

Illegitimate Families

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INTRODUCTION

Children with unmarried same-sex parents face significant discrimination in many states because of their family structure. In most U.S. states, such children are denied a legally recognized parent-child relationship with both of their parents when they join their family at birth or through adoption.¹ Only one parent is a legally recognized parent because that person adopted,² gave birth, or is the genetic parent of the child. The unrecognized parent who is not a genetic, birth, or adoptive parent has no legal relationship with the child.³ While that parent may acquire standing to seek custody or visitation with the child as a “de facto” parent in contested litigation at a later date, their status is unrecognized and uncertain unless or until they bring such an action. And in nine states,⁴ even this doubtful route is unavailable. The only way a same-sex couple can be the legal parents of their child is to marry so that they can benefit from the marital presumption of parentage, jointly adopt, or access step-parent adoption. Unmarried same-sex couples, who typically are not both the genetic parents of their children, often cannot obtain legal recognition as

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¹ See Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1584 (2022).

² See *id.* Many states allow only married couples to jointly adopt a child; in those jurisdictions, an unmarried person can adopt individually but not jointly with a partner. See *infra* Part I.

³ I have chosen to use the terms “unrecognized parent” or “functional parent” to refer to a person who is neither the biological, genetic, or adoptive parent of their child. Since most LGBTQ couples cannot sexually conceive a child together, and many states do not allow unmarried couples to jointly adopt a child, in many LGBTQ families only one partner can establish legally recognized parentage by birthing the child, being the genetic parent, or legally adopting the child. The other parent does not have legal parentage and is therefore an “unrecognized,” “functional” parent. I believe these terms are both more inclusive and less bio-normative than terms like “non-biological,” “non-genetic” or “non-adoptive” parent.

⁴ Alabama, Arizona, Florida, Louisiana, Louisiana, Michigan, Tennessee, Utah, Virginia, and Wyoming. See Hazeldean, *supra* note 2, at 1619, 1629.

co-parents.⁵ Children whose parents did not or could not marry are deprived of a secure relationship with their unrecognized parent.

This situation is particularly troubling because it reinscribes inequalities that exist along racial and class lines. Black and Brown children, and those who are low-income, are far less likely to have married parents. As Serena Mayeri points out, “marriage is both a privileged status and a status of the privileged.”⁶ White, affluent children are far more likely to have married parents than are children of color or those with less socioeconomic privilege. Only 22% of Black children are living with two parents who are both in their first marriage, compared with 46% of children overall.⁷ Thirty-three percent of Black children are living with two married parents, whereas 73% of white children and 84% of Asian-American children do.⁸ Marriage rates are also “more closely linked to socio-economic status than ever before.”⁹ In 2015, only 50% of those with no education beyond high school were married, but 65% of adults aged 25 or older with a college degree were married.¹⁰ By contrast, in 1990, more than 60% of adults in both of these groups

⁵ Unmarried heterosexual couples who have genetic children together, whether through sex or assisted reproductive technology, may be able to establish full parental rights by signing a Voluntary Acknowledgment of Paternity after birth, through a paternity action, or by supporting and caring for the child after birth. *See generally* Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (holding that an unmarried father who supported and raised his children could not be deprived of custody unless the state demonstrated he was unfit). Even unmarried heterosexual couples who conceive using donor gametes can establish joint parental rights more easily than same-sex couples. A heterosexual couple who used a donor egg to conceive may both be legal parents if the female partner carried the child and the male partner’s sperm was used—he would be the genetic father and she would be the legal mother by virtue of giving birth. *See, e.g., In re C.K.G.*, 173 S.W.3d 714, 730 (Tenn. 2005) (finding that “[e]ven though [the birth mother] lacks genetic connection to the triplets, in light of all the factors considered we determine that [the birth mother] is the children’s legal mother”). If an unmarried heterosexual couple used donor sperm to conceive, then the female partner would be the biological and birthing mother of the child and the male partner could choose to sign a Voluntary Acknowledgment of Paternity and thus establish himself as the father of the child even though he is not the genetic father. *See infra* note 215 and accompanying text. But unmarried heterosexual couples who want to adopt a child face the same challenges that unmarried same-sex couples do in states that do not permit unmarried couples to adopt jointly—both partners cannot become legal parents of the child unless they marry because marriage is a requirement for joint adoption. *See, e.g.,* UTAH CODE § 78B-6-117(3) (2021) (permitting only married couples and single people to adopt children).

⁶ Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1278 (2015).

⁷ Kim Parker et. al, *Parenting in America*, PEW RSCH. CTR., 19 (Dec. 17, 2015), https://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf [<https://perma.cc/9F24-D7E3>].

⁸ Nat’l Ctr. for Educ. Stat., *Status and Trends in the Education of Racial and Ethnic Groups: Early Childcare and Education Arrangements*, INST. OF EDUC. SCIS. (Feb. 2019), [https://nces.ed.gov/programs/raceindicators/indicator_rac.asp#:~:text=45%20percent\)%20children.The%20percentage%20of%20children%20living%20with%20married%20parents%20was%20highest.Native%20children%20\(45%20percent\)](https://nces.ed.gov/programs/raceindicators/indicator_rac.asp#:~:text=45%20percent)%20children.The%20percentage%20of%20children%20living%20with%20married%20parents%20was%20highest.Native%20children%20(45%20percent)) [<https://perma.cc/3MG6-4QGT>].

⁹ Kim Parker & Renee Stepler, *As Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RSCH. CTR. (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/> [<https://perma.cc/T9X9-ND86>].

¹⁰ These figures are for people with a 4-year college degree. Fifty-five percent of adults ages 25 and older with some college education were married. *Id.*

were married. Financial insecurity is often the reason that people give for why they have not wed. Many adults who would like to marry in the future say that “not being financially stable” is a “major reason” why they are not yet married.¹¹ In fact, more people identify economic instability as a reason they have not married than those who cite not being “ready to settle down.”¹² As Solangel Maldonado points out, many unwed parents “[choose] to delay marrying until they are financially stable and in a stable relationship,” not because they do not value marriage, but because they “hold marriage in such high esteem.”¹³ There is far less data about LGBTQ families specifically. But the U.S. Census Bureau’s 2013 American Community Survey indicated that married same-sex couples are more affluent than those who are not.¹⁴ The median household income of married same-sex couples is 27% higher than that of unmarried same-sex couples.¹⁵ It therefore seems likely that the burden of a parentage regime that excludes unmarried LGBTQ parents falls hardest on racial minorities and low-income people.¹⁶

Unfortunately, the question of who qualifies as a child’s legal parent is not merely a technical nicety; it has significant real-world impact. The fact that children with unmarried same-sex parents cannot have a secure, legal relationship with both parents leaves such children in a precarious position. They do not have a clear right to support from their unrecognized parent. If that person fails to provide for them financially, then they may not be able to obtain court-ordered support, because only legal parents are obligated to support their children. If the unrecognized parent dies, they may have no right to inherit from that parent or access Social Security survivor’s benefits on the parent’s earnings record.¹⁷ And if the relationship between the parents breaks down, the unrecognized parent and child can be permanently separated; the unrecognized parent may have no standing to seek custody or

¹¹ *Id.*

¹² *Id.*

¹³ Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 392 (2011).

¹⁴ Gary J. Gates, *Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey*, WILLIAMS INST. (Mar. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Demo-SS-Couples-US-Mar-2015.pdf> [<https://perma.cc/PN5A-25SY>].

¹⁵ *Id.*

¹⁶ *Cf.* Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN ST. L. REV. 1, 36 (2018) (noting that “low-income and African American same-sex families are in fact less likely to be planned . . . Planning, it seems, may be a class-based, racially, and regionally selective luxury.”)

¹⁷ “[T]he [intestacy] statutes do not provide intestacy rights for individuals who functioned as a parent or child of the decedent but were not related biologically or through adoption.” Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 656 (2002). The Social Security Act defines a “child” entitled to benefits on the parent’s earnings record as the “the child or legally adopted child of an individual;” or their stepchild. 42 U.S.C. § 416(e)(1), or a person who would be recognized as the worker’s child under the intestacy laws of the parent’s domicile. 42 U.S.C. § 416(h)(2)(A).

even visitation with the child.¹⁸ Even absent such dire scenarios, states' unwillingness to recognize unmarried same-sex couples as co-parents of their children harms the children in less dramatic ways, such as by depriving the unrecognized parent of the ability to make medical decisions for the child or direct the child's education.¹⁹ Simply put, children rely on their parents to fulfill myriad responsibilities, many of which can only be fulfilled when a parent is legally recognized as a parent. The only way to protect children from these harms is for the law to recognize the appropriate people as parents of a child, without limiting the possibilities on account of marriage or biology. Giving both parents in an unmarried same-sex couple the ability to establish legal parentage is critical to ensuring that all children can enjoy secure relationships with their parents.

Exclusionary state legal regimes that condition same-sex parents' rights upon marriage infringe on the constitutional rights of those parents' children.²⁰ They subject children of unmarried same-sex parents to discrimination based on illegitimacy, deny them equal protection based upon their parents' sex, and violate their constitutional right to association. Courts should permit unrecognized parents to raise constitutional claims on behalf of their children so that their children's rights can be vindicated. States should also address these issues legislatively by adopting inclusive parentage laws like the 2017 Uniform Parentage Act, which ensures equal treatment for children with unmarried same-sex parents. Finally, Congress should protect these children by requiring states to adopt more inclusive parentage laws in exchange for receiving federal public assistance funding. However it comes about, reform is urgently needed so that unmarried same-sex parents and their children may exercise their constitutional right to associate.

This Article proceeds in four parts. Part I describes the treatment of unmarried LGBTQ parents and their children under state law. Part II examines the effects of exclusionary parentage regimes on the children of unmarried same-sex couples. Part III considers the constitutional rights violated by exclusionary parentage regimes and argues that unrecognized parents should be allowed to raise these issues on behalf of their children. Part IV concludes that state laws denying legal rights to the children of unmarried LGBTQ people violate the equal protection and due process rights of those children. To protect the rights of children with unmarried same-sex parents, states must adopt a fair and more inclusive system of parentage laws.

¹⁸ Parents are also harmed when they cannot establish a legally recognized relationship with their children. See Hazeldean, *supra* note 2, at 1595–96, 1600–02.

¹⁹ See *infra* notes 123–128 and accompanying text.

²⁰ This Article focuses on the novel argument that these exclusionary legal regimes violate the equal protection rights of children of unmarried same-sex couples. For an argument that these regimes also violate the constitutional rights of parents, see *generally* Hazeldean, *supra* note 2, at 1583.

I. THE TREATMENT OF UNMARRIED LGBTQ PARENTS AND THEIR CHILDREN UNDER STATE LAW

Most states do not allow both members of an LGBTQ couple to establish full parental rights to their children without marriage.²¹ In many U.S. jurisdictions, only married couples can jointly adopt a child;²² a legal parent cannot allow their partner to adopt their child without giving up their own parental rights except when the couple is married and pursuing a step-parent adoption.²³ When unmarried same-sex couples conceive a child through assisted reproductive technology (“ART”), only the birthing parent is legally recognized as a parent at birth, even if the couple intends to co-parent.²⁴ Similarly, thirty-five states either exclude unmarried couples altogether from using a surrogate to gestate their child, or only consider the biological parent a parent at birth and treat the other parent as a legal stranger.²⁵ In thirty states,²⁶ that unrecognized parent may be able to win some parental rights later through a functional parentage doctrine.²⁷ While the terminology for such a doctrine varies, states allow “psychological parents,” “de facto parents,” “parents by estoppel,” or “third parties” standing to seek custody or visitation with a child for whom they have functioned as a parent. The rights extended to such functional parents vary; in some states, they can seek only visitation,²⁸ while in others, they may have standing to seek custody.²⁹

²¹ See *id.* at 1584.

²² See, e.g., ARIZ. REV. STAT. ANN. § 8-103 (West 2021) (limiting adoption to married couples and individual adults); FLA. STAT. ANN. § 63.042 (West 2021) (limiting adoption to married couples or “an unmarried adult”); HAW. REV. STAT. ANN. § 578-1 (West 2020) (limiting adoption to married couples or individual unmarried persons); see also Hazeldean, *supra* note 2, at 1605.

²³ See, e.g., *Boseman v. Jarrell*, 704 S.E.2d 494, 496-97 (N.C. 2010) (voiding adoption because birthing parent had sought to have her unmarried partner adopt child without giving up her own parental rights and, outside of step-parent adoption, “an adoption decree must sever the former parent-child relationship.”).

²⁴ See, e.g., ALA. CODE § 26-17-703 (West 2008) (granting parentage of child conceived through ART only to non-biological parent who is the spouse of person giving birth); ALASKA STAT. ANN. § 25.20.045 (West 2023) (same).

²⁵ See Hazeldean, *supra* note 2, at 1712.

²⁶ Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Kansas, Iowa, Indiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, West Virginia, Washington, and Wisconsin. See Hazeldean, *supra* note 2, at 1622-23.

²⁷ See, e.g., *Bethany v. Jones*, 378 S.W.3d 731, 738 (2011) (holding that a woman who co-parented the child her partner conceived through artificial insemination was a “nonparent” but stood “in loco parentis” to the child and so was entitled to visitation because it was in the child’s best interests.”).

²⁸ See, e.g., *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995) (holding that Wisconsin state law permits functional parent to sue for visitation).

²⁹ See, e.g., TEX. FAMILY CODE ANN. § 102.003(a)(9) (2020) (permitting functional parents to sue for custody and visitation). See also COURTNEY G. JOSLIN, SHANNON PRICE MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 7:1 (2021) (noting that, “a de facto parent has a right to seek visitation or custody, depending on the state, but is not a legal parent and thus may not have an obligation to pay child support, the right to make medical or educational decisions, or many other rights granted to legal parents”).

But whatever rights may be available, they are not automatically present when the child is born. Rather, they accrue over time, with uncertain and expensive litigation. Importantly, the rights of a non-biological parent can only be established in a contested custody or visitation action.³⁰

Nine states are even more hostile to unmarried same-sex couples and their children.³¹ In those jurisdictions, the non-biological parent in an unmarried same-sex couple can never establish a lawful parental relationship with their child. Those states do not recognize functional parentage doctrine and instead allow people to establish parentage only through adoption, biology, or marriage. Here, a child with unmarried same-sex parents will never have a legally recognized relationship with their non-biological parent.

Only eleven states offer children with unmarried same-sex parents full protection. In California, Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, Maine, Nevada, New York, Rhode Island, Vermont, and Washington, unmarried LGBTQ parents can establish legally recognized relationships with their children through a variety of means.³² First, if an unmarried same-sex couple chooses to adopt a child, they can do so jointly, so that they are both full parents from the start.³³ Second, if one member of the couple already has a biological or adopted child, then their unmarried partner can obtain a second-parent adoption to establish parentage.³⁴ The couple does not have to marry. Third, these states also allow unmarried couples to use assisted reproductive technology to have a child.³⁵ If a lesbian couple in one of these jurisdictions decides to have a child using ART with donor sperm, the non-biological parent will be recognized as a legal parent from birth even if she is not married to the partner giving birth.³⁶ Finally, same-sex couples are also permitted to have a child using a gestational surrogate, and both intended parents will be legal parents of their

³⁰ Since child custody proceedings in most states are confidential and court decisions are not electronically reported, no data is available regarding what percentage of functional parentage claims are successful or unsuccessful. *See* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319, 349 n.178 (2023) (noting that “[m]ost states do not report trial court decisions on electronic databases, and no previous research of which we are aware studies functional parent doctrines at the trial court level.”).

³¹ Alabama, Arizona, Florida, Louisiana, Michigan, Tennessee, Utah, Virginia, and Wyoming. *See* Hazeldean, *supra* note 2, at 1619, 1629.

³² Hazeldean, *supra* note 2, at 1615-16.

³³ *See, e.g.*, DEL. CODE ANN. TIT. 13 § 903(2)(D) (“A nonmarried couple petitioning jointly” are eligible to adopt a child.).

³⁴ *See, e.g.*, *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993) (permitting Vermont mother’s lesbian partner to adopt without giving up her rights because “when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother’s rights is unreasonable and unnecessary.”).

³⁵ *See, e.g.*, MD. CODE ANN., EST. & TRUSTS § 1-208 (West 2019); MD. CODE ANN., FAM. LAW § 5-3B-27 (West 2019).

³⁶ *See, e.g.*, ME. STAT. tit. 19-a § 1923 (2016) (Any “person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child.”).

child whether they are genetic parents or not.³⁷ As a result, a child in these states with unmarried same-sex parents would be legally recognized as the child of both, and not limited to a legally sanctioned relationship with just one of their parents.

States can thus be divided into three categories: first, states that do not allow children to have a legally-recognized relationship with both their unmarried same-sex parents under any circumstances; second, those that offer only partial or uncertain protection; and third, those states that offer robust protection to unmarried LGBTQ parents and their children.³⁸ To show what this looks like on the ground, I offer an example of a state that falls into each category.

A. *No Protection: Michigan*

Michigan is a state that provides no protection for children with unmarried LGBTQ parents. Illustratively, Michelle Lake and Kerri Putnam were in a committed relationship for over a decade.³⁹ Five years into their relationship, Putnam became pregnant through alternative insemination and gave birth to their child.⁴⁰ They raised their child together for several years until Putnam ended the relationship and moved out with their child.⁴¹ Initially, Putnam permitted Lake to visit their child, but eventually Putnam refused to allow any further contact.⁴² Michelle Lake then sued for time with her child.⁴³ A Michigan appellate court held that Lake was a legal stranger with no standing to seek custody or even visitation with her child because Michigan law does not recognize functional or de facto parents who are unmarried.⁴⁴ Only an “equitable parent”—a person married to the child’s legal parent—can sue for custody or visitation. Unmarried partners have no recourse under the equitable parent doctrine, even if they were not legally allowed to marry in Michigan when they created their child.⁴⁵ So Lake could not be the equitable parent of her child because she and Putnam were not married.⁴⁶ While same-sex marriage was not legal in Michigan during the parties’ 13-year relationship, the court nevertheless faulted Lake for failing to provide “any evidence reflecting the parties’ intent to marry,” and emphasized that the parties “never made an effort to marry in another

³⁷ See, e.g., N.Y. FAM. CT. ACT § 581-406 (McKinney 2021).

³⁸ Hazeldean, *supra* note 2, at 1589.

³⁹ Lake v. Putnam, 894 N.W.2d 62, 64 (Mich. Ct. App. 2016).

⁴⁰ *Id.* at 64.

⁴¹ *Id.* at 67-68 (Shapiro, J., concurring).

⁴² *Id.* at 68 (Shapiro, J., concurring).

⁴³ *Id.* at 64.

⁴⁴ *Id.*

⁴⁵ See Sheardown v. Guastella, 920 N.W.2d 172, 174 (Mich. Ct. App. 2018).

⁴⁶ Lake, 894 N.W.2d at 66.

jurisdiction.⁴⁷ As such, the court found that the application of Michigan's statute limiting equitable parenthood to spouses of the biological parent did not discriminate against Lake.⁴⁸ The court declared that, had Lake "been married to the child's biological parent, regardless of whether the biological parent was male or female, the outcome of this appeal would have been different. But she was not."⁴⁹

Michigan also does not permit unmarried couples to jointly adopt children.⁵⁰ And Michigan state law allows private adoption agencies to discriminate against same-sex couples.⁵¹ While some judges in Michigan have granted second parent adoptions, state law does not explicitly authorize judges to do so,⁵² and they are not widely available.⁵³ Michigan law also makes all surrogacy contracts "void and unenforceable as contrary to public policy."⁵⁴ Parties to compensated surrogacy agreements may be subject to criminal penalties.⁵⁵ Compassionate, or unpaid, surrogacy is allowed, but courts will recognize the intended parents only when they are married and at least one of them has a genetic tie to the child.⁵⁶ Only one member of an unmarried same-sex couple who uses a surrogate to gestate their child will be recognized as a legal parent, even if the surrogate is uncompensated as the law requires.⁵⁷

⁴⁷ *Id.* at 67.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ MICH. COMP. LAWS ANN. § 710.24 (West 2016). Tami Maisel, *Adoption, Michigan Style*, 80 MICH. B.J., , 26, 32 fn. 1 (2001) (stating that in Michigan, [c]hildren may be adopted by single men or women, as well as married couples.").

⁵¹ "Sec. 7. (1) Except as provided in subsection (2), an adoption facilitator shall not refuse to provide services to a potential adoptive parent based solely on age, race, religious affiliation, disability, or income level. A child placing agency shall not make placement decisions based solely on age, race, religious affiliation, disability, or income level.(2) Subsection (1), as related to religious affiliation, does not apply to a private child placing agency operated, supervised, or controlled by a religious institution or organization that limits services or gives preference to an applicant of the same religion." MICH. COMP. LAWS ANN. § 722.957(1)-(2) (West 1995).

⁵² See Margo Schlanger, *Stealth Advocacy Can (Sometimes) Change the World*, 113 MICH. L. REV. 897, 907–10 (2015); *Usitalo v. Landon*, 829 N.W.2d 359, 360–61 (Mich. Ct. App. 2012) (describing one such adoption granted in Shiawassee County in 2005 and declining to undo it).

⁵³ See *Mabry v. Mabry*, 882 N.W.2d 539, 540 (2016) (McCormack, J., dissenting) (noting that a social parent could not establish a legally recognized parent-child relationship because "Michigan . . . prohibited second-parent adoption between unmarried couples. See MCL 710.24" and so an unmarried "same-sex partner had no legal recourse to seek parental rights to a child born or adopted into his or her committed relationship but carried or adopted by his or her partner.").

⁵⁴ MICH. COMP. LAWS ANN. § 722.855 (West 1988).

⁵⁵ MICH. COMP. LAWS ANN. § 722.859 (West 2014).

⁵⁶ Gestational Surrogacy in Michigan, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/michigan/> [https://perma.cc/VXV7-3GMC].

⁵⁷ *Id.*

Similarly, when one parent conceives a child using donor sperm, the couple will not be recognized as co-parents unless they are married.⁵⁸ An unmarried partner of the person giving birth does not qualify as a legal parent, even if they are the child's intended second parent. The only possible exception is when the partner of the person giving birth provided the egg to create their child. Such a person might qualify as a "natural parent" under Michigan law because they are a genetic parent. In 2021, a Michigan appellate court ruled that two women were both "natural parents" of their child because one provided the egg to create their child, while the other mother carried the child.⁵⁹ But a parent who is neither the genetic nor gestational parent of their child would not be recognized as a legal parent.

Michigan law does not protect children with unmarried LGBTQ parents because they cannot have a legally recognized relationship with both their parents unless they are genetically or gestationally related to the child. The unrecognized parent is a legal stranger to the child under Michigan law, with no power to even seek visitation if the legal parent decides to cut off all contact. Eight other states have similarly exclusionary parentage regimes.⁶⁰

B. *Limited and Uncertain Protection: Arkansas*

Unlike Michigan, Arkansas offers some protection to children with unmarried same-sex parents. Arkansas case law permits a person who has stood *in loco parentis* to a child to sue for visitation. Functionally, this provides a child's social parent with standing to seek visitation if the legal parent refuses to allow them to see the child. The facts of *Bethany v. Jones*,⁶¹ the Arkansas Supreme Court case that established the right of unmarried functional parents to seek visitation as a person standing "in loco parentis," illustrate the stakes for parents and children in these situations. The Court ruled that Emily Jones was entitled to visitation with her child because she had functioned as a parent, even though she was not a biological or adoptive parent.⁶² Jones had been a "stay-at-home mom for over three years" and her child "called her mommy."⁶³ Jones and her same-sex partner Alicia Bethany's "intentions were always to co-parent, until Bethany unilaterally determined she no longer wanted to allow Jones to have visitation."⁶⁴ The Court held that visitation with Jones would be in the child's best interests

⁵⁸ See MICH. COMP. LAWS ANN. § 333.2824(1) (West 1997). "The name of the husband at the time of conception or, if none, the husband at birth shall be registered as the father of the child."

⁵⁹ *LeFever v. Matthews*, 971 N.W.2d, 656, 656-57 (Mich. Ct. App. 2021).

⁶⁰ Alabama, Arizona, Florida, Louisiana, Tennessee, Virginia, Wyoming, and Utah.

⁶¹ 378 S.W.3d 731, 738 (Ark. 2011).

⁶² *Id.* at 738.

⁶³ *Id.*

⁶⁴ *Id.*

because “[u]p to this point, [the child] has spent most of her life in [Jones’] care, and based upon the loving relationship that they formed, shared and enjoyed, it would be in [the child]’s best interest to continue to have contact with [Jones.]”⁶⁵

The fact that functional parents in Arkansas have standing to seek visitation with their children is critically important because it protects children from losing that parent altogether if the legal parent decides to cut off contact. But it does not grant a child’s functional parent full parental rights. A person standing *in loco parentis* can only seek visitation rights—not custody—of a child.⁶⁶ It is also not clear that such a person would be responsible for paying child support.⁶⁷ Finally, standing *in loco parentis* gives a functional parent the ability to seek visitation in a contested court proceeding, but does not guarantee it will be granted. The child—and functional parent—must endure the uncertainty and delay of litigation without knowing what the outcome will be.

Arkansas offers only partial protection to children with unmarried same-sex parents. Although the functional parent doctrine provides some protection, Arkansas law limits their rights in other respects. The state does not permit unmarried couples to jointly adopt children.⁶⁸ Second-parent adoption is also not permitted in Arkansas.⁶⁹ While a step-parent can adopt their spouse’s child without the spouse relinquishing their parental rights, an unmarried partner cannot. Similarly, if a married couple conceives a child using donor sperm, then both spouses will be recognized as legal parents of the child.⁷⁰ But an unmarried person whose partner gives birth to their child conceived with donor sperm will not be recognized as a legal parent.⁷¹ Arkansas also permits surrogacy, but if an unmarried same-sex couple uses a surrogate to gestate their child, only the biological parent will be recognized as a legal parent.⁷²

⁶⁵ *Id.*

⁶⁶ A parent with legal custody has the right to make decisions about how the child is raised, including with regard to their education, medical care, and religious faith, whereas a person with visitation only has a right to spend time with the child at designated times.

⁶⁷ See Courtney G. Joslin, Shannon Price Minter & Catherine Sakimura, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 7.1 (2021) (noting that, “a de facto parent has a right to seek visitation or custody, depending on the state, but is not a legal parent and thus may not have an obligation to pay child support[.]”); Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. AM. ACAD. MATRIM. LAW. 589, 594 (2023) (“[i]n some states, a functional parent has an obligation to financially support the child, while in other states no such obligation exists.”).

⁶⁸ See ARK. CODE ANN. § 9-9-204 (West 2020).

⁶⁹ See *id.*

⁷⁰ ARK. CODE ANN. § 9-10-201(a) (West 2020) (“Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination.”).

⁷¹ *Id.* (granting parentage only to the husband of the woman giving birth).

⁷² ARK. CODE ANN. § 9-10-201(b) and (c) (West 2020) provide that when a child is born to a “surrogate mother,” the child’s parents are:

The majority of U.S. states have parentage laws similar to those of Arkansas.⁷³ They offer some protection to children with unmarried same-sex parents, but it is limited or uncertain. While these children's relationship with their unrecognized parent may be protected, it is not as secure as it would be if the parents were married. Children with unmarried same-sex parents face significant disadvantages due to their family structure in these communities.

C. *Robust Protection: Maryland*

Maryland offers full protection for children with unmarried same-sex parents. The state allows unmarried partners to jointly adopt children,⁷⁴ and also permits second-parent adoption.⁷⁵ Maryland also permits gestational surrogacy.⁷⁶ While no statute explicitly authorizes the practice, Maryland courts will issue parentage orders to intended parents while a surrogate carries their child.⁷⁷ An unmarried same-sex couple can thus retain a surrogate to gestate their child and will be recognized as their child's parents from birth. For same-sex couples who conceive through assisted reproductive technology, both parents are legally recognized as co-parents when one of the partners carries their child. Maryland law provides that a person who "consented to the [gestational parent's] conception of the child by means of assisted reproduction with the shared express intent to be the parents of the child" is a legal parent.⁷⁸

Maryland also recognizes functional parents as legal parents. In *Conover v. Conover*,⁷⁹ Maryland's highest court ruled in favor of Michael

"(1) The biological father and the woman intended to be the mother if the biological father is married; (2) The biological father only if unmarried; or (3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.").

⁷³ Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin all have parentage regimes that offer only limited or uncertain protection to unmarried same-sex parents and their children. See Hazeldean, *supra* note 2, at 1619.

⁷⁴ MD. CODE ANN., FAM. LAW § 5-3A-29(a) (West 2022) states that "any adult may petition a court for an adoption under this subtitle."

⁷⁵ *Conaway v. Deane*, 932 A.2d 571, 641–42 (2007), abrogated by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁷⁶ See *In re Roberto d.B.*, A.2d 115, 117 (2007) (implicitly approving gestational surrogacy by ruling that a trial court erred when it refused to allow a gestational carrier to remove her name as the "mother" from a birth certificate, although the court specified that it was leaving surrogacy policy making to the legislature).

⁷⁷ Gestational Surrogacy in Maryland, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/maryland/>

⁷⁸ MD. CODE ANN., EST. & TRUSTS § 1-208(b)(2) (West 2022).

⁷⁹ *Conover v. Conover*, 146 A.3d 433 (2016).

Conover, a transgender man who had been in a committed relationship for nearly a decade with Brittany Eckel.⁸⁰ Michael and Brittany decided to have a child by alternative insemination, choosing an anonymous sperm donor who physically resembled Michael, and giving their son, Jaxon, Michael's last name.⁸¹ They parented Jaxon together for the first two years of his life before breaking up.⁸² When Michael sought court-ordered visitation with Jaxon, the lower courts ruled that he did not qualify because of *Janice M. v. Margaret K.*, a precedential case precluding a member of a same-sex couple from being recognized as a parent because she had not adopted the child.⁸³ On appeal, however, the Supreme Court of Maryland held unanimously that Michael could use "de facto parenthood" to "establish standing to contest custody or visitation."⁸⁴ The Court called the earlier decision "clearly wrong" because it "fails to effectively address problems typical of divorce by same-sex married couples."⁸⁵ The Court declared that "a legal parent does not have a right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it."⁸⁶ As a result of this decision, all functional parents, including unmarried same-sex parents, have standing to seek custody or visitation even if they are not related by genetics or adoption.

Finally, Maryland is one of eleven states to allow LGBTQ parents to execute a Voluntary Acknowledgment of Parentage, an administrative process used to establish legal parentage. When one member of an unmarried same-sex couple gives birth to a child, this process allows the partners to sign an affidavit of parentage that establishes legal recognition of both parents.⁸⁷ The functional parent will also then be named on the child's birth certificate.⁸⁸

Maryland is not the only state to offer robust protection to children with unmarried same-sex parents. Ten other states have similarly progressive parentage laws that allow LGBTQ parents to create secure, legally-recognized

⁸⁰ The case is titled under the parties' former names. Brittany Eckel took Michael Conover's last name when they married, but resumed her original last name after their divorce. Michael Conover legally changed his name after the litigation began. *Id.* at 85.

⁸¹ *Id.* at 435.

⁸² *Id.*

⁸³ *Id.* at 437.

⁸⁴ *Id.*

⁸⁵ *Id.* at 449.

⁸⁶ *Id.* at 447.

⁸⁷ MD. CODE ANN., FAM. LAW § 5-1028(c)(1)(vii)(2) (West 2022) (providing that an affidavit of parentage may be completed by an individual who did not give birth where "the individual and the child's mother consented to the conception of the child by means of assisted reproduction with the shared intent to be the parents of the child").

⁸⁸ *Id.*; see also Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 571 (2019) (noting that, after signing a VAP, "the father's name is listed as a parent on the child's birth certificate, thereby conferring him with parental recognition.").

relationships with their children whether or not they choose to marry.⁸⁹ Children with unmarried same-sex parents in these states are not disadvantaged because their parents did not wed.

II. THE EFFECTS OF EXCLUSIONARY PARENTAGE REGIMES ON CHILDREN

Children with unmarried same-sex parents face a wide range of challenges if they live in one of the many states that does not afford them a secure, legally recognized relationship with their functional parent. If their parents' relationship sours, their legal parent may exclude the other parent from their lives. Or if their unrecognized parent becomes disabled or dies, they will be denied the Social Security benefits to which they would otherwise be entitled. If the legal parent dies, the child may lose their relationship with their unrecognized parent too; an extended family member or the state may take custody since the unrecognized parent is a legal stranger. Even if the family remains intact, the child may be harmed because the social parent is unable to consent to their medical care, enroll them in education, or travel with them.

Giavanna and Lucciano P.-F.-G. were fraternal twins carried by Renee P.-F., who had agreed to act as a surrogate for her brother, Joseph P., and his partner, Frank G.⁹⁰ The three parties executed a written surrogacy contract in which Renee agreed to carry a child for Joseph and Frank, with the understanding that the couple would co-parent the child. Renee underwent IVF using her egg and Frank's sperm and gave birth to the children in February 2010. The parties' home state, New York, did not permit surrogacy at the time, so Renee and Frank were named as the children's parents on their birth certificates. After that, Joseph and Frank "equally shared the rights and responsibilities of parenthood" and "the children regarded both of them as their parents," "call[ing] Joseph 'dada,' and Frank 'dad.'"⁹¹ But Joseph never adopted the children because Frank refused to allow him to do so.⁹² Frank and Joseph broke up just before the twins' fourth birthday. Following their separation, Joseph continued "acting in a parental role [and] visited and cared for the children on a daily basis."⁹³ But a few months later, Frank refused to allow Joseph any access to the children. In December 2014, he moved the children to Florida "without informing Joseph."⁹⁴ Frank claimed that he was entitled to relocate the children and cut off their contact with

⁸⁹ California, Connecticut, Delaware, the District of Columbia, Massachusetts, Maine, Nevada, New York, Rhode Island, Vermont, and Washington also provide robust protection to unmarried same-sex couples and their children. See Hazeldean, *supra* note 2, at 1614-15.

⁹⁰ Frank G. v. Renee P.-F., 37 N.Y.S.3d 155, 156 (N.Y. 2nd App. Div. 2016).

⁹¹ *Id.* at 929.

⁹² Petition for Writ of Certiorari at 5, *G. v. P.*, No. 18-1431 (U.S. May 10, 2019).

⁹³ *Frank G.*, 37 N.Y.S.3d at 156.

⁹⁴ *Id.*

Joseph because Joseph was merely an uncle “who had cared for the twins but was not their legal parent.”⁹⁵

At the time of Giavanna and Lucciano’s birth, New York law recognized only biological and adoptive parents as legal parents.⁹⁶ The twins were therefore at risk of permanent separation from their father, Joseph, because he had no legal parent-child relationship to them. However, while Joseph and Frank were litigating custody of the twins, the state’s parentage law changed.⁹⁷ New York’s highest court decided that, under state law, the term “parent” included a person who had a pre-conception agreement to conceive and raise a child with the biological parent.⁹⁸ As a result, New York courts ruled that Joseph was a legal parent.⁹⁹ Because he was able to establish parentage, Joseph sought custody and the Family Court granted him, rather than Frank, primary custody of the children. The court held that Frank had willfully interfered with the relationship between the children and Joseph, and that alienating children from their other parent “[was] so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party [was] unfit to act as a custodial parent.”¹⁰⁰ Had the law in New York not changed to recognize functional parents as parents, however, Frank would have been able to cut off his children from their father and move them out of state without telling him. Frank would have had full discretion to unilaterally terminate their relationship with Joseph because Joseph was a legal stranger to his children.

Other children have faced a denial of support when the relationship between their unmarried same-sex parents ended.¹⁰¹ In *Elisa B. v. Superior Court*, the California Supreme Court ordered a social parent to pay child support for her twin children after she refused to provide for them financially.¹⁰² Elisa and Emily were an unmarried lesbian couple who decided to create a family using donor sperm. Both of them underwent alternative insemination; Elisa gave birth to one child and Emily gave birth to twins. The parents gave all three children the same hyphenated last name and raised them together, with Emily staying home to care for their children while Elisa worked outside the home. Neither parent adopted the children that the

⁹⁵ Petition for Writ of Certiorari at 6, *supra* note 86.

⁹⁶ *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651 (N.Y. 1991).

⁹⁷ The New York Court of Appeals held in *Matter of Brooke S.B.* that functional parents had standing to seek custody or visitation if they had a pre-conception agreement with the biological parent to conceive and raise the child together. *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (N.Y. 2016).

⁹⁸ *Id.*

⁹⁹ *Renee P.-F. v. Frank G.*, 79 N.Y.S.3d 45, 48 (N.Y. 2018).

¹⁰⁰ *Id.* at 49 (quoting *Matter of Khan-Soleil v. Rashad*, 978 N.Y.S.2d 226 (N.Y. App. Div. 2013), quoting *Matter of Ross v. Ross*, 890 N.Y.S.2d 127 (N.Y. App. Div. 2009)).

¹⁰¹ See Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) (discussing the financial harm children experience when their functional parent-child relationships are not legally recognized).

¹⁰² 34 Cal. 4th 108 (Cal. 2005).

other had carried, however. The couple ended their relationship when the children were still young, and Elisa informed Emily that she would no longer provide support for the twins. Emily sued, and the California Supreme Court ruled that Elisa was the legal parent of all three children, even though she was biologically related to only one.¹⁰³ The court found that she was obligated to pay child support for the twins. Had the California courts refused to recognize Elisa as the childrens' parent, they would have had no ability to obtain financial support from her.

Children with unmarried same-sex parents can also face discrimination if their legally recognized parent dies or becomes disabled. The Social Security Act defines a "child" to include "the child" or "legally adopted child of an individual."¹⁰⁴ It also states that the definition of "child" is determined by the laws for the "devolution of intestate personal property" of the parent's domicile at the time the application for benefits is filed if the parent is living, or at the time of death if the parent is deceased.¹⁰⁵ Whether a child is recognized as the child of their social parent thus depends on the law of the state where that parent was domiciled when the triggering event occurred. If a child and their parent do not have a legally recognized relationship, then the child must cope with the hardship of a parent's disability or death without access to Social Security benefits based on the parent's record. This can make a big difference in the child's financial situation, given that a child with a disabled parent qualifies for benefits equal to as much as 50% of the parent's full disability benefit.¹⁰⁶ A child whose parent has died would be eligible for up to 75% of the parent's basic social security benefits.¹⁰⁷ Such financial support may be critical to meeting the child's basic needs and providing financial security.

Similarly, a child whose legal parent dies may be subject to a contested custody proceeding and may face the possibility of losing their non-legal parent too.¹⁰⁸ Scholar Naomi Cahn has observed, "[g]ay and lesbian parents, and parents with partners who have not legally adopted the children can try to protect the surviving partner's ability to serve as a guardian, but courts do not always respect such testamentary choices."¹⁰⁹

¹⁰³ *Id.* (stating that "if both parents of an adopted child can be women, we see no reason why the twins in the present case cannot have two parents, both of whom are women.").

¹⁰⁴ 42 U.S.C. § 416(e)(1).

¹⁰⁵ *Id.* at § 416(h)(2)(A).

¹⁰⁶ Social Security Administration, *Benefits for Children*, (June 2022), <https://www.ssa.gov/pubs/EN-05-10085.pdf> [<https://perma.cc/RS3C-5P6F>]

¹⁰⁷ *Id.*

¹⁰⁸ *See, e.g.*, *Matter of Guardianship of Astonn H.*, 635 N.Y.S.2d 418, 419 (N.Y. Fam. Ct. 1995) (weighing competing claims of non-biological mother and deceased mother's estranged husband, who was the legal, but non-biological, father of the child to custody and ultimately granting non-biological mother custody because she was a "stable, loving presence" in the child's life.).

¹⁰⁹ Naomi Cahn, *Planning Options for the Daily Care of a Minor in the Event of an Adult's Incapacity or Death*, 125 TAX & EST. PLAN. FOR MINORS 5 (2006).

Jonathan and Nathaniel Porter were raised by their mother, Leigh Porter, who had full custody, and her partner, Carol Porter, who joined their family when the children were five and three years old, respectively. They all lived together for eight years until Leigh died. Prior to her passing, Leigh executed a power of attorney granting Carol the parental rights to the children, and named Carol in her will as the children's guardian.¹¹⁰ Her will also stated that she did not want the boys' father to become their guardian because he had failed to establish a relationship with them.¹¹¹ A court had ordered the children's father to pay child support, but he was \$20,000 in arrears. Despite this, the Michigan courts granted him custody following Leigh's death.¹¹² The father then "asserted his right to custody" by picking up the boys from their schools without notifying Carol.¹¹³ He then took them to his residence while her petition for guardianship was still pending.¹¹⁴ An appellate court subsequently ruled that Carol had no standing to seek custody.¹¹⁵ The boys not only lost their mother Leigh, but were cut off from their other parent, Carol, who had raised them since they were toddlers.¹¹⁶ The court required that they live with their father, with whom they previously had no relationship.¹¹⁷

Unfortunately, Jonathan and Nathaniel are not the only children to be removed from their unrecognized parent's custody when their legal parent died. Z.B.S. faced a similar fate. His parents, Tina B. and Christina S. used sperm donated by a friend to conceive Z.B.S., whom Christina carried.¹¹⁸ Z.B.S. was just two and a half years old when his parents were in a car accident that killed Christina.¹¹⁹ Tina B. survived but was seriously injured. While she was still hospitalized following the accident, Z.B.S.'s grandfather took custody of him and sought guardianship over the child.¹²⁰ The grandfather asserted that Tina B. was not the child's parent and had no right to raise him. Tina B. was able to regain custody eventually, but only after years of contested litigation against the father of her deceased partner.¹²¹ In both cases, children already mourning one parent lost a second, because another family member took custody, and courts either refused to return the child to their unrecognized parent or were slow to do so.

¹¹⁰ McGuffin v. Overton, 542 N.W.2d 288, 292 (Mich. App. 1995).

¹¹¹ *Id.* at 289 (noting that the children's father, Russell Overton, owed almost \$20,000 in child support arrears).

¹¹² *Id.* The court also cancelled Overton's child support arrears.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *In re Clifford K.*, 217 W. Va. 625, 631 (2005).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Even in situations where a child's family remains intact, the fact that one parent is not legally recognized can still have a negative impact on the child. Without a legal parent-child relationship, the parent may be unable to seek medical care for the child, enroll the child in school or participate in the child's education, or travel freely with the child. This may limit the child's opportunities, cause stress and discord in the family, and even impair the child's health. As explained by a district court that was affirmed in *Obergefell*: "The inability to obtain an accurate birth certificate [listing both parents] saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities."¹²²

Several earlier cases noted that unmarried same-sex parents had struggled to take care of their ill children because they did not have legal documentation of co-parentage. In one case, a couple whose child was hospitalized as an infant faced greater anguish because one parent was not legally recognized and had been omitted from their child's birth certificate.¹²³ "Because [the unrecognized parent] could not prove she was a legal parent to [their child], [both parents] maintained a bedside vigil for the child when she was in the hospital. They feared that [the unrecognized parent] would not be able to authorize emergency medical care if it became necessary."¹²⁴ As the court noted, this meant the legal parent had to miss "a great deal of work she would not otherwise have had to miss" and the family suffered unnecessary "additional stress and anxiety[.]"¹²⁵ In another case, same-sex parents who did not have a birth certificate naming them both as parents were "told by both an ambulance crew and emergency room personnel that only 'the mother' could accompany [the child] and thus initially faced a barrier to being with their child in a medical emergency."¹²⁶

Proof of legal parentage is also required to enroll a child in school or daycare. A parent who lacks a legally recognized relationship with their child will face difficulty helping them access educational opportunities or participating in their schooling. In one case, a same-sex couple had to execute a general power of attorney just so that the unrecognized parent could speak with their son's teacher and daycare workers.¹²⁷ Executing such legal documents is expensive, burdensome, and may not be possible for low-income

¹²² Henry v. Himes, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), *aff'd sub nom. Obergefell*, 576 U.S. at 644.

¹²³ Gartner v. Iowa Dep't of Pub. Health, No. CE67807, 2012 WL 28078 (Iowa Dist. Jan. 4, 2012), *aff'd*, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 341-42 (Iowa 2013).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Finstuen v. Crutcher, 496 F.3d 1139, 1142, 1145 (10th Cir. 2007).

¹²⁷ Brief for Appellant-Petitioner at 24, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 806 at *23-24.

families who lack the means to hire an attorney. And in an emergency situation, executing a power of attorney may not be feasible.

Similarly, an unrecognized parent cannot apply for a United States passport for their child. They may also face difficulty traveling internationally. Some countries require a single parent traveling with a child to produce proof of their legal relationship with the child.¹²⁸ The United States government also warns that parents traveling abroad with a child should carry documentation of their relationship.¹²⁹ A parent who is not legally recognized may therefore have to forgo international travel with their child due to fear that they will be questioned or detained by government agents when leaving or re-entering the country.¹³⁰ This may deprive the child of seeing family members abroad, experiencing another culture, visiting significant places, or enjoying myriad other benefits of traveling outside the United States.

Less tangible but also significant is the dignitary and emotional harm a child suffers from living in a family where only one parent is recognized as a “real” legal parent, while the other parent is confined to a liminal, second-class status.¹³¹ The Supreme Court’s concerns in *Obergefell* about the ways children with same-sex parents were harmed by their parents’ exclusion from marriage apply with equal or greater force to children who cannot have a legal relationship with both of their same-sex parents because they are unmarried. Access to legal recognition of a child’s family relationships “affords the permanency and stability important to children’s best interests.”¹³² It offers children “recognition, stability, and predictability[.]”¹³³ Without it, “children suffer the stigma of knowing their families are somehow lesser.”¹³⁴ The failure to recognize both of a child’s unmarried same-sex parents as their legal parents serves to “harm and humiliate” those children

¹²⁸ See, e.g., *Minor Children travelling to Canada*, Government of Canada, <https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/minor-children-travelling-canada.html> (“The parent should present: the child’s passport, a copy of the child’s birth certificate, and a letter of authorization...which is signed by the parent who is not travelling with them”).

¹²⁹ See *International Travel Documents for Children*, USA.GOV, <https://www.usa.gov/travel-documents-children> [<https://perma.cc/8X4X-BP9G>] (“If you are traveling alone with your child, you may be required to present documentation proving you are the parent or legal guardian.”).

¹³⁰ See Debra Kamin, *Flying Alone With Your Kids? Make Sure You Have Proof of Your Relationship*, N.Y. TIMES, Nov. 16, 2022, <https://www.nytimes.com/2022/11/16/travel/airports-children-custody.html> [<https://perma.cc/P5TL-5UKL>] (noting that a parent’s failure to carry “proof of their relationship to their children” can lead to being questioned or detained at airports and border crossings).

¹³¹ See Ya’ir Ronen, *Redefining the Child’s Right to Identity*, 18 INT’L J.L. POL’Y & FAM. 147 (2004) (discussing the importance of legally recognized parent-child relationships to a child’s sense of belonging); see also Angela Campbell, *Conceiving Parents Through Law*, 21 INT’L J.L. POL’Y & FAM. 242, 265 (2007) (noting that legal recognition of a child’s social parent fosters the child’s self-worth and sense of belonging).

¹³² *Obergefell*, 576 U.S. at 668.

¹³³ *Id.*

¹³⁴ *Id.*

and their families.¹³⁵ Studies have shown that “one result of legal inequity between parents can be a power imbalance between partners. This can lead to difficulties in making child-related parenting decisions and it can foster resentment between partners.”¹³⁶ Such conflict in the family can harm the child. Legal recognition is critical so that parents can provide care, protection, and guidance without obstruction as well as maintain a secure, stable relationship with their child.¹³⁷ In turn, the safety provided by that continuity helps the child “achieve self-fulfillment and form other meaningful relationships in life.”¹³⁸

IV. THE CONSTITUTIONAL ISSUES AT STAKE FOR CHILDREN

Exclusionary state parentage regimes that do not allow unmarried same-sex parents to establish secure legal relationships with their children violate the children’s constitutional rights. Such regimes subject children to discrimination based on illegitimacy, deny them equal protection based on their parents’ sexes, and infringe on their associational rights. Courts and legislators should act to uphold the rights of these children and end the discrimination against them.

A. *Discrimination Against Children Based on Illegitimacy*

At common law, children born out of wedlock faced tremendous discrimination. They were characterized as *filius nullius*—a child of no one, with no right to inherit from either their mother or father, and no right to parental support.¹³⁹ “Illegitimate” individuals also faced direct discrimination in their adult lives; they were disqualified from holding public office and endured other forms of de jure discrimination.¹⁴⁰ This reality changed in the early

¹³⁵ *Id.*

¹³⁶ Emily Kazyak et al., *Law and Family Formation Among LGBQ-Parent Families*, 56 *FAM. CT. REV.* 364, 368 (2018).

¹³⁷ See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 111–22 (2000) (discussing the benefits of stability in child-parent relationships); ANNE L. ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* 15–20, 45–47 (2004) (discussing benefits of continuity of care for children and society).

¹³⁸ Noy Naaman, *Timing Legal Parenthood*, 75 *ARK. L. REV.* 1, 14–15 (2022).

¹³⁹ D.H. Van Doren, *Rights of Illegitimate Children Under Modern Statutes*, 16 *COLUM. L. REV.* 698, 698 (1916) (“Under the early common law of England the lot of the child born out of wedlock was an intolerable one; he was regarded as *filius nullius*, having no right to inherit from either father or mother, no right to the surname of either parent, and no claim on them for support or education”); Blackstone wrote that a child born out of wedlock’s rights “are very few, being only such as he can acquire, for he can inherit nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*.”] WILLIAM BLACKSTONE, *COMMENTARIES* *458.

¹⁴⁰ Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 *FLA. L. REV.* 345, 350–51 (2011) (noting that children born out of wedlock were “precluded from holding ‘positions of social visibility and responsibility,’ and had no right to wrongful death damages, or government benefits available to marital children of a deceased or disabled parent.”).

twentieth century. Over time, children with unmarried parents came to have a legally recognized relationship with their mothers, from whom they could inherit property and seek support. But legal discrimination against such children endured. Up until the 1970s, children of unmarried parents could not necessarily seek child support¹⁴¹ or inherit intestate from their fathers.¹⁴²

In the 1960s and 1970s, the Supreme Court considered a series of cases involving “illegitimate” children and their parents. The Court did not strike down all legal distinctions based on illegitimacy, but greatly limited states’ abilities to discriminate against non-marital children by determining that statutory schemes penalizing children for their parents’ failure to marry violated the Equal Protection Clause.

In *Levy v. Louisiana*, the Court ruled in favor of five children whose mother died due to alleged medical malpractice.¹⁴³ They had been denied recovery against the tortfeasor because their parents were not married, and “illegitimate” children could not sue for the wrongful death of a parent under Louisiana law.¹⁴⁴ Declaring that “illegitimate children . . . are clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment,” and could not “be denied correlative rights which other citizens enjoy[,]” the Court held that the statute was unconstitutional.¹⁴⁵ Similarly, in *Weber v. Aetna Cas. & Sur. Co.*, the Court ruled in favor of two nonmarital children who were denied workers’ compensation benefits after their father was killed in a workplace accident.¹⁴⁶ Their eligibility for worker’s compensation benefits was governed by a state statute that relegated “illegitimate” children to a less favored category of claimants who could only be compensated if “maximum compensation benefits were not exhausted by the four legitimate children.”¹⁴⁷ In this case, the four marital children had already exhausted the family’s eligibility for benefits, so “the two dependent illegitimate children received nothing.”¹⁴⁸ The Court held that this was an Equal Protection violation and struck down the Louisiana statute as unconstitutional. It determined that “protecting ‘legitimate family relationships,’ and the regulation and protection of the family unit” were “venerable state

¹⁴¹ In 1973, the Supreme Court held that denying nonmarital children the same right to paternal child support as marital children violated the Equal Protection clause. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

¹⁴² The Supreme Court struck down a state statute that allowed illegitimate children to inherit by intestate succession only from their mothers, while marital children could inherit from both their parents. *Trimble v. Gordon*, 430 U.S. 762, 776 (1977).

¹⁴³ *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 167 (1972).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

concern[s],”¹⁴⁹ but the state could not attempt to deter nonmarital childbearing by “visiting [society’s] condemnation on the head of an infant.”¹⁵⁰ Not only would doing so be ineffective, because adults are not concerned with workers’ compensation when engaging in extramarital sex, but

imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as an unjust—way of deterring the parent.¹⁵¹

In subsequent cases, the Court ruled that states could not exclude nonmarital children from eligibility for child support. Rather, “once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers[,] there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”¹⁵² Similarly, the Court also found a state statute to be unconstitutional when it provided financial assistance to poor children with married parents but excluded families with nonmarital children.¹⁵³

In *Jimenez v. Weinberger*, the Supreme Court clarified that state statutes discriminating on the basis of illegitimacy needed to pass intermediate scrutiny and be “reasonably related” to a “legitimate governmental interest” such as “the prevention of spurious claims” for government benefits.¹⁵⁴ The statute at issue in *Jimenez* excluded nonmarital children from receiving disability benefits if they were born after the onset of their parent’s disability, but allowed legitimated children to qualify for benefits even if they had never been dependent on the parent’s support.¹⁵⁵ The Supreme Court held that the statute was unconstitutional because it categorically excluded petitioners from offering evidence to prove that they were dependent on their father and so entitled to benefits, while presuming eligibility for legitimated children who may not have been dependent.¹⁵⁶

¹⁴⁹ *Id.* at 173 (quoting *Stokes v. Aetna Cas. & Sur. Co.*, 257 La. 424, 433 (1970)).

¹⁵⁰ *Id.* at 175.

¹⁵¹ *Id.*

¹⁵² *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

¹⁵³ *New Jersey Welfare Rts. Org. v. Cahill*, 411 U.S. 619, 621 (1973) (“appellants’ claim of the denial of equal protection must be sustained, for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate.”).

¹⁵⁴ *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974).

¹⁵⁵ *Id.*

¹⁵⁶ *But see Lalli v. Lalli*, 439 U.S. 259, 273 (1978) (upholding a New York statute that allowed nonmarital children to inherit from their father intestate only if a court had adjudicated his paternity during his lifetime because “[t]his is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.” The court also held the statute was reasonably related to an important state interest in “the just and orderly disposition of property at death.” *Id.* at 268.)

States that fail to acknowledge the relationship between unmarried LGBTQ functional parents and their children also arguably discriminate based on illegitimacy.¹⁵⁷ A Virginia case provides a paradigmatic example. B.G. was conceived using anonymous donor insemination and born to Darla Grese and her partner, Denise Hawkins, in 2007.¹⁵⁸ At the time of his birth, their home state of Virginia did not permit same-sex marriage or second-parent adoption.¹⁵⁹ As a result, Hawkins had no way to create a legally recognized parent-child relationship with him.¹⁶⁰ B.G.'s mothers ended their relationship when he was seven years old.¹⁶¹ They continued to co-parent for two years, but in 2014, B.G.'s mother, Grese, cut off all contact between him and Hawkins.¹⁶² A Virginia trial court awarded Hawkins joint custody and visitation rights with B.G. because he "was developing behavioral problems based on his separation from Hawkins, and two psychologists, as well as the guardian *ad litem*, testified that removing either Hawkins or Grese from B.G.'s life would cause emotional and psychological harm."¹⁶³ But the Virginia Court of Appeals overturned the lower court's judgment, finding that Hawkins had no standing to seek custody or visitation because she was not a legal parent. As a result, the visitation order that had been put in place to prevent psychological harm to B.G. was reversed.

Had B.G.'s parents been legally married when he was born, the situation would have been different. Under Virginia law, when a child is conceived using assisted reproductive technology, the person giving birth is the child's mother, and "the spouse of the gestational mother . . . is the child's other parent."¹⁶⁴ If B.G.'s parents were married, Hawkins would have been

¹⁵⁷ Heterosexual unmarried couples are far less likely to face this discrimination because they often have biological children together, which means both parents can establish full parental rights by signing a Voluntary Acknowledgement of Parentage after birth, by filing a paternity action, or by supporting and caring for the child. *See generally* Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (holding that an unmarried father who supported and raised his children could not be deprived of custody unless the state demonstrated he was unfit). Heterosexual couples can establish joint parentage even if they use donor gametes to conceive. A woman who gives birth is typically recognized as a legal mother even if she uses a donor egg. *See, e.g., In re C.K.G.*, 173 S.W.3d 714, 730 (Tenn. 2005) (finding that "[e]ven though [the birth mother] lacks genetic connection to the triplets, in light of all the factors considered we determine that [the birth mother] is the children's legal mother"). A man whose partner gives birth to a child they conceived using donor sperm can still sign a Voluntary Acknowledgement of Paternity or establish paternity through the holding out doctrine. *See* Leslie Joan Harris, Voluntary Acknowledgments of Parentage for Same-Sex Couples, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 482 (2012) ("[A] man who is not the[child's] biological father can still sign a VAP, since genetic testing cannot be required. If paternity is never challenged, he remains the child's legal father.").

¹⁵⁸ Hawkins v. Grese, 68 Va. App. 462, 467–68 (2018).

¹⁵⁹ *Id.* at 467–68.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ VA. CODE ANN. § 20-158(A) (West 2019).

recognized as his parent and not a legal stranger.¹⁶⁵ She would have had standing to seek custody and visitation, and because the evidence showed that visitation was necessary to prevent psychological harm to B.G., it likely would have been granted. But because Hawkins and Grese were not married, B.G. was not protected by Virginia's parentage laws.

Not all states have statutes that specifically address the parentage of children conceived through ART. Those that do vary in the language they employ. Some are marital status-neutral and gender-neutral, giving intended parents of children conceived through ART parental rights whether or not they are married to the gestational parent. But others restrict their application only to married couples.¹⁶⁶ In states without a law specifically addressing children conceived using ART, however, married couples using donor sperm to conceive a child are still both regarded as the parents of that child. In every state, the spouse of a woman giving birth is presumed to be the second parent of her child.¹⁶⁷ After *Obergefell*, lesbian couples have relied on this presumption to compel state vital statistics offices to name both mothers on their children's birth certificates.¹⁶⁸ In one such case, the Supreme Court found that Arkansas violated the Constitution when it refused to name a birth mother's wife on their newborn child's birth certificate, even though

¹⁶⁵ It bears noting that Virginia did not permit same-sex marriage when B.G. was conceived, so this scenario is hypothetical to that extent. Same-sex couples have been able to marry in Virginia since October 6, 2014, when the Supreme Court declined to hear an appeal of the Fourth Circuit Court of Appeals' ruling in *Bostic v. Shafer* that Virginia's statute banning same-sex marriage was unconstitutional. *See Bostic v. Shafer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 574 U.S. 875 (2014). Rachel DePompa, On This Day: Same-Sex Marriage Becomes Legal in Virginia (<https://www.nbc12.com/2020/10/05/this-day-same-sex-marriage-became-legal-virginia/>).

¹⁶⁶ *See, e.g.*, ALA. CODE § 26-17-201 (West 2008); ALA. CODE § 26-17-703 (West 2008); ALA. CODE § 26-17-704 (West 2008); TENN. CODE ANN. § 68-3-306 (West 1977) ("A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife.") The language of these states' statutes limit their application to married heterosexual couples, but that is likely unconstitutional under *Pavan v. Smith*. *Pavan* held that same-sex married couples were entitled to all the benefits of marriage, including a marital presumption of parentage, if such a presumption existed under state law. *Pavan v. Smith*, 582 U.S. 563, 564, 567 (2017).

¹⁶⁷ Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 243 (2019) ("The marital presumption of paternity, which arose from English common law, has served as a core component of the law governing parentage in the United States since the nation's inception.") State laws vary regarding under what circumstances the presumption can be rebutted. *See id.* at 252-253. *See also* Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 738 (2016) ("Most marital presumptions are rebuttable today, some upon proof of no genetic tie between husband and child, some only if a court decree establishes paternity in another man.")

¹⁶⁸ *See, e.g.*, Order Granting Summ. J., at 7, *Brenner v. Scott*, No. 4:14-cv107-RH/CAS (N.D.Fla. Mar. 30, 2016), ECF No. 144 ("[I]n circumstances in which the [state] lists on a birth certificate an opposite-sex spouse who is not a biological parent, the [state] must list a same-sex spouse who is not a biological parent."); Order at 2, *De Leon v. Abbott*, No. SA-13-CA-00982-OLG (W.D. Tex. Aug. 11, 2015), ECF No. 113 (state policy must recognize same-sex marriage in birth certificates issued in Texas); *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL4476734, at *1 (D. Utah July 22, 2015) (holding state must apply the same terms and conditions to issuance of birth certificates to same-sex spouses as to different-sex spouses).

a similarly situated male spouse would have been named.¹⁶⁹ The court held “Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that [same] recognition.”¹⁷⁰

Courts have frequently described the marital presumption of parentage as a rule that exists for the benefit of children.¹⁷¹ In some cases, the asserted benefit has been avoiding the stigma of illegitimacy.¹⁷² But courts have also refused to rebut the presumption to protect a child’s relationship with a person who functioned as a parent, but was not a genetic parent.¹⁷³ Courts have thus recognized that the marital presumption of parentage is not just a reward for parents who behave in a socially sanctioned way by having their children in wedlock.¹⁷⁴ Rather, it exists to protect children and their relationship with their parents.¹⁷⁵ Viewed in those terms, it is discriminatory to fail to recognize the non-biological parent of a donor-conceived child as a legal parent solely because the parents did not marry before the child was born.

State laws discriminating on the basis of illegitimacy are subject to intermediate scrutiny.¹⁷⁶ To pass constitutional muster, the law must bear a

¹⁶⁹ Pavan, 582 U.S. at 566–67.

¹⁷⁰ *Id.* at 567.

¹⁷¹ *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (“The primary policy rationale underlying the common law’s severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state.” (citations omitted)).

¹⁷² *See id.*

¹⁷³ *See, e.g.*, In re Jesusa V., 85 P.3d 2, 15 (Cal. 2004) (in determining whether genetic father or mother’s husband is the legal father biology is not determinative; court must weigh all considerations of policy and logic, including the welfare of the child); N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000) (“We hold that the best interests of the child must be of paramount concern throughout a paternity proceeding, and therefore, must be explicitly considered as a part of the policy and logic analysis that is used to resolve competing presumptions of fatherhood [between the mother’s husband and the child’s genetic father.]”); Kelly v. Cataldo, 488 N.W.2d 822, 827 (Minn. Ct. App. 1992) (court should consider the child’s best interests in deciding whether the genetic father or the mother’s husband should be deemed the child’s legal father).

¹⁷⁴ *See* Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 616–17 (2009) (“If the presumption is challenged by the offer of genetic evidence, a number of states have held that a court can refuse to admit that evidence if contrary to the child’s best interests. Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped to deny parentage because of the detrimental reliance of the other party or, sometimes, the child.”); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 87 (2016) (“proof that the husband is not the biological father does not solely rebut the presumption; instead, doing so may involve the consideration of the child’s interests, the degree to which the husband assumed a paternal role, and/or the biological father’s ability and willingness to provide support.”).

¹⁷⁵ *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2336 (2017) (arguing that continuing to recognize marriage as a “pathway to parentage” makes sense because doing so protects parent-child relationships, including those based on social as well as biological ties); Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 266 (2006) (contending that marital presumption continues to be useful in protecting children’s relationship with nonbiological parents).

¹⁷⁶ Jimenez v. Weinberger, 417 U.S. 628, 636 (1974).

reasonable relationship to a legitimate state interest.¹⁷⁷ There is no such justification for the disparate treatment B.G. experienced compared to a similarly situated donor-conceived child with married parents. One possible state interest at issue might be encouraging people to have children in wedlock. Certainly, there is a closer link between that interest and conditioning parental rights upon marriage than the laws discussed in the seminal Supreme Court decisions on illegitimacy. The Court found it “farfetched” to suggest that a person would refrain from having nonmarital children so that the children could sue for wrongful death or collect worker’s compensation benefits after the parent died or became disabled.¹⁷⁸ A law telling people they need to marry if they want to be recognized as the parents of their children might be viewed as less attenuated from the goal of encouraging parents to marry. But like the children at issue in the prior cases, B.G. had no control over whether his mothers married or not. He too was not “responsible for his birth” and penalizing him was “an ineffectual – as well as an unjust – way of deterring [his] parent” from having a nonmarital child.¹⁷⁹ As such, a court could find that Virginia’s parentage law did not bear a reasonable relationship to the interest in encouraging people to have marital children.

The state also claimed to be interested in ensuring accuracy in parentage determinations for children conceived through ART,¹⁸⁰ but it is dubious that its parentage statute advances that interest. Marriage might appear to be a useful proxy for determining parentage, but Virginia’s parentage statute presumes that all children born to an unmarried person via ART have only one parent. That is not reasonable, especially given how common nonmarital childbearing is. Forty percent of babies are now born to unmarried people¹⁸¹ and more than half of all nonmarital children are born to cohabiting couples.¹⁸² So it stands to reason that many donor-conceived children born to an unmarried person have a second parent.¹⁸³ In the case of B.G., Hawkins

¹⁷⁷ *Id.*

¹⁷⁸ *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75 (1967). (“It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death”); *see also* *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972) (“Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen’s compensation.”).

¹⁷⁹ *Weber*, 406 U.S. at 175.

¹⁸⁰ *Cf. Smith v. Pavan*, 2016 Ark. 437 (2016), *cert. granted, judgment rev’d*, 582 U.S. 563 (2017) (declining to override a state’s refusal to list the same-sex spouse of a birthing parent on a child’s birth certificate because the “purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child.”).

¹⁸¹ *A Births to Unmarried Women*, CHILDSTATS: FORUM ON CHILD AND FAMILY STATISTICS, <https://www.childstats.gov/americaschildren/tables/fam2a.asp> [https://perma.cc/7KPS-8UYF] (noting that in 2019, approximately 40% of births were to unmarried women).

¹⁸² Daniel T. Lichter, Sharon Sassler, & Richard N. Turner, *Cohabitation, Post-Conception Unions, and the Rise in Nonmarital Fertility*, 47 *Soc. Sci. Rsch.* 134, 136 (2014).

¹⁸³ *Cf. id.* (“Antiquated stereotypes of single mothers – raising children on their own – are inconsistent with new evidence that nonmarital births increasingly involve two co-residential parents who presumably share expenses and parental obligations.”).

and Grese were both his parents. They raised him together for nine years.¹⁸⁴ LGBTQ couples might choose not to marry for a variety of reasons, whether financial,¹⁸⁵ emotional, or political.¹⁸⁶ That does not necessarily mean, however, that they did not intend to co-parent the child they conceived using donor sperm and ART. Notably, Virginia's parentage statute allows a spouse who is the functional parent of a donor-conceived child to disavow parentage if they "did not consent to the performance of assisted conception" and commence a court action within two years of the child's birth.¹⁸⁷ Marriage is thus not sufficient to create parentage under the law; parentage also requires consent to the child's conception. This suggests that the parents' intent and choice to create a child using ART is truly what gives rise to the parent-child relationship. But unmarried couples can also make an equally meaningful, deliberate, and intentional choice to become co-parents of a donor-conceived child. Categorically excluding people from establishing parentage based solely on marriage does not advance a state interest in accurately determining who has a parental relationship with the child.

The difficulty with asserting an illegitimacy discrimination claim on behalf of children who face separation from their unrecognized LGBTQ parents may be more procedural than substantive. Children are the subject of custody proceedings, but are not formally parties to the litigation.¹⁸⁸ So the party raising the issue of discrimination against the child is likely to be the unrecognized parent themselves. Given that the litigation is fundamentally about the functional parent's interest in maintaining a relationship with the child, these arguments on behalf of the child may seem self-serving, and courts may be less receptive to them as a consequence. For example, in B.G.'s case, the person who wanted to cut his functional mother out of his life was his legal mother, Grese.¹⁸⁹ Like many people who endure a bitter breakup, she wanted nothing to do with her former romantic partner, Hawkins, and did not want her son to associate with Hawkins either. Had

¹⁸⁴ Hawkins v. Grese, 809 S.E.2d 441, 443 (2018).

¹⁸⁵ Marriage is far less common among people with lower incomes than among the wealthy. The Decline of Marriage and Rise of New Families, PEW RESEARCH CTR., 2 (2010).

¹⁸⁶ See Nancy D. Polikoff, Law That Values All Families: Beyond (Straight and Gay) Marriage, 22 J. AM. ACAD. MATRIM. LAW. 85, 87 (2009) (noting that couples should be able to choose to marry or not "based on the spiritual, cultural, or religious meaning of marriage in their lives"); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1437 (2001) ("Some research indicates, for instance, that those who cohabit have more egalitarian views on gender roles than do spouses. For such couples, eschewing marriage may be a way to reject the gender assumptions that have been so prominent a feature of marriage as a social institution." (footnote omitted)).

¹⁸⁷ VA. CODE ANN. § 20-158(A)(2) (West 2019).

¹⁸⁸ In some states a guardian *ad litem* or attorney for the child may be appointed by the court to represent the child's interests or intervene on their behalf, however. See, e.g., N.Y. Fam. Ct. Act § 249 (McKinney 2012) (stating that the Family Court "may appoint an attorney to represent the child, when, in the opinion of the family court judge, such representation will serve the purposes of this act, if independent legal counsel is not available to the child.").

¹⁸⁹ Hawkins v. Grese, 809 S.E.2d 441, 443 (Va. Ct. App. 2018).

the issue of illegitimacy discrimination been raised in B.G.'s case, it would have been in the context of an acrimonious custody battle where Hawkins wanted visitation, and Grese wanted to cut all ties. Accepting the illegitimacy discrimination claim would thus have benefitted Hawkins' litigation position, not just B.G.'s best interests.¹⁹⁰ Courts may not be convinced by such arguments made on behalf of a child by an unrecognized parent since the parent also stands to benefit.

The Supreme Court has been far less receptive to *parents* of nonmarital children who asserted claims of illegitimacy discrimination.¹⁹¹ While the Court has intervened to limit illegitimacy penalties that harmed "hapless children,"¹⁹² it has failed to strike down statutes that limit the rights of parents who had children out of wedlock, reasoning that they could be justly sanctioned because they had chosen to engage in immoral behavior.¹⁹³ For example, in *Parham v. Hughes*, the Court upheld a Georgia statute that made a father of a nonmarital child ineligible to sue for wrongful death after the child was killed. The Court reasoned that the statute did not "impose differing burdens or award differing benefits to legitimate and illegitimate children,"¹⁹⁴ but rather "simply denies a natural father the right to sue for his illegitimate child's wrongful death."¹⁹⁵ Given that the father was "responsible for fostering an illegitimate child and for failing to change its status,"¹⁹⁶ there was no constitutional problem with penalizing him for his actions. According to the Court, it was "neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bonds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child."¹⁹⁷ This might suggest that courts would be similarly reluctant to rule for an unrecognized parent like Hawkins who did not marry the gestational parent of her child if she claimed that refusing to recognize her as a co-parent discriminated against her son on the basis of illegitimacy.

But *Grese v. Hawkins* is readily distinguishable from *Parham v. Hughes*. The child in *Parham* had been tragically killed, so the only interest at stake was the father's. But *Grese v. Hawkins* concerned a living nine-year-old boy who was suffering psychological harm because his relationship with his

¹⁹⁰ *Id.*

¹⁹¹ Many scholars have criticized the Court's illegitimacy cases for taking a solely child-centered approach and ignoring the harm to parents penalized for having non-marital children by being stripped of certain parental rights, arguing that the Court has perpetuated stigma against nonmarital children as a result. *See, e.g.,* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 355 (2011).

¹⁹² *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972).

¹⁹³ *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1299 (2015).

¹⁹⁴ *Parham v. Hughes*, 441 U.S. 347, 353 (1979).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

non-biological mother was terminated.¹⁹⁸ The failure to recognize Hawkins as B.G.'s parent because she was not married to his biological mother harmed B.G. directly. While Hawkins stood to benefit from a ruling that the failure to legally recognize her as B.G.'s mother was unconstitutional, such a determination would also advance B.G.'s interests.

B. Children's Right to Equal Protection Regardless of their Parents' Sex

Many states make it easier for a man to establish a parent-child relationship with a non-biological child than for a woman to do so. There are two legal mechanisms that allow fathers to easily establish parentage—Voluntary Acknowledgements of Paternity and the doctrine of “holding out”—but these mechanisms are available only to men in most states.¹⁹⁹ A child with lesbian parents who was conceived using donor sperm will likely have no legal relationship with one of their mothers, while a child raised by a non-biological father would have a legally recognized relationship with him. Accordingly, children with unmarried same-sex parents also face discrimination based on their parents' sex.

All states allow unmarried heterosexual couples to establish joint parentage over their child by signing a VAP form.²⁰⁰ VAPs are used to establish paternity for the vast majority of children with unmarried parents and allow the father's name to be listed as a parent on the child's birth certificate.²⁰¹ In 2021, 1.46 million children were born to unmarried mothers.²⁰² That same year, fathers executed 1 million VAPs.²⁰³ Parents typically complete these forms at the hospital right after the child's birth. After the form is executed, hospital staff file it with the state vital statistics office, and the man who signed the VAP is named on the child's birth certificate as the father. This system originated in efforts to facilitate child support enforcement. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, required states to adopt a VAP system in order to qualify for federal public

¹⁹⁸ *Hawkins*, 809 S.E.2d at 443.

¹⁹⁹ See Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 77, 80 (2017) (noting that 19 states have statutes recognizing paternity by “holding out,” but only 6 of them allow women to bring “holding out” parentage claims.)

²⁰⁰ Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 571 (2019). VAPs can only be used when one of the parents gives birth, however; when a child is born to a surrogate, the intended parents cannot use a VAP to establish parentage.

²⁰¹ See Cynthia Osborne & Daniel Dillon, *Dads on the Dotted Line: A Look at the In-Hospital Paternity Establishment Process*, 5 J. APPLIED RSCH. ON CHILD. 1, 1 (2014) (“[T]he vast majority of unmarried parents [are] now establishing paternity in the hospital voluntarily.”).

²⁰² Michelle J.K. Osterman, et. al., *Births: Final Data for 2021*, 72 CDC NAT'L VITAL STAT. REPS. 1, 5 (2023).

²⁰³ OFF. OF CHILD SUPPORT & ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVS., PRELIMINARY REPORT FY 2022 8 (2022), https://www.acf.hhs.gov/sites/default/files/documents/ocse/fy_2022_preliminary_report.pdf

assistance funding.²⁰⁴ In most states, only a child's biological father is supposed to execute a VAP to establish parentage, but there is no requirement to produce proof of a genetic relationship in order to complete the form.²⁰⁵ In fact, federal law forbids states from requiring a blood test to complete a VAP.²⁰⁶ And if later DNA testing shows that a man who executed a VAP is not the genetic father of the child, he does not lose his parental rights.²⁰⁷ Once executed, "a signed voluntary acknowledgment of paternity is considered a legal finding of paternity,"²⁰⁸ equivalent to a court order of parentage. After a brief 60-day rescission period has elapsed following execution, it can only be challenged in court "on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger."²⁰⁹ In essence, "VAPs provide a clear, inexpensive way to establish a legal parent-child relationship for all purposes between the man and the child and to identify the man and woman as the child's coparents."²¹⁰

The VAP process has many advantages for children. They benefit from having two parents identified immediately after birth. Both parents can be listed on the birth certificate and provide health insurance coverage for their child or other benefits, such as life insurance, social security, veteran's benefits, and inheritance.²¹¹ And both parents have an established legal obligation to support their child.²¹² When a heterosexual couple conceives a child using sperm from a third-party donor, nothing prevents the mother's partner from

²⁰⁴ 42 U.S.C. § 666(a)(5)(C)(i) (2006). See Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 *FORDHAM L. REV.* 2705, 2719 (2014) ("A major portion of this welfare reform act was targeted towards efforts to assign financial responsibility for children born out of wedlock to fathers, rather than to states and the federal government.").

²⁰⁵ See Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 *HARV. C.R.-C.L. L. REV.* 549, 577 (2019) (noting that if a non-biological parent signs an acknowledgement, "it may be impossible to set aside a VAP, even if genetic testing confirms that the man who signed the VAP is not the child's biological father.")

But states adopting the 2017 UPA, including California, Vermont, and Washington also allow the intended parents of a child conceived using alternative reproductive technology to sign a VAP even if they are not biologically related to the child.

²⁰⁶ 45 C.F.R. 302.70(a)(5)(vii) (2009).

²⁰⁷ See, e.g., *People ex rel. Dep't of Pub. Aid v. Smith*, 818 N.E.2d 1204, 1205 (Ill. 2004) ("At issue is whether a man who signs a voluntary acknowledgment of paternity can later seek to undo the acknowledgment on the basis of DNA test results. We hold that he cannot."); *In the Matter of Gendron*, 950 A.2d 151, 152–56 (N.H. 2008) (holding that a man who had signed a VAP at the time of his child's birth was a legal parent with standing to seek custody, notwithstanding the fact that a subsequent DNA test showed he was not genetically related to the child.). *But see* TEX. FAM. CODE ANN. § 161.005(c) (West 2015) (statute allowing a man to petition to terminate parental rights when he signed a VAP based on misrepresentation and genetic tests exclude him as the biological father.)

²⁰⁸ 42 U.S.C. § 666 (a)(5)(D)(ii) (2006).

²⁰⁹ *Id.* at § 666 (a)(5)(D)(iii).

²¹⁰ Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 *AM. UNIV. J. GENDER SOC. POL'Y & L.* 467, 478 (2012).

²¹¹ Cynthia Osborne & Daniel Dillon, *Dads on the Dotted Line: A Look at the In-Hospital Paternity Establishment Process*, 5 *J. APPLIED RSCH. ON CHILD.* 1, 3 (2014).

²¹² *Id.*

signing a VAP to establish his parental rights to their child.²¹³ Their child can then enjoy all the benefits of a streamlined, accessible, inexpensive way to establish parentage.

But in most states, a child born to lesbian parents who use donor sperm to conceive is in a very different situation.²¹⁴ The child's non-birthing parent cannot sign a VAP because the second parent is not a man. As a result, the second parent cannot be clearly identified at birth or listed on her birth certificate. The child will have only one legally recognized parent—the mother who carried her—while the other can establish parental rights only through a second parent adoption (if available in her state), contested litigation (if her state recognizes functional parentage), or not at all. In many states the child's second parent has no remedy and must remain a legal stranger to the child.

Precedent suggests that this may infringe on the child's right to equal protection. In 2010, a child identified only as L.P. sued the Indiana Department of Health over a state policy that prevented undocumented immigrant parents from signing VAPs. The state refused to accept VAPs from parents unless they listed a Social Security number on the form. L.P.'s father was undocumented, so he did not have a Social Security number to provide. The court found that under the policy, "children born to a parent without a social security number—typically because of the parent's immigration status—cannot be legitimized through the procedure contemplated by the Statute."²¹⁵ The court held that this constituted a violation of L.P.'s constitutional right to equal protection. Because of his parent's undocumented immigration status, L.P. was deprived of a benefit that he would otherwise enjoy: a parent's legal obligation to provide him with care and support. The court found that strict scrutiny should be applied where a U.S. citizen child was excluded from benefits based on his parent's undocumented immigration status, but determined that "[r]egardless of the level of scrutiny employed, Plaintiffs stand to prevail on their Equal Protection Clause claim."²¹⁶ The state of Indiana argued that there was no harm to L.P. because "in lieu of paternity affidavits, Plaintiffs could be legitimized through the Indiana court

²¹³ Cf. *State ex rel. Sec'y of Dep't for Child. & Fams. v. Smith*, 392 P.3d 68, 79 (Kan. 2017) (holding that a man who executed a VAP despite knowing that he was not the genetic father of the child was nevertheless the legal father obligated to pay child support because "[n]either the federal nor the [state] VAP statutes limit the availability of the VAP procedure to those who are, or reasonably believe themselves to be, biological parents.").

²¹⁴ Only eleven states currently permit the parent of a child conceived using Assisted Reproductive Technology to execute a VAP regardless of the parents' gender identities. Those states are California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Nevada, New York, Rhode Island, Vermont, and Washington. See Family Equality, Voluntary Acknowledgements of Parentage: What LGBTQ Parents Need to Know, https://familyequality.org/resources/voluntary-acknowledgements-of-parentage-vaps-what-lgbtq-parents-need-to-know/?_ga=2.27795455.2136845754.1702079395-768434325.1702079395.

²¹⁵ *L.P. v. Comm'r, Ind. State Dep't of Health*, No. 1:10-CV-1309, 2011 WL 255807, at *1 (S.D. Ind. Jan. 27, 2011).

²¹⁶ *Id.* at *3.

system.”²¹⁷ But the court found that the process of litigating a court action was “to put it charitably, burdensome,” and inappropriate relief.²¹⁸

Like L.P., children with same-sex parents are forced to undergo a far more difficult process to establish their legal right to care and support from their parents than are children with heterosexual parents. In states where a non-biological parent in a same-sex couple may be recognized as a “de facto” parent or psychological parent of her child if she sues for custody or visitation, establishing their legal parenthood will require contested, invasive litigation concerning the intimate details of their family life.²¹⁹ Twenty states permit unmarried same-sex couples to petition for a second parent adoption,²²⁰ but that is also an expensive, burdensome process that requires the parent to pass a criminal background check and home study, often costing thousands of dollars in legal and other fees.²²¹ Some states have no access to second parent adoption and do not recognize de facto parentage, instead conditioning parental recognition on biology, adoption, or marriage.²²² In those states, a child’s non-biological parent cannot establish a legal relationship by any means, so the child will never have a legal right to their parent’s care or support.

States that don’t allow same-sex couples who conceive through donor insemination to execute VAPs to establish parentage of their children thus appear to violate the children’s right to equal protection. This is particularly true because no state interest justifies refusing to allow such parents to execute VAPs. The VAP program was created to expedite establishing child support obligations to children born to unmarried parents. It exists to ensure that children can receive support whether their parents are married or not. When a lesbian couple conceives a child via donor insemination, the donor is not obligated to provide child support. The person who intends to raise and support the child is the mother’s same-sex partner. Allowing that person to sign a VAP advances the state’s interest in establishing a child support obligation for the child. While it does not identify the “biological father,” there is no benefit to doing so in the case of a donor-conceived child because the biological father is a sperm donor with no support obligation. The VAP program is also not primarily concerned with identifying genetic parents,

²¹⁷ *Id.* at *4.

²¹⁸ *Id.*

²¹⁹ De facto parentage doctrines “cannot provide certainty about a child’s legal parentage unless and until litigation occurs. Relationships remain vulnerable to disruption, and the expense and difficulty of litigation almost surely deters some functional parents from making claims that they could theoretically win.” Leslie Joan Harris, *Obergefell’s Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 84 (2017).

²²⁰ Movement Advancement Project, Second-Parent Adoption Laws, https://www.lgbtmap.org/equality-maps/second_parent_adoption_laws.

²²¹ Family Equality, Average Adoption Costs in the United States, <https://www.familyequality.org/resources/average-adoption-costs-in-the-united-states/>.

²²² Alabama, Arizona, Florida, Louisiana, Michigan, Tennessee, Utah, Virginia, and Wyoming. *See id.* at 1619, 1629.

since it does not require genetic testing prior to executing a VAP. In fact, it forbids it.²²³

Forbidding the same-sex parents of children conceived through donor insemination from executing VAPs thus discriminates against those children based on their parents' sex and violates their right to equal protection.

Sex-specific VAP processes are not the only way states discriminate against children based on their parents' sex. Many states have adopted versions of the 1973 Uniform Parentage Act ("UPA") that allowed a man to establish parental rights as the "natural father" of a child by receiving the child into his home, living with the child, and telling people the child is his, which is known as "holding the child out" as his natural child.²²⁴ Notably, the "presumption of paternity" created by a man "holding out" cannot necessarily be rebutted even if he was not the biological parent of the child.²²⁵ Rather, the fact that he functioned as a parent and represented himself as a parent is often sufficient to establish parental rights.²²⁶ In *Chatterjee v. King*, the New Mexico Supreme Court heard a case brought by a woman whose lesbian partner adopted a child from abroad during their relationship.²²⁷ New Mexico had adopted a version of the UPA that said "[a] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child."²²⁸ The court opined that a man in a same-sex relationship whose partner adopted a child would have been able to establish parentage under the holding out provision.²²⁹ The court also held that it would be sex discrimination to read the statute to prevent *Chatterjee* from establishing parentage through

²²³ See 42 U.S.C. § 666(a)(5)(C); see also Jayne Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 481, 490 (2005) ("Title IV-D does not call for the acknowledging man to assert his genetic parentage of the child."); State *ex rel.* Sec'y of Dep't for Child. & Fams. v. Smith, 392 P.3d 68, 79 (Kan. 2017) (holding that a man who executed a VAP despite knowing that he was not the genetic father of the child was nevertheless the legal father obligated to pay child support); *id.* ("Neither the federal nor the [state] VAP statutes limit the availability of the VAP procedure to those who are, or reasonably believe themselves to be, biological parents.").

²²⁴ Uniform Parentage Act § 4(a) (1973) (a man who "while the child is under the age of majority, . . . receives the child into his home and openly holds out the child as his" is presumed to be the father).

²²⁵ Under the 2002 UPA, a legal challenge to a presumption of paternity based on holding out must be filed "not later than two years after the birth of the child." Unif. Parentage Act §607(a) (Supp 2002). A court adjudicating such a challenge could also deny a motion seeking genetic testing if "it would be inequitable to disprove the father-child relationship between the child and the presumed . . . father" or conducting such testing would not be in the best interests of the child. Unif. Parentage Act §608 (Supp 2002).

²²⁶ See, e.g., *In re Nicholas H.*, 46 P.3d 932, 936 (Cal. 2002) (recognizing the presumed father as the legal father although he was not the biological father of the child).

²²⁷ *Chatterjee v. King*, 280 P.3d 283, 286 (N.M. 2012).

²²⁸ N.M. STAT. ANN. § 40-11-5(A)(4) (2021).

²²⁹ *Chatterjee*, 280 P.3d at 286.

holding out just because she is a woman.²³⁰ This suggests that a child whose functional parent is not legally recognized because she is a woman is being discriminated against based on their parent's sex. While this claim is somewhat complex because the child is being discriminated against based on their parent's sex rather than their own, the harm to the child is no less than that faced by a child who is excluded from state protection because his parents are undocumented. Because of their parents' sex, children with unmarried same-sex parents are denied a legal secure relationship with both their parents, which causes a range of harms including a threat of separation from the unrecognized parent.

Another challenge in pursuing this strategy is that some states' courts have rejected lesbian mothers' claims under similar statutes, holding that paternity provisions cannot be used by women to establish parentage. In *In re Custody of N.S.V.*, a Minnesota appellate court refused to recognize a lesbian non-biological mother as a legal parent to her 12- and 14-year-old children.²³¹ Terri Ann Bischoff and her partner Linda J. Vetter conceived three children through donor insemination, all of whom Vetter carried.²³² They lived together as a family until the oldest child was 5 and the younger twins were 3, when Bischoff and Vetter ended their relationship.²³³ Thereafter, Bischoff co-parented the children, with "one overnight [visit] per week and every other weekend," and she paid \$500 in child support each month.²³⁴ But five years later, Vetter terminated visitation. Bischoff sued for joint physical and legal custody.²³⁵ She argued that because she had lived with her children when they were born and held them out as her own, she could establish legal parentage under Minnesota's parentage act, which provided that "[a] man is presumed to be the biological father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child."²³⁶

Bischoff's claim was denied.²³⁷ The court claimed that the statutory presumptions of paternity were intended "to find the biological father" of a child and thus could not form the basis for a parentage claim by a woman.²³⁸ The court also rejected Bischoff's claim that the statute discriminated against her on the basis of sex, finding that the law advanced a government interest in identifying the child's parents, "which allows for the enforcement

²³⁰ *Id.*

²³¹ *In re Custody of N.S.V.*, No. A18-0990, 2019 WL 4412722, at *3 (Minn. Ct. App. Sept. 16, 2019).

²³² *Id.* at *1.

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *Id.* at *1–2.

²³⁶ MINN. STAT. § 257.55, subdiv. 1(d) (2021).

²³⁷ *In re Custody of N.S.V.*, 2019 WL 4412722, at *5.

²³⁸ *Id.* at *3.

of the legal duties and responsibilities imposed by the parent and child relationship.”²³⁹ Bischoff was denied recognition as her children’s parent.²⁴⁰

Although unaddressed in the litigation, the Bischoff children were discriminated against based on their parents’ sex. Had their second parent been a man who lived with them and represented to others that he was their parent, he would have been able to establish paternity under the statute even if he were not their biological father. The statute may require that a man “hold the child out as his biological child,” but it does not require a genetic connection between the alleged father and child for him to establish parentage. If the facts of the case had been identical, but the children’s parents had been a straight couple who used donor sperm to conceive, their father could have used the Minnesota statute to establish paternity. But Bischoff could not, because she is a woman.²⁴¹

Bischoff’s children were denied a legal relationship with both of their parents due to the sex of their unrecognized parent. This had significant effects that the paternity statute was designed to avoid: because Bischoff was not recognized as her children’s legal parent, she would not be legally obligated to continue paying child support or to otherwise ensure their needs were met. Rather than having two parents who were legally responsible for them, Bischoff’s children were left with only one. While the Minnesota court was certainly right that the paternity statute serves an important interest in the “enforcement of the legal duties and responsibilities imposed by the parent and child relationship,” excluding Bischoff from establishing parentage undermined that interest.²⁴²

C. Children’s Right of Association with a Parent

The Supreme Court has not yet ruled on the question of whether children have a due process right to be raised by their parents separate from the parents’ right to custody of them.²⁴³ But lower courts have held that such a right exists. In addressing whether a child could bring suit for deprivation of constitutional rights against police officers who killed his father, the 9th Circuit held that the

²³⁹ *Id.* at *4.

²⁴⁰ Bischoff did win “third party visitation” with her children. *Id.* at *5.

²⁴¹ *Cf.* *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) (stating that if an employer fires a male employee for no reason other than the fact he is attracted to men, then that is sex discrimination because “the employer discriminates against him for traits or actions it tolerates in his female colleague[s]”).

²⁴² *In re Custody of N.S.V.*, 2019 WL 4412722, at *4.

²⁴³ *See* *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (“We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.”); *Troxel v. Granville*, 530 U.S. 57, 88 (2000). (Stevens, J., dissenting) (“[T]his Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds . . .”).

constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents. The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.²⁴⁴

Similarly, the D.C. Circuit found that both a non-custodial father and his child had “constitutionally protected rights . . . to one another’s companionship.”²⁴⁵ Administrators of the federal witness protection program therefore violated the child’s rights as well as the father’s rights when they placed the child and his mother at an undisclosed location and gave the father no way to maintain contact with the child.²⁴⁶

While the Supreme Court has asserted in numerous cases that parents have a right to care and custody of their children, it has never clearly determined that children have a reciprocal right to a relationship with their parents. The Court came closest to addressing the issue in two cases, *Troxel v. Granville*, which held that a third-party visitation statute was unconstitutional as applied, and *Michael H. v. Gerald D.*, which concerned a putative father who had not established legal parentage.

In *Troxel*, the Court considered whether third parties could assert visitation rights with a child over a parent’s objection.²⁴⁷ A plurality of the Court held that a Washington visitation statute that allowed “any person” to obtain court-ordered visitation with a child if it was in the child’s best interests was unconstitutional as applied.²⁴⁸ In *Troxel*, grandparents sued for visitation because they wanted more time with their grandchildren than the children’s mother was willing to allow. The trial court granted the grandparents’ visitation petition over the objection of the children’s mother solely because the judge thought the children would benefit from spending time with their grandparents.²⁴⁹ The Supreme Court reserved the decision because there was no showing that the children’s mother was an unfit parent,²⁵⁰

²⁴⁴ *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040–41 n.1 (9th Cir. 1999).

²⁴⁵ *Franz v. United States*, 707 F.2d 582, 586–90 (D.C. Cir. 1983) (holding that the administrators of the Witness Protection Program “abrogated the constitutionally protected rights of the plaintiffs to one another’s companionship”).

²⁴⁶ *Id.*

²⁴⁷ *Troxel*, 530 U.S. at 57.

²⁴⁸ *Id.* at 75.

²⁴⁹ *Id.* at 72 (“[T]his case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interests.”).

²⁵⁰ *Id.* at 68 (“[T]he Troxels did not allege, and no court has found, that Granville was an unfit parent.”).

or that any harm to the children would result from the denial of the requested visitation.²⁵¹ Indeed, the Court emphasized that the mother had never denied the grandparents visitation; she simply wanted them to visit less frequently than they preferred.²⁵² Noting the presumption that “fit parents act in the best interests of their children,” the Court ruled that the statute as applied was unconstitutional because it violated the right of the mother to raise her children as she saw fit.²⁵³

Two dissenting justices in *Troxel* suggested that in the future, parents’ rights to autonomy should be balanced against the children’s associational rights.²⁵⁴ Justice Stevens stated, “While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”²⁵⁵

Similarly, Justice Scalia suggested that recognizing parents’ substantive due process right to family association implied that other members of the family would have such rights as well.²⁵⁶ This reasoning, if adopted by future courts, would establish that children have associational rights to relationships with adults, even when their parents object to the relationship.²⁵⁷

²⁵¹ *Id.* at 72 (noting that the Superior Court made only two formal findings of fact in support of the visitation order: that the Troxels are part of a large, loving family who can provide opportunities in the areas of cousins and music, and that the children would benefit from spending quality time with them).

²⁵² *Id.* at 71–72.

²⁵³ *Id.* at 68.

²⁵⁴ See David D. Meyer, *The Modest Promise of Children’s Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1119–20 (2003).

²⁵⁵ *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) (internal citations omitted).

²⁵⁶ *Id.* at 92–93 (Scalia, J., dissenting). Justice Scalia made this observation to suggest that the Court ought not to recognize parent’s fundamental right to raise their children. But this contention was rejected by the other 8 members of the Court.

²⁵⁷ Many scholars have pointed out that if the Court did recognize that children have a constitutional right to develop and maintain relationships with third parties over their parents’ objection, it would present difficult issues. See, e.g., Meyer, *supra* note 233, at 1128; James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845 (2003); Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 44 (2004). One challenge is “the vexing problem of conferring rights upon persons who may typically be incompetent to assert them.” Meyer, *supra* note 233, at 1128 (“[C]hildren’s dependency on others to articulate and represent their interests poses an obvious and basic dilemma for a program that seeks to empower them independently of their parents, the state, and other holders of power.”). Adults have the capacity to choose who they want to associate with, so granting them associational rights simply empowers them to make such a decision. But in cases involving babies, toddlers, or even school-age children, a judge would have to determine whether a relationship is important enough to justify upholding the child’s right to it, because the children themselves are not equipped to make such a determination. As such, “[c]hildren’s associational rights would protect relationships that courts concluded were good for children, not simply those a child is seeking to maintain.” Emily Buss, *Children’s Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101, 1103–04 (2003). Courts would presumably also have to balance the child’s right to associate

From the point of view of the child, the association right is far more important in the case of a parent than a third party. While relationships with third party adults may enhance the child's life, parents play a far more important role. They are responsible for supporting the child financially, guiding their emotional and intellectual growth, inculcating values, overseeing their education, and providing necessary care including food, clothing, and shelter. When a child is deprived of contact with a person that they have depended on for love, care, and protection, they experience a profound loss that can have a deep psychological impact.²⁵⁸

In *Michael H. v. Gerald D.*, the Court addressed the claims of a man who wished to be recognized as the legal parent of a child, Victoria.²⁵⁹ The California courts denied Michael H.'s claim because the child's mother was married when she was born, so state law presumed Victoria was the child of her mother's husband.²⁶⁰ Only husband or wife could challenge the marital parentage presumption under California law at the time, so Michael H. could not sue to establish paternity.²⁶¹ The Supreme Court upheld the state court's ruling, noting that under state law, it was "irrelevant for paternity purposes whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband and had a prior relationship with him."²⁶² Since the husband was the child's father, Michael H. was not, and he had no right to have a relationship with her. Importantly, the three-year-old child's court-appointed guardian *ad litem* had also asserted a claim to visitation with Michael H. on her behalf.²⁶³ But the Court denied her claim as well.²⁶⁴ Writing for a plurality, Justice Scalia noted that "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."²⁶⁵

against their parent's established right to determine how to raise the child. The parent not only has to produce the child at the appointed time, but must also manage the arrangements, prepare the child physically and emotionally for the visit, and deal with any potential fallout. Many parents could find these tasks invasive and onerous, especially when the parent objects to the relationship and acquiesces only upon a court order. These issues also arise in cases involving co-parents. Acrimonious breakups leading to custody battles are not uncommon. Still, absent extreme circumstances, courts will grant a non-custodial parent visitation, even if the parents do not share legal custody. And a parent who is seen to have alienated the child from their other parent may be disfavored as a custodian. This makes sense because legal parents have a constitutionally protected right to maintain a relationship with their children. Third-party adults have no such constitutional rights, so the imposition on the parent in such cases is more troubling.

²⁵⁸ See Anne L. Alstott et. al., *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2377 (2022) ("a growing body of high-quality, peer-reviewed research suggests that the termination of an attachment relationship is traumatic for a child even where there is no biological or adoptive connection to the parent—including in cases of same-sex parents.")

²⁵⁹ *Michael H.*, 491 U.S. at 110.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 119.

²⁶² *Id.*

²⁶³ *Id.* at 130.

²⁶⁴ *Id.* at 131.

²⁶⁵ *Id.* at 130.

But he determined that there was no need to address that issue, because the child had no right to maintain a relationship with *two* fathers. “[T]he claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country,”²⁶⁶ so it could not be protected by the due process clause.

While at first blush *Michael H.* may suggest that children have no constitutional right to a relationship with their parents, that is not the basis for the Court’s denial of the child, Victoria’s, visitation petition. Victoria’s claim was denied not because she had no right to a relationship with her father but because, under California law, Gerald was Victoria’s father and Michael was not.²⁶⁷ The Supreme Court thus did not foreclose the idea that a child had a constitutional right to a relationship with her parents; rather, the Court concluded that no parent-child relationship existed in this particular case. Of course, this is not especially encouraging for children with unmarried LGBTQ parents who do not have a legally recognized relationship with one of their parents. If *Michael H.* suggests that a state can decide who qualifies as a parent without offending the child’s constitutional interests, then states that refuse to recognize the parent-child relationship of unmarried LGBTQ parents are doing nothing wrong. But Victoria’s situation differs from that of a child with unmarried LGBTQ parents who cannot establish a legally recognized relationship with both of them. First, Victoria already had two legal parents. Second, while Victoria’s mother agreed to Michael H. forming a relationship with Victoria, Gerald D., her other legal parent, did not.

Children whose unmarried same-sex parents conceived them through assisted reproduction technology or adopted them as infants are in a different position. They have only one legal parent, and another parent who is unrecognized. In *Michael H.*, the majority was clearly concerned that recognizing the genetic father as a parent would displace the marital father, who was raising the child in a unitary family with his wife.²⁶⁸ A child whose parents cannot both establish legal parentage because they are an unmarried same-sex couple is also part of a unitary family, but in those cases only one parent is legally recognized, leaving the child in a far more precarious position than Victoria was. She had a legal relationship with both parents who were raising her, with all the attendant rights and benefits that flow from that recognition.²⁶⁹ Children who are left with only one legal parent and another who is unrecognized are in a far more marginal position.

²⁶⁶ *Id.* at 131.

²⁶⁷ *See id.* at 118 (“California law, like nature itself, makes no provision for dual fatherhood.”).

²⁶⁸ *See id.* at 123 (noting the “historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family”); *id.* at 124 (“our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts”).

²⁶⁹ *Cf.* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 *YALE J.L. & FEMINISM* 210, 213 (2012) (“Although an adult can be the caretaker of a child without legal-parent status (such as a foster parent), legal parentage has attendant benefits, such as long-term stability and clear lines of responsibility and obligation, that benefit the child in the long term.”).

A child's right to associate with their parent is violated when a state refuses to grant that parent standing to seek custody or visitation. While an existing legal parent generally has a right to determine who their child will associate with, when that person invites a partner to co-parent with them and form a parental relationship with their child, they waive the right to unilaterally exclude the other parent from the child's life.²⁷⁰ From the child's perspective, a functional parent is an equal parent whom the child loves and wants to maintain a relationship with. Losing contact with a caring parent causes significant harm to a child, and the law should prevent that harm.²⁷¹ While parents derive deep fulfillment and joy from caring for and guiding their children, the parent-child relationship is arguably more important for the child, who relies on the parent for basic needs: food, shelter, protection, education, guidance, and representation in relationships with the outside world. As such, it is logical that "to the extent parents and families have fundamental liberty interests in preserving [their] intimate relationships [with their children], so, too, do children have these interests[.]"²⁷²

More than twenty years ago, Katharine Bartlett argued that the frequency of divorce and increasing number of children born to unmarried parents meant that "one of the critical, underlying premises of child custody law—that parents raise their own [biological] children in nuclear families—is no longer a fair one."²⁷³ In her view, family law ought to respond to the increasing numbers of children growing up outside traditional, marital families by recognizing functional non-birth parents as parents and letting courts grant them custody or visitation where appropriate with a "focus on the child's welfare rather than the [biological] parents' rights."²⁷⁴ When an unmarried same-sex couple creates a family through ART or adoption, the child develops relationships with two parents from the outset. While only one is a legal parent, that person fosters and consents to the unrecognized parent's relationship with the child. The child should have a right to maintain a relationship with the unrecognized parent even if the other parent later objects. Permitting the functional parent to sue for custody or visitation is appropriate because it is necessary to prevent the harm to the child that

²⁷⁰ *Boseman v. Jarrell*, 704 S.E.2d 494, 504 (2010) (When legal parent "intentionally and voluntarily created a family unit in which [unrecognized parent] was intended to act—and acted—as a parent," she waived her right to exclude the other parent from custody without consideration of the child's best interests.).

²⁷¹ See *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010) (holding that when a legal parent chooses to foster a parent-child relationship between their partner and their child, "'harm . . . inevitably results from the destruction of the bond that develops' between the child and [a] nonparent who has raised the child as his or her own." (quoting *Boone v. Ballinger*, 228 S.W.3d 1, 10 (Ky. Ct. App. 2007)).

²⁷² *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J. dissenting).

²⁷³ Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 962 (1984).

²⁷⁴ *Id.* at 948.

arises from the “disruption of a child’s relationship with a person acting as a parent.”²⁷⁵

V. POLICY RECOMMENDATIONS

Urgent action is needed to address the discrimination that children with unmarried same-sex parents face in many states due to their familial structure. Courts, state legislatures, and the federal government should act to safeguard these children and their families. In thirty states, functional parentage doctrines grant standing for functional parents to seek custody or visitation.²⁷⁶ Such provisions do not provide full equality for children with unmarried same-sex parents,²⁷⁷ but they can afford relief from the worst-case scenario—being cut off from the functional parent altogether.²⁷⁸ States that lack such doctrines should adopt them through case law or statute.

States should also expand the VAP program to include the same-sex parents of children conceived through ART. This measure, included in the 2017 Uniform Parentage Act (UPA)²⁷⁹ and already in place in eleven states,²⁸⁰ protects the interests of children and LGBTQ parents while strengthening the VAP program. It ensures that more children can readily obtain legally enforceable child support obligations from both their parents regardless of their sex.²⁸¹

²⁷⁵ Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1426 (2020).

²⁷⁶ See Hazeldean, *supra* note 2, at 1622-3.

²⁷⁷ *Id.* at 1623 (contending that “functional parentage regimes fall short of providing certainty or security for the de facto parents or their children.”); Leslie Joan Harris, *Obergefell’s Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 84 (2017) (noting that de facto parents cannot establish legal parentage “unless and until litigation occurs”).

²⁷⁸ See Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319, 416 (2023) (“recognition of a person as a functional parent can protect and preserve the child’s existing home. In the absence of the doctrines, the result for some of these children would be removal from a stable and secure household.”)

²⁷⁹ See UNIF. PARENTAGE ACT § 301 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2017) (stating that “[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”); see also *id.* § 301 cmt. (noting that Section 301 of the Uniform Parentage Act was revised to “permit an intended parent under Article 7 or a presumed parent to sign an acknowledgment of parentage, in addition to an alleged genetic parent” in order to “ensur[e] that the act applies equally to children born to same-sex couples”); Joslin, *Nurturing Parenthood*, *supra* note 10, at 603 (2018) (noting that “the UPA (2017) expands the classes of people who can establish parentage through state voluntary acknowledgment processes (VAP)”).

²⁸⁰ See Family Equality, *Voluntary Acknowledgements of Parentage: What LGBTQ Parents Need to Know*, https://familyequality.org/resources/voluntary-acknowledgements-of-parentage-vaps-what-lgbtq-parents-need-to-know/?_ga=2.27795455.2136845754.1702079395-768434325.1702079395

²⁸¹ Expanding VAP programs to allow people of all genders to execute them does not help all children with unmarried same-sex parents. VAPs can only be executed by a parent giving birth plus an additional parent. If neither of a child’s parents gave birth to that child (because the child was carried by a surrogate or adopted into the family), then the parents raising the child cannot use a VAP to establish a legal parent-child relationship. See, e.g., UNIF. PARENTAGE ACT § 301

Courts deciding future cases involving children with unmarried same-sex parents should also apply the state's paternity statutes in an equitable manner and recognize the children's second parent on the basis of the holding out doctrine, regardless of that parent's gender identity. Like the court in *Chatterjee*, adjudicators should recognize that any parent who received a child into their home and raised that child as their own has held the child out as their "natural child."²⁸² Regardless of whether the child was conceived through donor insemination or surrogacy, or whether their partner adopted the child during their relationship, the second parent should still have a claim if their home state has adopted "holding out" as a basis for parentage.

All states should also act to make sure a child's ability to maintain a secure parent-child relationship is not dependent on the outcome of a contested custody proceeding months or years after birth. State legislatures can safeguard LGBTQ couples and their children by reforming parentage laws to be more inclusive, including by adopting the 2017 UPA which eliminates much of the discrimination unmarried same-sex couples face in parentage law.²⁸³ As of December 1, 2023, six states have passed some version of the UPA.²⁸⁴ If the 2017 UPA were enacted in every state, same-sex couples would no longer be required to marry to form legally recognized relationships with their children. Unmarried LGBTQ families would be able to access surrogacy, gamete donation, and ART nationwide. They could conceive children through ART without one partner's parentage being in question.

Ultimately, greater uniformity in this area of family law might be achieved through congressional action. Laws governing the establishment of paternity and child support vary little from state to state because federal law requires all jurisdictions to adopt uniform rules and procedures to qualify for federal public assistance funding.²⁸⁵ For example, prior to the imposition of these federal mandates, states had different statutes of limitation regarding child support.²⁸⁶ Now, every state allows a child support action to be filed

(NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017) (stating that "[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").

²⁸² See *Chatterjee v. King*, 2012-NMSC-019, ¶ 52, 280 P.3d 283, 286 (N.M. 2012).

²⁸³ See Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. AM. ACAD. MATRIM. LAW 589, 598–99 (2023) (noting the influence and adoption of the past UPA variations, as well as how the new UPA helps address the needs of same-sex couples by eliminating gender-based distinctions and the protecting functional parent-child relationships).

²⁸⁴ See *2017 Parentage Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f#LegBillTrackingAnchor> (reporting that California, Colorado, Connecticut, Maine, Rhode Island, Vermont, and Washington have enacted the 2017 Uniform Parentage Act or substantially similar legislation).

²⁸⁵ See Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 56–58 (2010).

²⁸⁶ See, e.g., *Clark v. Jeter*, 486 U.S. 456, 458–59 (1988) (showing that Pennsylvania had a six-year statute of limitations before federal Child Support Enforcement Amendments of 1984).

any time before a child turns eighteen.²⁸⁷ Similarly, every state has a VAP program²⁸⁸ because the Family Support Act of 1988 “encouraged” the states “to establish and implement a simple civil process for voluntarily acknowledging paternity.”²⁸⁹ Subsequently, states were required to implement a VAP program by the Omnibus Budget Reconciliation Act of 1993.²⁹⁰ Congress could similarly act to protect LGBTQ families by requiring states to adopt legislation recognizing the parental rights of non-biological parents of children conceived through ART.²⁹¹ This would ensure that such children have the benefits of a legally recognized relationship with their parents, including access to child support, just as sexually conceived children do. Without such reforms, children whose same-sex parents do not marry will continue to face the dire consequences that flow from being a legal stranger to one of their parents, including the threat of permanent separation from them.

CONCLUSION

Currently, children with unmarried same-sex parents face significant discrimination because of their family structure, which reinscribes existing inequalities along racial and class lines. Black and Brown children, and those who are low-income, are far less likely to have married parents.²⁹² In many states, when children are born to, or adopted by, unmarried same-sex parents, they are denied a legally recognized parent-child relationship with both their parents. Only the parent who adopted, gave birth, or is the genetic parent is legally recognized. In some states, the other parent may acquire standing to seek custody or visitation with the child as a *de facto* parent in contested litigation later, but unless or until they bring such an action, they are a legal stranger to the child. And in nine states, even this route is unavailable—a child cannot have two legally recognized same-sex parents unless they are married.²⁹³ The only way same-sex partners can both be legal parents of their child in those jurisdictions is to marry so they can jointly adopt,

²⁸⁷ 42 U.S.C. § 666(5)(A) (2018).

²⁸⁸ Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws*, 21 MICH. J. GENDER & L. 67, 69 (2014) (“Every state and the District of Columbia use a voluntary acknowledgment of paternity.”).

²⁸⁹ Family Support Act of 1988, H.R. 1720, 100th Cong. § 111(c) (codified as amended at 42 U.S.C. § 668).

²⁹⁰ Omnibus Budget Reconciliation Act of 1993, H.R. 2264, 103d Cong. § 13721(b)(2)(C) (codified as amended at 42 U.S.C. § 666).

²⁹¹ Cf. Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL’Y REV. 31, 44 (2010) (arguing that Congress should pass a statute requiring states to “adopt simple, administrative procedures, including hospital-based programs, pursuant to which a birth mother would be permitted to sign an affidavit of parentage regarding a child born through assisted reproduction”).

²⁹² See *supra* notes 7-17 and accompanying text.

²⁹³ Alabama, Arizona, Florida, Louisiana, Michigan, Tennessee, Utah, Virginia, Wyoming and Utah. See Hazeldean, *supra* note 2, at 1627.

access step-parent adoption, or benefit from the marital presumption of parentage. Children whose parents did not or could not marry are thus deprived of a secure relationship with their unrecognized parent.

Exclusionary parentage regimes that prevent unmarried same-sex couples from establishing legal parent-child relationships with their children impose significant harm. The children do not have a right to support from their unrecognized parent, cannot access Social Security or other benefits if that parent becomes disabled or dies, and may lose all contact with them if the parents' relationship ends or the legal parent dies. The denial of these legal rights is unconstitutional discrimination against the children based on their parents' marital status and sex, as well as a denial of their due process right to associate with their unrecognized parent. State courts should strike down such exclusionary parentage regimes and uphold the rights of unrecognized same-sex parents. Similarly, state legislatures should enact inclusive parentage laws, such as the 2017 UPA, that protect unmarried same-sex parents and their children. And Congress ought to encourage such reforms by requiring states to enact laws recognizing intended parents of children conceived through ART as legal parents, regardless of marital status, as a condition of receiving federal public assistance funding. These efforts will ensure that children with unmarried same-sex parents are protected and have legally recognized parent-child relationships with both of their parents.

