Parents in Fact

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The Restatement of Children and the Law, protects a child's relationship with a "de facto parent"—a person who has "established a bonded and dependent relationship with the child that is parental in nature." De facto parent doctrines are part of a broader category of functional parent doctrines that extend parental rights to an individual who has developed a parent-child relationship and acted as a parent to the child. Application of the de facto parent doctrine depends on a conclusion that the person formed a parental relationship, and yet debate remains over whether the person is a parent or merely a third-party nonparent.

This Essay examines the Restatement's full-throated embrace of a de facto parent doctrine—an immensely important development—in the context of family law's evolving treatment of functional parents. In the past, family law generally cast functional parents as nonparents. For example, a 1995 state court decision, on which the Restatement relies, treated a de facto parent as a third party entitled merely to visitation with the child she had raised. More recently, family law has grown to see functional parents as parents. Common law doctrines have regarded de facto parents as entitled to the rights and responsibilities of parenthood, and a growing number of states have adopted statutory provisions that treat functional parents as legal parents. The Restatement's approach to de facto parents reflects these developments. Even as the Restatement begins by locating de facto parents in a framework designed around conflicts between legal parents and third parties, it distinguishes de facto parents in ways that render them, both conceptually and legally, like parents. Indeed, the Restatement pushes well beyond the American Law Institute's earlier endorsement of a de facto parent doctrine—the 2002 Principles of the Law of Family Dissolution, which recognized de facto parents but consigned them to an inferior legal status.

After situating the Restatement's approach to de facto parents within broader family law developments, this Essay explores how the evolving status of functional parents—from nonparent to parent—matters to constitutional understandings of the parent-child relationship. To account for the fundamental right of parents to direct their children's upbringing, including by excluding third parties, the Restatement requires a de facto parent to show that "a parent consented to and fostered the formation of the parent-child relationship between the individual and the child." This consent-based approach to de facto parenthood proceeds from an assumption that a functional parent is a third party who, based not only on their conduct but

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also on the conduct of an existing legal parent, can transcend that third-party status. Yet, seeing de facto parents as parents prompts skepticism of this constitutionally grounded consent requirement. Such skepticism is reflected in law, as courts have resisted a restrictive application of the requirement, and newly enacted statutory doctrines have explicitly softened the requirement. Further, the fact that other functional parent doctrines, including those that yield legal parentage, do not expressly require parental consent suggests that consent is not a constitutional requirement. More broadly, the focus on consent obscures the constitutional interests of the functional parent, who, like other parents, may have a constitutional claim to parental recognition.

INTRODUCTION

Restatement of Law: the title suggests that this document simply describes the law.[1] Of course, this is not exactly what a restatement does. A restatement self-consciously makes choices "about how the law is restated."[2] It seeks to clarify the law.[3] It chooses positions among different approaches on questions about which jurisdictions are divided.[4] In an attempt to produce "more coherence in the law,"[5] a restatement supplies principled reasons

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1 *See* Harvey S. Perlman, *The Restatement Process*, 10 KAN. J.L. & PUB. POL'Y 2, 4 (2000) ("A Restatement of Law is firmly grounded in the existing case law. Thus, it is an effort to restate the governing rules in a coherent and systematic way.").

2 Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REGUL. 447, 448–49 (2019) ("Restatements of the law walk a line between being positive and normative projects. While Restatements purport to simply 'restate' the law, that is to summarize it, they inevitably involve choices about how the law is restated.").

3 *See* Robert A. Hillman, *Drafting Chapter 2 of the ALI's Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*, 100 CORNELL L. REV. 1341, 1359 (2015) ("The main goal of restatements, it is therefore fair to say, is to clarify the law.").

4 The American Law Institute's (ALI) own Style Guide explains the first two principles governing the "Restatement process":

> The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable.

AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS & THOSE WHO REVIEW THEIR WORK 5 (2015).

5 Continuing with the four principles governing the "Restatement process," the ALI's Style Guide explains: "A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth

for supporting one or another position on a contested question.[6] At base, a restatement purports to give the best account of the law in a particular area.

The Restatement of Children and the Law[7] (Restatement) does this. It gives an account—a comprehensive and compelling one—of the law governing children. But the Restatement does more than this. It captures law in motion.[8] Nowhere is that motion more evident than in the Restatement's treatment of the parent-child relationship. We are in the midst of deep and important shifts in our understanding of what constitutes a parent-child relationship worthy of the law's protection. The Restatement not only identifies these shifts; it participates in them.[9]

The Restatement includes provisions that protect a child's relationship with a "de facto parent"—a person who has "established a bonded and dependent relationship with the child that is parental in nature."[10] De facto parents are part of a broader category of *functional parents*. A range of doctrines—common law, equitable, and statutory—extend parental rights to an individual

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step is to ascertain the relative desirability of competing rules." *Id.* at 5; *see also* Perlman, *supra* note 1, at 2:

> In the circumstances in which courts have adopted a variety of formulations to explain a particular set of outcomes, the Restatements often seek to find a unifying theme that explains the outcome of cases, but does not necessarily reflect the terminology employed by the courts. In doing so, it is hoped that one can restate underlying principles employed by the courts to bring a more coherent or consistent approach to decision making.

6 *See* Perlman, *supra* note 1, at 4 ("Where jurisdictions disagree on a particular point, the Restatements do not purport to count jurisdictions and adopt the majority rule. Rather, the standard is to adopt the rule that a rational court, faced with the issue for the first time, would find most persuasive.").

7 Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

8 *Cf.* AM. L. INST., *supra* note 4, at 6:

> Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

9 *See id.* at 5 ("If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a 'law reform' organization.").

10 RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82(a)(3) (AM. L. INST., Revised Tentative Draft No. 4, 2022) (on file with author) [hereinafter RESTATEMENT Revised Draft No. 4]. The Revised Draft No. 4 updates the relevant sections of the December 2022 Draft No. 4.

based on evidence that the individual developed a parent-child relationship and acted as a parent to the child.[11]

The Restatement's embrace of de facto parenthood is immensely important. About two-thirds of all U.S. jurisdictions have a functional parent doctrine—meaning a significant number still do not.[12] Debate over these doctrines has grown in recent years. Scholars have largely supported the doctrines,[13] but recent work has expressed skepticism.[14] Advocates promoting progressive family law reform have embraced functional parent doctrines, yet resistance from some family law attorneys and domestic violence advocates has arisen.[15] In the midst of this ongoing debate, the American Law Institute's (ALI) strong endorsement of de facto parenthood is significant.[16]

This Essay examines family law's evolving understanding of functional parenthood through the lens of the Restatement. Application of the de facto parent doctrine depends on a conclusion that the person formed a parental relationship. Yet, the person's status as a parent remains in question. Is a de facto parent a parent, or a nonparent acting as a parent? In other words, is a de facto parent an imposter or the real thing?

As this Essay shows, the Restatement's position on the status of de facto parents reflects—and moves forward—an emergent

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[11] *See* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319, 329–42 (2023).

[12] *See id.* at 346 fig.1.

[13] *See generally* Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012); Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55 (2017). *See also* Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1622–24 (2022); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1425–26 (2020); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards A Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 438–40 (2013); Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 651–54 (2002).

[14] *See generally* Katharine K. Baker, *Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI.-KENT L. REV. 135 (2017); Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909 (2019).

[15] For a discussion of some of these objections, see Courtney G. Joslin & Douglas NeJaime, *Domestic Violence and Functional Parent Doctrines*, 30 VA. J. SOC. POL'Y & L. 68, 70–72 (2023).

[16] It is also significant that Chief Reporter Elizabeth Scott and Associate Reporter Clare Huntington have written supportively of de facto parent doctrines. *See* Huntington & Scott, *supra* note 13, at 1425 (arguing that the "trend toward widespread recognition of de facto parents promotes child wellbeing").

view of functional parents as *parents*. In the past, family law generally cast functional parents as third parties, valuing the caregiving they provided but maintaining their identity as nonparents and limiting the rights they could claim.[17] Over time, though, family law has grown to see functional parents more as parents—respecting the important role they play in children's lives and treating them as equally entitled to custody as legal parents. Indeed, the recent trend in state law has been to extend legal parentage to functional parents.[18] While the Restatement addresses de facto parents as part of its treatment of third-party custody and visitation, it distinguishes de facto parents from ordinary third parties, both conceptually and substantively. Ultimately, it regards de facto parents as parents and grants them the rights and responsibilities of parenthood.[19]

In examining the Restatement's approach to de facto parents, this Essay also revisits and reassesses constitutional assumptions that have long structured de facto parent doctrines.[20] The Restatement begins from the well-worn premise that parents enjoy a fundamental right to direct their children's upbringing.[21] After the Supreme Court's decision in *Troxel v. Granville*,[22] which struck down a third-party visitation statute as applied to a grandparent petition,[23] the entailments of parental rights have been extensively analyzed with respect to third-party custody and visitation. Courts have distinguished disputes between legal parents and true third parties from disputes between legal parents and individuals who have functioned as parents.[24] In the former, courts have required deference to the legal parent's wishes.[25] In the latter, courts have generally determined, in the words of the Washington Supreme Court, that "*Troxel* does not establish

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17 *See infra* Section I.A.

18 *See infra* Sections I.B, I.D.

19 *See infra* Section I.C.

20 *See infra* Part II.

21 *See* RESTATEMENT OF THE LAW, CHILDREN AND THE LAW ch. 1, intro. note (AM. L. INST., Tentative Draft No. 1, 2018) [hereinafter RESTATEMENT Draft No. 1] ("It has long been recognized that parents have a [fundamental right] in the care and custody of their children that is protected under the Due Process Clause of the 14th Amendment.").

22 530 U.S. 57 (2000).

23 *Id.* at 69–72.

24 *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 327–28 (2020) (noting "that courts in a growing number of states have declined to apply *Troxel* to disputes involving the claims of de facto parents").

25 *See* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 4 (2013).

that recognition of a de facto parentage right infringes on the liberty interests of a [legal] parent."[26]

De facto parent doctrines have typically accounted for the rights of legal parents by requiring that the parental relationship between the de facto parent and the child formed with the legal parent's consent. Accordingly, the Restatement requires a de facto parent to show that "a parent consented to and fostered the formation of the parent-child relationship between the individual and the child."[27] This consent-based approach to de facto parenthood proceeds from an assumption that a functional parent is a third party who, through their conduct and the conduct of the legal parent, can transcend that third-party status.[28] But what if we viewed the de facto parent simply as a parent, like any other parent?[29] What, then, is the justification for requiring another parent's consent to the parent-child relationship? What might we learn from other functional parent doctrines, such as the "holding out" presumption of parentage, which do not expressly require parental consent?[30] Going further, why does a functional parent not also possess interests of constitutional magnitude, including an interest in being treated as a parent?[31] As this Essay suggests, in light of the evolving status of functional parents, these questions merit serious consideration.

I. THE EVOLVING STATUS OF DE FACTO PARENTS

Are "de facto parents"[32] *parents*, or are they *nonparents*, to be treated like third parties? This Part examines family law's evolution on this question, tracing how de facto parents have become more like parents, and less like nonparents, over time. It then situates the Restatement inside of this shift—showing how de facto parents are treated as parents, entitled to the rights and responsibilities enjoyed by other parents.

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26 *In re* Parentage of L.B., 122 P.3d 161, 178 (Wash. 2005).

27 RESTATEMENT Revised Draft No. 4 § 1.82(a)(4).

28 *See infra* Section II.A.

29 *See* Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 336 (2017) ("Perhaps the best way to think about de facto parentage is not as a dispute in which a parent has consented to share rights with a non-parent, but as a dispute in which both women are rights-holding parents.").

30 *See infra* Section II.B.

31 *See infra* Section II.C.

32 RESTATEMENT Draft No.4 § 1.82.

A. De Facto Parents as Nonparents

Functional parent doctrines, which have long existed in many U.S. jurisdictions,[33] attracted widespread scholarly attention in the second half of the twentieth century. In the 1970s, the groundbreaking work of Yale Law Professor Joseph Goldstein, British psychoanalyst Anna Freud, and Yale Child Study Center Professor Albert Solnit injected the concept of the "psychological parent" into legal discourse.[34] They insisted that law should protect a child's relationship with the person who, "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs."[35]

By the 1990s, scholarly attention focused on nonbiological mothers in same-sex couples, shaped by a pathbreaking article by Professor Nancy Polikoff urging application of existing functional parent doctrines to these families.[36] At that point, courts began to decide high-profile cases involving same-sex couples who had children together. When a couple broke up, the biological mother could attempt to cut off the nonbiological mother's contact with the child on the grounds that the nonbiological mother was a legal stranger to the child. In response, the nonbiological mother argued that a functional parent doctrine should protect the parent-child relationship she formed. While the California and New York courts rejected such claims in the early 1990s,[37] the Wisconsin Supreme Court accepted such a claim in 1995.[38]

In doing so, the Wisconsin court announced an influential test for de facto parent claims. It emphasized the importance of a "parent-like" relationship, holding that a judge is authorized to award visitation under a best-interests-of-the-child standard "if the petitioner first proves that he or she has a *parent-like relationship* with the child and that a significant triggering event justifies

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33 *See* Joslin & NeJaime, *supra* note 11, at 327 & n.65.

34 *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17–20 (1973). For example, this work prominently featured in litigation in the 1970s over the status of foster parents, resulting in the Supreme Court's decision in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977). For a discussion, see NeJaime, *The Constitution of Parenthood*, *supra* note 24, at 308–13.

35 GOLDSTEIN ET AL., *supra* note 34, at 98.

36 *See generally* 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 (1990).

37 *See* Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991); Nancy S. v. Michele G., 279, 219 Cal. Rptr. 212, 215–19 (Ct. App. 1991).

38 *See In re* Custody of H.S.H.-K., 533 N.W.2d 419, 434–38 (Wis. 1995).

state intervention in the child's relationship with a biological or adoptive parent."[39] The court explained that de facto parent recognition "protects a child's best interest by preserving the child's relationship with an adult who has been *like a parent*."[40] On the Wisconsin court's view, a de facto parent was not a parent but was simply *like a parent*. And while a parent was entitled to seek custody, a de facto parent was authorized to seek only visitation. As Polikoff later described it: "She was still a third party. She was simply in a class of third parties entitled to visitation rights."[41]

When state supreme courts in other jurisdictions issued functional parent decisions in the years following the Wisconsin ruling, they often described functional parents as third parties.[42] For example, in a landmark 2000 decision, the New Jersey Supreme Court articulated a standard for its psychological parent doctrine that expressly drew on the Wisconsin standard: "[T]he legal parent must consent to and foster the relationship between the *third party* and the child, the *third party* must have lived with the child, the *third party* must perform parental functions for the child to a significant degree, and most importantly, a parent-child bond must be forged."[43] In other words, a psychological parent is a *third party* who can show a parent-child relationship. Unlike in Wisconsin, however, the psychological parent in New Jersey was entitled to seek custody, rather than merely visitation, under a best-interests-of-the-child standard.[44]

Other decisions describe functional *parents* as *nonparents*. In 2004, a Colorado court pointed to a common test "to determine whether a *nonparent* is a psychological parent."[45] In a well-known 2010 ruling, the North Carolina Supreme Court found functional parent recognition appropriate when "the natural parent created along with the *nonparent* a family unit in which the two acted as parents, shared decision-making authority with the *nonparent*,

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39 *Id.* at 421 (emphasis added).

40 *Id.* at 436 (emphasis added).

41 Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONT. PROBS. 195, 203 (2014).

42 *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 551–52 (N.J. 2000); Estroff v. Chatterjee, 660 S.E.2d 73, 79 (N.C. Ct. App. 2008) ("We agree with the New Jersey Supreme Court that the focus [for assessing de facto parenthood] must, however, be on the legal parent's 'intent during the formation and pendency of the parent-child relationship' between the third party and the child." (quoting *V.C.*, 748 A.2d at 552)). The Wisconsin decision generally referred to the de facto parent simply as "petitioner."

43 *V.C.*, 748 A.2d at 552–53 (emphasis added).

44 *See id.* at 554.

45 *In re* E.L.M.C., 100 P.3d 546, 560 (Colo. App. 2004) (emphasis added).

and manifested an intent that the arrangement exist indefinitely."[46] In an important 2011 opinion, the Arkansas Supreme Court emphasized that "the focus should be on what, if any, bond has formed between the child and the *nonparent*."[47] As in Wisconsin, the person who stood *in loco parentis* was entitled only to visitation under Arkansas law.[48]

For its part, the ALI included a de facto parent provision in its first family law project, the Principles of the Law of Family Dissolution (Principles), completed in 2002.[49] Unlike a restatement, a principles project is intended to allow reporters to be more normative and less descriptive.[50] The Principles defines a de facto parent as

> an individual . . . who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation . . . regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.[51]

The de facto parent provision emerged to accommodate a wider range of family arrangements, including families formed by same-sex couples.[52] As Professor Linda McClain and I describe in

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[46] Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010) (emphasis added) (citing Mason v. Dwinnell, 660 S.E.2d 58, 67–68 (N.C. Ct. App. 2008)).

[47] Bethany v. Jones, 378 S.W.3d 731, 737 (Ark. 2011) (emphasis added).

[48] *See id.* at 738.

[49] *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (AM. L. INST. 2002) [hereinafter PRINCIPLES]. As Professor Linda McClain and I discuss in detail, the Principles also captures functional parents through its "parent by estoppel" category. Linda C. McClain & Douglas NeJaime, *The ALI Principles of the Law of Family Dissolution: Addressing Family Inequality Through Functional Regulation*, *in* THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY 16–18 (Andrew S. Gold & Robert W. Gordon eds., 2023). A "parent by estoppel" includes a man who had acted as a father based on the mistaken belief that he was the biological father, as well as an individual who "lived with the child since the child's birth . . . or . . . lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent." PRINCIPLES § 2.03(b)(iii). Under the Principles, a parent by estoppel possesses the rights of a legal parent. *See* Memorandum from Katharine T. Bartlett, Reporter, to Council of the Am. L. Inst. 1 (Nov. 12, 1999) (on file with author).

[50] *See* Hillman, *supra* note 3, at 1359 ("The main goal of restatements, it is therefore fair to say, is to clarify the law. According to ALI's website, the ALI intends another type of project, ALI's 'Principles of the Law,' to do the main normative work.").

[51] PRINCIPLES § 2.03.

[52] *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.21 illus. 1 (AM. L. INST., Preliminary Draft No. 6, 1996) (same-sex couple illustration).

detail,[53] the Principles originally conceived of de facto parents as "nonparents,"[54] but eventually took the position that "a *parent* is either a legal parent or a de facto parent."[55] In this way, the Principles attempted to push understandings of parenthood in functional directions.

Nonetheless, even as a de facto parent could seek custody, rather than merely visitation, the person enjoyed fewer rights than a legal parent.[56] As one of the reporters explained, "[t]he rights of de facto parents were inferior in certain respects to those of legal parents."[57] More specifically, the Principles took the position that a court "should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent."[58] Ultimately, a de facto parent was "favored over *other nonparents*," but a legal parent was favored over a de facto parent.[59]

B. De Facto Parents as Parents

Over time, courts began to see functional parents as parents, rather than merely as third parties.[60] When the Washington Supreme Court announced its common law de facto parent doctrine in 2005, it departed in significant ways from the earlier Wisconsin and New Jersey decisions.[61] The rulings from Wisconsin and New Jersey constituted important advances, yet they did not fully vindicate the parental status of individuals who had formed parent-child relationships but who were not biological or adoptive parents. The Wisconsin court left the de facto parent merely with standing

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53 *See* McClain & NeJaime, *supra* note 47, at 15–16.

54 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.02(2)(b), 2.03(2)(b) (AM. L. INST., Preliminary Draft No. 5, 1995).

55 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. L. INST., Tentative Draft No. 3, 1998); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (Preliminary Draft No. 8, 1998).

56 *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.21 (AM. L. INST., Preliminary Draft No. 7, 1997).

57 Memorandum from Katharine T. Bartlett, Reporter, to Members and Advisers, Fam. Dissolution Project 1 (Sept. 17, 1999) (on file with author).

58 PRINCIPLES § 2.18.

59 *Id.* ch. 1, topic 1 (emphasis added) (providing "[a]n [o]verview of the [p]rinciples of [c]hapter 2").

60 *See* Grossman, *supra* note 29, at 337 (explaining state supreme courts' evolving views on de facto parentage as "reflect[ing] a difference in the view of the co-parent—as an individual with inchoate parental rights rather than as a third party").

61 *See In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005).

to seek visitation.[62] The New Jersey court declared that a psychological parent stands in parity with a legal parent for purposes of custody, but it did not reach other rights and responsibilities possessed by legal parents.[63] In contrast, the Washington Supreme Court held that the "common law recognizes the status of *de facto* parents and places them in parity with biological and adoptive parents."[64] The court translated this into a constitutional register, explaining that both a legal parent and a de facto parent "have a 'fundamental liberty interest[ ]' in the 'care, custody, and control' of [the child]."[65]

Since then, other courts have followed suit.[66] In 2014, the Maine Supreme Court, for example, held that under its equitable de facto parent doctrine, "once a party is determined to be a de facto parent, he or she has the same fundamental rights as the biological or adoptive parent."[67] This means, as the court explained in another decision the same year, that a de facto parent "is a parent for all purposes."[68] That is, the person possesses "parental rights and responsibilities."[69] They not only have standing to seek custody based on a determination of the child's best interests, but they also have "child support" obligations to financially support the child[70] and must be treated as a parent "'for all purposes' including child protection proceedings."[71]

When Maine and Washington eventually engaged in comprehensive parentage reform, they codified their de facto parent doctrines. The 2015 Maine Parentage Act[72] includes the following provision: "The court shall adjudicate a person to be a de facto parent if the court finds by clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life."[73] The statute then sets out the requirements to make such a

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62 *See H.S.H.-K.*, 533 N.W.2d at 438.

63 *See V.C.*, 748 A.2d at 554.

64 *L.B.*, 122 P.3d at 178.

65 *Id.* (quoting *Troxel*, 530 U.S. at 65).

66 *See, e.g.*, Smith v. Guest, 16 A.3d 920, 931 (Del. 2011) (concluding that a de facto parent "would have a co-equal 'fundamental parental interest' in raising [the child]").

67 *In re* K.S., 93 A.3d 687, 688 (Me. 2014).

68 Pitts v. Moore, 90 A.3d 1169, 1182 (Me. 2014).

69 *Id.*

70 *See id.*

71 *K.S.*, 93 A.3d at 688 (citing *Pitts*, 90 A.3d at 32, 34).

72 ME. REV. STAT. tit. 19-A, §§ 1831–1939 (2023).

73 *Id.* § 1891(3) (2015).

showing: The person must have "resided with the child for a significant period of time," "engaged in consistent caretaking of the child," and "accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation."[74] In addition, the person must show that they have established a "bonded and dependent relationship" with the child that "was fostered or supported by another parent of the child," and that continuing that relationship "is in the best interest of the child."[75] The statute makes clear that adjudication of a person as a de facto parent "establishes parentage."[76] In other words, a de facto parent is a legal parent.

Maine's parentage framework became a model for the 2017 Uniform Parentage Act[77] (2017 UPA), promulgated by the Uniform Law Commission. Under § 609 of the 2017 UPA, a de facto parent is an individual who shows by

> clear-and-convincing evidence that: (1) the individual resided with the child as a regular member of the child's household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation; (4) the individual held out the child as the individual's child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child.[78]

The Comment to § 609 explains that "[s]ome of these substantive requirements . . . are based on factors developed under common law doctrine that is utilized in many states."[79] Citing the

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74 *Id.* § 1891(3)(A)–(B), (D).

75 *Id.* § 1891(3)(C), (E).

76 *Id.* § 1891(4)(B).

77 UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

78 *Id.* § 609(d).

79 *Id.* § 609 cmt.; *see also* Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437, 454–58 (2018) (discussing the de facto parent provision); Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 601–03 (2018) (same).

well-known decisions from New Jersey, Washington, and Wisconsin,[80] the 2017 UPA makes clear that "a court may look to those common law decisions for guidance."[81] Nonetheless, it departs from those common law precedents, as well as from the Maine statute, by requiring that the person show that they "held out the child as [their] child"—a requirement that narrows the universe of individuals who can be treated as de facto parents.

Washington became the first state to adopt the 2017 UPA, thus codifying its de facto parent doctrine in 2018.[82] As with the Maine statute and the 2017 UPA, the Washington law makes clear that, when a court determines that a person meets the de facto parent standard, it shall adjudicate that person "to be a parent of the child."[83] Again, the de facto parent is a legal parent.

Other states have followed suit. Well before the 2017 UPA's promulgation, Delaware codified a de facto parent doctrine providing that the "[e]stablishment of [a] parent-child relationship" follows from "[a] determination by [a] court that [a person] is a de facto parent of the child."[84] More recently, by adopting the 2017 UPA, Connecticut, Rhode Island, and Vermont began to treat de facto parents as legal parents.[85] While Connecticut adopted a de facto parent doctrine for the first time through legislation, Rhode Island codified what had been a long-standing common law doctrine, dating back to an important 2000 decision.[86]

C. De Facto Parents in the Restatement

Two decades after the release of the Principles, the ALI returned to family law, and specifically to the topic of de facto parents, with the Restatement of Children and the Law. To be clear, the Restatement does not address legal parentage. This makes sense given that parentage is generally a statutory, rather than common law, matter. De facto parent status, which the Restatement includes in its coverage of custody and visitation, arose largely through judicial decisions. Where along the continuum between nonparent and parent does the Restatement's treatment of

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80 *See* UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM'N 2017) (citing *L.B.*, 122 P.3d at 176; *V.C.*, 748 A.2d at 551; *H.S.H.-K.*, 533 N.W.2d at 421).

81 *Id.*

82 *See* WASH. REV. CODE § 26.26A.440(4) (2023).

83 *Id.*

84 DEL. CODE ANN. tit. 13, § 8-201 (2023).

85 *See* CONN. GEN. STAT. § 46b-490 (2023); 15 R.I. GEN. LAWS § 15-8.1-501 (2023); VT. STAT. ANN. tit. 15C, § 201(6) (2023).

86 *See* Rubano v. Dicenzo, 759 A.2d 959, 971 (R.I. 2000).

de facto parents sit? Tracing the Restatement's approach highlights both the transitional status of de facto parents and the ALI's role in shaping family law's evolving approach to parenthood.

1. From "third parties" to "individuals."

The Restatement first locates de facto parents inside of a framework addressing third parties. The Reporters' Memorandum released in March 2019 with Tentative Draft No. 2 explains that §§ 1.80 through 1.82, which include the provisions on de facto parents, "deal[ ] with parental authority to make decisions about a child's associations with a third party."[87] Clearly, though, a de facto parent is not like any other third party.

Under § 1.80, a third party seeking contact with a child over a parent's objection must "show by clear and convincing evidence that the parent's decision places the child at substantial risk of serious harm."[88] Only then would the third party have standing to seek contact—not custody—under a best-interests-of-the-child standard and even then, only if contact "would not substantially interfere with the parent–child relationship."[89] Under § 1.81, a third party seeking "custodial or decisionmaking responsibility (physical or legal custody) of a child"—rather than merely contact—must "establish parental unfitness or extraordinary circumstances by clear and convincing evidence before a court may consider whether an award to the third party is in the child's best interests."[90] In other words, the burden on a third party seeking contact with or custody of a child is exceedingly high.

In contrast, § 1.82, the Reporters' Memorandum continues, "addresses a special category of third parties—de facto parents."[91] "Although the standard to establish de facto parent status is high,"[92] if "a third party establishes de facto parent status by clear and convincing evidence, the court may award the de facto parent custodial or decisionmaking responsibility of the child if it is in the child's best interests."[93] As the March 2019 draft explains,

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87 RESTATEMENT OF THE LAW, CHILDREN AND THE LAW reporters' mem. (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT Draft No. 2].

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 RESTATEMENT Draft No. 2 § 1.82 cmt. a.

93 *Id.* reporters' mem.

§ 1.82 "does not require harm, parental unfitness, or extraordinary circumstances when the third party is a de facto parent."[94]

The March 2019 draft consistently describes de facto parents as *third parties* who form *parental* relationships. It explains that § 1.82 "requires a *third party* to establish both that he or she assumed significant obligations of *parenthood* and that he or she shares a *parental* bond and dependent relationship with the child . . . thereby ensuring that a *third party* has *functioned as a parent* in every way."[95] It observes:

> The existence of a parental bond is crucial to the determination that a third party is a de facto parent because the justification for interfering with parental authority is the need to protect the child from the emotional harm likely to result if the relationship with the de facto parent is terminated.[96]

Importantly, the March 2019 draft appreciates that, from the child's perspective, the de facto parent is the child's *parent*. Invoking the concept developed by Goldstein, Freud, and Solnit,[97] it explains that "[a] third party establishes that he or she shares a bond and dependent relationship with the child that is parental in nature"—a required showing under the Restatement's de facto parent standard—"by demonstrating that he or she is a psychological parent."[98] As the draft Restatement observes, "[a] psychological parent is a third party that fulfills the child's physical and emotional needs for a parent and whom the child views as an *actual parent*."[99] From the perspective of Goldstein, Freud, and Solnit, the psychological parent *is a parent*.

The December 2022 draft of the de facto parent provisions translates this central insight into terminology. Whereas § 1.82 in the March 2019 draft employed a definition of de facto parent that repeatedly referred to the person as a "third party,"[100] the

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94 *Id.* § 1.82 cmt. a.

95 *Id.* (emphasis added) (citation omitted).

96 *Id.*

97 *See* GOLDSTEIN ET AL., *supra* note 34, at 308–13.

98 RESTATEMENT Draft No. 2 § 1.82 cmt. g.

99 *Id.* (emphasis added).

100 The March 2019 draft states:

> A de facto parent of a child is a *third party* who establishes by clear and convincing evidence that: (1) the *third party* lived with the child for a significant period of time; (2) the *third party* assumed significant obligations of parenthood without expectation of financial compensation; (3) the *third party* has been in a parental role for a length of time sufficient to have established a bond and dependent relationship with the child that is parental in nature; and (4) a parent consented to

December 2022 draft replaces that term in the definition with "individual"[101]—the same term used in the 2017 UPA's de facto parent provision.[102] The Restatement's substantive standard is unchanged. Yet, the rhetorical shift is important for symbolic and expressive reasons. Section 1.82 provides:

> A de facto parent of a child is an individual who establishes by clear and convincing evidence that: (1) the individual lived with the child for a significant period of time; (2) the individual assumed significant obligations of parenthood without expectation of financial compensation; (3) the individual has been in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature; and (4) a parent consented to and fostered the formation of the parent–child relationship between the individual and the child.[103]

Satisfaction of the standard "rebuts the presumption in § 1.80(a) that a parent's decision about a child's contact with the individual is in the child's best interest," as well as "the presumption in § 1.81(a) that a parent has a presumptive right to custodial and decisionmaking responsibility for a child."[104] Beyond the definition, the relevant provisions in the December 2022 draft repeatedly refer to the de facto parent as an "individual,"[105] even though some references to a "third party" remain.[106]

2. (De facto) parental rights and responsibilities.

After elaborating its de facto parent standard, the Restatement explicitly notes that "[i]t adopts the four-prong test to establish de facto parenthood announced by the Supreme Court of Wisconsin

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> and fostered the formation of the parent–child relationship between the *third party* and the child.

Id. § 1.82(a) (emphasis added).

101 *See* RESTATEMENT Revised Draft No. 4 § 1.82.

102 UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017).

103 RESTATEMENT Revised Draft No. 4 § 1.82(a).

104 *Id.* § 1.82(b)–(c).

105 *Id.* § 1.82(a) ("A de facto parent of a child is an individual . . . ."); *id.* § 1.82(a)(1)–(4) (describing the conditions that "the individual" must prove by clear and convincing evidence in order to be adjudicated a de facto parent); *id.* § 1.82(b)–(c) (explaining how "[c]lear and convincing evidence that the individual is a de facto parent" may rebut other presumptions).

106 *See id.* § 1.82 cmt. a (noting that "[a] fit parent's presumptive right to custodial and decisionmaking responsibility and authority to make decisions about a child's contact with a third party is not absolute").

in 1995 and adopted by a number of states."[107] Yet, the Restatement departs in a critical respect from the Wisconsin precedent it cites. Whereas the Wisconsin doctrine grants only standing to seek visitation,[108] under the Restatement, a de facto parent can receive "custodial or decisionmaking responsibility for a child."[109] This is consistent with the approach taken by the vast majority of jurisdictions with functional parent doctrines. Under the doctrines in most states, the person enjoys standing to seek custody under a best-interests-of-the-child standard.[110]

The Restatement, though, goes beyond the functional parent doctrines in many states by expressly clarifying that the de facto parent has not only parental rights but also parental responsibilities. As the Restatement observes: "Once an individual proves that he or she is a de facto parent, a petition for access to the child is, similar to [a] petition by a legal parent, treated as a petition for custodial responsibility."[111] At least with respect to the best-interests standard, third parties have "contact," but de facto parents, like legal parents, have "custodial responsibility." Importantly, the "de facto parent, similar to a legal parent, . . . has custodial or legal responsibility for the child, *including the responsibility to provide financial support*, even when that responsibility does not include residential or overnight responsibility."[112] In other words, a de facto parent can be made to support the child even if, going forward, they do not live with the child.

The Restatement not only draws on important state supreme court decisions, like the one from Wisconsin, but it also takes cues from the ALI's predecessor project. The Restatement declares that its "definition of a de facto parent reflects the spirit of the Principles,"[113] yet "differs in three respects."[114] These differences demonstrate that, today, the ALI views de facto parent-child relationships as entitled to the same legal protection as other parent-child relationships.

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107 RESTATEMENT Draft No. 2 reporters' mem.

108 *See H.S.H.-K.*, 533 N.W.2d at 436 (determining that a de facto parent could gain visitation when such visitation is in the best interest of the child but could not obtain custody).

109 RESTATEMENT Draft No. 2 § 1.82(d).

110 *See* Joslin & NeJaime, *supra* note 11, at 351 fig.2.

111 RESTATEMENT Revised Draft No. 4 § 1.82 cmt. b.

112 RESTATEMENT Draft No. 2 § 1.82 cmt. b (emphasis added).

113 *Id.*

114 *Id.*

The first two differences relate to coverage. First, whereas the Principles requires that a de facto parent lived with the child "for a significant period of time not less than two years,"[115] the Restatement "does not specify a minimum duration of time that the third party must have lived with the child."[116] The lack of a specified time period "recognizes that a young child may form a parent[-]child bond with a third party who functioned as a parent for a shorter period."[117] From a child-centered perspective, the Restatement prioritizes a child's relationship with the person who is parenting them—an especially important relationship for very young children. For example, the Restatement refuses to cut off an 18-month-old child from the only parental caregiver the child has ever known, simply because the person cannot satisfy a two-year requirement.[118] Compared to the ALI's earlier position, the Restatement's approach evidences less deference to the authority of the legal parent and greater respect for the parental role of the de facto parent.

Second, whereas the Principles requires that a de facto parent "regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived,"[119] the Restatement does not.[120] The Restatement makes it possible for an individual who, in comparison to the legal parent, makes more "economic and other noncaretaking contributions" to be recognized as a de facto parent.[121] In this way, the de facto parent category assimilates other features of legal parent-child relationships seen across a wide range of families, requiring simply that the de facto parent "assumed significant obligations of parenthood."[122] As the Restatement puts it, the parental unit can reflect "a division of roles commonly accepted between two legal parents whom the law acknowledges as parents with equal authority."[123]

The third difference between the Restatement and the Principles relates to legal consequences. Whereas the Principles provides that a court "should not allocate the majority of custodial

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115 PRINCIPLES § 2.03(1)(c).
116 RESTATEMENT Draft No. 2 § 1.82 cmt. b.
117 *Id.* § 1.82 cmt. d.
118 *See id.*
119 PRINCIPLES § 2.03(1)(c)(ii)(B) (providing "[d]efinitions").
120 *See* RESTATEMENT Draft No. 2 § 1.82 cmt. b.
121 *See id.* § 1.82 cmt. e.
122 *Id.* § 1.82(a)(2).
123 *Id.* § 1.82 cmt. e.

responsibility to a de facto parent over the objection of a legal parent,"[124] the Restatement states that "a court may award a de facto parent primary custodial responsibility if it is in the child's best interests."[125] This means that the Restatement treats de facto parents as equally entitled to custody as legal parents. This contrasts with the hierarchy erected by the Principles, which treats de facto parents as less than legal parents with respect to custody.

From this perspective, we see the dynamic nature of the law of parenthood and the critical role that the Restatement is playing. The Restatement draws on important authorities—both in the form of ALI projects and judicial precedents—yet moves beyond those authorities in ways that enlarge the rights of de facto parents, treating them more like parents than nonparents.

The Restatement does not go so far as to endorse the recent trend, represented by the 2017 UPA, to treat functional parents as legal parents. This makes sense when one appreciates that legal parentage for de facto parents has emerged primarily as a statutory matter—including through adoption of the 2017 UPA—whereas the Restatement is capturing common law developments. As Professor Solangel Maldonado, the lead drafter of the Restatement's de facto parent provisions, explained, "a restatement must focus on what a court has the authority to decide, and it must restate what courts have held."[126]

That the Restatement "does not take a position on whether de facto parents are legal parents"[127] makes sense for another reason. Most states do not allow a child to have more than two *legal* parents. Yet, as Maldonado pointed out, "[t]he majority of courts that have adopted the common law de facto parent doctrine recognize that a child can have two legal parents and one or more de facto parents."[128] The small number of states that expressly authorize a court to adjudicate more than two *legal* parents include the states that treat de facto parents as legal parents.[129] These states, often as part of their enactment of the 2017 UPA, codified de facto parentage *and* multiparent recognition at the same

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[124] PRINCIPLES § 2.18(1)(a).

[125] RESTATEMENT Draft No. 2 § 1.82 cmt. b.

[126] Solangel Maldonado, *De Facto Parents, Legal Parents, and Inchoate Rights*, 91 U. CHI. L. REV. 557, 561 (2024).

[127] *Id.* at 560.

[128] *Id.* at 563.

[129] *See* CONN. GEN. STAT. § 46b-475(c) (2023); WASH. REV. CODE § 26.26A.460(3) (2022); VT. STAT. ANN. tit. 15C, § 206(b) (2022); ME. STAT. tit. 19-A, § 1853(2) (2021); DEL. CODE ANN. tit. 13, § 8-201(c) (2022).

time.[130] For the majority of states, the Restatement acknowledges and preserves a system in which a child's relationship with a de facto parent can be protected even when the child already has two legal parents.

While the Restatement may extend a less comprehensive legal status to de facto parents than the 2017 UPA does, it covers a broader universe of parent-child relationships. Unlike the 2017 UPA, the Restatement, staking out a position that is consistent with a "majority of jurisdictions," "do[es] not require that a third party have held a child out as his or her own to establish de facto parent status."[131] By excluding this requirement, the Restatement is more inclusive, covering a wider range of parent-child relationships than those covered by the 2017 UPA's de facto parent provision.[132] As the Restatement observes, a "holding out" requirement

> would exclude third parties, such as grandparents, siblings, and other family members who have assumed parental responsibilities and share a parent–child bond and relationship with the child with the support of the parent but do not see themselves as the parent of their son's or daughter's or sibling's child.[133]

My recent work with Professor Courtney Joslin on functional parent doctrines supports the Restatement's observation. Doctrines that do not require holding out the child as one's child provide a mechanism for courts to protect the relationship between a child and the person who is providing the most consistent source of parental care. Surveying all electronically available functional parent decisions from 1980 to 2021 in all jurisdictions that we identify as having a functional parent doctrine, we find that the alleged functional parent appears to have served as a primary caregiver of the child in 83% of the cases in our dataset.[134] Strikingly,

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[130] *See, e.g.*, CONN. GEN. STAT. §§ 46b-475(c), 46b-490 (2023); VT. STAT. ANN. tit. 15C, §§ 201(6), 206(b) (2023); ME. STAT. tit. 19-A, §§ 1853(2), 1891(1) (2015).

[131] RESTATEMENT Draft No. 2 § 1.82 cmts. b, d.

[132] Similarly, the Uniform Nonparent Custody & Visitation Act's (UNCVA) "consistent caretaker" provision, unlike the 2017 UPA's de facto provision, "does not require that the individual seeking custody or visitation hold the child out as his or her own." UNIF. NONPARENT CUSTODY & VISITATION ACT § 4 cmt. (UNIF. L. COMM'N 2018). Consistent with its treatment of "nonparents," the UNCVA's "consistent caretaker" provision also departs from the 2017 UPA's de facto parent provision by "not requir[ing] that the individual has undertaken 'full and permanent responsibilities of a parent.'" *Id.*

[133] RESTATEMENT Draft No. 2 § 1.82 cmt. b.

[134] *See* Joslin & NeJaime, *supra* note 11, at 363 fig.7.

relatives constitute 36% of functional parents in our dataset.[135] Grandparents are featured in two-thirds of these cases.[136] Yet, we observe variation across jurisdictions that appears to relate to the requirements imposed by the relevant functional parent doctrine. For example, in California, where the functional parent doctrine requires that the person held the child out as their child, 90% of the cases in the dataset feature intimate partners (same-sex or different couples, married or unmarried).[137] In contrast, in Kentucky, where the main doctrine requires primary caregiving and financial support of the child but does not require that the person held out the child as their child, 70% of the cases in the dataset feature relatives.[138]

In applying a functional parent doctrine like the one from Kentucky, courts are protecting children's relationships with the individuals who are in fact parenting them, regardless of whether the person refers to the child as *their* child. In 93% of the cases in our dataset in which the court recognizes a person as a functional parent, that person appears to have been the child's primary caregiver.[139] Among the seventy-two cases in which the court recognized a grandparent as a functional parent, in all but one the grandparent was serving as the child's primary caregiver at the time the proceeding was initiated.[140] In all but four of the seventy-two cases, no legal parent was serving as the child's primary caregiver at the time of the proceeding.[141] While some grandparents do in fact regard the child as *their* child, many others do not. A grandparent, for example, may not want to disrespect or threaten the parental status of the child's biological parent (the grandparent's child).[142] From this perspective, we see that, as compared to a doctrine that requires holding out, the Restatement's de facto parent approach has the capacity to more fully protect children's relationships with the individuals who are parenting them.

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135 *See id.* at 356 fig.5.

136 *See id.* at 356–57.

137 *See id.* at 339 n.131.

138 *See id.* at 358 n.208; Courtney G. Joslin & Douglas NeJaime, *Functional Parent Doctrines Database, Version 1.0 (2023)*, YALE L. SCH. LILLIAN GOLDMAN L. LIB., https://perma.cc/Q876-NMXH.

139 *See* Joslin & NeJaime, *supra* note 11, at 378 fig.15.

140 *See id.* at 364.

141 *See id.*

142 *See* 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, 600–01 (2010).

D. The Evolving Understanding of Parenthood

Over time, family law has shifted toward a view of de facto parents as parents.[143] As we have seen, the Restatement reflects this shift. As I show in the following discussion, the evolution of de facto parent doctrines is consistent with broader trends in parentage law.

Across jurisdictions, individuals who are parenting children in the absence of a biological or adoptive tie can be treated as parents. The marital presumption, for example, has become more explicitly nonbiological as it has applied in a gender-neutral fashion.[144] This result has been sanctioned by the Supreme Court, even if it remains contested in some states.[145] More broadly, intended parent doctrines produce nonbiological parentage by treating individuals as parents based on consenting to assisted reproduction with an intent to be a parent of the resulting child.[146] These doctrines increasingly have been codified in forms that reach single parents as well as different-sex and same-sex parents in marital and nonmarital families. In addition, a key mechanism for establishing parentage—indeed, the most common way in which parentage is established for nonmarital children—has been expanded in explicitly nonbiological directions. While voluntary acknowledgments of *paternity* apply to men declaring their status as biological fathers, more than ten states now maintain broader acknowledgments of *parentage*. With these forms, not only biological fathers of nonmarital children but also, depending on the state, nonbiological presumed or intended parents of marital or nonmarital children can establish parentage.[147]

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143 *See* Grossman, *supra* note 29, at 336–39 (documenting how state supreme courts have come to see de facto parents as equal parents); Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495 (2014) ("[N]ot only has the number of states that extend at least some level of protection to nonbiological parents grown, but it is increasingly the case that these nonbiological parents are treated as full and equal legal parents.").

144 *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1242 (2016).

145 *See* Pavan v. Smith, 582 U.S. 563, 567 (2017). *But see* Gatsby v. Gatsby, 495 P.3d 996, 999 (Idaho 2021); Wilson v. Williams, No. FD-2021-3681, at *5 (Okla. Cnty. Dist. Ct. Feb. 13, 2023).

146 *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2291–96 (2017); Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 435–38 (2021).

147 *See, e.g.*, CAL. FAM. CODE § 7612(e) (West 2023); CONN. GEN. STAT § 46b-476 (2023); R.I. GEN. LAWS § 15-8.1-301 (2023); VT. STAT. ANN. tit. 15C, §§ 301–312 (2023). *See generally* Joslin, *Nurturing Parenthood*, *supra* note 75.

Functional parent doctrines, including de facto parent doctrines, reflect and advance this shift away from biological conceptions of parenthood.[148] Today, of the thirty-four U.S. jurisdictions with functional parent doctrines, all but a handful give functional parents standing to seek custody under a best-interests-of-the-child standard.[149] In some jurisdictions, it is clear that a functional parent also has a child support obligation.[150] Still, these custodial rights and support obligations may not equate with legal parentage.[151] The person may not be considered a parent, for example, for purposes of government benefits or wrongful death claims.[152] Nonetheless, there is a recent trend, evident in de facto parent statutes based on the 2017 UPA, to treat de facto parents as legal parents.

This move toward legal parentage aligns de facto parentage with another common functional parent doctrine—the "holding out" presumption of parentage. The 1973 Uniform Parentage Act[153] (1973 UPA), which aimed to equalize treatment between marital and nonmarital children in the wake of landmark U.S. Supreme Court decisions, includes not only a marital but also a nonmarital presumption of paternity. The 1973 UPA's nonmarital holding out presumption provides: "A man is presumed to be the *natural* father of a child if . . . he receives the child into his home and openly holds out the child as his *natural* child."[154] Family law has long used the term "natural" to refer to the biological parent. Although this presumption envisioned parentage for biological fathers, it was clear, especially in light of relatively unsophisticated methods of determining genetic parentage, that it could apply to men who were not in fact the child's biological father.[155]

Almost three decades after the 1973 UPA's promulgation, courts in some states, most notably the California Supreme Court

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148 *See* NeJaime, *supra* note 24, at 332.

149 *See* Joslin & NeJaime, *supra* note 11, at 351 fig.2.

150 This is true under statutory functional parent doctrines as well as under some common law or equitable doctrines. *See, e.g.*, L.S.K. v. H.A.N., 813 A.2d 872, 878 (Pa. Super. Ct. 2002) (holding that a nonbiological mother who stood *in loco parentis* was "responsible for the emotional and financial needs of the children"). In many states with common law doctrines, though, there is simply a lack of clear authority on this question.

151 *See, e.g.*, Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1198–1217 (2010) (exploring the extent of the protection provided by equitable parentage doctrines).

152 *See id.* at 1216.

153 UNIF. PARENTAGE ACT (UNIF. L. COMM'N 1973).

154 *Id.* § 4(a)(4) (emphasis added).

155 *See* Joslin & NeJaime, *supra* note 11, at 334 & nn.97–98.

in a landmark 2002 decision, began to explicitly apply the holding out presumption to men who openly acknowledged that they were not the child's biological father.[156] Through judicial application, the holding out presumption became a functional parent doctrine. "Natural" did not mean simply "biological." Instead, a "natural" parent-child relationship could exist when the father, though "not biologically linked to the child," "nevertheless has been the child's father in every social and cultural sense and has demonstrated a commitment to continuing to raise the child."[157] Eventually, courts in some states, including California, began to apply the presumption in a gender-neutral fashion to reach nonbiological mothers.[158] From this perspective, it became increasingly clear that the presumption's reference to "natural" parent meant "legal" parent. Indeed, California lawmakers amended the family code in 2014: "'Natural parent' . . . means a nonadoptive parent . . . , whether biologically related to the child or not."[159]

The 2002 version of the UPA eliminated the term "natural" from the holding out presumption, instead simply referring to "the father of a child" and requiring the man to "openly h[o]ld out the child as his own."[160] In this way, the 2002 version of the UPA appeared to codify the nonbiological application of the presumption.[161] This was not uncontroversial; the 2000 version of the UPA had removed the holding out presumption entirely.[162] But in response to significant resistance, the amended 2002 version restored the presumption. Importantly, though, the 2002 presumption narrowed the potential claimants by requiring that holding out occur "for the first two years of the child's life," rather than simply at any point while the child is a minor.[163]

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156 *See In re* Nicholas H., 46 P.3d 932, 933–34 (Cal. 2002).

157 Petition for Review of Decision of the Court of Appeal First Appellate District at 17, *In re* Nicholas H., 120 Cal. Rptr. 2d 146 (Cal. 2002) (No. S100490).

158 *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 668 (Cal. 2005); Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016); *In re* Salvador M., 4 Cal. Rptr. 3d 705, 708–09 (Ct. App. 2003); *In re* Karen C., 124 Cal. Rptr. 2d. 677, 679–81 (Ct. App. 2002).

159 CAL. FAM. CODE § 7601(a) (West 2023).

160 UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2002).

161 The 2002 version of the UPA makes clear that the presumption would not necessarily be rebutted by genetic evidence. *See* UNIF. PARENTAGE ACT § 608(a) (UNIF. L. COMM'N 2002, amended 2017) ("[T]he court may deny a motion [to] order . . . genetic testing . . . if . . . (1) the conduct of the mother or the presumed . . . father estops that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship.").

162 Joslin and I discuss conflict over the continued necessity for a holding out presumption and its elimination from the 2000 version of the UPA in Joslin & NeJaime, *supra* note 11, at 335 n.106.

163 UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2002, amended 2017).

The most recent version of the UPA explicitly adopts this functional approach to the holding out presumption and does so in a gender-neutral fashion. The 2017 UPA provides: "An individual is presumed to be a parent of a child if . . . the individual resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual's child."[164] A number of states have adopted the 2017 UPA's nonbiological and gender-neutral holding out presumption.[165]

The 2017 UPA treats both the de facto parent doctrine and the holding out presumption as functional parent doctrines that yield *legal* parentage.[166] As the 2017 UPA's preface explains, both extend "parental rights to people who have *functioned* as parents to children but who are unconnected to those children through either biology or marriage."[167] Similarly, when the 2017 UPA's commentary explains that, "by statute and through case law, several states recognize [functional parents] as legal parents," it cites both de facto parent precedents and holding out precedents.[168]

What do we gain by locating the Restatement's treatment of de facto parent status within the broader context of functional parent doctrines, including the holding out presumption? Why does it matter whether we understand de facto parents as parents or as nonparent third parties? The next Part turns to the constitutional stakes.

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164 *See* UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017).

165 *See* CONN. GEN. STAT. § 46b-488(a)(3) (2023) ("[A] person is presumed to be a parent of a child if . . . The person . . . resided in the same household with the child and openly held out the child as the person's own child from the time the child was born . . . and for a period of at least two years thereafter."); ME. STAT. tit. 19-A, § 1881(3) (2015) (same); 15 R.I. GEN. LAWS § 15-8.1-401(a)(4) (2023) (same); VT. STAT. ANN. tit. 15C, § 401(a)(4) (2023) (same); WASH. REV. CODE § 26.26A.115(1)(b) (2023) (same, with a four-year holding out period).

166 *See* UNIF. PARENTAGE ACT prefatory note (UNIF. L. COMM'N 2017):

> Some states recognize [functional parents] under a variety of equitable doctrines—sometimes called de facto parentage, or in loco parentis, or the psychological parent doctrine . . . . [M]ore recently, states have begun to treat such people as legal parents under their parentage provisions. Two states—Delaware and Maine—achieve this result by including "de facto parents" in their definition of parent in their state versions of the Uniform Parentage Act. Other states, including California, Colorado, Kansas, New Hampshire, and New Mexico, reached this conclusion by applying their existing parentage provisions to such persons.

167 *Id.*

168 *See* UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM'N 2017) (citing, among other cases, *Elisa B.*, 117 P.3d 660 (applying the holding out presumption); *In re* S.N.V., 2011 WL 6425562 (Colo. App. 2011) (same); Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016) (same); *L.B.*, 122 P.3d 161 (applying the de facto parent doctrine); DEL. CODE ANN. tit. 13, § 8-201(c) (2023) (same); ME. STAT. tit. 19-A, § 1891 (2015) (same)). Because the holding out presumption comes from parentage legislation, the Restatement does not address it.

II. DE FACTO PARENTHOOD AND THE CONSTITUTION

This Part identifies how the constitutional parameters within which the law has addressed de facto parents have been shaped by an increasingly outdated view of functional parents as nonparents. More recent developments treating functional parents as parents, I argue, have implications for the constitutional dimensions of parent-child relationships.

First, I show how the understanding of de facto parents as third parties has animated the law's focus on *consent* of a legal parent as a requirement for de facto parent recognition. I observe how liberal application of the consent requirement may at least in part reflect the ongoing transition of de facto parents from nonparents to parents.

Next, I suggest that if we see de facto parents as *parents*, the requirement that a de facto parent show that a legal parent consented to the parent-child relationship makes less sense as a constitutional imperative. Consistent with this observation, I show how the consent requirement has significantly softened in more recent iterations of the de facto parent doctrine in which the person is treated as a legal parent. And I point to other parentage doctrines, including the holding out presumption, that treat individuals who are neither biological nor adoptive parents as legal parents without expressly requiring a showing that a legal parent consented to the parent-child relationship. I also examine recent developments recognizing more than two legal parents for a child. To adjudicate a functional parent as a third parent, some courts and legislatures have not required that both existing legal parents "consented" to the parent-child relationship.

Finally, I explain how viewing de facto parents as parents may lead us to ask why the law has been preoccupied with the constitutional rights of the other parent and has failed to grapple with the constitutional rights of the de facto parent (or the child). Biological parents who have developed parent-child relationships possess a constitutional liberty interest in parental recognition. De facto parents, I suggest, also may have a constitutional interest in being treated as a parent.

A. Consent and Its Complexities

As the Restatement makes clear at the outset of Chapter 1, "[i]t has long been recognized that parents have a constitutional liberty interest in the care and custody of their children that is

protected under the Due Process Clause of the 14th Amendment."[169] Parents, the Restatement continues, enjoy "the freedom to make decisions about their children's upbringing."[170] The Supreme Court held in *Troxel* that this parental authority includes the ability to exclude nonparents and to make decisions about a child's relationships with third parties.[171]

How does recognition of de facto parents fit within a constitutional framework protecting parental rights? The Restatement endeavors to "balance parents' constitutional rights to the care and custody of their children with the state's interests in protecting the child's health and well-being."[172] Through this lens, the government's strong interest in safeguarding "relationships between children and their primary caregivers"[173] can justify a departure from the position that "deference to parental authority is in the child's best interest."[174] Accordingly, deference to parental authority, which animates the high burdens placed on third parties under §§ 1.80 and 1.81, gives way in § 1.82, under which a person who meets the de facto parent standard can seek custody based on the best interests of the child—just like a legal parent.

The Restatement's de facto parent standard purports to build in protection for parental rights by requiring the de facto parent to show that "a parent consented to and fostered the formation of the parent-child relationship between the individual and the

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169 RESTATEMENT Draft No. 1 ch. 1, intro. note.

170 *Id.*

171 *Troxel*, 503 U.S. at 74. As attorney Jeff Atkinson has observed, after *Troxel*, "legislatures and courts have modified the rules by which third parties may obtain visitation, generally placing greater emphasis on the rights of parents and making it more difficult for third parties to obtain visitation." Atkinson, *supra* note 25, at 1. It is notable that earlier in the twentieth century, questions of nonparental custody and visitation did not necessarily present constitutional issues. As Nancy Polikoff observes about Professor Robert Mnookin's pathbreaking 1975 article regarding the issue, "[a] reader . . . cannot help but be struck by its omission of constitutional doctrine. In the analyses of disputes between parents and third parties, Mnookin did prefer parents, but without declaring such a rule constitutionally mandated." Polikoff, *supra* note 41, at 204. One might make a similar observation about the classic custody decision, *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), in which the court awarded custody to the grandparents, with whom the child had been living, over the father, based on a determination of the child's best interest. The court identified a "presumption of parental preference [that] . . . exists by statute," rather than as a constitutional matter, and it ultimately found "the primary consideration [to be] the best interest of the child." *Id.* at 156.

172 RESTATEMENT Draft No. 2 reporters' mem.

173 RESTATEMENT Draft No. 1 ch. 1, intro. note.

174 RESTATEMENT Draft No. 2 reporters' mem.

child."[175] The March 2019 draft Restatement explains that the consent requirement "is critical because it defers to a parent's constitutional right to the care and custody of the child until the parent fosters the formation of a parent[-]child relationship by ceding to a third party a significant amount of parental responsibility and decisionmaking authority."[176] In other words, a legal parent can transform a *third party* into a de facto parent by allowing the third party to form a parental relationship with the child.[177] Once they have done so, the legal parent can no longer object on constitutional grounds to the person's standing to seek custody or visitation. As a South Carolina court put it, "[a] parent has the absolute control and ability to maintain a zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she voluntarily invites a third party to function as a parent to the child."[178]

The Restatement explains that its position on consent is consistent with leading legal authorities.[179] In the 1995 Wisconsin Supreme Court decision from which the Restatement draws its standard, the court explained that its de facto parent test "protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent."[180] Recall that

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175 RESTATEMENT Revised Draft No. 4 § 1.82(a)(4). The Principles includes a requirement that the de facto parent show "the agreement of a legal parent to form a parent-child relationship." PRINCIPLES § 2.03(1)(c)(ii). The commentary explains that, "[a]lthough agreement may be implied by the circumstances, it requires an affirmative act or acts by the legal parent demonstrating a willingness and an expectation of shared parental responsibilities." *Id.* § 2.03 cmt. c, illus. 21.

176 RESTATEMENT Draft No. 2 reporters' mem., § 1.82 cmt. h. The December 2022 version (Revised Draft No. 4) replaces "third party" in this sentence with "individual." RESTATEMENT Revised Draft No. 4 § 1.82.

177 *See* Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. J. GENDER, SOC. POL'Y & L. 671, 706 (2012) ("The de facto parent cases take the view that a legal parent can consent to share the parental rights the Constitution grants her by inviting another adult into a child's life and encouraging the development of a functional parent-child relationship.").

178 Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) (applying the psychological parent doctrine).

179 *See* RESTATEMENT Draft No. 2 § 1.82 cmt. h ("The Uniform Parentage Act, Uniform Nonparent Custody and Visitation Act, and every jurisdiction that extends rights to de facto parents require" that "a third party claiming to be a de facto parent establish that a parent agreed to the formation of a parent[-]child relationship between the third party and the child." (citations omitted)).

180 *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 436 (Wis. 1995) (determining that a de facto parent could not obtain custody but could gain visitation when such visitation is in the best interest of the child).

the Wisconsin decision treated the de facto parent as a third party merely entitled to visitation.

The consent requirement seeks to address objections that de facto parents are (nonparents) impermissibly interfering with the constitutional rights of legal parents.[181] This framing tends to imagine a representative case—a postdissolution custody action between a functional parent and a legal parent who has been a consistent caregiver.[182] This is the kind of situation at issue in the Wisconsin case. From this perspective, the functional parent asks the state to intervene in the family in ways that may appear to threaten the legal parent's stable relationship with their child.

In our study of functional parent decisions, Joslin and I find that this scene is not as common as assumed. Postdissolution custody disputes constitute fewer than half of functional parent cases in our dataset.[183] Approximately a third of the cases feature child welfare involvement, meaning that state intervention in the family ordinarily preceded any claim by a functional parent.[184] Moreover, a large number of cases in our dataset feature situations in which a legal parent is not consistently caring for the child. In 30% of the cases in our dataset, a legal parent had been, but no longer appeared to be, a primary caregiver of the child.[185] In 17% of the cases, no legal parent appears to have ever served as the child's primary caregiver.[186] Accordingly, in many cases, the functional parent's claim is not disrupting a stable relationship between the legal parent and the child.

Instead, the functional parent is typically the child's primary source of parental care. In 83% of all cases in our dataset, the functional parent appears to have served as the child's primary

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[181] The Restatement also requires a de facto parent to meet a "heightened" evidentiary standard. Rather than adhere to the ordinary preponderance-of-the-evidence standard applicable to most civil proceedings, the Restatement requires de facto parents to make the necessary showing, including the showing of parental consent, by clear-and-convincing evidence. This, it explains, "is necessary to protect a parent's fundamental right to the care, custody, and control of the child and is consistent with *Troxel*'s requirement of special deference to a parent's decision." RESTATEMENT Draft No. 2 § 1.82 cmt. m. That is, the heavier burden placed on de facto parents grows out of the constitutional authority of parents to exclude nonparents.

[182] *See* Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. AM. ACAD. MATRIM. L. 589, 596–97 (2023).

[183] Joslin & NeJaime, *supra* note 11, at 368.

[184] *Id.* at 371.

[185] *Id.* at 366 fig.8.

[186] *Id.*

caregiver.[187] And when courts treat a person as a functional parent, the person almost always has been the child's primary caregiver.[188] Consider cases involving relatives—cases that constitute more than a third of all cases in our dataset. The relative typically is not seeking to remove the child from a secure placement with a legal parent. Instead, a legal parent or the state is often attempting to remove the child from a stable placement with the functional parent, who has been parenting the child.[189]

Perhaps because they are faced with these real-world situations, rather than the paradigmatic scene envisioned in the conventional constitutional framing, courts have not taken a particularly strict or formalistic approach to consent. While the Restatement does not devote much space to a discussion of the consent requirement, the prevailing approach evident in the relevant case law is not as protective of parental rights as the constitutional rationale would suggest.[190] Courts rarely require "formalities and clear indications of intent"[191] to share parental rights. They do not demand a "parentage agreement."[192] Instead, courts may more accurately be described as considering whether the legal parent "acquiesce[d]" to the de facto parent assuming parental functions.[193]

Courts have made clear that consent need not be express. Consent can be implied,[194] and "implied consent may be inferred

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[187] *Id.* at 363 fig.7.

[188] Joslin & NeJaime, *supra* note 11, at 378 fig.15 (noting that functional parents served as primary caregivers in 94% of cases in the dataset).

[189] *Id.* at 393–95.

[190] Some critics of functional parent doctrines argue that, to protect parents' constitutional rights, consent should be based on "formalities and clear indications of intent," Baker, *supra* note 14, at 147, such as a "parentage agreement," Strauss, *supra* note 14, at 963. They also argue that a legal parent's "[a]ssent to parental functions is not the same as assent to parenthood." *Id.* at 966. On this view, de facto parent status should require a showing that the legal parent consented to "transfer[ ] parental rights," *id.* at 964, or "share legal co-parentage," Baker, *supra* note 14, at 146 (emphasis omitted). As reflected in the Restatement's requirement that a parent consented to a "parental" relationship, this is not the view of contemporary courts and legislatures.

[191] *See* Baker, *supra* note 14, at 147.

[192] *See* Strauss, *supra* note 14, at 963.

[193] *See id.* at 963–64.

[194] *See* E.N. v. T.R., 255 A.3d 1, 34 (Md. 2021); K.W. v. S.L., 157 A.3d 498, 507 (Pa. Super. Ct. 2017).

from a legal parent's conduct."[195] Consent can be based on inaction.[196] For example, the parent may simply "not attempt to intercede in [the functional parent's] assumption of parental duties."[197]

A parent's absence may also constitute consent. That is, a legal parent who has failed to parent their child may be found to have consented to a parental relationship between the child and another person. For example, a "noncustodial biological parent [who] voluntarily absented himself from the child's life" has essentially given "consent for [a de facto parent] to establish a parent-child relationship."[198] An absent parent, on this view, cannot "erase the fact that someone else fulfilled the parental role in his absence."[199]

Extending this logic, some jurisdictions' functional parent doctrines focus on whether the legal parent failed to protect their parental rights and fulfill their parental responsibilities. Consider a few examples. North Carolina's common law doctrine inquires whether the legal parent "has acted inconsistently with his or her paramount parental status" and has "cede[d] paramount decision-making authority."[200] Montana's custody statute asks whether "the natural parent has engaged in conduct that is contrary to the child-parent relationship," which includes "voluntarily permitting a child to remain continuously in the care of others for a significant period of time."[201] A South Carolina court has reasoned that, if a legal parent allows a third party to assume "a large part of [ ] parental responsibilities," they necessarily "fostered the parent-child bond."[202]

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195 *E.N.*, 255 A.3d at 34.

196 *See id.* (finding inaction sufficient so long as such "inaction is knowing and voluntary and is reasonably understood to be intended as that parent's consent to and fostering of the third party's formation of a parent-like relationship with the child"); L.M. v. D.W., 2018 WL 298997, at *10 (Pa. Super. Ct. Jan. 5, 2018) (finding that "[t]hrough her own inaction, [a] [m]other acquiesced to the development of the *in loco parentis* relationship between [the child's] [g]randparents and [the] [c]hild").

197 *L.M.*, 2018 WL 298997, at *10.

198 *In re* Parentage of J.B.R., 336 P.3d 648, 654 (Wash. Ct. App. 2014).

199 *In re* C.M.S., 884 A.2d 1284, 1290 (Pa. Super. Ct. 2005) (finding that a father consented to the *in loco parentis* status of prospective adoptive parents through his "failure to establish any sort of bond with his newborn child or to provide in any way for her care").

200 Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010); *see also* Best v. Gallup, 715 S.E.2d 597, 599 (N.C. Ct. App. 2011).

201 MONT. CODE ANN. § 40-4-228 (2023).

202 *See, e.g.*, Middleton v. Johnson, 633 S.E.2d 162, 170 (S.C. Ct. App. 2006) (finding that, "by ceding over a large part of her parental responsibilities to [the psychological parent], [the legal parent] fostered the parent-child bond").

Courts appear less preoccupied with a strict application of a consent requirement and more concerned with promoting children's interests by protecting their existing relationships with the individuals who are parenting them.[203] From this perspective, it may not be surprising that some jurisdictions maintain functional parent doctrines that do not expressly address constitutional concerns and instead focus primarily on the person's role in the child's life. For example, Kentucky's de facto custodian doctrine requires that the person served as "the primary caregiver for, and financial supporter of, [the] child" and resided with the child for six months of the previous two years if the child is under 3, or for one year if the child is at least 3 or has been placed by child welfare authorities.[204] A de facto custodian enjoys "the same standing in custody matters that is given to each parent."[205] Kentucky courts routinely apply this doctrine to recognize a child's primary caregiver as a functional parent, and they do so without suggesting that such application poses constitutional problems.[206] In fact, a Kentucky appellate court rejected a constitutional challenge by explaining that "Kentucky's de facto custodian statute is not triggered unless the natural parent abdicates his or her role of primary caregiver by allowing another person to fulfill that function for a significant period of time."[207]

B. Questioning Consent

The requirement that a legal parent consented to the de facto parent's formation of a parent-child relationship makes less sense, from a constitutional perspective, as we begin to see the de facto parent simply as *a parent*—like any other parent. Developments from jurisdictions that regard a functional parent as a *legal* parent illustrate this.

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[203] As Professor Emily Buss has argued in her treatment of the parental status of "nontraditional caregivers," "parental identity derives not from any set of individual characteristics, but rather from the parent-child relationship itself and, more particularly, the centrality of the relationship in the child's life." Buss, *supra* note 13, at 651.

[204] *See* KY. REV. STAT. ANN. § 403.270(1)(a) (West 2023).

[205] *Id.* § 403.270(1)(b).

[206] *See* Joslin & NeJaime, *supra* note 11, at 352 (noting that of the 669 cases in our dataset, 122 come from Kentucky—the most of any state).

[207] Rogers v. Blair, 2003 WL 1250837, at *2 (Ky. Ct. App. Feb. 7, 2003).

1. Functional parents as legal parents.

The 2017 UPA, which treats a de facto parent as a legal parent, does not use the language of consent. Instead, it requires that "another parent of the child *fostered or supported* the bonded and dependent relationship" between the de facto parent and the child.[208] Tellingly, the Comment to the de facto parent section does not justify the requirement that another parent "fostered or supported" the de facto parent's relationship in constitutional terms.[209] This seemingly subtle difference in language—from "consented" to "fostered or supported"—may reflect the shifting status of de facto parents.

"Consent" comports with the conventional constitutional framing, in which a legal parent seemingly must waive their right to exclude a third party and allow the person to form a parental relationship. The 1995 Wisconsin decision, on which the Restatement heavily relies, required the de facto parent's "parent-like relationship" be formed with the "consent and assistance" of a legal parent.[210] As we have seen, Wisconsin treats a de facto parent merely as an individual entitled to seek visitation with the child—a view that the Restatement rejects.

No longer merely a third party intruding into the parental autonomy of legal parents, de facto parents now appear as parents. Connecticut, Maine, Vermont, and Washington each have codified de facto parent doctrines in recent years.[211] Each state takes the approach of the 2017 UPA, requiring that another parent "fostered or supported" the relationship and treating a de facto parent as a legal parent.

Of course, the requirement that another parent "fostered or supported" the de facto parent's relationship still makes the conduct of an existing legal parent matter. But is there a constitutional need to consider the legal parent's conduct? The 2017

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208 UNIF. PARENTAGE ACT § 609(d)(6) (UNIF. L. COMM'N 2017) (emphasis added).

209 *See id.* § 609 cmt. ("In most states, if an individual can establish that he or she has developed a strong parent-child relationship with the consent and encouragement of a legal parent, the individual is entitled to some parental rights and possibly some parental responsibilities.").

210 *See H.S.H.-K.*, 533 N.W.2d at 436.

211 *See* CONN. GEN. STAT. ANN. § 46b-490 (2022); ME. STAT. tit. 19-A, § 1891(3)(C) (2015); 15 R.I. GEN. LAWS ANN. § 15-8.1-501(a)(1)(vi) (2020); VT. STAT. ANN. tit. 15C, § 201(6) (2023); WASH. REV. CODE § 26.26A.440(4)(f) (2023). The Washington statute also adopts a preponderance-of-the-evidence standard, rather than the clear-and-convincing standard that the Restatement adopts for constitutional reasons. WASH. REV. CODE § 26.26A.440(4) (2023).

UPA's other functional parent doctrine—the holding out presumption—does not include a requirement of consent by another parent. Ordinarily, the presumption, which requires that the person lived with the child and held the child out as their child, arises with the knowing cooperation, or at least acquiescence, of another parent.[212] Still, the presumption does not require such a showing.[213] Indeed, this is in part why some skeptics of functional parent doctrines object to nonbiological application of the holding out presumption specifically.[214] Yet, such application of the presumption has only grown, and with few constitutional objections.[215]

This approach to functional parenthood is consistent with the law's approach to parentage more generally. As the Washington Supreme Court explained in 2005, "*Troxel* does not . . . place any constitutional limitations on the ability of states to legislatively, or through their common law, *define a parent* or family."[216] That is why, when the Delaware Supreme Court rejected a constitutional challenge to the state's de facto parentage statute, it reasoned:

> The issue here is not whether the Family Court has infringed [the biological parent's] fundamental parental right to control who has access to [the child] by awarding [the de facto parent] co-equal parental status. Rather, the issue is whether [the de facto parent] is a legal "parent" of [the child] who would also have parental rights to [the child]—rights that are co-equal to [the biological parent's].[217]

In other words, because a de facto parent is a *parent* under state law, permitting that person to pursue their parental "interest

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[212] *See, e.g.*, R.M. v. T.A., 233 Cal. App. 4th 760, 777 (Ct. App. 2015) (reasoning that, in the context of single parents, "the presumption will arise only if the single parent *allows* the circumstances to evolve to a point where the person is holding out the child as his or her own and receiving the child into his or her home for purposes of parental caretaking" (emphasis added)).

[213] *See, e.g.*, *In re* Salvador M., 4 Cal. Rptr. 3d 705, 706–09 (Ct. App. 2003) (treating a biological half-sister as a parent after the biological mother's death).

[214] *See* Baker, *supra* note 14, at 158–59.

[215] *See* CONN. GEN. STAT. § 46b-490(4) (2023); ME. STAT. tit. 19-A, § 1881(3) (2015); 15 R.I. GEN. LAWS § 15-8.1-501(a)(1)(iv) (2020); VT. STAT. ANN. tit. 15C, § 501(a)(1)(D) (2023); WASH. REV. CODE § 26.26A.115(1)(b) (2023); Elisa B. v. Superior Ct., 117 P.3d 660, 668 (Cal. 2005); Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016); Chatterjee v. King, 280 P.3d 283, 286–93 (N.M. 2012); *In re* Guardianship of Madelyn B., 98 A.3d 494, 501–02 (N.H. 2014); *In re* Parental Responsibilities of A.D., 240 P.3d 488, 490 (Colo. App. 2010).

[216] *In re* Parentage of L.B., 122 P.3d 161, 178 (Wash. 2005) (emphasis added); *see also* Buss, *supra* note 13, at 683 (arguing that "the Constitution should be read to afford the state broad authority to recognize nontraditional caregivers as parents").

[217] Smith v. Guest, 16 A.3d 920, 931 (Del. 2010).

through a legally-recognized channel cannot unconstitutionally infringe [a biological parent's] due process rights."[218]

2. Multiparent families and consent.

The decreasing salience of constitutional concerns with functional parent doctrines is also evident in emerging approaches of courts and legislatures to multiparent families. Joslin and I have found that functional parent doctrines are frequently applied in ways that lead a child to have more than two individuals who possess some parental rights.[219] Importantly, this is true even in states that do not expressly authorize the recognition of more than two legal parents. In most of these cases, functional parent doctrines that provide standing for a person to seek custody but do not treat the person as a legal parent are applied in ways that protect the relationship between the child and their primary caregiver (the functional parent).[220] This is possible even if the child already has two legal parents.[221]

What if only one parent has consented to the formation of a parent-child relationship between the functional parent and the child? The constitutional rationale for the consent requirement seems to suggest that, when a child has two legal parents, each legal parent is equally entitled to object to the functional parent's formation of a parent-child relationship. On this view, one parent cannot waive the other parent's constitutional rights.[222] As a family law matter, in the absence of an agreement or order providing otherwise, each parent maintains decision making authority over the child. If both parents have legal custody, neither parent would be legally empowered to make a major decision without consultation with the other. Surely, the addition of a parent is a major decision.

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218 *Id.*

219 *See* Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families: Real and Imagined*, 90 FORDHAM L. REV. 2561, 2579–85 (2022) (describing cases based on a West Virginia dataset).

220 *Id.* at 2579 (reporting large percentage of multiparent cases from West Virginia in which "the legal parents had contact with their child, but the child was not living with either of the legal parents, and the legal parents were not making decisions for the child").

221 As Solangel Maldonado rightly points out, treating functional parents as legal parents would limit functional parent recognition in states that do not expressly allow a child to have more than two legal parents. This observation, Maldonado explains, bolsters the Restatement's position since a court can recognize a de facto parent without concern that a child would have three legal parents. *See* Maldonado, *supra* note 126, at 563–64.

222 For this perspective, see Jeffrey Parness, *Unconstitutional Parenthood*, 104 MARQUETTE L. REV. 183, 197–205 (2020).

Few legal authorities expressly address this issue. Courts have come out on both sides. The Maryland high court has held that, "where there are two legal parents, both parents must knowingly participate in consenting to and fostering the third party's formation of a parent-like relationship with a child."[223] In contrast, a New Jersey court has held that, for purposes of the state's psychological parent doctrine, "it is sufficient if only one of the legal custodial parents has consented to the parental role of the third party."[224] These conflicting authorities address doctrines that do not treat a functional parent as a legal parent but instead simply give de facto parents standing to seek custody based on the best interests of the child.

In jurisdictions that treat a de facto parent as a legal parent, the standard tends to require only that "another parent" of the child fostered or supported the de facto parent's parent-child relationship. Under Washington's common law de facto parent doctrine, a court had reasoned that, in situations in which the child has two existing legal parents, requiring only one parent to consent to a de facto parent-child relationship would "unilaterally abrogate the constitutional rights of at least one person"—the other legal parent.[225] Yet, when the Washington legislature subsequently codified a de facto parent doctrine in ways that treated the de facto parent as a legal parent, it required only that "another parent . . . fostered or supported" the parental relationship.[226] It did so as part of a broader parentage law that expressly allows a child to have more than two legal parents.[227] Washington courts have since applied the statutory de facto parent doctrine to recognize more than two legal parents without raising constitutional questions.[228] Washington's approach follows from the 2017

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223 *E.N.*, 255 A.3d at 33.

224 K.A.F. v. D.L.M., 96 A.3d 975, 983 (N.J. Super. Ct. App. Div. 2014).

225 *In re* Custody of Z., 2007 WL 2600853, at *8 (Wash. Ct. App., Sept. 11, 2007).

226 WASH. REV. CODE § 26.26A.440(4)(f) (2023).

227 *See id.* § 26.26A.460(3).

228 *See, e.g.*, *In re* Custody of T.B.M., 2021 WL 2156938, at *3–4 (2021) (affirming the recognition of a grandmother as a de facto parent and thus third parent). In contrast, the Maine Supreme Court has held that a de facto parent must prove that each "legal parent who appears and objects to the de facto parentage petition" fostered or supported the parent-child relationship, reasoning that "hold[ing] otherwise would potentially allow the unilateral actions of one legal parent to cause an unconstitutional dilution of another legal parent's rights." Martin v. MacMahan, 264 A.3d 1224, 1234 (Me. 2021) (finding that both legal parents fostered or supported the de facto parents' relationship with the child). The Maine court reached its conclusion based on precedents decided under the state's common law doctrine, even though the subsequent statutory de facto parent doctrine provides only that "another parent" fostered or supported the relationship. *Id.* Importantly, the court

UPA, which authorizes a court to recognize a de facto parent as a legal parent, even if there are already two legal parents, based on a showing that, among other things, "another parent" fostered or supported the parental relationship.[229]

Application of the holding out presumption bolsters the 2017 UPA's position. Consider developments in California, which authorizes a court to recognize more than two legal parents for a child when not doing so would be detrimental to the child.[230] Courts in the state have applied the holding out presumption in ways that recognize a third legal parent without inquiring into whether both of the other legal parents consented to (or even acquiesced in) the person's formation of a parent-child relationship.[231] That is because, according to a California appellate court, the person simply "is a parent."[232] In other words, the state is empowered to define "parent" in ways that include an individual who received the child into their home and held out the child as their child, regardless of the involvement of another legal parent.[233] Accordingly, the holding out presumption operates as a functional parent doctrine with the capacity to treat a person as a third legal parent without inquiring into the actions of the other legal parents.

For its part, the Restatement simply takes the position that "*a* parent" consented to and fostered the relationship between the de facto parent and the child.[234] This seems to suggest that in a situation involving a child with two legal parents, a de facto parent can meet the requirements by showing that only one of the legal parents consented to the relationship. Importantly, this represents a departure from the Principles, where the ALI explicitly took the view that "[t]he legal parent *or parents* must have agreed

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emphasized that the doctrine "does not require proof that every legal parent has given express consent to the de facto parent relationship," but instead demands only that "the child's legal parent or parents have implicitly, through acts or omissions if not through words, fostered, supported, and accepted the person's parental role." *Id.* at 1236.

229 *See* UNIF. PARENTAGE ACT § 609(d)(7) (UNIF. L. COMM'N 2017). The 2017 UPA authorizes a court to recognize a third legal parent only upon a showing that not doing so would be detrimental to the child. *See id.* § 613.

230 *See* CAL. FAM. CODE § 7612(c) (West 2023).

231 *See* R.M. v. J.J., 2022 WL 1301801, at *7 (Cal. Ct. App. Apr. 29, 2022) (rejecting the argument that "[a]dding a former stepfather as a third parent over the objection of custodial parents violates their rights to make decisions regarding the care, custody, and control of their children").

232 *Id.* (quoting C.A. v. C.P., 29 Cal. App. 5th 27, 43 (2018)).

233 *See* Grossman, *supra* note 29, at 337 ("Parentage . . . is a threshold determination that precedes the exercise of parental rights.").

234 *See* RESTATEMENT Draft No. 2 § 1.82(a)(4) (emphasis added).

to the arrangement."[235] In this sense, the ALI's movement from the Principles to the Restatement reflects the evolving status of de facto parents. While the position of the Principles makes sense from the conventional constitutional understanding of de facto parents as third parties who form parental relationships, the Restatement's approach aligns better with an emerging view of de facto parents simply as parents. And it promotes the foundational justification for functional parent doctrines: protecting children's relationships with the individuals who are parenting them.

C. The Constitutional Status of De Facto Parents

Up to this point, we have been focused on the constitutional rights of the legal parents who, in litigation, object to the de facto parent's recognition. A de facto parent standard that includes a requirement of parental consent rests on an assumption that the objecting parent has interests of constitutional magnitude, but the de facto parent does not. That assumption is problematic for a number of reasons that I trace in other work.[236] Here, I briefly point to the constitutional stakes, not for the objecting parent, but for the de facto parent, who may have a constitutional interest in maintaining their parent-child relationship.

The constitutional dimensions of parental recognition trace their origins to the second half of the twentieth century, when the U.S. Supreme Court protected the rights of unmarried fathers.[237] In doing so, the Court emphasized the social dimensions of parenthood.[238] The biological tie between father and child—a tie

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[235] PRINCIPLES § 2.03, cmt. c (emphasis added). In addition, the definition of "parent by estoppel," the more robust functional parent doctrine in the Principles, explicitly provides that the person show that they "lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (*or, if there are two legal parents, both parents*)." *Id.* § 2.03(1)(b)(iv) (emphasis added).

[236] *See generally* NeJaime, *supra* note 24 (challenging "the conventional assumption that the Constitution protects only biological parent-child relationships and mak[ing] an affirmative case for constitutional protection for nonbiological parents").

[237] *See* Stanley v. Illinois, 405 U.S. 645, 658 (1971); Caban v. Mohammed, 441 U.S. 380, 388–94 (1979); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2309–15 (2016). Of course, the Court protected parental rights in the 1920s in decisions that eventually supported protections for parental recognition, but it is important to distinguish between parental authority to direct a child's upbringing and a right to state recognition of one's parent-child relationship. *See* NeJaime, *supra* note 24, at 279.

[238] *See id.* at 284.

that long had been disregarded in nonmarital families—furnished the opportunity to form a constitutionally protected parental relationship. But the liberty interest turned on whether the unmarried father in fact developed such a relationship.[239]

Today, a new group of parents seeks protection in the Constitution: functional parents, raising children to whom they are not biologically connected and whom they have not adopted. These individuals may assert a liberty interest in being recognized as the child's parent. Courts—typically in jurisdictions that lack a functional parent doctrine—have not been particularly receptive.[240] But there are signs that, just as it did with respect to unmarried fathers in the twentieth century, the law may grow in ways that recognize the weight of the parental interests at stake.

In 2005, the Washington Supreme Court noted in its foundational de facto parent decision that the de facto parent "persuasively argue[d]" that she has "constitutionally protected rights to maintain the[ ] parent-child relationship."[241] The Washington court did not reach the constitutional question, since it ruled that the de facto parent could be recognized as a common law matter.[242] In other decisions protecting functional parents on common law or equitable grounds, courts have invoked constitutional principles and precedents. That is, even when the decision has not rested on constitutional grounds, some courts have engaged constitutional law. These courts have adapted constitutional commitments to contemporary family arrangements in ways that extend protection to functional parents and the children they are raising.[243]

Consider a 2000 Rhode Island Supreme Court decision recognizing that a person in an unmarried same-sex couple could qualify as a de facto parent under state family law.[244] The court viewed

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239 *See* Lehr v. Robertson, 463 U.S. 248, 271 (1983).

240 *See, e.g.*, Hawkins v. Grese, 809 S.E.2d 441, 447 (Va. Ct. App. 2018) ("[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." (quoting Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 943 (1977)); Russell v. Pasik, 178 So. 3d 55, 60 (Fla. Dist. Ct. App. 2015) (emphasis in original) (citations omitted):

> [T]he act of assuming parental responsibilities and actively caring for a child is sufficient to develop constitutional rights in favor of the parent. . . . However, ... it is the *biological connection between parent and child* that "gives rise to an inchoate right to be a parent that may develop into a protected fundamental constitutional right."

241 *L.B.*, 122 P.3d at 177 n.27.

242 *Id.* at 178.

243 *See* NeJaime, *supra* note 24, at 313–16.

244 *See generally* Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).

precedents on unmarried fathers as protecting "an actual relationship of parental responsibility," rather than simply a biological tie.[245] Indeed, the court characterized a 1978 U.S. Supreme Court decision denying the constitutional claim of an unmarried father as determining that, because

> the biological parent "never shouldered any significant responsibility with respect to the daily supervision . . . or care of the child," . . . his constitutional rights were of less weight than those of a married but nonbiological father who had "borne full responsibility for the rearing of his children during the period of the marriage."[246]

Although the U.S. Supreme Court had never approached stepfathers ("married but nonbiological father[s]"[247]) as possessing a liberty interest in their relationships with their stepchildren, the Rhode Island Supreme Court implied that both men seeking parental status—the biological father and the stepfather—possessed interests of constitutional magnitude. More importantly, it suggested that the stepfather's liberty interest was more significant precisely because he had formed actual relationships with his stepchildren—or what the court described as "his children."[248]

Other state courts also have read constitutional precedents to protect developed relationships between functional parents and the children they are raising. In recognizing psychological parents in its landmark 2000 decision, the New Jersey Supreme Court relied on an important 1983 precedent on the rights of unmarried fathers to explain that, "for constitutional as well as social purposes," the significance of parent-child relationships "lies in the emotional bonds that develop between family members as a result of shared daily life."[249] In 2007, the Minnesota Supreme Court quoted that same case to support its view that a functional parent was part of a "recognized family unit" entitled to protection.[250]

These state courts did not hold that the functional parent possessed a liberty interest in parental recognition. The courts simply allowed such recognition as a family law matter. Still, they

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[245] *Id.* at 973 (citing *Lehr*, 463 U.S. at 261).

[246] *Id.* at 974 (quoting Quilloin v. Walcott, 434 U.S. 246, 256 (1978)).

[247] *Id.*

[248] *Id.* (quoting *Quilloin*, 434 U.S. at 256).

[249] V.C. v. M.J.B., 748 A.2d 539, 550 (2000).

[250] *See* Soohoo v. Johnson, 731 N.W.2d 815, 822 (Minn. 2007) (quoting *Lehr*, 463 U.S. at 258).

viewed recognition on family law grounds as animated by and consistent with constitutional commitments.

The more that we see de facto parents as parents, rather than as nonparent third parties, the more we might see de facto parents, as well as the children they are raising, as having constitutional interests in maintaining the parent-child relationship. We might begin to reason about the constitutional stakes of de facto parenthood not from the perspective of the objecting parent's right to exclude but instead from the perspective of the functional parent's right to parent—and the child's right to maintain that parental relationship.

In an earlier era, the law failed to respect the parental interests of unmarried biological fathers, seeing these men as unwilling and unable to function as parents. Eventually, as courts began to appreciate the parent-child relationships formed by some unmarried biological fathers, they found that such men possessed a constitutional interest in being treated as parents. Today, the law in some states fails to respect the parental interests of functional parents, seeing these individuals merely as third-party caretakers. Eventually, as courts appreciate the parent-child relationships formed by functional parents, they may find that functional parents possess a constitutional interest in being treated as parents. On this view, states may be required, rather than simply allowed, to recognize functional parents as parents.[251]

CONCLUSION

In this Essay, I have traced how the status of de facto parents has shifted from nonparent to parent. Yet, as we have seen, that shift has been partial and is incomplete. In fact, the very terms used to describe these individuals suggest as much. They are not simply parents but de facto parents or functional parents. Their status is stipulated and constructed, as if they are not truly parents.

Yet, they are doing the critical work of parenting. Indeed, their very status as parents flows from the fact that they are *parenting*. That is, their legal status is being constructed in ways that emphasize parental acts—the person *functioning* as a parent (functional parent), the parent *in fact* (de facto parent), the person standing *in the place of a parent* (*in loco parentis*). It seems more appropriate to see these individuals not as imposters but as the

[251] *See* NeJaime, *supra* note 24, at 365.

best examples of the real thing, often stepping up to devote themselves to parenting children who are especially vulnerable.

If one were to look solely at contemporary commentary, one might conclude that nonbiological parents in same-sex couples are the primary target of functional parent doctrines.[252] Indeed, many of the cases that have garnered the most attention—including the Wisconsin, New Jersey, and Washington decisions discussed above—involved same-sex couples. Yet, as Joslin and I have shown in our study of functional parent decisions, same-sex couples are not the doctrines' primary beneficiaries.[253] Instead, the doctrines are serving families that depart from the conventional norms of the two-parent, nuclear family.

Many functional parents are family members who step in to parent a child when an existing legal parent is unwilling or unable. Of the 669 decisions in our dataset, 242 involve relatives. This constitutes 36% of the cases.[254] Grandparents constitute two-thirds of these cases.[255] Among the seventy-two cases in which the court recognized a grandparent as a functional parent, in all but one the grandparent was serving as the child's primary caregiver at the time the proceeding was initiated.[256] In all but four of the seventy-two cases, no legal parent was serving as the child's primary caregiver at the time of the proceeding.[257] Courts routinely apply functional parent doctrines to protect the child's relationship with the person who is in fact parenting them.[258]

Given the circumstances facing these families, it seems especially critical to recognize the child's primary caregiver as a functional parent. Individuals are forming parent-child relationships in response to their families' struggles with substance use disorders, physical and mental health challenges, incarceration, housing insecurity, and poverty. Many of these families are subject to child welfare intervention.[259] In such cases, courts can safeguard the child's relationship with their primary caregiver and prevent their removal into state custody.[260]

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252 *See* Joslin & NeJaime, *supra* note 11, at 384–86 (documenting this assumption).
253 *Id.* at 387–88.
254 *Id.* at 356 fig.5.
255 *Id.* at 357.
256 *Id.* at 364.
257 *See* Joslin & NeJaime, *supra* note 11, at 364.
258 *See id.* at 366–67.
259 *See id.* at 371.
260 *See id.* at 418–21.

Ultimately, our comprehensive review of functional parent decisions shows how families that have been marginalized—both in our society and in legal commentary on the family—are shaping legal understandings of parenthood.[261] From this perspective, we see increasing awareness that parenthood is a practice. Amid the challenges of daily life, parenthood emerges from the consistent work of care and the assumption of responsibility. If we were to look only at the most prominent legal authorities—the output of the ALI and the Uniform Law Commission, legal scholarship, and cases that garner the most attention—we would not fully appreciate the vital role that functional parent doctrines, like de facto parenthood, play in the lives of vulnerable children. We would not see how many grandparents and aunts and uncles are *parents*. We would not see how many stepparents and unmarried partners are *parents*. We would not fully apprehend the ways in which courts are recognizing these parents.

In the end, we should call them what they are: parents.

[261] It could be that we need a more robust understanding of important nonparental figures. That is, it might be that some individuals who would qualify as functional parents should be viewed as nonparents, but the law should do more to protect their relationships to the children for whom they are providing care. I do not pursue that path here. Instead, I suggest that shifting de facto parent doctrines are contributing to new understandings of *parenthood*, and these new understandings are emerging across parentage law.