BETWEEN FUNCTION AND FORM: TOWARDS A DIFFERENTIATED MODEL OF FUNCTIONAL PARENTHOOD

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INTRODUCTION

Traditionally, and still in most instances in most jurisdictions, formal parents have all legal rights to children and it is very difficult for custody or visitation to be awarded to anyone else. As defined by case law and legislation, formal parents are biological, presumptive, or adoptive parents with formal pre-determined parental status.[1] In order for a nonformal parent to gain any access to children, a formal parent must be found unfit,[2] or, in somewhat weaker versions, a finding must be made that extraordinary circumstances exist or it must be demonstrated that giving full parental custody to formal parents would cause substantial harm[3] to a child.[4] Parenthood is, for the most part, an all-or-nothing exclusive proposition.[5] Only formal parents have rights and obligations towards children as long as their formal legal status remains in place.

The American Law Institute's Principles of of the Law of Family Dissolution,[6] landmark court cases,[7] and a growing number of scholars[8] have

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1 See *infra* Part I for a discussion of different ways of creating and defining formal parenthood and the attributes that make parenthood formal as opposed to functional.

2 *See* WIS. STAT. ANN. § 767.41(3)(a) (West 2012); *Ex parte* S.T.S., 806 So. 2d 336, 342 (Ala. 2001); Cotton v. Wise, 977 S.W.2d 263, 264 (Mo. 1998); Simons v. Gisvold, 519 N.W.2d 585, 587 (N.D. 1994).

3 *See* CAL. FAM. CODE § 3041 (West 2012); Kinnard v. Kinnard, 43 P.3d 150, 155 (Alaska 2002) (upholding shared custody based on stepmother's demonstration that she was psychological parent to child and severing that bond would be detrimental); Froelich v. Clark, 745 N.E.2d 222, 230-31 (Ind. Ct. App. 2001); *In re* Askew, 993 S.W.2d 1, 5 (Tenn. 1999) (reversing award of child custody to family friend over parent because there was no determination that parent's custody of child would result in substantial harm to child); *In re* Custody of Anderson, 890 P.2d 525, 527-28 (Wash. Ct. App. 1995) (awarding custody to parent over aunt and uncle who had custody of child for previous two years, despite the finding that the aunt and uncle could offer a superior home environment).

4 *See* Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 14 (1997); James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's* Principles of the Law of Family Dissolution, 2001 BYU L. REV. 923, 929; John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 366-67 (1998).

5 *See* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 19-20 (2008); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 314-17 (2007); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85 (2004) ("[T]he rule of the 'exclusive' family . . . is a central problem in family law in the United States" but it is also harmful to children, families, and the public because it is an "intentionally, but unnecessarily, limited vision of parenthood that distorts the narrative of too many people's lives."); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 74 (2007); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 394-95 (2008).

6 AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2000) [*hereinafter* ALI PRINCIPLES].

begun to breakdown the exclusivity of formal parenthood, arguing for the rights of children to have relationships with significant caregivers who traditionally would have been considered unrelated third parties. These caregivers are usually described as functional or de facto parents.[9] Functional parents are people who function in parental roles without having any formal legal status as parents.[10] Functional parents take on the role of traditional

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[7] *See* Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677 (App. Div. 1998); *In re* Marriage of Sleeper, 929 P.2d 1028 (Or. Ct. App. 1996); Bupp v. Bupp, 718 A.2d 1278 (Pa. Super. Ct. 1998); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); Quinn v. Mouw-Quinn, 552 N.W.2d 843 (S.D. 1996).

[8] *See supra* note 5; *infra* part II.

[9] The functional parents we describe have also been called de facto parents, parents by estoppel, and described as "*in loco parentis*." Functional parents are variably considered to have status in the case law under six designations. (1) *Parens patriae*. *See, e.g.*, Roberts v. Ward, 493 A.2d 478, 482 (N.H. 1985) (using *parens patriae* power to determine whether visitation with grandparents would be in the best interests of the child, and also referring to such caregivers as "psychological parents"). (2) Parents by estoppel. *See, e.g.*, *Jean Maby H.*, 676 N.Y.S.2d at 682 (finding mother estopped from denying her husband's right to seek custody when she had publicly held out her husband as the child's father, and the husband had accepted this role, despite the fact that both knew that husband was not the child's biological father). (3) Equitable parents. *See, e.g.*, Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987); *see also* 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, 491-502 (1990) (analyzing the role of equitable estoppel in child custody cases). (4) De facto parents. *See* CAL. R. CT. 5.502(10) (West 2012) (defining de facto parent as "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period"); C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004). (5) Psychological parents. *See In re* E.L.M.C., 100 P.3d 546, 562 (Colo. App. 2004) (holding that former domestic partner has standing as psychological parent to petition for equal parenting time); V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) (holding that biological mother's former same-sex domestic partner was children's psychological parent and thus had standing to seek custody); Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006) (holding that mother's ex-boyfriend, who was allowed to visit and share custody of child for over nine years even after blood test proved that he was not the biological father, has standing to seek visitation as a psychological parent). (6) *In loco parentis* doctrine. *See* Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982) (acknowledging that stepparents who stand *in loco parentis* have ability to petition for visitation); Simpson v. Simpson, 586 S.W.2d 33, 36 (Ky. 1979) (holding that person who stands *in loco parentis* may petition for custody); *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995); Stacey A. Warman, *There's Nothing Psychological About It: Defining a New Role for the Other Mother in a State that Treats Her as Legally Invisible*, 24 NOVA L. REV. 907, 911 (2000).

[10] Some have described individuals that provide functional care as third-party caregivers as opposed to functional or de facto parents. *See* Josh Gupta-Kagan, *Children, Kin, and Courts: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 56 (2008); 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, 737 (2005). We think that the term "functional parent" is appropriate for persons who engage in a certain level of constant and continuous caregiving activities because it creates a status other than legal stranger between the person and the child. Furthermore, it gives more lucid recognition of the importance of these functional care relationships. It is also the term most used by scholars and courts. Finally, it elevates these nonformal parents to the realm of parental figures which best reflects the nature of the care they

formal parents by caring for children, living with children, and/or providing for their necessities.[11] Functional parents provide emotional, physical, and financial support that all children need and also provide for their day-to-day activities, educational needs, medical care, guidance, and physical accompaniment. At times, functional parenthood has been defined to attach to more typical female roles of caretaking, but other definitions have been more inclusive by including financial support and familial interconnectedness as sufficient to create a functional parenthood bond.[12] Functional parents are not babysitters or occasional friends who lend a hand; they provide constant support and presence in children's lives and create significant emotional attachments with children. These varied caregivers provide a "kin-like" structure in which children are raised. These caregivers are not necessarily close biological relations but they are "family" nonetheless because of the close and constant care they provide.[13] In order to distinguish between occasional "helpers" or more casual relationships and functional parents, minimum standards regarding the duration of the relationship, cohabitation, amount of daily and constant caregiving, and financial support should be established before this status is conferred by a court.[14] A judicial inquiry must take place to examine the nature of the relationship between the functional parent and the child and to determine whether continuing such a relationship is in the child's best interests. Alternately, if not contested, the status can be conferred through a registration system with the consent of a formal parent.[15] This latter approach has the benefit of avoiding litigation.

The role and legitimacy of functional parents who have no formal parental status vis-à-vis children has been noted, accepted, and advocated for

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provide. *See generally* Murray, *supra* note 5, at 447-52 (comparing the difference between using the term parent for functional caregivers or using an alternative status to civil unions versus gay marriage).

11 *See* Cahn, *supra* note 4, at 43-44; Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 640-41 (2005); Murray, *supra* note 5, at 399-401; Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1646 (1991).

12 The ALI Principles term "de facto parent" has been associated with a more "female" vision of caretaking as parenthood, whereas parenthood by estoppel is defined by child support and accepting responsibility as a more traditionally male role of parenthood. *See generally* Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 916-17 (2006) (suggesting parenthood by estoppel is the male model of parenthood and de facto parenthood is the female model of parenthood).

13 *See* Kavanagh, *supra* note 5, at 85; Kessler, *supra* note 5, at 47.

14 *See* ALI PRINCIPLES, *supra* note 6, § 2.03; *infra* notes 130-131 and accompanying text. Functional parenthood is conferred by courts whereas formal parenthood is recognized by courts but established by other constitutive means not ordinarily subject to judicial discretion. See Part I.A for a complete elaboration on how to define formal versus functional parenthood.

15 *See infra* Part III.B.2.

in a large variety of contexts—open adoption;[16] homosexual relationships;[17] stepparent and cohabitant relations;[18] grandparent relationships;[19] extended familial relationships;[20] assisted reproduction with multiple parents;[21] and foster parent relationships.[22] The weakening of the homogenous nuclear family as the normative and exclusive arena for raising children,[23] and the growth in alternate family forms and societal acceptance of such families, have created a positive environment for recognizing the role functional parents play in children's lives. In the context of the increasing number of sin-

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16 David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 757 (1999) ("A large handful of states now expressly empower their courts, in the event that an adoption cannot go forward, to permit the child to remain indefinitely in the custody of the adults who had sought to adopt, while giving the biological parent or parents rights of visitation and communication. Although the caregivers under this approach cannot become 'parents' to the child through adoption, they and the child at least can be spared the trauma of separation.").

17 V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (finding that a biological mother's same-sex former domestic partner was entitled to visitation rights because she was a "psychological parent" to the children). *Contra* Gregory, *supra* note 4, at 352-55.

18 *See* Gregory, *supra* note 4, at 361 (stating that many states have statutes that are sufficiently broad to include visitation by stepparents).

19 *Id.* at 369 ("Although the common law treated grandparents as legal strangers, today grandparents generally enjoy a statutory right to visitation."). *Contra* Kavanagh, *supra* note 5, at 94 ("Grandparents who may act as primary caregivers are written out of the narrative of children's lives in favor of biological parents, regardless of the real relationships of the family.").

20 *See, e.g.*, Youmans v. Ramos, 711 N.E.2d 165, 167 (Mass. 1999) (upholding visitation rights of child's maternal aunt in the face of father's challenge because aunt was child's "de facto parent."); *see also* 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, 598 (2010).

21 *See* Tim R. Schlesinger, *Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support*, 61 J. MO. B. 22, 25 (2005).

22 *See In re* Teela H., 547 N.W.2d 512, 521 (Neb. Ct. App. 1996) (finding that a court may consider psychological impact of removing child from foster parent when determining whether to reunite child and biological mother); *In re* Brian D., 461 S.E.2d 129, 144 (W. Va. 1995) (finding that foster parents' continued association with child should be considered, because of strong emotional bond established, after biological mother's rights were restored); Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 28 (2009) (arguing that if a relationship with a foster parent or long-term live-in paid caregiver is sufficiently formational, the money provided to enable that care should not disqualify functional caregivers from obtaining functional parental status).

23 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 63 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."); *see also* Natalie Reed, *Third-Party Visitation Statutes: Why Are Some Families More Equal Than Others?*, 78 S. CAL. L. REV. 1529, 1530 (2005) ("The family, which was once a standardized structure, has diversified substantially because of liberal no-fault divorce rules, social acceptance of nonmarital sexuality and cohabitation, and tolerance of same-sex relationships. Detractors assert that America is in the midst of a social breakdown; however, the structure of the American family, rather than disintegrating, is merely evolving into something new." (footnotes omitted)).

gle parent homes,[24] homes where both parents are employed full-time and thus various alternative arrangements for care are necessitated,[25] families of divorce,[26] families using webs of artificial reproduction, and adoptive families, functional caregivers are increasingly essential.[27] In other words, in many families, nonformal parents are undertaking serious and sustained caretaking roles to various degrees.[28] Such caregivers, or those who act functionally as parents to children, engage in crucial work on behalf of children and families, particularly at a time when so many children do not have sufficient care.[29] Because of the importance of such functional caregiving roles to children and families, it is argued that traditional, biological parenting rights must give way to the functional needs of children and the actual attachments that functional parents create and which formal parents willingly foster.[30]

On the whole, this is a positive development—even with regard to potentially giving certain legal status to paid caretakers who can demonstrate a sufficient relationship with children.[31] However, it is a mistake to model

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24 *See* Kavanagh, *supra* note 5, at 94 ("[T]he presence of a grandparent in the [single-mother] home is, in many situations, economically and emotionally helpful to mothers and children—sometimes even more so than a father."); Reed, *supra* note 23, at 1537.

25 *See* Reed, *supra* note 23, at 1535; Tali Schaefer, *Disposable Mothers: Paid In-Home Caretaking and the Regulation of Parenthood*, 19 YALE J.L. & FEMINISM 305, 307 (2008) ("[I]t is hard to know exactly how many parents employ in-home [child] caretakers. However, research indicates that this practice is prevalent in dual-career households.").

26 Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2082 (2000) ("[T]he U.S. divorce rate has been rising steadily since the 1860s . . . .").

27 Schlesinger, *supra* note 21, at 22 ("In the United States, more than six million people of reproductive age are affected by infertility. This number does not include the same-sex couples who desire to have children and who, by virtual necessity, must use A[ssisted] R[eproductive] T[echnologies]." (footnote omitted)).

28 *See* Kavanagh, *supra* note 5, at 91 ("Today, nearly one-third of first marriages end within ten years. One in three women giving birth is unmarried. Only sixty-nine percent of children in the United States live in two-parent families. Conservative estimates suggest these families include over six million stepchildren, meaning the exclusive biological family represents the lives of less than sixty percent of children in the United States. At least seventy-five thousand same-sex couples in the United States have children in their homes." (footnotes omitted)).

29 Troxel v. Granville, 530 U.S. 57, 64 (2000) ("The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties."); Kavanagh, *supra* note 5, at 94 ("In March 2002, over sixteen million children lived in 'mother only' households. Whether this resulted from marriages and relationships that ended or that never existed, as a whole thirty-eight percent of these children lived below the federal poverty line and twelve percent received public assistance. By contrast, of children living with a grandparent and a parent (usually a mother) only fifteen percent lived in poverty and eight percent received public assistance.").

30 *See supra* note 9.

31 *See, e.g.*, Laufer-Ukeles, *supra* note 22, at 28.

the rights and obligations of functional parents on those of formal parents and attempt to fit functional parents into the same mold by expanding the term "parent" to include both functional and formal parents.[32] Many, but not all, judges and commentators tend to equate functional and formal parenthood, arguing that once a person is labeled as a "parent" the formal or functional nature of the relationship becomes irrelevant.[33] On the contrary, functional parents should not be labeled as equivalent to formal parents thereby ignoring important differences between formal and functional parents. Instead, it is important to recognize the differences between these varied and beneficial functional relationships and more traditional formal parenthood from the perspective of a child, who ultimately benefits from such functional relationships, as well as the perspective of both formal and functional caregivers.

On the one hand, from a child's perspective, if the emotional attachments with nonlegal or biological parents are sufficiently sustained and expansive, they are no less important than attachments with formal parents and the services that functional parents provide are equally as valuable.[34] The legal differences simply do not matter from a child's perspective; it is the strength of the bond that is important or the quality and quantity of care and support that is given.[35] Attachments to loving adults are as crucial to proper development in children as are financial resources and familial love.[36] Thus, from a child's perspective, these attachments should be facilitated and recognized regardless of formalities, constitutional rights of parental privacy, etc.

On the other hand, it is in the best interest of the child that legal recognition of functional parenthood should account for the differences between formal and functional parenthood. Functional parenting is different in practice and in theory from formal parenthood. Functional parenthood develops in different ways, for different time periods, and fulfills different needs than formal parenthood. There are significant benefits to the flexible and diverse

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32 *See* Murray, *supra* note 5, at 442-47.

33 *See infra* Part II.A.

34 *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 39 (2d ed. 1979); Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 250 (2011); Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles*, 4 J.L. & FAM. STUD. 151, 162 (2002).

35 *See* GOLDSTEIN, FREUD & SOLNIT, *supra* note 34, at 39; Jennifer Bowes et al., *Continuity of Care in the Early Years?: Multiple and Changeable Child Care Arrangements in Australia*, FAM. MATTERS, Autumn 2003, at 30, 30-31; James Elicker, Cheryl Fornter-Wood & Illene C. Noppe, *The Context of Infant Attachment in Family Child Care*, 20 J. APPLIED DEVELOPMENTAL PSYCHOL. 319, 332 (1999).

36 ALI PRINCIPLES, *supra* note 6, § 2.02 cmt. e ("[T]he continuity of existing parent-child attachments after the break-up of the family unit is a factor critical to the child's well-being. Such attachments are thought to affect the child's sense of identity and later ability to trust and to form healthy relationships.").

manner in which such relationships develop and meet the needs of children. And, there are many different kinds of people that might qualify as functional caregivers by providing for children's needs. However, functional relations are not as stable, predictable, identifiable, or as easily assignable as formal parenting relationships. They also create a potential multiplicity of claims that can upset the stable, private lives of children through state and court intervention. Thus, for the sake of children who are the primary beneficiaries of functional caregivers, but also in acknowledgement of the different potential concerns and benefits involved for formal and functional caregivers, functional parenthood should be recognized without equating it to formal parenthood. Functional and formal parenthood are distinct statuses that need to be clearly distinguished and supported for the benefits they each provide as well as the different limitations involved in each method of obtaining parenting rights.

This Article is divided into three Parts. In Part I, this Article defines and describes formal and functional parenthood and stresses the ways in which functional parenthood has served to compliment and reinforce childcare provided by formal parents. In Part II, the Article describes how case law and academic literature have equated functional and formal parenthood and, even when the separation of function and form is attempted, such attempts are inconsistent, unexplained, and/or under-theorized. This Part also analogizes functional parenthood with common law marriage, describing how, in the law between adults, mixing function and form has not been successful. This Part incorporates lessons from the failure of common law marriage in devising a system of functional parenthood despite the clear differences in these doctrines.

In Part III, this Article first sets forth the distinct differences, advantages, and drawbacks of formal and functional parenthood. These differences include: (1) the diversity and flexibility of functional relationships; (2) the point at which such relationships begin and end; (3) the invasion of privacy from the state into children's lives; and (4) the stability, predictability, and assignability of these relationships.

This Part then introduces possible legal avenues to differentiate between function and form. This Article's primary argument is that a differentiated system of rights and obligations should attach to formal parents and those that fulfill stated functional requirements. This differentiation can be accomplished in a variety of ways. This Article discusses two main options that can exist separately but, ideally, would overlap and coexist. First, courts can award functional parental rights as a differentiated status than formal parenthood when minimum threshold requirements are found. Functional status should be awarded only in times of crisis and should usually entail only visitation when a formal parenthood relationship persists. Alternatively, a separate registration system could be devised for functional family forms when there is formal parental consent. Such registration system would provide the necessary status for functional caregivers to effectively

provide care for children. In addition, in any system of differentiated status, whether through registration or court decision, the incidents of parenthood—child support, physical custody, legal custody, and other rights and entitlements of parenthood—can be disaggregated in a manner that is not as feasible or advisable in the context of formal parenthood. Finally, this Part considers a few hypotheticals drawn from actual cases and applies the aforementioned theory demonstrating how function and form should be differentiated.

While the differentiation proposed in this Article might be accomplished through various combinations of these three proposals as well as through other means, the primary contention is that differentiation should exist. Thus, this Article begins the discussion of how best to achieve that differentiation.

I. DISCERNING FUNCTION AND FORM

A. *The Emergence of Functional Parenthood*

Legal parenthood has traditionally been defined through status-based indicators such as biology, adoption, marriage, and the use of presumptions.[37] This Article refers to the traditional definitional approach to parenthood as the "formal" approach to parenthood.[38] More recently, "functional" approaches to parenthood have emerged in contrast to approaches based on the "form" of the relationship or the status of the persons involved.[39] In this Article, functional parenthood is defined as the assignment of parental status based on actual, "functional" care work or support for children. While scholars and courts use these terms in a variety of ways, it is this definitional distinction that frames the theory of differentiation of form and function set forth in this Article.[40]

Functional parenthood is commonly associated with the changing reality of American family forms and the declining dominance of the traditional nuclear family.[41] However, the seeds of the legal recognition of functional parenting were sown more fundamentally with the changing perceptions of children and the nature of the parental relationship. With the rejection of legal treatment of children as their parents' property, the parental relation-

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37 *See generally* Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 771 (1999).

38 Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 24-25 (2000).

39 *See* Murray, *supra* note 5, at 442-44.

40 We define functional and formal parenthood with more specificity. *See infra* Part I.B.

41 We elaborate and expand on the way we perceive formal and functional definitions of parenthood below. *See infra* Part I.B.

ship has transformed from one based on status and property to a relationship centered on nurture and care.[42] Thus, even within a system of formal parenthood, functional elements have taken hold. The perception of the parental relationship as focused not only on lineage and biology but on the basis of the caregiving relationship has paved the way for abuse and neglect cases in which parental legal status is terminated when no parental function is provided or it is provided in a problematic manner.[43] When formal parents do not function, their parenthood can be terminated. Thus, although the status of parenthood is acquired through biological relations or formal processes, maintaining that status is a matter of function. The legal system has rejected as a manifestation of the proprietary notion of parenthood the continuation of formal legal parental ties when no care for children is provided. Formal legal parents can thus lose their status based on their (dis)function.[44]

The conceptual starting point for perceiving parenthood as a functional status, rather than a formal one, can be found in the psychological parenting theory developed in 1973 by Joseph Goldstein, child analyst Anna Freud, and psychiatrist Albert Solnit.[45] In their work on child placement, the trio de-emphasized formal parenthood, emphasizing instead the significance of the continuity of a psychological parenting relationship to a child.[46] They defined a psychological parent as the "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills

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42 This is not to suggest that the perception of children as their parents' property has been entirely eliminated, as there are good reasons to suggest it still casts its shadow. *See generally* Barbara Bennett Woodhouse, "*Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1042-43 (1992) ("If we look at history and listen to legislators, judges, and parents speaking about parental rights, clearly children were, and are, often conceptualized as closely akin to property.").

43 *See generally* JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 35-48, 64-69 (2006) (describing the development of child protection efforts in response to various cruel practices, as well as the advent of juvenile courts that could free children from abusive or neglectful parents). The roots of the perception that the rights of biological parents deserve less deference where they did not maintain ongoing relationship and care for the child can be found as early as the nineteenth century. Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1772 (1987).

44 Interestingly enough, later developments have suggested that these former legal parents are not completely strangers to the child, mainly based on their previous (dis)function, and should be accorded some legal status. This call is stronger with regard to older children, who shared a relationship with their biological parents, than regarding adopted babies for whom the biological parent is only that—a biological parent. Thus, even parental malfunction could still justify, according to some scholars, legal recognition. *See generally* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 494-95 (1983).

45 *See generally* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 893-94 (2000) (attributing the current emphasis on function in defining parenthood to the work of Goldstein, Freud, and Solnit).

46 GOLDSTEIN, FREUD & SOLNIT, *supra* note 34, at 6-7. Goldstein, Freud, and Solnit have argued that "[w]hat registers in [young children's] minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached." *Id.* at 12-13.

the child's psychological needs for a parent, as well as the child's physical needs."[47] The psychological parent may be "a biological . . . , adoptive, foster, or common-law . . . parent, or any other person" and "[t]here is no presumption in favor of any of these after the initial assignment at birth."[48] Their theory focusing on the need of children to attach to a psychological parent has transformed thinking about parental status, rights, and obligations.

In particular, the work of Goldstein, Freud, and Solnit has significantly impacted traditional child placement issues in cases involving neglect, abandonment, abuse, or parental separation and divorce.[49] The ideal of the nuclear family provided the setting for their writing.[50] Nonetheless, their approach to parenthood has been considered highly relevant to dilemmas that have arisen outside of the nuclear family.[51] Whereas custodial rights were once thought to derive naturally from a formal relationship with children, consideration of the importance of functional care is now influential. The continuity of functional caregiving is central to custodial decisions at divorce where the primary caregiver is regularly considered the preferred custodial parent even without a primary caretaker presumption.[52]

In addition, functional elements have emerged as significant in the context of unwed fathers. With the decline in marriage rates and the growth in extramarital births,[53] legal systems face the need to define the legal status

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47 *Id.* at 98.

48 *Id.*

49 *See id.* at 5.

50 *See id.* at 5-6 (noting that the law's ideal family structure occurs where "at birth the child is wanted by the adults who conceived him").

51 *See generally* Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1391-92 (1997).

52 *See In re* Marriage of Burgess, 913 P.2d 473, 478-79 (Cal. 1996) ("[T]he paramount need for continuity and stability in custody arrangements – and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker – weigh heavily in favor of maintaining ongoing custody arrangements."); Hollon v. Hollon, 784 So. 2d 943, 947 (Miss. 2001) (noting that emotional ties with parents is one of the factors in determining best interests of the child in custody determinations); Kjelland v. Kjelland, 609 N.W.2d 100, 103-04 (N.D. 2000) (citing stability, continuity, and permanence as relevant factors in determining custody, notwithstanding the opposing party's status as primary caretaker); Zepeda v. Zepeda, 632 N.W.2d 48, 53 (S.D. 2001) (utilizing a stability consideration). Although the maternal presumption no longer operates, empirical evidence, albeit somewhat dated, suggests that focus on the caretaking relationship persists, as approximately 90 percent of primary caretakers continue to be awarded custody. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112-13 (1992); Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 HOFSTRA L. REV. 877, 887 (2000) ("Child custody standards tend to stress past caretaking and emotional bonds which are generally generated through caretaking relationships, because it is thought that these are the best measures of the best interests of the child.").

53 The number of births outside of marriage in the United States has been steadily rising, and today four in ten children are born outside marriage. William J. Carney, *Martha Fineman: On Feminism, Politics, and Rhetoric*, 54 EMORY L.J. 261, 267-68 (2005); Jeffrey T. Cookston & Wenson W.

of unmarried biological fathers, which were traditionally excluded from the formal legal definition of "a father."[54] Fatherhood was traditionally established by marriage so that a man's paternal status was governed by his relationship to the child's mother.[55] A purely formal approach could have replaced "being married to the mother" with "a biological tie to the child" in defining legal fatherhood. However, in a series of cases, known as the "unwed fathers cases," the Supreme Court has defined legal fatherhood based not only on a biological-genetic tie to a child, but rather on the actual parental commitment to the child and the creation of a substantial relationship between the biological father and the child.[56] Parental function did not entirely replace biology and marriage in the Court's definition of legal fatherhood; married biological fathers gained their parental legal status merely based on their marriage to the child's mother. Function alone was also not enough—it was the combination of biology and parental function that defined legal fatherhood for the Court. However, in the context of the unwed father cases, legal definitions of parenthood began to incorporate parental function as a factor.

Following on the heels of the transformative focus on functional parenthood within the framework of formal parenthood, functional parenting has emerged as an independent basis for gaining parental status in some courts.[57] The expansion of same-sex families poses perhaps the most significant challenge to traditional formal parenthood and the greatest push towards recognizing functional parenthood. The growing recognition of same-sex couples and their increasing desire to procreate using reproductive technologies has driven the movement towards recognizing functional parental rights in courts and scholarship.[58] In these families, one adult who provides parental care may have no biological or formal legal ties to the child.[59] Additionally, access to formal parenthood is not available in states

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Fung, *The Kids' Turn Program Evaluation: Probing Change Within a Community-Based Intervention for Separating Families*, 49 FAM. CT. REV. 348, 350 (2011).

54 *See generally* John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 372-74 (1991). The legal status of biological mothers was never an issue prior to the appearance of surrogacy.

55 *Id.*

56 *See* Lehr v. Robertson, 463 U.S. 248, 266-67 (1983); Caban v. Mohammed, 441 U.S. 380, 393 (1979); Quilloin v. Walcott, 434 U.S. 246, 256 (1978); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972).

57 *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (awarding visitation rights to a nonlegal parent upon a finding that she "assumed many of the day-to-day obligations of parenthood toward the [children], including financial support; and that a bonded relationship developed . . . that [was] parental in nature"); ALI PRINCIPLES, *supra* note 6, § 2.18.

58 *See generally* Polikoff, *supra* note 9.

59 *See* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) ("The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples . . . are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto."); *In re* LaChapelle, 607 N.W.2d 151, 159 (Minn. Ct. App. 2000) (concluding that a nonbiological lesbian

that do not enable second parent adoption for gay couples.[60] Thus, in the case of same-sex parents, functionally defining parenthood seems especially pressing.[61]

However, same-sex families are not the only context in which functional parenthood is emerging as necessary to recognize the functional parental relationships in which children are raised. The revolutionary advancement of artificial reproductive technologies that involve gamete donation or surrogacy has undermined the biological basis underlying traditional formal parenthood.[62] With the tearing apart of the gestation-genetic link, biology can no longer serve as the determinative factor for establishing formal legal motherhood. Two women could claim maternity based on bi-

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parent was not prohibited from seeking custody of a child); *V.C.*, 748 A.2d at 550-52 (setting forth the factors that determine whether a nonbiological and nonlegal parent can be classified a "psychological parent"); Rubano v. DiCenzo, 759 A.2d 959, 968 (R.I. 2000) (holding that a "de facto parental relationship with the child" permitted a nonbiological parent access to visitation rights).

60 Arizona, Kentucky, Mississippi, Nebraska, Ohio, Utah, and Wisconsin currently limit or prohibit second-parent adoption in same-sex families. NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS 1-2 (2012), *available at* http://www.nclrights.org/site/DocServer/2PA_state_list.pdf?docID=3201.

61 *See* Christensen, *supra* note 51, at 1302 ("[G]ay people face daunting barriers to full-fledged membership in the modern legal family . . . ."); Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 513-19 (1993) (arguing that since lesbian parenthood is occurring in record numbers, current family law is unable to adequately address the needs of lesbian families); Polikoff, *supra* note 9, at 463 ("The existing legal literature on lesbian mothers does not adequately prepare the court system to address the dissolution of [a lesbian] family, should it occur.").

62 Naomi Cahn notes that "[i]n 2005, the most recent year in which data is available, there were more than 15,000 cases of egg donation and more than 6,000 babies born, and, while there are no reliable data, estimates of the total number of donor-conceived children born each year range from 30,000-60,000." Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 222 (2009); *see also* Jean Benward, Andrea Mechanick Braverman & Bette Galen, *Maximizing Autonomy and the Changing View of Donor Conception: The Creation of a National Donor Registry*, 12 DEPAUL J. HEALTH CARE L. 225, 225-26 (2009) ("We can only estimate the number of donor conceived children in the United States. The frequently cited number of 30,000 births a year from sperm donation comes from a US government sponsored study done in 1987, over 20 years ago. Although most donor sperm now comes from commercial sperm banks that keep records on donors and sale of sperm, neither physicians, IVF programs, nor parents consistently report pregnancies or births to sperm banks nor do most sperm banks reliably follow up with recipients to track births. The use of a known donor for a private insemination adds to the difficulty of establishing an accurate number. Similarly, egg donor births are not reported in a way that an aggregate number is easy to calculate. The Centers for Disease Control (CDC) issues an annual report on donor egg pregnancies and births, but it does not include data on donor sperm births. The CDC's last published statistics (2005) showed 12% of all ART cycles (16,161) used donor eggs. The same CDC statistics also show there were 5,877 donor egg pregnancies of which 53% were singleton pregnancies, 38% were twins, and almost 5% were triplets. The number of live births was 5,043 of which 59.2% were singletons, 38.9% were twins, and 1.9% were triplets or more. Thus the children conceived and born from donor eggs in just 2005, inferred from the CDC data, are estimated fairly accurately to be about 7,200 babies." (footnotes omitted)).

ology—one based on gestation, the other based on genetics—and require the law to go beyond biology to determine motherhood.[63] The involvement of individuals with no genetic or biological link to the child in the procreation process, individuals who initiated the process and intended to become parents, has further complicated traditional formal definitions of both motherhood and fatherhood. In contrast, gamete donors often have no intention of parenting. Still, it is nearly impossible to draw clear lines. Some donors are known and intend to take part in raising children along with formal parents, while others are known and do not.[64] The parenting that results from or is intended by the use of artificial reproductive technologies not only cannot easily rely on formal definitions of parenthood, but is often not intended to be limited to formal parents.

The changing reality of American family life has also provided a significant push towards recognizing actual functional parenting as a factor in determining legal parenthood. The decline in marriage rates over the past half a century in conjunction with the rise in divorce rates and rates of cohabitation has led to the creation of complex or blended families of numerous varieties.[65] Children may live with a married or unmarried partner of their legal parents, both following divorce and in cases where the biological parents never shared a relationship.[66] These married or unmarried cohabit-

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63 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) ("We conclude that although the [statute] recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child she intended to raise as her own—is the natural mother under California law.").

64 Some would argue that providing sperm coupled with intent to raise a child is sufficient to create formal parenthood. *See, e.g.*, *In re* Parentage of J.M.K., 119 P.3d 840 (Wash. 2005) (holding that an affidavit of fatherhood, combined with the donation of sperm, creates formal parental responsibilities); *see also* Hill, *supra* note 54, at 413-18. Delineating precise contours of formal parenthood is beyond the scope of this article.

65 Estimates are that one in three American children are now expected to spend some of their childhood years living with a stepparent. Demographic information, collected by the U.S. Census Bureau in the 2000 census, reports of 3.3 million stepchildren of householders under the age of eighteen in the United States. Susan L. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights and Obligations*, 48 FAM. CT. REV. 528, 529 (2010). It should be noted, however, that these numbers refer only to children living with a *married* partner of their legal parent. Cynthia Bowman notes that about 50 percent of the children currently living with opposite-sex cohabiting couples in the United States are living with a cohabitant partner of their biological parent. Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES L. 127, 130 (2012).

66 To clarify, legally recognizing the role that stepparents and unmarried cohabitants fulfill in the lives of their partner's children relies on functional rather than a formal approach to parenthood as long as it is based on the relationship between the child and the parent and not the relationship between the parents. *See* 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, 912-19 (1984) (indicating that the advantage of a functional approach is its non-exclusivity); Jennifer Klein Mangnall, Comment, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399 (1997).

ant partners of legal parents may provide sustained and comprehensive nurture, care, and support for children, assuming parental functions in a manner that begs legal recognition.[67]

Additionally, the changing character of adoption has added to the complexity in the identity of parental figures. In particular, the increasing use of open adoptions has complicated the nature of parenting and parenting rights as nonformal parents also function in parenting roles.[68] Similarly, foster parenting relies increasingly on kin and often results in permanent parenting relationships as opposed to temporary set-ups on the road to adoption.[69]

Demographic and social changes have also contributed to the emergence of functional parenthood. The need for dual incomes and the desire of women—who maintained the nuclear caregiving family by exclusively raising children—to join the workforce has resulted in the "networked family," as described by Melissa Murray, in which nannies, grandparents, and other kin help nuclear formal parents raise children.[70] In addition, following demographic shifts in the United States, white Christians are no longer in the majority and a greater diversity of cultures and ethnicities have engaged in extended kin care with much more frequency.[71]

The reality of American family life has dramatically changed over the last several decades. Today, it is "difficult to speak of an average American

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67 Research does indicate, though, that most often married or unmarried cohabitant partners of legal parents do not function fully as parents. *See* Andrew J. Cherlin & Frank F. Furstenberg, Jr., *Stepfamilies in the United States: A Reconsideration*, 20 ANN. REV. SOC. 359, 367, 375 (1994) ("[T]he odds of building durable and intimate bonds that resemble the strong ties that often occur among biological parents and children are relatively low."); E. Mavis Hetherington & Margaret Stanley-Hagan, *Diversity Among Stepfamilies*, *in* HANDBOOK OF FAMILY DIVERSITY 173, 187 (David H. Demo, Katherine R. Allen & Mark A. Fine eds., 2000); Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 224 (2003) ("Nonbiological stepfathers and mothers' cohabiting partners are similar and lower on measures of desirable parenting practices and investments than married biological fathers."); Jennifer E. Lansford et al., *Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households*, 63 J. MARRIAGE & FAM. 840, 847 (2001).

68 *See* Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 90-93 (2010) (chronicling the legal response to a movement away from secretive, closed adoption practices and toward ongoing contacts adoptions).

69 *See* Sandra J. Altshuler, *Child Well-Being in Kinship Foster Care: Similar to, or Different from, Non-Related Foster Care?*, 20 CHILD. & YOUTH SERVICES REV. 369, 369 (1998); Madeleine L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453, 1453-54 (1994); Laufer-Ukeles, *supra* note 22, at 47-48 (discussing the continued prevalence of long-term foster care relationships).

70 Murray, *supra* note 5.

71 *See* Coupet, *supra* note 20, at 603 ("In 2000, more than six million children across the country—approximately one in twelve—lived in homes maintained by grandparents or other relatives."); Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 358-60 (1996); Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539 (1984).

family. The composition of families varies greatly from household to household."[72] Ultimately, all these blended,[73] step,[74] extended, complex, and kin-like ways of raising children are increasingly utilized and provide necessary and needed support for children. People that are not formal parents are raising children in a dramatically increasing fashion. Formal legal parenthood provides too rigid and limited a means of recognizing the actual long-term, comprehensive, and beneficial parenting that is occurring. Thus, the value these caregiving networks provide to children should be heeded and recognized legally, while also recognizing how such family forms differ from traditional nuclear family forms.

B. *Parsing Formal and Functional Parenthood: The Role of Presumptions and Intent*

The changes in family structure and norms described above have caused upheaval not only in the determination of legal parenthood, but in the terminology used as well. Telling apart the formal approach to parenthood from a functional approach can be a complex task when determining how factors such as intent and presumptions fit into this distinction. This Section clarifies the usage of the terms "formal parenthood" and "functional parenthood" and lays out the roles of presumptions and intent in the discussion.

A formal approach to parenthood is distinguishable from a functional approach in that it is determined ex ante, usually established at birth, and, most importantly, determined by a legal rule that is applied without judicial discretion. A legal rule defining formal parenthood is usually established by legislation. However, in a legal system that is based on precedent, formal parenthood can theoretically be established through case law as well. For example, as noted above in the unwed fathers cases, the Supreme Court could have decided that a genetic tie to a child in itself determines legal paternity without reference to a man's parental behavior, or lack thereof.[75] Had this been the case, the Court would have adopted a formal approach to determining paternity, as determining a genetic connection could be done ex ante and without involving discretion.

A formal definition of parenthood could also address some of the challenges to legal parenthood created by the changing reality of American

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72 Troxel v. Granville, 530 U.S. 57, 63 (2000).

73 We use "blended families" to describe households in which adults have children from prior relationships.

74 "Step" refers to stepfamilies involving stepparents.

75 For a discussion of the question whether the definition of legal fatherhood should be based on "biology/genetic only" or on "biology/genetic plus," see generally Alison S. Pally, *Father by Newspaper Ad: The Impact of* In re *the Adoption of a Minor Child on the Definition of Fatherhood*, 13 COLUM. J. GENDER & L. 169, 183-89 (2004).

families. In cases of surrogacy, motherhood could be determined based on either genetics or gestation alone. Alternatively, motherhood could be determined solely by a "legal maternity decree" issued soon after a child's birth in a manner analogous to adoption decrees, without which the law will not recognize a parental relationship between a woman and a child.[76] A formal approach could also be adopted in cases of same-sex families, especially lesbian families, if the law issued a parenthood decree soon after a child's birth, based solely on a declaration by the biological mother and her partner regarding their relationship and intended joint parenthood. It should be clear that while some of the calls to recognize functional parenthood were mainly triggered by the denial of access to the formal legal definition (as in the case of same-sex families), in other cases a purely formal approach seems insufficient and inadequate, as in the case of stepfamilies or care by extended kin.

A functional approach to parenthood, on the other hand, relies on the actual care of children. As such, it can ***only*** be determined ex post and involves a considerable degree of judicial discretion to determine what parental care actually is, what activities a person must perform, and which behavior to demonstrate in order to gain recognition as someone who functioned as *a parent*.[77] While at first impression the distinction between formal parenthood and functional parenthood seems clear, it gets more complicated when considering the roles that "presumptions" and "intent" play in determining legal parenthood.

Presumptions play a significant role in establishing legal paternity. When the mother of a child is married, her husband is presumed to be the legal father.[78] While it could be argued that presumptions do not *define* legal parenthood since they could be rebutted, they cannot be ignored in discussing legal approaches to defining parenthood as they represent one of the traditional means of assigning parenthood status. On the one hand, a presumption of paternity is not based on the actual care of children, and thus is clearly not based on a functional approach. It is assigned at birth merely based on the formal status of a marriage to the mother. On the other hand, in cases addressing the rebuttal of the presumption, courts sometimes refer to the actual relationship that developed between the child and the man whom the child recognizes as his or her father. As noted by the California Court of Appeal: "A man who has lived with a child, treating it as his

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[76] This is similar, for instance, to the legislative approach in Israel. *See* Surrogate Motherhood Agreements Law, 5756-1996, SH No. 1577 pp. 8-9 (Isr.); *see also* Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL'Y 91, 95-98 (2002).

[77] Thus, for example, financially supporting a child is traditionally considered a significant factor in men's function as fathers. *See generally* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 327 (2005).

[78] *Id.* at 331.

son or daughter, has developed a relationship with the child that should not be lightly dissolved . . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity . . . ."[79] This line of reasoning presents a more complex approach. This presumption is relevant because the status represents aspects of formal parenthood, but yet when it is challenged, functionality and judicial discretion come into play.

The same complexity is present when considering the role of "intent" in defining legal parenthood. Intent has been used in a variety of ways, sometimes connoting formal parenthood and other times functional parenthood. Whether intent is established soon after birth or later in a child's life, the evidence required to establish intent, and the amount of discretion courts can apply in determining whether intent to bring the child into the world existed, affect the degree to which intent is more about formally or functionally defining parenthood.[80] For example, in cases of surrogacy or egg-donation, where intent is used to decide legal maternity, intent is used in a formal manner. Using intent to decide legal maternity between the woman genetically related to the child and the woman who gestated the fetus is determined ex ante and without judicial discretion—thus constituting a formal inquiry.[81] Furthermore, when parenthood is defined by determining whether the person intended to parent before a child's birth, this is a formal definition of parenthood. Indeed, preparing for a child is not functional parenthood because you can only function as a parent after a child is born. However, when the intent inquiry is done later in a child's life, and proving intent relies on the actual caring for and rearing of children, then courts and legal scholars are in fact referring to functional parenting when they discuss intent.[82] In these contexts, the way intent is used is better referred to as allocating functional parenthood based on care. In sum, intent is

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79 Susan H. v. Jack S., 37 Cal. Rptr. 2d 120, 124 (Ct. App. 1994) (citing *In re* Estate of Cornelious, 674 P.2d 245, 248 (Cal. 1984)); *see also* Michelle W. v. Ronald W., 703 P.2d 88, 92-93 (Cal. 1985).

80 *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 677 (2002). Richard Storrow acknowledges that intent takes on a different meaning when used before birth to assign parenthood, but pointing to factors such as preparing for birth and intending to parent as sufficient to create functional parenthood. We, however, believe that intent pre-birth is easily distinguishable from functional parenthood as the latter requires ongoing care to a live child.

81 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 779-82 (Cal. 1993).

82 *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005); *see also* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 434-38 (2005). Though Melanie Jacobs advocates defining parenthood in lesbian families based on intent, her interpretation of intent and specifically her insistence to go beyond pre-birth intention and consider an intent to parent *that accompanies functional parenting* and begins after the child's birth, suggests that she in fact considers function. *But see* K.M. v. E.G., 117 P.3d 673, 681-82 (Cal. 2005) (adopting a pure genetic analysis and declining to decide based on the putative mother's intent or functional analysis).

usually used to denote formal parenthood as determined pre-birth and ex ante, but has also been used more flexibly to refer to functional parenthood.

C. *The Normative Push Towards Functional Parenthood*

This Part briefly identifies the normative justifications for recognizing functional parenthood. Formal parenthood is often justified by natural rights,[83] but can also be justified by the needed stability, order, and caregiving responsibility it assigns.[84] Some have argued that it is possible to unravel the very status of parenthood and assign rights and responsibilities to children more flexibly.[85] However, formal parenthood still provides the primary framework in which children are raised, and it is not this Article's goal to challenge the benefits that it provides to children or the natural rights upon which some argue it is based. This Article provides greater discussion of the normative push for functional parenthood because it is a direct challenge to the exclusivity of formal parenthood. Functional parenthood is of sufficient importance to complement and, by necessity, limit the formal rights that already exist.

The Sections above have identified how and why functional parenthood has emerged as a relevant doctrine and how to identify formal versus functional parenting. It is also helpful to map the reasons that functional parenthood should be recognized. This discussion directly informs the argument that the benefits of both functional and formal parenthood should both be maintained, albeit differentiated. Many have previously made the normative argument for functional parenthood,[86] but for the sake of completeness and clarity, this Article points to the distinct sources that establish the need for functional caregiving and combine to make this a doctrine that is not only descriptively identifiable and sociologically relevant, but normatively desirable as well. Generally, there are three bases given for justifying the need for functional parenthood: (1) for the benefit of children; (2) for the benefit of formal parents; and (3) for the benefit of functional caregivers. All three combine to inform the necessity of recognizing functional parenthood as a legal category.

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83 *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (finding that California statute comports with "nature itself" in that there is no provision for dual fatherhood).

84 *See generally* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 502-03 (1992) (acknowledging that parenting laws can provide a framework for support and parental discipline).

85 *See generally* Murray, *supra* note 5, at 388.

86 *See supra* notes 16-30 and accompanying text.

1. For the Benefit of Children

Generally, children's interests should be paramount in determining custody.[87] Based on the work of Goldstein, Freud, and Solnit, the psychological attachment of children to their caregivers is well accepted and broadly influential.[88] When children attach to caregivers, breaking those ties can have detrimental impacts on children.[89] Sometimes it is necessary or inevitable—as in the death of a caregiver or when a caregiver turns abusive—but other times such breaks occur because of unjustified behavior by adults. Giving long-term caregivers rights to continue relationships with children when necessary can cure such behavior.

Moreover, many children do not receive sufficient care by formal caregivers.[90] In order to encourage and sustain caregiving endeavors by other parties who desire to parent children, it is in children's interests to provide their caregivers with a legally cognizable status.[91] This status will facilitate and incentivize their actions by giving them status vis-à-vis children. Functional parents should not fear that they may become attached to children and never see them again—this may dissuade them from providing needed care.[92]

Finally, children need functional parents to have legal status so that caregivers can effectively provide caregiving. Too often functional caregivers cannot make educational and health decisions that would benefit children due to their lack of legal standing.[93] Such standing is not available even if formal parents would not object to functional caregivers acting on

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87 *See* Cahn, *supra* note 4, at 48, 56-58; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 499 (1984); Woodhouse, *supra* note 42, at 1113-14.

88 *See supra* notes 46-52 and accompanying text.

89 *See supra* notes 46-52 and accompanying text.

90 In the United States, around 550,000 children per year are part of the foster care system. U.S. DEP'T OF HEALTH & HUMAN SERVS., AFCARS REPORT 1 (2006), *available at* http://archive.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.pdf. Children are also in need of stepparents, kin caregivers, and others to provide necessary daily care. *See supra* part I.A.

91 It is not our claim that legal rules are the only or even primary incentive that motivates caregiving behavior. However, we believe legal rules will provide support and express societal approbation for such roles. In this claim we refer to the expressive role of law. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 14-18 (1995); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8 (1987); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 139 (1989); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 293-94 (1988); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 991-92 (1989).

92 This is particularly relevant in the foster care context, but may be relevant in other context as well. *See* Laufer-Ukeles, *supra* note 22, at 55-69.

93 *See* Kavanagh, *supra* note 5, at 88-90; Murray, *supra* note 5, at 398-99.

their children's behalf.[94] Recognizing functional parenthood would facilitate actions on behalf of children that are necessary for children's success.

2. For the Benefit of Formal Parents

Recognizing functional parenthood, while potentially infringing on parental privacy, can also be of great assistance to formal parents. Such attachments are often good for formal parents who benefit from the care given to their formal children.[95] There are situations in which formal parents need functional parents and would like to facilitate their caregiving actions but do not want to lose their formal status. Under a framework of exclusive, binary parenthood, formal parents must consent to have their rights terminated in order to place responsibility and legal rights on functional parents.[96] This rigid framework may deter parents from allowing functional caregivers to provide caregiving work that formal parents cannot do themselves.[97] This is clearly to the detriment of children and also puts a strain on formal parents.

Moreover, as Murray has argued, binary exclusive parenthood does not reflect the way formal parents care for children.[98] Caregiving is done by people other than formal parents and under current legal frameworks is not sufficiently supported.[99] Legally recognizing that other people function as parents through the care that they provide can facilitate caregiving activities, reduce stigma associated with outsourcing care, and normalize legally what is already done in practice without having to abrogate formal parental ties.

3. For the Benefit of Functional Parents

Again, while the interests of children are the preeminent reason to support functional caregiving, functional parents need support and recognition for the valuable caregiving work that they do.[100] Often, they function as parental figures because formal parents are absent. This valued work in

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94 *See infra* notes 374-375 and accompanying text.

95 *See* Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 976-79 (1999); Murray, *supra* note 5, at 454-55.

96 *See* DiFonzo, *supra* note 4, at 929 ("[O]nly natural birth or an adoption could convert an adult-child relationship into that of parent and child.").

97 *See* Murray, *supra* note 5, at 387-88.

98 *Id.*

99 *Id.* at 394.

100 *Cf.* Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 16 (2009) (explaining the value that functional parents add a child's life).

raising and supporting children should be legally facilitated and recognized through providing them with a legal status.

In particular, in the context of same-sex couples, as well as in the context of reproductive technologies, parents act beneficently and deliberately to provide care and nurture to children that they raise. Their parental caregiving actions should not be ignored because they lack a biological link to children or could not (or did not) adopt the children they raise as their own.

All of these reasons support recognition of functional parents, although the primary reason to attach rights to functional parents is the best interests of children. Such interests are strong enough to limit the rights of formal parents because functional parents give needed valuable care to children, facilitate functional relationships that exist, support formal parents, and recognize the nurture work that is provided by nonformal parental figures.

II. THE MIXING OF FUNCTIONAL AND FORMAL PARENTHOOD

Despite the different ways in which functional and formal parenthood develop, are established, and are justified as described in Part I, there is a tendency to blur the lines between formal and functional parenthood when ascribing parent-like rights and obligations.[101] Thereby, the focus is on the concept of "parent" as opposed to the "functional" or "formal" manner in which this status arises or the nature of how it is experienced. There are two distinct ways in which functional and formal parenthood are equated. One method of equating formal and functional parenthood is to treat all persons described as parents equally. The second method is to recognize graduated or differentiated parenthood, but to base that recognition on levels of attachment as opposed to the formal or functional nature of the relationship. In addition, those who have distinguished functional and formal parenthood have done so in a manner that is incoherent, inconsistent, or undertheorized. This Article provides a detailed conceptual justification for differentiating function and form.

This Part outlines these two different ways of mixing function and form in case law and scholarship and then explains judicial and scholarly attempts at distinguishing form and function are insufficient. This Part then demonstrates how mixing function and form has also occurred in the context of marriage, where formal marriage and common law marriage have also been equated. Thereafter, the third Part offers various suggestions for how such differentiation could be applied.

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101 *See* Murray, *supra* note 5, at 442-43 (discussing how some scholars tend to advocate expanding the notion of parenthood to include formal and functional parenthood).

A. *Equalizing All Forms of Parenthood*

One way of blurring the lines between formal and functional parenthood is to equalize all forms of parenthood regardless of whether parenthood is created formally or functionally. A number of courts and scholars advocate recognition of functional caregivers as parental figures when they meet specific criteria and treat such functional caregivers in a manner equivalent to formal parents.[102]

Susan Appleton acknowledges that functional parentage might be treated distinctly from formal parentage but seems to favor equalization of all parenthood.[103] Appleton posits that differentiating formal and functional parenthood in a hierarchal manner would preserve traditional understandings of formal parenthood and suggests that equalizing all parenthood is a greater departure from the status quo.[104] Ultimately, however, Appleton supports treating functional parents the same as legal parents because they are acting as parents and "parent" is something other than a third-party.[105] She advocates reform of the concept of parent as being exclusive and binary and generally supports the equality inherent in equal treatment of all such parents.[106] Similarly, Matthew Kavanagh, focusing on the varied and fluctuating roles all caregivers have in children's lives, advocates equalizing all parenthood based on care, attention to connections, and children's needs.[107]

In considering the legal status of discreet types of functional parents, analogizing functional and formal parents is the norm. Cynthia Grant Bowman considers the rights of functional parents that cohabit with formal parents.[108] Scholars have also argued for legal rights for stepparents, homosexual cohabitants, and other functional parenting relationships.[109] While exploration of these rights and corresponding recommendations sets a bottom threshold for assuming the status of a functional parent, or in setting a system of registration, no distinction is made between functional and formal parents in setting parenthood rights once these thresholds are met.[110] Thus, the two forms are essentially merged in the context of custody, child support, or other disputes involving children once the status is assigned. For

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102 *See supra* Part I.C.

103 *See* Appleton, *supra* note 5, at 57-59, 61-62.

104 *Id.* at 58-59.

105 *Id.*; *see also* Cahn, *supra* note 4, 52-54.

106 Appleton, *supra* note 5, at 68-69.

107 *See* Kavanagh, *supra* note 5, 114-17.

108 *See* Bowman, *supra* note 65, at 136.

109 *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 84-88 (2008); Kavanagh, *supra* note 5, at 112 (positing that stepparents, lesbian and gay parents, and grandparents are among classes of caregivers deprived of rights by the parental exclusivity focus of American family law).

110 *See generally* Bowman, *supra* note 65, at 138-39.

instance, Bowman argues that the *Troxel v. Granville*[111] presumption[112] in favor of formal parents vis-à-vis third parties should not apply to functional parents who undertake the parenting role.[113] This is because functional, de facto/psychological parents should be deemed equivalent to formal parents in setting rights and responsibilities.[114] This approach to parenthood has the benefits of egalitarianism and conceptual simplicity. All potential parental figures are treated in precisely the same manner. It also has the benefit of focusing on the care children receive as opposed to genetic connection and status—thus giving greater value to functional caregiving and to children's interests and perspective.

Most of the case law that gives rights to functional parents equates formal and functional parental status.[115] One of the first cases to conflate all forms of parenthood regardless of the method by which the parental role was created and the level of intensity of the relationship is the seminal case of *Painter v. Bannister*,[116] which presented a custody battle between a father and the maternal grandparents of a child. The child, Mark Painter, was sent by his father to live with his maternal grandparents following the death of his mother and younger sister in a car accident.[117] Mark was five years old at the time.[118] About a year and a half later, the father remarried and sought Mark's return, but the grandparents refused and litigation was initiated.[119] The trial court issued a judgment in the father's favor; however, the Supreme Court of Iowa reversed, holding that Mark had established a father-son relationship with his maternal grandfather.[120] Since the court determined that Mark began to identify the grandfather as his "father figure,"[121] (and thus, something akin to a functional parent) it applied the best interest of the child standard,[122] commonly used in custody disputes between two formal

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111 530 U.S. 57 (2000).

112 *Id.* at 68.

113 Bowman, *supra* note 65, at 150.

114 *See id.*

115 *See In re* E.L.M.C., 100 P.3d 546, 562 (Colo. App. 2004); C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004); Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987); Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677, 682 (App. Div. 1998).

116 140 N.W.2d 152 (Iowa 1966); *see also* Stanley D. v. Deborah D., 467 A.2d 249, 251 (N.H. 1983) (awarding, upon divorce, physical custody of a stepchild to his stepfather in accordance with the best interests standard).

117 *Painter*, 140 N.W.2d at 153.

118 *Id.* at 156.

119 *Id.* at 153.

120 *Id.* at 158.

121 *Id.* at 157 (quoting expert testimony of Dr. Glenn R. Hawks).

122 *See* GOLDSTEIN, FREUD & SOLNIT, *supra* note 34, at 4 (explaining the factors that contribute to the "best interests of the child" standard).

parents, and determined that custody should be given to the Banister grandparents.[123]

Thus, the *Banister* Court held firm to the vision of the nuclear exclusive family developed in the context of formal parenthood where there can only be one father figure. The maternal grandfather, who was essentially a functional parent, was treated as equivalent to a formal parent based on the functional care he gave his grandson. All parental rights of the biological father were terminated and given to the grandfather who was legally classified as the exclusive parent. However, the need to choose between two committed father figures erased the potential benefits of having two parental figures that care deeply about the child and are willing to care for him. Moreover, this case demonstrated that treating functional and formal parents as equivalent maintains the binary and exclusive view of parenthood.[124]

In more modern cases, this conflation between formal and functional parenthood has occurred most frequently in the context of same-sex families where a same-sex couple mimics the rearing of children in a natural nuclear family.[125] For example, in the New Jersey case of *V.C. v. M.J.B,*[126] a leading precedent on functional parenthood, the Supreme Court of New Jersey defined the legal status of psychological parent in a manner that demonstrated the legal equivalence of function and form.[127] *V.C.* concerned former lesbian partners who shared a four-year relationship during which M.J.B. gave birth to twins that both partners raised together.[128] Following the end of the relationship between the lesbian couple, when the twins where two years old, V.C filled for joint custody and visitation with the twins.[129] The case eventually reached the Supreme Court of New Jersey, which established four elements that must be proven for a functional parent relationship to be legally recognized: (1) the legal parent consented to and fostered the nonparent's formation and establishment of a parent-like relationship between the nonparent and the child; (2) the nonparent and the

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123 *Painter*, 140 N.W.2d at 156. The court's decision reflected the theory that was proposed by law professor Joseph Goldstein, child analyst Anna Freud, and psychiatrist Albert Solnit, to define a legal parent so as to refer to a child's psychological parent. A psychological parent was defined by the trio as the adult who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." This psychological parent could be any adult, whether "a biological . . . , adoptive, foster, or common-law . . . parent . . . ." GOLDSTEIN, FREUD & SOLNIT, *supra* note 34, at 98.

124 For an in depth discussion of how equalizing formal and functional parenthood undermines the establishment of diverse and flexible parental figures, see *infra* Part III.A.

125 We acknowledge that in the case of same-sex couples who do not have the option of formalizing their relationship with children, equalizing functional and formal parenthood may be justified. *See infra* notes 285-286 and accompanying text.

126 748 A.2d 539 (N.J. 2000).

127 *See id.* at 554.

128 *Id.* at 542-44.

129 *Id.* at 544.

child "lived together in the same household"; (3) the nonparent 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) the nonparent has established a parental role sufficient to create with the child a bonded, dependent relationship parental in nature.[130] Once all these elements have been proven, in the case of "a conflict over custody and visitation between the legal parent and a psychological parent, *the legal paradigm is that of two legal parents and the standard to be applied is the best interests of the child*."[131]

Other cases have followed the general *V.C.* framework in recognizing functional parenthood. For instance, in *In re Parentage of L.B.*,[132] the Supreme Court of Washington held that, "[I]n Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise. . . . As such, recognition of a person as a child's *de facto* parent necessarily 'authorizes [a] court to consider an award of parental rights and responsibilities . . . based on its determination of the best interest of the child.'"[133] Indeed, once a person is declared a functional parent, no legal distinction is made between functional and formal parenthood and a general best interest standard is applied.[134] Likewise, in *Mason v. Dwinnell*,[135] the North Carolina Court of Appeals cited *V.C.* and held that where a legal parent invites a third person to function as a parent in the child's day-to-day life and "'that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation.'"[136] In Delaware, it was the legislature that eventually "expressly de-

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130 *Id.* at 551.

131 *Id.* at 555 (emphasis added). In this particular case, the court held that because V.C. had not been involved in the decision making for the children for nearly four years, during which the litigation took place, it would be unnecessarily disruptive for everyone involved to grant her decisional authority. *V.C.*, 748 A.2d at 555. However, she was awarded visitation on a regular basis. *Id*.

132 122 P.3d 161 (Wash. 2005).

133 *Id.* at 177 (quoting C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004)).

134 *See id.* For similar decisions by Washington courts, see *In re* Custody of B.M.H., 267 P.3d 499, 509 (Wash. Ct. App. 2011) (holding that a former stepparent may assert a de facto parentage claim); *In re* Custody of A.F.J., 260 P.3d 889, 896 (Wash Ct. App. 2011) (holding that the de facto parentage doctrine applied to a foster parent); *In re* Parentage of J.A.B., 191 P.3d 71, 74 (Wash. Ct. App. 2008) (describing the de facto parent doctrine).

135 660 S.E.2d 58 (N.C. Ct. App. 2008).

136 *Id.* at 69 (quoting V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000)). Applying a "best interest" test, the court affirmed the district court's judgment awarding the biological mother and her former lesbian partner permanent joint legal and physical custody of the child. *Id.* at 72-73. The N.C. Supreme Court endorsed this ruling and applied it to a similar case in *Boseman v. Jarrell*, 704 S.E.2d 494, 504 (N.C. 2010). Other North Carolina courts have reached similar decisions. *See, e.g.*, Davis v. Swan, 697 S.E.2d 473, 478-79 (N.C. Ct. App. 2010).

creed that *de facto* parents are legal 'parents'" without providing any explicit differentiation between formal and functional parents.[137] Other states have followed suit as well in equating functional status with formal status.[138]

Thus, although achieving functional parental status requires meeting a significant set of criteria, once the conditions are met, many jurisdictions treat functional parental figures as replacements for and equivalent to formal parents.

B. *Hierarchical Parenting Rights Based on Level of Care and Attachment*

In a different view of how functional parenthood should be included into family law doctrine, Katharine Baker extrapolates that any movement towards recognizing functional parents is a movement towards recognizing different levels of parenthood.[139] By recognizing different and varied means of acquiring parenthood rights, she conjectures, we are leading the way towards bifurcating and creating degrees of parenthood and parenting rights.[140]

Indeed, Baker is correct and many scholars have begun to argue for levels of parenthood rights.[141] Yet, the significant movement towards differentiated parenthood in scholarly accounts is not based on a clear separation between function and form but on the level of attachment between child and parenting adult.[142] Alison Harvison Young makes the case for expanding the exclusive nuclear family to include supplemental caretakers such as stepparents, grandparents, uncles, and other caretakers.[143] Harvison Young, however, says, "it is necessary to identify 'parents' or a 'core unit' in order to identify family members with support obligations, testamentary issues,

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137 Smith v. Guest, 16 A.3d 920, 932 (Del. 2011) (referring to DEL. CODE ANN. tit. 13, §§ 721(a), 8-102(12), 8-201 (2010)). This statute has been ruled unconstitutional when applied outside of the binary parenthood model, mimicking the nuclear family. For a detailed discussion, see *infra* notes 238-243 and accompanying text.

138 *See* KY. REV. STAT. ANN. § 403.270 (West 2012) (recognizing the status of a de facto custodian when a caretaker meets caretaking and support standards but indicating that such status must be determined by a court); Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011); T.B. v. L.R.M., 786 A.2d 913, 916-17 (Pa. 2001); J.A.L. v. E.P.H., 682 A.2d 1314, 1320 (Pa. Super. Ct. 1996) (finding that a functional parent could have standing under the doctrine of *in loco parentis* to custody or visitation).

139 Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 708 (2008).

140 *Id.* at 708-09.

141 *See* Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 250 (2007); Jacobs, *supra* note 5, 333; Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER SOC. POL'Y & L. 505, 517-18 (1998).

142 *See generally* Baker, *supra* note 139, at 709-10.

143 Young, *supra* note 141, at 517-18.

and decision-making authority."[144] She argues that this identification of core parents should not preclude the development of supplementary roles that could be legally recognized: "It is unnecessary for our notion of 'legal parent' to be a win-lose, winner-take-all proposition."[145] The core unit she describes, and which other scholars have adopted, is not based on the manner in which parenthood rights are acquired but on the primary care relationship that these caregivers have with children.[146]

Similarly, Nancy Dowd, who focuses on multiple fatherhood, merges the concepts of functional and formal parenthood, at least with regard to fathers, and advocates for a graduated system of parenthood based on levels of care.[147] Dowd's primary theme is that nurture and not genetic nature should establish fatherhood, and motherhood as well, although she posits that care and biology are generally aligned for mothers.[148] This normative argument is based on her belief in the importance of caregiving and the desire to firmly establish coequal parenting. Thus, according to Dowd, functional caregiving should be primary in establishing parental status and rights.[149] She argues that fatherly care is "characteristically serial rather than linear" and therefore multiple father figures should be recognized.[150] Accordingly, she argues for a model of fatherhood that recognizes both full fatherhood and partial fatherhood depending on the level of engagement involved and in recognition of the serial relationships many fathers have with children.[151] Primary parents, which she assumes will usually be mothers, could be both a mother and father when there is coequal parenting.[152]

Melanie Jacobs also endorses a tiered system of parenthood and argues that not all parenthood necessarily comes with "full" parental rights.[153] However, she does not explicitly break this model down on the basis of functional versus formal parenting rights, simply noting that "parents who contribute more caretaking should have a greater say in custody matters than parents who contribute less."[154] On the other hand, Jacobs does appear to agree with the American Law Institute ("ALI") stratification that separates between functional and formal parents.[155] While the hierarchal systems that these scholars promote may align with differentiating functional and

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144 *Id.* at 518 (footnote omitted).

145 *Id.*

146 *Id.*

147 *See* Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 135-36 (2003).

148 *Id.* at 135.

149 *See* Dowd, *supra* note 141, at 242.

150 Dowd, *supra* note 147, at 143; Dowd, *supra* note 141, at 236.

151 Dowd, *supra* note 141, at 250.

152 *Id.*

153 Jacobs, *supra* note 5, at 335.

154 *Id.* at 333.

155 *Id.* at 333-35.

formal parenthood, this is not necessarily the case. Moreover, no explicit mention is made of the differences between these types of parenthood and the effects of such differences.

Unlike the significant support such a perspective receives in the scholarship, courts have been reluctant to create degrees of parenthood based on levels of care without first determining formal status and imbuing at least equal standing to those formal parental figures. Although it may happen in practice, courts have not explicitly embraced the prospect of giving functional parents greater rights or obligations based on identification of a unit of core caregiving vis-à-vis fit formal parents with clear biological, adoptive, and legal ex ante status to children.[156] Moreover, when two formal parents seek custody, it is the level of caretaking that is the basis for awarding primary custody versus visitation.[157] Thus, at least among formal parents, courts are arguably creating tiers of parenting based on levels of care by awarding custody to primary caregivers, and awarding visitation to secondary caregivers.

C. *Inconsistent and Insufficient Attempts to Differentiate Formal and Functional Parenthood*

An alternate way to conceive of differentiated parenthood is differentiating between formal and functional parenthood. There have been some attempts by courts and scholars to differentiate parenthood based on whether it is formal or functional.[158] However, such attempts have been inconsistent, insufficient, and under theorized.

In *V.C.*, although the court theoretically and conceptually equated functional and formal parenthood,[159] the court did add that a person's status as a legal parent prior to an action for de facto parenthood plays a part in such cases so that

> under ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the

156 *See, e.g.*, Painter v. Bannister, 140 N.W.2d 152, 156 (Iowa 1966) (awarding custodial rights to grandparents who are functional parents despite the claims of intact formal parents).

157 *See* Young, *supra* note 141, at 536 (describing the need for the primary caregiver to be the default decision maker).

158 *See, e.g.*, *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995) (finding that when a petitioner has a "parent-like" relationship with a child even though not a formal parent, the court can order visitation but not custody using its equitable powers); *see also infra* notes 159-182 and accompanying text.

159 *See* V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000).

> legal parent. Visitation, however, will be the presumptive rule . . . as would be the case if two natural parents were in conflict.[160]

Thus, although the *V.C.* court initially equated functional and formal parenthood and indicated that once functional parenthood is assigned that person is a parent for all intents and purposes, it later said there should be a presumptive rule that functional parents (as opposed to formal parents) will receive visitation as opposed to full custody. In fact, courts applying functional parenthood have in practice followed this presumption despite conceptually equalizing parenthood.[161] The functional nature of the relationship does indeed make a difference to judges making legal parental decisions despite the theoretical desire to treat all persons deemed parents equally.

The Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*[162] recognized that a "parent-like" figure could gain visitation rights upon demonstrating a substantial relationship and upon a triggering event.[163] This parent-like figure is functional as opposed to formal because it is based on actual care. However, the parent-like figure recognized by the Wisconsin court is very limited and insufficiently contends with the variety and depth of functional relationships.[164] The court relied on its equitable power, did not create a functional parenthood status, and only allowed the possibility of visitation.[165] As discussed below, a proper vision of functional parenthood is much more robust, contemplating the possibility of all parental rights and responsibilities even without a finding that formal parents are unfit.[166] Moreover, functional parenthood should be its own status, not simply an equitable tool when a person functionally mirrors the idealized notion of formal parenthood.

In another example of an attempt to differentiate between formal and functional parenthood, the ALI Principles expand the definition of parenthood beyond the formal to embrace the functional by adding two additional concepts of parenthood to the traditional legal parent. The pro-

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160 *Id.*

161 *See* Carter v. Brodrick, 644 P.2d 850, 853, 855 (Alaska 1982) (describing stepfather who raised child as his own as a parental figure entitled to "rights and responsibilities . . . exactly the same as between parent and child" under the doctrine of *in loco parentis*, but in practice suggesting that this makes him suitable for visitation); Boru v. Foy, No. A-5378-09T1, 2011 WL 4550338 (N.J. Super. Ct. App. Div. Oct. 4, 2011) (per curiam) (finding, however, that under the particular circumstances of this case, custody should be awarded to the functional parent).

162 533 N.W.2d 419 (Wis. 1995).

163 *Id.* at 421.

164 *See id.*

165 *See id.* Additional cases exist where courts awarded visitation only to functional parents. However, in many such cases visitation was the only issue raised by the parties, and custody was not requested. *See, e.g.*, Rubano v. DiCenzo, 759 A.2d 959, 961 (R.I. 2000). It is difficult to know whether in such cases only visitation was sought because of the parties' knowledge (or presumed knowledge) of what can be obtained by the law, because of the specific circumstances and relationship, or for other reasons.

166 *See infra* notes 271-316 and accompanying text.

posed structure creates three categories of parents: "legal parent," "parent by estoppel," and "de facto parent."[167] According to the ALI Principles, both de facto parents and parents by estoppel are types of functional parents because they are able to obtain legal status by demonstrating that they lived with the child and accepted parental responsibilities for the child without being formal legal parents.[168] Parenthood by estoppel occurs when a person functions in a parental manner and has a legal parent's consent to form a parental relationship with the child.[169] As such, consent and equitable principles give parenthood by estoppel a more formal nature, not unlike fatherhood presumptions in traditional common law. Still, because parenthood by estoppel requires proof of an ongoing functional relationship, it is a status that can be likened to functional parenthood.[170] De facto parenthood under the ALI Principles does not necessitate consent for a parental relationship, just a history of unconcealed caretaking.[171] In order to obtain de facto parent status, a de facto parent must live with a child for a significant period of time—not less than two years—and perform the majority of the caretaking function, or at least as much as a legal parent residing with the child.[172] This legal status in the ALI Principles is groundbreaking because the de facto parent does not substitute for a legal parent, like a parent by estoppel. Rather, a de facto parent is simply a caretaker, who in light of such caretaking potentially incurs custodial rights. Thus, de facto parenthood is based entirely on function.

According to the ALI Principles, function alone does create a different status than form. While both parents by estoppel and de facto parents may be legally entitled to continue their parenting activities,[173] parents by estoppel have the potential to gain greater parental rights. De facto parents cannot be allocated the majority of custodial responsibility over the objection of a legal parent or a parent by estoppel that is fit and willing to assume the majority of custodial responsibility.[174] Still, nothing in the ALI Principles explains or justifies this difference between functional and formal parenthood. Nothing in the ALI Principles deciphers why parents by estoppel are treated

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167 ALI PRINCIPLES, *supra* note 6, §2.03(1).

168 *Id.* § 2.03(1)(b)-(c).

169 *Id.* § 2.03(1)(b).

170 *See* Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987); Jean Maby H. v. Jospeph H., 676 N.Y.S.2d 677, 680 (App. Div. 1998).

171 ALI PRINCIPLES, *supra* note 6, § 2.03(1)(c). The cases themselves tend to blur the term de facto parent and parent by estoppel. *See* Rubano v. DiCenzo, 759 A.2d 959, 975-76 (R.I. 2000); *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005). The ALI Principles are helpful in that they distinguish these terms in a conceptual clear way.

172 ALI PRINCIPLES, *supra* note 6, § 2.03(1)(c).

173 *Id.* § 2.18.

174 *Id.*

as equal to formal parents while de facto parents are treated differently. This distinction needs to be explained and justified.[175]

> Rigorous theoretical justifications for differentiating among family structures are not lacking in legal scholarship. In the context of comparing adoptive with biological families, Naomi Cahn argues that biological and adoptive families take different forms and that it is vital to preserving the integrity of these different families to treat adoptive families differently than biological families.[176] She describes legal attempts at treating adoptive families the same as nuclear biological families as conservative and tending towards assimilation and away from recognizing the benefits of each kind of family.[177] Cahn argues that assimilationist approaches, while beneficial for some families, are "ultimately flawed for three reasons: (1) the failure to recognize differences precludes responding to alternative needs; (2) groups with differences are foreclosed from those benefits; and (3) the model itself remains reified and unable to change."[178] Cahn implores greater flexibility and recognition of a variety of family forms to adequately provide for the care of children in instances of single parent and homosexual couple adoption, incest, inheritance, continuing contact with biological parents (open adoption), grandparent visitation, transracial adoption, and stigma.[179]

In the context of functional de facto parenthood, Cahn also recognizes the advantages of different family forms. However, counter to the compelling position she takes regarding the need to legally recognize differences between adoptive and nuclear families, she espouses opening up parentage to more parties in order to recognize functional parents without differentiating between functional and formal parenthood.[180] In comparing adoption with nuclear families, Cahn advocates "[e]xamining the 'deeper purposes' of the particular familial arrangement, together with the actual, and already-existing, case, should result in analogizing the similarities and respecting the differences. Instead of assimilation, a more accurate application of the interpretive method would result in "'adaptation with recognition of difference.'"[181] This is precisely the challenge this Article undertakes. In the context of parenthood, functional family forms are distinct from formal parenthood and should therefore be treated differently.

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175 The lack of substantive explanation for differentiating de facto from legal parenthood is notable because other parts of the ALI Principles are extensively theorized and justified.

176 *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1164-66 (2003) ("Using blood-based, two-parent, marital families as the prototype to which all other families are analogized utterly fails to recognize this complexity of family forms, and it is contrary to the inherent adaptability of the common law.").

177 *See id.* at 1087-88.

178 *Id.* at 1087.

179 *See id.* at 1087-88.

180 Cahn, *supra* note 4, at 53.

181 Cahn, *supra* note 176, at 1087.

D. *Mixing Function and Form in a Parallel Family Law Doctrine: Common Law Marriage*

Before explaining in more detail why and how functional and formal parenthood should be differentiated in awarding legal rights and responsibilities to children, this Section recounts how mixing functional and formal relationships between adults in the context of marriage has occurred and, for the most part, has caused more problems than solutions.

The prime example in family law of mixing formal and functional categories is common law marriage. Common law marriage essentially points to function as the basis for ascribing formal marriage to cohabiting couples. The elements of common law marriage are: (1) intent to marry, which is proven by demonstrating a public "holding out" as married; (2) eligibility for marriage; and (3) consummation of the marriage (proven by cohabitation).[182]Although the elements of common law marriage appear to entail formal requirements, in effect the case law instead focuses on the functioning of the couple because establishing the presence of an agreement has proven difficult, if not impossible.[183] In practice, the heart of common law marriage is acting like a married couple and demonstrating evidence of such behavior.[184] In fact, some states have now mandated a public display of marital behavior as an additional requirement to proving common law marriage.[185] Proving that a couple has "held [themselves] out" as married entails the demonstration of functional elements such as cohabitation, calling one another husband and wife, joint tax returns, financial intermingling, etc.[186] As such, common law marriage is a functional method of acquiring formal marital status. It provides the opportunity for behavior to take the place of registration and formalities. In so doing, common law marriage equates formal registration with functional behaviors and provides the same status to each.

This conflation of form and function in the context of common law marriage has become increasingly unpopular and has declined decidedly in stature. The decline of common law marriage is evident as it is currently only practiced in eleven states and the District of Columbia.[187] In 1920, a majority of states recognized common law marriage, and almost all did in

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182 *See, e.g.*, *In re* Estate of Love, 618 S.E.2d 97, 102 (Ga. Ct. App. 2005) ("To constitute a valid marriage in this state, there must be—number one; parties able to contract. Number two; an actual contract and number three; consummation according to law.").

183 *See* DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004) (per curiam); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 48 (2d ed. 1988).

184 CLARK, *supra* note 183, at 48.

185 *See, e.g.*, *In re* Estate of Hall, 588 N.E.2d 203, 205 (Ohio Ct. App. 1990).

186 *See* Jennings v. Hurt, 554 N.Y.S.2d 220, 221 (App. Div. 1990); *Hall*, 588 N.E.2d at 206.

187 LEGISLATIVE SERVS. AGENCY, LEGISLATIVE GUIDE TO MARRIAGE LAW 12 (2005), *available at* https://www.legis.iowa.gov/DOCS/Central/Guides/marriage.pdf.

the nineteenth century.[188] While there are a few advocates for its return,[189] traditional common law marriage is not likely to make a modern comeback.[190] At most, alternative constructs and regulations are used to protect vulnerable parties in long-term cohabitant relationships.[191]

The abandonment of common law marriage has a number of explanations, including: (1) concerns that common law marriage violated autonomy; (2) concerns about the disputed, invasive, and consuming court cases necessary to create the common law status; (3) the instability and disorder caused by not knowing if a person was considered married coupled with the growing ease of registration; (4) the conservatism relied upon in establishing the function of marriage; and, perhaps most importantly (5) fears about fraud in asserting the marriage ex post in order to gain financial benefits from a deceased cohabitant.[192] These concerns stand in stark contrast to the privacy, contractual intent, and formal significance of formal marriage.

Equating common law informal marriage with formal marriage, and allowing such a different method to create the same legal status of marriage, was seen as a threat to the sanctified, private, and contractual nature of marriage. As Ariela Dubler comments: "The doctrine of common law marriage—premised as it was on the legal rights of couples who *acted married*—implicated the institution of marriage itself."[193] The invasive and reputable court cases during this time period that examined common law marriage smeared the marriage institution. This is because "[c]ommon law marriage . . . revealed that there was, perhaps, little difference between common law marriages and solemnized marriages."[194] Indeed, there is no difference between common law marital status and formal marital status despite the real differences in the nature and formation of the relationship. Common law marriage may have served a function for those who did not have access to formal marriage or who were otherwise not willing or able to go through the formalities, but it was never an exact replica of formal marriage because it had to be proved ex post as opposed to ex ante. Common law marriage did not share the privacy and solemnity of formal marriage because of the invasive litigation it engendered. This clash between the equal

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188 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 141-42 (3d ed. 2005).

189 *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 769-70 (1996) (arguing that common law marriage protects vulnerable parties); Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 101 (1960) (same).

190 *See generally* Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 325-26 (2008).

191 Weyrauch, *supra* note 189, at 101.

192 *See* GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 955-1072 (2008); Bowman, *supra* note 189, at 731-36.

193 Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1008 (2000).

194 *Id.*

status but different natures of formal marriage and common law marriage disturbed courts, scholars, and legislators who advocated against the doctrine and pointed to the importance of distinguishing between formal and functional relationships in the marital context.[195]

The contested nature of equalizing marital status formed in different manners underscores the potential problems in mixing form and function in the context of parent-child relationships as well. Of course, relationships between adults can be differentiated from relationships between adults and children. Adults presumably consent to relationships in a manner that children do not. Thus, concerns about autonomy are stronger in adult relationships, particularly since formal marriage has become regularly available. Still, autonomy is also a concern when adults choose not to adopt children but yet functional parenthood could be used to assign them rights and responsibilities.[196] Generally, the concerns about fraud, invasion of privacy, order, and stability, as well as the ex ante versus ex post manner of establishing adult relationships, are also concerns in adult-children relationships. These concerns should be considered when establishing a system of functional parenthood.

III. SEPARATING FUNCTIONAL FROM FORMAL PARENTHOOD

Functional parenthood is different from formal biological or adoptive parenthood and should therefore be treated differently. This Part first sets out the significant differences between functional and formal parenthood. This Part then outlines a number of ways that legal systems can recognize these differences. Finally, this Part provides a few hypotheticals that demonstrate how this theory would be implemented in practice.

A. *Differences Between Functional and Formal Parenthood*

In a talk she gave in 1991 after having defended the rights of a lesbian coparent with no biological connection to her child, Martha Minnow pointed to her concerns about both progressive functional and traditional formal parenthood.[197] On one hand, she expressed concern that judges' prejudices will prevent loving, devoted, and deeply attached functional, nonbiological

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195 *See* Garrison, *supra* note 190, at 325-26; Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 229.

196 Still, when adults do not have the option to adopt children as in some jurisdictions where same-sex couples cannot adopt, the concern about autonomy is much weaker in the context of functional parenting.

197 Martha Minow, *Redefining Families: Who's in and Who's out?,* 62 U. COLO. L. REV. 269, 271, 276-78 (1991).

parents, such as her lesbian coparent client in *Alison D. v. Virginia M.*,[198] from obtaining legal status vis-à-vis children.[199] On the other hand, she expressed concern about legalizing functional parenthood because of the potential for lack of predictability, discretionary state interference, and the fear of manipulation.[200] Her biggest worry, however, was that functional, voluntary parenthood will lead to less adult accountability and responsibility because of the tragedy of the commons—too many parental figures will dilute parental responsibility.[201]

Nancy Polikoff expresses similar and additional concerns. According to Polikoff, lesbian and gay parents justifiably seek to strengthen the uniqueness and exclusivity of formal parental status to combat threats from homophobic relatives claiming to raise their children (who should not, according to them, be raised by gay parents), or otherwise try to interfere in the children's upbringing.[202] However, Polikoff worries about the growing number of cases involving homosexual couples, where a legally recognized mother has used her exclusive legal status to sever the child's relationship with her ex-partner, a functional caregiver, who was not legally recognized as a parent.[203]

These concerns are all valid. There are different concerns that must be addressed in each kind of parenting relationship—formal and functional. The benefits of the two forms of parenthood are also distinct. On the one hand, functional parenthood is more diverse and flexible, adapting to the changing needs of children. On the other hand, formal parenthood is more stable and predictable because it begins at a fixed time period and provides for the ongoing needs of children. It is these differences in concerns and benefits that validate treating formal and functional parenthood distinctly.

The distinctions delineated in this Article are not intended to create a preference for one form of parenthood over another. In circumstances in which there are stable formal parents, it is argued that there should be a preference for formal parents with regard to legal decision making and custody. However, it is also argued that there is real value in both forms of parenthood and the unique nature of each should be preserved. This Section's goal is to delineate the important differences between functional and formal parenthood that justify treating these two forms of parenthood differently in order to preserve their distinctive benefits and address their distinctive concerns.

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198 572 N.E.2d 27 (N.Y. 1991) (per curiam).

199 Minow, *supra* note 197, at 269-70.

200 *Id.* at 276-77.

201 *Id.* at 282-83.

202 Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 825-27 (2001).

203 *Id.* at 825-26.

1. Preserving the Value of Diverse Relationships

A diverse range of functional care can potentially create functional parental status. Some scholars argue that only caretaking can create functional status.[204] Other sources, including the ALI Principles, rely on caretaking to create functional relationships, but also create a category of parenthood by estoppel that allows a person who is held out as a parent with the consent of the legal parent and performs obligations of parenthood to obtain legal rights to children.[205] Some scholars also include traditional fatherly contributions to parenthood (i.e., financial support) to create parenting rights.[206] It is clear that some minimum baseline based on amount, duration, and depth of care must be demonstrated in order to obtain functional status.[207] However, it is possible that a range of diverse caregivers can be included as functional caregivers.[208]

Indeed, the greatest benefit and the greatest difference between functional and formal parenthood is the diverse sets of relationships that develop de facto. As described in Part I, functional relationships may grow from biological connections to the child, from marital or biological connections to a formal legal parent, or from meaningful caregiving relationships with children who are in need of care. These relationships may begin at the time of birth or they may develop later on. They may span a child's lifetime or they may be more temporary. They may come at times of need and crisis but then continue to provide needed support to children. Such kin-like, porous, and diverse relationships fulfill children's needs in modern society in which the nuclear family has undergone a distinctive transformation.[209]

While diversity is a goal often espoused in equalizing functional and formal parenthood,[210] equalization is not likely to recognize the diversity of functional forms of care that exist and provide clear benefits to children. In fact, equalization will only allow those few adults who act as courts believe traditional parents should act, and who intend to mirror traditional formal parents, to gain the role of functional parents. Yet, a primary attraction of functional parenthood is to expand upon traditional notions of parenthood

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204 *See* B.F. v. T.D., 194 S.W.3d 310, 311 (Ky. 2006); A.H. v. M.P., 857 N.E.2d 1061, 1073 (Mass. 2006); V.C. v. M.J.B., 748 A.2d 539, 548-49 (N.J. 2000).

205 ALI PRINCIPLES, *supra* note 6, § 2.03(1)(b).

206 The doctrine of parenthood by estoppel in the ALI Principles mirrors putative fathers status and can be assigned based on the payment of child support. *See id.* § 2.03(1)(b)(i).

207 Blecher-Prigat, *supra* note 100, at 36; Laufer-Ukeles, *supra* note 22, at 97-98.

208 *See* Appleton, *supra* note 5, at 27.

209 *See generally* Brad Sears, *Winning Arguments/Losing Themselves: The (Dys)Functional Approach in* Thomas S. v. Robin Y., 29 HARV. C.R.-C.L. L. REV. 559, 569 (1994); *see also supra* notes 11-13, 32-34, and accompanying text.

210 *See* Appleton, *supra* note 5, at 58-59.

for the sake of children who need care and for adults who functionally care for children.

Equalization of form and function squelches diversity and flexibility for a number of interrelated reasons. First, once functional and formal parenthood are viewed as an equivalent legal status, the flexibility and diversity of functional parenting is largely sacrificed through high threshold standards for entry to the status of parenthood.[211] Similar to Dubler's critique of common law marriage's conservative effect on the institution of marriage, prescribing certain behaviors in order to gain the exclusive functional parenthood status does not adequately recognize the diversity of relationships involved.[212] Such high standards are likely to have a conservative as opposed to a progressive effect on functional parenthood because they require that any parental status mimic idealized notions of the nuclear family.[213]

Second, and directly related to the issue of high thresholds, if formal and functional parenthood are afforded equivalent status, there is concern that too many people will be afforded equal rights and obligations, diluting and scattering parental responsibility in harmful ways.[214] Thus, if functional parents are to be considered in the same manner as formal parents, high standards will likely be exacted to establish this status. Otherwise, too many individuals might qualify as parents, potentially disrupting the ability of concerned adults to make decisions and care for children.[215]

Third, as discussed above in the context of *Painter*, once one person is designated a parent in the mold of a formal parent due to functional considerations, someone else's parenthood is usually abrogated because there is ordinarily a presumption that there are only two parents at any given time.[216] This is because parenthood has traditionally been synonymous with all the rights and obligations of care, while third parties are legal strangers who are seen as potential threats to this entrenched parental exclusivity.[217] While this does not have to be the case when functional parenthood mimics formal parenthood, it is the strong tendency.

In sum, equalizing formal and functional parenthood results in a narrow understanding of functional parenthood because of concerns about numbers, insistence on high thresholds in achieving the status, and the binary and exclusive nature of traditional formal parenthood. The relevant case

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211 *See generally* Murray, *supra* note 5, at 442-47.

212 *See* Dubler, *supra* note 193, at 1008-09.

213 *See generally* Sears, *supra* note 209, at 569-74.

214 *Cf.* Minow, *supra* note 197, at 277 ("Using a functional test rather than a formal, legal definition may open the system up to manipulation by people who want to take advantage of certain benefits from family status but not take on certain obligations or burdens.").

215 *See id.*

216 Painter v .Bannister, 140 N.W.2d 152, 158 (Iowa 1966).

217 *See* Bartlett, *supra* note 66, at 879; Murray, *supra* note 5, at 400-05; Sears, *supra* note 209, at 573-74.

law bears out the conservative and narrow understanding of functional parenthood when equated to formal parenthood. When high standards like those set forth above in *V.C.* are not met, then no status is given to a caretaker that may be instrumental in a child's life but not meet specific, high threshold requirements for attaining parental status.[218] Because status equivalent to formal parenthood is bestowed on the functional caregiver, and the binary model persists in this paradigm, a flexible approach to functional caregiving is avoided so as to prevent too many caregivers from being afforded too many rights to children.

There are many examples in the case law which demonstrate how equating formal and functional parenthood undermines diversity and reinforces an exclusive binary system of parenthood. For instance, in *A.F. v. D.L.P.*,[219] the New Jersey Superior Court denied functional parental status to a former partner of a lesbian adoptive mother, despite the clear depth and breadth of the parent-child relationship, because the four parameters defined in *V.C.* were not met.[220] In particular, in *V.C.* the former partners never cohabited—one reason being the wish of the adoptive mother to hide the romantic aspect of the relationship from family and friends.[221] However, A.F., the mother's partner, assisted her in adopting the child from China, cared for the child for a significant period of time, and continued to spend time caring for the child as needed even after the intimate relationship ended.[222] Nonetheless, even visitation was denied to A.F. because there was not sufficiently extensive cohabitation.[223] However, the facts of this case demonstrated a significant, close parental relationship and the failure to meet the high threshold requirements should not have disqualified A.F. without further inquiry. This case demonstrates the extreme all-or-nothing approach resulting from equalizing formal and functional parenthood because A.F., once determined not to be a functional parent, was relegated to the status of any other third-party.

This type of exclusive and inflexible reasoning extends beyond cases of homosexual coparents to many varied instances of functional caregiving.[224] Indeed, it is outside the context of same-sex couples, which often mirror the exclusive binary nature of heterosexual couples, that the lack of willingness to recognize different and diverse caregivers becomes readily

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218 V.C. v. M.J.B., 748 A.2d 539, 551-52 (N.J. 2000).

219 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001).

220 *Id.* at 700-01.

221 *Id.* at 694.

222 *Id.* at 694-96. The closeness of the relationship is evidenced by the other details discussed in the case. Both women traveled together with the child even after the end of their romantic relationship, the child and the adoptive mother often visited in the home of A.F.'s parents, and several of the child's birthdays were celebrated with parties at A.F.'s parents' home. *Id.* at 695.

223 *Id.* at 699-00; *see also* T.F. v. B.L., 813 N.E.2d 1244, 1253 (Mass. 2004) (finding that lack of cohabitation, as well as duration of relationship, precluded finding of parenthood).

224 *See supra* notes 14-28 and accompanying text; *supra* Part I.A.

apparent.[225] The reasoning underlying the New Jersey Superior Court's decision in *J.W. v. R.J.R*[226] typifies the lack of diversity that equalizing all forms of parenthood engenders. *J.W.* concerned an application for visitation by S.W., a child's great aunt, against the objections of the child's maternal grandmother ("R.J.R."), who adopted the child.[227] Both parties demonstrated deep care and attachment to the child, but the court could not find space to recognize these two different parental relationships—one formal and the other solely functional.[228] Soon after the child's birth, the Division of Youth and Family Services ("DYFS") removed him from his biological mother due to her substance abuse problems and gave custody of the child to S.W. and her husband.[229] At that time, the grandmother, R.J.R, was unable to obtain custody of her grandson as she was in the process of contesting a DYFS finding of abuse concerning one of her other daughters.[230] With the support of S.W. and her husband, R.J.R. obtained permanent custody of the child when he was a year and nine months old and adopted the child after the biological mother's death a year later.[231] Inexplicably, R.J.R. later informed S.W. that she could not visit with the child at all despite their extensive relationship.[232] S.W.'s appeal for visitation to the court was denied because of what was deemed the insufficient length of the caretaking relationship and the lack of intent to engage in a traditional parenting relationship where there were already two coparents.[233] The court preferred to award parenting rights to two parents who acted in traditional parental roles rather than give rights to functional caregivers who provided in-depth and long-term care but did not act as traditional parents.[234]

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225 *See, e.g.*, Bancroft v. Jameson, 19 A.3d 730 (Del. Fam. Ct. 2010) (holding Delaware's parentage statute unconstitutional when applied outside of the homosexual couple context when a child already has two fit parents because the possibility of awarding parenthood status to more than two individuals infringes on those parents' rights to privacy).

226 No. A-4440-08T1, 2010 WL 520505 (N.J. Super. Ct. App. Div. Feb. 16, 2010) (per curiam).

227 *Id.* at *1-2.

228 *Id.*

229 *Id.* at *1.

230 *Id.*

231 *Id.* at *1-2.

232 *J.W.*, 2010 WL 520505, at *1.

233 *Id.* at *3 ("[N]one of the parties here intended to create a parent-child relationship between plaintiff and the child. Rather, at all times, the parties intended that defendant would obtain custody of the child and become his legal parent. Moreover, the child ceased living with plaintiff when he was under the age of two, and he lived with defendant for a substantial period of time before the dispute over visitation arose."). The intent to act as a parent argument is circular and conservative. The court clearly refers back to a very traditional formal model of parenthood.

234 We do not necessarily contend that S.W. should have been awarded visitation. The description in the court's decision paints a picture of two parties with different parenting styles and different views of what is best for the child. Under such circumstances, it is possible that a child will be harmed "by dwelling on a battlefield" between the parties. *Id.* at *3-4; *see also* Quilloin v. Walcott, 434 U.S. 246, 251 (1978) (denying visitation based on the concern of conflicting loyalties and the harm it may cause a

New Jersey is not alone in this approach. Other states that have recognized functional parenting have created the same binary framework of full parenting rights modeled on formal parenthood or no rights at all.[235] Courts repeatedly cite the possibility of too many adults with rights to children as a cause for concern.[236] They also frequently fear giving parental rights to any parties that do not explicitly take on the traditional role of a formal parent. Courts are particularly uneasy with creating parenting rights for caregivers who act in addition to, as opposed to in lieu of, traditional parents.[237]

For instance, in Delaware, the legislature passed a statute giving full parental rights to functional parents that met minimum threshold requirements.[238] This statute was applied and upheld in the context of same-sex couples that conform with the exclusive, binary model of formal parenthood.[239] However, a lower court held the statute unconstitutional when applied to parental figures that do not mirror the model of two nuclear formal parents on the basis that it was an infringement of parental privacy.[240] Indeed, the process of equalization led to a model of functional parenthood that was only acceptable if it complied with a nuclear model of parenthood.

Another compelling example can be found in Washington where a court explicitly denied functional parenthood status to a stepparent when two formal parents were in place.[241] Yet, the court also stated that functional parenthood status would be available if only one formal parent existed.[242] The Washington court demonstrated a clear inflexibility in an attempt to imitate binary family forms. But again, that should be the great benefit of functional parenthood—that it reflects the reality of functional care that does not always mirror formal nuclear notions of parental care.

As demonstrated by the above cases, attempts to mimic binary family forms exclude caring, nurturing, and loving adults who provide needed care from having access to children, and prevent children from having access to

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child); Blecher-Prigat, *supra* note 100, at 16-18. Our concern is rather with the rejection of S.W.'s claim merely based on her failure to intentionally fill the role of traditional formal parents.

235 *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 179 (Wash. 2005).

236 *See, e.g.*, *In re* Parentage of M.F., 228 P.3d 1270, 1273 (Wash. 2010).

237 *Id.* at 1272 ("[U]nlike in L.B., Reimen's and Frazier's status as legal parents was established at the outset. In contrast, Corbin entered M.F.'s life as a stepparent, a third party to M.F.'s two existing parents. When Corbin entered her life, M.F.'s legal parents and their respective roles were already established under our statutory scheme. In the case before us, we perceive no statutory void and cannot apply an equitable remedy that infringes upon the rights and duties of M.F.'s existing parents.").

238 DEL. CODE ANN. tit.13, §§ 721(a), 8-102(12), 8-201 (West 2012).

239 Smith v. Guest, 16 A.3d 920, 932 (Del. 2011); *see also supra* note 106 and accompanying text.

240 Bancroft v. Jameson, 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (holding unconstitutional Delaware's statute that allowed more than two parents based on functional caregiving because of the invasion of parental privacy involved).

241 *M.F.*, 228 P.3d at 1273-74.

242 *Id.* at 1272-73; *In re* Custody of B.M.H., 267 P.3d 499, 504 (Wash. Ct. App. 2011).

them.[243] A more flexible model that recognizes the difference between a formal adoptive parent and a functional parent is needed. In true regard for the diversity that functional parenthood merits, we should escape the binary and exclusive trappings of traditional formal parenthood and create a separate, distinct, and more flexible category of functional parenthood that is more reflective of the nature of this parental status. Recognizing functional parents is an important step toward modernizing family law, but mimicking old norms will not do justice to either formal or functional parenthood. Formal parenthood should retain its distinct nature because it is distinct and beneficial. The differences between formal and functional parenthood should be acknowledged and the benefits of each retained. The following Sections recount additional differences between functional and formal parenthood that should be recognized in creating a modern, flexible doctrine of functional parenthood.

2. Invasion of Privacy

In a robust model of family privacy, states are limited in their ability to carve into parental rights and obligations.[244] Recognizing the legal rights of functional parents necessarily imposes on traditional notions of privacy inherent in formal parenthood.[245] If functional parents can obtain rights to visit children against the wishes of formal biological parents through sustained caregiving, then formal parents do not have "the right, coupled with the high duty" to raise children in any way they see fit without state interference.[246] Thus, functional parenthood makes formal parents uneasy about state interference with the parent-child relationship. Such an intrusion into the privacy of the parent-child relationship also ignites fears that judicial interference will be morally conservative and weigh against nonconformist lifestyles,[247] especially with regard to homosexual couples.[248] Similarly,

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243 Blecher-Prigat, *supra* note 100, at 24-25. Thus, for example, states condition non-parents visitation on a prior disruption of family life and are reluctant to award visitation over objection of parents in intact nuclear families. John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 172-73 (2002). Even in states where legislation is broad enough to award visitation when a nuclear family is intact and state courts recognize their authority to award visitation over objection of parents in intact traditional nuclear families, the actual chances of a non-parent to be awarded visitation are significantly lower. *See* Coulter v. Barber, 214 A.D.2d 195, 196 (N.Y. App. Div. 1995); Doe v. Smith, 595 N.Y.S.2d 624, 625 (Fam. Ct. 1993).

244 Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 647-50 (2002).

245 *See* Baker, *supra* note 139, at 699 (holding that by giving legal status to functional parents, "courts at once make parenthood less private, less exclusive, less biological, and less binary"). For an example of a court case that focuses on the issue of invasion of privacy, see *Bancroft*, 19 A.3d 730.

246 Buss, *supra* note 244, at 656.

247 *See* Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 630-41 (2005) (describing the conservative nature of judicial attitudes toward

Emily Buss has argued that expanding functional parenthood rights should be avoided because states are less capable than formal parents of determining what is best for children.[249]

Because functional parenthood is a de facto status that is based on functional caregiving that must be proven and recognized by the legal system, the very nature of functional parenthood is less private than traditional formal parenthood.[250] Indeed, the very act of determining functional parenthood entails reaching deep into the relationship between a parent and child to determine the nature and depth of the connection, its length, its intensity, its value, and ultimately whether it is in the best interests of the child to ensure, legally, that the relationship continue. Formal legal parenthood does not necessitate invasive legal inquiries. Like the privacy inherent in marriage, formal legal parenthood enjoys constitutionally protected privacy from state inquiry and regulation, unless there is harm to the child.[251] In determining functional parenthood, however, the nature of the relationship is looked at very closely and privacy undermined as judicial determinations of best interests resolve parenthood rights.

Still, formal parents are not free to do whatever they want with their children; the state can interfere because of abuse and neglect.[252] Functional parenthood, however, clearly envisions a further encroachment.[253] This greater invasion of privacy is subject to both concern and praise. The in-

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awarding rights based on functionally acting as though one has formal status); Dubler, *supra* note 193, at 982-88.

248 Polikoff, *supra* note 9, at 473;Polikoff, *supra* note 202, at 825-27.

249 Buss, *supra* note 244, at 647.

250 *See id.* at 651-52.

251 *See* Troxel v. Granville, 530 U.S. 57, 65-67 (2000); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972))); Parham v. J.R., 442 U.S. 584, 602 (1979); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 840 (1977); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (identifying a "private realm of family life which the state cannot enter"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Martin v. St. Mary's Dep't of Soc. Servs., 346 F.3d 502, 506 (4th Cir. 2003); Alber v. Ill. Dep't of Mental Health & Dev. Disabilities, 786 F. Supp. 1340, 1366-67 (N.D. Ill. 1992) ("Parents and children living together in traditionally recognized legal forms have historically found shelter against various forms of state intrusion."); Boswell v. Boswell, 721 A.2d 662, 668-69 (Md. 1998); Wolinski v. Browneller, 693 A.2d 30, 42 (Md. Ct. Spec. App. 1997), *overruled by* Koshko v. Haining, 921 A.2d 171 (Md. 2007); Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1235-37 (1999); Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1215 (1999).

252 *See* J.W. v. R.J.R., No. A-4440-08T1, 2010 WL 520505, at *1 (N.J. Super. Ct. App. Div. Feb. 16, 2010) (per curiam); *In re* Adoption of R.R.R., 763 P.2d 94, 98 (Okla. 1988); *In re* Adoption of RHA, 702 P.2d 1259, 1264-65 (Wyo. 1985).

253 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 67-73 (2000); *see also* Baker, *supra* note 139, at 712; Laufer-Ukeles, *supra* note 22, at 83-84.

fringement of traditional notions of privacy in parenthood is justifiable based on the interests of children and the functional care that they need and receive from functional caregivers.[254] As discussed above, formal parents often rely on such care as well.[255] And, they usually invite functional caregivers into their child's life, justifying the infringement on privacy.[256]

However, when formal legal families are stable and generally acting in their children's best interests, such relationships should be valued by the state and not interrupted and invaded because other caregivers are involved.[257] Moreover, fears of judicial conservatism when judging the nature of relationships should be heeded and discretion limited. Accordingly, concern about the invasion of privacy inherent in functional parenthood demands a limit on who can be considered a functional parent, when such functional parents can impose rights on formal parents, and the extent to which such rights can be imposed. These limits should be clear and distinctive to functional parenthood because of the different invasions of privacy ascribing such relationships entail.

The invasion of privacy inherent in functional parenthood, of course, also occurs at the time of a divorce between formal legal parents.[258] But, divorce represents a time of legal crisis for a family, while, potentially, a de facto parent could seek to be named when there is no such crisis between the legal parents and the child.[259] In other words, the core primary caregiving relationship with the child may be safely intact, while a functional parental figure creates strife and tension in a child's life. Although this may be warranted, it must also be acknowledged that tensions between parental figures are clearly harmful to children and functional relationships potentially multiply the number of times children must be involved in "custody battles."[260]

3. Recognizing the Difference in Timing

Another significant difference between formal and functional parenthood is the timing in which the relationship develops. Defining parenthood at birth is the norm and is most easily done on the basis of biology, genetics, or marital status. Any model of functional parenthood contemplates establishing the possibility of establishing the parenting relation-

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254 *See supra* notes 95-97 and accompanying text.

255 *See supra* notes 95-97 and accompanying text.

256 *See, e.g.*, Middleton v. Johnson, 633 S.E.2d 162, 168-69 (S.C. Ct. App. 2006).

257 *See* Bartlett, *supra* note 66, at 880-82, 944.

258 *Id.* at 899-02.

259 *See infra* notes 305-313 and accompanying text for the discussion of times of crises.

260 *See* Appleton, *supra* note 5, at 40-41; Bartlett, *supra* note 66, at 945 ("Uncertainty may both increase the litigiousness of persons seeking rights in the child and create distortions in private bargaining among parties to child custody and visitation disputes." (footnote omitted)).

ship in a manner that is removed from a child's birth.[261] Moreover, the functional relationship must occur first, making assignment at birth impractical.[262] While the relationship between a child and adoptive parents may also begin later in a child's life, this is because of a crisis event that ends formal legal parental ties with birth parents.[263] Moreover, an adoption *creates* the relationship, so it is an ex ante determination. No legal parental relationship exists prior to an adoption decree. Formal parenthood reacts to a child's need for parenting in a proactive, forward-looking manner, as opposed to the de facto recognition that occurs in functional parenthood after the fact.

The implications of regularly establishing parental status after a child's birth are substantial. Children need to be taken care of and have an adult, or set of adults, clearly responsible for their wellbeing at the moment of birth and at every proceeding moment thereafter, ideally in a continuous manner.[264] A de facto parent that is recognized years later cannot be tagged with that responsibility at birth,[265] although they might voluntarily undertake such care and financial support over time. On the contrary, a formal legal parent is obligated to care and financially support a child at birth or the child will be removed to a home that can provide appropriate care and support.[266] Legal formal parents are therefore needed to create order and stabil-

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261 *See* LaChapelle v. Mitten, 607 N.W.2d 151, 157-58 (Minn. Ct. App. 2000) (the child was four years old); V.C. v. M.J.B., 748 A.2d 539, 542, 544 (N.J. 2000) (the twin children were two years old); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421-22 (Wis. 1995) (the child was five years old); Fowler v. Jones, 949 S.W.2d 442, 443 (Tex. Ct. App. 1997), *rev'd*, 969 S.W.2d 429 (Tex. 1998) (the child was three years old). Under the relevant Texas statute in *Fowler*, the lesbian coparent had standing to seek "possessory conservatorship" if she had actual care, control, and possession of child for not less than six months. *Id.* at 445. ALI PRINCIPLES, *supra* note 6, § 2.03(1)(b)(iv) (defining a de facto parent as one who has not lived with the child since birth but has "lived with the child for at least two years" and assumed full parental responsibility with the agreement of the legal parent).

262 Functional parental figures who are around at the time of a child's birth are not usually given much "credit" for their presence. *See* Music v. Rachford, 654 So. 2d 1234, 1234-35 (Fla. Dist. Ct. App. 1995) (per curiam) (presence at birth did not give credence to a claim of functional parenthood); *H.S.H.-K.*, 533 N.W.2d at 421 (same).

263 *See* 2 AM. JUR. 2D *Adoption* §§ 1, 170 (2004); George H. Russ, *The Child's Right to Be Heard*, 5 GEO. J. ON FIGHTING POVERTY 305, 307 (1998); *see also In re* M.M., 619 N.E.2d 702, 708 (Ill. 1993) ("Adoption is the legal and social process by which a nonbiological parent-child relationship is created."); *In re* Estate of Kirkpatrick, 77 P.3d 404, 411-12 (Wyo. 2003) ("An adopted child is for *all purposes* the child of his adopters.").

264 *See supra* notes 45-48 and accompanying text. For a brief and thorough review of attachment theory between children and loving parental adults regardless of formalities, see Elrod, *supra* note 34, at 249-52 ("Forty years of social science research shows that children form significant 'attachment' relationships to parental figures early in life and these bonds are essential to the child's well being and development.").

265 *But see* Dowd, *supra* note 141, at 236-37.

266 *See, e.g.*, *In re* C.C.P., 310 S.E.2d 776 (Ga. Ct. App. 1983); H.W.S. v. C.T., 827 S.W.2d 237 (Mo. Ct. App. 1992); *In re* Adoption of T.G.K., 630 P.2d 740 (Mont. 1981); Stubbs v. Weathersby, 892 P.2d 991 (Or. 1995); *In re* Kristina L., 520 A.2d 574 (R.I. 1987).

ity in the provision of care for children in a manner distinct from functional relationships.

Some authors have argued that functional parenthood should begin even at birth,[267] and that society should look to a father's actions during the mother's pregnancy, presence at birth, and intent to care for the child to attribute functional status.[268] But even such authors admit that genetic parenthood must be given a presumption or edge because of the importance of assigning parentage at birth.[269] Simply put, it may not yet be clear who will be providing support and doing the caregiving when a child is born, but biological parents can be readily identified and assigned legal obligations.

4. Stability/Predictability

Functional parenthood is based on the provision of care. And, as caregivers change over time, functional parents can vary over time as well. Stepparents, for instance, may be important and fundamental parental figures for years but come on the scene later in a child's life and then become less central as cohabitation with a child's legal mother ends. The fluctuating nature of these relationships is significant for two reasons. First, it complicates determinations of the existence of a relationship significant enough to be deemed functional parenthood. Second, and most importantly, it has a destabilizing effect on children. As Dowd remarks, fathers often "nurture children as they live with them . . . . Children may have a father as a constant nurturing presence, but a significant number of children may experience a series of fathers or several fathers at the same time."[270] This reality is borne out compellingly by available empirical evidence.[271] While legal recognition could stabilize functional parenthood,[272] it must remain suffi-

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267 *See generally* Dowd, *supra* note 141, at 237.

268 See *supra* Part I.B for a discussion of the distinction between functional parenthood and intentional parenthood.

269 *See generally* Dowd, *supra* note 141, at 236-37 ("To that extent I am willing to give genetics an edge or recognition at the moment of birth, if it is essential to determine or designate parentage at that moment. At the same time, a purely social father should be recognized if he demonstrates nurture of the child. If there are two social fathers, both would be recognized; if there was a genetic and social father, genes would not trump care.").

270 *Id.* at 236 (footnote omitted).

271 Nancy Dowd supports her claims about serial fatherhood with significant empirical data. *Id.* at 231 n.1; *see also* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1311-14 (2005).

272 *See generally* Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 AM. J. SOC. 634, 634 (1978).

ciently flexible and variable to fulfill its responsive function to actual caregiving relationships.[273]

Ultimately, it is widely agreed that "[s]ustained nurture throughout the child's lifetime is what is most beneficial to the child."[274] The ways in which functional parenting do not correlate with this paradigm should be taken into account. Children are dependent and need to be cared for, and that care needs to be predictable, stable, and continuous to the greatest extent possible. While children are dependent on financial support as well, the quality and duration of emotional attachments are most fundamental to children's wellbeing.[275] The primary caregiver, or caregivers (married or cohabitant couple), should be as stable, predictable, dependable, and constant as possible.[276] In reality, these primary caregivers are usually, but not always, also formal parents who are designated at birth and follow a linear as opposed to a serial role in a child's life. Thus, if there is a continuous formal parent that also cares for children, this stability should be taken into account in any system of giving functional parents rights. Taking account of the benefits of stability does not preclude giving any rights to functional parents who step in and provide important care services. Rather, the different types of nurturing relationships should be treated separately.

Finally, although functional parents provide great benefit to children, formal registration and/or adoption, if available, is preferable due to the clarity, predictability, and notice it provides. Thus, to the extent available, formal demarcation of parenthood by registration or adoption should be encouraged and thus given a separate and less malleable status. Otherwise, there would be no reason for functional live-in caregivers such as stepparents to go through the process of adoption—as some have argued has become the case in states like California in which a strong movement towards awarding functional parents full parental rights has developed.[277]

B. *Towards a Differentiated System of Functional Parenthood*

Based on the differences discussed above, a differentiated system of rights and obligations attaching to those who fulfill formal requirements and those that fulfill functional requirements is appropriate.

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273 For a discussion of the exchange between flexibility and stability, see generally Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261 (2008).

274 Dowd, *supra* note 141, at 249; Kavanagh, *supra* note 5, at 92-93, 108; *see also supra* notes 45-48 and accompanying text.

275 *See supra* notes 45-48 and accompanying text.

276 *See* Appleton, *supra* note 5, at 40-46; Dowd, *supra* note 141, at 235.

277 *See generally* June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 55-56 (2007).

Like Katharine Bartlett and the ALI Principles that she helped craft, concerns about diversity, flexibility, and distinctions in timing, privacy, and stability between functional and formal parenthood necessitate a stratified system of formal and functional parenthood.[278] Formal parenthood would still be established in the traditional ways and would be privy to the presumptions or weighted balancing attaching to formal parenthood as in *Troxel*.[279] Through biology, adoption, or even presumptions and intention, formal parenthood should be as clear as possible and be denoted ex ante through registration and through statutes such as the Unified Parentage Act ("UPA").[280] Functional parenthood would constitute a different legal status determined in a de facto manner that could result in visitation or custody, support, and other parental rights and obligations in degrees depending on the circumstances. This is because formal parents are designated at birth, are more stable and predictable and are, in general, linear, not serial. When a formal stable parent or parents exists, the benefits of their long-term care should be accorded a distinct status and they should have presumptive primary custody and legal decision-making responsibilities as well as the bulk of child support obligations. When a stable formal primary caregiving parent does not exist, then all rights and obligations would adhere in functional parents when they exist.[281] Thus, unlike the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, where only visitation is possible for a "parent-like" functional caregiver,[282] a functional parenthood status should come with the possibility of full custody with a presumption that visitation will attach to the status in a manner comparable to V.C.[283] However, the status can result in a full panoply of parental rights as well.[284]

There is one possible exception to this proposed differentiation between formal and functional parents. When the functional relationship is significant and long term and functional parents do not have the option to formalize their status either because there is no same-sex adoption or step-parent adoption is not feasible, the argument for differentiation is weaker.[285] This is because the only reason the status was not formalized was the lack of an option to do so. On the other hand, if adoption was available and not chosen, differentiation is supported by the recognition of functional parental autonomy. Functional parents did not choose formal parenthood so it should not be imposed upon them. Rather, they should be recognized as the functional parents they are. If adoption is available and not chosen, as it is

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278 *See* Bartlett, *supra* note 66, at 945-48.

279 *See* Troxel v. Granville, 530 U.S. 57, 68-70 (2000); *supra* notes 75-82 and accompanying text.

280 UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2000).

281 *See e.g.,* P.B. v. T.H., 851 A.2d 780 (N.J. Super. Ct. App. Div. 2004) (determining custody as between two functional parental figures).

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

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

284 *See supra* Part II.B.

285 *See generally* Polikoff, *supra* note 202, at 825-27.

with many stepparents and lesbian coparents, the distinction between the process of formally adopting the child as opposed to obtaining functional parenthood status should be recognized.[286] The affirmative, clear, and notice-giving act of adoption should be encouraged where possible in maintaining the distinction between formal and functional parenthood. Ideally, this exception should be eliminated by the acceptance of second parent adoptions.

Differentiation can be accomplished in a variety of ways. This Article outlines three options for legal differentiation which can be used alone or in conjunction: (1) courts can recognize functional parents based on minimal threshold requirements; (2) a separate registration system for functional family forms with formal parental consent; and (3) disaggregation of child support, physical custody, legal custody, and other rights and entitlements of parenthood for functional parents and not for formal parents.

1. Judicial Recognition of Functional Parental Status

The most intuitive means of recognizing a differentiated functional parenthood status is through legislation or court decision that recognizes functional parenthood when long-term functional caregivers seek court involvement to obtain visitation or custody or when formal parents seek to assign this status to functional caregivers in order to collect child support. Functional status should be clearly differentiated from formal legal status. The stratification between formal and functional parenthood both protects the privacy and stability inherent in formal parenthood by maintaining its primary position as long as the formal parent-child relationship is intact and also opens the door to kin-like parental figures that maintain parent-like relationships with children. Functional parenthood status could be awarded in a variety of settings without having to conform to the exclusive binary model of the nuclear family that essentially requires functional parents fit into a formal parental-like idealized mold.[287]

In the case of litigation to obtain or assign parental status, minimum threshold requirements should have to be found and the court should engage in an overall best interests analysis. In order for functional parental status to adhere, there should be a finding regarding some depth of emotional attachment based on a number of factors, including duration, depth of attachment, frequency of caregiving or support activity, child preference,

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286 *See* Carbone, *supra* note 277, at 55-59 (contrasting the ALI Principles with California cases that give full-parenting rights to functional parents and noting that adoption would thereby become irrelevant for stepparents). *But see* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 204-06 (2009).

287 Polikoff, *supra* note 286, at 204-05 & nn.10-11.

and a finding regarding best interests.[288] The legal test for functional parenthood should retain flexibility. For instance, while cohabitation is usually necessary to demonstrate the attachment and caregiving involved in identifying a functional parenthood relationship,[289] courts should have discretion to waive the cohabitation requirement in extraordinary circumstances because attachments develop in different ways.[290] Although a long-term intimate relationship evidenced by cohabitation would usually be the appropriate standard, at times, such as in *A.F. v. D.L.P* discussed above, long-term cohabitation is specifically avoided although an in-depth, long-term relationship seems to have been created.[291] Courts should view these minimum guidelines as persuasive benchmarks but not rigid requirements in order to retain flexibility in assigning functional parenthood. Courts should recognize functional relationships as more fluid and flexible and should look carefully at the circumstances involved on a case-by-case basis.[292] While this entails some uncertainty, such a fact specific examination best reflects the nature of these relationships, which must be closely examined before giving such status and not based on mere formalities.[293] Functional parenthood should not only attach when the nuclear formal family fails as Bartlett posits.[294] Rather, upon meeting certain standards of care and duration and a finding of best interests, these attachments should be recognized even in the context of an intact nuclear formal family.

If a formal parent objects to a functional caregiver being recognized as a functional parent, the Supreme Court's decision in *Troxel* may be relevant. A plurality of the Court held that, as opposed to grandparents or other third parties, there must be a presumption in favor of parents' wishes for their children—in *Troxel* this presumption was in the context of visitation.[295] How do functional parents as described in this Article fit into this holding? When seeking rights of visitation, functional parents could be considered "parents" who would not have the presumption used against them in

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288 *See generally* ALI PRINCIPLES, *supra* note 6, §§ 2.02, 2.03, 2.08; Laufer-Ukeles, *supra* note 22, at 94-98.

289 We have previously suggested two years or the majority of a child's life, whichever is less, with a minimum of nine months. Laufer-Ukeles, *supra* note 22, at 97. This would allow caregivers of younger children to gain the functional parenthood status sooner than parents of older children for whom they care, which would correspond with the interests of younger children who need the care provided as well as older children with whom it may take longer to form attachments.

290 For example, kin caregivers may give daily constant long-term care without regular cohabitation. *See generally* Czapanskiy, *supra* note 95, at 978.

291 A.F. v. D.L.P., 771 A.2d 692, 699-700 (N.J. Super. Ct. App. Div. 2001).

292 *Cf.* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 36 (1996).

293 *See infra* notes 311-313 and accompanying text (describing how these fact specific determinations have not led to a flood of litigation or a notable amount of lack of predictability as some have feared in those jurisdictions that have de facto tests).

294 *See* Bartlett, *supra* note 66.

295 Troxel v. Granville, 530 U.S. 57, 68-70 (2000).

a manner equivalent to formal parents, or they could be considered third parties who would have the presumption used against them.[296] Many advocates of functional parenthood believe that the former position is the correct position.[297] In keeping with the case law's approach to equalizing functional and formal parents when de facto parenthood is applied, many cases assert that the presumption should not apply to functional parents.[298]

In order to treat functional parents differently from formal parents, functional parents should not enjoy the *Troxel* presumption.[299] To the contrary, it should be used against them due to the belief in the centrality of constant formal caregivers when they exist.[300] Declining to apply the *Troxel* presumption to functional parents also recognizes the natural reliance on formal parents to act in the best interests of their children.[301] Functional parents can attempt to overcome presumptions. When constant formal parents do not exist, or when formal parents are not providing sufficiently for the fundamental care that children need, a court should be willing to find that functional parents should have rights to visitation despite the wishes of formal parents. In some contexts and situations, presumptions can be weighty and difficult to rebut.[302] However, not all states have applied the

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296 *See, e.g.*, Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 396-401 (2002). Some cases applied *Troxel* to individuals who functioned as parents. *See* Seyboth v. Seyboth, 554 S.E.2d 378, 381-82 (N.C. Ct. App. 2001); Harrington v. Daum, 18 P.3d 456, 460-61 (Or. Ct. App. 2001). Other cases distinguished *Troxel*, stating it was inapplicable to cases involving a functional parent. *See* Clark v. Wade, 544 S.E.2d 99, 106 (Ga. 2001); Rideout v. Riendeau, 761 A.2d 291, 302-03 (Me. 2000); T.B. v. L.R.M., 786 A.2d 913, 919-20 (Pa. 2001); Rubano v. DiCenzo, 759 A.2d 959, 968 (R.I. 2000).

297 *See* Sally F. Goldfarb, *Visitation for Nonparents After* Troxel v. Granville*: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783, 791-92 (2001); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 895-97 (2003); Polikoff, *supra* note 202, at 851.

298 *See Clark*, 544 S.E.2d at 106; *Rideout*, 761 A.2d at 302-03; *Rubano*, 759 A.2d at 968; *see also* Blecher-Prigat, *supra* note 100, at 10-11.

299 *See supra* notes 285-286 and accompanying text (noting one exception to this position).

300 *See, e.g.*, OR. REV. STAT. ANN. § 109.119 (West 2012) (creating a status of psychological parent who can petition for custody but statutorily providing that there is a rebuttable presumption that the legal (formal) parent's wishes are in the child's best interests).

301 *See generally* Buss, *supra* note 244, at 647-50.

302 *See* 750 ILL. COMP. STAT. ANN. 45/8 (West 2012) (finding that a husband has two years to seek to rebut a marital presumption once he has "knowledge of relevant facts"); Michael H. v. Gerald D., 491 U.S. 110, 124-26 (1989) (holding that genetic father cannot rebut marital presumption; only husband and wife may rebut, under limited circumstances per the state statute); Cravens v. Cravens, 936 So. 2d 538, 542 (Ala. Civ. App. 2005) (per curiam) (finding that a wife could not rebut with DNA the marital presumption earlier recognized in a dissolution order); Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. U. L. REV. 892, 893-94 (1982) (discussing the varying use of presumptions among jurisdictions as more or less difficult to rebut); Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553, 553-55 (2001) (noting that courts have used the term "presumption" in at least

Troxel presumption in such a weighty manner given the ambiguity of the plurality opinion.[303] A weak deference can create a weighted balancing in favor of the formal parents' wishes that can be counterbalanced by claims of functional parents based on the strength of their attachments to children.[304]

In addition, over the objection of a formal parent, legal functional parenthood, as distinct from formal parenthood, should be awarded only at some time of crisis so as to preserve the privacy and stability of children's attachments. Custody battles and legal interventions are often disruptive and harmful to children.[305] Accordingly, grandparent visitation statutes frequently specify that there must be a crisis event in order to allow consideration of their claims.[306] This limits the amount of tumult and tension in a child's life.[307]

The question that arises is what constitutes a time of crisis for the purposes of establishing functional status. In the ALI Principles, the crisis event is the dissolution of the marriage, the legal separation of parents who

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seven different senses, which has resulted in misinterpretation, especially regarding how hard rebutting presumptions can be).

303 *See* Dolgin, *supra* note 296, at 396-401; Kristine L. Roberts, *State Supreme Court Applications of* Troxel v. Granville *and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 22-25 (2003).

304 If a weighty presumption is applied, the presumption can be weakened perhaps to a burden of proof standard if de facto parenthood is indicated through the depth and quality of the relationship. Thus, functional parents can be differentiated from grandparents or other third-parties who have a biological but not necessarily a functional parental relationship with children. If grandparents do fulfill the requirements of functional parenthood however, they could qualify as functional parents as well as grandparents.

305 *See* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 44 (1987) ("[C]ustody litigation imposes clear and immediate harm upon children."); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 175-76 (1984); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 63 (1991) ("Children have an interest in not being the subjects of long and bitter litigations to determine their custody. Many experts have expressed the view that litigated custody disputes can have a negative effect on children, often resulting in tension, uncertainty, and feelings of torn loyalties."); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 124 (1997).

306 Most states condition non-parental visitation on a prior disruption of family life and are reluctant to award visitation over objection of parents in intact nuclear families. *See* Gregory, *supra* note 243, at 168. For states awarding grandparents visitation in cases of dissolution of the relationship between the child's parents, or in cases of death of a parent or parents of the child, see MASS. GEN. LAWS ANN. ch. 119, § 39D (West 2012); MINN. STAT. ANN. § 257C.08 (West 2012); NEB. REV. STAT. ANN. § 43-1802 (West 2012); NEV. REV. STAT. ANN. § 125C.050 (West 2011); OHIO REV. CODE ANN. § 3109.11 (West 2011); 23 PA. CONS. STAT. ANN. § 5311 (West 2012); ALI PRINCIPLES, *supra* note 6, §§ 2.01, 2.08. For a discussion of existing state law regarding the requirement of a crisis event, see *supra* note 243 and accompanying text.

307 *See* Bartlett, *supra* note 66, at 946 (arguing for the need for a crisis to allow functional parents to gain status).

previously lived together, or the filing of a court action by biological parents to determine custodial responsibility.[308] But, the definition of a crisis event could be broader.[309] In the context of determining when it is appropriate to make a finding regarding functional parenthood, crisis should be defined from a child's perspective. When a formal parent forces a functional parental figure to altogether cease contact with a child, this in itself could constitute a crisis.[310] On the other hand, if a formal parent moves away or in some way reasonably limits the amount of access a functional parent has to a child, this may not constitute a crisis. Ultimately, it is hard to create a blanket rule in determining what constitutes a time of crisis and in determining rights and obligations of visitation, custody, and support. Still, the flexibility of considering formal and functional parenthood as separate statuses allows more creativity and particularity in resolving the legal implications of functional parental status.

Recognizing a variety of functional parents through litigation concerns many who fear such litigation could entail the invasion of privacy, cause instability, and have a negative effect on children. The differentiation outlined in this Article aims to garner the benefits of functional caregiving and the need to recognize and facilitate those relationships, as well as the desire to minimize these negative side effects. Therefore, it is suggested that functional status, when contested, should only be awarded at times of crisis. And, visitation should be preferred when a stable formal parenthood relationship exists. Litigation can be harmful to children, but it is worth noting that even after functional parenthood was recognized in such states as Wisconsin, no flood of litigation by functional parents ensued.[311] While commentators and courts fear that it maybe difficult and inappropriate for courts to determine when a functional parent really deserves contact with children, the case law has not born out this concern.[312] In general, parents are not likely to discourage functional caregiver interaction with children. Furthermore, once the law is in place acknowledging functional caregiver rights, parents will be even less likely to oppose functional caregivers. Bargaining in the shadow of the law, formal parents would be more likely to accept

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308 *See* ALI PRINCIPLES, *supra* note 6, §§ 2.01, 2.08; *supra* note 243 and accompanying text (discussing existing state law on requirements of a crisis event).

309 *See* Laufer-Ukeles, *supra* note 22, at 94-95.

310 *See, e.g.*, *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 436 (Wis. 1995) (determining that when a formal parent interferes substantially with a parent-like relationship, a significant trigger event for an order of visitation (similar to time of crisis) may be present).

311 *See generally* Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 653-54 (2012).

312 *Id.* at 650-51 (discussing the New York Court of Appeals decision in Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010), which decided not to allow functional parenthood status largely because of fears that determining functional parents would be nonobjective, contentious, unpredictable and disruptive).

functional caregivers' relationships knowing that a court is likely to recognize them.[313] Overall, the normative need to recognize functional caregiver relationships is pressing in light of the limitations of formal parenthood. However, this Article also acknowledges the drawbacks and ways functional parenthood differs from formal parenthood. Thus, differentiation seeks to create the proper balance between benefits, concerns, and overall difference.

2. Registration Systems

Another option for fostering functional parental rights is registration systems under which functional caregivers can be registered by state authorities and thereby receive certain rights and obligations to act on behalf of children. Registration systems can provide the benefit of facilitating functional parent relationships without the need for litigation. When there is no objection by a formal parent, functional kin-like parents should be able to gain status and recognition in order to facilitate their activities on behalf of children whether in the educational system, medical system, or in other areas.[314] Such a registration system would quell concerns about the invasion of the privacy of formal parents. It would also enhance predictability with regard to functional parents.[315] Depending on the nature of the registration system created, once functional parental status is established through registration, even if rescinded by formal parents later on, such status could enable functional caregivers who also meet threshold requirements to have their status recognized by the courts.[316] Like in the context of litigation, the status of a functional parent determined by registration could be a different and more flexible status than that of a formal parent. Registration systems can facilitate functional caregiver relationships, allowing functional parental figures to act on behalf of children within their care and to develop on-

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313 *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-57 (1979) (discussing how the law affects separation agreement negotiations at divorce).

314 *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 290 (2006) (discussing the use of registration to facilitate same-sex coparenting); Margaret M. Mahoney, *Stepparents as Third-Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 105-07 (2006) (recommending a registration system to give stepparents' rights to children); Murray, *supra* note 5, at 452 ("With a formal alternative status, parents and nonparental caregivers could be required to register their arrangements with the state, and would be subject to state licensing requirements, including the payment of fees to fund the administration of the system.").

315 *See* Murray, *supra* note 5, at 452 (discussing benefits of a registration system for functional parents).

316 It is beyond the scope of this article to consider how precisely a registration system might work and whether the status could be rescinded or not. Regardless, we believe that functional parenthood status that can be registered for should be different than formal parenthood status.

going emotional attachments to children who benefit from the care and attention they receive.

In the absence of a registration system for functional parents, which does not exist in any state in the United States, a limited guardianship may be an option for functional parents as well.[317] Like Bartlett, Joyce McConnell seeks to expand status to functional parents when the nuclear family breaks down in the context of single parents in particular.[318] She argues that while nuclear parents have joint guardianship of their children as a matter of natural law, single parents do not enjoy the same possibility for sharing responsibilities with another adult through concurrent guardianship.[319]

The law traditionally does not recognize simultaneous guardianship rights between a single parent and another adult outside the realm of formal parenthood.[320] Rather, the only recourses available to parents that need to transfer responsibilities for their children to functional caregivers are adoption, complete surrender of parental rights through traditional guardianship, or foster care. However, all such transfers are either permanent or transfer control to the state.[321] To meet the needs of non-nuclear families and families in distress, some states have enacted short-term power-of-attorney-type guardianships—standby guardianships pending incapacitation of formal parents and coguardianship statuses for sole legal custodians.[322] More flexible, limited, and consensual concurrent guardianship provisions could fulfill the needs of formal and functional parents in a proactive manner with maximum benefit and could minimize concerns. A few jurisdictions have already moved in this direction by providing limited guardianship for medical and school purposes that does not require formal parents to surrender their own rights nor relieve them of their responsibilities simultaneously.[323]

Concurrent limited guardianship would be particularly useful in the health and education systems to facilitate functional parents acting on be-

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317 *See generally* John W. Ellis, Comment, *Yours, Mine, Ours?—Why the Texas Legislature Should Simplify Caretaker Consent Capabilities for Minor Children and the Implications of the Addition of Chapter 34 to the Texas Family Code*, 42 TEX. TECH L. REV. 987, 1000-01 (2010).

318 Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 46-47 (1998).

319 *Id.* at 30.

320 *See generally* R. Alta Charo, *Biological Determinism in Legal Decision Making: The Parent Trap*, 3 TEX. J. WOMEN & L. 265, 268 (1994).

321 *See* McConnell, *supra* note 318, at 33. Under traditional inter vivos guardianship, the natural formal parent must be judged incapacitated or the parent must surrender all parental rights. *Id.* at 37-38.

322 *See id.* at 38-45.

323 *See id.* at 44 (citing CAL. FAM. CODE § 6550 (West 1981), which provides a transfer of rights for medical or education needs, and D.C. CODE ANN. § 16-4901 (1981), which allows a parent or guardian to authorize another adult to provide consent for a minor's medical care); *see also* TEX. FAM. CODE ANN. §§ 34.001-.009 (West 2011) (providing for flexible concurrent guardianship authorization for non-parent relatives); Ellis, *supra* note 317, 1000 nn.96-97.

half of children. Such options would also address children's needs for care while also recognizing the value and status of such caregivers.

3. Disaggregation of Child Support and Child Custody

Whether through litigation or registration, in order to recognize the full panoply of individuals who function as parental figures—some of whom provide sustained caregiving and others of whom provide significant financial support—it makes sense to decouple child support from custody/visitation in functional parenthood. However, in the context of formal legal parenthood, disaggregation is harder to justify.[324]

When allocating rights and obligations to functional parents, rights are regularly partitioned based on different functional parent-like behaviors. A functional parent that performs caretaking and support in a manner that reflects the rights and responsibilities of a traditional legal parent may be assigned both rights and obligations post-dissolution of a relationship with a legal parent.[325] Yet, a functional parent that provides support and does not provide care may be assigned child support without being awarded visitation or other rights such as legal decision-making powers.[326] For a functional caregiver who provides needed care, visitation may be appropriate although child support is not necessary or appropriate.[327] A stepparent or other functional caregiver may provide sustained care without necessarily providing financial support, which may be provided consistently by formal parents.[328] Some sustained caregivers simply cannot afford or do not have an

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324 *See infra* notes 204-208 and accompanying text.

325 *Compare* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) (holding that a lesbian woman who agreed to help raise children with her partner, supported the artifical semination of her partner, and held out the twins born from that semination as her own, is the parent of those children), *with* K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (holding that lesbian partners are the parents of children who were produced by one partner bearing them using the other partner's ova).

326 *See Elisa B.*, 117 P.3d at 670-73; Miller v. Miller, 478 A.2d 351, 357-58 (N.J. 1984) ("[P]ermanent support obligation may be imposed on a stepparent on the basis of equitable estoppel . . . .").

327 *See In re* Hirenia C., 22 Cal. Rptr. 2d 443, 450 (Ct. App. 1993); Clough v. Nez, 759 N.W.2d 297, 305 (S.D. 2008); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1999-2002 (2010).

328 Klipstein v. Zalewski, 553 A.2d 1384, 1388 (N.J. Super. Ct. Ch. Div. 1988) ("[A] stepparent's obligation to support does not arise on the basis of a perceived psychological or emotional bonding."); Niesen v. Niesen, 157 N.W.2d 660, 664 (Wis. 1968) ("A stepfather is under no obligation to support the child of his wife by a former husband so as to relieve him from support. In some cases where the stepfather takes the child into his family or under his care in such a way that he in fact intends and does place himself in the position of the father and is so accepted by the child, he may thereby assume an obligation to support such child. But a good Samaritan should not be saddled with the legal obligations of another and we think the law should not with alacrity conclude that a stepparent assumes parental relationships to a child." (citation omitted)).

interest in undertaking financial responsibility and such limitations should not restrict or discourage their willingness to provide long-term care relationships to children who need such care.[329] Consider, for example, a grandmother who provides care and support for her teenage daughter and grandchild that live in her home for the first year of the grandchild's life.[330] After they move out from the grandmother's home, the grandmother continues to care for her grandchild on a daily basis, allowing her daughter to continue her education and get a profession. Such care benefits both the grandchild and her mother, and may entitle the grandmother to a right to maintain a relationship with her grandchild.[331] Under the facts described above, it is doubtful whether an obligation to financially support the grandchild should also arise. In fact, de facto parents are regularly awarded visitation without being obliged to pay child support.[332] The ALI Principles explicitly envision custodial rights without child support obligation in de facto parenthood.[333]

Dowd emphatically endorses disaggregation of support and custody in order to ensure that biological parents whose sexual conduct creates children have financial responsibility, but that functional parents who nurture have exclusive relational rights to custody and visitation.[334] Such disaggregation of parental rights makes sense particularly for functional parents because their rights and obligations are based on the actual specific functions that they perform, which do not necessarily include all parental responsibilities and entitlements.

While rights and obligations may also be disaggregated for formal parents, formal status creates a context in which assigning the whole basket of parental rights is more appropriate.[335] First of all, formal legal parenthood

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329 *See generally* Blecher-Prigat, *supra* note 100, at 28-29 (arguing for detaching the right to visitation from the cluster of rights and duties associated with parental status, so that recognition of the right to visitation does not imply recognition of other parental rights or obligations). An approach that connects parental rights, such as visitation with parental duties, is a *quid pro quo* approach that conceptualizes children as property. *See generally* Bartlett, *supra* note 91, at 297-98.

330 The facts of this hypothetical are based on Argenio v. Fenton, 703 A.2d 1042 (Pa. Super. Ct. 1997).

331 *Id*.

332 *See* Rideout v. Riendeau, 761 A.2d 291, 303 (Me. 2000); V.C. v. M.J.B., 748 A.2d 539, 553 (N.J. 2000).

333 *See* Katharine K. Baker, *Asymmetric Parenthood*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 121, 124 (Robin Fretwell Wilson ed., 2006).

334 *See* Dowd, *supra* note 141, at 237 ("A genetic father should have an economic duty of support, but only a social father should claim the full rights of fatherhood, based on a record and ongoing performance of care/nurture. Therefore fatherhood would not be a single, unitary status with complementary rights and responsibilities, but rather could include multiple adults who may or may not have equal status.").

335 Blecher-Prigat, *supra* note 100, at 31-33.

always comes with child support.[336] The responsibility of having created the child either with intent or through sexual congress (unless through artificial insemination or egg donation in which financial responsibility does not attach) creates that financial responsibility.[337] Visitation (if not custody) is also almost always awarded to formal parents if desired, unless harm to the child can be shown.[338] This unity of formal parenthood conveys an important message about responsibility and obligation that should not be undone.[339] Second, while visitation should not necessarily be granted on a quid pro basis due to the payment of child support, practically, research demonstrates that visitation should be encouraged unless harmful to children because visitation makes payment of child support much more likely.[340]

Thus, in order to fully recognize those individuals who provide substantial care and function as parental figures in some ways and those who provide significant financial support and thereby function as parental figures in others, it makes sense to decouple child support from visitation in functional parenthood.[341] Scholars struggle with disaggregated obligations and rights with regard to all parental status,[342] but in fact, this struggle can be resolved by recognizing differences between functional and formal parents. Only functional parents should have their rights and obligations disaggregated.

C. *Hypotheticals*

1. Homosexual Couples

Perhaps the most common and intuitive use of the concept of functional parenthood is in the context of homosexual coparents. Such relationships mimic traditional nuclear families with only the sex of one of the parents, as

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336 59 AM. JUR. 2D *Parent and Child* § 45 (2012).

337 *See* Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005); ALI PRINCIPLES, *supra* note 6, §§ 2.01, 2.08; Appleton, *supra* note 5, at 38; Dowd, *supra* note 147, at 135. For criticism of the decoupling of parental rights and obligation in the ALI Principles, see Baker, *supra* note 333, at 126-30. For a discussion of the reasons biology creates the obligation for child support and criticism of the assumption that causation creates financial obligation, see Baker, *supra* note 139, at 664-66.

338 Blecher-Prigat, *supra* note 100, at 2-5.

339 *See id*. at 32-33; Minow, *supra* note 197, at 282-83.

340 *See generally* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 961-62 (2005).

341 *See* Appleton, *supra* note 5, at 38 ("Thinking through how to make room for more than two parents provides an impetus to reconsider the quid-pro-quo approach to parentage."). While Susan Appleton seems to argue that such decoupling should apply to legal parentage as well, we argue that the decoupling makes more sense in functional parenthood.

342 *Id.* at 38-40; *see* Baker, *supra* note 139, at 708-09 (struggling with the notion of degrees of parenthood in the context of a push towards joint custody and equal parenthood).

well as the biological link, being different. This Article has discussed a number of cases of homosexual coparenting in which functional parenthood status could and probably should have been awarded.[343] Yet, it is worth mentioning the case of *K.M. v. E.G*[344] for its demonstration of the difference between functional and formal parenthood. In this case, K.M. provided ova to her lesbian partner so that the partner could bear children by means of in vitro fertilization ("IVF").[345] Due to concerns about later disputes, E.G. unequivocally did not want to share custodial rights to the child and had K.M. sign an explicit waiver relinquishing any claim to the child born of her donation.[346] E.G. felt that if the relationship were sufficiently solid, K.M. would later adopt the children.[347] E.G. gave birth to twins using K.M.'s ova.[348]

Over the course of the first six years of the twins' lives, both K.M. and E.G. raised the twins together and the children referred to both as their mothers.[349] When K.M. and E.G. separated, K.M. sought access to the children in court.[350] K.M. claimed full parental rights to the children.[351] The trial court relied on the waiver agreement in denying K.M.'s right to any status or custodial rights to the child.[352] The appellate court relied on the agreement as well as the notion of "intent" to determine that K.M. should not be considered a parent of the twins because at the time of conception there was no intent to coparent the children.[353] The Supreme Court of California, however, reconceived the notion of intent to mean intent to functionally raise children, as opposed to intent to become legal parents, and held that K.M. was a mother of the twins.[354]

This decision is troubling in a number of respects. First, the use of intent in this context is not consistent with other legal uses of intent in cases involving reproductive technologies where the "intent" connotes intent to become parents.[355] More importantly, the result ran directly counter to an explicit agreement between E.G. and K.M. and thus violated E.G.'s autonomy and right to contract. K.M. was not a formal parent to the twins. She was not on their birth certificate, and she did not put the twins on her health

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343 *See supra* notes 159-165 and accompanying text.
344 117 P.3d 673 (Cal. 2005).
345 *Id.* at 675.
346 *Id.* at 676.
347 *Id.*
348 *Id.*
349 *Id.* at 677.
350 *K.M.*, 117 P.3d at 677.
351 *Id.*
352 *Id.*
353 *Id.*
354 *Id.* at 682.
355 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

insurance or legal documents in the same manner that E.G. did.[356] There was a difference between these two mothers in the eyes of the law and in their own eyes. This should matter. But, K.M. did functionally mother these children—she lived with them and raised them in a parent-like fashion. The children in turn were attached to her in a motherly way. This also matters. K.M. should have been considered a functional parent to these twins and undoubtedly had custodial access, likely in the form of visitation, to these children. Perhaps she should have support duties as well, depending on the nature of the financial relationship between K.M. and E.G and whether K.M contributed to the support of the children while they cohabited. However, K.M. should not be considered the same as a formal parent.

2. Artificial Reproductive Technologies

The case of *Thomas S. v. Robin Y.*[357] provides an interesting scenario in which both homosexual rights and complications involving third-party donors are involved. In this case, Robin Y. and Sandra R. were in a committed relationship and wanted to have children.[358] They made an oral agreement with Thomas S. in which he agreed to give Robin sperm for artificial insemination and in which he also agreed that Robin and Sandra would have all parental rights and that he would have neither rights nor obligations toward any children born of his donated sperm.[359] A child named Ry was born to Robin in 1981 in New York.[360] At this time, Thomas was living in California.[361] Before Ry was three, there were only two instances of contact between Ry and Thomas when Robin was visiting New York on business.[362] When Ry was three years old, Robin and Sandra contacted Thomas because they felt it would be good for Ry to know her biological father.[363] From the time Ry was three until she was nine, Ry and Thomas visited with each other several times a year (a total of twenty six visits), creating a "warm" relationship.[364] Although Thomas never cohabited with Ry nor was involved in the everyday upbringing of Ry, he created an ongoing relationship with her over the course of his visits to New York.[365]

In this case, Thomas was arguably neither a functional parent nor a formal parent. He agreed not to be a formal parent and was never registered

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356 *K.M.*, 117 P.3d at 677.
357 209 A.D.2d 298 (N.Y. App. Div. 1994).
358 *Id.* at 299.
359 *Id.*
360 *Id.*
361 *Id.* at 298.
362 *Id.* at 299.
363 *Thomas S.*, 209 A.D.2d at 299.
364 *Id.*
365 *Id.*

as a formal parent, nor did he take on that role from the time of Ry's birth. Although some cases have found that known donors cannot waive parental rights,[366] most courts have come out the other way when the donor agrees in advance not to parent and when the only difference between known and unknown donors is the level of anonymity maintained.[367] He was also not a functional parent because he did not raise Ry on a regular or constant basis nor support her financially on a continuous basis. He had a relationship with her based on his biological connection to her and at the invitation of her formal mother and her functional mother (Sandra S.). He should not have been entitled to any rights vis-à-vis the child as a functional parent. In this case, it is clear that Ry was interested in continuing her relationship with Thomas, but this was something for her and her mothers to negotiate. A different result is certainly possible on a similar set of facts wherein the sperm donor lives close by and visits with his biological daughter more regularly by engaging in ordinary daily caregiving functions like carpooling, after-school activities, and medical and other care needs. In this case, the appellate court did not decide the issue of visitation, but did find that Thomas should be granted formal parenthood status because he was the biological father and the mothers encouraged him to have a relationship with his child.[368] The reasoning is confusing, blending formal and functional reasoning without making a clear case for either. A more clear and predictable framework that defines and recognizes the rights of both formal and functional parenthood is needed to determine these complex issues of parental rights.

3. Step-Grandparent Caregiver

This hypothetical is based on the case of *In re Hood*.[369] In this case, a four-year old child, Christopher Hood, was cared for over a significant period of time on a daily basis by a "day care provider" named Dianne who Hood's mother paid for childcare services.[370] At the same time, Dianne also cared for Christopher's half-brother, who was her grandson.[371] Indeed, Christopher was the stepson of Dianne's son who was once married to

366 Jacob v. Shultz-Jacob, 923 A.2d 473, 481 (Pa. Super. Ct. 2007).

367 *See In re* Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010) (finding agreement between mother and known sperm donor relieving donor of parental rights and responsibilities was enforceable as to child conceived pursuant to agreement); *In re* K.M.H., 169 P.3d 1025 (Kan. 2007); Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007); *accord* DEL. CODE ANN. tit. 13, §§ 8-102, -702-03 (West 2012); FLA. STAT. ANN. §§ 742.11, .13-.14, .17 (West 2012).

368 *Thomas S.*, 209 A.D.2d at 306-07.

369 847 P.2d 1300 (Kan. 1993). Although we stick to the facts as they are given, we do not know all the facts so some presumptions are necessary.

370 *Id.* at 1301.

371 *Id.* at 1302.

Christopher's mother.[372] Thus, there was a clear kinship relationship between these individuals as Dianne was Christopher's "step-grandmother."[373]

In determining that Dianne had no standing for visitation rights with Christopher, the Kansas Supreme Court pointed out that Dianne was neither Christopher's parent nor grandparent, despite Dianne's contentions regarding the long-standing, significant grandparent-like relationship between her and Christopher.[374] The court specifically pointed out that allowing such third-parties visitation could cause intrusion on family privacy and the potential for harassment.[375]

Assuming that Dianne cared for Christopher over a significant period of time and had developed a significant relationship with him based on such daily, long-term care, Dianne should have been deemed a functional parent under the framework of this Article. As such, she should have been entitled to make a case for visitation. It is not clear from the case why she sought visitation at this point, but it was likely because Christopher was being removed from her care, possibly due to problems in the relationship between Dianne's son and Christopher's mom. The termination of relationships between adults should not necessarily end significant relationships between children and adults. Dianne clearly had a strong connection with Christopher and wanted to visit him regardless of remuneration. Therefore, Dianne should have had a right to prove that she was a functional parent and by so doing receive visitation with Christopher. Such kin-like, flexible, and long-term relationships are precisely the kind which children depend on and should be supported and encouraged by the law.

4. Open Adoption

This hypothetical draws its facts from the case of *Kattermann v. DiPiazza*.[376] In this case, a child—John—was adopted by his grandparents with the consent of his mother when he was two years old.[377] For the first two years of his life he lived with his mother and grandparents (adopted parents) in his grandparents' home.[378] About a year later, his mother married and left home.[379] For two years, John lived with his natural mother while his adopted parents were both working.[380] Thereafter, he returned to his adopted par-

372 *Id.*
373 *Id.*
374 *Id.* at 1302-04.
375 *In re Hood*, 847 P.2d at 1304.
376 376 A.2d 955 (N.J. Super. Ct. App. Div. 1977).
377 *Id.* at 956.
378 *Id.*
379 *Id.*
380 *Id.*

ents' home.[381] Years later, when John was fifteen, his adopted parents forbade him from visiting with his natural mother.[382] Subsequently, the natural mother brought a claim for visitation in New Jersey.[383]

New Jersey law states that once a child is adopted, natural parents should not disturb adoptive parents in their custodial control of their adoptive son.[384] However, the court in *Kattermann* indicated that, due to the psychological bond between natural mother and son and the psychological harm that would come from forbidding their contact, the natural mother did have a right to seek visitation in the child's best interests.[385]

The *Kattermann* court in essence treated the natural mother as a functional parent, emphasizing that she cared for the child in her home even after the adoption for two years.[386] It made sense in such a case to give the natural mother standing to seek visitation despite having formally ended her parental relationship with her son. Yet, that did not mean she retained her formal parental status—she consented to the adoption. Moreover, it was not her natural status that later gave her rights to visitation; it was her functional parental status. Due to the psychological bond that developed between her and her natural son since the adoption proceedings, visitation was permitted as an incidence of functional parenthood.

CONCLUSION

Functional parenthood is a valuable legal category, which can contribute significantly to alleviating the difficulties and dilemmas faced by the law due to its inability to react to the continuous change in family forms and parental relationships. More specifically, the concept of functional parenthood can bridge the gap between existing legal rules and the reality wherein many caregivers other than formal parents provide needed child care. Functional parents provide an important service to formal parents and society by raising children in a continuous and loving manner that creates deep and lasting emotional bonds. However, in order to make the most of the advantages functional parenthood offers, it must be maintained as a separate and distinct legal category. As a distinct legal category, functional parenthood enables the maintenance of the distinct advantages offered by traditional formal parenthood—stability, responsibility attaching at birth, and family privacy. Only as a separate legal category can functional parenthood encompass and be applied to diverse familial situations, main-

381 *Id.*
382 *Kattermann*, 376 A.2d at 956.
383 *Id.*
384 *Id.* at 957.
385 *Id.*
386 *Id.*

tain flexibility, and enable cautious step-by-step development, which is necessary in view of the novel issues modern-day adult-child relationships raise.