

The Italian Far Right's Attack on Queer Children

Matteo M. Winkler*

'How does it feel to be a problem?'
W.E.B. Du Bois

Abstract

With 'queer' acting as an umbrella term for lesbian, gay, bisexual, trans, and intersex (LGBTI) people, this article argues that the Italian far right's attempt to remove same-sex parents from their children's birth certificates reflects an ideology under which queer individuals are excluded from the notion of 'family' and queerness is depicted as an abnormality in a child's upbringing. By deconstructing these narratives through a human rights lens, this article aims to help queer activists, lawyers, scholars, and parents raise solid arguments in court, to recover, on behalf of all queer children, the dignity that the government is trying to take from them.

I. Introduction

Queer oppression is like a cockroach: once queer individuals are afforded new freedoms, repressive gatekeepers enact even more insidious and harmful alternatives.¹ This pattern occurred in the United States during the 1970s, when just a few years after the declassification of homosexuality as a mental illness, a new diagnosis was introduced to pathologize effeminate boys.² It later returned

* Associate Professor, HEC Paris, Tax & Law Department.

¹ The term 'queer' is used here, either as an adjective, a substantive, or a verb, to refer to persons who do not identify as 'cisgender' (their experience of gender coincides with the sex determined at birth) and/or *heterosexual* (their experience of attraction is directed toward a person of the same gender as theirs). In this article, 'queer' is a synonym for the popular acronym *LGBTI*. However, this is not the only possible definition of queer: see S.S. Raj, *Feeling Queer Jurisprudence. Injury, Intimacy, Identity* (New York: Routledge, 2020), 2-3; W.B. Turner, *A Genealogy of Queer Theory* (Philadelphia: Temple University Press, 2000), 8. On the 'backlash politics' in queer contexts see L.R. Helfer and C. Ryan, 'LGBT Rights as Mega-Politics: Litigating before the ECHR' 84(4) *Law and Contemporary Problems*, 59 (2021); P. Ayoub, 'With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights' 13(3) *Journal of Human Rights*, 337, 340 (2014), comparing Poland and Slovenia; W.N. Eskridge, 'Backlash Politics: How Constitutional Litigation has Advanced Marriage Equality in the United States' 93(1) *Boston University Law Review*, 275, 292 (2013).

² The new diagnosis, introduced in 1980, was called 'Gender Identity Disorder in Childhood'

in the United Kingdom during the 1980s, when the decriminalization of homosexuality was followed shortly by a ban on queer visibility in public schools.³ And it is happening in Italy today. Only a few years after a civil partnership law affording constitutional protection to same-sex couples was enacted,⁴ the newly elected radical-right populist government is engaged in a *war* with the sole objective of destroying arduously earned queer freedoms.⁵

On 19 January 2023, the Minister of the Interior commanded all of Italy's prefects to remind the mayors to comply with a recent Sezioni Unite judgment of the Corte di Cassazione (no 38162 of 30 December 2022) in which a child's foreign birth certificate indicating two men as the parents was refused registration on the grounds that such registration would circumvent the domestic surrogacy ban.⁶ Two months later, quoting both the Minister's order and the Sezioni Unite judgment, the prefect of Milan requested that the mayor halt registration of both male and female same-sex parents on birth certificates, which the municipality had been granting for six months. Shortly thereafter, thousands of people peacefully marched in Milan, Rome, and other cities to ask the mayors to continue the registrations while condemning the government's decision as an attack on children of same-sex

and pathologized a child's discomfort with their own sex. See E. Kosofsky Sedgwick, 'How to Bring Your Kids Up Gay' 29 *Social Text*, 18 (1991), republished in M. Warner ed, *Fear of a Queer Planet: Queer Politics and Social Theory* (Minneapolis and London: Minnesota University Press, 1993), 69; K. Bond Stockton, *The Queer Child. Or Growing Sideways in the Twentieth Century* (Durham and London: Duke University Press, 2009), 14. On the 1973 declassification see J. Drescher, 'Out of DSM: Depathologizing Homosexuality' 5 *Behavioral Science*, 565, 570 (2015); on the 1980 amendment see K.J. Zucker and R.L. Spitzer, 'Was the Gender Identity Disorder of Childhood Diagnosis Introduced into DSM-III as a Backdoor Maneuver to Replace Homosexuality? A Historical Note' 31 *Journal of Sex and Marital Therapy*, 32 (2005).

³ Repealed in 2003, Section 28 of the Local Government Act, 1988, c. 9, stated that local authorities 'shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality or promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'. See P. Johnson and R.M. Vanderbeck, *Law, Religion and Homosexuality* (New York: Routledge, 2014), 175-186 (examining the religious origin of this law).

⁴ Legge 20 May 2016 no 76, regulating registered partnerships between persons of the same sex and cohabiting couples (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*). See N. Cipriani, 'Unioni Civili: Same-Sex Partnerships Law in Italy' 3 *Italian Law Journal*, 343 (2017); S. Mezzanotte, 'The Civil Union in the Italian Legal System' *International Studies Journal*, 17, 49-74 (2020); M.M. Winkler, 'Same-Sex Marriage and Italian Exceptionalism' 12(4) *Vienna Journal on International Constitutional Law (ICL) Journal*, 431 (2018); M.M. Winkler, 'Italy's Gentle Revolution: the New Law on Same-Sex Partnerships' 25(1) *Digest: National Italian American Bar Association Law Journal*, 1 (2017); G.M. Cavaletto and E. Stewart, 'Civil Unions in Italy' 32 *Italian Politics* 194, 202 (2017); I. Ferrari, 'Family Relationship in Italy after the 2016 Reform: The New Provisions on Civil Unions and Cohabitation' *International Survey of Family Law*, 169 (2017).

⁵ See D. Broder, 'Giorgia Meloni's Government Declares War on Same-Sex Parents' *The Nation*, 12 April 2023 available at <https://tinyurl.com/33juvnbT> (last visited 20 September 2023).

⁶ Minister of Interior, Circular 19 January 2023 no 3, available at <https://rb.gy/7ars> (last visited 20 September 2023). See Corte di Cassazione-Sezioni unite 30 December 2022 no 38162, available at <https://rb.gy/xomm> (last visited 20 September 2023).

parents.⁷ On 30 March, after the mayors of several Italian cities decided to continue the registrations, the European Parliament officially called on the government to withdraw its decision, as it had gone ‘against not only same-sex couples, but also primarily their children’ and was considered ‘a direct breach of children’s rights (and) part of a broader attack against the LGBTQI+ community in Italy’.⁸

This article scrutinizes two main viewpoints that are indispensable to this assault on same-sex parents: the notion of family and the fear of the queer child. Section II specifically criticizes the idea of a ‘traditional family’ as a purely ideological model that is foundational to the far right’s world view and ontologically constructed on the very act of demonizing queer people, transforming them into ‘monsters’ so that the traditional family may continue to exist.⁹

Section III debunks the hypocrisy behind the government’s seemingly innocuous claim that ‘a child needs a mother and a father’ by arguing that it reflects an irrational anxiety resulting from the idea that children raised by two same-sex parents are either ‘indoctrinated’ into queerness or under the *influence* of queer role models, which will eventually ‘turn’ them into queer individuals.¹⁰ This section also highlights how the far right’s systematic demonization of surrogacy in Italian media reflects a fear of children’s ‘commodification’, which coalesces popular anxieties about artificial bonds *versus* assumedly ‘natural’ ones. By upraising biology over biography, Italy’s government is effectively erasing the rights of all children who have already been born through medically assisted procreative techniques, and at the same time ‘weaponizes’ this fear against couples who resort to these methods.¹¹

In trying to deconstruct the far right’s rhetoric about family and queer children through the human rights lens, this article aims to help queer activists, lawyers, scholars, and parents understand the dangers behind this rhetoric and contest it in court, so they can recover, on behalf of all queer children, the dignity that Italy’s far-right government is attempting to take from them.

II. Defending the Traditional Family (by Demonizing Same-Sex Parents)

⁷ See O. Bonnel, ‘In Italy, the Meloni Government Attack Same-Sex Parenthood’ *Le Monde*, 23 March 2023, available at <https://rb.gy/rowi> (last visited 20 September 2023).

⁸ European Parliament, ‘2022 Rule of Law Report - The Rule of Law Situation in the European Union’, P9_TA(2023)0094, 30 March 2023, para 10.

⁹ See R. Braidotti, ‘Mothers, Monsters and Machines’, in Id ed, *Nomadic Subjects* (New York: Columbia University Press, 1994), 59, 61-62; P.B. Preciado, *Can the Monster Speak? Report to an Academy of Psychoanalysts* (Cambridge: Massachusetts Institute of Technology Press, 2021), 19-21 (explaining how the *universal* is constructed on psychoanalytic *monsters* such as the trans).

¹⁰ See C.J. Rosky, ‘Fear of the Queer Child’ 61(3) *Buffalo Law Review*, 607 (2012).

¹¹ See S.L. Washington, ‘Weaponizing Fear’ 132 *Yale Law Journal*, 163, 166 (2022), using this term ‘to describe how state actors – whether intentionally or unintentionally – use a structural environment that induces, benefits from, or relies on fear, ultimately producing further marginalization’.

1. The Far Right's Conception of Family

There is no better synthesis of the Italian far right's family ideology than the following excerpt from the Fratelli d'Italia (FDI) program for the 2022 National Elections, where it was planned to:

‘contrast all discriminations based on sexual and sentimental choices, maintain the civil partnership law while at the same time reiterating the prohibition of same-sex parent adoption and the fight against all forms of surrogacy, in the supreme interest of the minor’.¹²

Unable to repeal the civil partnership law because of its constitutional foundations,¹³ FDI made queer children their new target. In fact, this text reveals a precise three-dimensional anti-queer strategy. The first dimension is the labeling of sexual orientation as a ‘choice’, so that any option other than heterosexuality can be self-restrained and re-directed.¹⁴ The second dimension consists of ‘the rejection of both same-sex parent adoption and surrogacy’, which are already barred under existing laws.¹⁵ Reinforcing these prohibitions will not prevent the creation of new families abroad and will only destabilize any established family bonds. The third and final dimension reflects the conviction that these prohibitions fulfill the child's ‘supreme interest’. As has been made clear on multiple occasions, FDI's official stance is that ‘between a homosexual's legitimate ‘desire’ of being a parent and a

¹² Fratelli d'Italia, ‘Il Programma per risollevere l'Italia. Elezioni politiche 25 settembre 2022’, available at <https://tinyurl.com/45d7f8rf>, 21 (last visited 20 September 2023).

¹³ Corte Costituzionale 14 aprile 2010 no 138, para 8 (concluding that the Italian Constitution mandates the Parliament to pass ‘legislation of general nature, aimed at regulating the rights and duties of the members of the couple’), on which M.F. Moscati, *Pasolini's Italian Premonitions: Same-Sex Unions and the Law in Comparative Perspective* (London: Wildy, Simmonds & Hill, 2014), 109-15; M.M. Winkler, ‘Italy's Gentle Revolution’ n 4 above, 14-17; see also Eur. Court H.R., *Oliari and Others v Italy*, Judgment of 21 July 2015, available at www.hudoc.echr.coe.it, paras 184-185.

¹⁴ Yet, sexual orientation is not only a sexual choice. It instead embraces extremely diverse forms of desire, intimacies, and erotic practices, all of which disappear behind the *choice* label. For a discussion see, among others, L.A. Boso, ‘Disrupting Sexual Categories of Intimate Preference’ 21(1) *Hastings Women's Law Journal*, 59, 69-73 (2010).

¹⁵ Respectively, Art 6(1), legge 4 May 1983 no 184 (*Diritto del minore ad una famiglia*) and Art 12(6), legge no 40 of 19 February 2004 (*Norme in materia di procreazione medicalmente assistita*, hereinafter Medically Assisted Procreation Act, MAPA). See V. Camboni Miller, ‘Legal and Ethical Considerations on the Use of Assisted Reproductive Technology in the United States and Italy’ 24 *Digest: National Italian American Bar Association Law Journal*, 17 (2018); G. Montanari Vergallo et al, ‘How the Legislation on Medically Assisted Procreation Has Evolved in Italy’ 36(1) *Medicine and Law*, 5 (2017) (exposing the case law of the Constitutional Court on the Law no 40 of 2004); S. Penasa, ‘Converging by Procedures: Assisted Reproductive Technology Regulation within the European Union’ 12 *Medical Law International*, 300 (2012) (highlighting ‘the shift from an ethics-focused approach to a right-centered perspective’ in the judicial interpretation of MAPA). On the criminal aspects of foreign surrogacy see Corte di Cassazione 17 November 2016 no 48696; Corte di Cassazione 10 March 2016 no 13525 *Diritto penale e processo*, 1085 (2016) (finding that performing a surrogacy abroad is irrelevant *vis-à-vis* Italian criminal law).

child's 'right' to have a father and a mother', the latter must always prevail. On this specific point, all three of the right-wing coalition parties that obtained the majority in the 2022 National Election have strategies that coincide and, remarkably, overlap with the doctrine of the Catholic Church, which expressly affirms 'the child's right to be born of a father and mother known to him'.¹⁶

The far right's triangular mother-father-child agenda, which recurs systematically in all public discussions concerning same-sex parents, is nothing but a specification of the 'traditional family' notion at the core of their political strategy. 'Family', so states FDI's electoral program quoting Pope Jean Paul II, 'is the foundational element of society and is what makes a Nation truly sovereign and spiritually vigorous'.¹⁷

This discourse is characterized by three distinct tropes. First, the notion of the traditional family is not conceived in relative historical terms, but is instead depicted as immutable and absolutized both as an 'anthropological' necessity – the foundation of an assumed 'natural order' – and a national priority.¹⁸ Second, the far right's concept of family is always construed 'negatively' as the alleged victim of violent ideological attacks that aim to destroy it, with its bonds being strenuously claimed as 'different from' and its boundaries being drawn over overwhelming external threats.¹⁹ Third, legal status determined by biological traits is considered to be superior to affective bonds; from this perspective, as Stefano Rodotà pointed out, 'biology wants to erase biography, resulting in a dangerous cultural and social regression'.²⁰

With this rhetoric, not only do demonic forces attacking the family dominate the public discourse more than the family itself, but the latter, given its deep connection to the objective of fertility decline reversion, also acts as a mere instrument to pursue racial and ethno-nationalist ambitions, as is made clear by the repeated insistence of subsisting biological links within the family.

¹⁶ See Catechism of the Catholic Church (Vatican: Vatican Press 1992), Canons 2376 and 2378. On the relationship between Italy's legislative (under)development and the Catholic Church see R. Bottoni, 'Challenges to the Catholic Notion of Family and the Responses of the Catholic Church in Italy' 6 *Journal of Law, Religion and State*, 274, 283-287 (2018).

¹⁷ Fratelli d'Italia, 'Il programma' n 12 above, 5. The pope's full quotation so reads: 'Every effort should be made so that the family will be recognized as the primordial and, in a certain sense "sovereign" society! The "sovereignty" of the family is essential for the good of society. A truly sovereign and spiritually vigorous nation is always made up of strong families who are aware of their vocation and mission in history'. John Paul II, *Letter to Families from John Pope II. Gratissimas Sane*, 2 February 1994, available at <https://rb.gy/cyfi1>, para 17, (last visited 20 September 2023).

¹⁸ See E. Fassin, 'Same-Sex Marriage, Nation, and Race: French Political Logics and Rhetorics' 39 *Contemporary French Civilization*, 281 (2014).

¹⁹ The need to 'defend the family' from a series of alleged violent aggression by 'ideologies', so reads the program of the European conservatives, that 'deny biological and social reality and undermine citizens' identities' and creepingly manipulates their minds is clearly affirmed in the conservatives' campaigns. See European Conservatives and Reformists (ECR), *Policy Group on Family and Life*, available at <https://tinyurl.com/4a52pwk3> (last visited 20 September 2023).

²⁰ S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: Laterza, 2012), 171.

2. Popular Movements and Demographic Concerns

Remarkably, these disturbing tropes have developed through a patient cultivation of public rhetoric that has united religious language and secular stances under the same pro-family flag.

Inspired by the French anti-queer movement *La Manif pour tous* (LMPT), created in 2012 to contest the *mariage pour tous* law on same-sex marriage, dozens of local movements, associations, and committees of concerned Italian citizens took to the streets to oppose the legal recognition of same-sex couples.²¹ This popular mobilization, with its rhetorical bases in the Church's doctrine and the support of neo-fascist underground organizations, was soon secularized and appropriated by right and far-right parties like *Lega* and FDI, and gave rise to a tentacular transnational network which supports the strenuous fight against 'gender theory', the systematic ridicule of gender equality, and the demonization of all sexual diversity. The 2019 World Congress of Families in Verona, attended by both *Lega* and FDI leaders, was the tipping point for the Italian right's participation in this global strategy.²²

The 'demographic winter' element also has a strong presence in the far right's rhetoric, coalescing typically ethno-nationalist concerns about the disastrous consequences of the fertility decline for the nation's endurance.²³ Here the dominant narrative stresses the dangers of impending European depopulation for the cultures, the traditions and, more importantly, the biological integrity of European nations, weaponizing popular anxieties while simultaneously dismissing the nefarious consequences of current overpopulation as someone else's problem.²⁴

²¹ See I. Heinemann and A. Minna Stern, 'Gender and Far-Right Nationalism: Historical and International Dimensions. Introduction' 20 *Journal of Modern European History*, 311, 316 (2022), (describing the demonization of gender and sexuality equality by far-right movements); S. Garbagnoli, 'Italy as a Lighthouse: Anti-Gender Protests in Italy', in D. Paternotte and R. Kuhar eds, *Anti-Gender Campaigns in Europe. Mobilizing against Equality* (Washington: Rowman & Littlefield, 2017), 151, 156-160.

²² See C. Cossutta and A.J. Habed, 'From Verona, with Love: Anti-Gender Mobilizations and Transfeminist (Re)Actions', in A. Henninger et al eds, *Mobilisierungen gegen Feminismus und Gender: Erscheinungsformen, Erklärungsversuche und Gegenstrategien* (Berlin: Verlag Barbara Budrich, 2021), 139-154, 143.

²³ The expression 'demographic winter' (*hiver démographique*) was coined by Gérard-François Dumont, a professor at Sorbonne, France, in *La France ridée. Les conditions du renouveau* (Paris: Hachette, 1986), 21 (the term referred to a demographic model suggesting that it needs two hundred and ten children from every one hundred women for a generation to be replaced, any level below this threshold being qualified as winter 'wishing to call for the spring's arrival'; in 2021, Italy witnessed four hundred point two hundred forty-nine newborns, equal to one point twenty five for each woman).

²⁴ In this regard, R. Trimble, 'The Threat of Demographic Winter: A Transnational Politics of Motherhood and Endangered Populations in Pro-Family Documentaries' 25 *Feminist Formations*, 30 (2013), 38, observes that 'the global population-decline framework provides an international scale for the World Congress of Families' discussion of procreative habits and proffers economic justifications for worldwide investment in encouraging natural family formation. The demographic winter theme sets a tone of decline and forms a frame for positing decreasing

In far-right leaders' speeches the connection between the demographic winter and queerness is especially omnipresent. For them, any positive representation of same-sex desire, intimacy, and love would result in human extinction because of queer individuals' (alleged) inability to procreate. This argument is identical to that which emerged from the United Kingdom's parliamentary debate and resulted in the enactment of the infamous Section 28, a law between 1988 and 2003 which prohibited local authorities from supporting queer-friendly initiatives.²⁵ With this law, as Carl F. Stychin observed,

'(h)omosexuality is linked to death – not only of the individual gay male (for lesbianism largely is rendered invisible in this discourse) – but the death of the body politics through the failure to reproduce. The promotion of a positive image of gay sexuality is the causal link to these catastrophic consequences'.²⁶

A relatedly interesting experience is that of the aforementioned World Congress of Families, whose foundational manifesto, elaborated on in the 2000s by two American authors, draws an explicit link between the survival of the nation and scientific evidence reportedly demonstrating that

'children do best when they are born into and raised by their two natural parents (whereas) under any other setting – including oneparent, stepparent, homosexual, cohabitating, or communal households – children predictably do worse'.²⁷

The religious origin of this argument is unquestionable.²⁸

The scenario that the far right decries in their rhetoric is reminiscent of Guido Morselli's novel *Dissipatio H.G.*, which was published posthumously in 1977 after the author committed suicide. The novel tells the story of a man who, after a vain attempt to take his own life, finds out that human beings have totally vanished. As he walks alone in the deserted streets of Chrysopolis, he enquires about the people's whereabouts:

'On the streets, in the squares, on the quays, and in the center, it is as calm and orderly as it must have been at two AM, but empty. How many were there? Four hundred thousand, four hundred twenty thousand. In any

population as a global crisis'. See also M. Mieli, *Towards a Gay Communism. Elements of a Homosexual Critique* (London: Pluto Press, 2018), 41-42 (claiming that 'overpopulation is determined above all by the oppressive insistence of the anti-gay taboo').

²⁵ See n 3 above.

²⁶ C.F. Stychin, *Law's Desire. Sexuality and the Limits of Justice* (New York: Routledge, 1995), 42.

²⁷ A.C. Carlson and P.T. Mero, *The Natural Family: A Manifesto* (New York: Routledge, 2009), 11.

²⁸ It suffices to read Cardinal Alfonso López Trujillo's 'The Nature of Marriage and Its Various Aspects' 4(2) *Ave Maria Law Review*, 297, 341 (2006).

event, they were'.²⁹

Whereas the prospect of a future where humanity *was*, instead of *is*, acts as the basis for the far right's obsession with defending the family, none of its arguments or rhetoric respond to the key question: 'how does destabilizing the legal status of the children with same-sex parents reinforce the traditional family'? Intuitively, frustrating the desire of same-sex couples to become parents and making the lives of children born to them harsher and more vulnerable would definitely not cause straight couples to make more children. Indeed, if given access to medically assisted procreation techniques and a well-regulated surrogacy, same-sex parents could contribute to reverting the fertility decline, and their legal recognition would increase the number of families. Why are they not considered worthy of legal recognition then?

If one is looking for 'bugs in the programming jargon' of the far-right rhetoric 'in the hope of coaxing unplanned stories or delightful nonsense',³⁰ this is one of multiple contradictions in anti-queer rhetoric that unveils a motivation other than slowing down the country's population decline. If it is hard to believe that any threat to Italy's demography could come from zero point twenty five percent of Italy's population, as such is the number of children born to same-sex couples, certainly denying these children their rights does not curb the problem: it only exacerbates it.³¹

3. Recovering the Language of Human Rights

Foreign and supranational courts have scrutinized 'the protection of family' on multiple occasions as an alleged basis for denying same-sex couples the same rights enjoyed by straight married couples, yet have found this ground untenable.

In *Obergefell v Hodges*, for instance, the US Supreme Court held that, instead of protecting children, same-sex marriage bans 'harm and humiliate the children of same-sex couples', forcing them to

'suffer the stigma of knowing their families are somehow lesser [and] the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life'.³²

²⁹ G. Morselli, *Dissipation H.G.* (New York: New York Review of Books, 2020), 5. The original Italian version was published by Adelphi in 1977.

³⁰ M.L. Ryan, 'Narrative and Digitality: Learning to Think with the Medium', in J. Phelan and P.J. Rabinowitz eds, *A Companion to Narrative Theory* (Malden, MA: Blackwell Publishing, 2005), 515, 518.

³¹ Equaling to one hundred thousand – one hundred and fifty thousand children. E. Tebano, 'I veri numeri sui figli delle coppie dello stesso sesso che hanno bisogno di essere riconosciuti all'anagrafe' *Corriere della Sera*, 21 March 2023, available at <https://tinyurl.com/25k6ssus> (last visited 20 September 2023).

³² *Obergefell v Hodges*, 576 U.S. 644, 646 (2015).

In that case, invoking concern for queer children, the federal government observed that marriage bans

‘crystallize in an acutely painful way the stigma that lesbian and gay adolescents experience as they come to understand that an essential attribute of their being marks them for second-class status’.³³

On this side of the Atlantic, the European Court of Human Rights (ECHR) has repeatedly stated that in terms of sexual orientation, restrictions on one’s rights to private and family life, to free speech, and to association must ‘not just be proportionate but necessary’ to attain the purported protection of family.³⁴ Significantly, only in one case (which is now twenty two-years-old) has the court been persuaded to hold that the protection of family dictates a restriction on these rights.³⁵ In *Fedotova v Russia*, the ECHR ultimately explained that:

‘there is no basis for considering that affording legal recognition and protection to same-sex couples in a stable and committed relationship could in itself harm families constituted in the traditional way or compromise their future or integrity. Indeed, the recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term. More broadly, securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples’.³⁶

For the court, although distinctions can be made between different families at the national level and are at times ‘even praiseworthy’, these distinctions nonetheless cannot ‘prejudice’ non-traditional families, whose members ‘enjoy the guarantees of (private and family life) on an equal footing with the members of the traditional family’.³⁷ Indeed, heterosexuality is not required to create a

³³ *ibid*, Brief for the United States as Amicus Curiae Supporting the Petitioners, 14-15.

³⁴ See Eur. Court H.R., *Karner v Austria*, Judgment of 24 July 2003, available at www.hudoc.echr.coe.it, para 41.

³⁵ Compare Eur. Court H.R., *Mata Estevez v Spain*, Judgment of 10 May 2001, available at www.hudoc.echr.coe.it (holding that in the protection of family based on marital bonds, differences in treatment fall within the State’s margin of appreciation) with *Shalk and Kopf v Austria*, Judgment of 24 June 2010, available at www.hudoc.echr.coe.it, para 94 (holding that ‘in view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Art 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would’).

³⁶ Eur. Court H.R. (GC), *Fedotova and Others v Russia*, Judgment of 17 January 2023, available at www.hudoc.echr.coe.it, para 212; see also the judgment of 31 July 2021 in the same case (deferral to the Grand Chamber), available at www.hudoc.echr.coe.it, para 55. For identical statements see Eur. Court H.R., *Bayev v Russia*, Judgment of 20 June 2017, available at www.hudoc.echr.coe.it, para 67.

³⁷ Eur. Court H.R., *Marckx v Belgium*, Judgment of 3 June 1979, available at

family and enjoy the right to a governmentally protected family life.³⁸

The first counterstrategy against the far right's fear-weaponizing rhetoric on the traditional family is to subject this rhetoric to judicial scrutiny and distill it to the 'real rigor' required to justify restrictions on someone's rights.³⁹ In addition to being defamatory, public statements like 'gays buy children on the Internet' or 'surrogacy is worse than pedophilia' might succeed on a television talk show or on social media, but would hardly carry weight in a courtroom.

III. Fear of the Queer Child

1. The Child as a Metaphor

When LMPT threatened the French Parliament, arguing that a law on same-sex marriage would destroy both the family and human civilization, Spanish queer philosopher Paul B. Preciado wrote a pointed critique against LMPT's stance on the child's alleged 'right to have a mother and a father':

'The child that (LMPT) claims to be protecting does not exist. The defenders of childhood and family conjure up the political image of a child that they construct, a child presumed to be heterosexual, with a standard binary gender. A child who is being stripped of any power to resist, any possibility of making free, collective use of their body, their organs and their sexual fluids. This childhood they claim to be protecting necessitates terror, oppression and death. (LMPT) takes advantage from the fact that it is impossible for a child to rebel politically against the discourse of adults: the child is always a body whose right to self-govern is not recognized'.⁴⁰

For Preciado, the child invoked by the far right is 'a political artefact that guarantees the normalization of the adult'.⁴¹ In Luce Irigaray's terms, this child is a 'metaphor for the norm', an oft-inaccurate yet nonetheless appealing representation of what a child should be: sharply projected toward a heterosexual adulthood 'if all goes well'.⁴² This rhetoric labels children born to heterosexual parents as 'normal', whereas those born to same-sex parents - as well as those

www.hudoc.echr.coe.it, para 40.

³⁸ Likewise K. McK. Norrie, 'Constitutional Challenges to Sexual Orientation Discrimination' 49 *International and Comparative Law Quarterly*, 755, 770 (2000). See Eur. Court H.R., *Salgueiro da Silva Mouta v Portugal*, Judgment of 21 December 1999, available at www.hudoc.echr.coe.it, paras 35-36.

³⁹ K. Yoshino, *Speak Now. Marriage Equality on Trial* (New York: Crown Publisher, 2015), 277-279 (praising courts' fact-finding as a remedy against the propagation of misinformation).

⁴⁰ P.B. Preciado, *An Apartment on Uranus* (London: Fitzcarraldo Editions, 2019), 54.

⁴¹ *ibid* 56.

⁴² K. Bond Stockton, n 2 above, 27. The text refers to L. Irigaray, *To Be Born. The Genesis of a New Human Being* (New York: Springer, 2017), on which see S. Thorgeirsdottir, 'Luce Irigaray's Philosophy of the Child and Philosophical Thinking for a New Era' 61 *Sophia*, 203, 209-210 (2022).

with only one parent, those living with their grandparents or other siblings, or any other variation - are considered dysfunctional and harmed. This powerful metaphor sends a clear message to both children and parents: it tells children that their future is childless and that they will never have a family of their own unless they 'choose' to assimilate into heterosexuality; it tells parents that they must be ashamed of their queer children and try to correct them at all costs.⁴³ Against this non-existent right to have a mother and father, we should affirm the child's right to be free from violence and from the false rhetoric of a childless future.

A rally in Domodossola, a small city in Northern Italy, illustrates how the rhetoric surrounding the child's right to have a mother and father is deeply connected to the classification of queer children as pathological. On 23 July 2022, Lega's leader Matteo Salvini delivered the following speech at this rally:

'In an elementary school, and also in a middle school, on the registry, they do not speak to pupils with their first names, so when they do the roll call, when they call out for a test, there are no Elena, Giorgio, Riccardo, Antonella, Matteo, Maria Grazia. They call them by their family name. Not to discriminate. For there may be perhaps a kid that at seven years old *feel themselves as fluid*. Let me tell you this: this is not future; this is absolute madness'.⁴⁴

Sarcasm aside,⁴⁵ Salvini's speech attributes children's agency to determine their own gender identity, as well as the related need for public accommodation and respect, to the world of madness, perhaps, one may add, in a Foucauldian sense.⁴⁶ For him, as for the far right's discourse generally, queer children's self-determined expression is a conceptual impossibility, a collective hardship, and certainly not a right. This logic, which condemns queer children's mere existence or a queer adult's desire to become a parent as monstrous, reflects an egregious exercise of queer erasure.⁴⁷

The whole rhetoric is encompassed by what Clifford J. Rosky, a professor at the University of Utah, calls the 'fear of the queer child', the fear that by being

⁴³ P.B. Preciado, *An Apartment on Uranus* n 40 above, 56.

⁴⁴ The video is available in Italian at <https://tinyurl.com/296a3ttn> (last visited 20 September 2023).

⁴⁵ N. Kumar, 'Salvini: "Absurd: At School They Appeal by Surname to Respect Fluid Children". Comments on Social Media: "It Has Always Been like This" ' *The Times Hub*, 25 July 2022, available at <https://rb.gy/efm1r> (last visited 20 September 2023).

⁴⁶ This point urges a reconsideration of societal oppositions to accommodations for queer children in public and private education, emphasizing that any *spectral difficulties* may as a matter of fact be remedied through recognition of these children's self-determination. In Eur. Court H.R., *Goodwin v United Kingdom*, 11 July 2002, available at www.hudoc.echr.coe.it, para 91, the ECHR concluded that 'society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost'.

⁴⁷ The fact that Salvini's story occurs in a school is not at all casual, as schools have always been a place of queer erasure. See C.A. Lugg, *US Public Schools and the Politics of Queer Erasure* (New York: Palgrave MacMillan, 2016), 2 and P.B. Preciado, *An Apartment* n 40 above, 149-152.

exposed to queerness – to two same-sex parents or simply a gay, lesbian, transgender parent or sibling, either in person or through imagery such as a drag queen show – children will *turn* queer.⁴⁸ Rosky proposes four models of this fear. First, at the historical level comes the *seduction* fear, which depicts queer adults as pathological seducers who try to make children queer through violence or simple advances. Rosky significantly observes that this fear dates back to Aristotle, who associated same-sex pleasure in adulthood with sexual abuse in childhood, and it has remained a constant theme in western culture for centuries.⁴⁹

Among modern fears is, second to seduction, the *indoctrination* fear, where queer individuals are perceived as actively recruiting children to increase the queer population.⁵⁰ Anita Bryant's homophobic and racist campaign 'Save Our Children' was launched in the 1970s to oppose local anti-discrimination regulations in Florida; it epitomized this fear and was based on the total farce that 'because homosexuals cannot reproduce, they must recruit'.⁵¹ Third, the campaign against the queer child is concretized by the *role modeling* fear, that is the fear that children will imitate queerness by influential adults like parents and teachers. Last in Rosky's analysis is the *public approval* fear, that children accept their queerness as a *lifestyle* because of equal marriage and analogous antidiscrimination laws.⁵²

All of these models are represented in the Italian far right's rhetoric. Salvini's aforementioned speech may be categorized as a model of public approval fear. Moreover, FDI's 9 September 2022 request not to broadcast an episode of *Peppa Pig* titled 'Families' because it displayed co-parenting lesbian bears exemplifies the indoctrination fear.⁵³ Finally, the role modeling fear is manifested every time – such as during the annual Sanremo Music Festival in February 2023 – a gender

⁴⁸ C.J. Rosky, n 10 above, 608, 645.

⁴⁹ See *ibid* 618-619. Aristotle stigmatized *the pleasure of sex with males* as an *unnatural propensity* that he believed arose particularly intense 'in those who are wantonly abused from childhood'. R.C. Bartlett and S.D. Collins eds, *Aristotle's Nicomachean Ethics* (Chicago: Chicago University Press, 2000), 145-146. One of Aristotle's disciples, moreover, theorized that a boy's memory of the pleasure experienced for being a passive partner would be replicated in his adulthood since 'on account of their habit they desire to be the passive partner as if they were naturally so constituted', Pseudo-Aristotle, 'Problems 4.26', in T.K. Hubbard ed, *Homosexuality in Greece and Rome. A Sourcebook of Basic Documents* (Berkeley and Los Angeles: University of California Press, 2003), 262, 263-264.

⁵⁰ C.J. Rosky, n 10 above, 641.

⁵¹ See G. Frank, 'The Civil Rights of Parents: Race and Conservative Politics in Anita Bryant's Campaign against Gay Rights in 1970s Florida' 22(1) *Journal of the History of Sexuality*, 126, 135 (2013); W. Frank, *Law and the Gay Rights Story. The Long Search for Equal Justice in a Divided Democracy* (New Brunswick: Rutgers University Press, 2014), 51-53.

⁵² C.J. Rosky, n 10 above, 650 and 655 respectively.

⁵³ 'We cannot accept gender indoctrination', FDI's Federico Mollicone claimed, blaming 'the politically correct (...) at the expense of our children. Can't children just be children?', he questioned. A. Giuffrida, 'Italian Politician Demands Ban on Peppa Pig Episode Showing Lesbian Couple' *The Guardian*, 9 September 2022, available at <https://rb.gy/mixbi> (last visited 20 September 2023).

ambiguous or even queer-friendly character takes part in a television program.⁵⁴

The *commodification* fear, the fear that children become tradable goods,⁵⁵ is another theme that has quickly emerged in public discourse and has progressively acquiring a dominant space therein, together with women's exploitation.⁵⁶ A symbol of this fear is the contempt for foreign surrogacy by male couples as well as the use of in vitro fertilization procedures by female couples abroad that allow them, in the words of one of FDI's leaders, 'to pass kids off as their children'.⁵⁷

It is noteworthy that the commodification fear is weaponized against not only male couples but also female couples, coalescing popular anxieties surrounding the alleged artificiality of the procedure as opposed to being born to a natural conception prescribed by religious discourse. Here the far right's metaphor of the child is supported by a 'DNA mystique', the ultimate result of which is the *purely materialistic view* that children are better off with people who share their DNA and not with people who love them.⁵⁸ Remarkably, the obsession with biology in this rhetoric does not consider queerness to be biologically determined but, contradictorily, shares the same political terrain as the qualification of queerness as a merely personal choice that deserves to be socially repressed.

2. Debunking the Exposure Myth

⁵⁴ On 2 February 2023, two weeks before the start of public broadcasting company RAI's Sanremo Italian Music Festival, MP Maddalena Morgante from FDI publicly requested that RAI reconsider the participation of a gender fluid singer. Morgante claimed that the festival 'is the emblem of the television tradition and keeps families and children glued to the screen'. 'In its last editions', she continued, 'the festival has mutated into a one-direction propaganda, a true distillation of the worse gender ideology which diminishes the identity of women and is disrespectful of the most important religious symbols' *Il Fatto Quotidiano*, 2 February 2023.

⁵⁵ See the classic M.J. Radin, *Contested Commodities* (Cambridge: Harvard University Press, 1996), 136-153 (discussing the baby-selling in relation to surrogacy).

⁵⁶ Notably, the fear of women's exploitation is foundational to the domestic prohibition of surrogacy in some judicial decisions regarding the recognition of foreign birth certificates for children born to surrogacy: see Tribunal Supremo (Spain) 6 February 2014 no 853/2013, *Revue critique de droit international privé*, 531 (2014), paras 4.7-4.8 (citing 'the respect for the dignity and the moral integrity of the surrogate woman, the avoidance of the exploitation of the state of need in which young women may be found in poverty and the prevention of the commodification of pregnancy and kinship'). On this point see S. Rudrappa, 'Why Is India's Ban on Commercial Surrogacy Bad for Women' 43(4) *North Carolina Journal of International Law*, 70 (2018); A. Cattapan, 'Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation' 29(3) *Canadian Journal of Law and Society*, 361 (2014). Regarding Italy, according to I. Kriari and A. Valongo, 'International Issues regarding Surrogacy' 2(2) *Italian Law Journal*, 331, 332-333 (2016), the prohibition of surrogacy is based on protecting the dignity of the surrogate woman, as mandated by Art 2 of the Italian Constitution. According to Corte Costituzionale 23 November 2017 no 272, *Foro Italiano*, 5 (2018), para 4.2, 'surrogacy (...) unacceptably offends the woman's dignity and profoundly undermines human relations'.

⁵⁷ See Huffpost Italia, 'L'attacco di Rampelli. Coppie gay spacciano per propri figli bambini avuti con la maternità surrogata' *Huffington Post*, 19 March 2023, available at <https://tinyurl.com/37txzpjtd> (last visited 20 September 2023).

⁵⁸ D. Nelkin and M.S. Lindee, *The DNA Mystique: The Gene as a Cultural Icon* (Ann Arbor: Minnesota University Press, 2004), 152.

The idea of *exposure*, which provides a powerful template for queer people's criminalization, discrimination, and marginalization, is a recent development. At its origin is the pretense – oftentimes used, as University of Utah professor Kathryn Bond Stockton emphasizes, by 'right-wing fundamentalists (who) find themselves in bed with Darwin and Freud'⁵⁹ – that a child's growth can at one point be *arrested* by external factors, in this case by exposure to queerness, and diverted from a *normal* development of *natural bisexuality* to a *deviant* queerness.⁶⁰ This claim appears in various Italian and European legislative and court reports.

In 1961, the Italian social-democratic MP Romano Bruno filed a bill with the Parliament seeking to punish both homosexual acts and the apologia of these acts with jailtime in order to 'defend the youths from this social cancer that leads them to a life of shame, degradation and progressive moral involution'.⁶¹ In 1968, at the end of a questionable criminal trial, the *Corte d'Assise* of Rome sentenced communist intellectual Aldo Braibanti to nine years in prison for bringing two young adults

'under his own power, in such a way as to reduce them to a total state of subjection' – such was the definition of *plagio* (plagiarist) under the criminal code at the time, as was defined as the 'corruption of minors'.⁶²

In his closing argument, the alleged victim's counsel Rinaldo Taddei affirmed that acquitting Braibanti would equate to a 'sign on a flag with written "Pederasts of the world, unite!" *What about the youths then?*', he wondered, '*What about the family?*'⁶³

In its 1981 milestone judgment in *Dudgeon v United Kingdom*, the ECHR conceded that, even if the criminalization of homosexuality infringed upon queer individuals' right to private life, democratic societies must nonetheless maintain 'some degree of control over homosexual conduct, notably in order to provide safeguards against the exploitation and corruption of (...) youth'.⁶⁴ For dissenting judge Franz Matscher, 'it is well known' that having 'homosexual relations with minors as well (...) is a widespread tendency in homosexual circles'.⁶⁵ As has been

⁵⁹K. Bond Stockton, n 2 above, 22.

⁶⁰ In a reversed perspective, the Italian activist Mario Mieli talked about *educastration* to designate the process that 'forces the child, through a sense of guilt, (...) to identify with a mutilated monosexual (heterosexual) model'. M. Mieli, n 24 above, 5.

⁶¹ Proposta di legge 29 April 1961 no 2990.

⁶² Corte d'Assise di Roma 14 July 1968, *Foro Italiano*, 154, 176-177 (1969), finding that, although homosexuality is not a crime per se, it can *causally lead* to criminally relevant events. See M. Mieli, n 24 above, 76-77 (arguing that plagiarism represented an *indirect* way of punishing homosexuality); for a contemporary account see A.I. Borowitz, 'Psychological Kidnaping in Italy: The Case of Aldo Braibanti' 57 *American Bar Association Journal*, 990 (1971). Art 603 of *Codice penale* on *plagio* was declared unconstitutional by Corte Costituzionale 9 April 1981 no 96, *Giurisprudenza costituzionale* I, 806 (1981).

⁶³ G. Ferluga, *Il processo Braibanti* (Turin: Zamorani, 2003), 90.

⁶⁴ Eur. Court H.R., *Dudgeon v United Kingdom*, Judgment of 22 October 1981, available at www.hudoc.echr.coe.it, para 12.

⁶⁵ *ibid.* Dissenting opinion of Judge Matscher. For a commentary see P. Johnson,

observed, this logic has long affected refugee law, where it served to transform the refugee-seeker persecuted for his homosexuality into ‘a predator, against whom the law must marshal its full strength to protect [...] the young and vulnerable’.⁶⁶

In more recent cases, however, the ECHR has firmly rejected the exposure claim through two techniques. The first technique involves de-weaponizing the alleged danger inherent to exposure – a child’s parent cohabiting with a partner of the same sex – by qualifying it as *a mere prejudice*, such that causation cannot be determined as to justify human rights restrictions.

For example, in the case of a father who had formed a new family with his boyfriend, maintaining that this was ‘a decision which is not normal according to common criteria’ and that he should therefore be denied custody because ‘children should not grow up in the shadow of abnormal situations’ amounts to an unacceptable discrimination on grounds of sexual orientation.⁶⁷ Moreover, when adoption is pursued by a woman who happens to live with another woman, the lack of a *paternal referent* as a basis for rejecting the adoption application also amounts to a mere prejudice based on the applicant’s sexual orientation, and is therefore insufficient to support the discrimination.⁶⁸ The same logic applies to stepparent adoption, whose prohibition in relation to the biological mother’s same-sex partner has been found to be discriminatory.⁶⁹ Relatedly, Italy’s *Corte di Cassazione* has found that it is a ‘prejudice’ to ‘believe that it is harmful for the well-balanced development of a child to live in a family centered on a couple of the same sex’.⁷⁰

The second technique entails relying on *the existing empirical research* confirming that children’s exposure to queerness is *not detrimental* to them. In a recent slew of judicial rulings, including the 2023 judgment in *Macatė v. Lithuania* concerning two queer-friendly fairy tales published by Lithuanian writer and poet Neringa Dangvydė, the ECHR employed this technique to reject the government’s claim that expressions of queer identities may harm children, therefore justifying restrictions on the visibility of queer materials and people. The ruling in *Macatė v Lithuania* delineates two bases for this technique:

‘First, with respect to the best interests of the child, (...) there is no scientific evidence or sociological data [...] suggesting that the mere mention of

Homosexuality and the European Court of Human Rights (New York: Routledge, 2014), 53.

⁶⁶ J. Millbank, ‘A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003’ 14(1) *Social & Legal Studies*, 115, 128 (2005).

⁶⁷ Eur. Court H.R., *Salgueiro da Silva Mouta v Portugal* n 38 above, paras 15 and 34-36. For an identical case in Italy see Corte di Cassazione 11 January 2013 no 601, *Giurisprudenza italiana*, 1036 (2013).

⁶⁸ Eur. Court H.R., *E.B. v France*, Judgment of 22 January 2008, available at www.hudoc.echr.coe.it, paras 87-98.

⁶⁹ Eur. Court H.R., *X and Others v Austria*, Judgment of 19 February 2013, available at www.hudoc.echr.coe.it, paras 87-98.

⁷⁰ Corte di Cassazione 11 January 2013 no 601 n 67 above.

homosexuality, or open public debate about sexual minorities' social status, would adversely affect children. Second, to the extent that minors who witnessed demonstrations in favour of LGBTI rights were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion. Shortly, there is no scientific evidence that such information, when presented in an objective and age-appropriate way, may cause any harm to children. On the contrary, (...) it is the lack of such information and the continuing stigmatization of LGBTI persons in society which is harmful to children'.⁷¹

These statements remind us of the motto 'silence = death' from late 1980s AIDS-prevention campaigns, and affirm the cathartic effect of naming as an act of freedom.⁷² Importantly, it is not just that there is *no evidence* of detrimental effects; on the contrary, there is *specific and overwhelming evidence* that children of same-sex couples – who, on a possible spectrum of exposure, would fall within the highest extreme – are psychologically and physically healthy.⁷³ There is an explicit agreement among all major pediatric, psychological, and psychiatric organizations that children need love, not the stigmatization of how they came into the world.⁷⁴

3. Taming the Commodification Fear

The final prong of the far right's claim that children must be protected from queer individuals who would otherwise deprive them of their right to have a mother and a father is represented by FDI's strategy to strengthen the prohibition of surrogacy, and as of now Italian law already provides for extremely harsh criminal sanctions (jailtime from three months to two years and a fine from six hundred thousand to one million euros).⁷⁵ It is because of this ban that male Italian couples pursue their parental projects abroad, mainly in Canada and California, where the process is legal, well-regulated, and comes with the assurance that children born to

⁷¹ Eur. Court H.R., *Macatė v Lithuania*, Judgment of 23 January 2023, available at www.hudoc.echr.coe.it, para 210-211. See also Eur. Court H.R., *Bayev v Russia* n 36 above, para 82; *Alekseyev and Others v Russia* and 2 others, Judgment of 21 October 2010, available at www.hudoc.echr.coe.it, para 86, on which P. Johnson, *Homosexuality* n 65 above, 58.

⁷² See K. Gümüşay, *Speaking and Being. How Language Binds and Frees Us* (Münich: Hanser, 2020), 40.

⁷³ Specifically, in 2011 the Italian Association of Psychology (*Associazione Italiana di Psicologia*) affirmed that 'psychological research has highlighted that what is important for children's well-being lies in the quality of the environment that parents offer to their children, regardless of the fact that they are cohabiting, are separated, re-marries, single, of the same sex'. V. Lingiardi, *Citizen gay* (Il Saggiatore: Milano, 2013), 135-136.

⁷⁴ See F. Ferrari, *La famiglia inattesa. I genitori omosessuali e i loro figli* (Udine: Mimesis, 2015), 147-168; N. Carone et al, 'Italian Gay Father Families Formed by Surrogacy: Parenting, Stigmatization, and Children's Psychological Adjustment' 54(10) *Developmental Psychology*, 1904, 1913-1914 (2018).

⁷⁵ Art 12(6), MAPA.

surrogates are legally recognized as both men's children. Joint adoption is also an option in certain other countries, though subject to residency.⁷⁶

For the last decade, Italian courts have navigated the complexity of cross-border surrogacy by relying on the French saga of Valentina and Fiorella Mennesson, two French twins born to surrogacy in California.⁷⁷ In its 2014 judgment in *Mennesson v France*, the ECHR ruled that children born abroad to surrogacy have a right 'to establish the substance of his or her identity, including the legal parent-child relationship' with *the biological parent* (in that case, the intended father).⁷⁸ Contrarily, regarding this parent's partner (the *nonbiological or intended parent*, in that case the intended mother), the ECHR clarified in its first advisory opinion arising from the same proceedings that the children's right to identity does not necessarily require recognition of the foreign birth certificate *if* stepparent adoption is made 'promptly and effectively' available at the domestic level, 'at the latest when (...) the relationship between the child and the intended mother has become a practical reality'.⁷⁹

There seems to be no issue with transposing these principles into the same-sex parents context.⁸⁰ In fact, adhering to the ECHR's conclusions, the *Corte di Cassazione* has insisted that foreign birth certificates of children born to surrogacy should be registered immediately in relation to the biological father, whereas the intended parent must petition for stepparent adoption and await a positive outcome from the proceedings.⁸¹ Similarly, on two occasions the Constitutional Court has required Parliament to legislate on the rights of this 'new category of non-recognizable children' by picking from 'all the possible options, all compatible with the Constitution', including, evidently, the immediate registration of foreign

⁷⁶ See Corte di Cassazione-Sezioni unite 12 January 2021 no 9006, *Foro Italiano*, 2054 (2021), which recognized a child's adoption by a same-sex couple in the United States and confirmed that the birth certificate can be registered in Italy.

⁷⁷ See V. Mennesson, *Moi, Valentina, née par GPA* (Paris: Michalon, 2019).

⁷⁸ See Eur. Court H.R., *Mennesson v France*, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it, paras 99-100 and *Labassee v France*, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it, paras 78-79. See also Eur. Court H.R., *Valdis Fjölnisdóttir and Others v Iceland*, Judgment of 18 May 2021, available at www.hudoc.echr.coe.it, para 75 (finding, in this specific case, no practical hindrances to the child's enjoyment of family life vis-à-vis the two intended parents, who had no biological relationship with the child).

⁷⁹ See Eur. Court H.R., 'Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother', Request no P16-2018-001 by the French Court of Cassation of 10 April 2019, para 54, 56. See L. Bracken, 'The ECHR's First Advisory Opinion: Implications for Cross-Border Surrogacy Involving Male Intended Parents' 21(1) *Medical Law International*, 3, 11 (2021); A. Margaria, 'Parenthood and Cross-Border Surrogacy: What is "New"? The ECHR's First Advisory Opinion' 28(2) *Medical Law Review*, 412, 419 (2020).

⁸⁰ See M.M. Winkler and K. Trilha Schappo, 'A Tale of Two Fathers' 5(1) *Italian Law Journal* 359, 365 (2019).

⁸¹ See also Corte di Cassazione-Sezioni unite 31 December 2022 no 38162, n 6 above; Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, *Rivista di Diritto Internazionale*, 1225 (2019); Corte di Cassazione 30 September 2016 no 19599, *GenIUS - Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 8 (2017).

birth certificates in relation to the intended parent as well.⁸² For children born in Italy to female couples, on the other hand, the *Cassazione* has refused to register the intended mother on her child's birth certificate despite the genetic link between the two, claiming that MAPA applies to different-sex couples only and therefore parenthood cannot be recognized outside said framework.⁸³

Against this complex background, the far right's strategy of amending and expanding the surrogacy ban resembles an act of pure sadism. This strategy consists of *transforming surrogacy into a universal crime* by expanding current criminal sanctions 'if the act is committed abroad' in order to prevent 'the banal commercialization of women and children'.⁸⁴ While this strategy's punitive obsession is too self-evident to require comment, the crucial question is whether reworking surrogacy as a universal crime responds to the Constitutional Court's urgent call for children's rights to be regulated: it clearly does not.

With this amendment, future parenthood-claiming Italian citizens and foreign travelers with children born to surrogacy alike could be prosecuted, jailed, and fined in Italy for having legally resorted to surrogacy *in their country of residence*. In the worst-case scenario, children would remain without personal and financial support while their parents faced jailtime and collected the funds to pay the huge fine required by law: *how would these measures fulfill the supreme interest of the child that the far right so boastfully claims to defend?*⁸⁵

What counterstrategies should be pursued? First, an amendment of this tenor, if passed, could be challenged in courts based on its proportionality to the pursued objective. For criminal and constitutional lawyers, this challenge could be based on the consideration that punishing the intended parents in Italy for

⁸² Corte Costituzionale 28 January 2021 no 32, *Giurisprudenza Costituzionale*, 306 (2019), para 2.4.1.4; Corte Costituzionale 9 February 2021 no 33, *Il Diritto di Famiglia e delle Persone*, 528 (2021), para 5.9. For a commentary see A. Schillaci, 'Non imposta, né vietata: l'omogenitorialità a metà del guado, tra Corti e processo politico' *Genius - Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 1-37, 22 (2021).

⁸³ Corte di Cassazione 25 February 2022 no 6383, para IV. In relation to the MAPA, the Constitutional Court has found that guaranteed access to medically assisted procreation techniques for same-sex couples is for legislators, not courts, to decide. As a result, until the Parliament intervenes, same-sex couples are barred from accessing these techniques in Italy and must therefore resort to them abroad. See Corte Costituzionale 18 June 2019 no 221, *Guida al diritto*, 36 (2020).

⁸⁴ See Proposta di legge 15 February 2023 no 887 (Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano), 2, identical to the prior Proposta di legge 23 March 2018 no 306.

⁸⁵ A further question is whether Italy's extraterritorial application of the surrogacy ban would protect women from exploitation, as the bill's sponsors claim, in countries where surrogacy is permitted and the surrogate's rights are already fully protected by local laws. In this regard, the Portuguese Constitutional Court has observed that, 'as such, the human dignity of the woman who takes on the role of gestational surrogate is not violated; on the contrary, her participation in the gestational surrogacy affirms a freedom of action which, at the end of the day, is founded on that same dignity'. Portuguese Constitutional Tribunal 24 April 2018 no 225. See V.L. Raposo, 'Rise and fall of surrogacy arrangements in Portugal (in the Aftermath of Decision n. 465/2019 of the Portuguese Constitutional Court)' *BioLaw Journal* 339 (2020).

doing something that is perfectly legal in another country would protect neither the surrogate, whose consent and conditions are usually monitored by local courts in countries where surrogacy is heavily regulated, nor the child born to her, who will end up paying for their intended parents' actions.⁸⁶ Not all vulnerabilities necessitate the expansion of criminal law.⁸⁷

Second, the results in *Mennesson* relate back to birth certificate registration *vis-à-vis* stepparent adoption. In its follow-up to the ECHR's advisory opinion, the French *Cour de Cassation* found that *fifteen years of litigation* sufficed so that Sylvie, the intended mother of Valentina and Fiorella Mennesson, now in their twenties, did not have to file for stepparent adoption, and instead immediate registration of the birth certificates in France was ordered.⁸⁸ In a subsequent case, the ECHR found that *four to five months of waiting time* in France satisfied the requirement for stepparent adoption to bring about a 'prompt and effective' recognition of the parent-child relationship, and that *three years well* exceeded the required time for 'the concretization of the bond between the children involved and the intended mother'.⁸⁹

In light of these elements, depending on their children's age and family history, same-sex parents could challenge the possibility of relying on stepparent adoption as a prompt and effective substitute to birth certificate registration, resorting once again to the ECHR's decision on whether the average of two years required before stepparent adoption in Italy passes the above-mentioned test. Of course, the fact that establishing parenthood depends on initiative from the intended parent, who can only file for stepparent adoption, remains a problem.⁹⁰ Meanwhile, Italian mayors are certainly entitled to proceed with birth certificate registrations to curtail the current precarious legal status of same-sex couples' children. As the far-right government pursues the annulment of these registrations, activists, lawyers, scholars, and caring parents should work together to debunk the rhetoric surrounding the family and the child, and should unreservedly affirm that children with two same-sex parents are families like any other and that there is nothing wrong with growing up queer.

Overall, the Parliament's deliberate dismissal of the Constitutional Court's urgent call to legislate the matter of non-recognizable children is a dangerous violation of democracy and the rule of law. As the ECHR has determined on multiple occasions,

⁸⁶ See Art 2, New York Convention on the Rights of the Child, signed on 20 November 1989 and entered into force on 2 September 1990.

⁸⁷ See A. Cattapan, 'Risky Business' n 56 above, 366.

⁸⁸ Cour de Cassation-Assemblée Plénière 4 October 2019 no 10-19.053. For a critical comment see S. Bollée and B. Haftel, 'L'art d'être inconstant. Regards sur les récents développements de la jurisprudence en matière de gestation pour autrui' *Revue critique de droit international privé*, 267, 275-277 (2020).

⁸⁹ See Eur. Court H.R., *C. v France* and *E. v France*, Judgment of 19 November 2019, available at www.hudoc.echr.coe.it, para 42-44.

⁹⁰ See M.M. Winkler and K. Trilha Schappo, n 80 above, 385.

‘a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branches of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardizing its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention. (...) This repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account’.⁹¹

Clearly, the Italian government's campaign to cancel the birth certificate registrations has nothing to do with enforcing the law, protecting the family, or promoting the child's right ‘to have a mother and a father’, but it instead ‘bears down in the heaviest and often deadliest way on those with least resources to combat it: queer children and teens’.⁹² This is a fight for all children's right to exist.

IV. Conclusion

This article puts forth a critical analysis of the Italian government's assault on same-sex parents and their children. This is an assault that, while formally motivated by the need to enforce a *Corte di Cassazione* ruling, is actually the result of anti-queer narratives – the narrative of the traditional family and the child's right to have a mother and a father – that the far right has been cultivating for at least a decade. The main argument raised here is that before litigating the government's attack, it is useful to understand these narratives' origin, context, content, and objective.

As to their *origin*, these narratives build on religious discourse and are replicated under a secular framing. The *context* in which they grow and succeed is that of backlash against the progress made in queer freedoms, backlash that the far right intends to exploit and strengthen at the same time. The *content* is that of ideological, abstract, and absolute notions of the family and the child with no connection back to reality and children's rights. Finally, the *objective* of these narratives is queer erasure, with far-right leaders operating as frontline agents of queer oppression.

Affirming all children's right to exist means challenging these narratives in public discourse and the courts. While both protests and the mayors' initiative

⁹¹ Eur. Court H.R., *Oliari and Others v Italy* n 13 above, para 184.

⁹² M. Warner, ‘Introduction’, in *Id ed*, n 2 above, 7-16.

regarding birth certificate registrations are steps in the right direction, it is in the courtroom where the battle will eventually be won. If the fight for queer freedom is a fight for pluralism, democracy, and the rule of law, then this is a fight no one can afford to lose.