

The Law of Assisted Reproductive Technologies for LGBTQ+ Parents:

A Recognition Regime of Family Law Built in Opposition to the Regulatory Regime

Rose Holden Vacanti Gilroy[†]

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INTRODUCTION

On August 22, 1996, President Bill Clinton signed the Personal

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[†]. Georgetown University Law Center, J.D., 2022. Many thanks to Professor Sherally K. Munshi, whose guidance was instrumental in writing this piece and whose courses gave me the space to explore my precise interests even within the confines of a legal education. To the editors of the *Berkeley Journal of Gender, Law & Justice*, thank you for your excellent editorial insights. This paper is about family, and I dedicate it to my grandparents, Janet Sutter Vacanti and Michael Vacanti, who I am eternally grateful to have at the center of my family. I am a fertility and matrimonial law associate in New York City.

Responsibility and Work Opportunity Reconciliation Act (PRWORA) into law, “the most sweeping crackdown on dead-beat parents in history.”¹ The legislation included the following threat to parents court-ordered to pay child support:

With this bill we say, if you don’t pay the child support you owe, we’ll garnish your wages, take away your driver’s license, track you across State lines, if necessary, make you work off...what you owe. It is a good thing, and it will help dramatically to reduce welfare, increase independence, and reinforce parental responsibility.²

PRWORA drastically reimagined the United States’ welfare regime to align with the Clinton administration’s neoliberal mission. The legislation shifted responsibility from the welfare state to impoverished individuals, and perhaps surprisingly, reconfigured the legal regulation of parentage. Although the requirement that a mother disclose her children’s paternity to receive government benefits predates PRWORA, the legislation strongly reinforced this invasive practice by reducing benefits for those unwilling to disclose paternity.³ It streamlined the path to legal parentage for fathers—fathers who mothers did not necessarily intend, or want, to be part of their child’s life—in order to hold them responsible for child support payments.⁴

PRWORA, bearing a title that exudes neoliberalism,⁵ should be understood as a *responsibilization* project that works to create worthy and unworthy parental subjects based on their ability and willingness to financially support their

1. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, 1996 PUB. PAPERS 1325 (Aug. 22, 1996).

2. *Id.*

3. Omarr Rambert, *The Absent Black Father: Race, The Welfare-Child Support System, and the Cyclical Nature of Fatherlessness*, 68 UCLA L. REV. 324, 343 (2021).

4. MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM 102 (2017). Professor Melinda Cooper also explains what makes parentage through welfare reform unique, writing:

In what marks a radical departure from standard family law, welfare law derives legal fatherhood from the mere fact of a biological relationship and proceeds to enforce the resulting obligations on this basis alone. Yet, even as this legal sleight of hand imposes obligations on men, it also authorizes them to claim certain exceptional rights. Once he has been named a legal father, a man can legitimately claim visitation and custody rights to his children, even if he previously had no relationship with them...Family law in general refuses to grant legal paternity to men on the simple basis of biological kinship, insisting that some more solid and long-lasting emotional relationship must be established before a man can be considered a father.

Id. at 104.

5. While neoliberalism is a commonly employed term, this Paper centers Professor Wendy Brown’s definition of neoliberalism as “[A] normative order of reason developed over three decades into a widely and deeply disseminated governing rationality” that “transmogrifies every human domain and endeavor, along with humans themselves, according to a specific image of the economic.” WENDY BROWN, UNDOING THE DEMOS, NEOLIBERALISM’S STEALTH REVOLUTION 9 (2015).

families.⁶ A term developed by social scientists in the 1990s, *responsibilization* refers to a process “whereby subjects are rendered individually responsible for a task which previously would have been the duty of another—usually a state agency—or would not have been recognized as a responsibility at all.”⁷ Like many social programs in the United States today, PRWORA stigmatizes those who turn to the government for support as a means of encouraging self-reliance.

In 1993, three years prior to President Clinton’s remarks, the high courts in Vermont and Massachusetts, respectively, allowed non-birth mothers to establish legal parentage of children that their same-gender partners conceived using assisted reproductive technologies (ART), a milestone for LGBTQ+ parents in the United States.⁸ In 2000, four years after PRWORA’s enactment, Massachusetts became the first state to allow two women to be listed on the birth certificate of a child born through reciprocal in-vitro fertilization (IVF).⁹ These monumental state court decisions became crucial precedent for LGBTQ+ parents attempting to establish legal parentage after using ART to conceive. The state court decisions also reflect the era’s nearly universal support for family responsibilization—which stemmed from a “convergence” of neoliberal and social conservative thought.¹⁰ They also demonstrate the state’s willingness to extend legal protections to LGBTQ+ families whose use of ART was thought to prove both their economic independence and their willingness to conform to nuclear family norms.¹¹

Writing in 1964, Jacobus tenBroek posited the existence of “dual system[s] of family law” in the United States: a family law that governs “those with means and another for the poor.”¹² It is now widely understood that the latter regime is tied to, and upheld by, criminal law, and exists primarily to regulate, surveil, and police Black families and incarcerate Black individuals.¹³ In contrast, the former

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6. This paper uses the term “responsibilization” to mean the process by which individuals are held personally responsible to support themselves on account of the government’s refusal to provide social services.
 7. See KIRSI JUHILA, SUVI RAITAKARI & CECILIA HANSEN LÖFSTRAND, RESPONSIBILISATION IN GOVERNMENTALITY LITERATURE, 1–2 (2017). The term responsibilization can be traced to the writings of Peter Miller and Nikolas Rose, with obvious influences from Michel Foucault. *Id.*
 8. SUSAN L. CROCKIN & HOWARD W. JONES, LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES, 17 (2010). Reciprocal IVF is the process by which one partners’ eggs are used to create an embryo carried by the other partner.
 9. *Id.*
 10. Professor Wendy Brown notes that the family is where seemingly oppositional ideologies intersect, and quotes Professor Melinda Cooper writing, “Cooper studies the convergence between neoliberalism and social conservatism at the site of the traditional family: ‘Despite their differences on virtually all other issues, neoliberals and social conservatives were in agreement that the bonds of family need to be encouraged—and at the limit enforced.’” WENDY BROWN, IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST 92 (2019).
 11. *Id.*
 12. Janet Halley, *What is Family Law: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 291 (2011) (quoting Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964)).
 13. See generally Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285

is a civil law system unconnected to the carceral state. Considering its ties to surveillance and invasive, legalistic control of families, the system of family law that governs families experiencing economic precarity can be understood as family law's *regulatory regime*.¹⁴ Due to PRWORA's systemization of legal mechanisms that are directly tied to the carceral state, such as child support enforcement, it is part of this regulatory regime. However, this Paper argues that LGBTQ+ families using ART are not regulated by either of the two preexisting family law systems. Instead, with the rise of legal recognition for LGBTQ+ families using ART, a third system of family law is born. This third system can be understood as family law's *recognition regime*, since it systematizes legal recognition for LGBTQ+ parents using ART. Unlike family law's regulatory regime, the recognition regime does not regulate and discipline families without their consent, but instead gives LGBTQ+ parents with economic means, the majority of whom are white, access to systems through which they can achieve legal parentage. Unlike the first regime of family law (the civil regime), what unites the regulatory and recognition regimes is that both systems seek to establish legal parentage, albeit through very different means and for distinct reasons. Due to their economic self-sufficiency, heteronormativity, and often whiteness, the parental status of the civil regime's subjects typically goes unquestioned.¹⁵ Despite their differences, the three separate regimes of family law should be considered as parts of a whole, united and upheld by the state's goal of creating self-sufficient family units. Professor Janet Halley describes family law as a "legally regulated private welfare system,"¹⁶ meaning that family law exists to establish responsabilized nuclear families, so that the state can avoid providing social services and support. However, family law should also be understood as designed to create worthy and unworthy parental subjects—those who deserve *regulation*, and those who deserve *recognition*.

Therefore, building off of tenBroek's scholarship, this Paper will discuss three distinct family law regimes, focusing on the latter two: 1) the civil regime, which governs heterosexual families with economic means for whom parentage is

(2017). Andrea L. Dennis further explains that,

The expansion of criminal justice has not only placed more individuals under criminal justice control, but also has inserted itself into virtually every aspect of family life. The modern criminal justice system regulates intrafamilial behavior that society deems wrongful as well as many facets of family life that are considered socially desirable. Legislatures have enacted new criminal laws targeting behavior between family members. Law enforcement and prosecutors directly and indirectly punish family members for the behavior of other family members. Courts can obtain jurisdiction over families who are the subject or target of criminal and quasi-criminal court proceedings.

Id. at 286.

14. See *infra* Part I(A).

15. This Paper refers to the first regime of family law as that which governs traditionally structured families, with at least some financial means, whose family law matters are merely civil and not intertwined with criminal law.

16. Janet Halley, *What is Family Law: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 6 (2011).

not a legal question; 2) the regulatory regime, which governs families facing economic precarity—and Black families in particular—and uses tactics from surveillance to incarceration to impose parentage on individuals; and 3) the recognition regime, which governs LGBTQ+ families with the economic means to access ART, and systemizes the path to legal parentage for this specific group of LGBTQ+ parents.

Although many families governed by the regulatory regime of family law exist outside of a nuclear family paradigm, the state forces parents to create quasi nuclear family structures in an attempt to ensure a child has two adults providing financial support.¹⁷ This manifests as the state conditioning a mother’s ability to receive social benefits, such as Temporary Assistance to Needy Families

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17. The nuclear family, and the parent-child relationships central to its formation, is at least in part a racialized outgrowth post-Civil War America. Prior to the Emancipation Proclamation, white men who owned enslaved persons acted as the patriarchs and masters of households that included not only their wives and children as dependents, but also the enslaved men, women, and children they owned. After emancipation, within the family context, white men only wielded their patriarchal power over their wives and children. COOPER, *supra* note 4, at 79.

Furthermore, enslaved Black Americans were denied the right to a nuclear family because the family as a unit based on biology and kinship is antithetical to the practice of slavery. Professor Hortense Spillers explains that “if ‘kinship’ were possible [for enslaved people], the property relations would be undermined, since the offspring would then ‘belong’ to a mother and a father.” Hortense Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 *DIACRITICS* 64, 75 (1987). Spillers also writes that,

It seems clear, however, that ‘Family,’ as we practice and understand it ‘in the West’—the vertical transfer of a bloodline, of a patronymic, of titles and entitlements, of real estate and the prerogatives of ‘cold cash,’ from fathers to sons and in the supposedly free exchange of affectional ties between a male and a female of his choice—becomes the mythically revered privilege of a free and freed community.

Id. at 74.

Essentially, enslaved individuals were denied the right to marry and have legal parentage rights, since such rights and families would threaten the “absolute” right of the white male masters. COOPER, *supra* note 4, at 79. Spillers explains that just like for enslaved fathers, enslaved mothers had no rights over their children. Spillers writes, “In effect, under conditions of captivity, the offspring of the female does not ‘belong’ to the Mother, nor is s/he ‘related’ to the ‘owner,’ though the latter ‘possesses’ it, and in the African-American instance, often fathered it, and, as often, without whatever benefit of patrimony.” Spillers, *supra* note 17, at 74. However, immediately after the abolition of slavery, the federal government established the Freedmen’s Bureau to ensure that Black men knew that “freedom in the labor market came with the right to marry and the responsibility to support a wife and children.” It should not go unnoticed that the federal government established the Freedmen’s Bureau, which some consider the United States’ “first federal welfare agency,” in order to responsabilize Black men as husbands and fathers, and ensure that the state did not have to step in and support recently emancipated Black Americans. For this reason, Freedmen’s Bureau agents were allowed and encouraged to officiate marriages between formerly enslaved individuals, and to track down spouses that were separated by their masters during slavery. Furthermore, states created apparatuses, with regulatory and putative intent, to ensure that formerly enslaved people living with a partner to whom they were not married were subject to prosecution for adultery and fornication. Clearly, the state has used the nuclear family to responsabilize, and create a “private welfare system” for Black Americans since the abolishment of slavery—PRWORA follows in this tradition. COOPER, *supra* note 4, at 78–80; Halley, *supra* note 12, at 6.

(TANF)—a program that PRWORA established to replace Aid to Families with Dependent Children¹⁸—on her willingness to disclose her child’s paternity.¹⁹ This process allows the state to transfer responsibility to the father through court-ordered child support payments, which are used to reimburse the state for TANF payments, so that the government is not responsible for supporting a family in need of assistance.²⁰ As Professor Melinda Cooper explains, PRWORA’s focus on tracking down fathers, especially Black fathers, to provide child support, “served to remind women that an individual man, not the state, was ultimately responsible for their economic security. Unless a woman could assume ‘personal responsibility’ for her economic fate, she would have to accept her condition of economic dependence on an absent father or substitute husband.”²¹ Therefore, even in the process of providing support to single mothers, PRWORA reinforces the importance of the nuclear family (a unit traditionally comprised of two married parents of opposite genders and their biological children) and attempts to create a “private welfare system”—proving that the legislation is an apparatus of the regulatory regime.

Although family law’s recognition regime is not forced onto LGBTQ+ parents using ART, interaction with the system is necessary to establish legal parentage. This Paper argues that obtaining legal parentage is easier for LGBTQ+ parents who conform to signifiers of the nuclear family structure, such as marriage, monogamy, and well-paid employment—statuses that are in many circumstances prerequisites for legal parentage through ART.²² Seemingly, the state is willing to grant legal parentage to LGBTQ+ parents not out of a newfound acceptance of LGBTQ+ individuals, but rather on account of some LGBTQ+ families’ willingness and ability to exist as “private welfare systems,” which uphold nuclear family structures. For LGBTQ+ families who adhere to less respectable kinship structures, or do not have the economic power to participate in the recognition regime, there are few legal protections available.

Contrasting family law’s regulatory and recognition regimes aids this Paper in revealing that the state’s interest in family building and the establishment of legal parentage is motivated by a desire to create the “private welfare system[s]” Halley describes, in order to avoid providing government support, and shift care responsibilities to the family.²³ Considering the concurrent rise of the contemporary welfare state with its reinvigorated interest in paternity, and the

18. *See generally* GENE FALK, CONG. RSCH SERV., R44668, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY (October 6, 2021).

19. Rambert, *supra* note 3, at 343.

20. *Id.* at 344.

21. COOPER, *supra* note 4, at 68.

22. As will be discussed in Part I (B), the second-parent adoption process, which is often necessary to establish legal parentage for LGBTQ+ parents using ART, can include home studies, background checks, and scrutiny from the court. It is also an expensive process, requiring parents to have a not insignificant amount of financial power. “*Confirmatory*” or *Second-Parent Adoption: What You Need to Know*, FAMILY EQUALITY COUNCIL (last visited Nov. 17, 2021), <https://perma.cc/26KY-EMBQ>.

23. Halley, *supra* note 12, at 6.

recognition regime of family law with its acceptance of respectable LGBTQ+ families, it should not come as a surprise that the two systems are mutually constitutive. In Part I, this Paper argues that the recognition regime of family law deems parental subjects as worthy on account of their situational opposition to parents governed by the regulatory family law regime—a difference that is rooted in racism and exemplifies family law’s intent to uphold capitalism through the creation of “private welfare systems”—by examining the parental binaries created by racism, financial status, apparent success, and marriage. Due to its past and present impact, and focus on establishing legal parentage, this Paper uses PRWORA as the primary example of welfare legislation that falls under the regulatory regime of family law. In Part II, this Paper uses intent-based parentage as a case-study exemplifying how the regulatory and recognition regimes of family law are deeply interconnected even as they create divergent parental subjects—in borrowing voluntary acknowledgements of parentage (VAPs) from the regulatory regime of family law, the recognition regime further entrenches the second system’s weaponization of parentage as a means of responsabilization.

I. PARENTAGE IN OPPOSITION

The recognition regime of family law creates worthy parental subjects by forcing them to prove their opposition to those governed by the regulatory regime. Uncovering these constructive binaries illuminates what attributes make a parent valuable in the United States—the overarching theme is that a valuable parent is one who monetarily provides for their family so that the state does not have to do so. This Paper will focus on the following four differentiating factors that position families regulated by the regulatory and recognition regimes of family law in opposition to one another: 1) race and racism; 2) wealth and poverty; 3) parentage perceived as success and parentage perceived as failure; and 4) marital status.

A. Race, Racism, and Parentage

Unsurprisingly, there is a racial divide between parents who are governed by the regulatory and recognition regimes of family law. President Clinton chose to employ highly racialized language when he referred to “dead-beat parents” in his remarks on PRWORA.²⁴ Professor Ann Cammett explains that the figure of the “deadbeat dad” arose as the gendered counterpart to the “welfare queen,” writing, “[t]he image of the Deadbeat Dad also slowly emerged as a racialized trope: an uncaring Black father unwilling to pull his weight, often with multiple families, who expects taxpayers to carry his burden.”²⁵ The groundwork for this racist stereotype long predates PRWORA, and was perhaps first given outward political sanction by Assistant Labor Secretary Daniel Patrick Moynihan’s 1965 report, *The*

24. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1, at 1326.

25. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 238 (2014).

Negro Family: The Case for National Action (the Moynihan Report).²⁶ Just as President Clinton would do via PRWORA half a century later, the Moynihan Report pathologized Black fatherlessness and single-mother families, blaming Black individuals for poverty, rather than systemic racism—and laying the groundwork for the creation of the “deadbeat dad” and the “Welfare Queen.”²⁷ PRWORA stands as an example of regulatory regime legislation that embodies these racist tropes laid out in the Moynihan Report.

Antithetically, PRWORA established a system in which states, as well as custodial parents, financially benefit if a child’s parents do not live together.²⁸ This fact further demonstrates that while President Clinton may have referred to “family” as a “fundamental” value in his PRWORA remarks, under capitalism, the state’s interest is always in lowering its bottom line rather than supporting families for reasons of morality.²⁹ PRWORA does not prioritize enforcing child support payments merely to benefit custodial parents and their children; instead, states collect child support benefits on behalf of parents receiving welfare as a way of reimbursing themselves for state-sponsored welfare programs. Omarr Rambert explains that welfare legislation associates “the amount of child support a custodial parent—usually the mother—receives to the amount of time the mother has with the child,” and continues, stating that a “decrease in the time a father spends with his child (or overall fatherlessness) corresponds with an increase in child support that a mother is awarded and in turn, an increase in the amount the state government will receive from the federal government.”³⁰ Therefore, the state stigmatizes single-parent families on welfare, while also disincentivizing parents from creating the nuclear families and “private welfare systems” it purports to value. The state’s willingness to disincentivize nuclear family structures for its own financial benefit exemplifies how its interest in families is primarily economic.

Furthermore, PRWORA’s child support enforcement apparatus works to incarcerate more Black men, the most disproportionately incarcerated group in the United States.³¹ All fifty states have laws that allow a parent to be incarcerated for nonpayment of child support³²—in South Carolina, one in every eight inmates is jailed for failure to pay child support.³³ Furthermore, enforcement of child support payments is racialized: a recent study in Indiana found that “unmarried, Black fathers had child support enforced against them in court at a rate of 57 percent, compared to 45 percent of white unmarried fathers and 38 percent of Hispanic

26. See generally DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR OFFICE OF POLICY PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

27. Rambert, *supra* note 3, at 335.

28. *Id.* at 343.

29. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1, at 1328.

30. Rambert, *supra* note 3, at 343.

31. See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://perma.cc/UL2V-YDE7>.

32. Rambert, *supra* note 3, at 350.

33. *Id.*

unmarried fathers.”³⁴ Therefore, PRWORA’s child support enforcement mandate disproportionately impacts Black families and perpetuates the mass incarceration of Black men, which leads to increased precarity for the families PRWORA purports to aid through child support enforcement.

On the other hand, the laws that establish parentage for LGBTQ+ parents using ART primarily regulate white parents. Race is a determinative factor in who uses ART. A survey by the Society for Assisted Reproductive Technology reports that white women account for 85.5 percent of ART cycles, whereas Black women only account for 4.6 percent³⁵—statistics that do not align with the racial breakdown of the United States.³⁶ Therefore, the laws that regulate parents using ART primarily regulate white parents. While these laws are often unaccommodating for LGBTQ+ parents, unlike the regulatory regime of family law, which often targets Black parents, the laws regulating ART are not putative and are not tied to the carceral state.

A lack of access to ART partially explains the racial breakdown of individuals using ART since Black women are twice as likely as white women to rely on Medicaid rather than private health insurance plans³⁷—and Medicaid does not cover most fertility treatments.³⁸ However, the United States’ medical system has a history of inflicting reproductive violence on people of color, and Black and Indigenous women in particular.³⁹ The subsequent, and understandable, mistrust of the medical system could also explain some of the racial disparity in ART use since ART can be a highly medicalized means of family building. Further, it is important to note that legislation such as PRWORA creates invasive and complex barriers to social supports, which exist at least in part to dissuade Black individuals from having children. Professor Dorothy Roberts explains, “Politicians, policy makers, sociologists, demographers, public-health experts, and the media, all cast black women’s childbearing as an urgent social problem because black women have too many babies and transmit their innate depravity to their children—genetically, chemically, or culturally.”⁴⁰ Therefore, it is not surprising that the ART industry does not target a population that is already disincentivized by the state, and by systemic racism, from family building. All of these factors contribute to the writing of laws regulating ART with white parents in mind.

The recognition regime’s focus on the reproduction of whiteness, as well as

34. *Id.* at 350–51.

35. Ada C. Dieke et al., *Disparities in Assisted Reproductive Technology Utilization by Race and Ethnicity, United States, 2014: A Commentary*, 26 *J. WOMEN’S HEALTH (LARCHMT)* 605, 606 (2017).

36. *See Quick Facts*, U. S. CENSUS BUREAU (July 1, 2019), <https://perma.cc/C8QD-ZGEH>.

37. *See Dieke, supra* note 35, at 606; *see also* Gabriela Weigel et al., *Coverage and Use of Fertility Services in the U.S.*, KAISER FAMILY FOUNDATION (Sept. 15, 2020), <https://perma.cc/3MWG-8XX6>.

38. Jenna Walls et al., *Medicaid Coverage of Family Planning Benefits: Results from a State Survey*, KAISER FAMILY FOUNDATION (2016), <https://perma.cc/P823-KREH>.

39. LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION*, 14, 54–57 (2017).

40. Dorothy E. Roberts, *Why Baby Markets Aren’t Free*, 7 *UC IRVINE L. REV.* 611, 615 (2017).

its economic barriers to entry, leaves many LGBTQ+ families of color (and to a lesser extent white LGBTQ+ families facing economic precarity) without the privileges the recognition regime gives to its white subjects. Without being the intended subjects of the recognition regime, LGBTQ+ families of color are not only deprived of its subjectivity, but likely further marked as deviant, both for their sexuality and race, and for their inability to fit within a family law regime. Existing outside of a family law regime inevitably places already stigmatized families in further legal precarity.

Not only do the laws regulating the establishment of legal parentage for parents using ART intend to regulate white parents, but also, the ART industry and its related laws “reflect and promote a racist hierarchy that values white babies as the most cherished products of reproductive transactions.”⁴¹ Perhaps no case in the United States better exemplifies this than *Cramblett v. Midwest Sperm Bank*.⁴² Jennifer Cramblett, a white mother, sued a sperm bank for wrongful birth after she was inseminated with a Black donor’s sperm, even though she had specifically chosen a white donor.⁴³ The basis for Cramblett’s claim was her daughter’s mixed-race status—Cramblett and her white partner, Amanda Zinkon, paid for a white donor’s sperm and wanted damages amounting to \$150,000 to make up for the “personal injuries, medical expense, pain, suffering, emotional distress, and other economic and non-economic losses” they apparently suffered from having a daughter who is not white.⁴⁴ While Cramblett did not prevail on her claim, the case demonstrates how many parents turn to the ART industry and its related laws to reproduce whiteness.

However, Professor Ulrika Dahl explains that it is not only white parents, but also the state, that is invested in ART’s ties to reproducing white babies. Dahl writes that the reproduction of whiteness is a “project of racial and national reproduction.”⁴⁵ Essentially, the state is incentivized to uphold ART’s reproduction of whiteness in the name of nation building, since white babies become worthy white citizens—which further explains why the state upholds the recognition regime of family law for LGBTQ+ parents using ART. Considering that anti-Black racism is endemic to the United States, it is not surprising that legislation stemming from the regulatory regime of family law, such as PRWORA—a law that works to establish Black parentage in order to penalize Black fathers—is entirely different in intent from the recognition regime of family law which regulates ART, an industry that at least partially exists to reproduce whiteness.

41. *Id.* at 616.

42. *See generally* *Cramblett v. Midwest Sperm Bank, LLC*, 230 F. Supp. 3d 865 (N.D. Ill. 2017).

43. M. Annie Houghton-Larsen, *I Paid for a White Baby: How Assisted Reproductive Technologies Preproduce White Supremacy*, 11 *GEO. J. L. & MOD. CRIT. RACE PERSP.* 161, 161–62 (2019).

44. *Id.* at 169.

45. Ulrika Dahl, *Not Gay as in Happy, but Queer as in Fuck You: Notes on Love and Failure in Queer(ing) Kinship*, 19 *LAMBDA NORDICA* 143, 162 (2015) (quoting JUANA MARÍA RODRÍGUEZ, *SEXUAL FUTURES, QUEER GESTURES, AND OTHER LATINA LONGINGS* 44 (2014)).

B. Wealthy Parents vs. Impoverished Parents

Financial status may play the most substantial role in determining which regime of family law governs a particular parent. Professor Dorothy Roberts writes, “[T]he ability of potential parents to engage in market transactions involving children enhances parents’ autonomy over their family lives. The free market seems to liberate us from the constraints of biology and state control.”⁴⁶ Expanding on Roberts’ theory, it seems that the recognition regime of family law grants “worthy” parents—those who can prove their ability to provide a “private welfare regime” for their families—autonomy as a reward for their self-sufficiency, placing them in opposition to parents who depend on the state for some level of support. Having a child through ART is a medically and legally expensive process—especially for LGBTQ+ parents. Therefore, participation in this form of family building legitimizes a family’s economic self-sufficiency. This autonomy manifests in a regime of family law that does not force participation; rather families choose to interact with the recognition regime of family law to establish legal parentage. Although in many cases LGBTQ+ parents must use the recognition regime of family law to establish legal parentage, and therefore sometimes face intrusive legal processes while doing so, the laws regulating LGBTQ+ parents are not nearly as conditional or intrusive as the regulatory regime of family law.⁴⁷ Essentially, the state rewards those who prove their self-sufficiency with fiscal autonomy, and punishes those who are dependent by undermining their autonomy through state intervention.

ART is expensive—especially for LGBTQ+ families who, in most circumstances, will need to purchase eggs or sperm on top of the cost of the ART procedures.⁴⁸ In vitro fertilization (IVF), one common form of ART used by LGBTQ+ families, costs between \$12,000 and \$15,000, which does not include the \$1,500 to \$6,000 dollars in additional costs for medication.⁴⁹ If the first round fails, the following frozen embryo transfers (FET) cost anywhere from \$4,000 to \$7,000 per cycle.⁵⁰ Many LGBTQ+ families must use surrogacy to conceive a genetically related child, and gestational surrogacy can cost \$60,000 to \$150,000.⁵¹ In the United States, purchasing donor eggs can cost approximately \$25,000 to \$30,000, and purchasing donor sperm can cost \$300 to \$1,500 per vial.⁵² Only seventeen states statutorily require private health insurance plans to cover some form of fertility treatment, and many of those seventeen states do not

46. Roberts, *supra* note 40, at 611–12.

47. The second-parent adoption process, which will be discussed below, can be costly and invasive for LGBTQ+ parents. In fact, some states require home studies and FBI background checks for parents partaking in the second-parent adoption process. “*Confirmatory*” or *Second-Parent Adoption: What You Need to Know*, *supra* note 22.

48. *Building LGBTQ+ Families: The Price of Parenthood*, FAMILY EQUALITY COUNCIL (2019), <https://perma.cc/26KY-EMBQ>.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

even stipulate that IVF must be one of the covered procedures.⁵³ In addition, Medicaid does not cover IVF or other costly forms of ART.⁵⁴ Therefore, most families must be able to pay out-of-pocket in order to use ART for family building.

While the legal fees associated with ART family building for LGBTQ+ families are far less substantial than the associated medical costs, in order to establish legally sound parentage, LGBTQ+ families must endure legal procedures that straight families using ART do not. For example, although many states have adopted legislation aimed at making legal parentage for families using ART less costly, most practitioners agree that LGBTQ+ parents should go through the second-parent adoption process or petition for a similar judgment in order to protect their parental status.⁵⁵ A second-parent adoption is the process by which a non-birth parent adopts the child their partner birthed.⁵⁶ In some states, when the non-birth parent petitions for adoption, they are forced to undergo an FBI background check, home studies, and hearings in front of a family law court.⁵⁷ Some states even force parents to provide affidavits from doctors or cryobanks that substantiate the facts of the child's birth.⁵⁸ Second-parent adoptions may cost up to \$3,000 in legal fees.⁵⁹ Although states that have adopted the 2017 Uniform Parentage Act (UPA) and other similar legislation may have eliminated the second-parent adoption requirement, Professor Courtney Joslin explains why second-parent adoptions are still necessary: "The Full Faith and Credit Clause of the Constitution only ensures that a person's parental status will be recognized and respected by the courts of other states if that status is established by virtue of a court adjudication."⁶⁰ Therefore, if legal parentage is only established as a "matter of state law," other states are not constitutionally required to recognize that parentage.⁶¹ LGBTQ+ parents that cannot afford to carry out the second-parent adoption process are placed in a legally precarious situation, exemplifying that the recognition system of family law also penalizes families lacking in economic means. Considering the high cost of building a family using ART, market power is nearly a requirement to partake in this form of family building, as well as for legitimization of LGBTQ+ parents.

While wealth is a form of parental legitimization under the recognition regime of family law, a lack thereof marks parents as unworthy and instead subjects them to the *regulatory* regime of family law. The regulatory regime is just as intertwined with poverty as the recognition regime is with wealth. This parental

53. Chanel Dubofsky, *Your Guide to Fertility Insurance Coverage by State*, A MODERN FERTILITY BLOG (Dec. 3, 2019), <https://perma.cc/YTD8-RKRW>.

54. Walls, *supra* note 38.

55. "Confirmatory" or Second-Parent Adoption: What You Need to Know, *supra* note 22.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Average Adoption Costs in the United States*, FAMILY EQUALITY COUNCIL (last visited Nov. 17, 2021), <https://perma.cc/GE4Q-U54F>.

60. Courtney Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 39 (2010).

61. *Id.*

unworthiness stems from the fact that programs like PRWORA stigmatize their own recipients—President Clinton did not speak highly of the parents who would be impacted by PRWORA’s enactment in his remarks on the legislation.⁶² Parents governed by the recognition regime of family law participate in this family law regime because they want to establish parenthood. While the regime’s unique burdens for LGBTQ+ families should not be ignored, the system is not forced on parents. However, many parents do not interact with the regulatory regime by choice. Rather, a mother in need of TANF benefits is forced to interact due to the stipulation that to receive TANF, a mother must disclose the identity of her child’s father.⁶³ Therefore, many fathers are forced to interact with the regulatory regime of family law once the state tracks them down for child support payments. This process exemplifies Roberts’ statement that a lack of market power robs parents of agency in the eyes of the state.⁶⁴

The inherent ties of the recognition regime of family law to market power further proves its differentiation from the other two regimes of family law. Professor Wendy Brown writes, “Enthusiasm for the market is typically animated by its promise of innovation, freedom, novelty, and wealth, while a politics centered in family, religion, and patriotism is authorized by tradition, authority, and restraint. The former innovates and disrupts; the latter secures and sustains.”⁶⁵ LGBTQ+ families using ART disrupt this paradigm. While the processes that enable LGBTQ+ families to establish legal parentage incentivize conformity to traditional family structures, as the above discussion of the costs of ART demonstrates, this form of family building is deeply intertwined with the market. In fact, it nearly conditions legal recognition for parents on market power. In addition, ART is a relatively new, and science-based, form of conception, further aligning it with Brown’s description of the market as innovative, and not with the traditional family.

What is the impact of the recognition regime of family law having more in common with “enthusiasm for the market” than with a “politics centered in family”?⁶⁶ Perhaps it indicates that the family law system regulating ART for LGBTQ+ parents is more blatantly concerned with market power than with “family values.” This raises the question: is the state’s willingness to create paths to parentage for LGBTQ+ parents based on an acceptance of LGBTQ+ individuals, or does it exemplify that enthusiasm for the market triumphs over anti-LGBTQ+ sentiment? Considering that neoliberal ideologies infiltrate all aspects of contemporary political and private life, it is likely that the interconnectedness of ART and the market have led to an increased acceptance of parentage rights for LGBTQ+ parents using ART.⁶⁷ No matter what, the recognition regime’s outward

62. See Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1.

63. See generally Rambert, *supra* note 3.

64. Roberts, *supra* note 40, at 611–12.

65. BROWN, *supra* note 10, at 89–90.

66. *Id.*

67. See generally BROWN, *supra* note 5.

interconnectedness with the market further establishes its existence within family law as a whole, as well as its differentiation from the two preexisting regimes of family law.

C. Children as Success vs. Children as Failure

In certain circumstances, parents governed by the recognition regime of family law are celebrated as successful merely for having a child through ART, whereas parents governed by the regulatory regime are marked as failures for having a child.⁶⁸ Undoubtedly, in a country that valorizes financial success, the market power inherent to ART marks almost any parent using the process as somewhat successful. However, intentionality is also inherent to family building for LGBTQ+ parents using ART. Under neoliberalism, worthy subjects are those who demonstrate personal responsibility, so the clear intent and choice to assume legal parentage that LGBTQ+ parents exhibit further substantiates their worthiness. Furthermore, LGBTQ+ parents using ART are deemed worthy and successful when they demonstrate their intention to conform to the norms of respectability, which they can demonstrate through nuclear family formation. Dahl explains that “[I]deals of queer family-making and reproduction often reflect, require, or lead to, middle class integration.”⁶⁹ Through intentional family building, LGBTQ+ families prove their willingness to create a “private welfare system,” thus becoming self-reliant and proving themselves worthy parental subjects.

President Clinton’s PRWORA remarks further underscore that individual responsibility is key to parental worthiness.⁷⁰ Those that share President Clinton’s beliefs argue that certain paths to parenthood do not demonstrate responsabilization. For example, the preamble to PRWORA stigmatizes young parents, stating, “Children of teenage single parents have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.”⁷¹ Essentially, the legislation faults young parents for having children that it claims will perpetuate the same parental failure. Similarly, single mothers are stigmatized for their existence outside the nuclear family—as if they are an affront to the “private welfare system.” Professor Martha Fineman explains that “. . . in political and professional discourses, single-Mother status is defined as one of the primary predictors of poverty—predictor often being translated into cause.”⁷² Instead of the state addressing the systemic issues that make it difficult for parents to succeed financially outside of the nuclear family structure, single

68. See Clara Moskowitz, *An L.G.B.T.Q. Pregnancy, From D.I.Y. to I.V.F.*, N.Y. TIMES (April 15, 2020), <https://perma.cc/3QFB-UNLB>.

69. Dahl, *supra* note 45, at 157.

70. See Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange with Reporters, *supra* note 1.

71. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

72. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 106 (1995).

mothers are blamed for the very poverty they experience—as if they chose or caused their own impoverishment.

Absurdly, in the United States, parents experiencing economic precarity face stigmatization for having children they cannot financially support, and are simultaneously accused of having children in order to leech off of the government.⁷³ These are of course ridiculous accusations since economic status should not determine whether or not an individual can have a child, and government support for additional children is extremely minimal because of “family caps” targeting this stereotype.⁷⁴ President Ronald Reagan once stated, “intact, self-reliant families are the best anti-poverty insurance ever devised.”⁷⁵ For those that share Reagan’s view that the point of a family is insurance against poverty, a poor family relying on welfare has inherently failed in its lack of self-reliance. This “failure” marks poor parents as unworthy, not only because of their economic status, but also because they have a child *despite* their economic status.

The racist pathologizing of poor mothers—especially poor Black mothers— as overly sexual⁷⁶ also creates a parental worthiness binary with LGBTQ+ parents using ART because for the latter parents, sex is removed from procreation.⁷⁷ In a country obsessed with policing sexual morality, which often punishes women for having nonmarital sex, and stigmatizes queer individuals for having sex at all, removing sex from procreation eliminates the opportunity for children to exemplify a parent’s sexual immorality.⁷⁸ On the other hand, American policymakers and the public alike have latched onto the idea that “poor women approach reproductive sex in a purely entrepreneurial manner,” and that “they engage in unprotected heterosexual intercourse in the hope that should they become pregnant and bear a newborn child, they would profit handsomely in the form of either public assistance eligibility or . . . increased cash payments and relief.”⁷⁹ Of course, these payments are “miniscule,” and in no way incentivize a person to have more children.⁸⁰ The “welfare queen” is the most common stereotype within this category of mothers procreating to take advantage of welfare, and it plays off of centuries-old racist stereotypes of Black women as overly lascivious.⁸¹ Therefore, for parents subject to the regulatory regime of

73. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 136 (2002).

74. Many states have implemented “family caps” to ensure that families do not see an increase in welfare benefits after having another child. Smith, *supra* note 73, at 124.

75. COOPER, *supra* note 4, at 69 (quoting President Ronald Reagan speaking about the importance of the family for poverty prevention).

76. Smith, *supra* note 73, at 137; Cammett, *supra* note 25, at 237.

77. Moskowitz, *supra* note 68.

78. LGBTQ+ individuals face scrutiny for their sexuality, just not in the same way as stigmatized groups of straight parents when it comes to procreation.

79. Smith, *supra* note 73, at 136.

80. *Id.*

81. Cammett, *supra* note 25, at 237. Professor Jennifer L. Morgan explains the explicit ties between slavery and racist stereotypes about Black women’s sexuality, writing,

family law, children represent immorality and failure, whereas for parents governed by the recognition regime, children represent respectability and fiscal success.

D. Married Parents vs. Unmarried Parents

The consummate “private welfare system” consists of two heterosexual married parents. It follows that many key statutory aspects of family law—for example, marital presumptions, which state that any child born to a mother during a marriage is her husband’s legal child—exist to ensure that children are not born out of wedlock.⁸² Therefore, if family law’s goal is to promote “private welfare systems,” unmarried parents are less worthy subjects due to their failure to partake in a traditionally structured nuclear family. PRWORA makes this clear with its opening statement: “The Congress makes the following findings: (1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children.”⁸³ This excerpt exemplifies that PRWORA acknowledges its bias against unmarried parents, so it is not surprising that the act is outwardly hostile to parents who are unwed. Over 85 percent of TANF recipients are women, the vast majority of whom are unmarried.⁸⁴ Unmarried women receiving TANF are by definition not married to the fathers that the regulatory regime of family law tracks down for child support payments; PRWORA’s child support enforcement provision subjects unmarried men to state interactions that can even lead to incarceration, all on account of their having a child out of wedlock.⁸⁵ Therefore, both mothers and fathers governed by the regulatory regime of family law are stigmatized for, and face material detriments on account of, their nonmarital status.

On the other hand, the rates at which LGBTQ+ individuals plan to have a

Ideas about black sexuality and misconceptions about black female sexual behavior formed the cornerstone of Europeans’ and Euro-Americans’ general attitudes toward slavery. Images of black women’s reproductive potential, as well as images of their voracious sexuality, were crucial to slaveowners faced with female laborers... [T]hey utilized both outrageous images and callously indifferent strategies to ultimately inscribe enslaved women as racially and culturally different while creating an economic and moral environment in which the appropriation of a woman’s children as well as her childbearing potential became rational and, indeed, natural.

This passage illustrates that white Europeans and Americans did not respect enslaved Black women’s parental status, which suggests that the legal system’s contemporary hostility toward Black motherhood is an aspect of slavery’s legacy in the United States. JENNIFER L. MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* 7 (2011).

82. Paula Roberts, *Truth and Consequences: Part II: Questioning the Paternity of Marital Children*, 37 *FAM. L.Q.* 55, 55 (2003).

83. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

84. CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS, FISCAL YEAR 2020, U.S. DEP’T OF HEALTH AND HUMAN SERVICES OFFICE OF FAMILY ASSISTANCE (2021).

85. Rambert, *supra* note 3, at 350.

child through ART are on the rise,⁸⁶ and while data on the percentage of married versus unmarried LGBTQ+ families using ART does not exist, it is likely that the rise in LGBTQ+ individuals planning to have children is tied to *Obergefell v. Hodges* and its federal legalization of same-sex marriage.⁸⁷ In fact, many ART procedures, such as surrogacy, incentivize marriage for LGBTQ+ individuals.⁸⁸ Until the last couple of years, in some states, access to IVF and surrogacy was tied to marital status.⁸⁹ The Supreme Court's decision in *Pavan v. Smith*, which extends marital presumptions to some same-sex couples, is not a panacea for LGBTQ+ families. However, for women in same-gender relationships, and in some states for gay men, too, marital presumptions serve as another incentive for LGBTQ+ parents using ART to legally legitimize their families through marriage.⁹⁰ It follows that in a country that has only recently socially accepted (to some extent), and begun to legally protect LGBTQ+ parents,⁹¹ conformity to heteronormative family structures can lead to further acceptance and legal protection.

However, the state's extension of marriage to same-gender couples must also be understood as the state's attempt to quash queer possibility and the reimagining of family structures.⁹² Professor Melissa Murray, in writing about the Supreme Court's "jurisprudence of non-marriage" preceding *Obergefell*, explains that the Court could have "radically" read *Lawrence v. Texas* "as a catalyst for greater constitutional protection for nonmarriage. On this interpretation, *Lawrence* need not serve only as a way station on the road to same-sex marriage but as the impetus for a more pluralistic regime of relationship recognition in which marriage exists alongside a range of nonmarital alternatives."⁹³ However, such "alternatives" might have chipped away at the nuclear family's dominance, which could have shifted responsibility back to the state. Therefore, by marrying, same-gender couples prove their worthiness to the state through their conformity to nuclear family structures, rather than to alternative forms of kinship.

Obergefell is a manifestation of American valorization of marriage.⁹⁴ Justice Anthony Kennedy's opinion about the "dignity" marriage confers, as well as its

86. *LGBTQ+ Family Building Survey*, FAMILY EQUALITY COUNSEL (2019), <https://perma.cc/XJ6H-JCLZ>.

87. Julie Compton, *LGBTQ Families Poised for 'Dramatic Growth,' National Survey Finds*, NBC (Feb. 7, 2019, 9:53 a.m.), <https://perma.cc/3LGW-7C8K>.

88. See, e.g., *The United States Surrogacy Law Map*, CREATIVE FAMILY CONNECTIONS (last visited Nov. 17, 2021), <https://perma.cc/884H-X75R>.

89. *Shady Grove Fertility (SGF) Celebrates Maryland's Revised Fertility Insurance Laws that Increase Access to Care for More Families*, SHADY GROVE FERTILITY (last visited Nov. 23, 2022), <https://perma.cc/X8XL-M2XY>.

90. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2315–2316 (2017).

91. *Pavan v. Smith*, 582 U.S. ____ (2017).

92. Nontraditional family structures are historically, and presently, integral to queer communities. For LGBTQ+ individuals who may face ostracization from their biological families on account of their sexuality, families based on other forms of kinship provide vital support. KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 29 (1991).

93. Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1211 (2016).

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

“sacred” nature and “transcendent importance” further valorize married LGBTQ+ families who choose to avail themselves of the “constellation of benefits that the States have linked to marriage.”⁹⁵ Essentially, *Obergefell* availed married LGBTQ+ parents of the moral superiority marriage provides—superiority that unmarried parents, such as those forced to pay child support in connection to their child’s other parent receiving TANF benefits, do not possess. When the recognition regime establishes legal parentage for married LGBTQ+ parents, it continues this process of conferring “dignity,” since parents living within the confines of a nuclear family are automatically more respectable than those who are unmarried, and through marrying and having children, LGBTQ+ parents demonstrate a willingness to live within the pinnacle of nuclear family norms.⁹⁶ Arguably, children conceived using ART also take the focus away from LGBTQ+ individuals’ sexuality, which was historically considered deviant, and represent respectable reproduction, removed from the act of sex.

II. INTENDED PARENTS AND THE WEAPONIZATION OF PARENTAGE

In Part II, this Paper examines the ways in which a comparison of the racist weaponization of parenthood and intent-based parenthood illuminates that all systems of family law exist to maintain a private welfare regime. It argues that by utilizing a governmental system created by PRWORA, and incorporating it into the Uniform Parentage Act (UPA), the LGBTQ+ movement is upholding a racist regime of parentage establishment. Part II will 1) explain the establishment of intent-based parentage through VAPs, 2) explore the connection between VAPs and PRWORA, and 3) examine the unequal distribution of intent-based parentage.

A. Intent-Based Parentage Through Voluntary Acknowledgements of Parentage

Establishing legal apparatuses to legitimize intent-based parentage, rather than genetic parentage or functional parentage, allows LGBTQ+ parents to establish legal parentage before or concurrently with the child’s birth, instead of after.⁹⁷ This is important because processes such as second-parent adoptions can take up to six months to complete, depending on the jurisdiction, and leave non-birth parents without parentage rights over their children.⁹⁸ Furthermore, functional parentage concepts, such as *de facto* parenthood, confer legal parentage based on parenting that has already occurred and therefore cannot be granted before or concurrent with birth.⁹⁹ For these reasons, Section 703 of the UPA—a

95. *Id.* at 656–57, 670.

96. Expanding on the significance of LGBTQ+ parents conforming to nuclear family norms, Dahl writes, “[S]ame-sex love is, in some nations and contexts, recognized and assimilated into the ever-expanding ‘norm’ of reproducing the species and the nation.” Dahl, *supra* note 45, at 143.

97. Dara Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 222 (2012).

98. NeJaime, *supra* note 90, at 2317.

99. Purvis, *supra* note 97, at 222.

model legislation heralded for its LGBTQ+ friendly reforms—enshrines intent-based paths to parenthood, stating, “An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”¹⁰⁰ A simple way to display intent and establish intent-based parenthood under the UPA is a voluntary acknowledgement of parentage (VAP),¹⁰¹ a document that the birth parent, and traditionally, the genetic father, sign at the time of a child’s birth, establishing the father’s legal parentage without relying on marriage.¹⁰² However, only eleven states have extended VAPs to LGBTQ+ parents¹⁰³ and less than half of those states have adopted the UPA.¹⁰⁴ Yet, the UPA drafters enshrined VAPs into the model legislation with section 301, which states, “A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child.”¹⁰⁵ Therefore, as more and more states adopt the UPA, more LGBTQ+ parents using ART will have the opportunity to establish legal parentage through VAPs.

B. Voluntary Acknowledgements of Parentage and the Personal Responsibility and Work Opportunity Reconciliation Act

Although VAPs can streamline the path to legal parentage for LGBTQ+ parents using ART, it is important to understand where the procedure derives from, as well as why legislators created VAPs in the first place. PRWORA established the VAP procedure, making it a vital tool in the legislation’s effort to force parentage onto fathers and violate mothers’ privacy in the name of creating “private welfare systems.”¹⁰⁶ PRWORA’s Section 331 directs states to establish a “simple civil process” for acknowledging paternity and states that “Such procedures must include a hospital-based program for the voluntary acknowledgment of paternity focusing on the period immediately before or after

100. UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM’N 2017).

101. The UPA states, “A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child.” UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM’N 2017).

102. *FAQ: Voluntary Acknowledgement of Parentage (VAP), A Simple Way for Your Family to Be Recognized and Respected Through Legal Parentage*, GLAD, (last visited Sept. 7, 2022), <https://perma.cc/9AL9-JAHT>.

103. As of 2022, Nevada, Massachusetts, Vermont, California, Washington, Maryland, Rhode Island, New York, Connecticut, and Colorado have updated their VAP procedures to no longer be based on biology, therefore allowing LGBTQ+ parents to establish parentage using VAPs. Of those states, only Vermont, California, Washington, Connecticut, Colorado, and Rhode Island have adopted the UPA; therefore, VAPs as an easy means of establishing intent under the UPA are only available to LGBTQ+ parents in those states. *Id.*; *Parentage Act*, UNIFORM LAW COMMISSION (last visited September 7, 2022), <https://perma.cc/R9RD-KP35>.

104. *Parentage Act*, *supra* note 103.

105. UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2017).

106. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

the birth of a child.”¹⁰⁷ This ensures that from the time of the child’s birth a father is on the hook for child support—which enables the state’s weaponization of parentage, primarily against Black fathers.¹⁰⁸ PRWORA even gives VAPs full faith and credit, a legal status that is vitally important for LGBTQ+ parents.¹⁰⁹ Clearly, the Clinton administration and bipartisan legislators who lobbied for PRWORA’s passage intended to create a sure proof means by which to hold fathers responsible for child support. Are LGBTQ+ parents who partake in VAPs complicit in PRWORA’s racialized responsabilization project? While LGBTQ+ families availing themselves of the legal protections VAPs provide should not be blamed for using the legal procedure, the LGBTQ+ movement should consider other options before tying legal reforms for LGBTQ+ parents to VAPs and thus upholding a racialized system created to responsabilize parents facing precarity.

C. The Unequal Distribution of Intent-Based Parentage

PRWORA’s establishment of VAPs should not be confused with state support for intent-based parentage for *all* parents. Professor Katharine Baker explains intent-based parentage and its downfall in the eyes of the state:

The law grants parental rights and responsibilities to those who caused a child to come into being with the intent of parenting that child once it was born. The problem, of course, is that the system is wholly inconsistent with bionormativity and paternity doctrine, the purposes of which are and always have been to make men who did not intend to parent, parents.¹¹⁰

Professor Baker continues by explaining that the state may be willing to allow intent-based parentage for LGBTQ+ parents using ART because it is likely that LGBTQ+ parents using the procedures are not in need of state support due to the cost of assisted reproduction: “If the state does not need the biological parent’s money, it may care less about biological connection” and allow intent-based parentage.¹¹¹ This fact exemplifies that for the state, establishing privatized “welfare systems” so that it can avoid providing support is the main goal. However, this acceptance of intent-based parentage for some parents and not for others further enshrines separate regimes of family law, rather than ensuring that all parents are governed by a family law regime that has the best interests of parents and children in mind. Essentially, VAPs manifest that a family law apparatus can impact differently situated families in vastly different ways—VAPs have entirely divergent intents when employed by the regulatory and recognition

107. *Id.*

108. *Id.*

109. *Id.*

110. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 701 (2008).

111. *Id.* at 702.

regimes of family law.

The fact that LGBTQ+ families using ART are at work convincing the state to recognize intent-based parentage through any means necessary, while many parents, and disproportionately Black fathers, cannot escape burdensome parentage obligations for children they did not intend to parent, exemplifies the vast differences between the regulatory and recognition systems of family law. However, it is unsurprising that the state is hesitant to adopt intent-based parentage for all parents; this is because the consistent argument against intent-based parentage is that if it becomes the norm for all parents, then the state cannot force parents who did not intend to parent to pay child support.¹¹² This is also likely why states are hesitant to extend VAPs to LGBTQ+ parents: intent-based parentage may find legitimization through VAPs, which could undermine the original, and in most circumstances current, responsabilization intent of the legal apparatus. This potential for undermining will likely continue to hold back the LGBTQ+ movement's attempts to expand intent-based parentage. However, it is also possible that this conflict over expanding intent-based parentage will further solidify the different regimes of family law, and lead to further disparity in family law's creation of worthy and unworthy parental subjects.

CONCLUSION

More than twenty-five years have passed since PRWORA's enactment and since courts began to legally recognize LGBTQ+ parents using ART. It is now apparent that the laws regulating ART for LGBTQ+ parents constitute a new regime of family law, one that legitimizes LGBTQ+ parents by situating them in opposition to families regulated by family law's regulatory regime. Each regime plays a part in family law's overarching goal of family responsabilization, and their differences can be explained by perceptions about the economic and racial characteristics of the populations each system governs. Over the past quarter century, LGBTQ+ parents in the United States who have the means to conform to the norms of respectability have become "recognized and assimilated into the ever-expanding 'norm' of reproducing the species and the nation,"¹¹³ whereas parents governed by the regulatory regime of family law continue to be blamed and punished for the "intergenerational transmission of poverty."¹¹⁴

Both the regulatory and recognition regimes of family law regulate reproduction, and in so doing, not only create worthy and unworthy parental subjects, but also mark children as worthy or unworthy in the process. PRWORA's preamble reads, "Children born into families receiving welfare assistance are 3 times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare."¹¹⁵ Evidently, the regulatory regime of

112. *See generally id.*

113. Dahl, *supra* note 45, at 143.

114. FINEMAN, *supra* note 72, at 108.

115. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C.A. § 1305 (1996).

family law stigmatizes the parents it exists to govern, and this statement demonstrates that it also preemptively subjects stigmatized parents' children to its governance. Rather than creating a system that could help parents and children flourish, it dooms both to precarious lives.

Separate family law regimes allow for differential treatment and valuation of families. Therefore, to minimize disparity in the legal treatment of American families, a uniform system of family law is needed—a regime that can apply to all families. Family law must be detached from the carceral state, decenter historically heterosexual institutions such as marriage, and make room for a regime of family recognition that does not require adherence to normative family structures. This will require disentanglement from laws such as PRWORA, which tether family law to racist carceral regimes and ideas of family worthiness.

As of now, the birth of family law's regime specifically regulating assisted reproduction—the recognition regime—has led to the further reproduction of disparity. Until the parental subjects governed by the recognition regime no longer derive their worthiness and respectability from their positionality in opposition to parents governed by the regulatory regime, and until the creation of a uniform regime that accepts all types of families, family law will continue to produce worthy and unworthy parents and reproduce inequality.