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Reproducing the Intersections of Inclusion and Exclusion: Exploring Gender Recognition Laws, Reproductive Technology, and the Children's Act in Denmark

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Stu Marvel
Emory University, USA

Abstract

This paper explores a November 2017 ruling from a Copenhagen appellate court, which involved a transgender man, his cisgender female partner, and their child conceived through third-party donor conception. In mapping the inclusions and exclusions performed by multiple domains of law, this paper applies an intersectional heuristic to track the state reproduction of reproductive norms. Although the plaintiff, a Korean adoptee, had legally changed his gender identity from female to male by the time the child was born, the case arose when he sought recognition of his fatherhood – not motherhood – for his mixed-race child. Intersectional analysis offers a powerful tool to map the dense cluster of Danish law at work in this case,

Corresponding Author:
Stu Marvel
Emory University, USA
smarvel@emory.edu

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as an institutional matrix that simultaneously recognized self-elected gender identity; denied socially gendered parenthood; and failed to register claims to intergenerational racial affiliation within cross-cutting legal architectures.

Keywords: assisted reproductive technology, transgender tights, structural intersectionality, legal parentage, Critical Race Theory.

1. Introduction

At this point, any text planning to take up 'intersectionality' as a central analytic finds itself launching into a rehearsal of the term's origins, its dispersion from law and legal studies, and its multiple applications and iterations within and across the study of race, gender, sexuality, disability, class and beyond (Bohrer 2019; Carastathis 2016; Erevelles and Minear 2010; Hancock 2016; May 2015). This is particularly so when writing in a non-American context, where imperial histories and racial formations differ widely from the context of U.S. anti-discrimination law and the intersecting dimensions of anti-Black misogyny in which Kimberlé Williams Crenshaw and others first sited their interventions (Crenshaw 1989; Collins 2008; Davis 1997; Dill 1983; Harris 1990). These citational practices continue to be important to acknowledge the centrality of Black women and other women of color in theorizing the violences of state-mandated oppression within the long durée of the wake of Atlantic chattel slavery, with intersectionality properly recognized as "part of a cohort of terms that black feminists created in order to analyze the interconnectedness of structures of domination" (Nash 2019, 6)[1]. However they can also function as an obligatory hand-wave before taking up critiques of the term

[1] Indeed, in a later piece Nash argues that the "preoccupation with crediting intersectionality's innovators particularly circulates in Black feminist theoretical writings as part of a larger Black feminist critique of the university's cannibalization of Black women scholars, uptake of Black women's work, and refusal to cite Black women" (2021, 131).

and/or questioning its utility for theoretical or methodological work, as well as for political praxis (Bilge 2013 and 2014; Tomlinson 2013). Indeed, as Jennifer Nash acutely diagnosed in a recent volume, "[m]ore than anything, intersectionality has become the preeminent location of a dense set of feminist desires, longings that reveal the continued centrality of racial anxieties to feminist practice" (Nash 2021, 129).

Rather than engaging in disciplinary debates about how and why the term 'intersectionality' might hold purchase for all manner of theoretical and political projects, this paper will hew closely to the legal dimensions of what Crenshaw formulated as the 'structural intersectionality' of formal institutions of power (Crenshaw 1991)[2]. As Patricia Hill Collins and Sirma Bilge have suggested, "[l]egal scholarship and practice enjoy a special relationship with intersectionality" (Collins and Bilge 2016, 38), and this paper is inspired by the long tradition of thinkers who have foregrounded an intersectional juridical analysis toward the aims of social and reproductive justice (Grabham *et al.* 2009; Carbado and Crenshaw 2019; Davis 2015; Clarke 2017; Roberts and Jesudason 2013). Amidst the many, and occasionally conflicting, definitions of intersectionality in circulation, this brings us perhaps closest to the framework offered by Sumi Cho, Kimberlé Williams Crenshaw, and Leslie McCall:

> [O]ur view is that intersectionality is best framed as an analytic sensibility. If intersectionality is an analytic disposition, a way of thinking about and conducting analyses, then what makes an analysis intersectional is not its use of the term 'intersectionality,' nor its being situated in a familiar genealogy, nor its drawing on lists of standard citations. Rather, what makes an analysis intersectional…is its adoption of an intersectional way of thinking about the

[2] This is not to imply that legal scholarship has not produced its own vigorous critiques of intersectionality theory! See, for example, Sumi Cho's careful tracking of jurisprudence focused on claims that intersectionality has not properly engaged, and/or was not theoretically suited to engage, issues of sexuality and masculinity (Cho 2013).

> problem of sameness and difference and its relation to power. This framing — conceiving of categories not as distinct but as always permeated by other categories, fluid and changing, always in the process of creating and being created by dynamics of power — emphasizes what intersectionality does rather than what intersectionality is (Cho *et al*. 2013, 795).

In reading a set of Danish laws on transgender self-declaration, family status, and reproductive technology through the lens of structural intersectionality, this paper is interested in both the conditions of racial and gender anxiety – of sameness and difference and its relation to power – that generated this intricate web, as well as its impact on a family seeking to navigate these convoluted channels. This paper will explore a set of 2017 rulings from a Copenhagen trial and appellate court, which involved a racialized transgender man, his white cisgender female partner, and their mixed-race child conceived through third-party donor conception. In mapping the inclusions and exclusions performed by multiple domains of law, it takes up an intersectional heuristic to map the state reproduction of reproductive norms.

Although the plaintiff, a Korean-born Danish adoptee, had legally changed his gender identity from female to male by the time the child was born, the case arose when he sought recognition of his *father*hood — not motherhood — in municipal court. Intersectional analysis offers a powerful tool to map the dense cluster of Danish law at work in this case, as an institutional matrix that simultaneously recognized self-elected gender identity; denied socially gendered parenthood; and failed to register claims to inter-generational racial affiliation within cross-cutting legal architectures. These contrasting modes of legal discrimination and recognition provide a useful window into multiply concatenated issues, including the manner in which sex and gender are figured by legislatures and the courts; the forms of racialized kinship being produced through assisted reproduction; and the ways in which overlapping domains of administrative law, health law, and family law

produce varied modes of discrimination and recognition. It is key to take all these elements in hand simultaneously, reading an intersectional view of family formation patterns beyond a single-axis approach of gender, race, class, or sexuality (Clarke and McCall 2013, 352).

As Carbado and Crenshaw argue, attention to the "hidden baselines" upon which the judiciary depends can reveal much about the normative operations of law; US jurisprudence has historically framed allegations of violence experienced by Black women as outside the single-axis approach of anti-discrimination law and therefore "extraordinary, preferential, and unfeasible" (Carbado and Crenshaw 2019, 110). This essay extends its search for hidden baselines beyond the domains of anti-discrimination law, to read across multiple and overlapping juridical domains of health, family, and administrative regulation. As will be seen, subjectification through law creates and affirms not only identity categories, but the proper domains in which legal petitions should be brought, as well as the correct tools to find a solution (Dietz 2020). Health law produces bodies for intervention; family law produces sets of relationships to adjudicated; and administrative law produces populations to be controlled and organized. Such attention to the productive power of the medico-juridical illustrates how such processes continually produce, manage, and deploy race and gender categories as well as norms of body, sexuality and family. In this manner, "[t]he nation-state form itself is produced by the project of gendered-racialized population management" (Spade 2013, 1046).

This paper proceeds in four parts, and begins by describing the legal backdrop in Denmark for transgender people who seek to become parents. There are at least three distinct areas of law in operation here, which will be taken in turn. The second part will introduce the facts of the case and the trial court and appellate judgments. The third part will use an intersectional analysis to understand the legal and social stakes of this case, before a conclusion that brings into relief larger issues around the reproduction of reproductive norms and values through law.

2. Legal Backdrop for Transgender People Seeking Parental Recognition

2.1. Gender Recognition Act

In recent years, legislative bodies across Europe have moved to incorporate the recognition of transgender people into law and policy. Gender recognition laws vary, but most European states now have some provisions allowing for a person to revise identity documents to match their gender identity (Transgender Europe 2021a). As reported by Transgender Europe, however, the majority of these laws still depend upon restrictive and medicalized guidelines: 10 states require sterilisation; 19 states require a married person to divorce; and 15 states have age restrictions in place that limit minors. Trans people's existence is de facto not recognised in 2 states, which do not provide for any recognition procedure (Transgender Europe 2021b).

Within this context, the 2014 passage of Denmark's Gender Recognition Act (*Lov om ændring af lov om Det Centrale Personregister*)[3] or CPR has been hailed as an important milestone, in dispensing with a diagnosis of gender dysphoria or psychological evaluation to proceed with the revision of gender identity documents. As the Parliamentary Assembly of the Council of Europe remarked in 2015, such legislation welcomed the emergence of a right to gender identity by basing gender recognition procedures on individual self-determination rather than medical diagnosis ("Discrimination against transgender people in Europe" 2015).

To undertake a legal gender change in Denmark, individuals over 18 years old need only submit a written statement that outlines their identification and sense of belonging to the other gender. After a reflection period of six months and follow-up confirmation the application is automatically granted.[4] This 'declaration

[3] The law is officially called 'Act no. 752 of 25 June 2014' amending the Law on the Central Office (Assigning new personal number to people who experience themselves as belonging to the other sex).
[4] Social Security Act § 6, Third paragraph. Act no. 646 of June 2, 2017 on the Central Office.

model' replaces the previous requirement for surgical or medical treatment, including what amounted to legally-mandated sterilization through sexual reassignment surgery and hormone replacement therapy. [5] As framed within a 2014 report for the *LGBT Policy Journal*, in the wake of this legislative change Denmark has "succeeded in creating a legal gender recognition scheme that, to a greater extent than any other jurisdiction, respects the self-determination right of trans persons" (Dunne 2014, 30).

Thus, a trans person in Denmark who has changed his or her legal gender marker may retain their reproductive abilities and the opportunity to create a family on their own or through assisted reproduction (Dietz 2018). While the excising of a legal requirement for sterilization cannot but be celebrated, the self-declaration model is not without its critics; empirical research on the material impact of these reforms indicates that such revisions may have held limited utility beyond civil administration. As Chris Dietz suggests, following interviews conducted with a range of stakeholders in the wake of the CPR's enactment, despite its gestures toward inclusivity the provisions in the law are limited to the change in one's gender: "It grants a right to amend legal gender status, and nothing more" (Dietz 2020, 73). If one seeks further state-approved supports – Dietz canvasses trans people interested in surgery or hormone therapy – a different set of legal rules come into play. As will be seen below in relation to reproduction and family law, these legal domains operate according to their own internal, often biologist, logics and may stand in tension with the self-determined gender status awarded by the much-lauded CPR.

[5] Health Law § 115, which removed the gonads (testes or ovaries and uterus).

2.2. Children's Act

It was not lost on the Danish parliament that the revision of gender recognition laws represents only a partial reshaping of the legal landscape. Related health care, marriage, adoption, parentage, insurance, inheritance, and employment laws, among others, were also flagged as needing fresh attention. This review process began even before the government moved to pass the revised gender identity law[6], as an inter-ministerial working group issued its statement four months prior, recommending strategies to manage the administrative and economic consequences of the new CPR. The Working Group considered in particular the question of legal parenthood as outlined in the Children's Act (*Børneloven)* in regard to questions that might emerge following a legal change to one's gender.

Parenthood, of course, is the expression of a legal relationship between parent and child and is linked to a series of rights and duties including parental leave, child custody, visitation and inheritance rights. In Denmark, parenthood is regulated by the *Children's Act*, which aims to establish adult legal responsibility for a child – ideally by locating two legal parents in step with perceptions around the best interests of the child. As with many common law jurisdictions, Danish parentage has historically not been based upon the proof of a genetic tie but upon the marriage bond. The longstanding *pater est* rule determines that when a woman gives birth to a child, her male spouse is automatically considered the father (Laursen 2021). This practical rule is aimed at ensuring that a child has two legal parents – a mother and father – who are obliged caregivers, thereby unburdening the state of direct responsibility. As Soren Laursen explains, questions of genetic parenthood are deliberately discarded in favor of an automatic legal tie that assumes the paternity of the husband or male partner, and therefore the nuclear

[6] Law no. 752 of 25 June 2014 amending the Law on the Central Person (Allocation of new Social Security persons who experience themselves on belonging to the other sex). Report was issued on 27 February 2014. In the corresponding bill 2013/1 LF 182, reference is made in paragraph 2 of the general comments to this report as the basis for the submitted bill.

family unit (Laursen 2021). While 'co-mother' status was later extended to married lesbian couples, this did not unsettle the presumption of two legal parents, one of whom is necessarily the birth mother. Thus the only time that biology had historically entered the *Children's Act* was when a disagreement over paternity arose, and testing was required to determine the genetic father.

The Working Group was aware that the CPR might have an impact on this neatly gendered language of mother and father, but in response to the issue of parental responsibility, their report suggested:

> The premise of the Children's Act is that the woman who gives birth to a child is the child's mother. The child's father or co-mother is determined, among other things, by their relation to the child's mother around the time of conception and birth.
>
> The Children's Act recognizes the sex that one uses to propagate, and should not give rise to confusion if one or both parents involved in the child's conception have a different legal sex than their biological sex. It is thus the parents' biological sex… which determines their role in the Children's Act as either father, mother or co-mother.
>
> A person who gives birth to a child will, regardless of whether the person is a legal man, be the mother of the child in the Children's Act. Likewise, a person who has made his female partner pregnant will – regardless of whether the person is legally a woman – be the child's father.

This model was confirmed by the Ministry of Children, Equality Integration and Social Affairs and enacted into law in December 2015.[7] As the Ministry noted, in their opinion, "the time is not ripe" to do away with a biological basis for the

[7] Children's Act (Act No. 1817 of 23 December 2015).

definition of legal parenthood. First, they believed that such laws remained adequate for the vast majority of the population, and second, they estimated that a "very limited number of people" would be affected by the problem. Whereas, according to the Ministry, it would require extensive amendment of the *Children's Act* and related legislation to remove such gendered norms. However, the law did clarify the ways in someone could be recognized as a *non*-biological parent, presumably through recourse to assisted reproduction. As below, Section 27 of the *Children's Act* reads:

> § 27. If a woman has been treated with assisted reproduction by a healthcare professional or under the responsibility of a healthcare person, her spouse, civil partner, or partner may be considered as the child's father or co-mother, if they have consented to the treatment and the child is assumed to be created through this process. The consent must be in writing and contain a statement that the man should be the child's father or the woman should be the child's co-mother.

While Section 30 says:

> § 30. The woman who gives birth to a child following a process of assisted reproduction is considered to be the mother of the child.

Thus a cisgender lesbian couple who conceived a child through anonymous sperm donation could both be viewed as legal parents. The non-biological mother would be recognized for her social ties to the birth mother, and could sign a consent form to ensure her status as co-mother. An Ethics Council tasked with reviewing these laws, however, noted a troubling discrepancy in regard to transgender parents. As they noted: Transgender man A, who has undergone a legal sex change but retained

his uterus, and gives birth to a child created in a clinic through assisted reproduction, would nevertheless be regarded as a mother under the *Children's Act*. Whereas transgender man B who has also undergone a legal sex change and retained his uterus, but acts as the *non-biological* parent of a child created in a clinic through assisted reproduction (and this part will get very important in a moment), could potentially be regarded as a father under the *Children's Act*.

Interestingly, gender seems to only enter the picture when biological material is in play. This is despite the longstanding Roman law of *pater est*, mentioned above, which has actively *avoided* inquiring into the genetic origin of a child in favour of awarding automatic paternity to the mother's partner. The legal architecture of paternity has carefully side-stepped questions of biology, instead pursing a practical scheme focused on ensuring the care of children…until the unsettling questions of trans parentage pushed Danish lawmakers into clarifications around the issue of 'biological propagation'.

Given this remarkable turn to 'sex' and the language of assisted reproduction in Section 30 – as well as how one defines a *woman* for its purposes – the final stop on this inter-jurisdictional tour will be health law, which both determines the criteria upon which biological sex is to be defined and outlines the need for a healthcare professional to be presiding.

2.3. Assisted Reproduction Act

Given the changes in the CPR, which allowed for a legal gender change without requiring castration or sterilization, the Danish *Health Act* was also revised to describe, for example, "the pregnant person" and "persons who have female breast tissue"[8]. At the same time, the 2015 Assisted Reproduction Act was revised, with the same biologist questions of 'propagation' haunting its drafters. In some ways this was no surprise, as the Act has long wrestled with assisted reproduction as

[8] LOV nr 744 of 25/06/2014 (https://www.retsinformation.dk/eli/lta/2014/744).

something artificial and "inherently unnatural", and has sought a wide range of bans and prohibitions to regulate its potentially monstrous excesses (Hermann 2022, 1; Dahl 2018).

Indeed, it was through precisely a turn to the 'natural' that the following definitions were added to create definitive language around the relationship between sexual organs and legal gender:

> The 2015 Act on Assisted Reproduction[9] contains, among others, the following provisions:
> § 1. … PCS. 3. For the purposes of this Act
> 1) Woman: A person with a uterus or ovarian tissue.
> 2) Man: A person with at least one testicle[10].

These reproductive guidelines are based on a static vision of biological sex as something affirmed and fixed at birth, linking the certainty of binary sexual reproduction with adult gender roles. These definitions are also wide-ranging, with the term "woman" used in a large number of clinical provisions that refer to female biology and reproduction. Despite the persistence of gendered terminology it was clarified that, even after the adoption of the CPR, persons who have made a legal gender change are still covered by health insurance[11]. So while it is possible to

[9] (Act no. 93 of 19 January 2015 on assisted re-production in connection with treatment, diagnosis and research etc.).
[10] The newspaper article quotes that in the "Children's Law," the gender that you use for to propagate … "is not derived from the Children's Act, but to the processors of Bill L 189 amendment of the Health Act and the Act on Assisted Reproduction in the Treatment, diagnostics and research, etc. in connection with the introduction of a legal gender shift (2013-14 L 189 / LOV NO 744 of 25/06/2014).
[11] In the report submitted by the Social Committee on 23 May 2013 to Bill no. L 189, 30. April 2014 amending the Health Act and the law on assisted reproduction in connection with treatment, diagnosis and research, etc. are as Entry no. 1 refers to a consultation answers and consultation note from the Social Integration Affairs of 7 April 2014.

provide fertility treatment to a transgender man with a uterus and assist his insemination with donated sperm, he will be regarded as a "man" within the domains of administrative law, a "woman" in health law and a "mother" in family law(!).

As Soren Laursen notes, not only is this language dizzyingly unhelpful, it is also imprecise given that not all trans people retain their reproductive organs following gender-affirming surgery. As Laursen suggests, at worst it might read "a person who has or has had at least one testicle" and the equivalent for ovarian tissue, although he suggests it would be preferable to describe "the person from which the sperm originates" or "the person from which the egg cell originates" (Laursen 2021, 11).

Importantly, the Act also codifies the responsibility of healthcare professionals as the primary gatekeepers of the clinic. As legal expert Janne Herrmann explains, Chapter 4 of the Act regulates the donation, use and storage of sperm, prohibiting anyone other than medical doctors from using manipulated sperm – including washed sperm – and providing the legal basis for the Minister of Health to regulate further in ministerial orders on donation, use and storage (Herrmann 2018, 2). Chapter Six, on the other hand, regulates the role of the health professional in gathering written consent before treatment can begin, with responsibility for ascertaining the continued validity of the consent also falling to the fertility doctor (Herrmann 2018). Together, these regulations drastically restrict access to home insemination with washed donor sperm, and empower health professionals with great authority to determine when, who, and under what conditions that people may employ donor sperm to create their families in Denmark.

3. The Legal Case: Facts and Rulings

With definitions and frameworks from these three domains of law in hand, we will now turn to a trial and appellate court ruling on a case from Copenhagen. Pseudonyms are employed throughout[12].

Britta and Casper are close platonic friends who had lived together 2 ½ years. Although both were in sexual relationships with other people at the time, they nevertheless decided to conceive a child together. Britta is a white cisgender woman who works as a midwife and political activist (The midwife part will be important later). Britta was also married to a woman, an old friend who lived in another city, with whom she was in a platonic relationship (This will also be important later). Casper is a racialized transgender man. He was born in South Korea and adopted into a Danish family as a child. Casper applied for and was awarded a legal gender change in March 2015 and was given a male registration number by the state. In 2017 he underwent gender affirming treatment. The case law does not specify whether or not he retained his uterus, although Casper does describe himself at one point in the ruling as "physically male".

Britta and Casper went to a fertility clinic together in June 2015 to begin the process of assisted reproduction, and both signed a declaration of consent identifying Casper as the intended father. They used a variety of anonymous donor sperm on multiple occasions, including a round of IVF, but Britta did not become pregnant. The clinic was aware that Casper was transgender, but because his genetic material was not being used to create the child, it does not appear as if they considered the "biological propagation" requirements of the Children's Act to be applicable, and were willing to recognize him as the legal father. Their attending doctor then took an extended holiday, and Britta and Casper grew frustrated with

[12] Because the appellate ruling refers to the plaintiffs as 'B' and 'C' I shall be using names that also begin with these letters.

the delay in insemination cycles. Britta contacted the clinic and asked whether she might inseminate at home during the break. As Britta is a midwife, and has presided over inseminations in the past, the clinic agreed that this would be acceptable. Britta ordered donor sperm to be delivered to their home for her personal use in May 2016 and signed a certificate of authorization for home insemination, which stated:

> This authorization must be completed and signed by the doctor or other health professional who assumes responsibility for monitoring, attending, or otherwise supporting the woman in connection with home insemination. The healthcare person must report, if necessary, pregnancy and serious side effects to the European Sperm Bank.

She then self-inseminated and became pregnant, and dutifully reported this pregnancy to the clinic and European Sperm Bank. In Fall 2016, Casper and Britta registered as unmarried co-habitants with the intention of Casper signing a "statement of liability and care" to affirm his legal role as parent and father. They used Section 27 of the *Children's Ac*t to indicate that assisted reproduction had occurred, with Britta listing herself as the attending healthcare professional.

The forms they submitted had some issues with the dates, so they sent in a new copy and Casper contacted the state administration to confirm their accuracy. During this conversation, it became clear to the official that Casper was a transgender man who had undergone a legal gender change under the CPR. He was then told that he could not be registered as a father, due to the *Children's Act* requirement that one's biological sex match one's parental gender. Casper insisted that he was both legally and physically a man. On December 22, 2016 the state administration rejected their request, stating that the condition for registering Casper as a father under the *Children's Act* had not been met.

The child was born in February 2017, and was registered with Britta as the sole parent. Casper was therefore ineligible for a set of critical parental rights – including state-funded employment leave following the birth. Britta requested a divorce from her longtime platonic friend in the meantime, and it was finalized on March 15, 2017. The state administration requested additional information, brought the case before Copenhagen City Council district court in late March, and a decision was released in June 2017.

3.1. Trial Court Decision

The trial court found that Britta could not be recognized as a healthcare professional because she conducted the insemination upon herself. In order to fall under Section 27, the insemination must occur within "proper healthcare parameters", including record keeping. The consent forms signed at the clinic were thus not valid.

Casper was recognized to be a transgender man who had legally changed his gender, but under the "biological propagation" standards of the *Children's Act* he was to be regarded as a woman and therefore could not be recognized as the legal father. They also found that Britta was married to a woman at the time of the birth and the female spouse's claim on parentage must be clarified before proceeding. The court concluded that Casper cannot be registered as a parent of the child, either as co-mother or as father.

3.2. Appellate Decision

Britta and Casper then appealed their case to the Eastern District High Court, which released a decision in late November 2017. This decision reversed the lower court holding and found Casper to be the legal father of the child, now nine months of age. First, the Court looked approvingly to Britta's divorce and her ex-wife's relinquishment of any parental claims to the child. With no competing claims beyond

the two-parent model, the Court could turn to the health and family law aspects of the case.

The court began by examining the time spent at the clinic and found it "particularly important" that Casper and Britta were "guided by an independent medical professional prior to the insemination" and that they both signed a declaration of consent at the time. The health professional they visited was known to have "particular expertise in assisted reproductive technology" and this expertise was seen as overriding the facts of the home insemination. This satisfied that court that the insemination and birth could be found as falling under the requirements of Section 27, despite not occurring at the clinic.

They then moved to inquire whether Section 27 clearly stated its application to people who had undergone a legal sex change and wished to be registered as a parent. While they noted the Working Group report, and the comments about "biological propagation" that had been determinative for the lower court, they distinguished these requirements as only applying when biological factors are in play. That is, when a transgender man gives *birth* to a child he should be viewed as a legal mother, or when a transgender woman inseminates her partner '*naturally*' without the use of assisted reproduction, she should be viewed as a legal father. But the court did not find correlative assumptions about transgender people who have consented to and seek registration as a non-biological father or mother. In deciding this issue more narrowly, they sought the legislative intention of the revisions, which they understood as addressing issues of *biological* parentage emerging from revisions to the CPR, not questions of *social* parentage.

While this decision appears to set precedent for similarly situated non-biological trans parents, full ramifications for their case as well as the relevant passage in

the *Children's Act* are not yet clear. The case has been discussed at some length in Danish media and has been cited as a political spur to legislative revision.[13]

4. Intersectional Analysis

The legal context in which Kimberle Crenshaw first deployed the language of intersectionality was one explicitly shaped by the simultaneous forces of racism and sexism, and the social and material forces of US violence wrought by white supremacy and misogyny (Crenshaw 1989; 1991). The centrality of race to an international analysis is necessitated by the enduring forces of imperial power and colonization which have produced not only the settler colonies, but which continue to structure life chances across the globe (Goldberg 2006; Lowe 2015; Mohanty 2003). Within a heuristic that tracks the relationship between social identities produced by and through the colonial mission – including not only race but the coproduction of gender (Morgan 2011), sexuality (Morgenson 2010; Rao 2020), and disability/debility (Puar 2017) – a sharp attention to how structures of power mediate both biopolitical and necropolitical outcomes under capitalist economies remains critical (Davis 1997; Melamed 2015; Snorton and Haritiworn 2013; Morgan 2021).

This is particularly the case when analyzing laws and legal provisions which deal with the central biopolitical project of the modern regulatory state: the reproduction of populations and reproductive norms. Here, racial anxieties around 'proper' citizenship and the shoring up of borders against immigration are brought into acute relief, and are perhaps no more explicit when dealing with the 'foreign'

[13] See for example: https://panbloggen.wordpress.com/2017/03/27/lgbt-danmark-sag-om-transmands-faderskab-er-fejlfortolket/ and https://panbloggen.wordpress.com/2017/11/24/landsretsdom-transmand-er-far/ as well as a correction to the ruling submitted by LGBT Denmark available at the second link above.

other as a site of difference (Walia 2021, Garcia Hernandez 2013). European scholars have long sought to account for the role of travel and migration in shaping national imaginaries around race and racism, with intersectionality deployed to account for variations in gender, class, dis/ability, and sexuality across immigrant populations (Bastia 2014; Van der Woude *et al*. 2017). Despite these interventions, "Nordic research fields of migration and gender continue to work within a paradigm of ethnicity" rather than race, with "concepts of race and racialization remain[ing] contested in Nordic academia" (Andraessen and Myong 2017, 97; see also Hervik 2019).

This reluctance to address the role of white supremacy in producing the nation-state is tied to what Ulrika Dahl has called the "epistemic habit" of whiteness within Nordic academic feminism in particular (Dahl 2021, 116). As Jensen *et al*. argue, "denials or racism and discrimination are part of a general (self-)perception of Denmark – as of all Scandinavian countries – as a progressive welfare state that advocates and practices social justice and humanitarianism" (Jensen *et al*. 2017, 51-52). Yet as social science data has revealed, the 'we' who dwell within a benevolent, expansive welfare state are often swift to cast suspicion upon so-called 'outsiders' seeking unentitled benefits from the public weal (Simsonsen 2015). In challenging the ideal of a "freedom-loving, egalitarian and tolerant people" to account for the structural racisms that frame public policy, Danish migration scholars have deployed careful critiques of immigration laws, public debates on immigration and integration, and the panic surrounding terror and securitization (Ivi, 52).

Interestingly, however, when the turn is made toward the biopolitical operations of reproductive technology, the centrality of race seems to lose its critical purchase. While certain strands of scholarship on assisted reproductive technology from the US and Canada, although by no means all, have carefully foregrounded the 'reproduction of whiteness' effected by and through gamete markets (Thomson

2009, Quiroga 2007; Roberts 1995; Mamo 2005; Ikemoto 1995), this is a more recent development in literature emerging from Nordic-affiliated thinkers (Kroløkke 2014; Andreassen 2018; Liebetseder 2018; Dahl and Andreassen 2021; Mohr and Herrmann 2021). In her excellent book on *Mediated Kinships*, for example, Andreassen argues that while gender has long been central in analyses of kinship within Scandinavia, few have examined the role of race in alternative families (Andreassen 2018, 18; Myong 2009). As Andreassen rightly suggests, "[w]hile there is a strong tendency to not name race and whiteness in Scandinavia, race, whiteness and racialisation do play important roles in Scandinavian kinship constructions" (Andreassen 2018, 18)[14].

This tendency stands in interesting contrast to the deep and remarkable vein of scholarship on *sexuality* and assisted reproduction which has also emerged from Scandinavia, as a set of leading inquiries on the relationship between queer lives and ART (Bryld 2001; Nordqvist 2009; Lykke 2010; Adrian 2006 and 2010; Rozental and Malmquist 2015; Stormhøj 2002; Leibetseder and Griffin 2018). To be fair, the elision of race or racialization within reproductive law and policy itself may be contribute to this lacuna, as across the bodies of Danish law canvassed above no mention of the social character of race or even 'race-matching' of gametes is made explicit. Indeed, even in the case discussed, notwithstanding Casper and Britta's conscious choice to use an Asian donor who would more closely resemble Casper, the court documents fail to mention any concerns with racial affiliation. Thus, despite the centrality of racialized kinship for Casper and Britta it remained illeg-

[14] I will also note, as a white Canadian scholar speaking with casual expertise on the whiteness of Nordic feminism, much of my authority here is drawn from my own proximity to whiteness. As Lene Myong affirms, in a powerful co-authored mediation on memory work and research positionality: "This is different from how it is to be a scholar of colour engaging critically with race and whiteness in Denmark" (Andreassen and Myong 2017, 102). Even as I participate in the "growing interest in race" that Myong tracks within European feminist scholarship, I wish to remain similarly attentive to "the uneven distribution of scholarly authority and agency among white scholars and scholars of colour" (Ivi, 102).

ible within legal deliberations, with juridical authority directed only to those categories through which the court could understand their parental intentions – gender, marriage, and sexual reproduction.

Indeed, the overlapping forms of race discrimination and sexual discrimination that Crenshaw famously identified within US employment law appears be much harder to track within the Danish legal system. When racial discrimination emerges, it is most often framed as an issue of 'ethnicity' rather than white supremacy, with the official government line appearing to stake out a claim to epistemological innocence in declaring "there is no racism here" (Jensen *et al.* 2015). Even the Danish Ministry for Refugees, Immigrants, and Integration prefers the terms "equal treatment" and "discrimination" instead of "racism," with a representative explaining: "We try to formulate something positive: If there is equal treatment there should be no racism" (Quoted in Jensen *et al.* 2015, 57). Without an explicit legal framework of 'racial discrimination' the sort of intersectional claims which Crenshaw deployed are buried deeply within state reproductive norms, making them difficult to parse even when reproductive choices are made with immediate concern for racial kinship (See for example, Dahl and Andreassen 2021; Nebeling Petersen, Kroløkke, and Myong 2017).

4.1. Casper and Britta's Case through an Intersectional Lens

Casper, Britta, and their child found themselves at the intersection of a dizzying set of governance projects. Intersectionality offers here a useful tool to bring attention to the juridical categories at work, with particular capacity to account for the (in)visibility of race within structures of oppression. In step with Crenshaw's original intention to map the "juridical erasure of Black women's subjectivity in antidiscrimination law" (Carbado *et al.* 2013, 304), the heuristic of intersectionality allows us to map the erasure of Casper's claim to racialized trans fatherhood within Danish reproductive law.

First is the CPR, as a piece of administrative law that represents an individualized model of legal recognition. As Denmark has moved further away from a need for medical intervention in determining gender, responsibility for this declaration has fallen upon the individual. It is a rights-based petition for state recognition as a self-actualized, competent, adult able to determine his or her own gender identity (Dietz 2018; 2020). In depathologizing gender dysphoria and moving toward a declaration model, it has focused squarely on questions of individual intent.

As an effect of limiting the role of medical expertise, and especially the requirement for sexual reassignment surgery, the law has increased reproductive possibilities for transgender people. This is hard to view as anything but a positive development (Dunne 2014). Yet as our survey of working reports and deliberations reveals, the liberalization of one domain of Danish law produced a hardening of gender and sexual norms in another. This finding resonates with work by Michael Nebeling Petersen, who found that claims to the right to artificial insemination for lesbians in Denmark swiftly enfolded same-sex motherhood into an equality rubric that limited the production of family forms outside the two-parent model (Nebeling Petersen 2009). As the first country in the world to legislate a declaration model of gender recognition and reject requirements for surgical or hormonal intervention, Denmark offers a fascinating test case to see how intent-based legal regimes around transgender status come to grapple with associated legal and political norms.

What emerges perhaps most clearly, is the limited capacity for social change produced by legislative mechanisms grounded in formal equality. Indeed, as Dean Spade rightly argues, "legal equality or rights strategies not only fail to address the harms facing intersectionally targeted populations but also often shore up and expand systems of violence and control" (Spade 2013, 1034). One legal transition may produce profound friction within other areas, expanding systems of surveillance and regulation. Such transitions, therefore, offer a productive site to explore

how systems of governance may produce additional vulnerabilities despite their formally neutral application.

For even as the CPR made a claim to liberal individualism and personal freedom, the gendered anxieties produced by this move provoked both a (re)turn to the 'natural' within ART as well as expanded requirements for medical expertise (Lykke 2010; Franklin 2013). In the context of assisted reproduction, legal subjectivity is not predicated upon the intent of the autonomous, self-defining subject. Instead responsibility is distributed primarily to the doctor – to hold medical expertise in reproductive technology; to determine a patient's 'real' sex despite their legal gender; to ensure that intended parents have understood treatment plans and signed consent forms accordingly (Herrmann 2022). As with Britta and Casper, fertility patients are given responsibility for the care of future offspring, but are stripped of the ability to determine their own gender or whether they will be viewed in law as a mother or father to their own child.

It is also a certain *type* of medical professional who is given authority, as the state administration and trial court both found that Britta's status as a trained and licensed midwife was inadequate to override the self-directed and informal circumstances of insemination[15]. Had Britta's pregnancy had occurred at the clinic, the doctor was prepared to recognize Casper as the legal father and none of these hurdles would have emerged: the doctor's sole medical authority and discretion would have trumped all other legal considerations. Indeed, it was only thanks to the doctor's initial role as an "independent medical professional" holding "particular expertise in assisted reproductive technology" that the appellate court could find Britta and Casper's consent forms to be retroactively binding. Their years of

[15] Incidentally, the sidelining of grassroots and women's medicine in favor of clinical expertise is a history that also occurred in Canada and the US during the 1980s, as lesbian women's sperm-sharing networks were shut down and assisted reproduction was medicalized in the fertility clinic (Marvel 2016; Murphy 2012).

cohabitation, planning, and applications for Casper's parentage were inadequate to secure legal recognition in the absence of medical expertise.

Next up is the *Children's Act*, which defines the legal relationship between adult sexual affiliates and their dependent children, or what we might call the marital family. The two-person model of heterosexual family has long been viewed as the idealized structure for child-bearing and child-rearing in Western cultures (Fineman 2014). It is within the private sphere that the critical work of social reproduction is done, and the organization of the state depends upon the resilience and continued effectiveness of the marital family as the legal manifestation of heterosexuality (Fineman 2012; Travis 2019).

The modern family, however, is no longer the 'natural' outcome of sexual reproduction. Social transformations in same-sex and queer parenting have made this evident, as has the rise in egg donation, sperm donation, and surrogacy, not to mention step-parents, blended families, and other kinds of non-nuclear kinship arrangements (Franklin 2013; Dahl 2018; Marvel 2014). Revisions to the *Children's Act* that defend ideals of biology and 'nature' forcibly channel the language of "biological propagation" to reinscribe a vision of fixed and immutable sex. In the face of apparently alarming social transformations that challenge the gender binary, family law retreats to a soothing reproductive biology constructed upon legal and medical expertise. This renders even Casper's legal victory a bittersweet one: law could extend him the right to a gender identity change on *individual* grounds, but he could not escape the biological determinism of sex in the *relational* context of the marital family. For while the court did eventually recognize his claim to fatherhood, it would not have done so had he given birth to his son (Laursen 2021).

Lurking beneath the surface of all these juridical anxieties is the reproduction of whiteness, and the central aim of the Danish state to 'protect' its imagined

racial homogeneity from external forces. Denmark is a global hub for assisted reproductive technology, yet its national legislation has little to say about racial norms beyond allowing individuals to select their donor of choice (Dahl and Andreasson 2021). This is because the presumed subject of the 'tolerant and LGBTQ-friendly' system of Danish reproductive assistance remains a white citizen, cradled in marked distinction to increasingly aggressive stances by the state toward immigration control (Myong and Bissenbaker 2016). Mons Bissenbaker and Lene Myong's recent work on the "biopolitics of belonging" has been instructive on the strategies by which the Danish administrative state enfolds transnational adoptees as "ideal" migrants into the whiteness of the body politic, affirming an affective belonging that is impossible to achieve for other transnational subjects (Bissenbaker and Myong 2022).

Casper's ability to navigate the Danish reproductive and juridical system as a racially unmarked citizen is a product of this manufactured whiteness, via his early entrance to the national body as a desired child adoptee, not as an adult migrant or refugee (Myong 2009). The constitutive whiteness of Danish citizenship in turn produces and reifies an assumption of 'sameness' that relegates racial discrimination law to a minor role within the Danish legal order. Racial issues are questions for immigration law here, not concerns for the Assisted Reproductive Act despite the absolute centrality of race in donor gamete selection (Dahl and Andreasson 2021). Yet as Dahl and Andreasson rightly argue, "in a time of rising hostility to migration and refugees, growing segregation and seemingly increased anxiety around racial diversity, we need to think critically about the welfare state's 'inclusion' and support of queer people's (white) reproduction" (2021, 18).

5. Conclusion

In conclusion, this paper has sought to analyze and contextualize Denmark's model legislation around self-determined gender recognition. The CPR produces a self-affirming legally gendered subject of liberal individualism, much prized by the mindset of Danish progressivism. This offers a rights-based model of recognition that promotes self-determination and the autonomy of individual actors, and can be comfortably hailed as a step toward transgender tolerance and recognition. This paper has also suggested, however, that it may be helpful to think through the questions raised by the case of Britta and Casper through a lens of structural intersectionality, which allows us to keep in focus a set of concerns around racial biopolitics that are not explicitly raised by the court. By attending to questions of sameness and difference, as well as a conception of legal categories as fluid and changing and permeated by dynamics of power, this paper has tracked the operation of state mechanisms designed to promote certain idealized forms of Danish family creation.

An intersectional approach allows us to see how legal exclusions are built upon 'hidden baselines' that privilege the normative subject within each domain – the dyadically and biologically reproductive, the good patient, the singular rights-seeking individual, the progressive white citizen. Crucially, these norms also depend on the juridical production of race and gender as separate doctrinal axes, as well as the normalization of an essentialist and static view of biological reproduction in sharp contrast to the fluid self-recognition of legal gender. Only by reading them together can we reveal the "interactive mechanisms of oppression" and exclusion upon which these overlapping legal strata are founded (Roberts and Jesudason 2013, 316).

Casper's case – involving a non-white Korean adoptee transgender male seeking fatherhood for his mixed-race child produced by at-home anonymous donor insemination self-performed by his non-sexual midwife co-parent – exposes the many baselines upon which the architecture of Danish law (and indeed, grammar!) is founded. The apparently exceptional case of Casper, Britta, and their child, and their desire to form a legal relationship together, draws attention to the violent machination of the categorial domains of law, as well as the many bodies and lives rendered invisible through such operations. Conflicting legal norms apply a series of cross-cutting stencils across the real circumstances of Casper and Britta's lives, carving up their story into a set of juridically legible shards.

Yet as Carbado and Crenshaw remind us, this is not how people move through the world: "a basic intersectionality insight [is] that because of the intersectional dimensions of power, people live their lives co-constitutively as 'both/and,' rather than fragmentarily as 'either/or'" (Carbado and Crenshaw 2019, 113). Intersectionality thus offers political purchase for grounding the production of new juridical grammars within the experience of the multiply marginalized. This is, crucially, not because of their 'exceptional' status, but because intersectionality "rejects both the declaration of a universal experience of a given vector of harm and the notion that people affected by multiple vectors are enduring conditions that are simply experiences of single-axis harm added together" (Spade 2013, 1050).

As we may also recall, the goal of intersectionality is "not simply to understand social relations of power… but to bring the often hidden dynamics forward in order to transform them… [as] a concept animated by the imperative of social change" (Carbado *et al*. 2014, 312). The relationship between critical inquiry and praxis is central to an intersectional analysis, and the two are tightly interconnected (Collins and Bilge 2020, 33). Thus, intersectionality can present an "exciting paradox" to social movement actors, as careful attention to these multiple differences may actually open room for political coalitions (Roberts, and Jesudason 2013, 315). In

the context of reproductive justice organizing in the US, for example, the program Generations Ahead has long sought to forge alliances between reproductive justice, racial justice, women's rights, and disability rights activists to develop strategies to address reproductive genetic technologies (Roberts and Jesudason 2013). Such an intersectional praxis, grounded firmly upon political commitments of anti-racism, may also prove useful within the Scandinavian context. With gratitude to Britta, Casper, and their son, and the queer anti-racist communities in which they move, it is my hope that this article may make some small contribution toward the engagement of these exciting paradoxes.

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