

7-26-2017

# Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents

Katharine K. Baker

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

Katharine K. Baker, *Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 Chi.-Kent L. Rev. 135 (2017).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol92/iss1/7>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## QUACKING LIKE A DUCK? FUNCTIONAL PARENTHOOD DOCTRINE AND SAME-SEX PARENTS

KATHARINE K. BAKER

*We believe (as with ducks) that if it looks like a family, if it holds itself out as a family, and if it functions like a family, then it is a family.*

GLAD, Protecting Families: Standards for LGBT Families.<sup>1</sup>

With insight, simplicity, and humor the GLAD pamphlet referenced above encapsulates the argument for a robust functional parent doctrine. Most advocates for gay and lesbian rights have consistently argued that quacking like a duck, that is, functioning as a parent, should constitute a judicially cognizable path to legal parenthood.<sup>2</sup>

This article argues that a functional approach to determining legal parenthood is inherently problematic, especially for those concerned with expanding legal recognition of non-traditional family forms. Functional analyses are almost always ugly, should be unnecessary, and take the power to define family away from family members. Functional doctrines necessarily ask common law judges to define what a family is, and the judiciary is a dangerous place to look for that definition.

The typical functional parent doctrine claim in the same-sex parent context arises like this: Alice and Beth are romantic partners; Alice purchases sperm from a sperm bank, finds a willing donor, or initiates an adoption; then she either gives birth to or adopts a child, Calvin.<sup>3</sup> Alice, Beth, and Calvin live together for some period of time and then Alice and Beth break up. Tensions run high; Alice and Beth continue to

1. GAY AND LESBIAN ADVOCATES AND DEFENDERS, PROTECTING FAMILIES: STANDARDS FOR LGBT FAMILIES (2011), <http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf>.

2. See *In re Guardianship of Madelyn B.*, 98 A.3d 494, 495 (N.H. 2014) (GLAD on brief for non-genetic parent); *McGaw v. McGaw*, 468 S.W.3d 435, 448 (Mo. Ct. App. 2015) (LAMBDA Legal Defense Fund on brief for non-genetic parent); Brief of 42 Law Professors et al. as Amici Curiae at 8, *Partenan v. Gallagher*, 59 N.E.3d 1133 (Mass. 2016) (No. SJC-12018) (National Center for Lesbian Rights, on amicus for non-genetic parent).

3. In this hypothetical, I have left Beth's role in the decision to have Calvin and her expressed commitment to Calvin and/or Beth purposefully opaque because by the time the typical functional parent case is litigated, those issues are usually contested.

fight, often with any emotional or material ammunition they have. Alice wants to sever all relations with Beth and take Calvin with her. Beth wants to continue her relationship with Calvin. Should the law treat Beth as a parent because she functioned as one for some period of time?

If Alice and Beth had married, either before or shortly after Calvin's birth, Beth would be a legal parent because, pursuant to the marital presumption of parenthood, legal parentage is presumed in the spouse of a woman who gives birth.<sup>4</sup> If Alice and Beth had both adopted Calvin, they would be equal legal parents.<sup>5</sup> For many years, neither marriage nor co-adoption was available to same-sex couples. Using a functional analysis, i.e., trying to determine whether a same-sex partner "quacked like a parent," was the only way to get a court to recognize a family that had same-sex partners as parents. There was no legal path to co-parenthood except through the functional parent doctrine.

Things are different today (though this article will argue not as different as they should be). Marriage and co-adoption are as available to same-sex couples as they are to opposite-sex couples.<sup>6</sup> Thus, there usually are established legal paths to parenthood that do not involve an evaluation of whether someone "quacked" like a parent, but advocates continue to ask courts to affirm function as a legitimate means of establishing parental status.

To be fair, no court or advocate—to my knowledge—has ever endorsed a purely functional approach. Some inquiry into intent to share parenting is embedded in how courts evaluate function, perhaps because unless there is intent to share parenting rights and obligations, it is hard for two people to function as if they actually are sharing those rights and obligations. Thus, as we will see, it matters tremendously how much Alice and Beth manifested a mutual intent to be treated legally as equivalent parents. The intent inquiry does more than just

4. Traditionally, the marital presumption only applied to fathers because there were no same-sex spouses, but all states now apply the marital presumption to same-sex couples. See *Legal Recognition of LGBT Families*, NAT'L CENTER FOR LESBIAN RIGHTS (2016), [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf).

5. A same-sex couple can co-adopt a child in all states if they have a legal relationship to each other, see *Second-Parent Adoption Laws*, FAMILY EQUALITY COUNCIL, [http://www.familyequality.org/get\\_informed/equality\\_maps/second-parent\\_adoption\\_laws/](http://www.familyequality.org/get_informed/equality_maps/second-parent_adoption_laws/) (last visited Oct. 4, 2016). Unmarried couples are not able to co-adopt in some states, but the same is true for unmarried heterosexual couples who want to co-adopt. *Id.*

6. What is not available to same-sex couples are parallel genetic paths to co-parentage, but that is true for all couples, gay or straight, who use reproductive technology or adoption to become parents. See *infra* text accompanying notes 103–107.

shed light on whether two people were actually functioning as parents though; as many courts recognize, it ensures that the legal parent willingly diminished her own constitutional rights as a parent. In granting rights to a non-legal parent, a court is inevitably diminishing the parental autonomy of an extant legal parent.

In same-sex functional parent cases, the extant parent—the person resisting the functional parent doctrine—is almost always, like Alice, an unmarried woman who became a parent through sperm donation or adoption. Both of those variables are critical because the marital presumption of parenthood assigns a co-parent to every married person who gives birth and the law of paternity assigns co-parents for every child born as a result of intercourse. It is only unmarried parents who get pregnant non-coitally and single parents who adopt, who have the option of forming an intact legal family with only one parent. The article demonstrates how, in practice, the functional parent doctrine undermines the legitimacy of that family form and any family form that does not conform to a court's view of what a family should look like.

Part I of this article introduces the tension between constitutionally protected parental autonomy rights and functional parent doctrine by examining the constitutional rights of parents. This examination demonstrates how the marital status of a parent has a substantial impact on the strength of that parent's constitutional rights. In cases in which there are *two* unmarried (never married or divorced) parents, neither parent has particularly robust constitutionally protected autonomy rights because both parents have competing constitutional rights that must be balanced against each other.<sup>7</sup> Each parent has the right to invoke a court's jurisdiction in vindication of his or her own parental rights. Functional parent doctrine exploits this weakness in an unmarried parent's constitutional rights even though, for many of the extant legal parents in functional parent cases, there is no other legal parent.

Part II of this article examines same-sex functional parent cases to demonstrate how courts weigh the importance of intent to share parental rights against the functional sharing of parental practices. When intent to share legal parentage is clear, most courts have little trouble granting parental rights based on function. When intent to co-parent is ambiguous and hard to discern, courts often—though not always—

7. See *infra* Part I.

reject a functional approach.<sup>8</sup> Those courts that have expressed a willingness to embrace a functional approach without clear indication of intent to co-parent do so because the judges find that the parties functioned as a family. In letting function trump or supplant intent, courts pay short shrift to the constitutional parental autonomy rights of the extant parent and discount an individual's right to create a legal family that does not mimic the traditional heteronormative ideal. Some cases suggest that allegiance to the traditional notion of family is so strong that only if someone like Alice, an extant parent, clearly and expressly *opts out* of co-parentage will courts allow her to parent alone.<sup>9</sup>

Part IIIA of this article suggests that an *opt-in* system makes more sense. A recent proposal by Professor Leslie Harris to make Voluntary Acknowledgements of Parentage available to unmarried same-sex couples just as they are available to unmarried opposite couples<sup>10</sup> would constitute such an opt-in system. A regime like this would establish a simple, intent-based registration system in which same-sex couples could mutually opt in to co-parentage. If parents want to be treated by the law as co-parents, they have to say so by executing a formal, though easy and inexpensive, document proclaiming their intent to co-parent. Opting-in puts the power and the burden to define family in the hands of family members themselves, not judges.<sup>11</sup>

Part IIIB explores the dangers attendant upon not adopting an intent-based registration system. Cases to date make clear that when using functional approaches to parenthood—when deciding whether a person has quacked like a parent—judges import gendered, dyadic and often genetic understandings of what family is and what families do.<sup>12</sup> Because this approach determines what a parent is by looking at what a parent does, it inevitably relies on what parents have traditionally

8. See *infra* Part II.

9. See *infra* Part IIC.

10. See Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same Sex Couples*, 20 Am. U. J. Gender, Soc. Pol'y & L. 467, 475–478 (2012). All states are required to try to secure a voluntary acknowledgment of paternity for any child, conceived sexually and born to an unmarried woman. See *infra* text accompanying notes 119–120; Katharine K. Baker, *The DNA Default and its Discontents: Establishing Modern Parenthood*, B.U. L. Rev. (forthcoming 2016) (manuscript at 113–114) (available online) (explaining the process through which those acknowledgements are usually secured).

11. Legislative bodies might set the parameters for how many people could opt into parentage (two or three or more per child) and/or whether all extant parents had to agree to a new parent and/or when, in a child's life, one could opt into the legal status. States could be laboratories of experimentation with regard to parentage in ways that would allow a variety of family forms to co-exist.

12. See *infra* Part III.

done. This results in judicial foci on stereotyped roles, binary romantic relationships and genetic contribution because these variables have been at the core of what families were and what families did. Judicial reinforcement of traditional understandings of parenthood make it more difficult for everyone to envision the kinds of responsible parenting that might be possible in a world in which reproduction need not and often is not sexual, marriage need not and often does not accompany parenting, and family members enjoy the security of knowing to whom they are legally bound.

### I. THE CONSTITUTIONAL RIGHTS OF PARENTS

There is a familiar paradox embedded in the constitutional treatment of parental rights. Constitutional parental autonomy doctrine restricts the state's ability to interfere with and regulate parenthood, even though parental status and the rights and obligations that attach to that status are a function of law; the state decides which people have which rights and obligations to which children. The same paradox operates in property law: the Takings Clause forbids states from taking property that the common law gives states the power to define.<sup>13</sup> In adjudicating property claims, courts are both "definers and defenders of property rights."<sup>14</sup> Similarly, in adjudicating parental disputes, courts are both the definers and defenders of parental rights.

Every time a court adjudicates a child custody or child support claim between two existing parents, it defines parental rights by making explicit those parents' rights vis-à-vis each other with regard to the child. Legislatures do the same thing when they adopt principles of joint custody and when they pass laws pertaining to mandatory schooling or health requirements. The content of one's parental rights are constantly being re-adjusted by state actors, but just as when the state regulates one's property too extensively it can run afoul of constitu-

13. See David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution* 47, 61 (Robin Fretwell Wilson ed. 2006) (describing a basic parallel between the ways in which parenthood and property are defined and protected for constitutional purposes). See Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 *Ohio St. L.J.* 127, 151–52 (2010) for further discussion of the paradox as it plays out with the granting of rights to non-traditional parents.

14. Jeremy Paul, *The Hidden Structure of Taking Law*, 64 *S. Cal. L. Rev.* 1393, 1402, 1415 (1991) (property rights serve "twin roles—as protector of individual rights against other citizens, and as safeguard against excessive government interference . . .").

tionally protected property interests, the state can “go too far”<sup>15</sup> in infringing on parental rights. When that happens, constitutional parental autonomy doctrine is triggered, and a court is bound to defend parental prerogatives by guarding against too much interference from the state. Functional parent claims implicate parental autonomy doctrine because, in asking a court to grant parental rights to a non-parent, a claimant necessarily asks a court to diminish the parental rights of the extant parent—rights that have traditionally only been subject to encroachment by another legal parent.

Parental autonomy doctrine and substantive due process doctrine were born together. It was in defense of parental liberty that the Supreme Court struck down laws that forbade parents to teach their children German,<sup>16</sup> and laws that required parents to send their children to public school.<sup>17</sup> Even when upholding some government regulation of children, the Court was careful to sing paeans to parental authority.<sup>18</sup> Since those early cases, the Court has upheld parents’ constitutional rights to discontinue schooling for their adolescent children<sup>19</sup> and made clear that parental status includes a presumption that parents will “decide what is best for the child.”<sup>20</sup>

Parental autonomy doctrine was explained in these cases as integral to our collective understanding of adult liberty,<sup>21</sup> appropriate given the Constitution’s respect for pluralism,<sup>22</sup> and much more likely to produce sound parenting practice than would a system that vested

15. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“[I]f regulation goes too far it will be recognized as a taking.”).

16. *Meyer v. Nebraska*, 262 U.S. 390, 400, 403 (1923).

17. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

18. *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (“It is cardinal [to] us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”) (citation omitted).

19. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (recognizing the “primary role of the parents in the upbringing of their children [as] . . . established beyond debate as an enduring American tradition.”).

20. *Parham v. J.R.*, 442 U.S. 584, 604 (1979). “[B]onds of affection lead parents to act in the best interests of their children. . . . Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.” *Id.* at 602–03.

21. Child rearing decisions are part of “the private realm of family life which the state cannot enter.” *Prince*, 321 U.S. at 166. The “primary role of the parents in the upbringing of their children is . . . established beyond debate as an enduring American tradition.” *Yoder*, 406 U.S. at 232.

22. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (contrasting the homogenizing parenting practices suggested by Plato with American traditions).

more parental authority in courts.<sup>23</sup> Adults who have nurtured, cared for, and loved children are likely to make better decisions on behalf of those children than the state is.<sup>24</sup> Referring to this doctrine in 1989, by the time much of substantive due process doctrine had collapsed,<sup>25</sup> Justice Brennan wrote, “I think I am safe in saying that no one doubts the wisdom or validity of those decisions.”<sup>26</sup>

What the Supreme Court has never directly acknowledged about most of those foundational parental autonomy decisions is that they all involved two married parents who were, together, challenging state action. When two legal parents dispute each other’s parenting ability, parental autonomy diminishes significantly.<sup>27</sup> If both parents have a constitutional right to raise the child and they disagree about how to do that, then—perhaps inevitably—the state must step in and exercise authority that it would otherwise be barred from exercising, because a court must balance the competing interests of two (possibly equally entitled) parents. This is what happens in most custody and visitation disputes between two legal parents.

Divorced or never-married parents each have the right to invoke a court’s power to monitor, judge, and possibly overturn the very decisions that are protected by the parental autonomy doctrine.<sup>28</sup> Custody

23. *Parham*, 442 U.S. 584, 603–04; Emily Buss, “Parental” Rights, 88 Va. L. Rev. 635, 636 (2002) (distinguishing between constitutional rights to exercise parental authority and constitutional rights to parental status and suggesting that the former should be robust while the latter is less significant).

24. Buss, *supra* note 23, at 647 (arguing that parents who have reared a child are most likely to have the child-specific knowledge that will lead them to make the best decisions on behalf of the child); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2402–03 (1995) (arguing that parents should be given the same kind of discretion that fiduciary agents are given because of their unique interest in their children); Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 Ohio St. L.J. 1523, 1543 (1998) (explaining how children benefit from the educational and socialization process that can only be achieved if parents are given the freedom to parent without too much state interference).

25. See Cass Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 880–82 (1987) (describing the Supreme Court’s retreat from *Lochner v. New York* and the principles of natural rights and common law entitlements that justified the original *Lochner* decision).

26. *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989) (Brennan, J., dissenting).

27. Baker, *supra* note 24, at 1545–46 (explaining how parental rights usually entail both negative rights to be free from governmental interference and positive rights to question another parent’s parental decisions. Once one parent exercises her positive parental rights, the negative parental rights of the other parent dissipate).

28. *Kilgrow v. Kilgrow*, 107 So.2d 885, 888–89 (1958) (“It would be anomalous to hold that a court of equity may sit in constant supervision over a household and see that either parent’s will and determination in the upbringing of a child is obeyed, even though the parents’ dispute might involve what is best for the child. Every difference of opinion between parents concerning their child’s upbringing necessarily involves the question of the child’s best interest.”). This case is often cited for the proposition that a court will not adjudicate parenting disputes between married parents.



and visitation rulings routinely restrict parents' religious, educational, and financial decisions.<sup>29</sup> Custodial parents who want to move away for a new job, or a new partner, or to be closer to family, are prevented from doing so if it will interfere too significantly with the custody or visitation rights of another parent.<sup>30</sup> I have argued previously that there are often strong reasons for courts not to treat legal parents as equally entitled to the constitutional rights associated with parental autonomy,<sup>31</sup> but regardless of one's views with regard to what should happen to parental autonomy when two parents disagree, today there is new question: what happens when there is only one legal parent?

This is a particularly important question because the Supreme Court's parental autonomy doctrine suggests—though does not explain why—a single parent's constitutional protection is weaker than a married parent's, even if there is no other parent. *Prince v. Massachusetts*—decided in 1944 and packed with language about the importance of parental autonomy—nonetheless found that the state's *parens patriae* interest trumped the adult's interest in “bring[ing] up the child in the way he should go.”<sup>32</sup> Ms. Prince was a guardian, and a single parent. In *Troxel v. Granville*,<sup>33</sup> when the Supreme Court considered the rights of grandparents who wanted more extensive visitation rights than the children's mother wanted to provide them with, the Court affirmed the existence of the parental autonomy doctrine, but suggested that it required only a weak presumption that parents act in their children's best interest.<sup>34</sup> The mother in *Troxel* was a divorced widow.<sup>35</sup> The

29. Baker, *supra* note 24, at 1546.

30. See *id.* at 1569–74 for further discussion. The reciprocal problem is also a problem for custodial parents, that is, someone with visitation rights moving away and/or re-marrying, thus changing circumstances that can justify a diminishment in the custodial parent's time with her children. See *Armbrister v. Armbrister*, 414 S.W.3d 685, 689 (Tenn. 2013) (allowing father's move and re-marriage to justify granting him equal custodial time with his children even though mother had been the primary caretaker for all of the children's lives).

31. Baker, *supra* note 24, at 1574 (“If the law really valued women's caretaking work, it would afford them negative legal protection [constitutional rights] based on their [greater] caretaking responsibilities.”).

32. *Prince v. Mass.*, 321 U.S. 158, 164 (1944). The *parens patriae* power allows the state to act to protect children from their inability to protect themselves. *Id.* at 166–67. See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (the state has *parens patriae* power over disabled adults and natural resources but it has no *parens patriae* authority over able-bodied adults. The liberty implicit in substantive due process doctrine would prevent it.).

33. *Troxel v. Granville*, 530 U.S. 57 (2000).

34. See *Troxel*, 530 U.S. at 65 (2000); (a court is free to find that the presumption is overcome, not with the clear and convincing evidence that is necessary before the state can terminate parental rights, [see *Santosky v. Kramer*, 455 U.S. 743, 743 (1982)], but with something like a preponderance of the evidence standard that grandparents can much more readily meet). See *also*

Court has never endorsed a robust parental autonomy right in a case involving a single parent.

The Supreme Court's reluctance to find robust parental rights in single parents was accompanied, in the latter part of the twentieth century, by both judicial and legislative efforts to eliminate the idea of single parenthood altogether. In the legitimacy cases, decided mostly between 1968 and 1980, the Supreme Court intimated—though never fully endorsed the view—that because all children should be treated “equally,” every child has a constitutional right to two parents.<sup>36</sup> Throughout the 1980s and 1990s, a cost-conscious Congress insisted that all states pursue paternity actions against any alleged genetic father of a child whose mother was receiving federal aid. The mothers themselves often did not want to pursue the genetic father; Congress gave them no choice.<sup>37</sup>

Defenses of legitimacy and paternity doctrine often focus on how important they were for children in light of the sordid history of discrimination against non-marital children.<sup>38</sup> Yet despite the hoary Latin term, *fillius nullius*, non-marital children were never really children of

Buss, *supra* note 23, at 638–40 (discussing the tepid nature of the Court's endorsement of parental autonomy doctrine in *Troxel*).

35. One wonders whether the Court would have been as lukewarm in its affirmation of parental rights if both parents had been alive and jointly opposed to the increased visitation. Obviously, there would have been more evidence to support not giving visitation, so the grandparents might have had a harder time securing visitation rights on remand, but the query is whether the Supreme Court would have articulated the same lukewarm standard if both parents had been opposed. Might the court have been more sure of the sanctity of parental rights if it was two married parents trying to keep the grandparents from visiting? In many states, no one has standing to petition for visitation if there are two married parents. See *e.g.*, 750 ILL. COMP. STAT. ANN. 5/602.9(c) (West 2016) (restricting grandparent, great-grandparent and step-sibling visitation to situations in which parents are divorced, never married, or where one parent is incarcerated or deceased).

36. Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. Rev. 1647, 1682 (2015) (providing a detailed account of the legitimacy cases and arguing that ultimately the court tied itself in knots because it could not do what the liberal justices seemed to want to do—treat all children “equally”—without dismantling intestacy law, tort law and our social welfare systems – all of which grant children entitlements based on who their parents were and what their parents did or did not do.)

37. One of the most comprehensive studies of child support, conducted before these Congressional actions, found that forty-three percent of unmarried mothers who did not receive child support said they did not want it. Andrea H. Beller & John W. Graham, *Small Change: The Economics of Child Support* 89 (Yale Univ. ed., 1993).

38. See generally Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 Cal. L. Rev. 1277 (2015) (discussing attempts by public interest litigators to put children's needs at the center of overturning traditional legitimacy law and expanding the class of men who could be considered legal parents); Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 347, 348 (2012) (describing “conventional wisdom” as believing the legitimacy cases were about children's equality).

no one; they were children of single mothers.<sup>39</sup> Their lives were severely impaired because of the constraints in which their mothers were forced to live, but in an age in which women have substantially greater opportunities to work, own, contract, borrow, live and play on their own, it is not at all clear that children are well served by doctrines that force another parent on an unwilling single parent. The concerns that motivated the parental autonomy doctrine in the first instance suggest that children might be better served by protecting the autonomy interests of single parents.<sup>40</sup>

Moreover, a trifecta of science, markets, and social norms in the early 21<sup>st</sup> century have disrupted any coherence in either paternity law or legitimacy doctrine. Science has separated reproduction from sex, the market (with the help of contract law) has produced reproductive goods and services for purchase, and marriage (with the help of same-sex marriage advocates) is decreasingly viewed as having anything to do with parentage.<sup>41</sup> Because contracts regarding intent to parent entered into by genetic progenitors of children born with purchased gametes are routinely enforced, even though contracts regarding intent to parent entered into by people who have sex are routinely found void as against public policy, we now have a regime that sanctions single parenthood, at least in some instances. A man who has sex that results in a child is strictly liable in paternity law for child support, but a man who sells his sperm to a bank or donates it to a friend is not.<sup>42</sup> A person who buys gametes and either uses them to gestate a child herself, or uses them in conjunction with purchased gestational labor is, absent a contract suggesting otherwise, a single parent of an “illegitimate” child, but no one suggests that the child has a constitutional right to a second parent.<sup>43</sup> It is also much more common now than it

39. See Baker, *supra* note 10, at 108, for a discussion.

40. See Baker, *supra* note 24, at 1585–94 (arguing that the strength of one’s parental rights should be determined in proportion to one’s investment in one’s relationship with one’s children because that is the best way to honor the concerns regarding liberty, pluralism and children’s well-being that justified the parental autonomy doctrine in the first place). See also *supra* notes 23–24 and accompanying text (discussing theory behind strong parental autonomy doctrine); Baker, *supra* note 10, at 126 (arguing that imposing dual parentage on many mothers and children does not serve anyone’s interests well).

41. See *Goodridge v. Mass.*, 798 N.E.2d 941, 962 (Mass. 2003). The first state Supreme Court to find a constitutional right to same-sex marriage wrote “[t]he ‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”

42. See Baker, *supra* note 10, at 118–21.

43. *Ferguson v. McKiernan*, 940 A.2d 1236, 1245 (Pa. 2007) (enforcing a contract in which mother promised not to sue the sperm donor even though enforcement of the contract meant the child had only one parent).

used to be for unmarried adults to adopt children.<sup>44</sup> Many people are single, as parents, on purpose.<sup>45</sup> Functional parent doctrine calls into question whether these single parents should be afforded the kind of exclusive constitutional autonomy rights that married parents enjoy or the (much weaker) protection that the courts afford to a parent whose interest must be balanced against another's.

## II. FUNCTION AND INTENT IN THE DE FACTO PARENT DOCTRINE

In 1995, the Wisconsin Supreme Court adopted the de facto parent doctrine, announcing the most common test used by courts when granting parental rights to “non-parents.”<sup>46</sup> Despite being known as the quintessential functional parent test, the first element listed by Wisconsin goes to intent, not function. The biological or adoptive parent must “consent[] to . . . the establishment of a parent-like relationship.”<sup>47</sup> The Court explained that consent was important in order to “protect[] parental autonomy and the constitutional rights” of the biological or adoptive parent.<sup>48</sup> In their ambitious *Principles of Family Dissolution*, finally approved in 2000, the American Law Institute (“ALI”) adopted the Wisconsin approach.<sup>49</sup> The ALI requires that the

44. See Ellen Herman, *Single Parent Adoptions*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/topics/singleparentadoptions.htm> (last updated Feb. 24, 2012) (noting that while some single parents have always adopted, it was frowned upon until the late 20<sup>th</sup> century).

45. June Carbone & Naomi Cahn, *Marriage Markets: How Inequality Is Remaking the American Family* 132 (Oxford U. Press 2014) (“We frequently see . . . disputes end with the mother’s decision to give up on collecting support in exchange for never having to deal with the father again and the father’s acceptance of the implicit bargain as a good one. For this group, autonomy means staying out of court.”). See also Hanna Rosin, *The End of Men* 15 (Penguin Group 2012) (describing lower middle class or working class women who have consciously chosen to raise their children on their own rather than worrying about trying to get support and endure interference from the children’s genetic father). Of course, many single women also purchase sperm or adopt. See SINGLE MOTHERS BY CHOICE, <http://www.singlemothersbychoice.org> (last visited Sept. 7, 2016).

46. *Holtzman v. Knott*, 533 N.W.2d 419, 435–36 (Wis. 1995). To establish de facto parenthood “the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.”

47. *Id.*

48. *Id.*

49. Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.03(c) (2002) [hereinafter ALI Principles].

non-legal parent “for reasons primarily other than financial compensation, and with the *agreement* of a legal parent . . . form a parent-child relationship.”<sup>50</sup> The tension between intent and function is thus built into the primary definitions of functional parenthood: *A*, the legal parent, must intend for *B*, her co-habitant,<sup>51</sup> to develop a “parent-child” relationship with her child, *C*.

What is a parent-child relationship? As articulated, the requirement that *A* must agree to the formation of a “parent-child” relationship between *B* and *C* is opaque at best. Before reviewing the cases, it is worth explaining the alternative constructions of that requirement and the different questions that those alternative constructions generate. Some courts view the requirement that *A* agree to the formation of a relationship between *B* and *C* as a question about *A*’s intent to share *legal* co-parentage; other courts view it as a question about the quality of the relationship between *B* and *C*.

If the query is about intent to share legal co-parentage, the inquiry is about the parties’ intent to alter their legal rights and responsibilities towards each other and the child. Isn’t the absence of any explicit agreement between the adults indicative of an intent NOT to share a legal relationship with regard to the child? The birth or adoptive mother, and any man who enters into a surrogacy agreement, must fill out legal documents—birth certificates and adoption forms—declaring their intention to be a legal parent;<sup>52</sup> why should a co-resident partner be excused from executing these legal documents? The tests speak to the extant parent’s consent and agreement, but what of the functional parent’s consent to responsibilities? Legal parenthood is, after all, a bundle of rights and duties; does there need to be any evidence of the functional parent’s willingness to accept legal obligations for the child before a court infers intent on the part of the legal parent to share parental rights? Wouldn’t *A* want some reassurance of *B*’s willingness to accept mutual legal responsibility before she agreed to mutual legal

50. *Id.* at § 2.03(c)(ii)(emphasis added).

51. Co-habitation is a critical factor under the ALI test. The residence requirement “is especially important since the de facto parent category might otherwise include neighbors, nonresidential relatives, or hired babysitters on whom parents have relied for regular caretaking functions, and whose recognition as parents, as a general matter, would be highly undesirable.” *See id.* at § 2.03 cmt. i.

52. By statute, every state requires a child’s birth to be registered shortly after birth. *See e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 192.003(d) (West 2016) (within five days); 410 ILL. COMP. STAT. ANN. 535/12(1) (West 2016) (within seven days); CAL. HEALTH & SAFETY CODE § 102400 (West 2016) (within ten days).

rights?<sup>53</sup> Some interpretations of the functional parent doctrine suggest that such formalities and clear indications of intent are unnecessary.<sup>54</sup>

If the requirement that the extant parent agree to the formation of a “parent-child relationship” is included in the functional parent test as a way of evaluating the quality of the relationship between the functional parent and the child (*B* and *C*), not the degree of legal authority that *A*, the extant parent, is ceding, other questions emerge—particularly why the relationship must have developed “for reasons primarily other than financial compensation” and during a period of cohabitation.<sup>55</sup> The ALI and various courts have at times suggested that the question of whether the extant parent has agreed to let a parent-child relationship develop is really about assessing the bond between the non-parent and child; yet, plenty a paid caretaker have developed deep, important bonds with their charges, bonds that may well be more emotionally satisfying to a child than a bond with a non-residential, or even residential, legal parent.<sup>56</sup> As scholars of the African-American community have documented, neighbors and non-resident relatives—two groups that the ALI specifically excludes from *de facto* parenthood claims—have often served critical roles for and developed important bonds with African-American children.<sup>57</sup>

53. See Katharine K. Baker, *Asymmetric Parenthood*, in *Reconceiving the Family* 121, 121 (Robin F. Wilson ed., 2006) for a full explanation of the asymmetric treatment of rights and obligations under the ALI Proposed Rules. “Put simply, the Principles significantly expand the class of people entitled to parental rights; while barely altering the traditional rules regarding who should be responsible for children.” *Id.*

54. This means that currently, through standard statutes of frauds, the law requires more formality when one alienates one’s property rights in land or enters into a contract for more than a year, than it requires when entering into an agreement to co-parent a child for eighteen years. See *e.g.*, U.C.C. § 2-201 (AM. LAW INST. & UNIF. LAW COMM’N 2015) (Statutes of Frauds requiring all contracts for land and for services for more than a year to be signed and in writing).

55. See ALI Principles, *supra* note 49, § 2.03(c)(ii).

56. When my two children were each young, between three and twenty-seven months, they were cared for by a loving, wonderful babysitter. During that time, especially after I had stopped nursing, I would have been hard-pressed to prove that their bond with me was stronger than their bond with their babysitter, and I am quite sure I would not have been able to establish that their bond with their father was stronger than their bond with their babysitter. And he was an involved, residential parent. Imagine how much stronger many children’s bonds are with consistent paid caretakers than with legal parents who live elsewhere or work constantly or travel often or have other children in other families who demand much of their time. If the functional parent doctrine excludes paid caretakers, but guarantees rights to the legal parent, it is doing something other than protecting the emotional bonds that a child forms.

57. Dorothy E. Roberts, *The Genetic Tie*, 62 U. Chi. L. Rev. 209, 270–72 (1995) (African-American women have shared parenting responsibilities with friends, neighbors, and distant family members since slavery); ANDREW Billingsley, *Climbing Jacob’s Ladder: The Enduring Legacy of African-American Families* 29–30 (1992) (African-American communities have often taken collective responsibilities for children).

There is no evidence that the existence of payment between *A* and *B*, or the absence of a shared residence between them,<sup>58</sup> necessarily reduces the quality of the relationship between *B* and *C*.<sup>59</sup> A single parent concerned about her own autonomy is better off paying someone to develop a parent-child relationship with her child than letting another adult love the child of her own accord. This is a bit odd on its face and it does not protect what the courts say they are protecting, which is the bonds that children have formed with various adults.

What follows is a survey of most of the major functional parenthood cases involving same-sex parents. What it suggests is that when intent to co-parent is clear, when *A* and *B* mutually express an intent to share legal co-parentage, courts most readily adopt the functional parent doctrine.<sup>60</sup> When intent is less clear, when *A* and *B* are conflicted or confused or just noncommittal about their intent to share legal rights and obligations, courts are wary of accepting the legitimacy of or applying the functional parent doctrine, even if *B* really did seem to function like a parent to *C*.<sup>61</sup> Some courts, though, have been more willing to find function in the absence of intent.<sup>62</sup> What these courts care about is the relationship between *B* and *C*.

#### *A. Function and Strong Intent: A and B Clearly Agree to Co-Parent*

The paradigmatic functional parent cases, decided fifteen to twenty years ago, use a court's equitable power to expand the class of people who may petition for custodial or visitation rights. The lesbian couple in *Holtzman v. Knott*,<sup>63</sup> the first de facto parent case mentioned above, were together for ten years. They had a commitment ceremony fifteen years before any state recognized same-sex marriages and one of them gave birth to a child five years before the state they were living in recognized second parent adoption. The ability of this couple to register their intent to be legal co-parents was substantially hampered by the absence of formats for them to register their intent. At that time,

58. Perhaps the cohabitation requirement is a proxy for a sexual relationship between two adults, but there is comparably little evidence that having sex with one's co-resident makes someone a better or more bonded parent.

59. Legal parents who have never shared a residence with their children routinely develop bonds which the law then protects regardless of the quality of the bond. Indeed, the law protects that legal relationship regardless of the existence of a bond.

60. See *infra* Part IIA.

61. See *infra* Part IIB.

62. See *infra* Part IIC.

63. *Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995).

trying to register one's intent to be legally recognized as a parent to one's non-genetic, non-marital child was akin to trying to register one's intent to be a third spouse or a third parent to a child who already had two parents. There was just no way to do it.

The couple in *Holtzman* nonetheless gave the child a surname that combined their two last names and listed each other as parents on the child's baptism certificate. At the baptism, the non-birth mother's parents were formally, if not legally, recognized as grandparents. The couple lived together with the child for five years. After they split, the non-genetic "parent" petitioned for visitation rights. The Wisconsin court enunciated the de facto parent doctrine.

One year after *Holtzman* was decided, the Pennsylvania Supreme Court decided a case in which a lesbian couple went out of their way to establish intent to be legal co-parents notwithstanding the absence of registration formats in which to do so. The couple in *JAL v. EPH*<sup>64</sup> enlisted an attorney while the genetic mother was pregnant. The attorney helped them execute guardianship documents, medical consents, and wills. The parties each signed documents stating that they "jointly made the decision . . . [to] conceive and bear a child that we would then jointly raise. It is our intention that [the non-genetic mother] will establish from birth a loving and parental relationship." The birth mother signed documents stating "[w]e intend to raise the child together as a family."<sup>65</sup> The couple separated when the child was less than a year old, but the evidence of intent to be treated as co-parents by the law was so strong that the Pennsylvania Supreme Court did not have to rely on any "established strong psychological bonds" between the child and the non-legal parent.<sup>66</sup> That would have been difficult in this case because the child was so young and the partner was not the one who took maternity leave or reduced her work schedule to care for the child. Clear intent to share legal parenthood was all the court needed to grant parental rights.

Four years later, in *ENO v. LLM*, the Massachusetts Supreme Judicial Court allowed a non-genetically related partner to claim de facto parent status based on her relationship with an almost four-year-old child.<sup>67</sup> The couple, who had been together for 13 years, gave the child a surname consisting of both of their surnames, listed both parents'

64. *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1316 (Pa. 1996).

65. *Id.* at 1317.

66. *Id.* at 1320-21.

67. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 889, 893 (Ma. 1999).



names on the birth announcement and, both before and after the child was born, “executed a co-parenting agreement in which they expressly stated their intent to co-parent,” including a provision agreeing that the non-genetic mother retain parental status in the event the couple separated.<sup>68</sup> The couple had started the legal adoption process, but they separated a month after they started.

All three of these cases were decided before the ALI drafted its final Principles of Family Dissolution. They were all cited by the ALI in its explanation for why it endorsed the de facto parent doctrine.<sup>69</sup> Many of the cases that have followed in their wake have used a functional test on facts comparable to those in the original cases, function with quite clear indications of intent to share legal parentage.

In *Rubano v. DiCenzo*,<sup>70</sup> the Rhode Island Supreme Court granted visitation rights to a non-legal parent based on the couple’s four years of living together with the child, three years of sharing visitation, and a jointly executed, judicially approved visitation schedule in which the legal mother agreed that her ex-partner should have “permanent visitation with [the child]’ on a periodic basis.”<sup>71</sup> The birth mother invoked her constitutional rights as a parent to try to alter the visitation schedule, but the court held that the legal mother’s constitutional rights were “less exclusive and less exclusionary” because of her “conduct in allowing [her partner] to assume an equal role as one of the child’s two parents, and by her conduct in agreeing to and signing an order that granted [her partner] ‘permanent visitation’ rights.”<sup>72</sup> In *Frazier v. Goudschaal*, the Supreme Court of Kansas granted a same-sex partner standing to sue for visitation in part because of a signed co-parenting agreement that the court did not enforce per se, but which it said showed proof of intent to share constitutional rights.<sup>73</sup> The New Hampshire Supreme Court recently bestowed standing rights on an ex-partner who had functioned as parent and who had also been appointed as the child’s guardian (a legal proceeding requiring the consent of

68. *Id.* at 889.

69. ALI Principles, *supra* note 51, §§ 2.03 cmt. b, 2.04 cmt. d.

70. 759 A.2d 959 (R.I. 2000).

71. *Id.* at 962.

72. *Id.* at 976.

73. *Frazier v. Goudschaal*, 295 P.3d 542, 557 (Kan. 2013) (“If a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference, then that parent should have the right to enter into a co-parenting agreement to share custody with another . . .”).

the legal mother) prior to the couple breaking up. The couple had been advised by a lawyer that they should not pursue adoption.<sup>74</sup>

*B. Function and Questionable Intent: A and B May Not Agree*

When the evidence of intent is less clear, courts are far less willing to rely on function. Janice M. and Margaret K. lived together in Maryland for eighteen years.<sup>75</sup> Thirteen years into their relationship, in 1999, Janice, who had always talked of wanting children and unsuccessfully tried to become pregnant through in vitro fertilization, traveled to India to adopt a child. Margaret did not adopt the child from India, possibly because Indian law did not permit two people of the same sex to adopt. Margaret never attempted to adopt the child in Maryland.<sup>76</sup> The two women never executed any other documents suggesting intent to co-parent. They divided childcare responsibilities for the child while they lived together, but they separated when the child was five years old. The couple had “functioned” as parents just as long as the parents in *Holtzman* and far longer than the parents in either *JAL* or *ENO*, but the Maryland Supreme Court expressly rejected adopting the de facto parent doctrine. It did so in a case in which it was the express intent to co-parent—not the functional parenthood—that was missing. This past summer, the Maryland Supreme Court overruled *Janice M. v Margaret K* and adopted the functional parent doctrine, but, as discussed below, it did so in a case in which the evidence of intent to co-parent was explicit and written.<sup>77</sup>

In *A.H. v. M.P.*, the Massachusetts Supreme Judicial Court—seven years after using the de facto parenthood standard to grant rights in *ENO*, and four years after being the first state to recognize same-sex marriage—declined to apply the doctrine in a case in which intent was

74. *In re Madelyn B.*, 98 A.3d 494, 496 (N.H. 2014). As second parent adoption became more widely available to same-sex couples, courts began to look to the absence of adoption as a reason to reject application of the functional parent doctrine. See *infra* notes 79, 80 and accompanying text for a discussion of *A.H. v. M.P.*, 857 N.E.2d 1061 (Mass. 2006) and *Debra H. v. Janice M.*, 930 N.E.2d 184 (N.Y. 2010). The court in *Madelyn B.* may have thought it important that this couple contemplated but had been advised not to pursue the only formal path to legal co-parentage.

75. *Janice M. v. Margaret K.*, 948 A.2d 73, 75 (Md. 2008).

76. *Id.* While some same-sex couples had been allowed to adopt in Maryland since 1996, the state’s supreme court had never officially condoned the practice. *Id.* at n. 3. Nonetheless, in deciding this case, the Supreme Court of Maryland noted that discrimination against adoptive parents on the basis of sexual orientation is explicitly forbidden. *Id.* at 87. It seems likely that the court included this aside because it was concerned about the absence of any attempt by Margaret to adopt the child in Maryland.

77. *Conover v. Conover*, 141 A.3d 31, 33 (Md. 2016).

extensively contested.<sup>78</sup> The couple in *A.H.* had been together for five years when the birth mother conceived with sperm from a sperm donor that both women planned on using to get pregnant. The partner attended parenting classes, was listed as a parent on fertility clinic forms, and was authorized by the birth mother to make medical decisions for the child. No other formal indicia of intent to co-parent were executed. The parties initiated adoption proceedings and had a lawyer prepare all of the necessary papers, but the partner repeatedly failed to execute them, explaining that she did not like being nagged about it.<sup>79</sup>

The partner took a two-month parental leave when the child was first born and performed many caretaking functions. She returned to work after two months and soon became engrossed in an attempt to save her employer from a financial crisis. She spent much less time at home, but she was the sole source of financial support for the household. The genetic mother felt abandoned by her partner, and the relationship deteriorated. The couple split when the child was eighteen months old.

Relying on the trial court's findings that the partner had not contributed as much or as well to the child's care and that the partner could not prove that continued contact would be in the child's best interest, the Massachusetts Supreme Judicial Court rejected the functional parent claim. This is a curious holding. If the partner in *A.H.* had been an unmarried genetic father of the child, his decision to take parental leave for two full months would be celebrated as showing extraordinary commitment to the child. His decision to return to work in order to support the child's household would be both normative and noble. By almost all definitions of responsible fatherhood, the partner in *A.H.* was functioning as a parent, she was just not acting like a mother . . . and there was very ambiguous evidence regarding her willingness to share legal co-parentage, at least prior to her lawsuit.

Four years later, in *Debra H. v. Janice R.*,<sup>80</sup> the New York Court of Appeals reaffirmed an earlier holding, *Alison D. v. Virginia M.*,<sup>81</sup> in

78. *A.H. v. M.P.*, 857 N.E.2d 1061, 1065 (Mass. 2006).

79. *Id.* at 1066 (she testified to this even though other people testified that they had informed the couple about how important it was for them both to adopt).

80. 930 N.E.2d 184, 194 (N.Y. 2010).

81. 572 N.E.2d 27, 33 (N.Y. 1991). In this case, the court refused standing to a same-sex partner who had lived with the mother and child for the first two years of the child's life and then visited the child pursuant to a negotiated visitation schedule for another two years. *Id.* at 28. The court held that it was the legislature's job to determine who should have standing to cut into a fit legal parent's constitutional rights to parent. "While one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did

which it declined to adopt functional parenthood.<sup>82</sup> In rejecting a functional approach, the court emphasized that second-parent adoption was available,<sup>83</sup> and that functional tests are “complicated and non-objective.”<sup>84</sup> It noted the wide variety of ways different state legislatures have dealt with the question of third-party standing for visitation rights.<sup>85</sup> It then held that it was the job of the New York legislature to determine when and how much functional parenthood should suffice to confer standing.

This year, concerned about how same-sex parent families may have been hurt by their rejection of expansive paths to parentage, the New York Court of Appeals overruled both *Debra H.* and *Alison D.*, but it did not adopt the de facto parent doctrine. Instead, the court held, in *Brooke S.B. v. Elizabeth A. C.C.*,<sup>86</sup> that if a party can prove “by clear and convincing evidence” that “the parties entered into a pre-conception agreement to conceive and raise a child as co-parents,”<sup>87</sup> then that party has standing to pursue parental rights.

As mentioned, the Maryland Supreme Court was also recently asked to revisit its rejection of the functional parenthood. Unlike New York, it chose to adopt the functional parent doctrine in overturning *Janice M.*,<sup>88</sup> but it did so in a case in which it could have let intent, not function, determine parentage. In *Conover v. Conover*, there was a document, written in the legal mother’s handwriting, dated three months after the child was born and well before the couple broke up, stating that both parties “verified” that they agreed to “joint custody.”<sup>89</sup> That document, with its obvious manifestation of intent, suggests that *Conover* belongs in Part IIA of this essay, cases in which courts adopted a functional approach when there were clear indications of intent. It is in Part IIB because it explicitly overrules what had been one of the leading rejections of the functional parent doctrine. What is most con-

not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so.” *Id.* at 29.

82. *Id.* at 29–30.

83. *Debra H.*, 930 N.E.2d at 190–91. The legal parent is “entitled[d] . . . to refuse to allow a second parent adoption, as Janice R did, even if they have permitted or encouraged another adult to become a virtual parent of the child.” *Id.* at 193.

84. *Id.* at 192.

85. *Id.* at 193–94 (citing state statutes from D.C., Oregon, Wyoming, California, Virginia, Colorado, Minnesota, Texas, and Indiana, all of which have different provisions detailing when and in what circumstances non-parents can have standing to challenge a parent’s parental rights).

86. 2016 WL 4507780 (N.Y. Aug. 30, 2016).

87. *Id.* at 25.

88. *Conover v. Conover*, 141 A.3d 31, 49 (Md. 2016).

89. *Id.* at 33.

cerning about *Conover*, however, is how, unlike New York, the Maryland court minimized the importance of intent and went out of its way to emphasize the primary importance of the relationship between the functional parent and the child. Like the cases to be discussed in Part IIC, *Conover* focuses on “bonding” and the “essentially . . . parent[al]” “psychological” relationship between the child and the functional parent.<sup>90</sup> As Part IIC explains, this emphasis on the strength of the *B-C* bond charts a problematic course.

### *C. Holding Out and The Relationship Between B and C*

Some courts have been willing to find functional parenthood notwithstanding the absence of clear intent to share legal co-parentage. The New Jersey Supreme Court, in *V.C. v. M.J.B.*,<sup>91</sup> granted an ex-partner standing to petition for visitation of twins because she had become a “psychological parent.” The ex-partner had lived with the twins for four years, engaged in public “family” activities, (joining the LAMBDA family organization, going together to family gatherings), and participated in a (non-legally-binding) commitment ceremony with the twins’ mother after the twins were born.<sup>92</sup> The most significant formal action that might have indicated intent to co-parent was the opening of bank accounts for each twin, with each adult taking custodial duties for one of the twins.

While acknowledging that the “legal parent must consent and foster” the “parent-child relationship” between the third party and the child, the New Jersey court explained that the critical question is not whether the legal parent consented to share legal rights, but whether

90. *Id.* at 43–44.

91. 748 A.2d 539, 539 (N.J. 2000).

92. *Id.* at 542–44, 551–52. The couple also opened joint bank accounts for household expenses and prepared wills, powers of attorney and life insurance policies mutually naming the other as legal surrogates. These legal documents attest to their commitment to each other, but not necessarily the extant parents’ agreement to share legal rights to the child. Commitment to each other, unless expressly related to children, does not trigger obligations to children. If it were otherwise, then step-parents would routinely be held responsible for child support. In practice, step-parents are found responsible only rarely. New Jersey has been particularly clear on this point. *See Miller v. Miller*, 478 A.2d 351, 35758 (N.J. 1984) (refusing to impose child support obligation on a step-parent for fear of discouraging men from marrying a woman with children). Over time, a step-parent can acquire rights and responsibilities, but usually only if he or she has explicitly agreed to accept responsibility and/or if the extant parent and children have reasonably relied on the step-parent. *See* ALI Principles, *supra* note 51, § 3.03(1) (imposing child support obligation on a cohabitant, non-parent only if there was “affirmative conduct [indicating an] . . . agreement . . . to assume a parental support obligation,” and even then only in “exceptional” circumstances.).

she allowed the development of a “profound bond with the child.”<sup>93</sup> The Court found that the bond between the partner and the twins was strong enough to award visitation to the non-parent,<sup>94</sup> though it felt the need to explain that its “profound bond” approach would exclude the “paid nanny or babysitter.”<sup>95</sup> Again, it is not clear this makes sense. Most parents choose a particular nanny or regular babysitter precisely because they think that person will develop a deep bond with the child. That is what makes her a good nanny.

In other cases demonstrating weak intent, courts have relied on the “holding out” provision of their state parentage acts. This kind of provision, one of several alternatives the Uniform Parentage Act (“UPA”) offers as a means of establishing a presumption of paternity in the absence of marriage, suggests that if a man takes a child into his home and holds himself out as the father of the child, the law can presume legal fatherhood.<sup>96</sup> In *Elisa B v. Superior Court*,<sup>97</sup> the California Supreme court relied on California’s version of this provision to find a same-sex partner liable for child support of twins, one of whom was severely disabled, even though the same-sex partner left (with her own child), when the twins were twenty months old. The parties never registered as domestic partners (though they could have), nor did they co-adopt the children, nor did they execute any co-parenting agreements. They did give all three children last names that combined the partners’ surnames, and the woman who was not the birth mother of the twins listed all three children as dependents on her tax return.<sup>98</sup>

More recently, in *Chatterjee v. King*,<sup>99</sup> using particularly broad language, the New Mexico Supreme Court granted an ex-partner the op-

93. *M.J.B.*, 748 A.2d at 551–52.

94. Notably, this holding required overturning the trial court’s finding that even if the partner had standing, awarding visitation would not be in the best interest of the child because so much time had passed, new attachments had developed and the relationship between the two adults had deteriorated. *See infra*, text accompanying note 156.

95. *M.J.B.*, 748 A.2d at 552.

96. UNIF. PARENTAGE ACT, § 204(a)(5), p. 14 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2002) (“A man is presumed to be the father of a child if . . . for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.”).

97. *Elisa B. v. Superior Court*, 117 P.3d 660, 663, 670 (Cal. 2005).

98. *Id.* at 663. It is not clear that it was legal for Elisa B. to do this. The IRS requires that a dependent be related to the person claiming him or her, at least by marriage. *See Personal Exemptions and Dependents*, INTERNAL REVENUE SERVICE, [https://www.irs.gov/publications/p17/ch03.html#en\\_US\\_2015\\_publink1000170876](https://www.irs.gov/publications/p17/ch03.html#en_US_2015_publink1000170876) (last visited Oct. 3, 2016). Until this case was decided, the twins were not legally related to Elisa B. and Elisa B. was not legally related (i.e., married or in a domestic partnership) to their mother.

99. 280 P.3d 283 (N.M. 2012).

portunity to establish parentage under New Mexico's holding out provision because "she has held [the child] out as her natural child from the moment the child came into the lives of both the adoptive mother and the presumptive mother."<sup>100</sup> The legal mother had adopted the child from Russia by herself (Russia would not have permitted two parents of the same sex to adopt) and Chatterjee did not try to adopt the child in New Mexico. The child was four years old when the couple split and the court relied completely on the holding out provision.

As had the California court in *Elisa B*, and as have several other courts, the New Mexico court in *Chatterjee* felt the need to address whether a woman (as opposed to a man) could establish a presumption of parenthood based on a holding out provision.<sup>101</sup> Courts tend to view this as a question of gender equality. What these courts fail to recognize is that the crucial distinction is usually not based on the gender of *who* is holding the child out as her own, but on *how* the extant parent became a parent. A more in-depth analysis of the UPA explains why.

The holding out presumption, section 204 of the UPA, has been part of the common law and the UPA for decades.<sup>102</sup> But, like all of the first six articles of the UPA, it is meant to apply only to children conceived through intercourse.<sup>103</sup> All states and the UPA treat the parentage of children conceived through intercourse differently than the parentage of children conceived using reproductive technologies.<sup>104</sup> Comparably, an entirely different uniform act, the Uniform Adoption Act,<sup>105</sup> governs parentage for children who are adopted. Neither Article 7 nor 8 of the UPA—which govern reproductive technologies—nor the Adoption Act have any presumptions of parenthood because

100. *Id.* at 293.

101. *Id.* at 286 ("[W]e must now determine whether Chatterjee, as a woman, can establish a presumed natural parent and child relationship under [New Mexico's parentage act]."). See also *Elisa B.*, 117 P.3d at 665; *In re Madelyn B.*, 98 A.3d 494, 499 (N.H. 2014).

102. UNIF. PARENTAGE ACT, § 204 cmt. at 14–15 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002). The most recent revision of the Parentage Act clarified the previous holding out provision by making clear that the man must have lived with the child for at least two years (as opposed to for an indefinite period of time), but the idea that holding oneself out as a parent could give rise to a presumption of parenthood was part of the common law and has been part of the Uniform Parentage Act since at least 1973.

103. See Baker, *supra* note 10, at 117–18 (explaining how the UPA treats children conceived sexually and children conceived non-sexually differently).

104. See UNIF. PARENTAGE ACT §§ 701–809, pp 62–68 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002). Articles 7 and 8 of the UPA apply to "children . . . of assisted reproduction" and "gestational agreements" respectively.

105. UNIF. ADOPTION ACT prefatory note at 1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1994).

parenthood under those conditions is a question of intent, not genetic connection.<sup>106</sup>

The presumptions of parentage, as envisioned by the UPA, are designed to serve as proxies for genetic connection. That is why, at least for the first two years of a child's life, the presumptions can be rebutted with genetic evidence.<sup>107</sup> All states with a holding out provision have an accompanying provision that allows a presumed father to disprove his paternity with genetic evidence.<sup>108</sup> The UPA allows parentage to be "disproved" after even more than two years if evidence establishes that the mother and the presumed parent "neither cohabited nor engaged in sexual intercourse with each other during the time of conception."<sup>109</sup> The comments explain that this provision is logical because it would be "inappropriate for the law to assume a presumption known by all those concerned to be untrue."<sup>110</sup> Every extant parent in a same-sex parentage case could make this argument—that it is inappropriate for the law to presume parentage when that presumption could not reflect the genetic truth.<sup>111</sup>

106. See UNIF. PARENTAGE ACT §§ 701–809, pp 6268, p. 62 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002) The terms "intent" and "consent" are riddled throughout Articles 7 and 8 of the UPA, and through case law determining parentage in cases of non-coital reproduction. See also *infra* note 112.

107. UNIF. PARENTAGE ACT § 607(a) p. 47 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002). Section 607 does not explicitly mention genetic evidence, but a comprehensive reading of the UPA makes clear that the drafters believed that genetic connection should be the *sin qua non* of parentage for children conceived sexually. "[T]he existence of modern genetic testing obviates [the] old approach to the problem of conflicting presumptions when a court is to determine paternity. Nowadays, genetic testing makes it possible in most cases to resolve competing claims to paternity." *Id.* at § 204, cmt., p. 15.

108. See *e.g. infra* note 111 (discussing cases from a variety of states in which genetic evidence is used to try to disprove a parental presumption. The longer a man has been presumed a father, the less willing courts are to disrupt the presumption, but as those cases show, absent fraud on the mother's part, courts only let the presumption trump genetic evidence if a substantial period of time has passed).

109. UNIF. PARENTAGE ACT § 607(b)(1) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002).

110. UNIF. PARENTAGE ACT § 607, cmt. 48

111. Case law from both California and New Mexico suggest that Elisa B. and Chatterjee could have challenged the holding out presumption with genetic evidence, which would have indisputably established that they were not genetic parents. See *Pangilinan v. Palisoc*, 227 Cal. App. 4th 765 (Cal. Ct. App. 2014); *County of Orange v. Leslie B.*, 17 Cal. Rptr. 2d 797, 801 (Cal. Ct. App. 1993) (California cases allowing genetic evidence to disprove presumption of paternity). See *Tedford v. Gregory*, 959 P.2d 540, 545 (N.M. Ct. App. 1998); *State ex rel. Human Services Dep't v. Rawls*, 279 P.3d 766 (N.M. Ct. App. 2012) (New Mexico cases allowing use of genetic evidence to disprove presumption of paternity for children much older than the child in *Chatterjee*) for a discussion of *Chatterjee*. For sure, courts do not always allow genetic evidence to trump presumptions of parenthood, particularly when the child is older. See *e.g., In re Paternity of Cheryl*, 746 N.E.2d 488, 500–01 (Mass. 2001) (man who signed a VAP could not dis-establish paternity after eight years); *Watts v. Watts*, 337 A.2d 350, 352–53 (N.H. 1975) (divorcing husband could not use



There are no presumptions of parenthood under the assisted reproduction sections or the Adoption Act because there is no relevant “genetic truth” for the presumptions to be acting as proxies for.<sup>112</sup> Moreover, Article 7 of the UPA describes numerous instances in which a child conceived through assisted reproduction would have only one parent.<sup>113</sup> This is important because in functional parent cases, courts routinely invoke, as public policy, a preference that every child have two parents.<sup>114</sup> At least for children conceived non-sexually, the UPA envisions an alternative world in which single parenthood is legitimate. The Uniform Adoption Act views single parenthood as legitimate as well.<sup>115</sup>

#### *D. Summary*

By using the holding out provision and not the functional parent test, courts have avoided any inquiry into intent to co-parent, but they have also misunderstood the history and statutory context of that provision. As designed, the holding out provision, which is an inquiry into

blood tests to disprove fatherhood after 15 years); *Marriage of Sleeper*, 929 P.2d 1028, 1033 (Or. Ct. App 1996) (wife could not dis-establish husband’s paternity after leading husband to believe that he could safely develop relationships with the children), but the presumptions were designed to operate in tandem with a genetic regime, not instead of it.

112. UNIF PARENTAGE ACT § 704 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1994). Section 704(a) requires that a man who intends to be a parent of a child born through assisted reproduction to, together with the other intended parent, acknowledge that intent in writing. p. 64. Failure to indicate that intent to parent in writing does not preclude a later finding of parentage if the man “intend[ed] to be a parent of the child” and if “he and the mother openly held the child out as their own.” p. 65 But this provision appears to allow space for a court to find legal parentage in cases of death, not create a general presumption of parentage. The comments suggest that the failure to sign a consent will not preclude a finding of parentage for inheritance purposes under the Uniform Probate Code, but the comments make no reference to a general presumption of paternity for children conceived non-coitally. *Id.* If the drafters intended a holding out provision to operate for children whose parentage is determined under Article 7, in the same way the holding out provision operates for children whose parentage is determined under Article 2, it would be very odd not to provide a reference to § 204 in § 704(b). And it would be odd not to label §704 a presumption of parentage, just as is § 204. Instead, again, the language in § 704 relies heavily on the notion of intent. See §704(a) and cmt. to §704(b), p. 65. same-sex

113. See UNIF. PARENTAGE ACT §§ 702 cmts p. 63–64. (when an unmarried woman uses donor sperm); UNIF. PARENTAGE ACT§ 705 cmts., p. 64 (when a husband does not consent to his wife’s insemination); UNIF. PARENTAGE ACT § 706 cmts, pp. 66–67 when a husband’s original consent has been formally withdrawn or voided by divorce).

114. *Elisa B. v. Superior Court*, 117 P.3d 660, 669 (Cal. 2005) (stating that the paternity statute reflects a legislative preference for two parents); *Chatterjee v. King*, 280 P.3d 283, 292 (N.M. 2012) (citing New Jersey case, *In re Parentage of Robinson*, 890 A.2d 1036, 1039–42 (N.J. Super. Ct. Ch. Div. 2005), for the proposition that “the state has strong interest in ensuring that a child will be cared for, financially and otherwise, by two parents”).

115. See UNIF. ADOPTION ACT § 1-102, p. 7 (“Marital status does not preclude an individual from adopting”). See generally Herman, *supra* note 44.

function, was meant to serve as a proxy for genetic connection. In some of the same-sex parenting cases, courts are using it as a provision designed to protect the relationship between *B* and *C*. This approach may render *A*'s intent irrelevant. The majority's language in *Chatterjee*, and some of the language in cases like *Eliza B, M.J.B.*, and *Conover*, would appear to give a cohabitant parental rights in the name of protecting children's established bonds, notwithstanding clear evidence that the extant parent did not intend to share parental rights.<sup>116</sup> If the holding out requirement or the requirement that the legal parent "agree to the development of a parent-child relationship" is really about the quality of the relationship between the partner and the child (*B* and *C*), then presumably it would not matter if the extant legal parent (*A*) steadfastly refused to let the co-parent adopt, never executed any co-parenting agreement, or even secured an acknowledgment that neither of them expected the partner to assume the legal status as parent. The quality of the B-C relationship could be very strong in all these instances, notwithstanding *A*'s clear intent to parent alone. By suggesting that it is only the quality of the B-C bond that matters, courts are demanding that a single parent choose between living together with a romantic partner who might develop a relationship with the child and maintaining exclusive, constitutional rights to her child. They suggest she cannot have both.

This is a constitutionally problematic conclusion. One would think courts would be very wary of inferring an intent to waive constitutionally protected parental autonomy rights in the face of explicit, written documentation to the contrary, and wary of conditioning a romantic relationship on the diminishment of those rights.<sup>117</sup> The bulk of the cases described above probably suggest that this is an outlier concern. With such obvious evidence of intent not to share parental rights, most courts will not force the extant parent to share. That is, with clear evi-

116. *Conover v. Conover*, 141 A.3d 31, 46 (Md. 2016) (emphasizing "importance—for legal purposes—of a psychological bond between a child and non-parent . . ."); *Chatterjee*, 280 P.3d at 293 ("held [the child] out as her own natural child from the moment the child came into [her] lif[e] . . ."); *Elisa B.*, 117 P.3d at 670 ("received the children into her home and openly held them out as her natural children . . ."); *V.C. v. M.J.B.*, 748 A.2d 539, 552 (N.J. 2000) (court must protect "profound bond with child.").

117. As critics were quick to point out, it was the right to a romantic relationship, more than the sex, that the Supreme Court seemed so eager to protect in *Lawrence v. Texas*, 539 U.S. 558 (2003). See generally Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1400 (2004) (questioning how much freedom LGBT rights advocates gained in an opinion that reified traditional understandings of sexual relationships). Does a parent have to choose between the constitutionally protected relationship and the constitutional right to the presumption that one acts in the best interest of one's child?

dence of intent not to share, courts would probably sanction single parenthood. Thus, in practice, what may be emerging is a kind of opt-out system. A romantic partner who develops a close bond with a child will be granted legal status as a parent unless the legal parent has opted out—made clear that she does not want to share legal parenthood. *B* will be granted parental rights to *C* unless *A* has clearly insisted that she does not want to share those rights. The next section argues that an opt-in system, in which *A* and *B* mutually declare their intent to be parents, makes much more sense.

### III. THE CASE FOR AN OPT-IN SYSTEM

#### *A. VAPs as an Opting-in System*

Four years ago, in a symposium on modern illegitimacy, Professor Leslie Harris suggested the equivalent of an opt-in system.<sup>118</sup> She argued that same-sex couples should be afforded the same opportunities that unmarried, opposite-sex couples have to establish what would amount to written, signed, intent-based presumption of parenthood at birth. The federal government *requires* states to offer all opposite-sex genetic parents the opportunity to sign a Voluntary Acknowledgement of Paternity at birthing facilities and vital records offices.<sup>119</sup> These documents usually require that the parties aver that the male signatory is the genetic father, but (i) the federal law does not require an averment of genetic connection; and (ii) without genetic testing, there is no way for the man signing to know whether he is the genetic father or not.<sup>120</sup>

Once signed by both the mother and the acknowledging father, this Acknowledgement becomes a final judgment of paternity, one that can only be overturned on grounds of “fraud, duress or material mistake of fact.”<sup>121</sup> States differ on how they interpret fraud and mistake of fact, but in most states, if a man signs a formal acknowledgement knowing that he is not the genetic father, and lets sufficient time pass, regardless of whether he is actively involved in parenting, he cannot later move to disestablish his paternity.<sup>122</sup> Thus, the intent of the

118. See Harris, *supra* note 10, at 479–82.

119. 42 U.S.C. § 666(a)(5)(C)(ii) (2012).

120. See Baker, *supra* note 10, at 113–14, nn. 51–52.

121. 42 U.S.C. § 666(a)(5)(D)(iii).

122. See Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, & Class Inequality*, 2013 Mich. St. L. Rev 1295, 1330–33 (2013) (discussing cases in which a VAP has been treated as a final judgement).

mother and the acknowledged father when signing the acknowledgment, not genetics or function, often determines parentage.

At an almost infinitesimally small marginal cost, states could change the name—though not the acronym—on these forms from Voluntary Acknowledgment of Paternity to Voluntary Acknowledgement of Parenthood (“VAP”) and make them available to same-sex couples. In doing so, states would be affording same-sex couples an inexpensive, practical way of registering their intent to be co-parents with the state. States might vary in when and how they let a VAP’s presumption of parenthood be rebutted in same-sex relationships, just as states vary in how much they let presumptions of paternity be rebutted with genetic evidence.<sup>123</sup> But in one short, signed document, there would be ample evidence of mutual intent to be legally bound to each other and the child. In the vast majority of cases, this would eliminate the need for a functional parent analysis. Courts would not have to muddle through an inquiry of whether *A* let *B* develop a parent-child relationship with *C* because *A*’s intent to share rights and *B*’s intent to accept responsibilities would be documented and registered with the state as soon as *C* was born.

For adoptive cases and in situations in which same-sex partners start their relationship after the child is born, states might want to allow the extant and intending parent to execute a VAP for some while after the child is born.<sup>124</sup> In this process, as with a VAP signed at birth, states would be free to limit—or to not limit—the number of adults who might register an intent to be parents.<sup>125</sup> Executing a VAP would be less invasive, less time-consuming and much less expensive than is second parent adoption. It would not have the full effect of an adoption, but it could at least create a presumption that the person who wanted to negate legal recognition of the parental status would have to overcome.

The strongest argument for letting this kind of registration program supplant the functional parent doctrine is probably that once

123. See *id.* at 1321–28, for a discussion of different approaches to rebutting the VAP presumption with genetic evidence.

124. States would not necessarily have to provide this option. States might insist that any co-parent that came to the family “late” adopt. All that would probably be required is that states afford same-sex co-parents the same amount of time they allow opposite-sex co-parents to register as parents.

125. Currently, only a few states have recognized more than two parents, but this system would allow states to do so if they wanted to. See Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. Ill. L. Rev. 319, 344 (2012).

such a program was in place, there would be no reasonable justification for not filling out such a form. As mentioned, every legal parent has executed a birth certificate or other vital record and registered it with the state. In doing so, legal parents signal that they have accepted the rights and responsibilities of legal parenthood. These rights include the right to make decisions on behalf of the child, that will impact one's own life, and rights to make decisions on behalf of oneself that will impact the child's. Almost every educational, religious, and medical decision made on behalf of the child is an example of the former. Decisions about what job to take, where to live, who to become involved with, and whether to move are examples of the latter. Both sets of rights are seriously impacted if there is another adult who has custody or visitation rights with regard to the child.<sup>126</sup> Why should a functional parent have an expectation that a court will help her exercise those competing rights if she, unlike her partner, has not registered with the state?

The idea that these rights and obligations can grow organically, as a function of the lived relationships between all the parties, such that the law has an obligation to recognize them *ex post* even if they have not been established *ex ante*, misconstrues the ongoing *parens patriae* responsibility that the state has for all children.<sup>127</sup> Children's inability to protect themselves necessitates the state assuming a role as guardian of all children's welfare.<sup>128</sup> The state always has a legitimate interest in any endeavor involving a child because the state has ultimate responsibility for ensuring children's wellbeing.

The primary way that the state protects children's welfare is by ensuring that some adult is assuming legal responsibility for the child.<sup>129</sup> Once that is done, the state affords that parent or those par-

126. See *supra* notes 28–31 and accompanying text.

127. The idea that the state assumes ultimate responsibility for children in a way that it does not assume responsibility for able-bodied adults extends back to Blackstone, who declared that the King's chancellor "is the general guardian of all infants, idiots and lunatics . . .", and has been delegated to the states in this country since at least 1890. 3 William Blackstone, *Commentaries on the Laws of England* \*47 (William D. Lewis 1902). See *Mormon Church v. United States*, 136 U.S. 1, 57 (1890) (explaining that the states assumed the paternalistic duties of *parens patriae*).

128. *Prince v. Mass.*, 321 U.S. 158, 165–166 (1944) (discussing state's *parens patriae* power with regard to children).

129. When an initial parent registers with the state, she assumes full responsibility for a child that starts life as a helpless, incredibly needy infant. For at least eighteen years, a parent or guardian is required to provide food, shelter, and care for that child. A parent must vaccinate her child, send her to school, keep her from hurting others. Failure to do these things, or go to the state to get permission not to do these things, leaves one subject to civil and sometimes criminal penalties. See Cullen Dirner, *Parents Face Fines, Jail Time for Failure to Immunize*, ABC NEWS (Nov. 14, 2007), <http://abcnews.go.com/Health/US/story?id=3866502&page=1>; Annette Fuentes, *The*

ents rights based on the view that the designated parent(s) will protect the child's welfare better than can the state.<sup>130</sup> A parent's romantic partner has no legal responsibilities at birth. She retains the right to walk away from the child. The cost of having that freedom is the burden of having to register when she wants to eliminate it. Other adults—grandparents, aunts, uncles, close friends—who want to step in to help the designated parent care for the child and share legal responsibility must register with the state as guardians.<sup>131</sup>

In suggesting that partners need not apply for guardianship in the way that other third parties do, partners ask a court to apply a kind of common-law-marriage doctrine to parenthood. Just as common-law-marriage litigants claimed that, because they acted like they were married, assumed some of the responsibilities of marriage, and held themselves out to the world as married, the law should treat them as married, so functional parents claim that, because they acted as if they were parents, assumed some of the duties of parenthood, and held themselves out as parents, the law should treat them as parents. Moreover, like common-law-marriage doctrine, functional parent doctrine grew up at a time when it was much harder than it is now for same-sex partners to co-register as legal parents with the state.<sup>132</sup>

The analogy works on the surface, but there is a huge difference between functional parent doctrine and common law marriage. It is plausible and legal for two adult parties to establish a life together “without any sanction by the State.”<sup>133</sup> It makes some sense to think of one's adult relationship to another adult as existing completely apart from any state status determination or license.<sup>134</sup> Parenthood is different. Because of its *parens patriae* interest, the state is intruding, sanc-

*Truancy Trap*, THE ATLANTIC, Sep. 5, 2012, at 4 (parents fined for their children's truancy); Catherine Pearson, *In This City, Parents Must Now Pay Up if Their Child is a Bully*, HUFFINGTON POST (May 4, 2016), [http://www.huffingtonpost.com/entry/in-this-city-parents-must-now-pay-up-if-their-child-is-a-bully\\_us\\_572a0604e4b096e9f08fc8e](http://www.huffingtonpost.com/entry/in-this-city-parents-must-now-pay-up-if-their-child-is-a-bully_us_572a0604e4b096e9f08fc8e).

130. See *supra* note 24.

131. See *The Basics: Becoming a Legal Guardian in New York State*, CROSS-BOUROUGH COLLABORATION, [http://www.herjustice.org/assets/pdfs/TheBasicsSeries\\_English/Becoming-a-Legal-Guardian\\_ENGLISH.pdf](http://www.herjustice.org/assets/pdfs/TheBasicsSeries_English/Becoming-a-Legal-Guardian_ENGLISH.pdf) (last updated 2002) for an example of how third parties must register to be guardians.

132. See Cynthia Grant Bowman, *Unmarried Couples, Law, & Public Policy* 22–23 (2010) (“Common law marriages were often found in the frontier territories and state, where institutions of civil government were inadequate.”).

133. See *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 894 (Cal. Ct. App. 1993) (cohabiting romantic partner explaining why she and her partner did not get married).

134. In the nineteenth century, some people embraced common law marriage as a legitimate rejection of civil authority and an intrusive state. See Michael Grossberg, *Governing the Hearth: Law & the Family in Nineteenth Century America* 89–90 (1985).

tioning, and mandating certain parental action from the start. It is neither reasonable nor plausible to expect otherwise. The *parens patriae* interest prevents anyone from raising a child without sanction from the state.<sup>135</sup>

Common law marriage doctrine waned—indeed almost fully died—as marriage licensing procedures became readily available for all. As much as some people may have wanted to live their lives free of state sanction, the “fraud and uncertainty” that the fact-bound functional common law analysis required,<sup>136</sup> and the messy, expensive litigation it produced<sup>137</sup> led most states to abandon it almost completely.<sup>138</sup> As the next section will show, functional parenthood doctrine has all of those same problems and more. It should become as rare as common law marriage claims.

### B. The Case Against Function

Many people will argue that even if a VAP program were in place, not all adults who develop parent-child relationships with the consent of the extant parent will avail themselves of the VAP system; therefore, equity will always demand that the courts protect established relationships for the sake of children. The state’s *parens patriae* responsibility may even demand this kind of equitable action because the state always has an interest in protecting children. That is probably right, but this article suggests that such equitable action should be reserved for circumstances that are truly exceptional, not circumstances in which the parties are ambivalent, conflicted, lazy, or just resistant to legalizing their relationship. A moderate public education campaign conduct-

135. As the Supreme Court carefully analyzed in *Prince v. Mass.*, there will always be tension between the states’ *parens patriae* interest and parental autonomy doctrine, but existence of one concern does not negate the other. 321 U.S. 158, 165–66 (1944).

136. See e.g., *Collins v. Hoag & Rollins, Inc.* 241 N.W. 766, 767 (Neb. 1932 ) (describing many common law marriage claims as attempts at blackmail); *Dacunzo v. Edgye*, 117 A.2d 508, 513 (N.J. 1955) (describing the statute eliminating common law marriage as necessary to ameliorate “mischief.”).

137. Cynthia G. Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 742–46 (1996). Bowman argues that the arguments against common law marriage, which emphasize administrative and judicial efficiency, must be balanced with the values served by recognizing it. *Id.* at 753. The same might be true with regard to balancing the administrative and efficiency difficulties with functional parenthood doctrine against children’s best interests. But for reasons explained below, children’s interests are very often not served by a messy, fact-bound doctrine that leads to divisive litigation, nor, given the ease of a potential VAP system, should such a doctrine be necessary.

138. Homer Clark, Jr., *The Law of Domestic Relations in the United States* 45 (2d ed. 1988) (all but thirteen states have eliminated common law marriage).

ed by the state with help from LGBT organizations could render ignorance of the VAP an unpersuasive defense as well.<sup>139</sup> As the arguments below demonstrate, functional parent claims, in addition to being internally confused about the nature of the intent inquiry, drain judicial and private party resources, imperil children's wellbeing, and asks judges to define family by looking back at what families have been.

### 1. Messy and Contested Facts

Functional parent claims are almost always bitter, fact-bound contests that leave the parties emotionally and financially depleted. Regardless of whether courts focus on A, B, or C, when courts look to the past behavior of the parties, in light of what is inevitably conflicting testimony from the parties about their previous intentions, devotions and actions, what courts get are protracted, ugly court battles with children at the center.<sup>140</sup> Defenders of functional parenthood correctly point out that inquiries into intent are often just as fact-based and indeterminate as inquiries into function,<sup>141</sup> but this is true only if the intent inquiry is based upon implicit agreements and undocumented facts. An inquiry into whether a couple has registered an intent to parent in a VAP could not be more efficient or clear-cut. The functional parent cases are anything but.

Consider the frustrations expressed by the courts in several of the cases already discussed. Quoting the lower court, the New York Court of Appeals in *Debra H.* noted that there were "many contested facts" and "the parties' submissions . . . differ[ed] substantially with respect to the nature and extent of [the partner's] relationship with [both parent and child]."<sup>142</sup> The New Jersey Supreme Court in *M.J.B.* described conflicting testimony from the parties with regard to whether the decision to have the children was mutual and who made substantive decisions for the children, as well as conflicting testimony from friends as

139. Ignorance of a putative father registry does not constitute a defense for genetic fathers who fail to register with the state. See *Lehr v. Robertson*, 463 U.S. 248, 264 (1983).

140. See *infra* Part IIIB1.

141. Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 Am. U. J. Gender, Soc. Pol'y 623, 659 (2012) ("[T]he issue of intent may not always be clear; former partners sometimes dispute each other's account of the extent to which they both agreed [to parent] . . ."). Indeed, I would argue that if they are involved in litigation, former partners *always* dispute the extent to which they agreed; that is why we need a VAP or some other objective evidence of intent.

142. 930 N.E.2d at 187–88.



to how much responsibility each partner assumed for the children.<sup>143</sup> The Court in *A.H.* described:

[A] factious course of litigation that, not including the present appeal, resulted in more than three years of legal proceedings, including, among other things, the filing of more than fifty motions, most substantive; dozens of motions hearings; two interlocutory appeals; the filing of a complaint for contempt; the imposition of sanctions; an eleven day trial; and an appeal to a single justice of this court.<sup>144</sup>

These kinds of contested disputes are not limited to same-sex couples. Opposite-sex couple relationships that involve functional parent claims have comparably messy facts.<sup>145</sup>

As Jenni Milbank has observed, the functional inquiry “falters in intra-family disputes . . . [when] . . . the court is confronted with conflicted—dysfunctional—individuals with contradictory accounts of who their family is and was.”<sup>146</sup> This dysfunction is understandable in light of the emotional trauma that parties feel when romantic relationships end, but the dysfunction often fuels a desire to litigate. Courts defend this litigation and their inquiry into the quality of the relationship between the functional parent and the child as being necessary to protect the child’s interests, but the process of inquiring often does more harm than good. High conflict legal disputes between parents are notoriously bad for children.<sup>147</sup>

Family law has learned this lesson before. Contested custody disputes following the advent of no-fault divorce, which Professor June Carbone referred to as “ground zero in the gender wars,”<sup>148</sup> left almost

143. *V.C. v. M.J.B.*, 748 A.2d 539, 543 (N.J. 2000). Imagine being a single parent by choice and being concerned about letting your partner attend to the needs of your children during a birthday party because you were worried that your friends might think you were not being the most important parent. Again, one would be better off hiring a babysitter.

144. *A.H. v. M.P.*, 857 N.E.2d 1061, 1068 (Mass. 2006).

145. *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 792 (Cal. Ct. App. 2014) (conflicting testimony about what a letter signed by the sperm donor suggesting he did not want to be a father meant with regard to future intent to parent); *R.M. v. T.A.*, 182 Cal. Rptr. 3d 836, 840–41 (Cal. Ct. App. 2015) (conflicting testimony regarding whether sperm donor knew mother was not using his sperm, what she was intending to do when she let him develop a relationship with a child for whom he was not a genetic father, and whether she asked him to be a father); *L.P. v. L.F.*, 338 P.3d 908, 909 (Wyo. 2014) (“The facts of this case are disputed”). See also *In re Madrone*, 350 P.3d 495, 496 (Or. Ct App. 2015) (“The parties present fairly divergent views of the facts.”).

146. Jenni Milbank, *The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family*, 22 *Int’l. J.L. Pol’y, & Fam.* 149, 150–51 (2008).

147. See Janet R. Johnston, *High Conflict Divorce*, 4 *THE Future of Children*, no. 1 (1994) at 170, 172; Frank F. Furstenberg, Jr. & Andrew J. Cherlin, *Divided Families* 106–07 (Harv. U. Press) (1991) (describing effects on children of stress created by conflictual relationship between parents). See generally Baker, *supra* note 24 at 1561–62.

148. June Carbone, *From Partners to Parents: The Second Revolution in Family Law* 180 (2000).

all judges and scholars in agreement that protracted litigation was bad for children. This largely explains the massive push for more mediation, collaborative divorce and clear rules that are easy to apply.<sup>149</sup> By embracing functional parent claims—albeit in an effort to provide a kind of equality for same-sex couples—courts and litigants seem to be ignoring one of the most important lessons of domestic relations law of the last fifty years: litigation, particularly litigation over children, imposes tremendous emotional and financial costs for no good reason.<sup>150</sup> Courts are not particularly good at deciding custody matters;<sup>151</sup> they do not like deciding custody matters;<sup>152</sup> and by the time protracted litigation reaches the court of last resort, whatever solution might have at first been in the best interest of the child, rarely is.<sup>153</sup> The trial courts

149. See Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values & Expectations Transform the Divorce Process*, 42 Fam. L.Q. 659, 662 (Fall 2008) for the push to mediation (referring to mediation as “the workhorse of family dispute resolution”) and Douglas E. Abrams, Naomi R. Cahn, Catherine J. Ross & David D. Meyer, *Contemporary Fam. L.* 93743 (3rd ed. 2012) for collaborative law. For the desire for clear rules, see the ALI Principles, explaining how the Best Interest of the Child test is “uniformly disparaged” for being “unpredictable” and therefore leading to “strategic behavior . . . [more] litigation . . . [and] expensive experts.” See *Introduction to ALI Principles*, *supra* note 49 at 2.

150. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law. and Succession Law*, 60 Tul. L. Rev. 1165, 1181 (1986) (the best interest standard’s indeterminacy increases litigation and the conflict that is harmful to children.). See generally Baker, *supra* note 113, at 319 for a discussion of how most areas of family law, property, division, maintenance and child support have all adopted more formulaic, less open-ended standards.

151. See David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 491 (1984) (It is not “possible to develop a state-prescribed view of children’s interests that does not mindlessly refer to the a majority’s (or the judge’s) preferences[.]”); Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. Davis L. Rev. 829, 846 (1989) (the best interest of the child standard lets medical and social service professional usurp the role that primary caretakers usually played in determining what is in a child’s best interest); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 16–28 (1987) (arguing that even if courts were capable of determining child’s needs, preferring them unfairly neglects the needs and entitlements of the parents involved).

152. See *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981) (“[I]n the average divorce proceeding intelligent determination of relative degrees of fitness requires a precision of measurement which is not possible given the tools available to judges.”).

153. In *V.C. v. M.J.B.*, the functional parent had not been involved with any decision-making for the child for four years by the time New Jersey Supreme Court decided the case. It is hard to believe that it was really in the child’s best interest for VC to again assume any sort of decision-making role. *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000). Two other renowned cases demonstrating this problem are *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) and *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986). In *Michael H.*, even people who may think that Michael H. should have had standing to assert some parental rights given his genetic connection and relationship to his genetic daughter, question the wisdom of him being able to do so by the time the Supreme Court decided the case. At that point, the child had been living with her marital parents and siblings for five years and had had no further contact with Michael. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 Wm. & Mary Bill Rts. J. 1011, 1044–45 (2003). In *Burchard*, the California Supreme Court announced that a court could not take into consideration a working mother’s schedule and need for paid child care when de-

in both *A.H.* and *M.J.B.* found that the best interest of the child would *not* be served by continued contact, despite the established relationship with the functional parent.<sup>154</sup> There was too much animosity and distrust between the parties and, by the time the litigation was resolved, any benefit gained by honoring the functional relationship was outweighed by the costs of exposing the child to so much vitriol. And, of course, after the passage of time, children in the center of these contests have often moved on to new families and developed yet another functional parent-child relationship.<sup>155</sup>

## 2. Defining Family

The more children spend time in different households, with different adults in different kinds of romantic and platonic agreements, the harder it will be for any “fact finding” to determine what a “functional family” is. This realization highlights the epistemological problem with functional parent doctrine: Asking judges to assess the quality of the relationship between the functional parent and the child to see if it is a “parent-child relationship” asks judges to determine what a family relationship is. It puts the power to define family in the hands of judges. Evidence from the cases to date suggest that when defining family, judges import heteronormative, dyadic and often genetic understandings of parentage that will ultimately undermine attempts to expand the legal understanding of parent.

termining the best interest of the child in a suit between a mother and father (with a new wife, who did not work outside the home). *Burchard*, 724 P.2d at 493. The problem was that the child had been living with his father and step-mother for over four years. However appropriate and ultimately fair the ruling in terms of vindicating the mother's rights, it is unlikely that a “best interest of the child” analysis and the mother's rights aligned by the time of the California Supreme Court's decision. What should control? Fairness to the parents or best interest of the child? If functional parent cases are about fairness between the adults, not protection of the child, then the operative question should be whether *A* has consented to *B*'s legal relationship, not whether there is a strong relationship between *B* and *C*. If they are about protecting the strong relationship between *B* and *C*, what should courts do when that relationship has waned because the adults split?

154. *M.J.B.*, 748 A.2d at 545 (the trial court “resolved that visitation was not in the children's best interests because *M.J.B.* harbored animosity toward *V.C.* that would ‘inevitably pass[] along to the children’”); *A.H. v. M.P.*, 857 N.E.2d 1061, 1073 (Mass. 2006) (emphasizing “the best interests of the child that is the paramount consideration” and justifying the refusal to extend rights to *AH* on that basis).

155. As Professor Millbank explains, in functional parent cases, courts are left to “address roles that . . . are no longer being performed, or no longer being performed in the same way, or are being performed by others[.]” Millbank, *supra* note 146, at 151.

*a. Romantic Relationships*

Every decision cited above mentions the length of time the adult parties were together as a romantic couple. No court has explained why that matters. Judges seem oblivious to the idea that one member of the couple might want to parent alone, or that the other member of the couple might not want to parent, while still remaining a romantic couple. This oblivion is somewhat understandable; after all, heterosexual couples who conceive the traditional way do not have the option of opting out or parenting alone. But same-sex couples do. Isn't it possible that two people were romantically involved but did not agree on whether, when, and how to raise a child? Isn't it possible that one of the parties went ahead with the pregnancy without any consensus on co-parenting because she knew her biological clock was ticking? Can't a couple discuss whose sperm to use, how to get pregnant, or what name to give, without agreeing to co-parent? Most of the functional parenthood cases suggest that having those discussions while living together implies a decision to co-parent, but many people have those discussions with friends and other family members with whom they have no intent to co-parent. Is it the co-habitation, or the romantic relationship, or the discussions about parenting that gives rise to the assumption that a couple is embarking on co-parentage together? Why?

On the other hand, some adults may want to co-parent even though they are not involved romantically. Having a romantic relationship with the other parent is what makes the person claiming parental rights "look like" and "function" like a parent, but that is only because some form of sexual relationship used to be necessary to conceive children. It no longer is.<sup>156</sup>

156. As Mary Ann Case noted about "coupling" in the days before same-sex couples could register their relationship as a domestic partnership or a marriage, functional analyses required same-sex couples to live very conservative lives in order to qualify for the legal benefits of coupling. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643, 1665 (1993). Married couples could live apart and sleep around and keep completely separate bank accounts and still be treated as married. Same-sex couples were not allowed such freedom. Comparably, married and genetic parents are free to gender their parenting or not, to allocate parenting to paid babysitters or not, to freely share responsibilities with friend and family or not, without ever putting their parental rights in jeopardy.

### *b. Two Parents*

Courts often justify their infringement on an extant parent's autonomy rights because the two-parent family, as they understand it, has faltered.<sup>157</sup> The Kansas court in *Frazier v. Goudschaal* explained that greater judicial interference is appropriate "after the *family unit* fails to function . . ." <sup>158</sup> Quoting a California case, the Court in *Chatterjee* explained that the holding-out provision was designed to protect the state's interest "in the integrity of the *family*."<sup>159</sup> What had failed to function in *Frazier*? Who was in the family that deserved integrity in *Chatterjee*? Most courts never contemplate the idea that there might be such thing as a complete, integrated family unit consisting of just one parent and child(ren). Courts routinely invoke a public policy in favor of each child having two parents,<sup>160</sup> but contemporary parentage acts recognize the realities of assisted reproduction technology and sanction a notion of a complete, integrated family unit with only one parent. Given the existence of those statutes and adoption laws allowing single adults to adopt, it is not at all clear that there is, much less should be, a clear public policy of assuming that each child has two parents.

### *c. Consent*

Judicial confusion about the ubiquity of two parents also emerges in discussions of a partner's "consent" to the pregnancy. Courts and advocates speak of the importance of the partner's "consent" to the mother's insemination.<sup>161</sup> Courts seem to presume that, because traditionally it was necessary to secure the consent of the husband before the wife was inseminated, it is somehow important that an unmarried same-sex partner consent to sperm insemination as well.

157. See David Meyer, *The Paradox of Family Privacy*, 53 Vand. L. Rev. 527, 580-81 (2000) (explaining that Supreme Court's respect for family privacy depends upon the degree of unity or fracture in the family unit without defining what the family unit is in the first instance).

158. *Frazier v. Goudschaal*, 295 P.3d 542, 552 (Kan. 2013) (emphasis added) (quoting *In re Marriage of Ross*, 783 P.2d 331 (Kan. 1989)).

159. *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Cal. Ct. App. 2003).

160. *Chatterjee v. King*, 280 P.3d 283, 292 (N.M. 2012).

161. See Shineovich v. Kemp, 214 P.3d 29, 39-40 (Or. Ct. App. 2009) (extending the artificial insemination statute so that it applies "when the same-sex [unmarried] partner of the biological mother consented to the artificial insemination"); Brief of 42 Law Professors et al. as Amici Curiae at 33, *Partenan v. Gallagher*, 59 N.E.3d 1133 (Mass. 2016) (No. SJC-12018) ("This Court should follow the decisions of other states and hold that an unmarried woman like in *Partenan* who consented to the conception of children through assisted reproduction and then lived with her children and held herself out as the children's parent can be a parent . . .").

Anyone familiar with parentage acts as a whole should recognize why this is a false analogy. The marital presumption of parentage makes the consent to insemination of a spouse, male or female, important because the birth of the child profoundly affects the legal rights and obligations of the mother's spouse. Because the marital presumption makes the spouse a parent at birth, that spouse should have to consent to his or her changed legal status. There is no comparable reason why a non-marital partner should have to consent because her legal rights and obligations do not change with the insemination or the birth.

As with the holding-out provisions, courts surmise that gender equality or sexual orientation equality principles necessitate equating the non-marital partner with a genetic parent or a spouse, both of whom become parents at birth. But that is the wrong analogy. The non-marital same-sex partner should be compared to a non-marital opposite-sex partner—whose consent is not required because his legal rights and obligations do not change.<sup>162</sup>

A romantic partner's decision to "agree" to her partner's insemination may be a question of private agreement between the partner and the birth mother regarding what the two of them intend with regard to future parental rights and obligations. It is not an agreement that the law requires, though it may be a contract that the law chooses to enforce. In doing so, courts would be recognizing contracts for parenthood. This is a controversial idea, one which some of the most progressive states have rejected,<sup>163</sup> but it is a perfectly coherent regime. It is a regime that would base parentage on the preconception intent of the parties to be contractually bound to each other as parents,<sup>164</sup> not on who functioned as a parent.

#### *d. Protecting the Sperm Donor*

By inviting judges to evaluate the quality of the parent-child relationship and the importance of that relationship to the child, the func-

162. An opposite-sex partner who manifested pre-conception intent to be a parent to child conceived through artificial insemination might be considered a parent. *See Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 288 (Cal. Ct. App. 1998). However, this finding was based on intent to parent, not consent to insemination. *Id.* at 293.

163. *See T.F. v. B.L.*, 813 N.E.2d 1244, 1251 (Mass. 2004) ("'Parenthood by contract' is not the law in Massachusetts, and, to the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child, that agreement is unenforceable.").

164. *See generally* Gregory Klass, *Intent to Contract*, 95 Va. L. Rev 1437, 1440-41 (2009) (contracts are enforced as such because of the parties' intent to be legally bound to each other).

tional parent doctrine also opens the door to what appears to be a bias in favor of protecting genetic relationships. This is a bias that will not inure to the benefit of same-sex couples. Time and again, courts have bent over backwards to protect a sperm donor's subsequent desire to be a parent, even if the mother does not intend him to be such. As Susan Boyd has suggested, when a sperm donor is involved, a man's professed intentionality to be a parent is much more likely to be honored than is the birth mother's intent that he not be a parent.<sup>165</sup> Jenni Millbank has observed that the introduction of a genetic father to a lesbian family is often "not seen to take away anything from the family . . . it only adds to it."<sup>166</sup>

In *Thomas S. v. Robin Y.*,<sup>167</sup> the New York court granted a sperm donor visitation rights in order to protect the parent-child "like" relationship that the child's mother (and her lesbian partner) had "let" develop. The quality of the relationship with the sperm donor was nothing like the intensive caretaking relationships that the functional parent doctrine usually protects, but that level of care was not necessary if there was genetic connection. In *Jason P. v Danielle S.*,<sup>168</sup> a California court refused to honor a written letter from the sperm donor in which he said he did not want to be a father. As is almost always the case, there was competing testimony about what this letter "meant" and how important and developed the sperm donor's relationship was with the child. Because there was a genetic connection and some established relationship, the court ignored intent. It is hard to believe that a court would have been as interested in protecting the rights of a same-sex partner who had so clearly, in writing, indicated an intent not to be a parent. In *E.E. v. O.M.G.R.*, both a sperm donor and the birth mother asked the court to enforce a preconception agreement that negated the sperm donor's paternity, but the New Jersey court refused because the insemination had taken place in private, without the help of a licensed physician, as the assisted reproduction statute required.<sup>169</sup> The court

165. Susan Boyd, *Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility*, 25 Windsor Y.B. Access Just. 63, 70 (2007).

166. Millbank, *supra* note 146, at 24 (emphasis removed).

167. 618 N.Y.S.2d 298, 306-07 (N.Y. App. Div. 1994).

168. *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 798 (Cal. Ct. App. 2014).

169. 420 N.J. Super. 283, 285 (N.J. Super. Ch. Div. 2011). The court relied in part on a renowned California case, *Jhordan C. v. Mary K., Victoria T.*, 179 Cal. App. 3d 386 (Cal. Ct. App. 1986) that also relied on the physician requirement. Other courts have done the same, usually in the face of challenges from the sperm donor. See *Bruce v. Boardwine*, 770 S.E.2d 774, 778 (Va. App. 2015). It is worth noting that the formality that these courts seem to think important in establishing or

refused to legitimate the single-parent family in the case of a known genetic donor even though both pre and post-conception intent for him not to be a parent were clear.<sup>170</sup>

### *e. Mothering*

Finally, the functional parenting cases have enabled or encouraged a reification of gendered parenting norms. In explaining the relationships it was trying to protect with the de facto parent standard, the ALI drafters emphasized that it was the emotional bonds created by physical caretaking, more than the financial dependence that might be created by a parent who provides financially, that were the most important to the child.<sup>171</sup> As applied, this has evolved into a gendered practice of courts being willing to protect lesbians' relationships with their children if they look like mothering, but not necessarily if they don't, while protecting men's relationships even if they conform to traditional male parenting norms.

In reviewing numerous functional parent claims brought between lesbians, Jenni Millbank notes the prominence of discussions regarding who breast-fed the children, an inquiry that is, for obvious reasons, completely absent in opposite-sex couple litigation.<sup>172</sup> As noted above, the Massachusetts court in *A.H.*, citing the ALI, declined to extend parental rights to a woman who had clearly acted like a father.<sup>173</sup> In a related line of semi-functional parenthood cases, collectively comprising what is known as the parenthood-by-estoppel doctrine, courts look to whether a mother should be estopped from using genetic evidence to disprove the legal paternity of a husband or partner.<sup>174</sup> In these cases, courts tend to spend much less time on the quality of the father-child relationship and much more time on the behavior of the mother.<sup>175</sup> If the mother misled the father into believing he was the genetic

disestablishing parentage would be readily found in an administrative VAP procedure that required state registration.

170. *E.E. v. O.M.G.R.*, 20 A.3d 1171, 1176–77 (N.J. Super. Ch. Div. 2011).

171. See ALI Principles, *supra* note 49 § 2.03 cmt. g. (physical caretaking is “likely to have a special bearing on the strength and quality of the adult’s relationship with the child.”).

172. Millbank, *supra* note 146, at 156–57.

173. See *supra* notes 78–79 and accompanying text.

174. See *e.g. In re Marriage of Gallagher*, 539 N.W.2d 479, 482 (Iowa 1995) (granting husband standing to estop mother from denying his paternity of a 2 year old without any evaluation of the quality of the father-child relationship); ; *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990) (mother estopped from denying husband’s paternity after telling husband he was the father of the child, who was less than two years old).

175. See *Gallagher*, 539 N.W.2d at 482; *Pettinato*, 582 A.2d at 912–913. See also, ALI Principles, *supra* note 49 § 2.03(1)(b)(ii) (defining parent by estoppel as someone who “had a reasona-



father or into believing that she would not challenge his paternity even though he was not the genetic donor, then courts are not as concerned with the strength of the “father-child bond” as the same-sex parenting cases are with the “other-mother-child bond.” A man who acts at all like a father can gain legal status much more readily than a woman who acts like a father.<sup>176</sup>

By inviting courts to evaluate the quality of the relationship between the functional parent and the child, by suggesting that the functional parent question is an inquiry into whether the *B-C* relationship is a “parent-child” relationship, courts are deciding what a parent is based on what a parent does. As should be no surprise to anyone familiar with modern parenting practice, parenting is very often still gendered. What a parent does and how a person parents closely aligns with gender.<sup>177</sup> The different assessments of the quality of the relationship in the parenthood by estoppel cases, which usually evaluate male parenting, and the *de facto* parent cases, which usually evaluate female parenting, reflect and possibly reify this reality.

Same-sex partner relationships, even if they involve parenting, tend to be less gendered than opposite-sex relationships,<sup>178</sup> but there are still clear household efficiencies involved in dividing parental responsibilities, especially when children are young.<sup>179</sup> It usually only makes sense for one parent to breast-feed and it often makes sense for one parent to assume a disproportionate responsibility for household

ble good-faith belief that he was the child’s biological father” and made a reasonable effort to accept responsibility as the child’s father, but not requiring any inquiry into the quality of the child-father relationship).

176. Usually, courts require that the legal father have been misled or acted under a good-faith belief that he was the genetic father, but that just begs the question of why. If the concern is protecting the functional bond between the functional father and the child, why does being misled or having a good-faith belief in a genetic connection matter?

177. See Katharine K. Baker, *The Problem with Unpaid Work*, 4 Univ. St. Thom. L.J. 599, 600 (2007) (describing the gendered nature of both paid and unpaid work). Mothers spend much more time caretaking than do fathers. Fathers spend more time providing than do mothers. See generally Suzanne M. Bianchi et al, *Changing Rhythms of American Family Life* 66 (2006) (mothers do twice as much child care as fathers).

178. See Sondra E. Solomon et al., *Money, Housework, Sex and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 Sex Roles 561, 572 (2005) (explaining that same-sex couples are less gendered in their divisions of labor).

179. See Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 Pepp. L. Rev. 359, 376–77 (2007) for the advantages of this kind of division of labor (exploring the advantages of specialization for the person who does more of the paid work, the person who does more of the unpaid caretaking and the household as a whole).

income.<sup>180</sup> Same-sex couples who rely on functional analyses may not be able to take advantage of these efficiencies.

Securing legal status as parents frees parties up to alter and expand the social practices and social meaning of parenthood. A VAP like registration system affords adults the freedom to parent in unconventional ways and thereby push the boundaries of parenthood forward. In contrast, functional parenthood doctrine looks backward to find out what the parties did and it then asks judges to evaluate that behavior against a standard of what parenthood has always been.

#### IV. CONCLUSION

The ultimate importance of the functional parent doctrine for same-sex couples probably depends on how many same-sex couples decide to marry before raising children together. If same-sex couples routinely marry first, co-parentage will be established at birth. Most opposite-sex couples do not have to marry first to establish co-parentage, but that is not because opposite-sex couples and same-sex couples are treated differently, it is because children born as a result of intercourse and children conceived non-coitally are treated differently. Unmarried opposite-sex couples are asked to register their legal parentage by signing a voluntary acknowledgement of paternity. Unmarried same-sex couples who intend to be co-parents should be asked to sign a comparable document.

In on-going functional parent litigation, parties and advocates are spending time and money trying to establish parentage for a few same-sex parents, on a case-by-case basis, by mapping those individual same-sex relationships onto traditional heterosexual parenting models of family. It is emotionally arduous work, taxing on all the parties involved. The same advocates could be spending time lobbying legislatures to open up the VAP system to same-sex couples. Even if courts need to retain some residual equitable power to recognize functional parents in some situations, far more same-sex parenting families will be legally recognized as such, and far fewer resources will be exhausted, if states adopt an intent-based registration system for all co-parents.

The VAP system endorsed here would be less invasive, less expensive, and much more progressive than the functional parent doctrine.

180. *Id.* (discussing couples' half-hearted attempts to think about whether the husband should assume primary caretaker responsibility).

An *ex ante*, intent-based parentage system contemplates and validates a single-parent family unit, even as it provides a means for more than one adult, regardless of genetic connection, to establish a multi-parent family. It avoids *ex post*, backward looking judicial evaluation of what parental roles have been and asks the parties themselves to look forward and declare what they want their family to be.