WHAT ROLE REMAINS FOR DE FACTO PARENTHOOD?

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ABSTRACT

Imagine you and your two-year old child move in with your parents, and you rely on them to care for her while you work several jobs at odd hours. After several years, you get into a fight about parenting, move out, and limit their time with your child. Should the law treat them as equal legal parents and allow a judge to decide how much grandparent visitation will benefit your child? Legal doctrines with this effect now appear in the Uniform Parentage Act (2017), the Uniform Nonparent Custody and Visitation Act, and the Restatement of Children and the Law. Under these de facto parenthood provisions, a nonparent can become a legal parent if the existing parent allows her to reside with, care for, and develop a relationship parental in nature.

De facto parenthood is either unnecessary, unwise, or unconstitutional. Many courts adopted it to protect same-sex parents from discriminatory parentage statutes, but the new parentage presumptions and assisted reproduction provisions apply irrespective of gender or sexual orientation. De facto parenthood is often duplicative of rules about abandonment, guardianship, de facto custody, and stepparent adoption, except its broad parentage standard sometimes undermines their well-established formal limits. The doctrine's only distinctive contribution concerns former co-residential caregivers. It empowers judges to decide whether it is best for a child to maintain ongoing relationships with a relative, cohabitant, or stepparent who helped care for the child alongside her parent. In these cases, de facto parenthood violates parents' constitutional rights. These parents consented to help, not to transfer their parental rights. Little evidence suggests that limiting a child's ongoing relationships with secondary caretakers is harmful. Although de facto parenthood was an essential bridge to protect children and parents from discriminatory parentage laws, the doctrine should have no ongoing role in contemporary parentage law.

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I. INTRODUCTION

Imagine you lose your job and the bank forecloses on your home so you and your child move back in with your parents. While you work multiple jobs at odd hours, your mother helps parent your child.[1] She drops him off at school, takes him to soccer practice, and puts him to bed. After a few years, you regain your financial footing and buy a home of your own. If over this time your child and his grandmother developed a "bonded and dependent relationship … which is parental in nature,"[2] then some states now allow your mother to seek custody or visitation as an equal legal parent.[3] As in any custody dispute between parents, a judge will decide what division of custody or visitation is in your child's best interests.

De facto parent provisions with this effect now appear in the Uniform Parentage Act of 2017 (UPA (2017)),[4] the Uniform Nonparent Custody and Visitation Act (UNCVA),[5] and the Restatement of Children and the Law.[6] Under these provisions, a nonparent becomes a de facto parent if the legal parent allows her to reside with, care for, and develop a parent-like relationship with the child.[7] The UPA (2017) treats de facto parents as equal legal parents with all the rights and responsibilities.[8] The UNCVA and the Restatement continue to label de facto

1. In 2011, Pew estimated 1.5 million children lived with both a parent and grandparent, and the grandparent reported being "currently responsible for most of the [child's] basic needs." Gretchen Livingston, *At Grandmother's House We Stay* 1-2 (Pew Res. Ctr. 2013), http://assets.pewresearch.org/wp-content/uploads/sites/3/2013/09/grandparents_report_final_2013.pdf [https://perma.cc/9SEK-5LSC]. In 2017, it found twenty-three percent of solo and four percent of married parents lived with grandparents. Gretchen Livingston, *The Changing Profile of Unmarried Parents* 9-10 (Pew Res. Ctr. 2018), http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/04/Unmarried-Parents-Full-Report-PDF.pdf [https://perma.cc/8XDV-WCYQ].

2. UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. LAW COMM'N 2017).

3. *See infra* note 58.

4. *See* UNIF. PARENTAGE ACT § 609(d) (UNIF. LAW COMM'N 2017).

5. UNIF. NONPARENT CUSTODY AND VISITATION ACT § 4 (UNIF. LAW COMM'N 2018).

6. RESTATEMENT OF CHILDREN AND THE LAW § 1.82 (AM. LAW INST. Tentative Draft No. 2, 2019).

7. *See infra* Section II.A (offering a detailed analysis of different tests).

8. UNIF. PARENTAGE ACT § 609(c) (UNIF. LAW COMM'N 2017).

parents as third parties, but allow courts to award them visitation or custody as if they were equal legal parents.[9]

De facto parent doctrines spread widely over the last twenty years, as courts and legislatures sought to alleviate discrimination against gay and lesbian parents.[10] Most of the seminal de facto parenthood cases have similar facts.[11] A committed lesbian couple agrees to conceive and raise a child together, which they do for several years until their relationship falls apart. Then the biological mother cuts off all contact between the child and the non-biological mother, who had no avenue to become a legal parent. Under state law, the paternity presumptions applied only to husbands or fathers, and only married couples could perform second-parent adoptions or enter preconception agreements.[12] Seeking to avoid this injustice and the devastating harm it would cause the child, courts used their equitable power to adopt a functional parent test that would treat the non-biological mother as a legal parent.[13]

There are hopeful signs that the tide has turned against discrimination in parentage law. While state law still needs substantial reform to accommodate same-sex families,[14] some states have revised their parentage laws to recognize same-sex parents, either on their own initiative[15] or under constitutional pressure from *Obergefell v. Hodges*.[16] A primary goal of the UPA (2017) is to revise parentage law to eliminate gender discrimination.[17] The UPA (2017) allows any non-biological parent, regardless of gender, to become a legal parent by satisfying

9. UNIF. NONPARENT CUSTODY AND VISITATION ACT § 4(a) (UNIF. LAW COMM'N 2018); RESTATEMENT OF CHILDREN AND THE LAW § 1.82, cmts. i-k (AM. LAW INST. Tentative Draft No. 2, 2019).

10. *See infra* notes 162-78. Some states first extended rights to functional parents for stepparents who had acted *in loco parentis*. *E.g.*, Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 12-17 (Neb. 1991) (collecting cases); Edwards v. Edwards, 777 N.W.2d 606, 608-09 (N.D. 2010). *See* Stephen Hellman, *The Child, the Step-Parent and the State: Step-Parent Visitation and the Voice of the Child*, 16 TOURO L. REV. 45, 51-56 (1999).

11. *E.g.*, *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995). *See infra* Section II.A.1.

12. *See infra* notes 185-91, 214.

13. Conover v. Conover, 146 A.3d 433, 453 (Md. 2016).

14. *See generally* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2316-2331 (2017) (describing continued difficulties that same-sex families face in establishing legal parentage).

15. *E.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 669-71 (Cal. 2005).

16. *E.g.*, McLaughlin v. Jones *ex rel*. Cty. of Pima, 401 P.3d 492, 494, 498 (Ariz. 2017).

17. UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017); Courtney Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 600-09 (2017) (describing changes made to avoid discrimination).

the marital[18] or residential presumptions,[19] by entering a preconception agreement to assisted reproduction[20] or surrogacy,[21] or by signing a voluntary acknowledgement of parentage after the birth.[22] Why, then, does the UPA (2017) need a de facto parenthood doctrine? Does this doctrine still have a viable independent role?

In this Article, I argue de facto parenthood is either redundant or unconstitutional. From a comprehensive survey of the case law, I identify six factual scenarios in which courts use de facto parenthood. The first four scenarios—preconception agreements, informal adoptions, misrepresentations about parentage, and child abandonment—overlap established rules of family law. In these cases, de facto parenthood is at best redundant and at worst in conflict with existing law. Its functional standard gives courts ad hoc discretion to avoid time limits for presumptions, formalities for agreements, and requirements of consent, unfitness, or abandonment for adoption. The final two scenarios—romantic partners or relatives who lived with a parent and assisted with childcare—are distinctive to de facto parenthood. When the adult relationship falls apart and the parent tries to limit the former caregiver's access to her child, this third party has no legal avenue for custody or visitation except through de facto parenthood.

As applied in its distinctive niche, de facto parenthood will often infringe upon parents' constitutional right to decide who may associate with their children. In *Troxel v. Granville*, the Supreme Court held states must presume parents make visitation decisions in their children's best interests.[23] States cannot order visitation with nonparents simply because judges disagree with parents about whether visitation will benefit the children.[24] Lower courts disagree about what third parties must prove to rebut this parental presumption: some adopt a harm standard and others raise the burden of proof on the best interests test.[25] Under either interpretation, the strong de facto parenthood doctrine conflicts with this parental presumption.

Nevertheless, courts and scholars have largely rebuffed constitutional objections to de facto parenthood. They rely on three arguments. First, they argue *Troxel* does not apply to de facto parenthood because under state law, the de facto parent is not a mere third party but a

18. UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. LAW COMM'N 2017).
19. *Id.* at § 204(a)(2).
20. *Id.* at § 703.
21. *Id.* at § 802(b).
22. *Id.* at § 301.
23. Troxel v. Granville, 530 U.S. 57, 68-70 (2000).
24. *Id.* at 68-69.
25. *See infra* Section II.B.2.

coequal legal parent with her own constitutional rights.[26] Second, they argue the legal parent consented to the parent-like relationship, so she exercised her parental authority and waived her right to exclude the de facto parent.[27] Last, they argue states have a compelling interest in preventing the psychological harm caused when a child loses parent-like relationships.[28]

The first argument is question-begging. Relabeling cannot solve the constitutional problem. If de facto parenthood is consistent with parental rights, it is not because states have unlimited power to redefine parentage in *ipse dixit* fashion. What matters is how and why states elevate caregivers to parental status. Consent and harm arguments can justify de facto parenthood in cases where the legal parent formed an express parenting agreement, as in most of the seminal de facto parent cases. The parent cannot object because she performed public acts with the intent to confer parental rights on her partner and encouraged her child to form parental attachments that would now be harmful to sever. Unfortunately, courts developed broad doctrinal tests that sweep in many cases where these reasons do not apply, as in most stepparent, cohabitant, or relative caregivers cases. Accepting caregiving assistance is not the same as agreeing to full parental status, even if the legal parent wants to share "parental" activities. Moreover, there is remarkably little evidence that a child is likely to suffer psychological harm if her parent ends her relationship with a former cohabitant or relative caregiver. States may grant third party rights if harm is proven in a specific case, but speculative and over inclusive generalizations about harm cannot justify elevating all de facto parents to full parental status.

The Article proceeds in three parts. Part II describes de facto parenthood doctrines and explains why elevating de facto parents to legal status implicates constitutional rights. Part III classifies the typical fact patterns in which courts invoke de facto parenthood, arguing this doctrine is redundant in most cases and necessary only when a parent lives with a romantic partner or relative and allows this person to care for her child. Part IV argues de facto parentage is unconstitutional as applied to former cohabitants or relative caregivers. De facto parenthood may have been essential to protect children from discriminatory parentage laws, but with reformed parentage law, de facto parenthood is either unnecessary or unconstitutional.

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26. *E.g.*, Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 336 (2017); *see infra* Section III.A.

27. *E.g.*, V.C. v. M.J.B., 748 A.2d 539, 553-54 (N.J. 2000); *see infra* Section II.B.

28. RESTATEMENT OF CHILDREN AND THE LAW § 1.82 cmt. e, Reporter's Note cmt. g. (AM. LAW INST. Tentative Draft No. 2, 2019). *See infra* Section IV.C.

II. DE FACTO PARENTHOOD'S CONSTITUTIONAL DIFFICULTY

The Supreme Court has recognized parents have a constitutional right to decide who has access to their children.[29] Yet, the de facto parenthood doctrine enables a third party who has fulfilled parental roles to receive custody or visitation over the parent's objection. This section describes the variety of de facto parenthood doctrines and their constitutional difficulties.

A. The De Facto Parenthood Doctrine and its Variations

Thirty-three states allow functional parents to obtain visitation or custody over the objection of a fit legal parent in some circumstances.[30] I will call all such doctrines de facto parenthood for now, although similar rules go under different labels, including "psychological parenthood," "equitable parenthood," or "in loco parentis."[31] (While labels matter little, I explain in Part III why there are good reasons to

29. Troxel, 530 U.S. at 66.

30. ME. REV. STAT. tit. 19-A, § 1891 (2015); OR. REV. STAT. ANN. § 109.119 (West 2019); S.D. CODIFIED LAWS § 25-5-29; VT. STAT. ANN. tit. 15C, § 501 (West 2018); WASH. REV. CODE ANN. § 26.26A.440 (West 2019); Evans v. McTaggart, 88 P.3d 1078, 1091 (Alaska 2004); Egan v. Fridlund-Horne, 211 P.3d 1213, 1221-22 (Ariz. Ct. App. 2009) (rejecting de facto parenthood but allowing visitation under *in loco parentis* statute); Bethany v. Jones, 378 S.W.3d 731, 737 (Ark. 2011) (recognizing *in loco parentis*); *In re* E.L.M.C., 100 P.3d 546, 554 (Colo. App. 2004); DiGiovanna v. St. George, 12 A.3d 900, 907-09 (Conn. 2011); Smith v. Guest, 16 A.3d 920, 931-32 (Del. 2011); A.A. v. B.B., 384 P.3d 878, 883 (Haw. 2016); A.C. v. N.J., 1 N.E.3d 685, 695-97 (Ind. Ct. App. 2013) (stepparents and former domestic partners may seek third party visitation); Frazier v. Goudschaal, 295 P.3d 542, 555-56 (Kan. 2013) (recognizing express co-parenting agreements); Mullins v. Picklesimer, 317 S.W.3d 569, 577-79 (Ky. 2010); Ferrand v. Ferrand, 221 So. 3d 909, 920 (La. Ct. App. 2016); Conover v. Conover, 146 A.3d 433, 453 (Md. 2016); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999); SooHoo v. Johnson, 731 N.W.2d 815, 823-24 (Minn. 2007) (construing Minn. Stat. Ann. § 257C.08 (2006)); McGaw v. McGaw, 468 S.W.3d 435, 447 (Mo. Ct. App. 2015); Kulstad v. Maniaci, 220 P.3d 595, 607-08 (Mont. 2009); Windham v. Griffin, 887 N.W.2d 710, 717 (Neb. 2016) (*in loco parentis* confers third-party standing); Nguyen v. Boynes, 396 P.3d 774, 778 (Nev. 2017) (for equitable adoption but not parentage presumptions); V.C. v. M.J.B., 748 A.2d 539, 551-52 (N.J. 2000); *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490-91 (N.Y. 2016) (preconception agreement); Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010); Edwards v. Edwards, 777 N.W.2d 606, 608-09 (N.D. 2010) (visitation or physical custody but not decision-making authority); *In re* Mullen, 953 N.E.2d 302, 308 (Ohio 2011) (by agreement to share custody, inferred from conduct); Ramey v. Sutton, 362 P.3d 217, 221 (Okla. 2015) (preconception agreement for same-sex committed couple unable to marry); T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001) (*in loco parentis* doctrine); Rubano v. DiCenzo, 759 A.2d 959, 961 (R.I. 2000); Marquez v. Caudill, 656 S.E.2d 737, 745 (S.C. 2008) (child had no legal parent); Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006); *In re* Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995). West Virginia is difficult to classify: "psychological parents" may not petition for custody but they may *intervene* in a custody dispute, *In re* Clifford K., 619 S.E.2d 138, 148-49 (W. Va. 2005), in which case a best interests test applies, *In re* K.H., 773 S.E.2d 20, 27 (W. Va. 2015), except parents still receive substantial deference even against long-term caretakers. *In re* L.H., No. 17-0102, 2017 WL 5157367, at *10 (W. Va. Nov. 7, 2017) (unpublished opinion).

31. I avoid "psychological parent" because it more clearly refers to the psychological rather than the legal relation; "equitable parent" because it implies the doctrine is inherently

be much more precise about actual doctrinal differences.) Most states adopted de facto parenthood when a court exercised its "equitable power" over child custody to supplement parentage, custody, and visitation statutes.[32] A few jurisdictions adopted de facto parenthood statutes, including two that adopted the UPA (2017).[33] Courts in thirteen states still decline to recognize de facto parenthood.[34] These courts often stay their hand out of deference to the legislature and the difficult policy choices, but some recognize the potential constitutional problems.[35]

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judicially created or involves discretionary judgments about fairness; and "in loco parentis" because this term has a more traditional common law meaning. *See infra* Section III.A.4.

32. *E.g.*, *Conover*, 146 A.3d at 451-52; *In re* Parentage of L.B., 122 P.3d at 174; *H.S.H.-K.*, 533 N.W.2d at 424-25; *E.N.O.*, 711 N.E.2d at 890. The power is "equitable" in the sense that it is exercised by chancery courts and it is judicial lawmaking but not necessarily in the sense that it inherently involves holistic fairness judgments.

33. DEL. CODE ANN. tit. 13, § 8-201 (West 2013); D.C. CODE § 16-831.01(1) (West 2009); ME. REV. STAT. ANN. tit. 19-A, § 1891 (West 2016); MINN. STAT. ANN. § 257C.08 (West 2018); MONT. CODE ANN. §§ 40-4-211(6), 40-4-228 (2017); OR. REV. STAT. ANN. § 109.119 (West 2018); S.D. CODIFIED LAWS § 25-5-29 ((2018); VT. STAT. ANN. tit. 15C, § 501 (West 2018); WASH. REV. CODE ANN. § 26.26A.440 (West 2019). Several courts interpret de facto custodian statutes liberally to create de facto parenthood when a parent and child reside with a caregiver. *In re* E.L.M.C., 100 P.3d 546, 554 (Colo. App. 2004) (interpreting Colo. Rev. Stat. § 14-10-123(1)(c)); *A.A.*, 384 P.3d at 883 (interpreting Haw. Rev. Stat. § 571-46(a)(2)); *In re H.S.*, 550 S.W.3d 151, 158 (Tex. 2018) (interpreting Tex. Fam. Code § 102.003(a)(9)). California adopted UPA (2017) but not its de facto parent provision. 2018 Cal. Stat. 5654, 5654-55.

34. De Los Milagros Castellat v. Pereira, 225 So. 3d 368, 370-71 (Fla. Dist. Ct. App. 2017); Doe v. Doe, 395 P.3d 1287, 1290 (Idaho 2017); *In re* Scarlett Z.-D., 28 N.E.3d 776, 790 (Ill. 2015); Petition of Ash, 507 N.W.2d 400, 404-5 (Iowa 1993); Van v. Zahorik, 597 N.W.2d 15, 20 (Mich. 1999); *In re* Waites, 152 So. 3d 306, 314 (Miss. 2014); Nguyen v. Boynes, 396 P.3d 774, 778 (Nev. 2017) (limiting de facto parenthood to joint agreement to adopt by nonbiological parents); *In re* Nelson, 825 A.2d 501, 504 (N.H. 2003); *In re* Adoption of J.J.B., 894 P.2d 994, 1006, 1011 (N.M. 1995); Stanley J. v. Cliff L., 319 P.3d 662, 666-67 (N.M. Ct. App. 2013); *In re* Thompson, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999); Jones v. Barlow, 154 P.3d 808, 816 (Utah 2007); Stadter v. Siperko, 661 S.E.2d 494, 498-99 (Va. Ct. App. 2008); LP v. LF, 338 P.3d 908, 920 (Wyo. 2014). Georgia rejected psychological parenthood for foster parents. Drummond v. Fulton Co. Dept. of Family & Children Services, 228 S.E.2d 839, 842-43 (Ga. 1976). Missouri courts expressly reject de facto parenthood, Cotton v. Wise, 977 S.W.2d 263, 265 (Mo. 1998); White v. White, 293 S.W.3d 1, 15-16 (Mo. Ct. App. 2009), yet recreate it through liberal third-party custody. The statute authorizes third party custody if the "welfare of the child requires," MO. ANN. STAT. § 452.375.5(5)(a) (West 2018), and while the courts insist nonparents must prove "extraordinary circumstances" to rebut the parental presumption, this seemingly strict test can be met if the nonparent has a "significant bonded familial custodial relationship" with the child. K.M.M. v. K.E.W., 539 S.W.3d 722, 736-38 (Mo. Ct. App. 2017). Kansas rejected equitable parenthood, *In re* Hood, 847 P.2d 1300, 1304 (Kan. 1993), but this precedent was substantially weakened by *Frazier*, 295 P.3d at 556.

35. *Compare Scarlett Z.-D*, 28 N.E.3d at 790 (deferring to "legislature's superior institutional competence" to resolve conflicting policies), *LP*, 338 P.3d at 919-20 (concluding parentage statute lacks gaps to supplement and recognition of functional parentage required holistic legislative solution), *and Van*, 597 N.W.2d at 21-22 (concluding statutory policy favoring marriage required limitation of equitable parenthood), *with Nelson*, 825 A.2d at 504 (explaining third party who stood in loco parentis lacked status as constitutional parent so granting custody would violate parental rights under state constitution), *and Doe*, 395 P.3d at 1291 (supplementing statutory conclusion with potential constitutional violation).

Most states use a similar test to identify de facto parents. The most influential test was articulated by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.,* which ruled a petitioner has a "parent-like relationship" if she proves:

> (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.[36]

Four state supreme courts and the Restatement expressly adopted Wisconsin's test, while other states reached similar tests through their own common law.[37]

A few states have broader definitions. In Hawaii and Colorado, anyone who accepts responsibility to care for a child in a shared home can petition for custody or visitation.[38] A few states have narrower tests. Massachusetts only recognizes a de facto parent if he performs an equal share of "caretaking functions," as distinguished from parental roles like financial support.[39] Several states rejected broad de facto parent tests initially but later limited those precedents to recognize narrow classes of intentional parents. The high courts of Kansas, Nevada, New York, and Vermont refused broad tests but recently changed course to recognize de facto parents who either planned the child's conception with the birth parent[40] or planned the child's adoption with the

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36. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995).

37. *Conove*r, 146 A.3d at 453; V.C. v. M.J.B., 748 A.2d 539, 553 (N.J. 2000); Marquez v. Caudill, 656 S.E.2d 737, 744 (S.C. 2008); *L.B.*, 122 P.3d at 176; RESTATEMENT OF CHILDREN AND THE LAW § 1.82, cmt. a (AM. LAW INST. Tentative Draft No. 2, 2019). West Virginia is an example of the latter. *In re* Clifford K., 619 S.E.2d 138, 156-57 (W. Va. 2005).

38. *In re* B.B.O., 277 P.3d 818, 820 (Colo. 2012) (interpreting "physical care"); A.A. v. B.B., 384 P.3d 878, 883 (Haw. 2016) (interpreting "de facto custody" under HRS § 571-46(a)(2)).

39. E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999).

40. *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488(N.Y. 2016) (*overruling In re* Alison D., 572 N.E.2d 27 (N.Y. 1991)); Frazier v, Goudschaal, 295 P.3d 542, 557 (Kan. 2013) (also requiring express contract) (*limiting In re* Hood, 847 P.2d 1300, 1303 (Kan. 1993)); *see also* Ramey v. Sutton, 362 P.3d 217, 218, 221 (Okla. 2015) (extending recognition to intentional parents in same-sex relationships prior to same-sex marriage who engaged in intentional family planning) (*overruling* Dubose v. North, 332 P.3d 311 (2014)). The Vermont legislature has since adopted the broad de facto parentage provision of UPA (2017). V.S.A. 15C, § 501 (West 2018).

adoptive parent.[41] Some states will not recognize de facto parents as such, but a legal parent may agree to share custody, and this parenting agreement may be inferred from conduct.[42]

The 2017 Uniform Parentage Act modifies Wisconsin's definition. Under UPA (2017) § 609, an individual is a "de facto parent" if she "demonstrates by clear-and-convincing evidence that:

> (1) the individual resided with the child as a regular member of the child's household for a significant period;
>
> (2) the individual engaged in consistent caretaking of the child;
>
> (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
>
> (4) the individual held out the child as the individual's child;
>
> (5) the individual established a bonded and dependent relationship with the child which is parental in nature; [and]
>
> (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5). . . .[43]

This provision makes four changes relevant to the analysis below. First, the de facto parent must hold the child out as her own child. No state had previously made holding out an element. It tracks the residential presumption for infants, under which someone who "resided" with and "openly held out" an infant as her own for the first two years of its life is presumed to be a parent.[44] Insofar as the UPA clearly expects relatives will claim de facto parent status, it is difficult to predict what this element will mean. Second, a de facto parent must have undertaken "full and permanent responsibilities of a parent."[45] This phrase appeared in the 2001 A.L.I. *Principles of Family Dissolution* and was incorporated into some common law and statutes.[46] Third, the UPA (2017) privileges "consistent caretaking" by making it an independent

41. Sinnott v. Peck, 180 A.3d 560, 568 (Vt. 2017) (*overruling* Moreau v. Sylvester, 95 A.3d 416, 421-22 (Vt. 2014); Nguyen v. Boynes, 396 P.3d 774, 778 (Nev. 2017) (*overruling* Russo v. Gardner, 956 P.2d 98, 101-02 (Nev. 1998)).

42. In re Mullen, 953 N.E.2d 302, 308 (Ohio 2011); Mullins v. Picklesimer, 317 S.W.3d 569, 577 (Ky. 2010).

43. UNIF. PARENTAGE ACT § 609(d) (UNIF. LAW COMM'N 2017).

44. *Id.* at § 204(a)(2).

45. *Id.* at § 609(d)(3).

46. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (2002) [hereinafter A.L.I. PRINCIPLES]; C.E.W. v. D.E.W., 845 A.2d 1146, 1152, n.13 (Me. 2004) (citing A.L.I. PRINCIPLES); D.C. CODE ANN. § 16-831.01 (West 2009). The A.L.I. Principles treats de facto parents as third parties entitled to visitation, reserving full parentage for "parent[s] by estoppel," A.L.I. PRINCIPLES, § 2.03.

element, rather than one "obligation of parenthood" alongside education and financial support.[47] It appears to reflect a judgment that children are most likely to develop deep relationships with physical caretakers. Fourth, the UPA (2017) downplays the role of consent by the legal parent. It removes an explicit requirement of "consent", applying its rule whenever "another parent fostered or supported" the relationship.[48]

Despite convergence on the definition, being a de facto parent can have vastly different legal effects depending on one's jurisdiction. Some states give the facto parent standing to seek visitation or custody as a third party, while others treat de facto parents as coequal legal parents entitled to visitation or custody.[49]

When a de facto parent has third-party standing to petition for visitation or custody, she must still overcome the parent's rights by satisfying heightened substantive or procedural standards. In some cases, she must prove denying visitation will cause "harm" to or be "detrimental" to the child.[50] In others, she must prove visitation is in the child's best interests under a heightened burden of proof.[51] While de

47. *Compare* UNIF. PARENTAGE ACT § 609(d)(2) (UNIF. LAW COMM'N (2017) *with In re* Custody of H.S.H.-K., 533 N.W.2d at 435-36 (factor 3).

48. *Compare* UNIF. PARENTAGE ACT § 609(d)(6) (UNIF. LAW COMM'N (2017) *with In re* Custody of H.S.H.-K., 533 N.W.2d at 435-36 (factor 1).

49. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471-72 (1990).

50. S.D. CODIFIED LAWS 25-5-29(4) (2018); *In re* Kieshia E., 859 P.2d 1290, 1294 (Cal. 1993); Ed H. v. Ashley C., 221 Cal. Rptr. 3d 911, 924-25 (Cal. Ct. App. 2017); DiGiovanna v. St. George, 12 A.3d 900, 907 (Conn. 2011); Ferrand v. Ferrand, 16-7 (La. App. 5 Cir. 8/31/16); 221 So. 3d 909, 938; Davis v. McGuire, 2018 ME 72, ¶ 15, 186 A.3d 837, 842 n.7 (noting precedent requires harm or exceptional circumstances while statute uses best interests); McGaw v. McGaw, 468 S.W.3d 435, 447 (Mo. Ct. App. 2015); McAllister v. McAllister, 2010 ND 40, ¶ 21, 779 N.W.2d 652, 660; *In re* V.L.K., 24 S.W.3d 338, 341 (Tex. 2000). The Nebraska Supreme Court wrote the parental "preference is negated by a demonstration that the best interests of the child lie elsewhere," Windham v. Griffin, 887 N.W.2d 710, 717 (Neb. 2016), but its examples look like cases of harm. *See In re* Guardianship of K.R. v. Mark R., 26 Neb. App. 713, 724 (Neb. Ct. App. 2018). Some states achieve a similar affect even though they reject de facto parenthood, such as by giving third-party standing to a "family member." Stadter v. Siperko, 661 S.E.2d 494, 499 (Va. Ct. App. 2008).

51. Evans v. McTaggart, 88 P.3d 1078, 1089 (Alaska 2004); Egan v. Fridlund-Horne, 211 P.3d 1213, 1224 (Ariz. Ct. App. 2009); *In re* Reese, 227 P.3d 900, 903 (Colo. App. 2010); A.C. v. N.J., 1 N.E.3d 685, 695 (Ind. Ct. App. 2013); SooHoo v. Johnson, 731 N.W.2d 815, 822-24 (Minn. 2007); Kulstad v. Maniaci, 220 P.3d 595, 606 (Mont. 2009) (citing MONT. CODE ANN. § 40-4-228 (West 2009)); Hiller v. Fausey, 904 A.2d 875, 890 (Pa. 2006); A.J.B. v. A.G.B., 180 A.3d 1263, 1279 (Pa. Super. Ct. 2018); Lester v. Sanchez, No. 2015-000027, 2017 WL 4817527, at *1 (S.C. Ct. App. Aug. 30, 2017) (applying Moore v. Moore, 386 S.E.2d 456, 458 (S.C. 1989) (temporary entrustment case); *In re* Marriage of Meister, 876 N.W.2d 746, 759 (Wis. 2016). Indiana recognized de facto parents in unmarried couples have standing to seek custody but did not address the standard, and the lower courts declined to resolve the uncertainty. A.C. v. N.J., 1 N.E.3d 685, 693 (Ind. Ct. App. 2013). The Restatement adopts a clear and convincing evidence standard for the test but then custody is allocated under an

facto parents are "third parties," they are not "legal strangers."[52] Any nonparent with standing to petition for visitation is a third party. Third-party standing rules identify classes of people with some legitimate expectation of an ongoing relationship.[53] Other relationships fail to confer standing entirely, including siblings,[54] aunts,[55] babysitters,[56] neighbors,[57] teachers, friends, and true strangers.

In a second group of states, de facto parenthood has a more dramatic legal effect: a de facto parent becomes a legal parent on par with a parent by biology or adoption.[58] The judge will decide what amount of custody or visitation is in the child's best interest, without special presumptions in favor of either parent.[59] Some cases conclude that the law will enforce the legal parent's agreement to share custody as long as it serves the child's best interest.[60] Other courts take this equivalency to its logical conclusion. Because the de facto parent is a legal parent, she has her own constitutional right to visitation that cannot be denied without compelling reasons.[61] Consequently, the burden shifts to the legal parent. A de facto parent should "almost invariably" receive visitation, unless a legal parent proves she is unfit or "visitation will cause physical or emotional harm to the children."[62]

The UPA adopts this last, strongest form of de facto parenthood. Once the petitioner proves she is a de facto parent and having another

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ordinary best interest analysis. RESTATEMENT OF CHILDREN AND THE LAW § 1.82(a), (d) (AM. LAW INST. Tentative Draft No. 2, 2019).

52. Some scholars criticize states that recognize functional parents but still apply a parental presumption as if the stepparent were a "legal stranger." *E.g.*, Polikoff, *supra* note 49, at 511-13.

53. Jackson v. Garland, 622 A.2d 969, 972 (Pa. Super. Ct. 1993).

54. Weber v. Weber, 524 A.2d 498 (Pa. Super. Ct. 1987).

55. Romasz v. Coombs, 55 N.Y.S.3d 770, 773 (N.Y. App. Div. 2017).

56. In re D.T., 292 P.3d 1120, 1122 (Colo. App. 2012).

57. P.B. v. T.H., 851 A.2d 780, 789 (N.J. Super. Ct. App. Div. 2004) (holding petitioner-neighbor became a de facto parent when her relationship "developed from that of an occasional babysitter to the primary residential parent, viewed by [aunt who had legal custody] as an equal in raising [the child]").

58. VT. STAT. ANN. § 15C-501 (West 2018); WASH. REV. CODE ANN. § 26.26A.440 (West 2019); Smith v. Guest, 16 A.3d 920, 931-32 (Del. 2011); Frazier v. Goudschaal, 295 P.3d 542, 558 (Kan. 2013); Conover v. Conover, 146 A.3d 433, 453 (Md. 2016); V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000); *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016); Resendes v. Brown, 966 A.2d 1249, 1256 (R.I. 2009); *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005).

59. *Conover*, 146 A.3d at 453; *Resendes*, 966 A.2d at 1256.

60. Mason v. Dwinnell, 660 S.E.2d 58, 71 (N.C. Ct. App. 2008) (agreement to share caretaking is acting contrary to the constitutionally protected status); *In re* Mullen, 953 N.E.2d 302, 308 (Ohio 2011). Still others use a best interests test for third party visitation under *in loco parentis* or de facto custodian statutes. Bethany v. Jones, 378 S.W.3d 731, 738 (Ark. 2011); A.A. v. B.B., 384 P.3d 878, 883 (Haw. 2016).

61. Polikoff, *supra* note 49, at 521.

62. V.C. v. M.J.B., 748 A.2d 539, 554-55 (N.J. 2000).

parent is in the best interests of the child, "the court *shall* adjudicate the individual who claims to be a de facto parent to be a parent of the child."[63] Adjudication as a de facto parent is an equal path to establish the "parent-child relationship," on par with parentage by birth, biology, presumptions, and preconception agreements.[64] The UNCVA labels de facto parents as "third parties," yet it directs courts to award visitation or custody to de facto parents if doing so is in the child's best interest.[65] This provision maintains the rhetoric of non-parent visitation but treats de facto parents as equal parents for the purposes of visitation or custody.

Of course, many states do not fall neatly into these two archetypes. Some states have different standards for custody and visitation. Some assume custody is more intrusive, so they award de facto parents custody only for harm but grant visitation under a best interests test.[66] Some rules appear to rest on one end as a formal matter, yet fall nearer the opposite in practice. For example, courts may say de facto parents are third parties who may receive visitation only in "exceptional cases," yet they assume cutting ties with a de facto parent is exceptional, which in practice gives de facto parents a presumptive right to visitation.[67] Maine offers a twist. A de facto parent can become an equal legal parent only if she proves "by clear and convincing evidence, that harm to the child will occur if he or she is not acknowledged to be the child's de facto parent."[68]

B. Strong De Facto Parenthood Infringes the Right to Parent

De facto parenthood allows a third party to obtain visitation or custody over the objection of a fit legal parent, yet the United States Su-

63. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017) (emphasis added).

64. *Id.* at § 201 (listing de facto parentage as an equal way to establish a parent-child relationship).

65. UNIF. NONPARENT CUSTODY AND VISITATION ACT § 4(a) (UNIF. LAW COMM'N 2018).

66. ARIZ. REV. STAT. ANN. § 25-409(A), (C) (West 2013); Evans v. McTaggart, 88 P.3d 1078, 1085-86, 1089 (Alaska 2004); McCrillis v. Hicks, 518 S.W.3d 734, 743 (Ark. Ct. App. 2017); R.D. v. A.H., 912 N.E.2d 958, 964 (Mass. 2009); Smith v. Wilson, 90 So. 3d 51, 57 (Miss. 2012) (third-party visitation using best interests test); *In re* Custody of M.A.G., 859 So. 2d 1001, 1003-04 (Miss. 2003) (third-party custody requires unfitness). Connecticut takes the opposite approach. Fish v. Fish, 939 A.2d 1040, 1059-61 (Conn. 2008). Oregon is difficult to classify. A psychological parent can "overcome the presumption that a legal parent acts in the best interests of the child" "by a preponderance of the evidence" with respect to five statutory factors, while anyone with a personal relationship to the child can receive visitation if they rebut the presumption by clear and convincing evidence. OR. REV. STAT. ANN. § 109.119 (West 2018); *In re* Marriage of O'Donnell-Lamont, 91 P.3d 721, 733-34, 738-39 (Or. 2004).

67. Middleton v. Johnson, 633 S.E.2d 162, 172 (S.C. Ct. App. 2006); K.M.M. v. K.E.W., 539 S.W.3d 722, 736-38 (Mo. Ct. App. 2017).

68. Pitts v. Moore, 90 A.3d 1169, 1181 (Me. 2014) (plurality opinion).

preme Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[69]

1. The Constitutional Right to Parent

In *Troxel v. Granville*, the Court concluded parents' rights limit the power of states to order visitation with third parties against the wishes of a fit parent.[70] Tommie Granville and Brad Troxel had two daughters.[71] When they separated, Brad moved in with his parents, where he brought the children for his weekend visitations.[72] Two years later, Brad committed suicide.[73] For the next six months, Granville arranged for her daughters to visit Brad's parents every other weekend.[74] When she later tried to scale back the visits to one day a month,[75] the grandparents filed a petition seeking visitation every other weekend.[76]

Washington's visitation statute provided that "[a]ny person may petition the court for visitation rights at any time, including but not limited to custody proceedings," and "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child."[77] The trial judge remarked that he believed, from his experience with his grandparents, that "in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent."[78] He "balanced" the children's interest in a relationship with loving grandparents and extended family against their interest in spending time with their "nuclear family," concluding their welfare would be best promoted by one weekend of overnight visitation with their grandparents per month.[79]

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69. Troxel v. Granville, 530 U.S. 57, 66 (2000) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Prince v. Massachusetts., 321 U.S. 158, 166 (1944); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J. R., 442 U.S. 584, 602 (1979); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

70. 530 U.S. at 69-70 (plurality); *id.* at 79 (J. Souter, concurring in judgment); *id.* at 80 (J. Thomas, concurring in judgment).

71. *Id.* at 60.

72. *Id.*

73. *Id.*

74. Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J. L. & FAM. STUD. 71, 101 (2006) (citing *In re* Visitation of Troxel, Brief for Respondents (No. 99-138), 1999 WL 1146868, *8-*9 (U.S. 1999)).

75. *Troxel*, 530 U.S. at 61. Granville believed the frequent visits were preventing her children from forming bonds with her new fiancé. Lawrence, *supra* note 74, at n.198.

76. *Troxel*, 530 U.S. at 71.

77. *In re* Custody of Smith, 969 P.2d 21, 24 (Wash. 1998) (quoting WASH. REV. CODE § 26.10.160(3) (1998)).

78. *Troxel*, 530 U.S. at 69.

79. *Id.* at 72.

The Supreme Court of Washington held the third-party visitation statute was facially unconstitutional because its standing and substantive rules violated parental Constitutional rights.[80] Only if parents have "a right to limit visitation of their children with third persons" can they have control over fundamental decisions, such as whether their children are exposed to physical discipline or exposed to religious, racist, or sexist beliefs.[81] Although the court acknowledged that "arbitrarily" ending a substantial non-parental relationship might cause harm, the statute did not demand proof of relationship or of harm.[82] Asserting that a judge has authority to award visitation to whomever she believes will improve "a child's quality of life" is "the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the 'best family.' "[83] A parent has no real authority if the law respects her decision only when a judge agrees with it.[84] The court concluded a person may petition for visitation only if she has a substantial relationship with the child[85] and may receive visitation only if necessary to avoid harm to the child.[86]

The United States Supreme Court affirmed, with six judges concluding Washington violated Granville's right to parent under substantive due process.[87] Justice O'Connor wrote for a four-judge plurality.[88] The plurality avoided both of the broad conclusions reached in the lower court. They described the standing rule as "breathtaking broad" but also said "the problem" in this case was not that the Troxels were allowed to petition for visitation.[89] They also declined to decide "whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm,"[90] preferring instead to focus on the "specific manner in which the standard is applied."[91] They concluded that the statute was unconstitutional "as applied in this case,"[92]

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80. *Smith*, 969 P.2d at 30.

81. *Id.* at 31.

82. *Id.* at 30.

83. *Id.* at 30-31.

84. *Id.* at 30 (citing Hawk v. Hawk, 855 S.W.2d 573, 580 (Tenn. 1993)) (quoting Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393, 441 (1985-86)) ("For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.")).

85. *Id.* at 31.

86. *Id.* at 30.

87. *Troxel*, 530 U.S. at 67-68 (O'Connor, J., plurality); *id.* at 77-78 (Souter, J., concurring).

88. *Id.* at 60.

89. *Id.* at 67, 69.

90. *Id.* at 73.

91. *Id.*

92. *Id.*

because the trial court "gave no special weight at all to Granville's determination of her daughters' best interests."[93] To respect parental authority, states must presume a fit parent acts in their child's best interest,[94] which means:

> [T]he decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.[95]

The family court judge did not simply ignore this presumption; he reversed it. He assumed children benefit from grandparent relationships and, therefore, the children should spend time with the Troxels unless Granville proved visitation would affect her daughters "adversely."[96]

Justices Souter and Thomas wrote separate opinions concurring in the judgment. Souter agreed with the Washington Supreme Court that the statute was facially unconstitutional because of its unlimited standing provision.[97] Thomas applied traditional strict scrutiny, concluding that "Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties."[98] For such a fragmented decision, the Supreme Court directs lower courts to follow the concurrence decided on the "narrowest grounds."[99] Unfortunately, it is unclear which *Troxel* opinion is narrowest. Thomas' opinion is the broadest along several dimensions: it concludes that the statute is invalid on its face and that there are no compelling reasons for third-party visitation against the parent's objection. Between Souter and the plurality, the answer is more difficult. Souter concludes the statute is facially unconstitutional, while the plurality limits itself to an as applied conclusion;[100] yet, Souter's opinion prohibits only extraordinarily broad standing rules, while the plurality opinion limits all nonparent visitation cases.[101] For purposes of this essay, I assume the plurality is controlling, recognizing that this conclusion is tentative.

The dissenting opinions by Justices Stevens and Kennedy merit brief review because courts and scholars rely on them to support de

93. *Id.* at 69.

94. *Id.* at 68.

95. *Id.* at 70.

96. *Id.* at 69.

97. *Id.* at 76-77 (Souter, J., concurring).

98. *Id.* at 80. (Thomas, J., concurring).

99. Marks v. United States, 430 U.S. 188, 193 (1977).

100. McGaw v. McGaw, 468 S.W.3d 435, 446 n. 10 (Mo. Ct. App. 2015) (finding the plurality narrower because it was as applied).

101. David D. Meyer, *Lochner Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1190 n. 82 (2001).

facto parenthood.[102] Justice Stevens adopts a strikingly instrumental theory of parental rights. He mentions parental "right[s]" when describing precedent,[103] but his analysis slides easily from talk of rights to "fundamental liberty interest[s]" to simple interest balancing.[104] He recognizes parents have "a fundamental liberty interest in caring for and guiding their children . . . without the undue interference of strangers,"[105] yet "the parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae* . . . and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection."[106] When parents engage in "arbitrary exercise of parental authority," the state may intervene to protect the child's "interests in preserving established familial or family-like bonds."[107] Although Stevens says courts should respect parents' decisions unless they are "arbitrary," he regards parental decisions as arbitrary if a judge concludes they "neither serve nor are motivated by the best interests of the child."[108] Justice Stevens treats parental rights as a mere heuristic for child welfare. If parents exercise their authority in ways that do not serve child welfare, their decisions warrant no deference.

Justice Kennedy wrote a more measured dissent, which scholars and courts often quote to justify reforms to recognize functional parents.[109] He criticizes the lower court for assuming a nuclear family model in which "the . . . parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child."[110] This assumption obscures cases where a "third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto."[111] In those cases, a best-interests test may be appropriate, especially if the law has other "methods for limiting parents' exposure to third-party visitation petitions and for ensuring parental decisions are

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102. *E.g.*, A.A., 384 P.3d at 889; Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights-and Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 732 (2005).

103. *Troxel*, 530 U.S. at 86-87.

104. *Id.* at 87 (Stevens, J., dissenting).

105. *Id.* at 86.

106. *Id.* at 88.

107. *Id.* at 88-89.

108. *Id.* at 91.

109. *E.g.*, Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 898 (2003); RESTATEMENT OF CHILDREN AND THE LAW § 1.82, cmt. a (AM. LAW. INST. 2019).

110. *Id.* (quoting *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting)).

111. *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting).

given respect."[112] Kennedy describes options but disclaims any intent to opine on their constitutionality.[113] He concludes only that proof of harm is not categorically required, and the constitutionality of a best interests test "depends on more specific factors" that "must be elaborated with care, using the discipline and instruction of the case law system."[114]

2. State Responses to Troxel

Aside from ruling out a pure best-interests test, the *Troxel* plurality says little about what states must do to maintain the parental presumption that ensures parental decisions receive "special weight." The states have adopted two basic mechanisms: they either raise the substantive standard for granting third-party visitation or apply a heightened standard of proof for the best-interests test.[115]

Raising the merits standard is the cleanest option. Twenty states award third-party visitation or custody over a parent's objection only to prevent harm to the child. Sixteen high courts have held a harm standard is necessary to protect parental rights under either the federal or a state constitution.[116] The other four adopted a harm standard by statute,[117] often after courts invalidated their statutes instead of

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112. *Id.* at 99.

113. *Id.* at 100-01.

114. *Id.* at 101.

115. *See* Weldon v. Ballow, 200 So. 3d 654, 670 (Ala. Civ. App. 2015) (collecting cases). Three outliers use a simple best interests test as long as it does not substantially burden parental liberty. The Mississippi Supreme Court directs judges to evaluate the burden using ten factors, such as the distance to the grandparents' home and their respect for parental child-rearing. Smith v. Wilson, 90 So. 3d 51, 57-58 (Miss. 2012). The West Virginia Supreme Court expressed its confidence that third-party visitation orders "would not interfere with the parent-child relationship" as long as trial courts consider the twelve statutory factors, one of which is "the preferences of the parents." Brandon L. v. Moats, 551 S.E.2d 674, 684-85 (W. Va. 2001). *See also In re* K.H., 773 S.E.2d 20, 30-31 (W. Va. 2015) (parental presumption is a slightly-tilted best interests test).

116. *Ex parte* E.R.G., 73 So. 3d 634, 650 (Ala. 2011); Osterkamp v. Stiles, 235 P.3d 178, 185 (Alaska 2010); Crockett v. Pastore, 789 A.2d 453, 459 (Conn. 2002); Sullivan v. Sapp, 866 So. 2d 28, 36 (Fla. 2004) (state right to privacy); Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995); Doe v. Doe, 172 P.3d 1067, 1080 (Haw. 2007); *In re* Marriage of Howard, 661 N.W.2d 183, 191 (Iowa 2003); Koshko v. Haining, 921 A.2d 171, 195 (Md. 2007); Blixt v. Blixt, 774 N.E.2d 1052, 1059 (Mass. 2002); Moriarty v. Bradt, 827 A.2d 203, 222 (N.J. 2003); Craig v. Craig, 253 P.3d 57, 63 (Okla. 2011); Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993); Lewelling v. Lewelling, 796 S.W.2d 164, 167 (Tex. 1990) (custody); *In re* Pensom, 126 S.W.3d 251, 256 (Tex. App. 2003) (visitation); Jones v. Jones, 359 P.3d 603, 612 (Utah 2015); Glidden v. Conley, 820 A.2d 197, 205 (Vt. 2003); Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998); *In re* Parentage of C.A.M.A., 109 P.3d 405, 413 (Wash. 2005); *see also In re* Marriage of Ciesluk, 113 P.3d 135, 145 (Colo. 2005) (harm required to interfere with parental autonomy). *Compare* UNCVA, *supra* note 5, at § 4 cmt. 3 (citing ten opinions and nine statutes but no opinions before *Troxel*), *with* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 5 (2013).

117. ARK. CODE ANN. § 9-13-103(d), (e) (West 2009); 750 ILL. COMP. STAT. 5/602.9(b)(3) (West 2019); MICH. COMP. LAWS. ANN. § 16 722.27b (4)(b) (West 2010); S.D. CODIFIED

narrowing them.[118] Some states require "substantial" or "significant" harm and emphasize that losing a meaningful non-parental relationship is not sufficient.[119]

The other states protect parental rights with evidentiary rules. These rules come in two forms. The first form allows third party visitation only if the petitioner presents clear and convincing evidence that visitation serves the best interest of the child. Fifteen state statutes adopt a clear and convincing standard,[120] and five state high courts have held this sufficient to respect parents' rights.[121] The second form instructs family courts to apply a rebuttable parental presumption and give parents' preferences "special weight." Eight state courts have upheld this type of third-party visitation statute.[122]

Most of the states that direct trial courts to apply the parental presumption say little about how this operates in practice.[123] The petitioner might bear the burden of production or the burden of persuasion, or she

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LAWS § 25-5-29, -30 (2017). Several more states passed harm statutes *after* their courts held a harm standard was constitutionally necessary. ALA. CODE § 30-3-4.2(e) (2016); CONN. GEN. STAT. § 46b-59(b) (2013); GA. CODE ANN. § 19-7-3(c)(1) (West 2016); TENN. CODE ANN. § 36-6-306(b)(1) (2018); TEX. FAM. CODE ANN. § 153.432(c) (West 2009); UTAH CODE ANN. § 30-5a-103(2)(f) (West 2017).

118. Seagrave v. Price, 79 S.W.3d 339, 346 n.1 (Ark. 2002); Flynn v. Henkel, 880 N.E.2d 166, 169 (Ill. 2007); DeRose v. DeRose, 666 N.W.2d 636, 643 (Mich. 2003); Clough v. Nez, 759 N.W.2d 297, 302 (S.D. 2008) (describing statute as codification of the "extraordinary circumstances" listed in Meldrum v. Novotny, 640 N.W.2d 460, 470-71 (S.D. 2002) (Konenkamp, J., concurring in part)).

119. *E.g.*, CONN. GEN. STAT. ANN. § 46b-59(b) (West 2013); *Jones*, 359 P.3d at 613; *Doe*, 172 P.3d at 1077.

120. UNIF. NONPARENT CUSTODY AND VISITATION ACT § 5 cmt. at 16-17 (UNIF. LAW COMM'N 2018) (listing twenty-two states with a clear and convincing evidence standard, but seven of these states *also* use a harm or detriment substantive standard).

121. *In re* Adoption of C.A., 137 P.3d 318, 327 (Colo. 2006); *In re* Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002); Walker v. Blair, 382 S.W.3d 862, 873 (Ky. 2012); Hunter v. Hunter, 771 N.W.2d 694, 705 (Mich. 2009); Polasek v. Omura, 136 P.3d 519, 523 (Mont. 2006); Camburn v. Smith, 586 S.E.2d 565, 568 (S.C. 2003) (listing harm as the example of clear and convincing evidence).

122. *In re* Marriage of Friedman & Roels, 418 P.3d 884, 890 (Ariz. 2018); Deem v. Lobato, 96 P.3d 1186, 1192 (N.M. 2004) (enough if courts "accord deference to the parents[] wishes"); *In re* S.B., 845 N.W.2d 317, 323 (N.D. 2014); Harrold v. Collier, 836 N.E.2d 1165, 1168 (Ohio 2005); *In re* Marriage of O'Donnell-Lamont, 91 P.3d 721, 733 (Or. 2004); Hiller v. Fausey, 904 A.2d 875, 890 (Pa. 2006); I*n re* Paternity of Roger D.H., 641 N.W.2d 440, 445 (Ct. App. Wis. 2002). Louisiana's statute grants visitation under a best interest test that lists the parental presumption as one factor, LA. CIV.CODE ANN. art 136(D)(1) (West 2018), but third-party custody requires proof of harm. LA. CIV.CODE ANN. art 133 (West 2018). California law is uncertain. *Compare* Ian J. v. Peter M., 152 Cal. Rptr. 3d 323, 336 (Cal. Ct. App. 4th 2013), *with* Fenn v. Sherriff, 109 Cal. App. 4th 1466, 1470-71 (Cal. Ct. App. 4th 2003).

123. The Wisconsin Supreme Court declined to decide the standard to rebut the parental presumption, *In re* Marriage of Meister, 876 N.W.2d 746, 759 (Wis. 2016), but the court of appeals quickly certified this question and the court granted cert. Michels v. Lyons, 918 N.W.2d 75 (2018). The Oregon statute offers an admirable contrast. *In re* Marriage of O'Donnell-Lamont, 91 P.3d 721, 740 (Or. 2004) (interpreting OR. REV. STAT. § 109.119 (2018) (describing five "factors" courts must consider to decide whether the presumption is rebutted)).

might implicitly raise the burden of persuasion. A mere burden-shift is unlikely to satisfy *Troxel*. A third-party petitioner ordinarily bears the burden of production. Even ensuring petitioners also have the burden of persuasion does not give "special weight" to parental judgments. The judge will decide for herself whether the child benefits from visitation, only giving independent weight to the parent's judgment if the evidence is in equipoise. Perhaps that is all the deference parental judgments merit, but then we should openly say there is no fundamental right to parent. If *Troxel* means only that a parent's beliefs are the tiebreaker when a judge concludes the evidence is in equipoise, then parental liberty is hardly "fundamental." The Pennsylvania Supreme Court, which has the most extensive judicial discussion of the rebuttable presumption, implicitly raises the standard of persuasion. It says the substantive question is what serves the child's interests, but courts should grant visitation only for "convincing reasons," because the "evidentiary scale is tipped, and tipped hard, to the parents' side."[124]

A third option, perpendicular to the previous two, is to restrict the class of people with statutory standing. Only two concurring justices concluded the standing provisions in the Washington statute were unconstitutional. Nevertheless, nearly all the states that use a best interests test limit standing, typically to grandparents, close blood relatives, or nonparents who have had physical custody of the child.[125] Other states limit grandparent visitation to specific circumstances, such as when a parent is deceased or had her rights terminated or when the parents are divorcing or living separately.[126] A few statutes allow petitions for visitation only if the parent cuts off all visitation, in order to defer to parental decisions about the extent of visitation.[127]

C. The Constitutional Problem with De Facto Parenthood

Weak de facto parenthood doctrines do not run afoul of *Troxel*; in fact, they are a direct application of the plurality opinion. Recall that under weak versions of de facto parenthood, the psychological parent has standing to petition for visitation or custody as a third party under heightened substantive or evidentiary standards.

The easiest way to reconcile de facto parenthood with parental rights is to demand de facto parents prove denying visitation risks harm, as many states do.[128] Other states grant visitation or custody to

124. Hiller v. Fausey, 904 A.2d 875, 887 (Pa. 2006).

125. *E.g.*, COLO. REV. STAT. ANN. § 14-10-123 (West 2012); IND. CODE ANN. § 31-17-2-8.5 (West 2018); TEX. FAM. CODE ANN. § 102.003 (West 2015).

126. *E.g.*, MICH. COMP. LAWS ANN. § 722.27b (West 2010).

127. *E.g.*, Lovlace v. Copley, 418 S.W.3d 1, 21 (Tenn. 2013) (interpreting TENN. CODE ANN. § 36-6-306(a) (West 2018)); LA. CIV. CODE ANN. art. 136(B) (2018).

128. *See supra* note 50.

de facto parents only if refusing it "clearly would be detrimental to the child."[129] Even if parental rights trigger strict scrutiny, preventing harm to a particular child should be a compelling state interest.

Of course, this concept of harm is vague. To specify it, states must chart a course between two unacceptable options. On one side, losing a parent-like relationship cannot itself be a sufficient harm. Some courts assume that "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed."[130] This collapses the harm and best interest tests, and it implies that anyone who qualifies as a de facto parent meets the substantive test for visitation.[131] States need a baseline capable of distinguishing being harmed from merely losing a benefit.[132] On the other hand, the requisite harm must be less than the harm required to prove parental unfitness. Some courts demand de facto parents prove neglect or abandonment.[133] With such a demanding test, de facto parenthood applies only in termination cases, where the parent cannot object to non-parental custody anyway.

A plurality of the Maine Supreme Court has articulated one plausible intermediate standard: "the child's life would be substantially and negatively affected if the person who has undertaken a permanent, unequivocal, committed, and responsible parental role in that child's life is removed from that role."[134] This standard is well-illustrated by *In re Marriage of Allen*, a well-known stepparent case.[135] The court awarded custody of a child to his stepmother rather than her

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129. Kinnard v. Kinnard, 43 P.3d 150, 154 (Alaska 2002).

130. Middleton v. Johnson, 633 S.E.2d 162,169 (S. C. Ct. App. 2006); *see also* A.H. v. M.P., 857 N.E.2d 1061, 1070 (Mass. 2006); Clough v. Nez, 759 N.W.2d 297, 304-05 (S.D. 2008) (finding proof "provision of the child's physical, emotional, and other needs by persons other than the parent over a significant period of time" is sufficient to infer "significant emotional harm" without expert testimony).

131. Gordius v. Kelley, 139 A.3d 928, 931-32 (Me. 2016) (reversing trial court that had assumed "exceptional circumstances" exist whenever a child loses a parent-like relationship because "these ruptured relationships can be deeply wounding").

132. If one assumes any diminution in wellbeing is a harm, then this distinction is nonsensical. Troxel v. Granville, 530 U.S. 57, 97-98 (Kennedy, J., dissenting). A similar difficulty arises for attempts to define harm for purpose of abuse and neglect. DAVID ARCHARD, *Can Child Abuse be Defined*, *in* MORAL AGENDAS FOR CHILDREN'S WELFARE 65-66 (Michael King, ed.,1999) (noting possible baselines for abuse as the minimum universal needs for survival, the minimum acceptability with a community's norms, or the best possible upbringing).

133. Windham v. Griffin, 887 N.W.2d 710, 717 (Neb. 2016) (permitting non-parental custody for adult standing in loco parentis only if parent neglected child or forfeited parental rights by abandonment).

134. Pitts v. Moore, 90 A.3d 1169, 1181 (plurality opinion). Maine adopted a new de facto parent statute that does not require harm, ME. STAT. tit. 19-A, § 1891 (2016), but the Supreme Court has yet to decide whether harm is constitutionally required. Davis v. McGuire, 186 A.3d 837, 842 n. 7 (Me. 2018).

135. 626 P.2d 16, 23 (Me. 1981) (described in Polikoff, *supra* note 49, at 509-10); Cynthia G. Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES IN L. 127, 138 (2012)).

former husband, the legal father.[136] They had married when his son was three.[137] The child was deaf, and had substantially delayed development.[138] The stepmother took charge of his care: she enrolled him in sign language programs and took on substantial debt to provide special tools and training.[139] She and her three children all became fluent in sign language.[140] In contrast to her "exceptional . . . dedication," the father's attitude was "apathetic and fatalistic" and his sign language skills were "minimal."[141] Due to the stepmother's efforts and the child's integration into her family, he caught up with his peers by the time he was seven.[142] The appellate court concluded the child's welfare "outweigh[ed]" the father's parental rights, for two reasons.[143] Although the father was a fit and caring parent, awarding him custody would "set back [the child's] intellectual development" by limiting his "opportunities for interaction and communication."[144] Second, the child, his stepmother and stepsiblings had become a "family unit" over eight years, and disrupting their "everyday living relationship . . . would have deeply disturbed" the child.[145]

Instead of a harm standard, some states demand de facto parents prove visitation will serve the best interests of the child under a heightened standard of persuasion.[146] The Pennsylvania Supreme Court applies its third-party framework to de facto parents. A court may award visitation to a person acting *in loco parentis* (effectively a de facto parent) if it is in the best interests of the child, but the petitioner must offer convincing reasons to offset the scale "tipped hard" to the parent.[147]

A heightened standard of persuasion is sufficient in theory, but it faces difficulties in application. As the *Troxel* plurality emphasized, the wording of the legal test matters less than how courts apply it.[148] De facto parents must not receive visitation as a matter of course,

136. *Allen*, 626 P.2d at 18-19.

137. *Id.* at 18.

138. *Id.*

139. *Id.* at 19.

140. *Id.*

141. *Id.*

142. *Id.* at 18-19.

143. *Id.* at 22.

144. *Id.* at 22.

145. *Id.* at 23.

146. *In re* B.H., 770 N.E.2d 283, 287 (Ind. 2002) ("clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served"); Hunter v. Hunter, 771 N.W.2d 694, 706 (Mich. 2009); *In re* C.T.C., 339 P.3d 54, 58 (Mont. 2014).

147. T.B. v. L.R.M., 786 A.2d 913, 919 n. 8 (Pa. 2001) (quoting Charles v. Stehlik, 744 A.2d 1255, 1258 (Pa. 2000)).

148. Troxel v. Granville, 530 U.S. 57, 73 (2000).

simply because judges or legislators believe children benefit from de facto parent relationships. Similar reasoning led the trial court in *Troxel* to reverse the parental presumption.[149] If judges assume maintaining parent-like relationships generally benefits children, then they may effectively demand parents disprove those benefits. The temptation to second-guess legal parents will be stronger in de facto parent cases than grandparent cases. Once a court concludes the petitioner and child have a parent-like relationship, it is easy to slip into thinking the de facto parent ought to receive visitation and custody, instead of assuming the legal parent's decisions about whether to sustain that relationship is presumptively correct.

Eight states, the UPA (2017), and the Restatement embrace that result.[150] They adopt strong facto parenthood tests that allow a judge to decide whether visitation or custody with a de facto parent serves the child's best interests, without giving special weight to the legal parent's judgment. How can this be reconciled with *Troxel*? Courts and scholars make three kinds of arguments, each of which I discuss in detail in Part IV below. First, they argue *Troxel* does not apply, because de facto parents are not third parties but full legal parents. Second, they argue de facto parenthood does not impinge on the rights of a legal parent because she consented to this parental relationship. Finally, they argue states have compelling reasons to limit parental rights because losing parent-like relationships harms children. To evaluate these arguments, we need a closer look at the type of cases in which courts apply de facto parenthood. Whether de facto parent decisions violate parental rights depends on the how the test is applied.

III. WHAT ROLE REMAINS FOR DE FACTO PARENTHOOD?

This section offers a typology of the fact patterns in which courts invoke de facto parenthood. In the first four, the doctrine overlaps formal parentage rules for agreements, adoption, misrepresentation, and abandonment.[151] The doctrine is often simply redundant in these cases, but sometimes its new standard blunts the formal limits of traditional rules. In two kinds of cases, when a stepparents or relatives lives with the parent and performs substantial childcare, the de facto parent doctrine is the only way a petitioner can obtain a right to custody or visitation. This is de facto parenthood's distinctive conceptual niche.

149. *Id.* at 69.

150. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017); *supra* note 58; RESTATEMENT OF CHILDREN AND THE LAW § 1.82, cmts. i-k (AM. LAW INST. Tentative Draft No. 2, 2019).

151. The UPA (2017) and other scholars lump together different doctrines that protect functional parents. UNIF. PARENTAGE ACT § 609 cmt. at 50 (UNIF. LAW COMM'N 2017); Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 61 (2017). Others, particularly Nancy Polikoff, carefully distinguish de facto parenthood

A. De Facto Parenthood as a Substitute for Existing Doctrines

1. Preconception Agreements Substitute for ART or Presumptions

A and B agree that A will conceive a child by assisted reproductive technology and they will raise the child together. B assists with A's pregnancy. After the birth, B lives with the child and performs caretaking responsibilities for several years. A and B represents to the child and the public that B is the child's parent, and the child regards both A and B as parents.

Most of the seminal cases adopting de facto parenthood involve strikingly similar facts: two women in a committed relationship enter a preconception agreement and then raise the child together as equal parents for years.[152] An early and well-known case, *In re H.S.H.-K*, is a prototype.[153] Two women, Knott and Holtzman, purchased a home together and held a commitment ceremony.[154] They decided to have a child together by having Knott use artificial insemination, and four years later, she became pregnant.[155] Holtzman assisted with obstetrical appointments, birth classes, and the birth.[156] They chose his name together, giving him a surname that combined their last names.[157] During his church dedication ceremony, Knott and Holtzman were both announced as his parents.[158] For the next four years, Holtzman provided financial support and shared everyday childcare.[159] "The two women explained to the child that there are many kinds of families and that he had two parents who loved him very much."[160] When their son was five, Knott ended her relationship with Holtzman, moved out with their son, and refused to allow Holtzman any visitation.[161]

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from other doctrines. *See* Polikoff, *supra* note 49, at 491-525. Polikoff argued courts were straining exceptions to parental authority to protect non-biological mothers in lesbian relationships; instead, they should create a functional parent rule to recognize these mothers as full parents. *Id.* at 483. In contrast, I argue in this article that once formal parentage rules recognize same-sex parents on a nondiscriminatory basis, we do not need a functional parentage rule that conflict with existing rules to allocate parental authority.

152. *See infra* notes 168, 180-90. *But see* Robinson v. Ford-Robinson, 208 S.W.3d 140, 143 (Ark. 2005) (expanding *in loco parentis* to permit post-divorce visitation for stepparent in different-sex couple); *In re* Marriage of Dureno, 854 P.2d 1352, 1357 (Colo. App. 1992) (allowing stepparent to seek custody under statute permitting anyone who cared for child for six months to seek visitation); A.C. v. N.J., 1 N.E.3d 685, 697 (Ind. Ct. App. 2013) (extending established stepparent visitation to same-sex couple with domestic partnership).

153. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995).

154. *Id.* at 421.

155. *Id.*

156. *Id.* at 421-22.

157. *Id.* at 422.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

Many of the cases adopting de facto parenthood for the first time involve similar facts, including cases in Hawaii,[162] Kentucky,[163]Maine,[164] Maryland,[165] Massachusetts,[166] New Hampshire,[167] New Jersey,[168] New York,[169] North Carolina,[170] Oklahoma,[171] Rhode Island,[172] Washington,[173] and West Virginia.[174] If these had been heterosexual rather than same-sex couples, then the legal paternity of the non-biological parent would be easy to establish under common parentage rules, as I discuss at length below.[175] Statutory parentage law discriminated on the basis of gender and marital status, and courts were unwilling to interpret the statutes in ways that would extend them to same-sex parents. Instead, courts reached for the retroactive and functional de facto parenthood to rectify the legislature's lack of sympathy for same-sex parents.[176]

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162. A.A. v. B.B., 384 P.3d 878, 880 (Haw. 2016). A.A. concluded a statute providing "[a]ny person who has had de facto custody of the child in a stable and wholesome home," HAW. REV. STAT. § 571-46(a)(2) (2016), applied to nonparents who lived at all times with the legal parent. *See A.A.*, 384 P.3d 878, 880, 891-92 (Haw. 2016). The only prior case cited was Inoue v. Inoue, 185 P.3d 834, 842 (Haw. Ct. App. 2008), in which mother was equitably estopped to deny a father's marital presumption.

163. Mullins v. Picklesimer, 317 S.W.3d 569, 579 (Ky. 2010). *Mullins* recognizes, as the lower court of appeals held, its prior waiver cases involved a parent surrendering physical custody, but then decides to extend that principle to recognize partial waiver through intent to co-parent with joint custody. *Id.*

164. C.E.W. v. D.E.W., 845 A.2d 1146, 1147 (Me. 2004). *C.E.W.* cites two Maine cases recognizing functional parents: one equitable estoppel case in which a marital father raised a child he believed was his genetic child for three years, Stitham v. Henderson, 768 A.2d 598 (Me. 2001), and one abandonment case in which the father left his child with its grandmother for four years, Merchant v. Bussell, 27 A.2d 816, 817-19 (Me. 1942). *C.E.W.*, 845 A.2d at 1149-51.

165. Conover v. Conover, 146 A.3d 433, 435 (Md. 2016) (overruling Janice M. v. Margaret K., 948 A.2d 73, 86 (Md. 2008)). *Conover* cites a Maryland case recognizing a functional parent, *id.* at 447, but it is an estoppel case in which a man relied on his partner's assertion that he was the genetic father, they subsequently married, and their divorce included a joint custody agreement, Monroe v. Monroe, 621 A.2d 898, 899 (Md. 1993).

166. E.N.O. v. L.M.M., 711 N.E.2d 886, 891-93 (Mass. 1999). *E.N.O.* cites two relevant precedents. *Id.* (citing Youmans v. Ramos, 711 N.E.2d 165, 169 (Mass. 1999) (awarding visitation to an aunt because the father allowed her to raise his daughter for eleven years during military deployments); C.C. v. A.B., 550 N.E.2d 365, 372-73 (Mass. 1990) (allowing a biological father to rebut the marital presumption because he lived with the mother at the time of conception and the child after its birth, developing a "substantial relationship.")).

167. *In re* Guardianship of Madelyn B., 98 A.3d 494, 496 (N.H. 2014).

168. V.C. v. M.J.B., 748 A.2d 539, 542 (N.J. 2000). *V.C.* recounts numerous cases awarding custody to "psychological parents" but admits—as if this were a minor point—that, "[t]o be sure, prior cases in New Jersey have arisen in the context of a third party taking over the role of an unwilling, absent or incapacitated parent." *Id.* at 550.

169. *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490-91 (N.Y. 2016). Before *Brooke S.B.*, New York used equitable estoppel only to hold presumed fathers liable for child support, *id.* at 496, and had twice declined to adopt parenthood by estoppel or de facto parentage for preconception agreement cases, Alison D. v. Virginia M., 572 N.E.2d 27, 28-29 (N.Y. 1991); Debra H. v. Janice R, 930 N.E.2d 184, 186 (N.Y. 2010).

170. Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010). *Boseman* cited a rule that a parent can lose their parental presumption if they engage in conduct "inconsistent with the

The courts did not, of course, draw de facto parenthood out of thin air. Each court could cite a handful of cases awarding visitation to persons who were not biological or adoptive parents. In most of the precedents, either legal parents abandoned the child, or the mother lied to her husband about his paternity for years.[177] A few ordered visitation with a stepparent who fulfilled parental roles during the marriage, but only after finding parental custody would be harmful.[178] These precedents did protect functional parents, but they rested on distinguishable principles of abandonment or estoppel. I discuss those legal principles below. In this section, the crucial point is that courts do not need to stretch to protect non-biological mothers if parentage law does not discriminate on the basis of sex and gender.

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protected status of natural parents," *id.* at 503 (quoting Price v. Howard, 484 S.E.2d 528, 534-35 (N.C. 1997)), but that rule was adopted in a paternity estoppel case, in which the mother left the child with the putative father and in which the court merely reversed to determine if she intended it to be permanent or temporary, *Price*, 484 S.E.2d at 536-37. *Boseman* was preceded by Mason v. Dwinnell, 660 S.E.2d 58, 68 (N.C. App. 2008), a same-sex intentional parenting case that relied on *Price* and another lower court case granting stepparent custody when the legal parent left the child with the stepparent for substantial time, Ellison v. Ramos, 502 S.E.2d 891, 895 (N.C. App. 1998).

171. Eldredge v. Taylor, 339 P.3d 888, 890-91 (Okla. 2014); Ramey v. Sutton, 362 P.3d 217, 218 (Okla. 2015). *Ramey* refers to *in loco parentis* cases giving custody to nonparents, but the case it cites involves parental abandonment. *Id.* at 221 (citing Taylor v. Taylor, 75 P.2d 1132, 1133 (Okla. 1938)).

172. Rubano v. DiCenzo, 759 A.2d 959, 961 (R.I. 2000). *Rubano*'s only comparable precedent was a case in which a mother was equitably estopped from denying her husband's marital presumption. *Id.* at 967-68 (discussing Pettinato v. Pettinato, 582 A.2d 909 (R.I. 1990)).

173. *In re* Parentage of L.B., 122 P.3d 161, 164 (Wash. 2005). L.B. cites two lower court cases recognizing a functional parent, but in each case the court found denying non-parental custody would harm the child. *In re* Marriage of Allen, 626 P.2d 16 (Wash. App. Ct. 1981); *In re* Custody of Stell, 783 P.2d 615, 618 (Wash. App. Ct. 1989) (child with history of abuse and resulting psychological problems; father entrusted child to aunt's custody for several years; father was transient, lacked a residence for the child, and had proven unable to fulfill his child's needs).

174. *In re* Clifford K., 619 S.E.2d 138, 164 n.2 (W. Va. 2005) (Benjamin, J., concurring in part, dissenting in part) (describing prior psychological parent cases as limited to child abandonment cases).

175. *In re* Parentage of L.B., 122 P.3d at 164-65 (Wash. 2005); *Brooke S.B.*, 61 N.E.3d at 498-99 (acknowledging the court is crafting new definition of parentage to ensure equality between different and same-sex parents). I assume in this analysis that there is no competing claim by the genetic father; regardless, the non-biological mother and the non-biological father are also in parity with respect to this third parental claim.

176. Conover v. Conover, 146 A.3d 433, 453 (Md. 2016).

177. Middleton v. Johnson, 633 S.E.2d 162, 164-65 (S.C. Ct. App. 2006) (man adopted parental role for one year while uncertain about genetic parentage and, after finding out he was not the biological father, shared custody four days a week for eight years).

178. Carter v. Broderick, 644 P.2d 850, 855 (Alaska 1982); Bethany v. Jones, 378 S.W.3d 731, 736-738 (Ark. 2011) (relying on Robinson v. Ford-Robinson, 208 S.W.3d 140, 140 (Ark. 2005)); *see* John DeWitt Gregory, *Defining the Family in the Millennium: The Troxel Follies*, 32 U. MEM. L. REV. 687, 692 (2002). I say more about these cases *infra* Section II.B.1.

First, these non-biological mothers should have been legal mothers under assisted reproduction statutes. Under the UPA (2002), if a woman and a man sign a document expressing their shared intent for him to be the father of a child that she conceives with donated sperm, then he is the legal father.[179] If this provision had been applied irrespective of gender, these women might have had binding preconception agreements. They planned conception through ART with the shared intent to parent together.[180] Some even signed written co-parenting agreements.[181]

In recent years, many states extended assisted reproduction statutes to same-sex couples.[182] A few courts have held the constitution demands ART statutes be interpreted without regard to sex.[183] Reproductive technology statutes that still apply only to married couples raise additional hard questions about the retroactive treatment of same-sex couples and about illegitimacy or marital status discrimination. Nevertheless, these problems do not apply to the new uniform acts. The assisted reproduction and surrogacy provisions of the UPA (2017) apply without regard to the sex or marital status of the intended parents.[184]

Second, many of these non-biological mothers should have qualified as parents under a marital presumption.[185] Under the UPA (2002), a husband is the presumed father of any child born to his wife during the marriage.[186] All of these same-sex couples planned to have children during long-term, committed relationships: some were married[187] or

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179. UNIF. PARENTAGE ACT §§ 703, 704 (AM. LAW INST. 2002) [hereinafter UPA (2002)]. Some states allow only married couples to take advantage of ART provisions, but these statutes should apply to married same-sex couples. Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

180. *Conover*, 146 A.3d at 435; *Brooke S.B.*, 61 N.E.3d at 491; Rubano v. DiCenzo, 759 A.2d 959, 961 (R.I. 2000); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

181. E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999).

182. NeJaime, *supra* note 14, at 2294 (also detailing continuing struggle to reform law to facilitate intentional parenthood for same-sex couples through assisted reproduction).

183. D.M.T. v. T.M.H., 129 So. 3d 320, 344 (Fla. 2013); Gartner v. Iowa Dept. of Public Health, 830 N.W.2d 335, 354 (Iowa 2013) (applying state equal protection law); Roe v. Patton, 2015 WL 4476734, at *3 (D. Utah 2015). Some states use the common law of contracts to similar effect. *In re* T.P.S., 978 N.E.2d 1070, 1084 (Ill. App. Ct. 2012); Eldredge v. Taylor, 339 P.3d 888, 893 (Okla. 2014).

184. *Supra* notes 19-20.

185. *See* Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 289 (2003); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 246 (2006) (discussing less desirable values served by marital presumptions, such as establishing heterosexual nuclear family as an ideal family or facilitating husband's ownership of children); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1241-49 (2016).

186. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. LAW COMM'N 2002).

187. A.J.B. v. A.G.B., 180 A.3d 1263, 1278 (Pa. Super. Ct. 2018).

domestic partners,[188] while others held commitment ceremonies because their state offered them no status.[189] If the law had not discriminated against same-sex relationships, many of these women would have been presumed legal mothers.

Some states have interpreted their marital presumptions to apply to same-sex spouses, either on their own judgment or under pressure from *Obergefell*.[190] The UPA (2017) adopts this conclusion across the board, avoiding sex or gender pronouns whenever possible.[191] Of course, some states still refuse to extend the marital presumption to same-sex spouses, arguing it rests on the assumption that husbands are likely genetic fathers.[192] This argument conflicts with *Pavan v. Smith*, which held Arkansas must list same-sex parents on birth certificates despite the state's argument that husbands receive this benefit only because of their likely genetic fatherhood.[193] In any case, this biological interpretation of the marital presumption fits the state law doctrine poorly, as Susan Appleton has argued.[194] A marital father may retain his parental status, even if the admitted evidence demonstrates that he is not the genetic father, as long as the court concludes treating him as the father is in the child's best interests.[195] Accordingly, to Appleton, "[T]he presumption today reflects the belief that someone legally connected to the woman bearing the child likely planned for the child, demonstrated a willingness to assume responsibility, or provided support (emotional and/or economic) during the pregnancy, in turn supporting the expected child."[196] This marital presumption should apply equally to same-and-different-sex spouses.[197]

Third, even if unmarried and without an agreement, these nonbiological mothers should have qualified as parents under the holding-out

188. Conover v. Conover, 146 A.3d 433, 435 (Md. 2016); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 956 (Vt. 2006); *In re* Brooke S.B. v. Elizabeth A.C.C, 61 N.E.3d 488, 491-92 (N.Y.2016).

189. *Brooke S.B.*, 61 N.E.3d at 490; E.N.O. v. L.M.M., 711 N.E.2d 886, 888 (Mass. 1999).

190. LC v. MG & Child Support Enf't Agency, 430 P.3d 400, 411-12 (Haw. 2018) (statutory interpretation); McLaughlin v. Jones *ex rel.* Cty. of Pima, 401 P.3d 492, 496-98 (Ariz. 2017) (required by federal right to marry); *see* also Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 67-68 (2017) (describing pre-Obergefell cases in Massachusetts, Connecticut, Iowa, Arizona, and Missouri).

191. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. LAW COMM'N 2017). Extending the marital presumption to spouses of a biological father (his husband or his wife) raises different and difficult questions about the rights of the gestational mother. Appleton, *supra* note 185, at 260-61; NeJaime, *supra* note 14, at 2339-40.

192. In Interest of A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *8 (Tex. App. Apr. 27, 2017).

193. Pavan v. Smith, 137 S. Ct. 2075, 2078-79 (2017) (rejecting similar argument).

194. Appleton, *supra* note 185, at 285-86.

195. *Id.*

196. *Id.*

197. *Id.*

presumption.[198] Under the UPA (2002), a man is the presumed 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."[199] These non-biological mothers had resided with their children for more than two years.[200] They had strong evidence of holding out: the couples taught their child to call the non-biological mother some variant of "mom," they gave the child her surname, they listed both adults as mothers in birth announcements and in religious ceremonies, and both adults signed medical and school forms as parents.[201] If the residential presumption had been gender-neutral, then these non-biological mothers would have been presumed legal mothers.[202]

Several state supreme courts have interpreted their residential presumption to encompass non-biological mothers in same-sex couples.[203] Many paternity statutes follow the UPA (1973) by stating their provisions apply equally to mothers insofar as practical.[204] On the other hand, the 1973 residential presumption requires a father to hold the child out as his "natural child," which some courts interpret to mean biological child.[205] Other states, in contrast, have interpreted this language to protect non-biological fathers and mothers.[206] The residential presumption in the UPA (2017) drops this "natural" modifier and applies without regard to gender.[207]

Last, most of these nonbiological mothers were in committed relationships with the birth mothers at the time of birth. Federal law requires all states to offer a voluntary acknowledgment of paternity that

198. *See* Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS. 195, 212-16 (2014) (tracing progression of California precedent leading to the application of the residential presumption to lesbian co-parents).

199. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002).

200. *E.g.*, Conover v. Conover, 146 A.3d 433, 435 (Md. 2016) (petitioner lived with child until she was 17 months old, then had overnight and weekend visitation until she was 25 months old); E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (petitioner lived with child until four); *In re* Custody of H.S.H.-K, 533 N.W.2d 419, 421-22 (same); *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 491 (N.Y. 2016) (petitioner lived with child until he was one, then had regular overnight visitation until he was three).

201. *E.g.*, *E.N.O.*, 711 N.E.2d at 889.

202. Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (extending residential presumption to same-sex couple instead of de facto parenthood).

203. *Id.* at 669; Chatterjee v. King, 280 P.3d 283, 288 (N.M. 2012); Partanen v. Gallagher, 59 N.E.3d 1133, 1135 (Mass. 2016); *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014).

204. UNIF. PARENTAGE ACT § 21 (UNIF. LAW COMM'N 1973).

205. L.P. v. L.F., 338 P.3d 908, 915 (Wyo. 2014); *see also* COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2008) ("A man is presumed to be the natural father of a child if . . . he receives the child into his home and openly holds out the child *as his natural child* . . . .") (emphasis added) (adopting UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973)).

206. *E.g.*, Chatterjee v. King, 280 P.3d at 293-94; *see also* Polikoff, *supra* note 198, at 216-17 (citing California, Colorado, New Mexico, and Kansas).

207. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017).

allows the birth mother and alleged genetic father to agree to identify him as the legal father.[208] After a sixty-day rescission period, the form is binding on the parties as if it were a legal judgment.[209] While these forms were clearly designed to identify genetic fathers without the expense of adjudication, the UPA (2017) introduces a parallel voluntary "acknowledgement of parentage" that allows the birth mother to acknowledge parentage of a genetic, intended, or presumed parent, regardless of sex or gender.[210] It remains to be seen if many states will accept this procedure, but it would be a fourth avenue for intended parents to obtain legal status.

When parentage law stops discriminating on the basis of gender, non-biological mothers in same-sex couples may become parents through assisted reproduction provisions, the marital presumption, the residential presumption, or voluntary acknowledgements of parentage. De facto parenthood is largely redundant in the very class of cases that motivated courts to adopt it.

Of course, even reformed parentage rules may be under-inclusive. Same-sex couples who conceived before the revisions will fall between the cracks. They did not satisfy the presumptions or assisted reproduction statutes in force when they conceived. Other couples may not have foreseen the formalities required by the new reformed statutes. For example, while the UPA (2017) allows oral preconception agreements,[211] many states insist on a written contract. In *C.G. v. J.H.*, the parents decided to conceive together without a written agreement, and the Pennsylvania Supreme Court refused to recognize the non-biological parent based merely on subjective intent and function.[212] De facto parenthood could play a gap-filling role that softens the formal rules to recognize these parents.

Of course, a more precise route to avoid injustice would be to create retroactive statutory or equitable exceptions. This narrower route seems appropriate because exceptions are harder to justify *after* the legal reforms. Lawmakers may demand written agreements to clarify the parties' intent *ex ante* and avoid unreliable decisions based on parole evidence and evolving ideas after the birth. Allowing petitioners to use de facto parentage to avoid the writing requirement may undermine the legislatures' intended benefits. Similar arguments could apply to other reformed parentage statutes. Lawmakers may require two years of co-residence for the holding out because they prefer a certain date to unreliable battles between psychological experts. In that case,

208. 42 U.S.C. § 666(a)(5)(C)(i) (2019).

209. 42 U.S.C. § 666(a)(5)(D)(iii) (2019).

210. UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2017).

211. *See id.* at § 704 (permitting oral agreements with clear and convincing evidence).

212. C.G. v. J.H., 193 A.3d 891, 904 (Pa. 2018).

allowing de facto parent claims for shorter periods of co-residence recreates the precise problem the residential presumption sought to avoid.[213] Existing formal limits on parentage may not be ideal. But if they can be improved, we should debate modifying their limits, rather than supplanting them with blanket ad hoc standards.

2. Adding a Second Parent: Substitute for Adoption

(a) A and B agree to adopt and raise a child together, but only A adopts. Nevertheless, A and B hold B out as the child's parent, and the child regards B as a parent. B lives with the child and fulfills caretaking responsibilities for several years.

(b) A is the legal parent of the child. A and B would like B to adopt the child, but B never adopts. Nevertheless, A and B hold B out as the child's parent, and the child regards B as a parent. B lives with the child and fulfills caretaking responsibilities for several years.

Some litigants use de facto parenthood as a substitute for adoption.[214] Indeed, Jeffrey Parness refers to it as "informal adoption."[215] In some cases, two adults plan to adopt and raise a child together, but only one parent completes the adoption process. For example, in *Sinnott v. Peck*, a same-sex couple decided to adopt an infant from Guatemala, but the only feasible adoption agency would not serve same-sex couples.[216] One adult adopted the child initially, and the couple planned a civil union so they could perform a second-parent adoption in Vermont.[217] Unfortunately, personal and familial illnesses prevented them from completing the ceremony.[218] Nevertheless, the nonadoptive mother was fully involved in all caretaking activities, and the

213. *But see* RESTATEMENT OF CHILDREN AND THE LAW § 1.82, cmt. d (AM. LAW. INST. Tentative Draft No. 2, 2019) (rejecting "necessarily arbitrary" set time period in favor of judicial determination that petitioner occupied "a parental role for a length of time sufficient to have established a bond and dependent relationship"). Broad judicial standards can be a rational supplement to formal rules, if false negatives are more likely than false positives. Suppose legislators believe (1) few judges are excessively eager to recognize functional parents and (2) legislators can identify general situations where functional parentage is appropriate but judges are unlikely to find parentage. Legislators could define parentage rules that prevent judges from failing to recognize functional parents in these clear cases (reducing false negatives), while the parentage standard allows judges to recognize functional parents in situations unforeseen by the formal rule (with few false positives). If these premises are true, this is a sound argument against treating parentage provisions as exhaustive, although I have not seen anyone make this argument for the UPA's structure. Thanks to Fred Schauer for raising this argument.

214. *E.g.*, Kulstad v. Maniaci, 220 P.3d 595, 606-08 (Mont. 2009).

215. Jeffrey A. Parness, *Formalities for Informal Adoptions*, 43 CAP. U. L. REV. 373, 375 (2015).

216. Sinnott v. Peck, 180 A.3d 560, 562, 572 (Vt. 2017); *cf.* Smith v. Gordon, 968 A.2d 1, 14 (Del. 2009) (superseded by statute); *In re* E.L.M.C., 100 P.3d 546, 562 (Colo. App. 2004) (only visitation under a harm standard); Titchenal v. Dexter, 693 A.2d 682, 685 (Vt. 1997) (rejecting de facto parenthood on similar facts).

217. *Sinnott*, 180 A.3d at 572.

218. *Id.* at 562.

child called her "Mom."[219] Four years later, the parents ended their relationship amicably and shared custody equally for three years.[220] Then, when their child was seven, the adoptive mother tried to sever all contact between the child and the second mother.[221]

This scenario is similar to a preconception agreement case. The Vermont Supreme Court concluded that when two adults intend to take on joint responsibility for a new child, "there is no principled basis for distinguishing a couple that decides to bring a child into their family through donor insemination and childbirth from a couple in which one of the mothers adopts pursuant to a joint plan to acquire and parent a child together."[222] Both adults subjectively intend to be equal legal parents, but they fail to complete the formalities because adoption is impractical or costly.[223] Sometimes the parents seek other legal-sounding substitutes, like changing the child's birth certificate and surname.[224] State law may excuse their failure to comply with adoption formalities, recognizing their intent and follow-through.[225]

The second set of adoption-related cases raises different issues, which are well illustrated by *Kilborn v. Carey*.[226] Carey moved in with Kilborn when her daughter was two months old.[227] The biological father had "removed himself from his daughter's life."[228] Four months later, Carey and Kilborn married.[229] Their wedding ceremony included "an informal 'adoption' ceremony called 'sprouts and roots,' which celebrated their union as a family and held the child out to their family and friends as Kilborn's 'adopted' daughter in spirit and intention."[230] For the next four years, Kilborn was the family's primary wage earner and provided "day-to-day care" for the child, who referred to him as "daddy."[231] Carey and Kilborn discussed adoption, but the biological

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219. *Id.*

220. *Id.*

221. *Id.* at 562-63.

222. *Id.* at 573 n.6.

223. Marquez v. Caudill, 656 S.E.2d 737, 744 (S.C. 2008); Fry v. Caudill, 554 S.W.3d 866, 867-68 (Ky. Ct. App. 2018) (legal mother worried adoption would lead to loss of children's "medical card").

224. Inoue v. Inoue, 185 P.3d 834, 848-49 (Haw. Ct. App. 2008); *Fry*, 554 S.W.3d at 868; Nguyen v. Boynes, 396 P.3d 774, 778 (Nev. 2017).

225. Some states have long recognized "equitable adoption" to excuse formalities, but this doctrine is limited to probate not custody determinations. *In re* Parentage of Scarlett Z.-D., 28 N.E.3d 776, 792 (Ill. 2015).

226. 140 A.3d 461, 462 (Me. 2016).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 463.

father refused to consent.[232] The couple separated when Carey's first child was four.[233] The Supreme Judicial Court of Maine upheld the trial court's conclusion that Kilburn was the child's de facto parent.[234]

Unlike in the first scenario, here one party begins as a recognized legal parent while the other has no legal status. Yet, as in the first scenario, both adults intend for the new partner to be a legal parent. Only legal impediments stand in the way. Carey and Kilborn could not act on their intention to adopt because the noncustodial legal parent did not consent. Other couples cannot adopt because of discrimination. Many states allow second-parent adoption only to married stepparents,[235] which until recently precluded same-sex adoption.[236] Although the new parent lacks legal status, both adults regard her as a full parent, and she takes on substantial parental roles. Some states may, like Vermont, choose to regard these cases as analogous to preconception agreements.

On the other hand, states may hesitate to use de facto parenthood in either adoption situation because the doctrine is not merely filling gaps but openly circumventing adoption law.[237] Adoption's substantive and procedural rules were designed to establish new parents in ways consistent with the constitutional rights of existing parents and with the child's welfare.[238] A child can be adopted only if he is "available" for adoption, which means either the child has no legal parents or the parents consent to the adoption.[239] Existing legal parents must have notice of the adoption proceeding and an opportunity to contest it.[240] If the legal parent does not consent, the adoption cannot proceed unless her rights are terminated for neglect, abandonment, or other statutory factors.[241] Even if the child is available for adoption, public officials must investigate the adoptive parent and approve of the home placement.[242]

These rules reflect state judgments about how much to encourage stepparent relationships, how much to investigate adoptive parents, and how to do all of this consistent with the rights of existing parents.

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232. *Id.* at 463, 466.

233. *Id.* at 462-63.

234. *Id.* at 467.

235. MARGARET C. JASPER, THE LAW OF ADOPTION 2 (2008).

236. *See In re* Adoption of Luke, 640 N.W.2d 374, 382 (Neb. 2002).

237. *Id.*; V.C. v. M.J.B., 748 A.2d 539, 553 (2000) (admitting the doctrine substitutes for adoption).

238. Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 90-91 (2006); UNIF. ADOPTION ACT, § 2-401, commentary (UNIF. LAW COMM'N 1994) (describing how consent provisions were crafted to accommodate the Supreme Court's unwed father cases).

239. *See* JASPER, *supra* note 235, at 39.

240. *Id.* at 44-45.

241. *Id.* at 46-47.

242. *Id.* at 14-15.

Perhaps adoption law is too strict. Maybe states should readily grant second-parent adoptions over the objection of noncustodial parents, as the court did in *Kilborn*. One court has held de facto parenthood does not require consent by noncustodial parents, as long as they know about the relationship.[243] Maybe states should overlook discriminatory foreign adoption laws and forgive parents' failure to adopt due to expense or inconvenience, as the court did in *Sinnott*. Indeed, some scholars support de facto parenthood because they believe the failure to adopt should be excused because it is expensive, time consuming, or intrusive.[244] Maybe states should permit joint adoption by unmarried couples or by multiple people. Some scholars support de facto parenthood because they believe the law should accommodate three parents, even over parental objection.[245]

As I said above, I do not intend to resolve such policy debates. My point is that where de facto parenthood overlaps adoption law, the new parentage standard empowers judges to resolve policy debates using ad hoc discretion in ways that will differ from the adoption statutes and will vary between judges. Instead of adopting a sweeping functional parent test that empowers courts to resolve policy disagreements under the façade of a best interests analysis, reformers should face these policy choices openly.

3. Representation About Parentage: Substitute for Estoppel

A is the legal parent. A tells B that B is a biological or legal parent. B relies on A's statement to take on a caretaking role for a substantial period of time and for the child to regard B as a parent. If A tries to deny B's parentage to avoid sharing custody, B may equitably estop A from denying her representation about B's parentage.

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243. K.A.F. v. D.L.M., 96 A.3d 975, 982-83 (N.J. Super. Ct. App. Div. 2014) ("consent of both legal parents is not required to create a psychological parent relationship between their child and a third party," but lack of consent by one parent is one factor to consider under the best interests test). *Contra In re* Parentage of M.F., 228 P.3d 1270, 1273-74 (Wash. 2010); Bancroft v. Jameson, 19 A.3d 730, 748 (Del. Fam. Ct. 2010) (holding de facto parent statute unconstitutional as applied to permit boyfriend seeking parental rights as against two fit legal parents).

244. Nancy Polikoff, *The New "Illegitimacy:" Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 733-34 (2012); Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 95 (2017). See *also* NeJaime, *supra* note 14, at 2317-23 (arguing against adoption as a substitute for binding preconception agreements).

245. Sacha M. Coupet, *"Ain't I a Parent?": The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 636-40 (2010).

A is the legal parent. B tells A that B will be a parent of the child, and A and the child rely on that statement. If B later tries to deny parentage to avoid paying child support, A may equitably estop B from denying her prior representation.

Many de facto parenthood cases involve facts that would justify application of equitable estoppel.[246] In general, equitable estoppel prevents a litigant from contradicting his past misrepresentations, if it will unfairly harm those he induced to rely on his statements.[247] Courts often use estoppel to prevent parties from rebutting the parentage presumptions. A father may be estopped from rebutting the marital presumption to avoid child support if he told the child he was its father knowing he was not its genetic father.[248] Conversely, a mother may be estopped from rebutting the marital presumption to avoid sharing custody with her husband, if she told him that he was the child's father and he relied on her to develop a parental relationship over a substantial period.[249] These principles developed around the marital presumption but now extend to non-marital parents,[250] albeit with less certain results.[251]

Equitable estoppel can overlap functional parentage.[252] *Debra H v. Janice R*, for example, is a preconception agreement case with an estoppel twist.[253] The social mother, Janice, alleged she entered an oral

246. *E.g.*, Middleton v. Johnson, 633 S.E.2d 162, 164-65 (S.C. Ct. App. 2006) (biological mother misled former long-term boyfriend, who nevertheless maintained informal custody four nights a week despite DNA test); Rubano v. DiCenzo, 759 A.2d 959, 961-62 (R.I. 2000) (parties entered a written settlement agreement awarding custody to non-biological mother, which court held estopped biological mother from denying maternity—without addressing whether non-biological mother could be a de facto parent in the first instance).

247. T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 387 (2008) (quoting Pickard v. Sears, 112 Eng. Rep. 179 (K.B. (1837)); Bergan v. Bergan, 572 N.W.2d 272, 274 (Mich. Ct. App. 1997).

248. Clevenger v. Clevenger, 11 Cal. Rptr. 707, 716 (Cal. Ct. App. 1961); W. v. W., 728 A.2d 1076, 1085 (Conn. 1999); Johnson v. Johnson, 286 N.W.2d 886, 887 (Mich. Ct. App. 1979); Knill v. Knill, 510 A.2d 546, 551 (Md. 1986); June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 230 (2011); *see also* Nguyen v. Boynes, 396 P.3d 774, 777-78 (Nev. 2017) (non-biological parent obligated to pay support if he promised to adopt and in reasonable reliance, the biological father's parental rights are terminated).

249. *In re* Marriage of Gallagher, 539 N.W.2d 479, 482 (Iowa 1995); Pettinato v. Pettinato, 582 A.2d 909, 912 (R.I. 1990). Some courts apply estoppel only to prevent wives from rebutting marital paternity. Lake v. Putnam, 894 N.W.2d 62, 65 (Mich. Ct. App. 2016).

250. *E.g.*, Shondel J. v. Mark D., 853 N.E.2d 610, 611 (N.Y. 2006).

251. Carbone & Cahn, *supra* note 248, at 233-37.

252. Inoue v. Inoue, 185 P.3d 834, 848-49 (Haw. Ct. App. 2008) (biological mother met man while pregnant, married him, changed birth certificate, and represented the child was adopted).

253. Debra H. v. Janice R., 930 N.E.2d 184, 184 (N.Y. 2010), *abrogated by In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500 (N.Y. 2016) (recognizing preconception agreement as path to parentage).

parenting agreement with the biological mother, Debra.[254] Debra, who was a lawyer, assured Janice that Janice was a legal parent even without adoption, which would require unnecessary and intrusive state approval.[255] The New York Court of Appeals refused to apply equitable estoppel because the legislature codified estoppel for support but not visitation.[256] Imagine instead that New York recognized written preconception agreements. In that situation, perhaps Debra should be estopped from disproving Janice's motherhood. Later New York cases use equitable estoppel to prevent a biological parent from rebutting the marital presumption in a same-sex relationship.[257]

Although equitable estoppel and de facto parenthood are often equated, their distinct elements reflect distinct moral concerns.[258] Most important, estoppel focuses on misrepresentations. This "allays concerns" about the rights of the legal parent, who cannot in fairness complain because the law refuses to allow her to benefit from her own misrepresentations.[259] This element limits the use of estoppel to impose paternity on unwilling fathers. When a father had no reason to doubt his genetic paternity, many courts find he did not knowingly make false statements to the child and cannot be estopped from ending the relationship.[260] De facto parenthood, in contrast, is unconcerned with misrepresentations, knowing or otherwise. The legal parent must foster the new relationship, but she need not make any representations about parental status.[261] The de facto parent must assume parental obligations, but she need not make false representations about being the child's parent.

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254. *See* Debra H v. Janice R., No. 106569/08, 2008 WL 7675822 , at *3-4 (N.Y. Sup. Ct. Oct. 2, 2008).

255. *Id.* at *4 ("[W]e don't need an adoption. You are his parent. I am a lawyer. I know the court system. We don't want the Courts to get involved."), discussed in Feinberg, *supra* note 244, at 99 (citing appellate briefs).

256. *Debra H.*, 930 N.E.2d at 191; *see also* Josh Smolow, *Can Equitable Estoppel Be Used As an Effective Way for A Legal Parent to Obtain Child Support for the Children of A Separated Same-Sex Couple?*, 18 CARDOZO J.L. & GENDER 481, 486-87 (2012).

257. *E.g.*, Christopher Y.Y. v. Jessica Z.Z., 69 N.Y.S.3d 887, 895 (N.Y. App. Div. 2018).

258. Janice M. v. Margaret K., 948 A.2d 73, 83 n.7 (Md. 2008). Jeffrey A. Parness and Matthew Timko argue de facto parenthood supersedes equitable estoppel, but the fact that the doctrines conflict does not show one supersedes the other. *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 805 (2018).

259. Nicole M. Riel, *The Other Mother: Protecting Non-Biological Mothers in Same-Sex Marriages*, 31 QUINNIPIAC PROB. L.J. 387, 403 (2018).

260. *See* Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 262 (2006).

261. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

Second, only a victim who reasonably relied on false representations can assert estoppel, and only the person who made the representations is estopped.[262] As a result, if both parents knew the husband was not the genetic father, then many courts refuse to apply estoppel principles.[263] Other courts still apply estoppel if the child relied on the parents' misrepresentations and will suffer if one of them denies paternity.[264] Even here, courts require a detriment to the child beyond "the emotional harm that a child experiences as a result of a parent's rejection," such as financial harm or interference with another paternal relationship.[265] In addition, because estoppel applies only among the parties to the statement, it cannot alter the rights of third parties. The wife's false statements to her husband do not prevent a putative father from claiming paternity.[266] In contrast, many de facto parent cases involve a cohabitant or relative asserting rights to custody or visitation against another, noncustodial parent.

Finally, equitable estoppel is a defense, not a cause of action. A party can use estoppel to prevent someone from rebutting a parentage presumption, but estoppel cannot create legal rights where none existed.[267] This could have interesting consequences. Equitable estoppel can coherently divide an adult's rights and duties to a child. Suppose a man and woman agree to have a child by artificial insemination with donor sperm, but then the man leaves his partner during pregnancy.[268] Because estoppel focuses on unfairness to the child and to the mother induced to shoulder parental burdens, estoppel can coherently impose (some) support payments on the man without giving him parental rights. In contrast, strong de facto parenthood carries the full suite of parental rights and duties, or none at all. The man who left his pregnant partner never had any relationship with the child, so he cannot be a de facto parent with a duty of support. The unified status of de facto parenthood can also have troubling consequences. Some courts are reluctant to impose support duties on unwilling de facto parents, even if they satisfy the test and could have used the doctrine to assert

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262. Soltis v. First of Am. Bank-Muskegon, 513 N.W.2d 148, 152 (Mich. Ct. App. 1994). *But see* T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 389-91 (2008) (recognizing substantial case law requires reliance, but noting many courts no longer demand reliance if necessary to prevent manifest injustice).

263. *E.g.* Barber v. Barber, 77 P.3d 576, 579-80 (Okla. 2003).

264. Shondel J. v. Mark D., 853 N.E.2d 610, 616 (N.Y. 2006). If the equities between or among the adults are now irrelevant because estoppel turns "exclusively on the best interests of the child," *id.*, then equitable estoppel and de facto parenthood have effectively collapsed.

265. Singer, *supra* note 260, at 262.

266. *But see* Juanita A. v. Kenneth Mark N., 930 N.E.2d 214, 216 (N.Y. 2010) (discussed in Carbone & Cahn, *supra* note 248, at 230).

267. *See* White v. White, 293 S.W.3d 1, 17 (Mo. Ct. App. 2009).

268. Smolow, *supra* note 256, at 499; Levin v. Levin, 645 N.E.2d 601 (Ind. 1994).

parental rights.[269] This is also the position of the UPA (2017).[270] De facto parenthood thus becomes troublingly asymmetric. The de facto parent can have the benefits and duties of parenthood if he is willing, but he need not risk parental responsibilities if he declines the opportunity.

4. Entrustment: Substitute for In Loco Parentis or Abandonment

A is the legal parent. A leaves the child with B, a cohabitant, relative, or friend. A intends to return for the child but has little or no contact with the child for a substantial period of time. B takes on all parental roles for the child.

Many de facto parent cases involve something akin to abandonment.[271] In this class of cases, a legal parent leaves her child with a cohabitant, relative, or friend, often because the parent is suffering from mental health or substance abuse problems or is serving a prison sentence.[272]

In *McDonel v. Sohn*, for example, a child often stayed with her aunt and uncle because of her mother's "serious psychological problems."[273] The child had little contact with her biological father until she was three, when he began seeing her one weekend a month.[274] After the mother committed suicide, the trial court awarded the aunt and uncle primary custody.[275] The appellate court affirmed, noting that the aunt and uncle's "commitment to raising [the child] and their willingness to accept the parental responsibility was the reason [she] thrived developmentally."[276] The aunt in *McDonel* sought custody against the noncustodial father, but in other cases, relatives seek custody against the parent who entrusted a child to their care.[277]

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269. *See* Parness & Timko, *supra* note 258, at 799-800. *But see* Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000).

270. *See* UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM. 2017).

271. *E.g.*, Kilborn v. Carey, 140 A.3d 461, 465-66 (Me. 2016) (father saw his daughter only twice in four years and knew she was being cared for by mother's boyfriend); Francies v. Francies, 759 N.E.2d 1106, 1116-18 (Ind. Ct. App. 2001) (upholding grandparent custody that offered more stable emotional and financial support because mother voluntarily relinquished custody for months to travel for dating relationships).

272. *E.g.*, Eaton v. Paradis, 91 A.3d 590, 592 (Me. 2014).

273. 762 A.2d 1101, 1103, 1106 (Pa. Super. Ct. 2000).

274. *Id.* at 1103.

275. *Id.* at 1102.

276. *Id.* at 1108-09 (quoting trial court findings) (alterations added).

277. *E.g.*, Windham v. Griffin, 887 N.W.2d 710, 717-18 (Neb. 2016) (birth mother suffering from postpartum depression intended to entrust newborn temporarily to grandmother's care); J.W. v. R.J.R., No. AFD-07-42-09, 2010 WL 520505, at *1 (N.J. Super. Ct. App. Div. Feb. 16, 2010) (grandmother intended to adopt grandchild but was not granted custody because she was contesting her own neglect allegations, so she entrusted child to great-aunt, who later asserted de facto parenthood in effort to retain custody).

The facts of *McDonel* are tragic but not novel. Parents have always turned to relatives and friends for help, and the law has long allowed parents to delegate their parental authority to " 'the capable and loving hands' of a relative when the parent is unable to care for the child."[278] Under the common law, someone who has control of a child and intends to accept parental duties without adoption is said to stand in loco parentis, or "in the place of a parent."[279] When a parent leaves their child in a nonparent's physical custody, the nonparent stands in loco parentis.[280] Stepparents who accept a stepchild into their home stand also in loco parentis, although being a stepparent alone does not generate freestanding or ongoing rights or duties.[281]

During the relationship, a person acting in loco parentis has the same legal rights and duties as a parent.[282] He has a duty to care for the child and provide necessary food, shelter, and clothing, and thus can be held liable for injuries caused by neglect.[283] Creditors who provide the child with necessities can sue him.[284] He has a right to discipline the child,[285] and at common law he had a right to the child's labor without payment.[286] Under modern statutes, he may also have the power to make medical, schooling or other custodial decisions.[287] Un-

278. *Windham*, 887 N.W.2d at 718.

279. T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001) (discussing Logan v. Murray, 6 Serg. & Rawle 175, 178 (Pa. 1820)); *see generally* 28 AM. JUR. PROOF OF FACTS 2D 545 (1981). In its common law origins, in loco parentis also enabled fathers to delegate rights to a master, tutor, or schoolmaster. John C. Hogan & Mortimer D. Schwartz, *In Loco Parentis in the United States 1765-1985*, 8 J. LEGAL HISTORY 260, 260 (1987).

280. Moritz v. Garnhart, 7 Watts 302, 1838 WL 3244, at *1 (Pa. 1838) (grandfather had right to custody of illegitimate child because he had acted *in loco parentis* since her birth); Farve v. Medders, 128 So. 2d 877, 878-80 (Miss. 1961) (friend acting *in loco parentis* at mother's request had right to custody superior to grandparents).

281. Lantz v. Frey, 14 Pa. 201, 202 (Pa. 1850) (stepparent); *In re* Adoption of Tompkins, 20 S.W.3d 385, 386-87 (Ark. 2000) (stepparent). Many cases rely on 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *192 (O.W.Holmes, Jr. ed., 12th ed. 1878) (Stepfather has no duty to support stepchild, but if "he takes the wife's child into his own house, he is then considered as standing *in loco parentis*, and is responsible for the maintenance and education of the child so long as it lives with him.").

282. Commonwealth v. Gerstner, 656 A.2d 108, 112 (Pa. 1995); Young v. Hipple, 117 A. 185, 188 (Pa. 1922).

283. Nelson v. Johansen, 24 N.W. 730, 730 (Neb. 1885) (defendant stood *in loco parentis* for child living and working in his home, so he could be liable in negligence for allowing her to walk back home to her parents through winter storm with inadequate clothing); Clasen v. Pruhs, 95 N.W. 640, 641 (Neb. 1903) (German citizens sent their children to live with aunt in America and later sued aunt in her capacity *in loco parentis* for failing to clothe or feed the child adequately).

284. Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 42 (1984).

285. McReynolds v. State, 901 N.E.2d 1149, 1153 (Ind. Ct. App. 2009) (*quoting* Snow v. England, 862 N.E.2d 664, 666 (Ind. 2007) (school discipline)).

286. Lantz v. Frey, 14 Pa. 201, 201-02 (Pa. 1850).

287. Commonwealth v. Gerstner, 656 A.2d 108, 112 n.6 (Pa. 1995).

like parental rights, however, these rights are temporary. Traditionally, once the relationship ends, neither the child nor the surrogate parent has ongoing rights or duties, including to support, inheritance, decisional authority, custody, or visitation.[288]

The in loco parentis relationship can be terminated by the surrogate, the child, or the legal parent.[289] Some scholars argue parents cannot revoke in loco parentis status.[290] They draw on a line of cases tracing back to a 1978 Utah Supreme Court case, *Gribble v. Gribble*.[291] However, the same court later disavowed *Gribble*'s interpretation of the common law.[292] Like the subsequent court, I found no historical support for this position that parents cannot revoke in loco parentis status.[293] Quoting a common phrase among cases and treatises, *Gribble* claims in loco parentis can be terminated at will by the surrogate parent or by the child.[294] *Gribble* assumes this is an exhaustive list, but its cited cases do not support this assumption. In some of the cases, courts denied claims for child support against former stepfathers who had acted *in loco parentis*, noting that a stepparent relationship is voluntary.[295] In other cases, an insurer refused to pay a stepchild for a stepparent's life insurance, arguing the *in loco parentis* relationship ended because the child was grown and married.[296] Courts reject the insurer's self-interested position, holding the relationship persists as long as the child and surrogate choose.[297] None of these

288. Mahoney, *supra* note 284, at 42.

289. Jones v. Barlow, 154 P.3d 808, 812 (Utah 2007); Windham v. Griffin, 887 N.W.2d 710, 716 (Neb. 2016); Rosky v Schmitz, 188 P. 493, 494 (Wash. 1920).

290. Polikoff, *supra* note 49, at 507; Hellman, *supra* note 10, at 57.

291. 583 P.2d 64, 67 (Utah 1978).

292. *Jones*, 154 P.3d at 812-14. *Jones*'s common law interpretation seems correct, even if the court was motivated in part by hostility to same-sex couples. Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS. 29, 66 (2014).

293. *See generally* Carignan v. Carignan (1989), 61 Man. R. 2d 66 (Can. Man. Ct. App.) (surveying the common law of England, America, and Canada), *overruled by* Chartier v. Chartier, [1999] D.L.R. 4th 540 (Can. S.C.C.) (holding statutory use of "*in loco parentis*" need not follow the common law). However, in loco parentis has been used to describe the status of the person to whom a parent voluntarily ceded parental rights through intentional abandonment. *In re* M.A.F., 334 S.E.2d 668, 671 (Ga. 1985).

294. *Gribble*, 583 P.2d at 67 (citing Taylor v. Taylor, 364 P.2d 444, 445 (Wash. 1961); Chestnut v. Chestnut, 147 S.E.2d 269, 270 (S.C. 1966)). *Taylor* and *Chesnut* both quoted State *ex rel.* Gilman v. Bacon, 91 N.W.2d 395, 399 (Iowa 1958), which quoted McDonald v. Texas Employers' Insurance Ass'n, 267 S.W. 1074, 1076 (Tex. Civ. App. 1924) ("the status of one in loco parentis is temporary, and may be abrogated at will by either the person thus standing in loco parentis or by the child"). *Gribble* also cited 59 AM. JUR. 2D PARENT AND CHILD § 9 (formerly 59 AM. JUR. 2D PARENT AND CHILD § 91). *See also* 67A C.J.S. PARENT AND CHILD § 366.

295. *Taylor*, 364 P.2d at 444-45 (support); *Chestnut*, 147 S.E.2d at 270 (support); *Ex rel.* Gilman, 91 N.W.2d at 399 (support).

296. *Young v. Hipple*, 117 A. 185, 188 (Pa. 1922).

297. *Id.* at 189.

cases ask if the legal parent may end this relationship. Moreover, the *Gribble* interpretation results in a strange allocation of authority. The child can disown the surrogate parent; the surrogate parent can disown the child; yet, the legal parent has no say in this relationship?[298]

In any case, over the last forty years, courts have expanded *in loco parentis* status beyond its common law roots. In the 1980s, some courts began invoking it when they awarded visitation to stepparents in divorce.[299] Divorce statutes allowed courts to divide custody over "children of the marriage," and a few courts evoked *in loco parentis* while interpreting these provisions to give custody to stepparents who acted as parents during the marriage.[300] Later, a handful of states revised their statutes to give stepparents standing for visitation, while others chose to confer standing on anyone who acted *in loco parentis*.[301] Another group of states expanded *in loco parentis* through the common law, creating a general exception to the rule that only third parties listed in the statute have standing to seek visitation.[302]

How does the expanded *in loco parentis* relate to strong de facto parenthood? Some scholars and courts treat them as interchangeable,[303] but they are distinct in principle and practice.[304] Most important, a person acting in place of a parent does not become a parent, but remains a "third party."[305] Consequently, to receive visitation or custody, she must still rebut the parental presumption.[306] Second, *in loco parentis* is still a temporary status occupied with the legal parent's consent. Even where the law gives her an ongoing right to visitation, the broader powers, rights, and duties of the parent-like status terminate with the relationship. *In loco parentis* is more akin to guardianship

298. Jones v. Barlow, 154 P.3d 808, 814 (Utah 2007); Foust v. Montez-Torres, 456 S.W.3d 736, 738-39 (Ark. 2015).

299. Spells v. Spells, 378 A.2d 879, 883 (Pa. Super. Ct. 1977); *see* Hellman, *supra* note 10, at 53; *Bowman*, *supra* note 135, at 137.

300. *Spells*, 378 A.2d at 881-83; Carter v. Broderick, 644 P.2d 850, 853-54 (Alaska 1982).

301. Hellman, *supra* note 10, at 53 (citing five states with stepparent statutes and many where stepparents receive visitation under other provisions). Arizona's statute redefines *in loco parentis* broadly; *e.g.*, ARIZ. REV. STAT. ANN. § 25-401 (2013); Riepe v. Riepe, 91 P.3d 312, 314 (Ariz. Ct. App. 2004) (recognizing common law supplanted by statutory definition as "a person who has been treated as a parent by the child and who has formed a meaningful parental relationship with the child for a substantial period of time").

302. J.A.L. v. E.P.H., 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996) (*in loco parentis* applied to lesbian couple with preconception agreement) (endorsed in T.B. v. L.R.M., 786 A.2d 913, 917-18 (Pa. 2001).

303. *See* UNIF. PARENTAGE ACT § 609 cmt. at 50-51 (UNIF. LAW COMM'N 2017).

304. C.G. v. J.H., 193 A.3d 891, 906-07 (Pa. 2018) (refusing to recognize intentional parentage based on oral preconception agreement).

305. *See id.* at 911 n. 17; Davis v. Vaughn, 126 So.3d 33, 35-37 (Miss. 2013);

306. Polikoff, *supra* note 49, at 515-16 (describing third-party visitation cases that give standing to seek visitation to persons acting in loco parentis, but then refusing to lower the substantive standard); Bowman, *supra* note 135, at 137. *But see* Bethany v. Jones, 378 S.W.3d 731, 738 (Ark. 2011).

than parentage. Some statutes authorize parents to appoint a temporary guardian, delegating to the guardian their duty of care and right to control the child.[307] A parent may revoke this guardianship, and courts must presume that returning to parental custody is in the child's best interests.[308]

In loco parentis and statutory guardianship cover situations when a parent entrusts a child temporarily to the care of nonparents. But what if the arrangement is more enduring? For long-term custody, mechanisms exist to protect the relationship that develops between the child and non-parental caregiver.

When parents leave their children with third parties for a substantial period of time, usually six months or a year, many states allow the caregiver to seek custody under a "de facto custodian" statute.[309] These statutes apply if the parents are "absent"[310] or do not have physical custody.[311] If a parent does return and manage to regain custody, the former de facto custodian may still have standing to seek visitation.[312]

When the parent abandons his child permanently, then the custodial caregiver can file a petition to adopt the child without the parent's consent.[313] A parent abandons a child if he engages in voluntary and unex-

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307. *In re* D.I.S., 249 P.3d 775, 783 (Colo. 2011).

308. *Id.* at 781, 783-86 (citing cases in accord from Nebraska, Vermont, Michigan, North Dakota, Iowa, and Indiana, but noting three contrary cases in Mississippi, California, and Tennessee); *In re* Guardianship of Reena D., 35 A.3d 509, 512 (N.H. 2011).

309. See Kathleen Meara, *What's in A Name? Defining and Granting A Legal Status to Grandparents Who Are Informal Primary Caregivers of Their Grandchildren*, 52 FAM. CT. REV. 128, 133-34 (2014) (citing ten states with de facto *custodian* statutes and proposing model act).

310. O'Hearon v. Hansen, 409 P.3d 85, 94 (Utah Ct. App. 2017).

311. *See*, *e.g.*, ARK. CODE ANN. § 9-13-107(b) (West 2013); COLO. REV. STAT. ANN. § 14-10-123 (1)(b) (West 2012); IND. CODE ANN. § 31-17-2-8.5 (West 2018); MINN. STAT. ANN. § 257C.01 subdiv. 2(a) (West 2018) ("[R]esided with the individual without the parent present and with a lack of demonstrated consistent participation by a parent . . . ."); N.M. STAT. ANN. § 40-10B-8(B)(3) (West 2015) (resided with petitioner for ninety days and "extraordinary circumstances"); OR. REV. STAT. ANN. § 109.119(1) (West 2018); TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2015); *see also* WYO. STAT. ANN. § 20-7-102(a) (2011) (custody for "primary caregiver" of six months, but without defining primary caregiver).

312. COLO. REV. STAT. ANN. § 14-10-123 (1)(c) (West 2012) (if nonparent had physical custody for 182 days and commences suit within 182 days of returning custody); TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2015) (visitation for "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than ninety days preceding the date of the filing of the petition"); *see also In Interest of H.S.*, 550 S.W.3d 151, 160 (Tex. 2018) ("The statute does not require the nonparent to have ultimate legal authority to control the child, nor does it require the parents to have wholly ceded or relinquished their own parental rights and responsibilities.").

313. *Cf.* Kilborn v. Carey, 140 A.3d 461, 465-66 (Me 2016).

cused conduct that demonstrates his intent to forgo rights and duties permanently.[314] Courts and scholars disagree about whether the abandonment test should focus on the parent's subjective intent or on conduct that is objectively inconsistent with parental rights.[315] While the concept of abandonment may be vague, its endpoints are clear. All states find abandonment when intent and conduct converge, such as when a parent chooses to leave his child permanently in another person's care.[316] On the other end of the spectrum, a parent has not abandoned her child if she leaves the child temporarily[317] or if the separation is involuntary.[318]

In between these poles, disagreements abound. How much time must pass without contact before temporary entrustment becomes permanent abandonment? What if the contact is limited and sporadic? Must the parent provide financial support to avoid abandonment? Sensibly, many statutes try to specify the relevant conduct and period. In Ohio, a parent abandons his child if he "failed without justifiable cause to provide more than *de minimis* contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year."[319] Even with such guidance, courts must judge whether contact was *de minimis*[320] and what

314. Jeremiah J. v. Dakota D., 843 N.W.2d 820, 826-27 (Neb. 2014); C.C. Marvel, *What constitutes abandonment or desertion of child by its parent or parents within purview of adoption laws*, *in* 35 A.L.R.2d § 2; Kristin M. Wirgler, *Abandonment As A Ground for Termination of Parental Rights*, 16 J. CONTEMP. LEGAL ISSUES 333, 335 (2007).

315. *See* Boseman v. Jarrell, 704 S.E.2d 494, 503 (N.C. 2010). In the latter case, it would be more accurate to say continuous failure to perform parental duties is a forfeiture of parental rights. Farnsworth v. Farnsworth, 756 N.W.2d 522, 527 (Neb. 2008).

316. *E.g.*, *Boseman*, 704 S.E.2d at 503.

317. G.T. v. Adoption of A.E.T., 725 So. 2d 404, 410 (Fla. Dist. Ct. App. 1999) (citing Solomon v. McLucas, 382 So. 2d 339 (Fla. Dist. Ct. App. 1980) (teenage mother's temporary inability to care for child not abandonment)); *In Re* Adoption of Gossett, 277 So. 2d 832 (Fla. Dist. Ct. App. 1973) (father's failure to support daughter for twenty-five months while in military not abandonment when following discharge he matured and sought to exercise parental responsibilities); Windham v. Griffin, 887 N.W.2d 710, 718 (Neb. 2016) (allowing relative to care for child for "significant period of time is not the equivalent of forfeiting parental preference" because parent's recognition of her own temporary inability may be evidence of adequate parenting).

318. T.H. v. Dep't of Children & Family Servs., 979 So.2d 1075, 1080 (Fla. Dist. Ct. App. 2008); Adoption of Isabelle T., 175 A.3d 639, 649 (Me. 2017); Matter of Adoption of Joseph LL, 473 N.E.2d 736, 736-37 (N.Y. 1984).

319. OHIO REV. CODE ANN. § 3107.07(A) (West 2015) (italics added); *see also* FLA. STAT. ANN. § 63.032(1) (West 2014) (court shall infer intent to abandon if a parent "makes little or no provision for the child's support or makes little or no effort to communicate with the child" and may infer intent if a parent makes "only marginal efforts that do not evince a settled purpose to assume all parental duties").

320. *In re* Adoption of C.N.A., 108 N.E.3d 553, 557-58 (Ohio Ct. App. 2018); *In re* D.T., 292 P.3d 1120, 1121 (Colo. App. 2012) (interpreting de facto custody statute applying to child not in parent's "physical care").

circumstances excuse periods of *de minimis* contact.[321] Is minimal contact excused when a parent was deployed in the military, thwarted by the custodial parent, struggles with drug addiction, or recuperates from serious illness? In these scenarios, courts typically hold the child is not abandoned.[322] Yet, each scenario has also given rise to a de facto parent case.[323] Because de facto parenthood applies to the same cases as entrustment and abandonment, it enables courts to bypass the well-traversed limits on adoption on an ad hoc basis.[324]

B. De Facto Parenthood's Distinctive Cases

Given this vast overlap, does de facto parenthood have a distinctive niche where it the primary legal norm? De facto parenthood is the only option for petitioners who want to claim parental rights by virtue of living with and performing childcare *alongside* the fit legal parent.

1. Caregiving by Former Cohabitants and Stepparents

A and B are the legal parents of a child. A starts a relationship with C, who later moves in and provides substantial caretaking assistance for the child. After multiple years, A and C split. C may assert de facto parent status against A or B or both.

The first fact-pattern involves the married or unmarried stepparents of the custodial parent who use de facto parenthood to seek visitation or custody against the objection of their former partner or the

321. E.B.F. v. D.F., 93 N.E.3d 759, 765 (Ind. 2018) (mother's failure to communicate for one year excused because she was making a good faith effort at recovery from drug abuse and the father and stepmother thwarted her efforts at communication); Rodgers v. Rodgers, 519 S.W.3d 324, 328 (Ark. 2017) (court order denying mother visitation due to drug use did not excuse her failure to communicate with the children in other ways).

322. *In re* Madeline S., 769 N.Y.S.2d 22, 26 (N.Y. App. Div. 2003) (discussing scenarios).

323. *See, e.g.*, *supra* note 318; Youmans v. Ramos, 711 N.E.2d 165, 173 (Mass. 1999) (father is largely absent from child's life while deployed overseas and child lives with mother and aunt; mother dies when child is five and father continues to acquiesce to aunt's caretaking for four more years); McDonel v. Sohn, 762 A.2d 1101, 1105 (Pa. Super. Ct. 2000); Randy A.J. v. Norma I.J., 655 N.W.2d 195, 201 (Wis. Ct. App. 2002); Moran v. Weldon, 57 P.3d 898, 901 (Or. Ct. App. 2002); *In re* Visitation & Custody of Senturi N.S.V., 652 S.E.2d 490, 500 (W. Va. 2007) (overturning trial and appellate courts' approval of shared custody to paternal grandparents with whom biological mother allowed overnight stays); Matter of Holt, 420 P.3d 676, 680-81 (Or. Ct. App. 2018) (recounting attempts to determine whether "residing in the same household . . . on a day-to-day basis" is satisfied by weekends, three nights, or five nights each week).

324. *See, e.g.*, *In re* Guardianship of Victoria R., 201 P.3d 169, 175 (N.M. Ct. App. 2009) (using psychological parentage when mother left child with petitioners telling them she did not intend to return); *Matter of Holt*, 420 P.3d at 681 (describing attempts by courts of appeals to determine how many overnights each week is sufficient to establish residency with the grandparents).

non-custodial parent.[325] In *Moreau v. Sylvester*, for example, the legal mother Sylvester had an "on-again-off-again relationship for eight to ten years" with Moreau, during which he played a "significant, father-figure role" in the lives of her two children.[326] After they stopped dating, they continued to share responsibility for several years until their relationship deteriorated.[327] Moreau engaged in threatening behavior and received a relief from abuse order, at about the same time he filed a parentage complaint seeking custody.[328] The Vermont Supreme Court recognized Moreau might qualify as a parent under a de facto parenthood doctrine and declined to adopt it, in part out of concern cohabitants could use the doctrine for harassment.[329]

Sometimes disputes arise between the cohabitant of a custodial parent and the noncustodial parent, such as in *Harrington v. Daum*.[330] Daum and his wife had two children before their divorce, during which she received custody and he substantial visitation.[331] A month after the divorce, she met Harrington and began staying at his home on weekends with the children.[332] Harrington often performed parental tasks, such as picking the children up from daycare.[333] When the mother died a year later, Daum received custody.[334] He allowed Harrington to see the children several times, but then decided Harrington was interfering with his role as a father and limited his contact.[335] Harrington sought visitation as a de facto parent.[336] The trial court concluded Harrington had a parent-child relationship and awarded him visitation under a best interest test, but was reversed by the court of appeals.[337]

If former stepparents or cohabitants are going to obtain custody or visitation in these circumstances, then it will have to come via de facto parenthood. There were no allegations Sylvester or Daum were unfit or abandoned their children. Some states allow former stepparents or cohabitants to seek visitation as persons in loco parentis, but even if Moreau or Harrington had third-party standing, they could not have

325. *See* Kinnard v. Kinnard, 43 P.3d 150, 154 (Alaska 2002) (former stepmother); Thorndike v. Lisio, 154 A.3d 624, 628 (Me. 2017) (former stepfather); *cf.* Janet Mary Riley, *Stepparents' Responsibility of Support*, 44 LA. L. REV. 1753, 1764 (1984).

326. 95 A.3d 416, 417-18 (Vt. 2014).

327. *Id.* at 418.

328. *Id.*

329. *Id.* at 424.

330. 18 P.3d 456 (Or. Ct. App. 2001).

331. *Id.* at 456-57.

332. *Id.* at 457.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 458.

overcome the parental presumption. Sylvester and Daum voluntarily sustained their children's relationship with a former stepparent because they needed help or believed it benefited the children. While these two stepfathers were ultimately unsuccessful, this is one place where de facto parenthood makes a distinctive contribution that does not overlap or soften formal rules. De facto parenthood can decisively alter the relationship between a child and her parents' spouses or cohabitants who takes on parental responsibilities alongside the legal parent.

2. Parents Living with Relatives who Assist with Childcare

The second distinctive fact pattern involves relatives who live with a parent and her children and assist with childcare. A typical example is D.G. v. D.B, in which a grandmother sought to share custody of her grandchild with her daughter.[338] Facing financial hardship due in part to drug addiction, D.B. and her child lived sporadically with the grandmother.[339] The grandmother "played a large role in [the child's] life, providing occasional shelter, meals, laundry, and transportation to and from medical appointments."[340] Although nothing suggested the mother intended her child to live permanently with the grandmother and it had been four years since they last lived with her, the trial court found the grandmother could seek visitation as a de facto parent.[341]

Like stepparents, relatives who live with and care for a child can petition for third-party visitation under modern in loco parentis law, but they are unlikely to overcome the parental presumption. De facto parenthood fundamentally changes the posture of these cases. Although some scholars contend functional parentage advocacy slights relative caretakers,[342] the de facto parent doctrine is not limited by its terms to people who understand themselves as "parents," as opposed to nonparent caretakers with full parental responsibilities. *In re Custody of H.S.H.-K.* and the UPA (2017) only require a relationship that is "parental in nature."[343] Neither define this term, but it is broad enough to encompass relatives who act as parents, even if they are not

338. D.G. v. D.B., 91 A.3d 706, 708 (Pa. Sup. Ct. 2014).

339. *Id.* at 711-12.

340. *Id.* at 711.

341. *Id.*

342. Coupet, *supra* note 245, at 639-41.

343. *In re* H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995); UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. LAW COMM'N 2017); RESTATEMENT OF CHILDREN AND THE LAW § 1.82(a)(3), cmt. b (AM. LAW INST. Tentative Draft No. 2, 2019) (noting Restatement intended to encompass relative caregivers who might be excluded by UPA's "holding out" element).

"parents" in a more typical sense.[344] Similar de facto parenthood doctrines have been used to give custody to relative caretakers.[345]

Under non-discriminatory parentage and adoption law, de facto parenthood is unnecessary in most cases where custody or visitation is appropriate. When parents enter preconception agreements or when a parent abandons a child, other doctrines exist to protect caretakers. The rules of these existing doctrines, however, are threatened by de facto parenthood's broad parentage standard. I do not contend existing law is ideal, but existing rules developed to accommodate parental rights and child welfare in common fact patterns. Before we give judges discretion to avoid these policy settlements on an ad hoc basis, we should argue about whether the policies justify revising the rules. The problems are worse in the last two types of cases. De facto parenthood's distinctive conceptual niche, where it is revolutionary, is to treat former partners or relative caretakers as legal parents. In these cases, de facto parenthood raises serious constitutional problems because these petitioners would otherwise have to overcome *Troxel*'s parental presumption.

IV. CAN DE FACTO PARENTHOOD BE CONSTITUTIONAL?

Courts and scholars appeal to three arguments to reconcile strong de facto parenthood with the constitutional rights of the legal parent: (1) the de facto parent is a legal parent under state law, so *Troxel* does not apply; (2) the legal parent consented to de facto parenthood; and (3) children suffer when they lose a relationship with a de facto parent.[346] None of these arguments justifies a de facto parent doctrine that elevates stepparent or relative caregivers to parental status. They appear persuasive only because courts still treat preconception agreements as the paradigm and, consequently, fail to confront the constitutional problem.

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344. RESTATEMENT OF CHILDREN AND THE LAW § 1.82, Reporter's Note, cmt. a (AM. LAW INST. Tentative Draft No. 2, 2019) (describing precedent for applying de facto parenthood to relative caregivers).

345. W.H. v. D.W., 78 A.3d 327, 331-42 (D.C. 2013) (Two young children lived with their mother and eighteen-year-old half-brother. Their father had little involvement except paying child support. Because their mother was seriously ill, the half-brother performed most of the childcare with assistance from his grandmother. When their mother died, the court awarded the half-brother custody over the children, denying custody to the father and grandmother.). *See* Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking Up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104, 107 (2013).

346. Some courts also argue the legal parent acted "contrary to the child-parent relationship," but the two ways parents act contrary to the relationship is by consenting to another parent, Kulstad v. Maniaci, 220 P.3d 595, 604, 607 (Mont. 2009) (preadoption consent); *In re* L.F.A., 220 P.3d 391, 395 (Mont. 2009) (preconception consent), or by voluntarily failing to perform parental roles. In re A.P.P., 251 P.3d 127, 129 (Mont. 2011) (noncustodial father missed "many visitation opportunities" and paid only 30% of child support). *See also* Estroff v. Chatterjee, 660 S.E.2d 73, 82 (N.C. 2008) (similar).

A. State Power to Define Parentage

Many courts and scholars think de facto parenthood can be distinguished from *Troxel* in a way that "bypass[es] the constitutional problem altogether."[347] *Troxel* held that states must give "special weight" to parents' judgment about visitation with third parties, such as grandparents.[348] De facto parents are not third parties. They are legal parents on par with parents by biology or adoption.[349] State law answers the prior "threshold question" of "who qualifies as a 'parent' with coequal rights" before any constitutional parental presumptions apply.[350] As the Washington Supreme Court asserts, "*Troxel* does not . . . place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family."[351]

1. Limits on State Discretion to Define Parentage

In its boldest version, this argument assumes that state law determines who is a "parent" for constitutional law purposes with no constitutional oversight. This is a clear exaggeration. States generally define parents, but state parentage law is circumscribed by constitutional parental rights.[352] Parental rights are not unique in this regard. As Dean David Meyer has explained, the Constitution protects other liberties specified by state law.[353] The Constitution forbids states from depriving persons of property without due process and just compensation, yet state law defines property interests.[354] Individuals also have a constitutional right to marry, yet marriage is a status created by state law.[355]

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347. Grossman, *supra* note 26, at 336-37; *see also* Smith v. Guest, 16 A.3d 920, 931 (Del. 2011); *In re* Parentage of L.B., 122 P.3d 161, 178 (Wash. 2005); Bowman, *supra* note 135, at 150; Maldonado, *supra* note 109, at 896; Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31, 35 (2018); Polikoff, *supra* note 198, at 219 (only with respect to intentional parenthood). *But see* Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 456-61, 468-70 (2013) (arguing functional parents should not be treated as formal parents entitled to the constitutional presumption).

348. 530 U.S. 57, 69-70 (2000).

349. *Smith*, 16 A.3d at 931.

350. *Id. See also In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 499 (N.Y. 2016); Moreau v. Sylvester, 95 A.3d 416, 443 (Vt. 2014) (Robinson, J., dissenting).

351. *In re* Parentage of L.B., 122 P.3d at 178. *Contra In re* Nelson, 825 A.2d 501, 504 (2003); Guardianship of K.N., 73 N.E.3d 271, 275 (Mass. 2017).

352. Lehr v. Robertson, 463 U.S. 248 (1983), 256-57; Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1499 (2018).

353. David Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood, in* RECONCEIVING THE FAMILY 47, 57-62 (Robin Fretwell Wilson ed., 2006).

354. *Id.* at 57.

355. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

Property law scholars have explored the dynamic in such hybrid constitutional and state law rights.[356] On the one hand, deferring to a state's definitions of property limits interference with welfare regulations, encourages innovation and democracy, and limits the uncertainty and cost of federal litigation.[357] It also allows states to identify novel property interests that merit constitutional protection.[358] On the other hand, without a federal definition of property, states may unduly contract or expand constitutional protections.[359] States could avoid providing due process or compensation by declaring an interest is not "property"; or, states could interfere with regulation or established property rights by deeming a novel interest "property."[360] Thus, although state law creates the property interests that receive Constitutional protection, the takings and due process clauses also constrain state power to define property, fixing a floor to specify the minimal content of property and a ceiling to limit the expansion of protected interests.[361]

Something similar is true of parentage. Although state law defines parents, the Constitutional rights of parents constrain state power to define parents in two ways: states must recognize certain individuals as parents, and states may recognize new classes of parents only if consistent with established parental rights. The remainder of this section describes the required classes of parents, while the next section describes some limits on adding parents.

Constitutional law sets a floor by requiring states to recognize certain classes of individuals as legal parents.[362] The precise contours of constitutional parentage are uncertain, but three classes of adults have claims to constitutional parental rights independent of state law: genetic fathers, birth mothers, and genetic mothers.

Only the first is firmly established in existing Supreme Court precedent. The Court's only substantial discussions of constitutional par-

356. *See generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000); Maureen E. Brady, Penn Central *Squared: What The Many Factors of* Murr v. Wisconsin *Mean For Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 59-63 (2017).

357. Brady, *supra* note 356, at 63.

358. Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1208-09 (2016).

359. Merrill, *supra* note 356, at 923.

360. Brady, *supra* note 356, at 59, 62-63.

361. *Id.* at 65-66. *But see* Brady, *supra* note 358, at 1218-23 (casting doubt on value of a federal definition).

362. *See* Higdon, *supra* note 352, at 1495-1502, 1524-25 (describing constitutional limits on state efforts to define nonmarital fatherhood).

entage occur in its unmarried father cases, where the Justices developed what is now known as the "biology plus" test.[363] States must recognize the legal paternity of a genetic father who has fulfilled parental roles, at least as long as there is no competing paternity presumption.[364] In addition, genetic fathers must have some opportunity to adopt the caretaking roles that will ground full constitutional parental rights.[365]

This Constitutional definition of fatherhood limits state power to define legal paternity, as the Court explained in *Stanley v. Illinois*.[366] Stanley lived with his three genetic children and their mother, yet when she passed away, Illinois automatically removed his children.[367] Illinois argued Stanley had no parental liberty interest under the Constitution, because state law defined a man as a legal father only if he married the child's mother.[368] The Court rejected this argument. A state cannot simply define paternity to exclude unmarried genetic fathers because the Constitution "necessarily limits the authority of a State to draw such 'legal' lines as they choose."[369]

Unlike paternity, the Supreme Court has never addressed the factual ground for mothers' constitutional rights. Nevertheless, simple extensions of the biology plus test can support tentative conclusions. A woman who gives birth to her own genetic child has full parental rights at birth, because she accepts a measure of responsibility by performing the work of pregnancy and childbirth.[370] This argument coheres with the Court's reasoning in the equal protection cases where it has allowed the law to treat birth mothers and fathers differently.[371]

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363. Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 971-78 (1994).

364. Lehr v. Robertson, 463 U.S. 248, 262 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 128-29 (1989). Justice Scalia's plurality opinion in *Michael H.* suggests states may define parentage however they prefer, *id.* at 130, and, moreover, that any laws that follow traditional conceptions of parenthood are beyond challenge, *id.* at 126-27. However, Scalia relies on his controversial historical method for defining unenumerated rights, and contrary to his plurality opinion, five justices assumed that biological fathers have a parental liberty with respect to a child conceived in an adulterous affair, irrespective of state law or history. *Id.* at 136 (Brennan, J., dissenting).

365. Mark Strasser, *The Often Illusory Protections of "Biology Plus:" on the Supreme Court's Parental Rights Jurisprudence*, 13 TEX. J. ON C.L. & C.R. 31, 67-78 (2007) (surveying state court interpretations of the constitutional "opportunity," finding little actual protection for unmarried genetic fathers).

366. 405 U.S. 645, 652 (1972). *See also Lehr*, 463 U.S. at 256-57.

367. *Stanley*, 405 U.S. at 646-47.

368. *Id.* at 650.

369. *Id.* at 652 (quotation omitted). The Court writes that the "Equal Protection Clause" limits state authority in this regard, but the reference is to equal treatment of a fundamental right rather than to sex discrimination.

370. Kathy Baker, *The DNA Default and its Discontents*, 90 B.U. L. REV. 2037, 2057-61 (2016); Higdon, *supra* note 352, at 1535.

371. Baker, *supra* note 370, at 2059-61.

Sometimes the Justices suggests pregnant women form emotional bonds with the fetus in utero, which comes perilously close to gender stereotyping, but other times the Court recognizes that pregnancy and childbirth are work that can justify additional rights.[372] In addition to traditional mothers, genetic mothers who are not gestational mothers should receive constitutional protection. If the biology plus test applies in a gender-neutral fashion, then states must define legal maternity to include genetic mothers who fulfil parental responsibilities for their children after the birth.[373]

Outside these cases, it is difficult to predict who else, if anyone, has Constitutional parental rights because the Court has never addressed cases of pure intentional or functional parents without a genetic connection.[374] Suppose a woman and her partner decide to have a child together, so she undergoes IVF using anonymous egg and sperm donors. If their relationship ends during the pregnancy, must state law afford her partner an opportunity to develop a parental relationship? Suppose a woman agrees to be a gestational surrogate for two intended parents, again using anonymous gamete donors. If the surrogate later changes her mind and wants to keep the child, who has parental rights? There are few legal or moral signposts in this novel territory. So far, courts have allowed legal, social, and moral norms to develop without federal constitutional constraint. States are developing legal regimes for assisted reproductive technology, including preconception agreements, surrogacy agreements, and voluntary acknowledgements of parentage.

2. Limits on State Discretion to Add New Kinds of Parents

Few people suggest that assisted reproduction statutes raise deep constitutional problems. Does this suggest that as long as states maintain the required classes of constitutional parents, they may add new types of parents without constitutional oversight? This might suggest a narrowed state power argument: states may not constrict the core categories of parentage but may expand parentage without implicating constitutional rights. Can de facto parenthood be justified by states' plenary authority to add new classes of parents?

Even this narrower vision of state discretion is too strong. Two hypothetical examples can illustrate why states lack plenary power to create new classes of parents. Imagine a state statute that provides genetic grandparents are presumed parents. This statute answers the threshold question of who a legal parent is, yet surely it limits the constitutional rights of birth mothers and fathers. It would be incredible

372. *Id.* at 2060-61.

373. Higdon, *supra* note 352, at 1535-36.

374. *Id.* at 1510-14 (describing state law approaches to gestational surrogacy).

to suggest Washington could award the Troxels visitation without violating Granville's rights if only its statute labels grandparents as "parents." An *ipse dixit* of state law cannot turn grandparents into parents. Although *Troxel* was a case between a parent and grandparent, it does limit state power to define a parent.

Other, more realistic parentage reforms raise more difficult issues. Imagine a statute providing cohabitants of birth mothers are presumed legal parents. Perhaps legislators wanted to treat married and unmarried couples equally. Under current law, spouses are presumed parents at birth, but cohabitants remain in limbo until they satisfy the two-year residence requirement, during which time their partner controls their ability to become parents.[375] This cohabitant presumption, like the grandparent presumption, limits the constitutional rights of birth mothers. Whether this limit is constitutional depends on whether its justification is consistent with the mother's parental rights. The argument for treating spouses and cohabitants equally assumes that the rationale for the marital presumption applies equally to cohabitants. Most mothers intend for their spouses to be a coparent, and most spouses demonstrate commitment to the child by assisting with the pregnancy, birth, and infant care. Is that equally true of cohabitants?

These hypothetical laws illustrate two things: adding a new category of parents can limit the rights of recognized constitutional parents, and whether adding a new category is constitutional depends on whether its rationale is consistent with the right of existing parents. De facto parentage cannot be justified by a bald appeal to state power. Persuasive definition cannot bypass this constitutional difficulty. Advocates of de facto parenthood must show it falls within the range of state discretion bounded by the rights of established constitutional parents.

3. De Facto Parents just are Constitutional Parents

Courts and scholars might have a different argument in mind when they say de facto parents are parents not third parties. They might believe de facto parent tests recognize caregivers who are already constitutional parents. Why would de facto parents be constitutional parents? This could be an interpretive claim: existing constitutional precedents justify recognizing de facto parents have a liberty interest in the relationship. Or it could be a natural rights claim: de facto parents have a moral right to sustain a relationship with their children. If either proposition is true, then it is not state law that elevates de facto parents to the status of constitutional parents. Functional parents

375. UNIF.PARENTAGE ACT § 204(a)(1), (5) (UNIF. LAW COMM'N 2017).

have constitutional parental rights, and de facto parenthood merely recognizes and protects those constitutional rights.

Indeed, these arguments entail a stronger conclusion: if de facto parents have Constitutional parental rights, then states *must* adopt strong de facto parentage. This hefty implication is a reason for skepticism. Nevertheless, I cannot rule it out within the scope of this Article. Evaluating these arguments would require complete theories of constitutional and moral parentage.[376] That said, I have not seen courts or advocates make these arguments either. The argumentative burden should fall on advocates who seek to limit the rights of adults with well-established constitutional parental rights, whether by biology, presumptions, agreements, or adoption. In what follows, I assume that elevating a third party to parental status limits the constitutional rights of existing parents. Sections B and C consider two arguments intended to demonstrate that states have sufficient reason to recognize de facto parentage even though it limits the rights of existing parents.

B. Consent to a New Parent-like Relationship

When courts and scholars admit that de facto parenthood restricts the rights of an existing parent, the courts typically respond that they may limit her rights because she "consented to, and fostered, the . . . parent-like relationship."[377] The Washington Supreme Court argued,

> Once a petitioner has made the threshold showing that the natural or legal parent consented to and fostered the parent-like relationship, the State is no longer interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to de facto parents.[378]

Other courts argue the legal parent waived her right to exclusive custody by consenting to a de facto parent relationship.[379] A similar argument appears in the commentary to the Restatement.[380]

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376. The nonmarital fathers sketch vague contours for constitutional parentage but their underlying conception of parentage remains unclear, Higdon, *supra* note 352, at 1501-02, and in any case, does not suggest functional parentage is sufficient to confer constitutional status. *Id.* at 1534-35.

377. V.C. v. M.J.B., 748 A.2d 539, 551, 553-54 (N.J. 2000). *Contra In re* B.B.O., 277 P.3d 818, 823 (Colo. 2012) (finding parental consent is not required to respect parent's constitutional rights).

378. *In re* Custody of B.M.H. 315 P.3d 470, 478 (Wash. 2013) (internal quotation omitted). *See also* A.A. v. B.B., 384 P.3d 878, 891 (Haw. 2016) ("because [the legal parent] permitted [the de facto parent] to share physical custody of Child in addition to the parenting responsibilities and duties with regard to Child, [the legal parent] does not have a protected privacy interest in excluding [the de facto parent] from Child's life").

379. *E.g.*, *V.C.*, 748 A.2d at 553-54.

380. *E.g.*, RESTATEMENT OF CHILDREN AND THE LAW § 1.82 cmt. h (AM. LAW INST. Tentative Draft No. 2, 2019).

Consent is a notoriously slippery concept. To evaluate this argument, we need to know more about the nature of consent and how courts use consent in de facto parent cases.[381] In this section, I argue consent may justify de facto parenthood in agreement cases, but legal parents rarely consent to stepparent or relative caregiving in a way that could justify elevating these nonparents to parental status.

1. The nature of consent in general

As Professor Heidi Hurd nicely phrased it, consent is "moral magic."[382] Consent transforms the moral universe, converting "a trespass into a dinner party; a battery into a handshake; [and] a theft into a gift."[383] Consent works by rearranging moral relations. By entering the ring, a boxer turns her opponents' duty not to touch her into a privilege to punch her.[384] Do legal parents consent to de facto parenthood in a way that gives the state permission to create new parental rights?

Evaluating consent arguments requires wrestling with four interrelated questions. First, how does a parent consent? One might consent by forming a mental state, uttering an expression, or performing an act. Second, to what must a parent consent? One always consents to something, the object of consent. Legal parents might consent to caretaking, attachments, a relationship, or a legal parent. Third, how does the law fix the object of consent? One must interpret the relevant mental state, expressions, or acts to determine what he consented to. Finally, answers to the first three questions should be tailored to the fourth: why does consent alter rights? A legal parent's consent to a particular object must justify extending parental rights to this third party.

The first question, the nature of consent, is particularly illuminating for de facto parenthood. Legal philosophers distinguish three possibilities. Consent might be (1) a subjective mental state of willingness, (2) a communication that expresses willingness, or (3) a performative act designated by social norms as changing moral relations.[385] I will be agnostic about which is the best theory of consent, but the advocates of de facto parenthood who appeal to consent must use some viable theory. Is one in the offing?

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381. *See* Parness, *supra* note 215, at 400 (discussing the ways courts use consent in de facto parent cases).

382. Heidi Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 144 (1996).

383. *Id.* at 123.

384. Heidi Hurd, *The Normative Force of Consen*t, *in* ROUTLEDGE HANDBOOK ON THE ETHICS OF CONSENT, § 4.2.1 (Peter Schaber & Andreas Muller eds., 2018).

385. Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102, 102 (2014).

2. Consent as a performative act that transfers parental rights

The law often conceives of consent as a performative. A performative is a speech act that changes moral, legal, or conventional relations.[386] The act itself can be a verbal expression or an action endowed by convention with expressive meaning.[387] Classic examples include exchanging marital vows, issuing commands, or christening ships.[388]

Because performatives rely on conventional meaning, the law can designate which public act or expression is sufficient "consent" to alter legal relations.[389] This allows the law to limit disputes about whether, when, and how consent alters rights. For this reason, the performative theory resonates with the objective theory of contract.[390] The acts need to be salient yet somewhat arbitrary. The public must recognize the acts as altering rights, yet the acts also need to be unusual enough that people do not perform them with no intention of changing rights. Contracting parties used to affix a seal to a document; now they check a box on an electronic form. Fiancés used to jump over a broom; now they exchange vows. Performative theory also allows the law to efficiently resolve the object of consent. Just as the law can declare which acts count, it also can declare how to interpret the legal effect of those acts. Parties who exchange promises generate legal duties that follow their conventional meaning, yet couples who exchange promises in marriage ceremonies create only the default marital obligations.

One might think of adoption and parenting agreements as speech acts by which one legal parent creates a new legal parent. The law empowers a legal parent to share parental custody rights with a third party, specifies the acts the parent must perform to exercise her power, and sets conditions for the exercise of that power. In adoption, all the existing parents must declare their consent in court (or in writing) and obtain judicial approval.[391] States could liberalize adoption law by removing the formal conditions. That is arguably what the court did in *Kilborn* by recognizing the legal parents had an elaborate "sprouts and

386. PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 66 (2016); *see also* N.C. Manson, *Permissive Consent: a robust reason-changing account*, 173 PHILOSOPHICAL STUD. 3317, 3318 (2016) (defining consent as a behavioral act directed at others with the intent to change their reasons).

387. John Kleinig, *The Nature of Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 11-12 (Franklin G. Miller & Alan Wertheimer eds., 2010).

388. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 64 (J. O. Urmson & Marina Sbisa eds., 1975).

389. The acts must occur against the right normative background conditions. *See* Kleinig, *supra* note 387, at 11-20; Govert Den Hartogh, *Can Consent be Presumed?*, 28 J. APPLIED PHIL. 295, 301 (2011).

390. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUMBIA L. REV. 269, 304-06 (1986).

391. *See* JASPER, *supra* notes 235, 239-42. Some might argue the adoption or agreement is just evidence of the parents' subjective asset to create a new parent. In that case, the burden of the argument shifts to subsection IV.B.3 below.

roots" ceremony.[392] Preconception agreements perform a similar function for prospective parents and surrogates. By signing a parentage agreement, the biological parent creates a new nonbiological legal parent.[393] Some courts call these parenting "contracts," but this is not a contract in the sense of an exchange of promises of performance with the intent to be bound.[394] Rather, the agreement declares someone with no biological relationship to the child is a legal parent.[395]

Performative consent is sufficient to protect the rights of the existing parent. When a legal parent performs a formal adoption or parentage agreement, she is exercising her power to create rights for the new parent. It is nearly nonsensical for her to claim later that treating this person as a legal parent violates her constitutional rights.[396] In this set of cases, it is accurate to say that the legal parent exercised her parental autonomy to create a new legal parent.[397] I suspect one reason courts accept the consent justification is that most of the seminal cases involve oral or written preconception agreements.[398] Indeed, the recent New York and Vermont cases carefully limit their consent holdings to parentage agreements.[399] The Supreme Court of Kansas has been particularly clear in demanding the legal parent "knowingly, intelligently, and voluntarily waive their parental preference by entering a custody agreement with a third party."[400]

Unfortunately, most courts have been more freewheeling. After they note that the legal mother agreed to recognize the second legal parent, they continue on to describe how she also allowed her partner to fulfill parental roles and develop parental bonds.[401] If consent is a performative, these latter comments are unnecessary. Insofar as they

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392. "Equitable adoption" sometimes allows courts to forgive formal defects when parties perform an act equivalent to judicial adoption, while in other cases it treats subjective intent to adopt as sufficient in the absence of any performative act or similar equivalent.

393. *In re* T.P.S., 978 N.E.2d 1070, 1084 (Ill. App. Ct. 2012); Frazier v. Goudschaal, 295 P.3d 542, 556-57 (Kan. 2013); *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d. 488, 500 (N.Y. 2016).

394. *See* Eldredge v. Taylor, 339 P.3d 888, 893 (Okla. 2014); *Frazier*, 295 P.3d at 555-58.

395. Ohio will not allow a shared parenting agreement because the legislature has the power to define parentage, but a parent may relinquish some of her exclusive rights via contract, conditioned on a judicial determination that sharing custody is in the child's best interests. *In re* Bonfield, 780 N.E.2d 241, 248 (Ohio 2002).

396. She could argue, implausibly but coherently, that the constitutional right to parent is not alienable by the parent, so states cannot give parents the legal power to transfer their parental rights voluntarily, so her attempt to do so was ultra vires.

397. *Frazier*, 295 P.3d at 557 (2013).

398. *See, e.g.*, *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 436, n. 40 (Wis. 1995).

399. *E.g.*, Sinnott v. Peck, 180 A.3d 560, 572 (Vt. 2017).

400. Frazier, 295 P.3d at 556; Matter of Adoption of T.M.M.H., 416 P.3d 999, 1009 (Kan. 2018) (plurality).

401. *E.g.*, T.B. v. L.R.M., 786 A.2d 913, 919 (Pa. 2001) ("The record is clear that Appellant consented to Appellee's performance of parental duties. She encouraged Appellee to assume the status of a parent and acquiesced as Appellee carried out the day-to-day care of A.M."); *H.S.H.-K.*, 533 N.W.2d at 436, n. 40.

suggest that what matters is whether the legal parent acquiesces to caretaking, they invoke a different and wider sense of consent. The notion of consent as acquiescence is necessary to open the door to step-parent or relative caretakers because in these cases, the legal parent rarely performs any acts that could be conventionally understood as transferring parental rights.

One might object that I underestimate the conventional nature of speech acts. Law can create new conventions. Perhaps by enacting de facto parenthood, a state declares that allowing someone to reside with and care for a child henceforth counts as consent to parental rights.[402]

One problem with this response is that these are not felicitous speech acts. Allowing someone to develop a relationship is not a determinate act that could mark the moment when rights transfer. This practical problem can be addressed, however. States may move to a formal rule, such as co-residence for a fixed period. A more intractable problem is that co-residence is not arbitrary enough. The act must be relatively arbitrary, so it can develop a public meaning as a rights-triggering event, as distinct from a common act done for other reasons.[403] A legal parent has many reasons to cohabit and share caretaking that have nothing to do with changing legal rights.

In any case, this hypothetical argument is insincere, in a sense. The justifications for de facto parenthood conflict with the justifications for treating consent as a speech act. Performative consent protects autonomy, because an agent can use the convention to control her rights, and others can interact with the agent based on the conventional understanding.[404] Giving agents a means to define their rights prospectively also enables them to coordinate efficiently. The goal of de facto parenthood is not to give parents control over when their children obtain new legal parents, either to protect parental liberty or encourage efficient parenting. Advocates want parental status to be determined retroactively according to past caretaking. One cannot retroactively reinterpret past conduct as a non-existent performative. What advocates really seem to believe is that parents lose their right to exclude third parties when they allow them to share parenting. This is a claim of waiver, which brings us to the next sense of consent.

3. Consent as subjective assent waiving a right to exclude

The New Jersey Supreme Court expounded a consent argument in the most detail. It argues de facto parenthood does not infringe the legal parent's rights because

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402. Thanks to Sean Williams for pressing this objection.

403. Manson, *supra* note 386, at 3328.

404. Barnett, *supra* note 390, at 310-11.

> [w]hat we have addressed here is . . . the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child.[405]

This passage equates consent with choice, one of a variety of subjective theories of consent.[406] Subjective consent might be a mental state, such as desire, willingness, or acquiescence, or a mental act, such as intending, willing, or choosing.[407]

Subjective consent is central to moral autonomy.[408] Consider how consent functions in a property rights context, as illustrated by Professor Kim Ferzan.[409] Suppose I see you out my window about to cross my lawn to reach the beach. I do not mind. I want to shout, "It's ok," but you cannot hear. If you cross, you act culpably by not ensuring that I did not mind, but you have not violated my property rights. My assent extended you a privilege.[410] Some theorists think we have a right to our body, labor, or property only if we have a moral power to grant or withhold such assent.[411]

If a parent is willing to allow the state to recognize another adult as a parent, then no constitutional problems arise. Some ostensibly de facto parent cases involve consent in this subjective assent sense. A biological mother who planned in vitro fertilization with her partner likely wanted her partner to have parental rights.[412] This is a waiver in the classic sense of a "voluntary and intentional surrender or relinquishment of a known right."[413] Yet, consent in this sense will not justify most cases involving stepparent or relative caregivers. The problem with subjective assent is not, as it was with performative consent, that these legal parents never consented. These parents did assent. The problem is with the *object of their consent*. To what do they assent?

Unlike performative consent, for subjective consent the object of consent is fixed by the object of the agent's intentional mental state.[414] She is the master of her consent. Her mental state may be difficult to

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405. V.C. v. M.J.B., 748 A.2d 539, 553-54 (N.J. 2000).

406. *See also* Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 264-65 (2011).

407. Alexander, *supra* note 385, at 104; Hurd, *supra* note 382, at 125.

408. Hurd, *supra* note 382, at 124; Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 405 (2016).

409. Ferzan, *supra* note 408, at 405.

410. *See also* Hurd, *supra* note 384, at § 4.2.2.4.

411. H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 187-89 (1982).

412. *E.g.*, Kulstad v. Maniaci, 220 P.3d 595, 606 (Mont. 2006).

413. Mullins v. Picklesimer, 317 S.W.3d 569, 578 (Ky. 2010) (quotation omitted).

414. *See, e.g.*, Hurd, *supra* note 382, at 125.

discern, but it is a matter of fact. For stepparent or relative caregivers, the parent's intent is rarely in dispute. The parent was willing to allow the nonparent to perform caretaking functions, exercise caretaking authority, and bond emotionally with her child.[415] She did not intend to create a coequal parent. Assent to parental functions is not the same as assent to parenthood.

Courts and scholars consistently equivocate on this point. Judicial rhetoric conjoins the choice to perform parental functions with a choice to transfer rights. For example, in a widely cited passage, the New Jersey Supreme court argues

> The requirement of cooperation by the legal parent is critical because it places control within his or her hands.... [I]f she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.[416]

This passage equates willingness to share parental responsibilities or authority with assent to parentage. The ALI Principles make a similar mistake. De facto parenthood requires "agreement of a parent to the de facto parent relationship," but an agreement exists when "affirmative act or acts by the legal parent demonstrat[e] a willingness and an expectation of shared parental responsibilities."[417] The UPA (2017) completes this conflation by abandoning consent as an express element. The parent need only "foster[] or support[] the bonded and dependent relationship" that is "parental in nature."[418] The assumption is that one cannot foster a relationship without consenting to it.

Nancy Polikoff, an early advocate of de facto parentage, was careful to avoid this equivocation. She argues, "[b]ecause parental autonomy would be eviscerated unless . . . the legal parent consents to or cooperates in the formation of an explicit parent-child relationship . . . , the legal parent also should consider the other adult to be a parent."[419] It is not enough that the legal parent sought assistance; she must have the "intent to create third-party parent status"[420] or "explicitly . . . parental relationships."[421] Some courts heed Polikoff's distinction. The Maine Supreme Court emphasized the "distinction, which can be nu-

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415. Parness, *supra* note 215, at 400.

416. V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000); *see also* Conover v. Conover, 146 A.3d 443, 447 (Md. 2016).

417. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (AM. LAW INST. (2002)) (emphasis added).

418. UNIF. PARENTAGE ACT § 609(d)(6) (UNIF. LAW COMM'N 2017).

419. Polikoff, *supra* note 49, at 490. *See also id.* at 483 n. 114.

420. *Id.* at 512.

421. *Id.* at 516.

anced and subtle, between the role of a nurturing and involved caregiver and one who acts with and is recognized as being fully equivalent to a parent."[422] This Restatement appears to be adopting a similar interpretation of consent. The petitioner must prove the parent "consented to and fostered the formation of a parental bond and dependent relationship," which the commentary explains occurs "by ceding to the third party a significant amount of parental responsibility and decisionmaking authority."[423] The Restatement illustrations describe relationships in which the legal parent encourages the de facto parent to play an equal (or greater) role in the childcare and decisionmaking and encourages the de facto to be called a "mom."[424] These descriptions are an improvement, but even they remain ambiguous.

Is assent to an explicitly parental relationship the same as assent to a third-party parent status? Polikoff describes a case in which a mother tried to avoid the expense of an adoption by giving the child his stepfather's surname and executing an affidavit saying he was the child's father. Polikoff concludes this mother "exercised her right to create a father for her child."[425] I worry this example is misleading. The mother's acts were not successful *legal performatives* because she did not follow adoption procedures; nevertheless, she took legalistic actions that revealed she wanted her husband to have a permanent legal status. In many preconception agreement cases, the parents search for ways to signal their intent to accept legal parental status.[426] Do most parents who live with stepparents or relative caregivers form a similar intent?

Even for careful writers, the waiver argument conflates assent to parental caretaking, authority, or attachments with assent to equal legal parentage.[427] Families often fall into parent-like roles out of necessity. Parents trying out new blended families may encourage their partners to help parent—what else would we expect? A legal parent

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422. Davis v. McGuire, 186 A.3d 837, 847 (Me. 2018). *But see* ME. REV. STAT. ANN. Tit. 19-A, § 1891(3)(c) (2016) (parent "understood, acknowledged or accepted that or behaved as though the person is a parent of the child").

423. RESTATEMENT OF CHILDREN AND THE LAW § 1.82 cmt. h (AM. LAW INST. Tentative Draft No. 2, 2019).

424. *Id.* at § 1.82 cmt. h. The extent of caretaking plays a large role in illustrations 11 and 13, and in addition, the legal parent allowed the third-party to share childrearing decisions rather than refused to share any authority, *compare* illus. 11, 13 *with* 12, 15, and encouraged the child to call the third-party some variant of "mom" rather than "auntie." *Compare* illus. 11, 12, *with* 14, 15.

425. Polikoff, *supra* note 49, at 513.

426. *E.g.*, Mullins v. Picklesimer, 317 S.W.3d 569, 576-77 (Ky. 2010) (seeking agreed judgment of custody).

427. *See* Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) ("A parent has the absolute control and ability to maintain a zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she voluntarily invites a third party to function as a parent to the child.").

who assents to caretaking gives another person the liberty to parent. He waives his claim against interference. He waives the kind of complaint he has against intrusive aunts, teachers, or neighbors who seek to develop parental bonds with his child. He does not waive his objection to the creation of a permanent new legal parent.[428] Subjective assent to parental roles is fundamentally distinct from subjective assent to legal parentage, as some courts recognize.[429]

Assent to parental roles does not justify de facto parenthood because such assent is usually revocable.[430] Typically, a right-holder has the power to waive a correlative duty *and reinstate it*. When I consent to box, I waive my claim that you not hit me. I exercise my power to replace your duty not to hit me with a privilege. Yet, I can quit, which reinstates your duty. If you punch me after I turn my back, you commit a battery. The same applies to trespass. When I allow you to cross my land, I exercise my power to replace your duty not to enter with a privilege. Yet, I can kick you out. In both examples, you had a duty to me and I had a power to turn it into a privilege. I exercised my power without giving it up. Consequently, I can change your privilege back into a duty. I could have given up my power over your duty. I could have promised to sell you an easement, which would deprive me and subsequent owners of the ability to change your privilege back into a duty. The easement creates a first-order privilege *and* a second-order immunity. Consent to the privilege does not *necessarily* create any immunity that deprives the agent of his ability to revoke the privilege.

When a legal parent allows someone to care for her child, she gives him a privilege to parent held by no other adult. The privilege to parent does not *necessarily* come with an immunity. The legal parent did not assent to transfer her power to decide who may associate with her child in the future.[431] Moreover, a legal parent can allow someone to make parental decisions without thereby giving up her power to choose who will decide in the future.[432] The delegation of parental authority

428. Estroff v. Chatterjee, 660 S.E.2d 73, 78 (N.C. App. 2008) (courts must look at both conduct and subjective intent to determine "whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child"); Moriggia v. Castelo, 805 S.E.2d 378, 386-87 (N.C. Ct. App. 2017) (intentions during the "formation and pendency" of the relationship).

429. *In re* N.M.V., 385 P.3d 564, 567 (Mont. 2016) (parent did not cede parenting authority by moving in with boyfriend and allowing him to spend time with the child because they never intended him to assume equal parenting responsibilities); *In re* Mullen, 953 N.E.2d 302, 307-08 (Ohio 2011) (absent writing, simply fulfilling parental roles is not convincing evidence about the intent to relinquish custodial rights permanently).

430. 1 DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, THE LAW OF TORTS § 108 (2d ed.)

431. *In re* N.M.V., 385 P.3d at 567.

432. *In re* Mullen, 953 N.E.2d 302, 307-08 (Ohio 2011) (legal parent allowed nonparent to exercise authority and even named her on power of attorney but refused to sign permanent waiver of custodial powers).

does not *necessarily* come with an immunity. The waiver argument for de facto parenthood attempts to infer an immunity from the grant of a privilege or a power, but these are distinct relations that require distinct justifications.

Some courts accept the distinction, such as in *Smith v. Jones*.[433] Jones and Smith had lived together for five years when Jones adopted a child.[434] After Jones's family leave ended, Smith cared for the child during the day until the couple broke up.[435] The courts concluded that Jones allowed Smith to care for the child but did not intend for Smith to be a permanent legal parent.[436] Jones travelled to Russia alone to select the child from an orphanage without Smith's input.[437] The couple had a lawyer, but Jones never pursued joint adoption "because [she] did not want a permanent co-parenting arrangement."[438] Jones gave the child her surname.[439] She named her sister, not Smith, as guardian in the event of her death.[440] She made medical decisions about a major surgery without consulting Smith.[441]

Why would adults accept these kinds of relationships? Sometimes, as in *Smith*, one person is so committed to becoming a parent that she is willing to proceed even though her partner is noncommittal.[442] Often the legal parent ends up leaning on the cohabitant or relative for caretaking anyway. The parent needs help but does not regard the uncommitted partner as an equal parent. In other cases, a single parent has an evolving and uncertain relationship with her romantic partner and wants to keep distance between him and her children.[443] Allowing someone to help care for your child is a privilege that, by default, should be revocable.

Of course, this does not mean the privilege *must* be revocable in all circumstances. The point is that it takes a distinct normative argument to show a privilege *should* be immune from change. Advocates of de facto parenthood need a normative argument to justify treating the legal parent's assent to caretaking, relationships, or authority as an irrevocable transfer of rights to the nonparent. Consent alone is insufficient. Consent might, however, be a necessary condition.

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433. Smith v. Jones, 868 N.E.2d 629, 630 (Mass. App. Ct. 2007).

434. *Id.*

435. *Id.* at 631.

436. *Id.* at 634.

437. *Id.* at 630.

438. *Id.* at 630, 635 n.9.

439. *Id.* at 635.

440. *Id.*

441. *Id.*

442. *See also* J.S. v. M.C., 107 N.E.3d 1118, 2018 WL 3558921, at *3 (Ind. Ct. App. 2018) (unpublished disposition).

443. Brown v. Wyandt, No.8-13-08 2014 Ohio App. LEXIS 149, 18-20 (Ohio Ct. App. 2014).

4. Consent as subjective assent with knowledge of detrimental reliance

The law often treats consent as irrevocable to protect reliance interests. If the parent's consent to nonparental caretaking led to detrimental reliance, protecting these reliance interests might justify an immunity for the de facto parent's rights. This argument is most plausible in preconception or preadoption agreement cases, where de facto parents can rely on principles of promissory estoppel.[444] When a legal mother has agreed to have and raise a child together with her partner, the legal mother should not be allowed to withdraw her agreement after the partner has relied on it to invest heavily in functional motherhood. These cases, however, can also appeal to consent as a performative. What about the cases without agreements?

Servitudes by estoppel offer another analogy. If I allow someone to use my land when it is foreseeable she will rely on the privilege in a substantial way, and she relies on the privilege under a reasonable belief that I will not revoke it, then I will be estopped from denying her a servitude insofar as necessary to avoid injustice.[445] Could a parallel argument be made for de facto parenthood in stepparent or relative caretaker cases?

One argument appeals to reliance by the de facto parent. The legal parent allowed her to engage in caretaking and to develop parental bonds with the child. Once the de facto parent invests time and effort and becomes attached to the child, it is unfair to the de facto parent if the legal parent may simply cut her out of the child's life. It is hard to imagine the de facto parent's interests are sufficiently weighty to justify creating a permanent parental relationship. A parent should avoid causing unnecessary emotional harm to her former partner, but it is difficult to see why her partner's interests justify visitation orders. The Massachusetts Supreme Court has expressly denied that de facto parents have a protected liberty interest in the relationship.[446] In any case, this reliance argument is close to circular.[447] The law protects reliance only if it is reasonable. Can a de facto parent reasonably believe she is entitled to a permanent relationship? This reliance argument assumes what it seeks to prove.

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444. *See supra* Section III.A.3; *see, e.g.*, Nguyen v. Boynes, 396 P.3d 774, 778 (Nev. 2017).

445. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 (AM. LAW. INST. 2000). *But see* Stewart E. Sterk, *Estoppel in Property Law*, 77 NEB. L. REV. 756, 776-79 (1998) (arguing many courts find servitudes by estoppel cannot arise without express representations about permanent use).

446. Guardianship of K.N., 73 N.E.3d 271, 275-76 (Mass. 2017); *see also* Estroff v. Chatterjee, 660 S.E.2d 73, 79 (N.C. App. 2008) ("Harm to the third party is immaterial . . .").

447. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275-76 (1986).

A more plausible alternative appeals to reliance by the child. When a legal parent encourages her child to develop parent-like bonds with another adult, she should know that ending this relationship later may harm the child. She shaped the child's beliefs about the role that this new adult would occupy in her life. The child has an interest in maintaining the quasi-parent relationship that her parent created, which could justify creating irrevocable rights for the de facto parent.[448]

Thinking about consent under an estoppel rubric reorients de facto parent law in a morally appropriate fashion that fits the doctrine nicely. The legal parent's subjective assent *to caretaking and emotional bonding* is necessary because only with her acquiescence can another adult perform enter roles at all. A teacher who secretly performed parent-like caretaking would have no claim. Yet, the legal parent need not subjectively assent *to a new legal parent*. Why? Because parental consent is not what justifies elevating a de facto parent to legal status. The justification for treating consent as irrevocable and creating a new legal parent is to protect a relationship essential to the child's wellbeing. This brings us to the final argument.

C. Presuming Harm from Termination of Parent-like Relationships

The last argument re-centers discussion about de facto parenthood around child welfare. Perhaps states treat parental consent as a transfer of rights because protecting quasi-parent relationships is necessary to protect child welfare. This argument admits de facto parenthood limits the legal parent's rights and responds that this limitation is justified because it is narrowly tailored to a compelling state interest.

One version of this argument centers on the best interests of the child. Professor Solangel Maldonado, for example, argues that proving the elements of the de facto parent test by clear and convincing evidence is sufficient to rebut the parental presumption.[449] The argument for this conclusion is reminiscent of Steven's dissent in *Troxel*. The law defers to parental authority because parents tend to make decisions that promote child welfare. Parental rights are an evidentiary presumption.[450] The petitioner bears the burden of production, but "proof of a substantial relationship between the third party and the child overcomes the presumption that the parent was acting in the child's best interests in denying visitation . . . ."[451]

448. Mullins v. Picklesimer, 317 S.W.3d 569, 579 (Ky. 2010) (arguing waiver doctrine must apply to custody agreements to prevent legal parent from causing harm by terminating relationship she encouraged to develop).

449. Maldonado, *supra* note 109, at 895.

450. *Id.* at 894-96.

451. *Id.* at 894.

As I argued in Section II.C, this theory of parental authority barely qualifies as a conception of parental *rights*. Regardless, this argument makes the same mistake as the lower court in *Troxel.* Why does a parent's decision to end a parent-like relationship imply that she is not acting in her child's best interest? The de facto parent test "protects children's interests in maintaining those relationships with caregivers that have been shown to significantly benefit them in the long-term."[452] From this perspective, a de facto parent "threshold" is not giving "special weight" to parents' judgment about visitation.[453] This is a bare dispute about what is good for a child, simply shifted to a different procedural moment. Reformers presume children's lives go better when they sustain parent-like relationships, so they make parents prove the contrary. In *Troxel*, the trial court presumed children benefit from grandparent relationships, so it made Granville prove the contrary. Just as the decision whether "an intergenerational relationship would be beneficial in any specific case is for the parent to make,"[454] so should the judgment whether a parent-like relationship would be beneficial.

One might try to revive the argument by switching to a presumption of harm. Parental rights, like any constitutional right, may be limited by state action narrowly tailored to a compelling interest, such as protecting children from physical or psychological harm.[455] The key point here is de facto parenthood does not require the petitioner to prove harm in their specific case. The test assumes that limiting children's relationships with de facto parents is harmful.[456] The commentary to the Uniform Nonparent Custody and Visitation Act, for example, argues the court may award visitation to a "consistent caretaker" under a best interest test, "because severance of a bonded and dependent relationship between a child and a nonparent is presumptively harmful to the child."[457] If severing quasi-parent relationships is generally harmful, and the petitioner proves she a quasi-parent, then the petitioner has rebutted the presumption that the parent acts in the child's best interests.

Some courts adopt this presumption of harm. The Massachusetts Supreme Judicial Court argues the existence of "a significant preexisting relationship . . . would allow an inference, when evaluating a child's best interests, that measurable harm would befall the child on

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452. *Id.* at 895; *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 347, at 439, 462-63 (arguing interests of children in care justifies infringing parental liberty).

453. *See, e.g.*, In Interest of H.S., 550 S.W.3d 151, 162 (Tex. 2018) (assuming the threshold standing requirement is sufficient to distinguish *Troxel*).

454. Troxel v. Granville, 530 U.S. 57, 70 (2000).

455. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

456. *In re* Care & Prot. of Sharlene, 840 N.E.2d 918, 926 (Mass. 2006); A.H. v. M.P., 857 N.E.2d 1061, 1071-72 (Mass. 2006).

457. UNIF. NONPARENT CUSTODY AND VISITATION ACT § 4 cmt. 2 (UNIF. LAW COMM'N 2018).

the disruption of that relationship."[458] In *In re E.L.M.C.*, the Colorado Court of Appeals wrote, "without precisely defining all attributes of a psychological parent, we further conclude that emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term."[459] It reached this empirical conclusion despite three pages surveying tests that defined a de facto parent variously as someone who fulfills a child's psychological need for an adult, who the child recognizes as a parent because of "daily guidance and nurturance," who "performs a share of caretaking functions at least as great as the legal parent," or who has "fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role . . . ."[460]

As *In re E.L.C.M.* illustrates, the harm argument rests on an overbroad generalization. Not all de facto parents have such deep psychological bonds with the child that denying court-ordered visitation will harm the child. Whether, how often, and how much a child will be harmed if denied visitation with a parent-like caregiver is an empirical question. And the empirical data is scarce.

When the A.L.I. first adopted a de facto parent provision in *The Principles of Family Law* in 2001, Robin Wilson criticized the drafters for acting without empirical evidence.[461] Not only did they lack evidence about the psychological benefits of ongoing visitation, but they also ignored substantial evidence that ongoing visitation with male ex-partners posed a substantial risk of abuse. What evidence has been marshalled since?

The UNCVA commentary cites no evidence for a presumption of harm. Most articles adopt the following reasoning.[462] According to an influential theory of child development called "attachment theory," a child's bond with a primary attachment figure influences her sense of security and cognitive development.[463] When this attachment is disrupted, children fare worse on many measures of well-being. Children from attachments with the person who is a continuous presence attending to their material and emotional needs, regardless of biological

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458. *A.H.*, 857 N.E.2d at 1069-70.

459. *In re* E.L.M.C., 100 P.3d 546, 561 (Colo. App. 2004).

460. *Id.* at 559-61. *But see In re* Reese, 227 P.3d 900, 904 (Colo. App. 2010) (rejecting the per se harm rule adopted in E.L.M.C).

461. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1118-35 (2010).

462. *See*, *e.g.*, Jamie Bryant, *My Two Dads (and Three Moms): Balancing a Child's Interest and a Parent's Fundamental Right When Granting De Facto Parent Status*, 50 FAM. L.Q. 151, 156 n. 27 (2016); Laufer-Ukeles & Blecher-Prigat, *supra* note 347, at 430, 439; Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 632-35 (2012); Feinberg, *supra* note 244, at 110.

463. Elrod, supra note 406, at 249-50.

or legal relatedness. Consequently, scholars argue, states may presume a child will suffer harm if she loses a parent-like attachment. These scholars often rely heavily on Goldstein, Freud, and Solnit, who long ago recommended legal recognition for psychological parents.[464]

This argument rests on doubtful inferences. Most attachment research studies how children form initial parental attachments or form new attachments after losing a parent.[465] Attachments form irrespective of gender, sex, or biology, which supports neutral rules for parentage presumptions, preconception agreements, or adoption.[466] When separated from their parents, children develop attachments to new caretakers, which supports rights for de facto custodians in cases of parental abandonment.[467] Attachment theory does not, however, suggest all parent-like bonds are equivalent.[468] In particular, it offers little support for extending rights to stepparent or relative caregivers over the objection of an existing parent who maintained a relationship with the child. Relying on Goldstein, et. al, is particularly problematic here. They recommend strong deference to custodial parents and oppose judicial visitation orders even in a divorce between established parents.[469] They propose recognizing new psychological parents when a child is *outside parental care* for sufficient time to weaken her residual ties to the existing parent and to develop new attachments with a foster parent.[470]

Is there direct evidence about the likelihood of harm? With regard to co-residential relatives caregivers, legal scholars have little evidence their attachments are equivalent to primary parental attachments. The most extensive discussion comes from Professor Karen

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464. JOSEPH GOLDSTEIN, ALBERT SOLNIT, AND ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 16, 20-21 (1996) (revised collection of books published between 1973 and 1986). *See, e.g.*, Bryant, *supra* note 462, at 156 n. 27; Laufer-Ukeles & Blecher-Prigat, *supra* note 347, at 430; Scharf, *supra* note 462, at 634-36.

465. *See, e.g.*, Scharf, *supra* note 462, at 632 (acknowledging empirical evidence is limited to situation when child loses principal attachment); Nicole M. Onorato, *The Right to Be Heard: Incorporating the Needs and Interests of Children of Nonmarital Families into the Visitation Rights Dialogue*, 4 WHITTIER J. CHILD & FAM. ADVOC. 491, 495 (2005) (citing A.G. Broberg, *A Review of Interventions in the Parent-Child Relationship Informed by Attachment Theory*, 434 ACTA PAEDIATRICA SUPP. 37 (2000)).

466. Feinberg, *supra* note 244, at 110 (citing Elrod, *supra* note 406, at 249-50 (citing studies of intentional lesbian co-parents)); Bryant, *supra* note 462, at 156 (citing H. RUDOLPH SCHAFFER, MAKING DECISIONS ABOUT CHILDREN 62 (1990)) (discussing lesbian co-parents); Jane Hare & Leslie Richards, *Children Raised by Lesbian Couples: Does Context of Birth Affect Father and Partner Involvement?*, 42 FAM. REL. 249, 253-54 (1993).

467. GOLDSTEIN, ET. AL., *supra* note 464, at 20-22, 104-07; *In re* B.B.O., 277 P.3d 818, 822 (Colo. 2012).

468. Some scholars recognize this distinction but nevertheless argue that child welfare depends on a network of secondary attachments that deserve recognition. Shelley A. Riggs, *Response to Troxel v. Granville*, 41 FAM. CT. REV. 39, 43 (2003).

469. GOLDSTEIN, ET. AL., *supra* note 464, at 23-27.

470. *Id.* at 104-07.

Czapinsky in an article advocating for grandparent visitation that predates *Troxel*. According to her literature review, children are more likely to report their grandparent is an important person in their lives if the grandparent is more involved, but a grandparent's level of involvement had no measurable effect on child wellbeing.[471] None of this research studied children who lose relationships with co-residential grandparents after the parent and child move out.

The data about cohabitant and stepparent relationships is no better. Many scholars rely on studies about the effect of divorce on disrupting established parental relationships.[472] Professor Cynthia Grant Bowman has written the most empirically grounded article arguing for cohabitant visitation rights. She admits the study of cohabitation "is in its infancy" and existing research supports conflicting conclusions.[473] As a result, she relies on studies about married stepparents.[474] Even with regard to stepparents, the results are mixed and mostly irrelevant. Stepparents may have a positive or negative effect on child wellbeing, depending on many variables: the age of the child, the gender of the stepparent, the role of the non-residential parent, and the presence of step or half-siblings.[475] More important, nearly all of the studies Bowman cites concern stepparent relationships *in intact stepfamilies*.[476] She cites only two studies about stepparent relationships after divorce. They show some children maintain meaningful relationships with former stepparents, but they do not study how these relationships affect child wellbeing, much less suggests ending them is

471. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1329-30 (1994) (discussing ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART (1986); ARTHUR KORNHABER & KENNETH L. WOODWARD, GRANDPARENTS/GRANDCHILDREN THE VITAL CONNECTION 55 (1981)); *see also* Laurence C. Nolan, *Beyond Troxel: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 DRAKE L. REV. 267, 289 (2002) (finding data limited to "courts' sentimental generalizations").

472. Katharine T. Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 909-11 (1984); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 390 (1994); Onorato, *supra* note 464, at 494-97.

473. Bowman, *supra* note 135, at 130, 132 (citing Marion C. Willetts & Nick G. Maroules, *Parental Reports of Adolescent Well-Being: Does Marital Status Matter?*, 43 J. DIVORCE & REMARRIAGE 129, 133 (2005)).

474. *Id.* at 133.

475. *Id.* at 133-35. *See also* David R. Fine & Mark A. Fine, *Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 65 (1992).

476. Bowman, *supra* note 135, at 136 (arguing law should maintain emotional and financial benefits provided by stepparents but citing studies about intact families, such as Bridget Freisthler et al., *It Was the Best of Times, It Was the Worst of Times*, 38 J. DIVORCE & REMARRIAGE 83, 98-99 (2003)); Sarah E.C. Malia, *Balancing Family Members' Interests Regarding Stepparent Rights and Obligations*, 54 FAM. REL. 298, 304 (2005)).

harmful.[477] Any claim that children suffer trauma from ending stepparent relationships is speculative, at best.

No reliable evidence suggests ending parent-like relationships typically harms children who maintain their primary parental attachments. While some children undoubtedly form deep bonds with de facto parents, a blanket rule that treats all de facto parents as equal parents is an overinclusive means to prevent harm when more narrowly tailored rules are available. Under a weak de facto parent rule, social parents can petition for visitation as a third party and rebut the parental presumption by proving harm in their particular case.

Another alternative is to narrow de facto parenthood to situations where research suggests harm is likely. Under the 2001 A.L.I. Principles, an alleged de facto parent must prove she performed at least as much "caretaking" as the legal parent.[478] A primary caretaker test might rest on more solid constitutional footing, because attachment research suggests disrupting primary caretaker relationships is traumatic irrespective of biological or legal parentage. Of course, if the de facto parent was the primary caretaker, it will also be relatively easy for litigants to marshal evidence of harm specific to this child.[479] Moreover, those who conceive of de facto parenthood as a parentage test should be wary of a primary caretaker rule that implies real parents must fulfill traditional conceptions of motherhood, which risks penalizing parents who work outside the home. In *A.H. v. M.P.*, for example, the nonbiological mother entered a preconception agreement with the biological mother, who regarded her as an equal parent, yet the court concluded the nonbiological mother had no rights as a de facto parent because she played a "breadwinner" role and spent too much time bailing out her failing company while her partner stayed home with the child.[480] The court's protestations that its ruling "is not meant to disparage or discount the role of the breadwinner in providing for a child's welfare" rings relatively hollow, when the legal test explicitly requires

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477. Bowman, *supra* note 135, at 135-36 (citing Constance R. Ahrons, *Family Ties After Divorce: Long-Term Implications for Children*, 46 FAM. PROCESS 53, 60-61 (2006); Maria Schmeeckle et al., *What Makes Someone Family? Adult Children's Perceptions of Current and Former Stepparents*, 68 J. MARRIAGE & FAM. 595, 597-98 (2006)). Another qualitative study asked former stepchildren about their experiences following their parents' divorces from their stepparents, finding close relationships were more often sustained if the child "claimed" the stepparent as kin during the marriage. Marilyn Coleman, et. al, *Stepchildren's Views about Former Step-Relationships Following Stepfamily Dissolution*, 77 J. MARRIAGE & FAMILY 775, 778 (2015). They speculate that children may benefit from sustained relationships but reported no systematic data about child welfare. *Id.* at 786-88.

478. A.H. v. M.P., 857 N.E.2d 1061, 1070 (Mass. 2006).

479. *E.g.*, Clough v. Nez, 759 N.W.2d 297, 304-05, 307 (S.D. 2008) (de facto father proved he provided effectively all of child's care, which was sufficient to prove establish harm without expert and thus rebut presumption).

480. *A.H.*, 857 N.E.2d at 1064-65, 1067, 1071-72.

courts to evaluate whether the petitioner's relationship "rise[s] to that of a parental relationship."[481]

The empirical evidence does not support the claim that law must recognize de facto parents as full legal parents to protect children from harm. The test could be narrowed to improve its fit, but a strong de facto parent rule is not well-tailored to prevent harm to children.

V. CONCLUSION

Sometimes easy cases make bad law.[482] Same-sex couples with preconception agreements *should* have been easy cases. Instead, formal parentage rules discriminated against same-sex couples, so courts turned to de facto parenthood to avoid depriving these children of their non-biological mothers. Under non-discriminatory parentage statutes like the UPA (2017), these will be easy cases, as they always should have been. These courts reached the just result, but the strong de facto parenthood doctrines that they created should have little ongoing role in parentage law.

Where de facto parenthood seems appropriate, as in preconception agreements or abandonment cases, the doctrine overlaps other formal rules. Sometimes the redundancy is harmless, but often ad hoc judicial application of this functional standard will upset the balance between parental rights and child welfare struck by existing rules. De facto parenthood's distinctive contribution is to treat residential caregivers as equal parents. As applied in most stepparent or relative caregiver cases, de facto parenthood will often violate the constitutional rights of the existing legal parent. The legal parent did not "consent" to create a new parent by accepting caretaking assistance or encouraging her new partner to form a relationship with her child, and there is no evidence children often suffer harm when their relationships with co-residential stepparents, cohabitants, or relatives end.

Someone must decide what goods, activities, and relationships will benefit each particular child. Someone must make these judgments, despite normative and empirical disagreements about what children need to flourish. As a matter of constitutional law, we entrust parents to decide what benefits their children. That includes the authority to decide whether their child will benefit from an ongoing relationship with a former "parent-like" caregiver.

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481. *Id.* at 1071-72.

482. United States v. Young, 580 F.3d 373, 381 (6th Cir. 2009) (Sutton, J., concurring) ("Sometimes hard cases make bad law. And sometimes easy cases make bad law. Only rarely, however, do easy cases make bad law by overruling good law.").