and historical, but also embedded in everyday culture, which took many decades to develop (2004:40). The point that I make here, however, is that in a nation-state such as Italy where there is arguably a weaker sense of national identity, the possibility for advancement of European identity is greater. Although Italians are not any more likely to embrace the EU’s cultural symbols than other so-called EU citizens, they may be more

susceptible to the idea of a pan-EU identity that is capable of compensating for the nation-state's inadequacies. At a minimum, disadvantaged segments of the Italian population, such as the LGBTI activists in this study, have demonstrated a propensity to take advantage of opportunities made possible by the EU or at the EU level to advance their cause(s). In doing so, such groups embrace and invoke a form of cultural politics that encourages the further development of a European consciousness.

In addition to the two "from above" approaches, there is a third approach to EU identity formation that adopts a "from below" perspective and looks at the way that European integration provides a new framework for identity construction as persons and organizations increasingly define themselves in relation or opposition to the EU (Wilken 2012:126). These groups have included, among others: 1) "kin-state minorities" that ended up on the wrong side of the national border following centuries of war in Europe; 2) stateless "micro nations"; and 3) linguistic minorities that have struggled to keep their languages alive in the face of nation-states' attempts to eradicate them. European integration provides an opportunity for these groups to reframe their culture and identity. As previously noted, through their engagement in various forms of political cooperation with the EU, many of these groups have been able to reposition themselves vis-à-vis the nation-state and reframe their identities in a European context.

What I have shown here is that there is yet another way that EU identity is forged. Significantly, in terms of EU identity formation, the Italian LGBTI activist groups I worked with are acting on their own, unsolicited by any EU institution or official. The processes I describe are not part of a larger cultural project initiated by the EU. In fact, the opposite can be stated. With respect to the family laws of its member states, the EU has been generally unwilling to interfere, citing principles of "subsidiarity" and proclaiming that family law is a matter best left

to the member states' discretion. In addition, although LGBTI activists have asserted an interest in becoming more "European," at least in terms of the recognition of rights for LGBTI persons, EU identity formation largely occurs as a side-effect (rather than as a deliberate goal) of the activists' activities. Finally, the delineation of an EU citizenship that overrides the interests of the nation-state in this particular area of law (and thereby fosters European identity) requires the cooperation of the Italian courts. While the activists play a fundamental role in carving out a transnational citizenship, in the end it is the Italian courts that are largely responsible for actually advancing processes of European integration.

The bottom-line is that identity affiliation with the EU occurs as the result of a fragmented nation-state in Italy that is unable to meet the demands of a changing society. While segments of the nation-state attempt to maintain a sense of national identity based on Catholic social teachings, especially those concerning the so-called traditional family, this no longer resonates with large parts of contemporary Italian society. In the struggle over recognition of rights for same-sex couples and calls for family law reform in Italy one can see that large portions of society have moved on and no longer see kinship as grounded in biological notions of reproduction. Politics remain at an impasse, however, and while the battle over identity takes place through law, it is situated primarily in the European and national courts. As evidenced by *Certi Diritti's* recent formulation of a "Roadmap" for a national strategic litigation project that will involve multiple LGBTI associations throughout Italy, Italian LGBTI activists are looking to the national courts as a viable alternate avenue for the recognition of rights in the face of a parliament that is unwilling or unable to take action.

The fact that recent changes with respect to the treatment of same-sex couples in Italy are a direct result of the EU's influence on the nation-state points as well to larger issues regarding

sovereignty and territoriality. This study demonstrates how major changes in the status of the nation-state frequently occur through unintended and peripheral processes of post-national identity formation in which the state itself is implicated. In this situation, to the extent that the EU is being “integrated,” it is in large part due to the desire of activists in the national context to see the Kantian vision of the EU succeed, rather than to processes of market integration.

Law and policy with respect to same-sex couples in Italy, Europe, and the EU continues to develop, even as I write this. For example, in May 2013, a civil court in Milan ordered the City of Milan to enter a same-sex partnership contracted abroad in the city register. The couple had signed a civil partnership in London in 2010. When the City of Milan refused to enter the civil partnership in the local registry the couple appealed to the court. As a result of the court’s order to record the civil partnership in local registry, the couple will now be able to access local welfare benefits. This example and the many others discussed in this dissertation demonstrate the continued development of law in the area of recognition of rights for same-sex couples. While Italian politicians continue to debate the possibility of civil unions, *Certi Diritti* activists demand full marriage equality, something that was virtually unthinkable when I began this project. Meanwhile, in the absence of comprehensive family law reform, the Italian and European courts continue to plug away at defining the rights of same-sex couples and the current trend indicates an expansion of those rights, something that bodes well for the future of the Kantian vision of the EU.

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