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## A NEW FORMALISM FOR FAMILY LAW

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### ABSTRACT

*Family law is simultaneously moving toward and away from formalist decision making. Examining family law across its various component doctrines—custody disputes, child support, jurisdiction, and parentage—reveals these two competing trends. In some of these areas, scholars and lawmakers have recognized that litigating under open-ended, amorphous standards is unpredictable and often painful, with costs that undermine the very purposes served by these legal frameworks; in these areas we are witnessing a turn toward determinate rules over judicial discretion as the preferred means of resolving disputes. In other areas, however, family law is experiencing a trend toward more flexible decision making that prioritizes functional assessment of relationships above formal legal status. This Article brings all of these developments into the same frame for the first time. It asserts that the “functional turn” in some areas of family law would benefit from the lessons learned in other areas: that indeterminate standards and contextualized decision making do*

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*not necessarily provide the best means of doing justice for separating families. I argue instead for a new formalism, one that extends the profound advantages of certainty and stability to a wider range of family relationships.*

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## INTRODUCTION

Family law is simultaneously moving toward and away from formalist decision making. Examining family law across its various component doctrines—custody disputes, jurisdictional frameworks, child support, and parentage determinations—reveals these two competing trends. In some of these areas, scholars and lawmakers have recognized that litigating under open-ended, amorphous standards is unpredictable and often painful, with costs that undermine the very purposes served by these legal frameworks.<sup>1</sup> The shortcomings of the famously indeterminate standard for awarding child custody have inspired reform efforts that seek to provide more certainty and predictability for separating families. These shifts have already occurred in the laws that govern child support and the jurisdictional frameworks used to determine where these disputes should be litigated. In these areas lawmakers have prioritized determinate rules over judicial discretion as the preferred means of resolving disputes.

In other areas, however, family law is experiencing a trend toward more flexible decision making that prioritizes functional assessment of relationships above formal legal status. With regard to disputes over parentage between individuals who do not conform to the traditional template of a heterosexual married couple, there has been a push for legislatures and courts to acknowledge more fluid conceptions of family, assigning rights and responsibilities on the basis of highly individualized assessments.

This Article brings all of these developments into the same frame for the first time. It demonstrates that the “functional turn” in some areas of family law would benefit from the lessons learned in other areas: that indeterminate standards and contextualized decision making do not necessarily provide the best means of doing justice for separating families, who turn to the law at junctures of conflict and strife. Moreover, reliance on the functionalist model of resolving

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1. See, e.g., Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11-12 (1987) (asserting that the best-interests standard is “self-defeating, in that finely tuned consideration of the best interests of each particular child is likely to impose ‘process costs’ that on balance tend to make children worse off”).

domestic relations disputes perpetuates rather than alleviates inequality, particularly on the basis of sexual orientation. A family law framework that emphasizes formal legal status has been needlessly tethered to a traditionalist view of legitimate family composition,<sup>2</sup> obscuring the extent to which equality requires full access to legal mechanisms for formalizing relationships.

This Article argues for a new formalism: determinate but not traditional, it offers predictability and certainty on a much more inclusive basis than either the old formalism or the functional analysis that has increasingly been working as family law's stopgap. The new formalism I envision incorporates the best features of the functional turn—emphasis on intent, rejection of heteronormativity, focus on the interests of children—while doing much more to recognize the virtues of determinate rules at moments of conflict and strife.

I begin in Part I by setting forth a working definition of formalism and contrasting that to the flexible and discretionary standards that characterize much of family law. In Part II, I identify areas of family law in which scholars and lawmakers have recognized the shortcomings of unfettered discretion and have attempted to craft more determinate rules of decision. These include disputes over the initial allocation of child custody; petitions to modify existing custody orders and the jurisdictional frameworks that govern where parties can litigate such disputes; and the rules that govern the imposition of child support. In Part III, I identify the contrary trend: when it comes to ascertaining which individuals our legal system should recognize as the parents of a child in the first place, we are witnessing an increased willingness on the part of courts, scholars, and lawmakers to embrace flexible, individualized, and functional assessments of the relationships in question. I critique this development in Part IV, explaining why it is an inadequate response to the needs of nontraditional families, one that replicates, in more extreme form, the uncertainty and instability so thoroughly

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2. Cf. Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 21 (2008) (describing a work that “reveals that the allure of a bi-parentage rule lies in its ability to naturalize a normative family in which only enduringly monogamous heterosexual couples reproduce”) (citing COMM’N ON PARENTHOOD’S FUTURE, INSTITUTE FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS 22 (2006)).

criticized in other areas of family law. Instead, I argue, the law should offer a re-imagined formalism, one that extends the benefits of predictability and administrability to a larger and more inclusive group of families. While this Article does not offer a comprehensive proposal for this formalist reform, it concludes with some preliminary ideas for the shape that such reform should take.

### I. A WORKING DEFINITION OF FAMILY LAW FORMALISM

Before aligning multiple developments in family law upon any sort of axis that involves a notion of formalism, it is necessary to define what formalism is. As Professor Frederick Schauer recognized more than twenty years ago, the scholarly literature reveals “scant agreement” on what makes a legal decision or framework formalist, “except that whatever formalism is, it is not good.”<sup>3</sup> I embrace and rely on Professor Schauer’s own description of formalism as “the concept of decisionmaking according to *rule*.”<sup>4</sup> Nonetheless, we must untangle various strands of formalism to arrive at a working definition that helps us sort out the trends in family law with which this Article is concerned.

#### *A. Synthesizing Multiple Notions of Formalism*

In a discussion of legal formalism, Professor Lawrence Solum uses the term “hard law” to describe “determinate legal rules which draw relatively ‘bright lines.’”<sup>5</sup> In contrast, another core meaning of formalism describes a judicial practice: adherence to legal rules without consideration of purposes, policies, or other concerns

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3. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509-10 (1988) (noting a range of meanings in the literature, all of them pejorative).

4. *Id.* at 510. Schauer elaborates by noting that “[f]ormalism is the way in which rules achieve their ‘ruleness’ precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.” *Id.* For further discussion of the nature of legal rules, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 231 nn.20-21.

5. Lawrence Solum, *Legal Theory Lexicon: Formalism and Instrumentalism*, LEGAL THEORY BLOG (Aug. 12, 2012, 9:11 PM), <http://lsolum.typepad.com/legaltheory/2012/08/legal-theory-lexicon-formalism-instrumentalism.html>.

underlying or external to the rule.<sup>6</sup> My observations primarily concern the first attribute of formalism. Family law has become increasingly codified in comprehensive statutory schemes, and this Article is oriented more toward the nature of the rules provided to judges rather than the method of judging or the interpretive approach used by the judges to whom the rules are directed. Professor Schauer captures this distinction by differentiating between “the denial of choice *by* the judge” and “the denial of choice *to* the judge.”<sup>7</sup>

This distinction is tenuous, of course, as these two elements of formalism often converge. Such convergence is reflected in one author’s description of formalism as resting on the principle that “well-crafted rules embodied in authoritative texts will constrain the choice of an impartial decisionmaker.”<sup>8</sup> Formalism, then, results from the combination of determinate legal rules with a judicial practice of adhering to those rules—even when they result in outcomes that seem contrary to what a sensitive and unencumbered decision maker, taking into account all that is relevant, might produce.<sup>9</sup> Although the realist critique has irrevocably weakened the law’s claim to constrain decision makers and produce neutral results,<sup>10</sup> it remains possible to align legal rules along a spectrum that reflects more or less judicial discretion.<sup>11</sup>

For the purposes of this Article, we must add to this understanding an element of formalism that has particular relevance to family law: the meaning conveyed by the transitive verb “to formalize,” something one does to a relationship through a set of prescribed steps, triggering the application of particular legal rules. Marriage

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6. See Schauer, *supra* note 3, at 510.

7. *Id.* at 521.

8. Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393, 1393 (1998).

9. See Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1185 (1986) (noting that a system of fixed rules “can cause hardship or injustice in individual situations, but in most cases they assure predictability at a low cost”).

10. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372-73, 382-83 (1978).

11. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462-63 (1987).

is the preeminent example.<sup>12</sup> To formalize a relationship<sup>13</sup> is to take action at the intersection of private and public; doing so synchronizes the personal, lived experience with the framework of legal rights and responsibilities that attend the intentional and voluntary recognition of such a relationship.<sup>14</sup> The connection between the verb “formalize” and the notions of formalism discussed above is that a relationship properly formalized in accordance with state-prescribed procedures is subject to legal rules that do not apply to other relationships, no matter how functionally equivalent they might be. In this sense, a system for formalizing certain relationships is “formalist” in that it results in the mechanical application of legal rules and screens off, from the decision maker, more nuanced determinations of how the relationship in question actually functions.

Ultimately, the phenomena I describe in this Article turn on the quality described by Professor Schauer as “ruleness”: the extent to which family law doctrines provide determinate instructions that can be more or less mechanically applied to domestic relations disputes.<sup>15</sup>

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12. See, e.g., Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 780 (1995) (“Tremendous legal and symbolic benefits inure to couples who formalize their relationships in marriage.”); Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27, 43 (1996) (“What would a world without marriage look like? First, all couples who wished to formalize their understandings of personal and financial commitment and responsibility would have to do so for themselves, that is, without the state’s provision of a default set of rules known as the marriage contract.”).

13. “To formalize” has a similar usage in contract law, which is interesting given the theory that marriage has moved from a status to a contract. See HENRY MAINE, *ANCIENT LAW* 100, 183-84, 191 (Everyman’s Library 1965).

14. Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 242-43 (“The formality of marital status, together with the requirement of legal action for both entry into marriage and divorce, clarifies the meaning of the commitment that the couple [is] making and underscores its seriousness.... Although wedding ceremonies vary a great deal depending on the couple’s religious traditions, wealth, and preferences, all couples must register their marriage with civil authorities as a legal change in status. The formality of the occasion encourages deliberation and solemnity—an acknowledgment that the decision represents an important commitment and the undertaking of legal obligations between the spouses. Finally, the nature and extent of these obligations are defined by the formal legal status.”).

15. Schauer, *supra* note 3, at 510. That some of these determinate instructions become controlling upon an individual or a couple intentionally embracing the rights and responsibilities of a particular legal status will become increasingly relevant as we proceed;



### *B. Contrasting These Qualities with Flexible Standards*

As most students of family law quickly learn, many of the decisional frameworks in family law lack “ruleness.”<sup>16</sup> They instead vest judges with enormous discretion to rely on their individual assessments of purposes, policies, and context.<sup>17</sup> Laws of this type provide little more instruction to judges than “decide what is right, under the circumstances.”<sup>18</sup> To the extent that lawmakers have attempted to provide more concrete guidance by fleshing out the factors judges must consider in resolving family law disputes, the resulting standards seem to sweep in everything short of the parties’ respective astrological signs.<sup>19</sup> We will see a variety of examples illustrating this type of legal framework.<sup>20</sup> For now, let us characterize these as contextualized, functionalist, and flexible nearly to the point of radical indeterminacy—everything that formalism is not.<sup>21</sup>

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I put this to the side for now.

16. *See, e.g.*, Glendon, *supra* note 9, at 1167-70 (“[Family law] is characterized by more discretion than any other field of private law.... [T]rial judges have been expressly granted broad discretion to try to achieve individualized justice on a case-by-case basis.”); *see also* Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 871 (1999) (endeavoring to show “that rules of largely limitless discretion are common in family law, and that their prevalence is not a good thing”); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 970 n.64 (1979) (characterizing as still apt the observation made in 1939 that “[j]udicial discretion is probably nowhere ... given freer rein, than in the field of domestic relations”) (quoting Edward W. Cooby, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROBS. 213, 213 (1939)); Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 209-10 (1991) (asserting that nowhere do legal scholars justify “broad, unfettered judicial discretion more than in family law”); Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases*, 16 LAW & SEXUALITY 77, 81 (2007) (noting that family law is notoriously vague and indeterminate).

17. *See* Glendon, *supra* note 9, at 1167.

18. *See, e.g.*, Ellman, *supra* note 16, at 870 (discussing “family law’s version of Rule 1: decide as you see fit”); Glendon, *supra* note 9, at 1171 (noting the meaningless direction to judges to do what is “equitable,” “just,” or “equitable and just”).

19. *See* Schauer, *supra* note 3, at 518 (noting that, whatever other choices may or may not be available to judges within the American legal system, resolving a case on the grounds that one party was a Capricorn and the other a Sagittarius is not one of them).

20. *See infra* Part II.

21. *See, e.g.*, Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 283 (1989) (“Law is indeterminate to the extent that legal questions lack single right answers. In adjudication, law is indeterminate to the extent that authoritative legal materials and methods permit multiple outcomes to lawsuits.”).

*C. An Admittedly Imperfect Typology for Classifying Family Law Rules*

Does this framework merely recapitulate the familiar (and itself over-determined) distinction between rules and standards that is a staple of nearly every first year law student experience?<sup>22</sup> In large part, it probably does.<sup>23</sup> But it is nonetheless a helpful typology for understanding the two competing trends in family law, and for thinking critically about how to take the best of both in designing frameworks that accommodate the dizzying rate of social and technological change manifesting itself in domestic relations disputes.<sup>24</sup> In the section that follows, I discuss areas in which

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22. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (identifying “the dichotomy between general rules and personal discretion within the narrow context of *law that is made by the courts*”); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (exploring the debate among legal thinkers of rules versus standards).

23. It tracks very closely, for example, with the notion of rules and standards offered in Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). She suggests:

[a] legal directive is “rule”-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.... A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.

*Id.* at 58 (footnotes omitted). A standard, in contrast:

tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.

*Id.* at 58-59 (footnotes omitted).

24. See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02 cmt. c, at 98 (2000) (“The question for rule-makers is not whether the law in this area should require determinacy or permit unbridled judicial discretion. It is, rather, what blend of determinacy and discretion produces the best combination of predictable and acceptable results, and what substantive values are most appropriately reflected in the mix.”); Glendon, *supra* note 9, at 1166 (urging “a search for the proper mix of discretion and fixed rules under each set of circumstances—the optimum degree

scholars and lawmakers have recognized the shortcomings of flexible standards for family law decision making and have sought to develop more determinate legal frameworks.

## II. RETURNING TO DETERMINATE RULES

A trans-substantive review of family law reveals that “over the past three decades, one theme that emerges is the movement from broad judicial discretion toward more certain rules of adjudication.”<sup>25</sup> The standard for awarding child custody, the procedural frameworks that determine where and when parties can litigate child custody, and the rules for calculating child support are at varying stages of this transition, making it interesting to look at them comparatively.

### A. *Child Custody*

Family law’s best-known legal framework directs judges in almost every state to decide child custody disputes according to the “best interests of the child.”<sup>26</sup> Most custody statutes flesh out this best-interests standard with enumerated factors for judges to consider. For example, the Uniform Marriage and Divorce Act, upon which several state laws are modeled,<sup>27</sup> instructs judges to:

consider all relevant factors including: (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best

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of fine-tuning without losing coherence and predictability, of reasonable certainty without losing flexibility”).

25. James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute’s Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923, 926 (quoting Ira Mark Ellman, *Chief Reporter’s Preface* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 3, pt. II, Apr. 18, 1998), at xiii).

26. See Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 6 (1997).

27. See *Marriage and Divorce Act, Model Summary*, UNIFORM L. COMMISSION, <http://uniformlaws.org/Act.aspx?title=Marriage+and+Divorce+Act,+Model> (last visited Mar. 31, 2014).

interests; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.<sup>28</sup>

As with the UMDA, many of the factors provided in these statutes are intended to be illustrative rather than exhaustive;<sup>29</sup> in some jurisdictions the enumerated factors conclude with a catchall that instructs the judge to consider any "other factors relevant to the parent-child relationship."<sup>30</sup>

Especially in contrast to the approaches it replaced, which provided fixed rules for child custody that were explicitly gender-based,<sup>31</sup> the best-interests standard "seems wonderfully simple, egalitarian, and flexible."<sup>32</sup> It also, as one scholar has observed, "expresses the right societal message about the responsibility of parents to put their children's interests first."<sup>33</sup> But the praise is faint in comparison to the criticism; these same commentators go on to assert that the standard "has no objective content"<sup>34</sup> and "is not determinate enough to produce predictable results, yielding instead a process that is contentious, expensive, subjective, and unjust."<sup>35</sup> They are joined by a legion of scholars who have produced a body of criticism that is as extensive as the standard is amorphous.<sup>36</sup>

A recurrent line of criticism observes that the vagueness of the best-interests standard provides a vessel for the personal biases and

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28. UNIF. MARRIAGE & DIVORCE ACT § 402 (1973).

29. See Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 269 (2002).

30. See, e.g., *Hollon v. Hollon*, 784 So. 2d 943, 947 (Miss. 2001).

31. The earliest rules for awarding custody viewed children as chattel, assignable to their father as head of the household in what operated as an absolute paternal preference. See William Weston, *Putative Fathers' Rights to Custody—A Rocky Road at Best*, 10 WHITTIER L. REV. 683, 686 & n.18 (1989). This eventually gave way to maternal preference, especially for children of "tender years." See Elster, *supra* note 1, at 7-10.

32. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984). *But see id.* at 488 (noting that the standard "has no objective content").

33. Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 849 (1998). *But see* Elster, *supra* note 1, at 16-17 (criticizing the best-interests standard for failing to take account of the needs and rights of the parents).

34. Chambers, *supra* note 32, at 488.

35. Bartlett, *supra* note 33, at 849.

36. See, e.g., Cahn, *supra* note 26, at 17.

ideologies of the presiding judge with regards to gender,<sup>37</sup> race,<sup>38</sup> religion,<sup>39</sup> and sexual orientation.<sup>40</sup> To this list we could add disability,<sup>41</sup> educational attainment,<sup>42</sup> and likely any other point of difference between the parties that strikes the judge as relevant to parenting ability and the interests of children.<sup>43</sup> Critics have also noted that unlike most forms of adjudication, which involve the determination of historical fact,<sup>44</sup> applying the standard requires a prediction about a particular child's *future* well-being.<sup>45</sup> Because this is an assessment beyond the institutional competence of judges,<sup>46</sup> custody trials reflect heavy reliance on expert testimony,<sup>47</sup> making

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37. See, e.g., MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 85-94* (1991); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 175-83 (1992); Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 725 (2000); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 735 (1988); Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 350 (1993) (asserting the best-interests standard is permeated with gender bias).

38. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1994); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61-63 (1994) (noting that the best-interests standard invites race, class, and cultural bias).

39. See, e.g., *Pater v. Pater*, 588 N.E.2d 794 (Ohio 1992); Joshua S. Press, *The Uses and Abuses of Religion in Child Custody Cases: Parents Outside the Wall of Separation*, 84 IND. L.J. SUPP. 47, 47-48 (2009) (noting that parents have been "penalized in custody proceedings for being too religious, not religious enough, or for belonging to an unpopular religious sect") (footnote omitted).

40. See, e.g., Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996).

41. See, e.g., *Carney v. Carney*, 598 P.2d 36 (Cal. 1979).

42. See, e.g., *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

43. See, e.g., *Painter v. Bannister*, 140 N.W.2d 152, 154-56 (Iowa 1966) (considering a parent's "unconventional, arty, Bohemian" lifestyle); *Hollon v. Hollon*, 784 So. 2d 943, 949, 951 (Miss. 2001) (considering a "messy house" and purported misrepresentation regarding a sexual relationship); *Jones v. Jones*, 542 N.W.2d 119, 122 (S.D. 1996) (considering the benefits of an extended family network and farm upbringing).

44. See Mnookin, *supra* note 4, at 251.

45. More specifically, courts must determine the marginal increase in future well-being that the child would experience with one fit parent as compared to the other fit parent. See *id.* at 257.

46. Glendon, *supra* note 9, at 1181 ("The 'best interests' standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge or other third party.... [I]t asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself. The idea that a judge can determine the best interests of a child under such circumstances is a fantasy.").

47. See, e.g., *Garska*, 278 S.E.2d at 362.

them more expensive and inviting the risk of results that are distorted by the parties' respective abilities and willingness to spend money on a battle of the experts.

The utter inability to predict how any case would be resolved under the standard has been the point of most persistent concern. Scholars have identified several distinct problems that stem from the standard's amorphousness. The enormous discretion it affords to judges has been described as "difficult to reconcile with an historic commitment to the rule of law," raising concerns about the legitimate exercise of judicial authority in one of the most consequential aspects of litigants' lives.<sup>48</sup> Scholars have asserted that the standard's vagueness promotes and protracts litigation,<sup>49</sup> with costs to all parties but especially the very children it is designed to protect. Even when parties attempt to avoid litigation, uncertainty about how the court would rule in the absence of settlement exacerbates power imbalances between the parents and fosters bad faith negotiation. As Professors Robert Mnookin and Lewis Kornhauser famously elaborated in *Bargaining in the Shadow of the Law*, the inability to predict what a judge would decide facilitates a dynamic in which one party may threaten to seek custody so as to obtain concessions from the other party with regards to property distribution and spousal maintenance.<sup>50</sup> In the absence of any clear standard for assessing whether the strategic move will be successful, the prospect of losing custody becomes a credible threat, potentially inducing parents with the stronger bond to their children to forego financial awards to which they are entitled.

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48. Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499-500 (1990).

49. Glendon, *supra* note 9, at 1181 (noting that the vagueness of the best-interests standard "provides maximum incentive to those who are inclined to wrangle over custody"); *see also* Elster, *supra* note 1, at 24 (arguing that, under the best-interests standard, "more cases will be brought than if there existed a strong presumption rule or an automatic decision procedure because both parties may persuade themselves that they stand a chance of getting custody"); Mnookin, *supra* note 4, at 262 ("[T]he use of an indeterminate standard makes the outcome of litigation difficult to predict. This may encourage more litigation than would a standard that made the outcome of more cases predictable. Because each divorcing parent can often make plausible arguments why a child would be better off with him or her, a best-interests standard probably creates a greater incentive to litigate than would a rule that children should go to the parent of the same sex.").

50. Mnookin & Kornhauser, *supra* note 16, at 972-73 & n.77.

Judges tasked with applying the standard have been similarly critical,<sup>51</sup> describing it as “no more definable than is the expression ‘as long as a rope.’”<sup>52</sup> An emphasis on the standard’s indeterminacy and unfettered discretion unites all but one of these distinct strands of scholarly and judicial criticism.<sup>53</sup>

The development of collateral rules about the proper application of the best-interests standard reflects an effort to cabin some of that discretion. For example, consider that numerous iterations of the standard include, as an enumerated factor for the judge’s consideration, the “moral fitness of the parents.”<sup>54</sup> Given the vagueness of this factor and the utter lack of social consensus regarding what it means to be morally fit, the potential for mischief in the use of this factor is fairly evident. To curb the most blatant abuses, appellate courts have reversed lower court decisions when the supposed moral unfitness was unrelated to the child’s well-being.<sup>55</sup> Requiring some nexus between the child’s interests and the parental conduct being invoked as a basis to deny custody is one way to limit judicial disapproval of certain parental conduct from masquerading as concern for children. Appellate courts have also insisted on some procedural safeguards, such as requiring the trial judge to weigh each factor individually, to identify the facts in the record that pertain to the application of a particular factor, and to state which parent is favored under each particular factor.<sup>56</sup>

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51. See, e.g., *Garska*, 278 S.E.2d at 362; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168 (1984).

52. *Perkins v. Courson*, 135 S.E.2d 388, 399 (Ga. 1964) (Duckworth, C.J., dissenting).

53. The notable exception is the argument regarding institutional competence, which asserts that the standard requires judges to deploy expertise they do not have in order to arrive at the correct result. This is distinct from the charge that the standard has no correct result.

54. See, e.g., *Hollon v. Hollon*, 784 So. 2d 943, 947, 949-50 (Miss. 2001).

55. See, e.g., *Smith-Helstrom v. Yonker*, 544 N.W.2d 93, 101-02 (Neb. 1996) (giving little weight to mother’s moral conduct that did not “adversely affect[] her son”); see also *Hassenstab v. Hassenstab*, 570 N.W.2d 368, 372-73 (Neb. 1997); *Van Driel v. Van Driel*, 525 N.W.2d 37, 39, 41 (S.D. 1994).

56. See, e.g., *Hollon*, 784 So. 2d at 951-52.

Even with these collateral requirements,<sup>57</sup> however, the standard's primary virtue seems to be of the sort that Winston Churchill famously observed regarding democratic government: it is the worst system except for all the others.<sup>58</sup> Its tenacity as the overwhelmingly prevalent approach for resolving child custody disputes is attributable to the difficulty scholars and lawmakers have had crafting a tolerable alternative, one that ameliorates the problems posed by the standard's indeterminacy while still accommodating two fundamental truths: not only are all families different from one another,<sup>59</sup> but each family is different after a dissolution than it was before.<sup>60</sup>

The dilemma is perhaps best expressed in one of the early and now oft-cited critiques of indeterminacy in custody law:

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57. These requirements are enforceable only through appellate review. Although this is true of all constraints imposed on trial judges, there is reason to be concerned that errors in custody decision making are particularly immune from appellate review. See Law & Hennessey, *supra* note 37, at 351; Murphy, *supra* note 16, at 214-15; Joan D. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 762 (1985). First, domestic relations litigants are more likely to lack the funds necessary to pursue error correction on appeal. See Fitzgerald, *supra* note 38, at 62 n.331; Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 674 (2001); Murphy, *supra* note 16, at 219-20, 237. Second, the passage of time while an appeal is pending works against the losing parent in a way that does not have an analogue in other areas of the law: not only does the parent lose years with the child that will never be recovered, but because of the importance of stability to the child concerned, courts sometimes express reluctance to reverse even admittedly erroneous custody decisions. See Linda D. Elrod, *When Should Custody Orders Be Modified? Flexibility Versus Stability*, FAM. ADVOC., Spring 2004, at 40, 40; Elster, *supra* note 1, at 23-24.

58. CHURCHILL BY HIMSELF 573 (Richard M. Langworth ed., 2008).

59. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY 164 (2004) ("The best interests test does have a great moral virtue—it directs the child custody court to thoroughly review each child's particular circumstances without preconceptions or presumptions. The individualized nature of the inquiry is a tribute to our society's collective sense that relationships between children and parents are unique and should be judged individually."); Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L.Q. 229, 234-35 (1993) (defending discretion by noting "that it gives a judge authority to respond to the full range of circumstances a case presents and thus to do justice in each individual case.... [T]he need for individualized justice in family law is particularly pressing. People organize and conduct their family lives in a burgeoning and bewildering variety of ways. And a court's resolution of a family dispute will matter to the parties more deeply and durably than in perhaps any other kind of civil litigation.").

60. See Mnookin & Kornhauser, *supra* note 16, at 967 (noting that parental needs and preferences with regards to division of child-rearing responsibilities may change dramatically upon dissolution).



Because what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes. But the underlying reasons for this indeterminacy—our inability to make predictions and our lack of consensus with regard to values—make the formulation of rules especially problematic.<sup>61</sup>

Professor Mnookin's own work reflected the pattern: after incisively critiquing the indeterminacy of the best-interests standard, he then carefully considered alternatives and found each of them lacking.<sup>62</sup>

Law reform efforts have experienced a similar trajectory. Two states, West Virginia and Minnesota, experimented with a presumption in favor of awarding custody to the parent who had acted as the primary caretaker prior to dissolution.<sup>63</sup> The first and often dispositive stage of the analysis was an assessment of historical fact, identifying which parent had performed most of the nurturing tasks, from preparing meals and conducting the bedtime routine to inculcating manners, imposing discipline, and fostering the child's education.<sup>64</sup> Only where that parent was shown to be unfit would the presumption be rebutted.<sup>65</sup>

The appeal of the primary caretaker presumption lies in its ability to correct several of the key shortcomings that characterize the best-interests standard. It is retrospective rather than predictive and turns on assessments that are more concrete than the factors that typically comprise the best-interests standard. Surely, ascertaining which parent bathed and fed the children most of the time is simpler and less subjective than assessing which parent's "moral fitness" or "mental health" is more likely to advance the child's interests.

The problem is that the primary caretaker presumption assumes a past division of caretaking labor that is so unevenly distributed as

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61. Mnookin, *supra* note 4, at 230.

62. *Id.* at 282-91 ("My conclusion is hardly comforting: while the indeterminate best-interests standard may not be good, there is no available alternative that is plainly less detrimental.")

63. See *Pikula v. Pikula*, 374 N.W.2d 705, 711-12 (Minn. 1985); *Garska v. McCoy*, 378 S.E.2d 357, 363 (W. Va. 1981).

64. *Garska*, 378 S.E.2d at 363.

65. *Id.*

to justify awarding custody to one parent on the basis of past practice alone. Although it acknowledges the possibility of a fifty-fifty split in which the presumption does not arise,<sup>66</sup> it raises troubling questions for what we might call the sixty-forty families. For these families, the presumption makes enormously consequential what might be trivial differences in the parents' respective caretaking duties. The presumption directs the court toward a winner-take-all result predicated on a much more limited scope of information than what the best-interests standard would afford.<sup>67</sup> States have been unwilling to cabin custody decision making in this way and for the most part incorporate an assessment of past caretaking into the best-interests standard, making it one of the many equally weighted factors for the court to consider.<sup>68</sup> It was, however, precisely the presumptive force of the past caretaking assessment that gave this alternative approach the potential to dial back the discretion and indeterminacy inherent in the best-interests standard.

This experience seems to support one scholar's assertion that "custody is surely the most difficult" area within family law "for which to generate a sensible nondiscretionary rule."<sup>69</sup> But even in the face of such obstacles, reformers have been laboring to produce a more determinate framework for child custody decision making that cabins discretion and promises more predictable results.<sup>70</sup> In 2002, the lawyers, judges, and law professors that compose the American Law Institute published a set of principles to guide lawmakers in revising the law of family dissolution.<sup>71</sup> Its

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66. *See id.*

67. *See* Bartlett, *supra* note 33, at 853. *Compare supra* notes 26-30 and accompanying text (summarizing the breadth of information a court evaluates in the best-interests standard), *with Garska*, 278 S.E.2d at 363 (detailing the specified parenting tasks a court evaluates to determine which parent is the primary caretaker).

68. *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 393, 400 (2008); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 621-22 (1992).

69. Ellman, *supra* note 16, at 876.

70. *See* Bartlett, *supra* note 33, at 846 ("[T]he [ALI] principles offer determinacy in decisionmaking without presupposing, or attempting to promote, a standard family scenario.").

71. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000).

recommended approach to resolving custody disputes instructs judges to allocate custodial responsibility so that the amount of time each parent will spend with the child after dissolution approximates the proportion of time the parent spent on caretaking duties prior to the separation.<sup>72</sup> The approximation approach had been first advocated by Professor Elizabeth Scott, who argued that a custody arrangement that approximates “as closely as possible the pre-divorce patterns of parental responsibility” was “likely to be less disruptive to the child,” more reliably reflective of the parents’ true preferences, and thus more stable over time than any possible alternative.<sup>73</sup>

Like the primary caretaker presumption, the approximation approach prioritizes past caretaking above any other parental attribute, but it improves upon the primary caretaker presumption by calibrating the effect of pre-divorce patterns on post-divorce custodial arrangements. Rather than identifying the parent who performed the majority of caretaking tasks prior to dissolution and awarding custody to that parent, relegating the other parent to visitation, it would give each parent a post-divorce role that reflects, as much as possible, the relationship between parent and child prior to the divorce. It thus avoids the sixty-forty problem described above: what might be marginal differences in the amount of parental responsibility shouldered prior to divorce would result in only marginal differences in the amount of post-divorce time spent with the child.

The approximation approach does not promise to eliminate the discord that accompanies disputes over custody. As with any custody rule, a court will apply it only to those parents in such profound conflict that they are unable to arrive at an agreement regarding the allocation of parenting rights and responsibilities. Such parents will fight about whatever the governing standard identifies as relevant; we therefore can expect parents to challenge each other’s assessments of past division of labor.<sup>74</sup> But the question

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72. *Id.* § 2.08(1), at 178. The Principles identify eight exceptions to the rule of approximation, including keeping siblings together, accommodating the preferences of older children, protecting children from domestic abuse, and avoiding extreme impracticality or “substantial and almost certain harm to the child.” *Id.* § 2.08(1), at 178-79.

73. Scott, *supra* note 68, at 630.

74. See Andrew Shepard, *Law and Children: ALI’s Approximation Rule for Child Custody*

is whether something can be gained by channeling parental acrimony into a focused, retrospective inquiry that does not require the assistance of experts and clearly identifies the basis for decision. A number of influential scholars agree that the answer is yes. As Professor Ellman has observed:

While hardly a mechanical rule, one can see that this section provides a much more predictable rubric for deciding custody cases than does the typical best interest standard. One starts any custody inquiry with a presumptively correct result, which is alone an important advance over the best interests test, which does not even provide any tiebreaker rule.<sup>75</sup>

The approximation approach reflects the lessons learned from prior efforts to improve child custody decision making: it illustrates the possibility of a custody rule that offers more predictability than the best-interests standard and yet allows for individually tailored results that reflect the particular circumstances of any given family.<sup>76</sup>

Notwithstanding scholarly enthusiasm, lawmakers have been slow to replace the best-interests standard with the approximation approach.<sup>77</sup> Some observers credit the latter approach with growing influence, however, noting that courts have praised the rationale upon which it rests and that it is under “serious consideration in

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*Disputes*, N.Y. L.J., May 10, 2004, at 20 (“Custody tests based on past caretaking invite parents to exaggerate and argue about their contributions to childrearing.”).

75. Ellman, *supra* note 16, at 877.

76. See also Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute’s Family Dissolution Project*, 36 FAM. L.Q. 11, 18-19 (2002); DiFonzo, *supra* note 25, at 923 (characterizing the ALI Principles as seeking to substitute “discrete rules” for the “largely limitless discretion ... common in family law”) (quoting Ellman, *supra* note 16, at 871).

77. Only one state has done so. See W. VA. CODE § 48-9-206 (2013).

other jurisdictions.”<sup>78</sup> At this point, it is simply too soon to tell what kind of impact it will ultimately have.<sup>79</sup>

In sum, child custody can be fairly characterized as the arena in which the most has been written and the least has been done about the shortcomings of discretion and indeterminacy in resolving family law disputes. These insights, however, have had a profound effect on other areas of family law, in which lawmakers have heeded the call to craft more certain and predictable rules for family law decision making.

### *B. Procedural Frameworks*

A preference for determinate rules is emerging in the procedural frameworks that govern where child custody litigation takes place and when parties can re-initiate such litigation. Even if one views the best-interests standard as the most tolerable rubric for achieving justice in the original custody dispute, its indeterminance offers the prospect of a different result in front of a different judge, or with arguably new facts, providing an incentive for disappointed parents to relitigate. As the harmful effects of this indeterminance have become apparent, lawmakers have responded by constraining the discretion of judges to revisit child custody disputes after the initial decree has been issued, imposing relatively determinate rules about when and where a court can hear these successive petitions.

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78. See, e.g., Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83, 87 (2011). For criticisms of the approximation approach, see Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids,* 45 FAM. CT. REV. 600 (2007). Emily Buss asserts that the ALI's approach “fails to account for the difference between those arrangements worked out cooperatively, when custodial authority is not an issue, and those arrangements that are compelled by a court, when that authority is contested.” Emily Buss, *Parental Rights*, 88 VA. L. REV. 635, 645 (2002).

79. It is interesting to note that in 1979, when Mnookin and Kornhauser wrote *Bargaining in the Shadow of the Law*, joint custody had been “seriously proposed” but not adopted in any jurisdiction. Mnookin & Kornhauser, *supra* note 16, at 977-78. Since then, a number of jurisdictions have adopted some form of joint custody. See Bartlett, *supra* note 33, at 850. Scholars have noted that joint custody regimes can also produce strategic behavior. See Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539, 550-51 (1982).

### 1. *Modification*

Much of the reasoning that justifies the use of an inordinately flexible standard for the initial custody decree could support the same approach to post-decree matters. After all, if meeting the needs and interests of individual children requires open-ended, highly discretionary decision making in the first instance, so too one might argue that judges must be unconstrained in their authority to rehear custody disputes that arise after the initial determination. A wide array of post-divorce changes might have bearing on the best interests of the children involved—parents move, take new jobs, remarry, suffer setbacks or improvements in their mental, physical, emotional, or financial well-being, and of course the children themselves grow older and present new and different needs that might change the custody calculus.<sup>80</sup> Mnookin and Kornhauser describe as “obvious” the insight that “because people’s lives change, an arrangement that benefits the child at one stage may not benefit the child at some later stage.”<sup>81</sup> And indeed, the traditional approach to adjudicating requests for custody modification reflects the primacy of this idea: typically, one seeking modification of a custody decree has been required to show a substantial change in circumstances warranted a change in custody.<sup>82</sup> Some jurisdictions have dispensed with the change in circumstances requirement altogether, authorizing the court to modify the initial custody order whenever doing so would be in the best interests of the children.<sup>83</sup> In these

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80. *See, e.g.*, *Kovacs v. Brewer*, 356 U.S. 604, 612 (1958) (“Because the child’s welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature. The passage of even a relatively short period of time may work great changes, although difficult of ascertainment, in the needs of a developing child. Subtle, almost imperceptible, changes in the fitness and adaptability of custodians to provide for such needs may develop with corresponding rapidity. A court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court.”).

81. *See* Mnookin & Kornhauser, *supra* note 16, at 984.

82. *See* JUDITH AREEN & MILTON C. REGAN, JR., *FAMILY LAW* 948 (6th ed. 2012) (“Some courts, however, have construed the modification standard rather loosely, so that parents who lose the initial custody decision can fairly easily find a basis for relitigating the issue.”).

83. IDAHO CODE ANN. § 32-717(1) (2013). In some jurisdictions, courts are free to order a modification without any demonstration of changed circumstances if the original decree was the product of agreement between the parties or if the court was simply unaware of the facts giving rise to the modification motion. Wexler, *supra* note 57, at 767-72.

cases, the indeterminacy of the best-interests standard becomes multiplied by the virtually infinite number of times it might be used to resolve custody disputes in the same family. But even the traditional modification standard, which ostensibly requires the demonstration of relevant changed circumstances, vests the judge with nearly as much discretion as the judge exercised in the original dispute; as one commentator observes, “The court decides what constitutes a change in circumstances and whether that change has an impact on a child’s interests on the facts of each case, and the court’s appraisal of the individuals and circumstances before it is accorded great weight on any appeal.”<sup>84</sup> As it turns out, requiring the demonstration of changed circumstances as a condition of modifying a prior custody order is to require very little.<sup>85</sup>

Take, as an example, a case in which divorcing parents originally stipulated to joint legal custody of a young child, with primary residential custody for the mother and liberal visitation for the father.<sup>86</sup> Over three years later, the father filed emergency motions to modify custody because the child’s second grade teacher reported a decline in her school performance.<sup>87</sup> The court set the matter for a hearing, at which the teacher testified that the child, “an exceptionally bright student, performed very well during the first two quarters of the school year but had struggled during the third and fourth quarters.”<sup>88</sup> The teacher identified several notations in the child’s weekly progress reports indicating that she “had failed to turn in homework and had been talking in class.”<sup>89</sup> According to the teacher, the child “was not applying herself as she had in the past” and “did not complete her assignments and refused to revise her work” in spite of being requested to do so.<sup>90</sup> The teacher testified that she had frequent contact with the child’s father, who regularly inquired about the child’s performance but “very little contact” with the child’s mother.<sup>91</sup>

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84. Wexler, *supra* note 57, at 762.

85. *See id.* at 795.

86. *Ellis v. Carucci*, 161 P.3d 239 (Nev. 2007). As is very common, this agreement between the parents was incorporated into the decree. *Id.* at 240.

87. *Id.* at 240, 243.

88. *Id.* at 240.

89. *Id.*

90. *Id.*

91. *Id.* at 240-41. The father testified that he met with the teacher at least once every two

The district court granted the motion to modify, ordering a joint physical custody arrangement in which the child would spend alternating weeks with each parent.<sup>92</sup> The court stated that the child's "school performance was the key substantial issue" and concluded that the teacher's testimony "constituted sufficient evidence of changed circumstances to warrant a modification."<sup>93</sup> The state supreme court affirmed.<sup>94</sup> In identifying the legal standard it was applying, the appeals court specified that "[a] modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification would serve the child's best interest."<sup>95</sup> It then determined that both of those elements were satisfied.<sup>96</sup>

Perhaps this particular result poses few concerns; rather than transferring custody from the mother to the father, the court ordered a shared arrangement in which the child would spend equal time with each of her two caring, involved, and attentive parents.<sup>97</sup> But the primary point is not whether modifying custody in this instance was wise, beneficial, or merely harmless.<sup>98</sup> Instead, the essential point is that if talking in class and failing to turn in homework is a "substantial change in circumstances" that warrants a change in custody, then surely almost anything is. The most tenuous proffer of changed circumstances thus entitles a disappointed

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weeks and communicated frequently via e-mail; he also asserted that "because he and his new wife emphasize education, he believed they could best assist [the child] in her studies." *Id.* at 241. The mother testified that "she and her new husband often assisted [the child] with her homework" and that in her view the child's academic performance had declined as a result of increased stress associated with the ongoing dispute between her parents. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 244.

95. *Id.*

96. *Id.*

97. *See id.* But see Wexler, *supra* note 57, at 758-59, 766-67, 769-70 (discussing cases in which the original custodial parent truly does lose primary custody as a result of a modification motion).

98. This is certainly a valid question, however, especially if we think that stability and continuity are important values to prioritize in the adjudication of modification petitions. The *Ellis* court itself mentioned this, citing to a number of cases in which stability and continuity were discussed. *See Ellis*, 161 P.3d at 242 & n.11. Notably, the state supreme court's decision affirming the modification was issued *six and a half years* after the original decree, a remarkably long time for a family's custodial arrangement to be in flux. *Id.* at 239-40.



parent to a relitigation of custody, reopening the wildly indeterminate inquiry anew. Even if the parent is ultimately unsuccessful in obtaining a modification, the costs of reinitiating an adversarial dispute, combined with the demonstrated harms this poses for the children whose interests are purportedly being protected,<sup>99</sup> undermine the goals of stability and certainty, multiplying the deficiencies of the best-interests standard.<sup>100</sup>

For all these reasons, the drafters of the Uniform Marriage and Divorce Act approached the issue of custody modification in a considerably more determinate, less discretionary fashion. Although only six states have formally adopted the UMDA,<sup>101</sup> its approach to modification has been influential in many jurisdictions,<sup>102</sup> despite its considerable divergence from the traditional standard. The first notable departure from the traditional standard is a post-divorce waiting period: the UMDA prohibits modification motions within two years of a custody decree,<sup>103</sup> unless the parent seeking modification can provide affidavits indicating a “reason to believe the child’s present environment may endanger seriously his physical, mental, moral, or emotional health.”<sup>104</sup> Once a modification motion is properly before the court, the court may grant it in three specified circumstances:

- (1) the custodian agrees to the modification;
- (2) the child has been integrated into the family of the petitioner with consent of the custodian; or
- (3) the child’s present environment endangers seriously his physical, mental, moral, or emotional health, *and*

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99. See, e.g., Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 123-24 (1997).

100. See *id.* at 124. Modification motions can be used, for example, to harass and scrutinize the custodial parent. See Wexler, *supra* note 57, at 774.

101. *Marriage and Divorce Act*, *supra* note 27 (identifying enactment of the UMDA in Arizona, Colorado, Georgia, Minnesota, Montana, and Washington). For a slightly different count, see Sally Adams, *Avoiding Round Two: The Inadequacy of Current Relocation Laws and a Proposed Solution*, 43 FAM. L.Q. 181, 183 & n.7 (2009) (citing UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 159 (prefatory note) (1998)) (identifying eight states as having enacted the UMDA: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington).

102. ROBERT E. OLIPHANT & NANCY VER STEEGH, FAMILY LAW 191 (2013).

103. UNIF. MARRIAGE & DIVORCE ACT § 409(a), 9A(II) U.L.A. 439 (1998).

104. Although this mitigates the force of the waiting period, it prohibits a noncustodial parent from arguing integration or consent until two years have passed. *Id.* Also, the two-year waiting period has a communicative value about the importance of repose.

the harm likely to be caused by a change of environment is outweighed by its advantages to him.<sup>105</sup>

Given that the first two circumstances require some demonstration of consent on the part of the custodian, the third is the most likely to cover contentious modification disputes. The intent to dial back the discretion prevalent in the traditional standard is apparent in two aspects of this provision. Not only does the provision require the determination that there is “serious endangerment,” but it *assumes* that some countervailing harm is associated with a change in environment, and it instructs the court to determine that the risk of endangerment outweighs the risk of upheaval as a condition to ordering modification.

Although the UMDA approach has not been foolproof, it communicates a presumption against modification more clearly than the alternatives.<sup>106</sup> Cast in terms that recall our discussion of formalism, the UMDA approach does much more than the traditional standard to constrain the choices of decision makers who are asked to revisit a family’s custodial arrangement.<sup>107</sup> It is formalist in the sense that it accords considerable weight to the very existence of a custodial decree, regardless of the decree’s actual virtues; it expresses the view that, except in carefully circumscribed scenarios, adherence to the original decree takes precedence over trying to improve upon it.<sup>108</sup> Moreover, it expresses that view in a form that attempts to gain the benefits of “ruleness,” by imposing a fixed two-year waiting period and identifying three scenarios that constitute the closed universe of scenarios in which a judge may order

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105. *Id.* § 409(b) (emphasis added). Interestingly, the language of the UMDA modification provision locates its approach within the traditional standard, stating that the court shall not modify a prior custody decree “unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child.” *Id.* But the UMDA then states that “[i]n applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless” one of the three specified circumstances is present. *Id.*

106. Joan Wexler has demonstrated that even under the UMDA standard judges continue to embrace divergent and insufficient notions of “serious endangerment.” See Wexler, *supra* note 57, at 776-79.

107. See discussion *supra* Part I.

108. See Wexler, *supra* note 57, at 774.

modification.<sup>109</sup> The choice in favor of “ruleness” is best seen by reference to a counterexample: the preference against modification could have been expressed in flexible, indeterminate language, instructing the judge to “weigh the interest in stability and continuity against the claim of changed circumstances” before ordering a modification.

To the extent that the UMDA approach reflects a preference against modification that is predicated on the competing interests at stake in that particular posture, it is nonetheless illuminating for our purposes. The preference against modification is premised on the insight that infinite exercise of discretion does not materially advance the substantive interests entrusted to the regime. Even if it were possible to expect such flawless decision making that the risk of error was minute, at a certain point, the costs become prohibitive.<sup>110</sup> The UMDA approach to modification can thus fairly be characterized to reflect a skepticism about judicial discretion and indeterminate standards that has relevance beyond the particular context of modification.

## 2. *Jurisdiction*

The indeterminacy of the best-interests standard fosters a closely related but even more troubling dynamic: because it offers no predictable way to gauge the relative merits of each parent in any given custody dispute, a disappointed parent might reasonably expect that the result would be different in front of a different judge. For better or for worse, however, courts offer parents no opportunity to go judge shopping within the same jurisdiction as the original custody dispute: custody orders are not final in the same way as other judgments, reflecting the notion that the court must be able to revisit custody disputes as necessary to protect the interests of the children involved.<sup>111</sup> For this reason, post-decree matters are typically directed to the same judge that presided over the original

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109. See discussion *supra* Part I.

110. See Weinstein, *supra* note 99, at 118.

111. JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 11.02, at 497 (4th ed. 2013) (“Custody decrees are not considered final judgments, but may be modified in order to safeguard the best interests of the child upon changed circumstances.”).

dispute.<sup>112</sup> Thus, the incentive to try a different judge has the potential to metastasize into an incentive to take the child to a different state and try again there.<sup>113</sup>

Under the traditional approach to custody jurisdiction, there were few, if any, checks on this incentive. The original decree, not bearing the mantle of a final judgment, was either treated as outside the purview of the Full Faith and Credit Clause altogether,<sup>114</sup> or was entitled only to the force it would carry in the courts of the state where the judgment was entered.<sup>115</sup> Because the issuing court would treat the original decree as subject to modification, so too would the courts of sister states, who would proceed as if the extant custody decree was no bar to relitigation.<sup>116</sup> Courts would exercise jurisdiction on one of a number of alternative bases—the child’s domicile, the domicile of one or both parents, or even just the physical presence of the child<sup>117</sup>—and then would reconsider the disappointed parent’s claim to custody under the amorphous best-interests

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112. See, e.g., Santos v. Santos, 422 N.E.2d 985, 987 (Ill. App. Ct. 1981).

113. See GREGORY ET AL., *supra* note 111, § 11.02(A), at 500-01.

114. As one scholar observes, this is an unfortunate paradox given “[t]hat children might perhaps need the benefits of full faith and credit more than ordinary litigants to assure the stability of custody arrangements and the continuity of family attachments.” Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1212 (1969).

115. See New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614 (1947).

116. See Thompson v. Thompson, 484 U.S. 174, 180 (1988) (“Even if custody orders were subject to full faith and credit requirements, the Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered. Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child’s best interest.”).

117. Todd Heine, *Home State, Cross-Border Custody, and Habitual Residence Jurisdiction: Time for a Temporal Standard in International Family Law*, 17 ANN. SURV. INT’L & COMP. L. 9, 15 (2011); see Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 293 (1986) (“[S]tate courts were aggressive in asserting initial jurisdiction in custody cases without the presence of domicile. Courts commonly asserted jurisdiction in cases in which it was clear that courts in other jurisdictions potentially had jurisdiction and an interest in asserting it. Some even asserted jurisdiction in those cases in which a court in another state had already asserted its jurisdiction.”) (footnotes omitted). One commentator suggests that during this time period the “true rule” for the exercise of jurisdiction was “the court’s discretion exclusively governed by the child’s welfare.” Albert A. Ehrenzweig, *Interstate Recognition of Custody Decrees: Law and Reason v. the Restatement*, 51 MICH. L. REV. 345, 357-58 (1953). For additional discussion of the reasoning behind these various approaches to child custody jurisdiction, see Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 378 (1991).

standard.<sup>118</sup> There was little reason to expect that the court revisiting the judgment of a sister state would show deference to the original order: as one commentator has observed, “This may be due to a tendency of any individual to think that in a situation demanding the wisdom of Solomon he can come closer than anyone else. And there is always the suspicion that even a judge will be a little more sympathetic with a constituent.”<sup>119</sup>

Not only did this give rise to “widespread jurisdictional deadlocks” in which the same child might be the subject of two conflicting custody orders from two different states, but it created “a national epidemic of parental kidna[p]ping.”<sup>120</sup> By the early 1980s, commentators were estimating that between 25,000 and 100,000 such incidents were taking place every year.<sup>121</sup> The results of a survey conducted by the National Conference of Commissioners on Uniform State Laws confirmed the “rampant” operation of the “rule of seize and run” and demonstrated “that many courts freely alter custody decisions made out-of-state; that conflicting custody decrees in two states are no rarity; and that innumerable children are without secure and permanent homes because of severe shortcomings in interstate custody law.”<sup>122</sup>

The crisis sparked concurrent responses at the state and federal levels. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction Act (UCCJA), which authorized four alternative bases for the exercise of jurisdiction over a child custody case.<sup>123</sup> A court was authorized to exercise jurisdiction if it was located in the child’s “home state,” defined as “the state in which the child immediately preceding the time involved lived with [the child’s] parents, a parent, or a person

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118. See Wexler, *supra* note 57, at 761.

119. Bodenheimer, *supra* note 114, at 1211 (quoting Thomas E. Fairchild, *Conflicts of Jurisdiction*, 1961 CONF. CHIEF JUSTICES 28, 35).

120. *Thompson*, 484 U.S. at 180-81; see also Atwood, *supra* note 117, at 378 (noting that the law “fairly invited kidnapping”).

121. *Thompson*, 484 U.S. at 181 (noting that Sen. Malcolm Wallop invoked this figure in the legislative hearings that preceded the enactment of the Parental Kidnaping Prevention Act); SANFORD N. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 11 (1981) (noting that the number could be higher, given that “parents who abduct their children do not advertise that information”).

122. Bodenheimer, *supra* note 114, at 1216-17.

123. UNIF. CHILD CUSTODY JURISDICTION ACT § 2(5), 9(IA) U.L.A. 286 (1999) [hereinafter UCCJA].

acting as parent, for at least 6 consecutive months.”<sup>124</sup> Alternatively, a court might exercise jurisdiction if it was located in a state that had a “significant connection” to the child and at least one of the child’s parents, and the state was the site of “substantial evidence concerning the child’s present or future care, protection, training, and personal relationships.”<sup>125</sup> Two additional provisions authorized a court to take jurisdiction in emergency circumstances<sup>126</sup> or situations in which no state satisfied the parameters set forth in the preceding three alternatives and the court deemed it in the best interests of the child to assume jurisdiction.<sup>127</sup> Congress in turn enacted the Parental Kidnaping Prevention Act, which provided standards for the interstate recognition and enforcement of custody decrees that had been properly issued by a court with adequate jurisdiction.<sup>128</sup>

The UCCJA was adopted by every state, although with variations that undermined the goal of national uniformity in child custody jurisdiction.<sup>129</sup> Nonetheless, it “marked an improvement over the

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124. *Id.* §§ 2(5), 3(a)(1), 9(IA) U.L.A. at 286, 307. The definition specified that in the case of a child who was less than six months old, the home state would be “the state in which the child lived from birth with any of the persons mentioned.” *Id.* § 2(5), 9(IA) U.L.A. at 286. Home state jurisdiction was not necessarily defeated by the child’s departure from the state. *See id.* § 3(a)(1)(ii), 9(IA) U.L.A. at 307. If a parent remained in the home state, home state jurisdiction would persist for another six months, as long as the child’s removal took place within the six months prior to the jurisdiction determination and was caused by a parent contesting custody, or the child was removed from the home state “for other reasons.” *See id.*

125. *Id.* § 3(a)(2), 9(IA) U.L.A. at 307.

126. Emergency jurisdiction was authorized where the child was physically present in the state and had been abandoned or “subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent].” *Id.* § 3(a)(3), 9(IA) U.L.A. at 307.

127. The jurisdiction granted under this catchall or default jurisdiction included states that had been specifically identified as a superior forum to determine child custody by a state that had declined jurisdiction for that very reason. *Id.* § 3(a)(4)(I), 9(IA) U.L.A. at 307-08.

128. *See* 28 U.S.C. § 1738A (2006). As one authority explains:

The PKPA does not dictate the terms for exercising initial custody jurisdiction nor does it prohibit states from recognizing decrees that do not conform to the PKPA. Rather, it sets out criteria which, if complied with, will result in a custody decree that must be afforded full faith and credit.

GREGORY ET AL., *supra* note 111, § 11.02(1), at 511.

129. In addition to these discrepancies, the UCCJA suffered from a complicated intersection with the PKPA. *See* UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, prefatory note, 9 U.L.A. 650 (1997) (describing the relationship between the two statutes as “technical enough to delight a medieval property lawyer”) (quoting HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 12.5, at 494 (2d ed. 1988)).

traditional, domicile-based approach to custody jurisdiction.”<sup>130</sup> Perhaps its most significant contribution was to treat the child’s physical presence as a condition that was neither necessary nor sufficient for the exercise of jurisdiction, counteracting at least in part the kidnapping incentives that had permeated the traditional approach.<sup>131</sup> It left plenty of room for interstate custody disputes, however, and the litigation that ensued revealed that the UCCJA had not done enough to constrain the discretion of judges deciding whether to take jurisdiction.

Take, for example, *Chaddick v. Monopoli*, an interstate custody dispute spanning ten years and three states and presenting exactly the sort of jurisdictional controversy the UCCJA was designed to alleviate.<sup>132</sup> The couple divorced in Massachusetts, and the mother was awarded custody of the couple’s two children. Pursuant to the order, the father was to have visitation every summer. The mother and the children then moved to Florida, while the father moved to Virginia. In 1993, five years after the divorce, the mother sent the children to Virginia for visitation with their father during July and August. Instead of returning the children on August 6 as he had promised to do, the father kept the children and filed a petition in Virginia court to obtain custody. He alleged that he did not have the mother’s current address and had been unsuccessful in his attempts to obtain it from her, that the airline would not permit the children to travel without the current address, and that the mother “was pregnant and living with a man to whom she was not married.”<sup>133</sup>

The Virginia court assumed jurisdiction, presumably finding the state of Virginia to have a “significant connection” with the children,<sup>134</sup> and the very same month issued an order transferring

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130. GREGORY ET AL., *supra* note 111, § 11.02(C), at 510.

131. The Reporter for the NCCUSL Committee that drafted the UCCJA observes that “[t]he basic notion underlying the Act—that jurisdiction be limited to those states which have maximum access to the relevant facts—implicitly excludes jurisdiction when the child and custody claimant are merely physically present without any durable ties with the state.” Bodenheimer, *supra* note 114, at 1227-28.

132. *See Chaddick v. Monopoli*, 714 So. 2d 1007, 1008 (Fla. 1998).

133. *Id.*

134. The Florida District Court of Appeal entertained the possibility that the Virginia court may have deemed the situation an emergency because of the mother’s address. *See Chaddick*, 677 So. 2d 347, 349 (Fla. Dist. Ct. App. 1996) (Harris, J., concurring), *approved in part, disapproved in part*, 714 So. 2d 1007 (Fla. 1998). But to characterize that as tantamount to abandonment, or that it was therefore “necessary ... to protect the child because he ha[d] been

custody to the father.<sup>135</sup> The mother hired local counsel and appeared in Virginia to contest jurisdiction, becoming enmeshed in out-of-state proceedings that would persist for more than a year and a half. In March 1995, the Virginia court ruled against the mother both as to the jurisdictional issues and as to custody itself.<sup>136</sup>

When the mother filed suit the next month in Florida, challenging the Virginia court's authority to issue the modification and requesting enforcement of the original Massachusetts decree, the Florida courts refused to consider whether Virginia had properly exercised jurisdiction, treating the mother as the litigant in search of the proverbial second bite of the apple.<sup>137</sup> The mother's efforts to contest the jurisdiction of the Virginia court weighed heavily against her. The Florida courts treated as a damning admission the statement in her brief that she "cooperated and fully participated in the court proceedings in Virginia in an attempt to rectify the injustice which has occurred, but all efforts in that jurisdiction have failed."<sup>138</sup> Against this backdrop, the Florida Supreme Court characterized the mother as "seeking to have the Florida court overrule the Virginia court's determination of jurisdiction and to reconsider the Virginia court's determination of custody."<sup>139</sup> It held that doing so would contravene the UCCJA: "Such conduct is clearly contrary to the

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subjected to or threatened with mistreatment or abuse or [was] otherwise neglected," UCCJA §6 3(a)(3), 9(IA) U.L.A. 307 (1999), is farfetched.

135. *Chaddick*, 714 So. 2d at 1008.

136. *Id.*

137. The Florida District Court of Appeal explained:

If the mother wished to challenge the authority of the Virginia courts to hear this issue without submitting herself to the jurisdiction of the Virginia courts, she should have filed her petition to domesticate and enforce the Massachusetts judgment in Florida. Then the assigned judges, pursuant to the UCCJA, would determine which state should proceed. Indeed that is a primary function of the UCCJA. In our case, the mother did not come to the Florida courts until the Virginia court had not only, with her full participation, ruled on the issue of jurisdiction but also had awarded custody of the children to the father. This was too late .... [She had her] bite of the apple.

*Id.* at 1008, 1011 (quoting *Chaddick*, 667 So. 2d at 349-50).

138. *Id.* at 1008. As the dissent noted, the mother "has been punished for attempting to convince the foreign court that it was not the appropriate forum to decide this dispute. Presumably, under the majority opinion she should have ignored the Virginia courts and rushed right into court in Florida. Her decision not to do so has proven fatal." *Id.* at 1016 (Anstead, J., dissenting).

139. *Id.* at 1010.



basic philosophy of the UCCJA and requires the type of relitigation that the UCCJA was intended to prevent.”<sup>140</sup>

The court’s emphasis on its obligations under the UCCJA is both perplexing and yet revealing of the UCCJA’s limitations. Virginia, acquiescing to the father’s choice of forum, assumed jurisdiction in spite of the facts that (1) Massachusetts was the state that issued the original custody order and (2) Florida was the children’s home state at the time the father filed the modification petition. The children had lived in Florida with their primary caretaker for two years, well beyond the statutory period that gives rise to home state jurisdiction. The children attended school in Florida and spent only brief periods of their summer vacation in Virginia,<sup>141</sup> hardly enough to make Virginia the site of the most relevant evidence about the children and their “care, protection, training, and personal relationships.”<sup>142</sup>

How is it possible that the UCCJA, designed to improve the jurisdictional frameworks that govern where a child custody dispute should take place, could be read to countenance, much less require, this result? Dissenting judges on both the intermediate appellate court and the Florida Supreme Court raised some very convincing arguments that the UCCJA did not counsel this outcome.<sup>143</sup> But the UCCJA was plagued with weaknesses that arguably allowed such

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140. *Id.* at 1010-11. The Florida courts noted that the UCCJA, adopted in both Florida and Virginia, prohibited the courts of one state from exercising jurisdiction over a custody petition if “a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act.” *Id.* at 1009 (quoting UCCJA § 6, 9(A) U.L.A. 474 (1999)). From the mother’s point of view, whether the Virginia court had acted “substantially in conformity with the act” was exactly the question that she was asking the Florida courts to determine.

141. The father moved to Virginia sometime between 1991 and July 1993, so at most the children would have had two summer visits in Virginia prior to the one that culminated in the modification dispute. *Chaddick*, 677 So. 2d at 351 (Sharp, J., dissenting).

142. One of the stated purposes of the UCCJA is to:

assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

UCCJA § 1(a)(3), 9(A) U.L.A. 271 (1999).

143. See *Chaddick*, 714 So. 2d at 1013-14 (Anstead, J., dissenting); *Chaddick*, 677 So. 2d at 350-51 (W. Sharp, J., dissenting).

a result, permitting Virginia to declare itself an appropriate forum on “significant connection” grounds in spite of another state’s superior relationship with the children in question. Virginia’s exercise of the discretion afforded to it—which then became binding and preclusive on other states—rewarded the father’s race to his preferred courthouse, which began with him retaining the children beyond the time they were to return to their custodial parent.<sup>144</sup>

The National Conference of Commissioners on Uniform State Laws addressed these and other shortcomings when it revised the Act in 1997, issuing the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>145</sup> The UCCJEA improves upon the UCCJA by ordering the various jurisdictional bases in a hierarchy, rather than treating them as equally available alternatives from which a court could select one or another at its own discretion.<sup>146</sup> Under the UCCJEA, a court assessing whether it has jurisdiction over a child custody matter is directed first to determine the child’s home state, if one exists.<sup>147</sup> The home state is given an unambiguous, mandatory priority above all other modes of exercising jurisdiction. Only if there is no court with home state jurisdiction, or the home state court has declined to exercise jurisdiction on the grounds that another, specifically identified state is the more appropriate forum, may a court exercise jurisdiction on the basis that it has a significant connection with the child and is the site of

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144. As the dissent noted, this is just a slight variation on seize and run. *See Chaddick*, 714 So. 2d at 1014 (Anstead, J., dissenting).

145. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9(IA) U.L.A. 655 (1999) [hereinafter UCCJEA]. Every state except Massachusetts has adopted the UCCJEA. *Child Custody Jurisdiction and Enforcement Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Child+Custody+Jurisdiction+and+Enforcement+Act> (last visited Mar. 31, 2014); *see* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Numbers of Disputes Increase*, 45 FAM. L.Q. 443, 450 (2012).

146. *See* UCCJEA § 201, 9(IA) U.L.A. at 671.

147. *Id.* A child may have moved too frequently, or too close in time to the initiation of the proceeding, to have a home state. *See id.* For an illustration, *see* AREEN & REGAN, *supra* note 82, at 664. Their example is as follows:

Jane lives with her mother and father in Ohio for five years. Her parents split up and she and her mother move to Wisconsin for four months, Indiana for three months and Florida for three months. Jane’s mother has a job in Florida and Jane has enrolled in school there and is taking dance classes after school. Jane’s father continues to live in Ohio. No state court in this instance is authorized to exercise home state jurisdiction, because Jane has been gone from Ohio for more than six months and has not lived in another state for six months.

substantial evidence regarding the child's care and relationships.<sup>148</sup> Although default jurisdiction remains much the same as it had appeared in the UCCJA, the NCCUSL reworked emergency jurisdiction to emphasize its extraordinary nature and disfavored status.<sup>149</sup> It continues to authorize a court to take jurisdiction when the child is present in the state and has either been abandoned or is facing mistreatment or abuse.<sup>150</sup> It also allows for emergency jurisdiction when necessary to protect the child in the event that the child's sibling or parent is subjected to or threatened with mistreatment or abuse, a significant protection for children whose welfare is threatened by family violence.<sup>151</sup> But anything the court does pursuant to its emergency jurisdiction is merely temporary.<sup>152</sup> No longer can emergency jurisdiction be used as a hook to confer full dispositional authority on a court that, but for the emergent circumstances, would lack jurisdiction.

These changes—a subset of the many improvements reflected in the UCCJEA<sup>153</sup>—do much more than simply clarify gaps and ambiguities in the previous Act. The tritrate dispute discussed above, *Chaddick v. Monopoli*, illustrates the significance of these revisions: the jurisdictional outcome would have been different under the UCCJEA. Given Florida's indisputable status as the children's home state, Virginia would not have been permitted to exercise significant connection jurisdiction. To the extent that the Virginia court was

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148. To be clear, if there is a home state but the home state has declined jurisdiction on the grounds that another state is the superior forum, only a court in the state specified by the home state may exercise "significant connection" jurisdiction. UCCJEA § 201(a)(2), 9(IA) U.L.A. at 671.

149. In the UCCJA, the emergency jurisdiction provision was found in the same section of the Act as the other bases for exercising jurisdiction. § 3(a)(3), 9(IA) U.L.A. 307 (1999). In the UCCJEA, the NCCUSL removed it from the section that sets forth the bases for exercising initial child custody jurisdiction and gave it its own section, entitled "Temporary Emergency Jurisdiction." § 204, 9(IA) U.L.A. at 676-77.

150. UCCJEA § 204(a), 9(IA) U.L.A. at 676.

151. *Id.*

152. *See id.* § 204(b)-(d), 9(IA) U.L.A. at 676-77.

153. The changes are more extensive than this Article summarizes here. For a side-by-side comparison of the two Acts, see Ron W. Nelson, *The UCCJA and the UCCJEA: A Side-by-Side Comparison*, 10 DIVORCE LITIG. 233 (1998); see also Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 FAM. L.Q. 267 (1998). For a discussion of the ways in which the UCCJEA might yet still be improved, see David H. Levy & Nanette McCarthy, *A Critique of the Proposed Uniform Child Custody Jurisdiction and Enforcement Act*, 15 J. AM. ACAD. MATRIM. LAW. 149 (1998).

exercising emergency jurisdiction predicated on the father's inability to obtain the mother's current address, such jurisdiction would have been temporary and would not have authorized the modification ruling. By mandating that the modification dispute be litigated in Florida, the state with the most substantial relationship to the children and their primary caregiver, the UCCJEA would have compelled a normatively superior result, one that is closer to the purposes served by uniform jurisdictional rules.<sup>154</sup> To effectuate these purposes, it was not enough to limit the grounds on which jurisdiction could be exercised, as the UCCJA had done. It was necessary to create a jurisdictional hierarchy, prioritizing the most determinate means of exercising jurisdiction and eliminating the discretion to pursue a more subjective, indeterminate, and thus unpredictable inquiry.<sup>155</sup>

### *C. Child Support*

The transformation from judicial discretion to determinate rules has already taken place in the law governing child support.<sup>156</sup> The previous generation of child support statutes offered little more predictability or certainty than the best-interests standard used for child custody.<sup>157</sup> The provision of the Uniform Marriage and Divorce Act governing child support is illustrative, instructing courts to order:

either or both parents ... to pay an amount reasonable or necessary for [the child's] support ... after considering all relevant factors including: (1) the financial resources of the child; (2) the financial resources of the custodial parent; (3) the standard of living the child would have enjoyed had the marriage not been dissolved; (4) the physical and emotional

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154. See *supra* note 142.

155. Every state except Massachusetts has adopted the UCCJEA. See Elrod & Spector, *supra* note 145, at 450; cf. Appleton, *supra* note 2, at 47-48 (discussing the Uniform Adoption Act, which prescribes the jurisdictional inquiry for adoption cases).

156. See Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167.

157. See JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 653 (1978) ("Statutes which authorize courts to award child support tend to be written in so general a fashion as to leave judges almost total discretion in the matter.").

condition of the child and his educational needs; and (5) the financial resources and needs of the noncustodial parent.<sup>158</sup>

This kind of flexibility resulted in awards that were not only wildly inconsistent across the similarly situated,<sup>159</sup> but also all too often inadequate, contributing to “spiraling poverty rate[s] among women and children.”<sup>160</sup> Finding that the poverty attributable to inadequate child support awards was a matter of national concern, Congress responded with legislation that required states to develop quantitative formulae for child support awards as a condition of receiving certain federal funds.<sup>161</sup> Every state has since abandoned the “all relevant factors including” approach in favor of fixed rules for calculating child support.<sup>162</sup>

The formulae that resulted are hardly impervious to criticism; in fact, the methodology used to develop the child support rules has been described as “theoretically suspect and empirically unverifiable.”<sup>163</sup> Professor Katharine Baker goes further, demonstrating that fixed rules or formulae are not merely less sensitive to context than open-ended standards, but are in fact “mostly arbitrary.”<sup>164</sup> She nonetheless argues quite persuasively why we must accept such arbitrariness, asking us to imagine a world in which a court issuing a child support order would endeavor to address the following:

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158. UNIFORM MARRIAGE & DIVORCE ACT § 309 (1973).

159. As one scholar discusses:

[O]ne study found that in a district court in Denver, the support that judges ordered in single-child families ranged from six percent to thirty-three percent of the obligor’s income. In another study, a random sampling of cases revealed that fathers earning \$155.00 per week had to pay anywhere from ten dollars to sixty dollars per week for one child, depending on the judge.

Murphy, *supra* note 16, at 227 (footnotes omitted).

160. *Id.* at 226-27.

161. The Congressional response came in stages, each time providing for the further reduction of judicial discretion. *See, e.g.*, AREEN & REGAN, *supra* note 82, at 782; Charlotte L. Allen, *Federalization of Child Support: Twenty Years and Counting*, 73 MICH. B.J. 660, 660-61 (1994).

162. *See* Ellman, *supra* note 156, at 169-70.

163. *Id.* at 168; *see also* Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 340-42.

164. Baker, *supra* note 163, at 361.

Has an adult developed a sufficiently important relationship with a child for that relationship to warrant the imposition of obligation? Whose views about the relationship should count? The child's? The potential obligor's? A current obligor who may know nothing about the potential obligor, but has much to gain from someone else being obligated? How should a judge allocate responsibilities between obligors? What if one obligor already has outstanding duties to another set of children? Should the formalization of the parental obligation to either set of children matter or just the reliance of the children? What about the reliance of another parent? How many other parents? When is such reliance reasonable? What if one set of children finds a new source of support, who should enjoy the windfall of that new support, the children or the obligor? Should the obligor's income, parenting philosophy, or intent to parent be at all relevant?<sup>165</sup>

Noting that “[t]hese are very messy questions,” Professor Baker concludes that “[a] parent and/or child eager to secure and keep resources flowing might strongly resent how much time it would take to answer the questions, how invasive the process of answering would be, and how many resources the whole process would drain.”<sup>166</sup> Baker's critique is particularly powerful for our purposes because it illustrates that the benefits of a determinate approach accrue not merely in spite of, but *because of*, the limitations that are placed on the decision-making process.

Studies comparing the fixed-rule regime to its predecessor suggest that the former has achieved higher awards<sup>167</sup> as well as more consistency across awards,<sup>168</sup> allows parties and their attorneys to predict with much more accuracy the amount of support ordered,<sup>169</sup> and has reduced the time and expense of child support litigation.<sup>170</sup> As one author asserts, “The consensus emerging from the studies and the stories is that child support guidelines are working. The guidelines seem to realize the virtues of having rules that fix, with

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165. *Id.* at 362.

166. *Id.*

167. Murphy, *supra* note 16, at 238-40.

168. *Id.* at 233.

169. *Id.* at 234.

170. *See id.* at 237.

more certainty than before, the parameters of parents' responsibility to support their children."<sup>171</sup>

#### *D. Synthesizing the Trend Toward Determinate Rules*

The judgments being made in each of the preceding contexts are, of course, very different from one another, as are the legal developments taking place in each, and it would be a mistake to over-generalize or overstate what they all have in common.<sup>172</sup> But with that caution in mind, it is fair to say that these examples illustrate an emerging recognition that families are not necessarily best served by infinitely individualized decision making. In fact, as Baker's work on child support illustrates so beautifully, infinitely individualized decision making places enormous procedural burdens on precisely the individuals the law is designed to serve.<sup>173</sup>

Nonetheless, increasing the "ruleness" of legal frameworks always comes at a cost to flexibility and sensitivity to context,<sup>174</sup> and we can readily see why lawmakers might be particularly hesitant to accept these costs in family law, where advancing the goals of postdissolution child welfare or economic stability seems difficult to achieve by means of standardization. But even in these areas, lawmakers and scholars are recognizing that these costs are sometimes warranted: that the predictability and certainty that come from fixed rules can do more to further family welfare than the sensitivity to context that comes from an unconstrained decision maker.<sup>175</sup>

In tension with these developments is a competing trend: in another area of family law we are seeing a move toward more flexible and more individualized decision making that eschews reliance on formal legal status in favor of functional assessments of

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171. *Id.* at 232; *see also* Ellman, *supra* note 16, at 858 (characterizing child support as "an example ... of the willingness to sacrifice the decision maker's discretion to craft customized justice in each individual case, in order to achieve a larger benefit over the full run of cases").

172. It would, however, also be a mistake to assume that child support is more amenable to fixed rules simply because it involves financial calculations. As one scholar has noted, ascertaining the cost of raising children involves "quintessentially subjective value judgments" that "cannot be determined neutrally. What kind and how much food, clothing, enrichment, education, and recreation does a child need, deserve, or benefit from? Millions of parents answer these questions differently every day." Baker, *supra* note 163, at 330.

173. *See supra* text accompanying note 166.

174. *See* Ellman, *supra* note 16, at 859.

175. *See id.* at 871.

the relationships in question. I examine this phenomenon in the following Part.

### III. FAMILY LAW'S FUNCTIONAL TURN

The legal frameworks discussed above, which indicate a trend toward determinate rules, generally apply to disputes between two people both recognized as the legal parents of the children in question.<sup>176</sup> But when it comes to determining who the law should treat as a parent in the first place, a different trend emerges. Here we see movement away from a formalist, rule-based regime to one that affords flexibility, discretion, and sensitivity to context. In this Part, I describe the traditional formalist approach to legal parentage and the emerging functionalist response.

#### *A. Understanding Traditional Parentage*

The determination of a child's parentage was traditionally an inquiry governed by determinate rules, the application of which yielded legally clear—though still normatively contestable—answers about which individuals enjoyed formal legal status as a parent.<sup>177</sup> The woman who gave birth to a child was identified as the child's mother, and her husband was presumed, often conclusively, to be the child's father.<sup>178</sup> Professor Susan Frelich Appleton illuminates the practical significance of the presumption: "Whether he is genetically related or not, the presumption makes the mother's husband automatically and immediately a full-fledged legal parent,

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176. This is definitely true for child custody disputes in which the court applies the best-interests standard, the modification of orders arising from those contests, and child support proceedings. The UCCJEA, however, applies both to disputes between two legal parents and disputes that involve a person "acting as a parent." See UCCJEA § 201, 9(A) U.L.A. 671 (1997).

177. See, e.g., Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 318 (2007).

178. *Id.* at 309-10; Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 55-56 & n.2 (2003). The scheme was not merely biologically determinate, as the marital parentage presumption conferred legal fatherhood on husbands to the exclusion of the known biological fathers. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).



without the need for any additional state intervention.”<sup>179</sup> When the birth mother was unmarried, she was the sole legal parent of her child.<sup>180</sup> Legal parenthood, conferred automatically via these biological and marital-based defaults, was occasionally transferred to adoptive parents via judicial proceedings, bestowing upon them the full complement of parental rights and responsibilities.<sup>181</sup>

To understand the implications of these rules that identify who is a legal parent, we need to explore in more detail what it means to be deemed a parent in the eyes of the law. Formal legal status as a parent has been an enormously powerful construct. It has traditionally been an exclusive status, afforded to at most two people,<sup>182</sup> and it has, for the most part, reflected a binary quality—one is either a legal parent or a legal stranger to any given child.<sup>183</sup> With certain carefully circumscribed exceptions, one’s relationship with a child has traditionally been given either the full range of protection afforded to legally recognized parents or none at all, leaving the relationship entirely vulnerable to the consent of the child’s parent or parents.<sup>184</sup>

The central elements of the traditional parentage regime are still in place, both as to what it means to be a legal parent and how the

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179. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 233 (2006). Appleton makes the point particularly clear by contrasting this with other methods of becoming legally recognized as a father, which entail considerable state regulation, the passage of time, or both, and in some cases are available only upon family dissolution. *Id.*

180. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 207 (1985). Historically, however, the maternal ties were weaker. MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 26 (1994).

181. For a history of adoption in the United States, see Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003).

182. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 (1984); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 506 (1998).

183. See, e.g., Jacobs, *supra* note 177, at 314 (“The dichotomy between the rights of parents and nonparents is well established in American jurisprudence.”); Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 770-71 (1999) (“The law utilizes dualistic categories, such as ‘parent’ versus ‘nonparent’—which, in law, may be the same as ‘stranger’—to identify those who hold legally recognized and enforceable rights or obligations and to separate them from those who have no rights or obligations.”).

184. See Shapiro, *supra* note 183, at 770-73.

law identifies one as such.<sup>185</sup> The binary and exclusive nature of legal parenthood is expressed and enforced through special gate-keeping statutes that delineate when an individual who is not a legal parent may initiate or participate in a child custody proceeding in which a court will allocate parental rights and responsibilities. Although some states allow fairly unrestricted access,<sup>186</sup> most require petitioners to satisfy specific conditions that reflect the legislature's judgment about which situations warrant interference with a parent's decision making.<sup>187</sup> For some states, the key inquiry is whether the petitioner is a relative of the child in question; nearly every state allows grandparents to seek visitation in some form, although some require the grandparent to first demonstrate that there is a custody case currently pending or that there has been a disruptive event in the family, such as a death or a divorce.<sup>188</sup> Other states allow nonparents to initiate child custody proceedings only if they have existing caretaker relationships with the child in question. In Colorado, for example, a nonparent may initiate a child custody proceeding only if the child has been in her physical care for at least six months and she files the petition within six months of the end of the period of physical care.<sup>189</sup> The Texas statute reflects an even more restrictive version of this approach, requiring a nonparent to show that he "has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition."<sup>190</sup>

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185. *But see* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295 (2005) (noting increasing uncertainty in the legal definition of parenthood).

186. Washington is one example, although the Supreme Court has deemed an application of this statute to be unconstitutional in *Troxel v. Granville*, 530 U.S. 57 (2000).

187. *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, 8, 18 (2013).

188. *Id.* at 29; Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 75 (2008). The key difference here is between those states that permit a grandparent to initiate a proceeding and those that simply permit a grandparent to seek visitation within the context of an existing proceeding. *See, e.g.*, COLO. REV. STAT. ANN. § 19-1-117 (2013) (permitting only the latter), *limited by In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006).

189. COLO. REV. STAT. ANN. § 14-10-123(1)(c) (2013).

190. TEX. FAM. CODE ANN. § 102.003(a)(9) (2013). The Texas courts have interpreted this provision to require some degree of control beyond that inherent in caretaking, and have denied standing to petitioners with long-standing caretaking relationships who were unable

Although these are often referred to as questions of “standing,” the reference to trans-substantive justiciability doctrines is misleading; these statutes close the family court door to a great many individuals who would easily meet the federal courts’ tripartite requirement of injury, causation, and redressability.<sup>191</sup> The statutes that govern “standing” in family law do considerably more than ensure that courts are adjudicating disputes between litigants who have a sufficiently personal and concrete stake in the outcome.<sup>192</sup> They operate as a significant procedural and substantive entitlement for the legally recognized parent: except in carefully circumscribed situations, parents do not have to answer to nonparents. The right to exclude is at the heart of the law’s package of parental rights, as surely as the obligation to provide support is at the heart of the law’s package of parental responsibilities. Standing in family law is therefore an expression of the view that the parental prerogative is not only to have the ultimate authority regarding the child in question but to be free of the obligation to explain or defend such decisions.

This prerogative continues to be conferred largely through the biological and marital-based default rules summarized above. The woman who gives birth to a child continues to be automatically

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to show that they enjoyed some sort of “power or authority to guide and manage, and ... to make decisions of legal significance for the child.” *In re K.K.C.*, 292 S.W.3d 788, 793 (Tex. Ct. App. 2009). Even when a co-parent was able to point to a written agreement to share custody after the couple’s separation, the court insisted that she had not established the requisite control because the biological mother had not relinquished or “ceded ... any of her exclusive legal rights to control” the child. *In re Wells*, 373 S.W.3d 174 (Tex. Ct. App. 2012). This drains the provision of much of its significance, because if it allows standing only when a legal parent has relinquished rights to the child, it offers no avenue for a co-parent to assert that he or she should be deemed to share those legal rights.

191. Constitutional principles reinforce the exclusive and binary nature of legal parenthood; the Supreme Court has held that a parent’s constitutionally protected right to the care, custody, and control of her child barred the application of a state statute permitting anyone to petition for visitation at any time. *See Troxel v. Granville*, 530 U.S. 57, 63 (2000).

192. This is, of course, a simplified view of standing as a trans-substantive justiciability doctrine that restricts the jurisdiction of federal courts and, to a lesser extent, state courts. I use this simplified view to draw the contrast to “standing” as it operates in the domestic relations context. I do not mean to diminish the substantial obstacles that standing poses to many plaintiffs or to endorse the federal courts’ standing doctrine, which has been rightly criticized as incoherent and politically motivated. For some of this criticism, see F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 n.3 (2008) (noting this body of literature and collecting sources).

recognized as the child's legal mother.<sup>193</sup> And although many jurisdictions have weakened its force,<sup>194</sup> the marital parentage presumption is present in some form in every state,<sup>195</sup> proving more tenacious than the requirement that there be one man and one woman to compose a valid marriage.<sup>196</sup> Nonetheless, while biology and marriage continue to be preeminent in the law's assignment of parental status, as scholars have observed, a "contemporary emphasis on behavior and function" is increasingly pronounced in the way courts are handling difficult parentage disputes.<sup>197</sup>

### *B. The Tension Between Formal Parentage and Functional Parenthood*

One can see the divide between the old formalism and the new functionalism most dramatically in the ever-growing set of custody disputes between people who do not fit the mold of a married,

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193. See Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 674 (2012) ("In every state, a woman who gives birth to a child—outside of an enforceable surrogacy agreement—is the legal mother of that child. A single woman who adopts a child has a similarly invulnerable, legal parent-child relationship with the adopted child.")

194. See Appleton, *supra* note 179, at 234-36. For an illuminating discussion of why the marital presumption is no longer as effective in securing legal paternity as it once was, see Carbone, *supra* note 185.

195. See Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 467 (2012) ("The law in all states presumes that a husband is the father of his wife's children and gives him the status of the children's legal father.")

196. There are currently more states that permit same-sex marriage—as this goes to print, seventeen plus the District of Columbia—than have abandoned the marital parentage presumption. See *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 26, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx>. The number may very well grow. Federal courts in two additional states, Utah and Oklahoma, have struck down bans on same-sex marriage; those orders have been stayed pending appeal and are thus not included in the above count. With more than forty cases currently pending in state and federal courts raising the constitutionality of same-sex marriage bans, the accuracy of such a tally is necessarily short-lived. See Juliet Eilperin, *Judge Rules Oklahoma Same-Sex Marriage Ban Is Unconstitutional*, WASH. POST (Jan. 14, 2014), [http://www.washingtonpost.com/politics/judge-rules-oklahoma-same-sex-marriage-ban-is-unconstitutional/2014/01/14/2729f2b4-7d73-11e3-95c6-0a7aa80874bc\\_story.html](http://www.washingtonpost.com/politics/judge-rules-oklahoma-same-sex-marriage-ban-is-unconstitutional/2014/01/14/2729f2b4-7d73-11e3-95c6-0a7aa80874bc_story.html).

197. Appleton, *supra* note 2, at 26; see also Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 55 (2007) ("[T]he law is slowly but surely moving toward a functional definition of parenthood.")

heterosexual couple who are both biologically related to the children in question.<sup>198</sup> Prominent among these are same-sex couples who have raised children together, sharing fully and equally in care-taking duties.<sup>199</sup> Often one parent has a biological or adoptive connection to the child, whereas the other does not.<sup>200</sup> Some states now issue marriage licenses to same-sex couples or recognize civil unions or domestic partnerships with nearly all the rights and responsibilities of marriage; by one count, sixteen such jurisdictions have thereby extended the marital parentage presumption to same-sex couples who formalize their relationships.<sup>201</sup> But for those who decided to have children before these developments,<sup>202</sup> or who live in jurisdictions that continue to exclude same-sex couples from the rights and responsibilities of marriage, or for couples who have not formalized their relationship for other reasons, the law lacks a determinate mechanism for conferring parental rights on individuals who do not enjoy the status that attends a biological or adoptive

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198. As Pamela Laufer-Ukeles and Ayelet Blecher-Prigat have explained, the issue of functional parenthood can arise in a range of different contexts, including “open adoption; homosexual relationships; stepparent and cohabitant relations; grandparent [and other] extended familial relationships; assisted reproduction with multiple parents; and foster parent relationships.” Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 423-24 (2013) (footnotes omitted).

199. For other examples, see *C.M. v. P.R.*, 649 N.E.2d 154 (Mass. 1995); *Multari v. Sorrell*, 731 N.Y.S.2d 238 (App. Div. 2001); *Sean H. v. Leila H.*, 783 N.Y.S.2d 785 (Sup. Ct. 2004); *In re K.K.C.*, 292 S.W.3d 788 (Tex. Ct. App. 2009).

200. Some states allow second parent adoption, a mechanism that allows a co-parent to adopt her partner’s child as long as the legal mother consents and joins the adoption petition. See Grossman, *supra* note 193, at 674. One authority identifies eighteen states plus the District of Columbia that allow second-parent adoption by statute or appellate court decision and notes that in another twelve states trial courts have granted second-parent adoptions. See COURTNEY JOSLIN & SHANNON MINTER, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 5:3 (2012). For further explanation and critique of second-parent adoptions, see Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 207 (2009) (“Even where second-parent adoption is available today, the couple must hire a lawyer and participate in what can be both a lengthy and expensive legal process.”); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN’S L.J. 17 (1999).

201. Harris, *supra* note 195, at 467.

202. This assumes that the marital parentage presumption would not operate retroactively when a child was conceived or born before the beginning of the marriage. See, e.g., 750 ILL. COMP. STAT. ANN. 45/5 (2013) (“A man is presumed to be the natural father of a child if: (1) he and the child’s natural mother are or have been married to each other ... and the child is born or conceived during such marriage.”).

connection. In the all-or-nothing world of parental rights, such individuals can be left with no recourse in the event that the legal parent decides to cut off contact between her children and her former partner. Courts following the traditional approach treat these “former partner parents” as legal strangers, in spite of overwhelming evidence that the couples both intended to, and did in fact, raise children jointly as co-parents.

In one such dispute, former partners Michelle and Leslea White had each conceived and given birth to a biologically related child via artificial insemination, using the same anonymous sperm donor.<sup>203</sup> The couple separated approximately a year and a half after the younger child was born, and for about six months, the children lived with one parent part of the time and the other parent part of the time.<sup>204</sup> Michelle, the biological mother of C.E.W., then refused to allow Leslea to have any contact with C.E.W. or to contribute to C.E.W.’s support.<sup>205</sup> At the risk of making the unseemly suggestion that a parent in Leslea’s situation would leverage her own parental rights in a retaliatory fashion, one might think that Michelle’s interest in her relationship with Leslea’s biological child would inspire collaborative behavior with reciprocal expectations. Instead, Michelle stopped seeking contact with Leslea’s biological child or contributing to his support and refused to allow the siblings to see each other.<sup>206</sup> In short, she severed the relationship between two siblings, between herself and an almost two-year-old child she raised from birth as a co-parent, and between her biological three-year-old child and a person the child had known as a parent since birth.<sup>207</sup>

Surely, whatever else we might expect from a family law regime, a tolerably effective one would impose some backstop on this kind of conduct. According to the Missouri Court of Appeals, however, there was not a single statutory provision or equitable principle that Leslea, as a legal stranger to C.E.W., could invoke to call upon the assistance of the state; Leslea did not even have standing to initiate

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203. *White v. White*, 293 S.W.3d 1, 6 (Mo. Ct. App. 2009). “The sperm donor waived all parental rights to both children.” *Id.* at 6 n.1.

204. *Id.* at 6.

205. *Id.*

206. *Id.*

207. *See id.*

a proceeding in which the court could evaluate her relationship with C.E.W. in any sort of qualitative fashion.<sup>208</sup> In other words, Missouri's family law framework, as the court understood it, conferred upon Michelle an absolute right to behave in this way, imposing upon her no obligation to submit to a determination of the impact on the children.<sup>209</sup> This kind of formalism garners few defenders.<sup>210</sup>

For courts following the traditional approach, even the existence of unambiguous co-parenting agreements offers no protection to a functional parent when the legal parent has denied contact with her children.<sup>211</sup> After eight years of living together, Mary Wakeman and

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208. *See id.* at 25 (affirming the trial court's dismissal of Leslea's petition for lack of standing and failure to state a claim).

209. *See id.*

210. *See* Schauer, *supra* note 3 and accompanying text (noting that in spite of scholarly disagreement over the exact meaning of formalism, there is consensus that "whatever formalism is, it is not good"). Notwithstanding Schauer's wry observation, this particular brand of formalism does in fact have a few proponents: typically, conservative individuals and organizations that resist the expansion of recognized family forms beyond the heterosexual couple and their biologically related children. *See, e.g.*, William C. Duncan, *Deconstructing Parenthood*, 22 THE FAMILY IN AMERICA, Oct.-Dec. 2008, at 8, available at [www.profam.org/pub/fia/fia.2204.htm](http://www.profam.org/pub/fia/fia.2204.htm); William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263 (2010).

Duncan is the director of the Marriage Law Foundation, an organization that describes its mission as one of "reaffirming the legal definition of marriage as the union of a husband and wife." *About the Foundation*, MARRIAGE L. FOUND., <http://www.marriagelawfoundation.org/board.html> (last visited Mar. 31, 2014). Although these organizations consistently deploy rhetoric that emphasizes the welfare of children, they apparently believe that this objective would be advanced by allowing a legal parent to terminate all contact between a child and someone who had functioned as a parent since the child's birth. In one parentage and custody dispute between two former partners who had formalized their relationship under Vermont's civil union law, an organization opposed to the recognition of same-sex couples in Vermont raised money to support the biological mother's efforts to repudiate her former partner's parental status. *See* Appleton, *supra* note 179, at 251. The biological mother was represented by lawyers from Liberty University, an evangelical institution, throughout legal proceedings that lasted seven years due to her repeated refusal to comply with court orders granting visitation to her former partner. Erik Eckholm, *Pastor Is Accused of Helping to Kidnap Girl at Center of Lesbian Custody Fight*, N.Y. TIMES, Apr. 24, 2011, at 16N. The collaboration between the biological mother and her conservative evangelical supporters eventually took a criminal turn, as the woman's pastor helped her kidnap the child and travel to Canada, Mexico, and then Nicaragua in an effort to evade authorities. *Id.* To the extent that these same proponents have railed against the shortcomings of single parenthood, there is some irony in the fact that the denial of parental status to former partner parents leaves the vast majority of the children in question with one rather than two parents. *See, e.g.*, White, 293 S.W.3d 1, 6-7, 25 (6 Mo. Ct. App. 2009).

211. *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006); *see also* *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Ct. App. 1990) (denying co-parent standing to assert a claim for

Dene Dixon entered into an agreement with a sperm donor, in which he relinquished parental rights and agreed that the two women would be the “co-parents” for any child conceived through the sperm donation.<sup>212</sup> The same agreement specified that Wakeman would be the co-parent of any children born to Dixon and that Dixon would be the co-parent of any children born to Wakeman.<sup>213</sup> Dixon became pregnant as a result of the sperm donation.<sup>214</sup> After the child was born in May 1999:

Dixon and Wakeman entered into another agreement in which each party acknowledged that the decision to conceive the child was a ‘joint decision’ which was based on the commitment of each to ‘jointly parent the child.’ In this agreement ... Wakeman agreed to contribute to the financial support of the child and both parties indicated their intent to ‘equally share in providing the child’ with the necessary support until [the age of] majority.<sup>215</sup>

The document also reflected their agreement that Wakeman is “a de facto parent who has participated in all phases of pre-natal care, and who plans to provide [the child] with a stable environment and psychological parenting relationship ... [that] should be protected and promoted to preserve the strong emotional tie that will develop between them.”<sup>216</sup> Perhaps most notably, the agreement provided that in the event Wakeman and Dixon separated, they would “continue to provide for the child [as described above,] and that each party [would] facilitate a close relationship with the other and [would] continue to raise the child in a joint manner.”<sup>217</sup> Dixon also executed a designation of guardianship naming Wakeman as the child’s guardian should the need arise.<sup>218</sup> Wakeman and Dixon prepared for the birth of their second child two and a half years

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custody or visitation against legal mother in spite of the fact that the two had agreed to raise the child together and share custody).

212. *Wakeman*, 921 So. 2d at 670.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*



later with a similar sperm donation agreement and executed an identical co-parenting agreement and execution of guardianship.<sup>219</sup>

In short, for each of their two children, no fewer than three agreements reflected the couple's intent to care for the children jointly as co-parents. The existence of these agreements reflects the sustained efforts the couple went through to protect the family's parent-child relationships against a framework in which the default rules offered no help at all. Nonetheless, when Dixon and Wakeman separated, Dixon asserted that "Wakeman had no enforceable legal rights regarding the children," and the Florida courts agreed.<sup>220</sup>

In addition to serving as evidence of the couple's intent, these agreements also suggested an opportunity for Wakeman to style her complaint as one seeking enforcement of contract, arguably offering a procedural route to a custody determination on the merits that would be unavailable under the state's third-party standing requirements.<sup>221</sup> The court could have accepted the invitation, issuing a narrow, only-on-these-facts contract law determination conferring parental rights on Wakeman without importing the concept of functional parenthood into a statutory scheme that had declined to recognize it. The court, however, deemed such agreements categorically unenforceable and treated the case as indistinguishable from one in which an unrelated third-party attempts to obtain visitation in the absence of explicit co-parenting agreements.<sup>222</sup> The court treated Wakeman as a legal stranger to the two children and affirmed the dismissal of her complaint.<sup>223</sup>

The case is fascinating for its conclusion that a legal parent cannot contract around the default parentage rules, giving effect to what was at one time the parent's considered judgment regarding the best interests of her child.<sup>224</sup> The court offered no discussion to

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219. *Id.*

220. *Id.* at 671, 673.

221. The Florida statute governing standing in domestic relations disputes does not allow nonparents to seek custody or visitation, and the Florida courts had held that they lacked inherent authority to award visitation to nonparents. *See Music v. Rachford*, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995) (citing *Meeks v. Garner*, 598 So. 2d 261 (Fla. Dist. Ct. App. 1992)).

222. *Wakeman*, 921 So. 2d at 673.

223. *Id.*

224. This arguably fails to reflect the presumption, invoked in so many other contexts, that a fit parent acts in the best interest of her child. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

illuminate the wisdom of adopting this prohibition, obscuring the profound arguments that surely exist on either side of the issue.<sup>225</sup> This is especially troubling given that Wakeman's allegations indicated that their family life reflected the principles of the co-parenting agreements for the five years preceding the break-up.<sup>226</sup> Assuming this to be true, the resulting bonds between Wakeman and the children, and the harmful effects of severing these bonds, would seem to warrant some attention in any discussion of the enforceability of co-parenting agreements. A considered treatment of this issue would address the reality that agreements between parents are likely to influence family behavior in ways that directly implicate the interests of the children, the supposed touchstone of all child custody matters.<sup>227</sup>

This is not to suggest that importing contract principles into parentage determinations is unproblematic. Since the days of *Baby M.*, courts and scholars have been skeptical that basic contract principles are adequate to protect the profound interests in play.<sup>228</sup> But to the extent that we worry about binding a legal mother to her earlier commitment to share parentage with another, these very same concerns would apply to voluntary acknowledgements of paternity, a mechanism available in every state for unmarried opposite-sex couples to confer legal fatherhood on the partner of a child's birth mother.<sup>229</sup> In any event, had the court been willing to even consider Wakeman's proffer of a binding contractual agreement, it could have deemed Wakeman and Dixon's particular agreement to be unenforceable because it was coerced or involuntary, had Dixon adduced facts to that effect. Or it might have concluded that the evidence was insufficient to establish a mutual intent to share the rights and responsibilities of co-parents. Instead, the court's ruling renders

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225. Any such discussion was similarly lacking in a prior case the court cited as establishing the unenforceability of co-parenting agreements. See *Wakeman*, 921 So. 2d at 672; *Taylor v. Kennedy*, 649 So. 2d 270 (Fla. Dist. Ct. App. 1994).

226. *Wakeman*, 921 So. 2d at 671-78.

227. For cases taking contrasting approaches to co-parenting agreements, see *E.N.O. v. L.M.N.*, 711 N.E.2d 886 (Mass. 1999); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); see also JOSLIN & MINTER, *supra* note 200, § 5:31.

228. See, e.g., J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345 (2011); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323.

229. Harris, *supra* note 195, at 469, 475.

absolutely meaningless not only the family's lived experience, but the couple's effort to formalize their understanding through contractual mechanisms.<sup>230</sup> This case exemplifies the qualities of formalism that have driven it into such disrepute: a superficial adherence to the statutory framework at the cost of the very interests supposedly protected therein, and the failure to acknowledge plausible alternative decisional pathways that might have better harmonized the result with the substantive interests at stake.<sup>231</sup>

It is little wonder, then, that a contrasting approach is emerging. To avoid the kind of injustices described above and the manifest harm to the children involved, courts have been increasingly responsive to claims that someone who has functioned as a parent should have some legally protectable rights that overcome the objection of the legal parent, even when the statutory scheme makes no such provision.<sup>232</sup> Confronted with litigants who have shared parenting responsibilities as pervasively as the couples described above, these courts have allowed a functional parent the opportunity to demonstrate a "parent-like relationship" and a "triggering event" that is sufficient to justify the state's intervention in the legal parent's relationship with her child.<sup>233</sup> A functional parent who can make these requisite showings is then entitled to a hearing at which she can attempt to establish that continued contact would be in the child's best interests.<sup>234</sup> A handful of jurisdictions have enacted

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230. For more on the regulation of family relationships through private ordering, see Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1756 (2007); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249 (2010); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1325-63 (1997); Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. & FAM. STUD. 1 (2003); Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913 (2007).

231. See, e.g., Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 336 (2004) ("Our legal system's claim that the best interests of children serve as the guiding principle for all law relating to children is regularly ignored in reality.").

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

233. *Id.* at 421.

234. See *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959, 968 (R.I. 2000); *H.S.H.-K.*, 533 N.W.2d at 421.

statutory provisions that afford some protection for functional or “de facto” parents.<sup>235</sup>

It is easy to see why the “functional turn” in parentage, permitting the recognition of “parental status based on behavior and the resulting emotional ties and dependencies,” would be embraced as a welcome development.<sup>236</sup> Professor Carlos Ball has argued persuasively that the functional parenthood doctrine “has an important role to play in the allocation of parental rights” and that individuals who have functioned as parents should have “the opportunity to demonstrate that granting them custody and visitation rights would be in the children’s best interests.”<sup>237</sup> Professor Melanie Jacobs has advocated that “courts confer legal parentage on people who have functioned as parents and/or intended to be parents” in situations “when families do not comport with the traditional nuclear family.”<sup>238</sup> Professor Laura Kessler asserts that the law is “slowly but surely moving toward a functional definition of parenthood.”<sup>239</sup> She characterizes this trend as being particularly pronounced in “the more progressive states,” and calls for policymakers to take another step, providing for the legal recognition of “community parenting” where multiple adults function as parents.<sup>240</sup> While she specifies that the article is offered as a “preliminary thought experiment” and therefore “does not seek to work out in any detailed fashion a set of legal rules for defining or regulating community parenting,”<sup>241</sup> she acknowledges that functional parenthood is “the threshold question” that must be addressed prior to the recognition of community parenting.<sup>242</sup> Other scholars have similarly been willing, to varying degrees, to consider what Professor Susan Frelich

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235. See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (2009); D.C. CODE § 16-831.01 (2009).

236. Appleton, *supra* note 2, at 16-17 (describing “family law’s functional turn” as “the rise of standards that accord legal recognition to those who perform a family relationship, regardless of the absence of formal or biological connections”); see also Appleton, *supra* note 179, at 271 (noting that “a strictly functional approach” has been recommended by commentators “for a wide variety of family law problems”).

237. Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POLY & L. 623, 668 (2012).

238. Jacobs, *supra* note 177, at 333.

239. Kessler, *supra* note 197, at 55.

240. See *id.* at 49, 63-65.

241. *Id.* at 52.

242. *Id.* at 77.

Appleton calls “multi-parentage.”<sup>243</sup> Multi-parentage questions can certainly arise in situations where more than two parents claim the sort of biological or marital connection upon which formal legal parenthood has traditionally been predicated—in states that extend the marital parentage presumption to same-sex couples, for example, it is easy to imagine a biological mother, the woman to whom she is married, and the male friend who assisted them in conceiving all pressing parentage claims cast in formalist terms. Nonetheless, much of the scholarly discourse surrounding multi-parentage incorporates an acceptance of functional parenthood.<sup>244</sup> It in fact suggests confidence that a functional approach is up to the task of delineating parental status among numerous adults who are in such profound conflict over the proper allocation of parental rights and responsibilities that they seek judicial intervention to resolve the dispute.<sup>245</sup>

It is one thing to acknowledge functional parenthood as an important stopgap to which courts may resort<sup>246</sup> in the absence of other mechanisms that would protect a parent-child relationship from lasting harm. But it is quite different to suggest that the law of parentage should evolve toward an increasingly functional approach or that such an approach can serve as the foundation upon which to build a framework that recognizes multiple parents. To do so overlooks the shortcomings of the functional approach and mistakes a deeply flawed stopgap for the promising future of parentage. A closer look at family law’s “functional turn,” undertaken

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243. See Appleton, *supra* note 2, at 13.

244. See *id.* at 16-17 (“[A]ll those scholars considering multi-parentage emphasize modern family law’s functional turn—the rise of standards that accord legal recognition to those who perform a family relationship, regardless of the absence of formal or biological connections.”) (footnotes omitted).

245. See Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 127 (2004) (“Mutual caregiving relationships, in which an adult provides for the needs of a child, should be legally recognized. The level of legal protection accorded should be appropriate for, reflective of, and limited to that which is beneficial and necessary to protect and support the established caregiving relationship. Further, the legal protection accorded should be granted in accordance with the protection for practical parental decision-making authority necessary for life of each child.”) (emphasis removed) (footnote omitted).

246. Courts can make use of this stopgap at their own behest, through the common law development of equitable principles, or at the direction of statutory provisions that acknowledge functional parenthood. See, e.g., *infra* notes 247-58 and accompanying text.

below, reveals reasons to be skeptical that it should serve as a model for family law decision making.

#### IV. THE COMPARATIVE VIRTUES OF A NEW FORMALISM

First, as a descriptive matter, some of the mechanisms noted by scholars as evidence of positive trends toward recognizing functional parenthood fall seriously short of what we might hope for in protecting the relationships between co-parents and their children. Consider, for example, the discourse surrounding Kentucky's custody statute, which defines "de facto custodians" and specifies that they may participate in custody proceedings.<sup>247</sup> One scholar characterizes Kentucky as a state that has "recognized functional parents by statute where certain conditions are met."<sup>248</sup> Other scholars have invoked the same Kentucky statute as an instance of states "equating functional status with formal status."<sup>249</sup> But the statute confers "de facto custodian" status only on those who have been the primary caretaker *and* the primary financial supporter of the child in question.<sup>250</sup> The asserted custodian has to demonstrate these facts by clear and convincing evidence,<sup>251</sup> and such standing has to be demonstrated anew each time custody is disputed.<sup>252</sup> It should be evident how dissimilar this is from the procedural posture occupied by those who enjoy formal legal status as parent; in order to advance to a custody determination on the merits, legal parents do not have to show that they are either the primary caretaker or the primary financial supporter, much less that they are both.<sup>253</sup> Such a showing is, almost by definition, only possible when the legal parent is absent from the scene.<sup>254</sup> Recall the dispute between Mary

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247. KY. REV. STAT. ANN. § 403.270(1)(a)-(b) (2013).

248. Kessler, *supra* note 197, at 65 (citing KY. REV. STAT. ANN. § 403.270(1) (1999)).

249. Laufer-Ukeles & Blecher-Prigat, *supra* note 198, at 446 & n.138.

250. *See* Swiss v. Cabinet for Families & Children, 43 S.W.3d 796, 798 (Ky. Ct. App. 2001) (holding that petitioner must be both primary caretaker and primary financial supporter to satisfy statutory definition of de facto custodian).

251. § 403.270(1).

252. Sullivan v. Tucker, 29 S.W.3d 805, 808 (Ky. Ct. App. 2000).

253. *See, e.g.*, Young v. Hector, 740 So. 2d 1153, 1158-59, 1161 (Fla. Dist. Ct. App. 1998) (explaining that the mother, who was awarded custody by the trial court, worked full-time outside the home and shared child care responsibilities with a nanny, in spite of the fact that father was unemployed).

254. Kentucky courts have held that parenting the child alongside the natural parent does

Wakeman and Dene Dixon, or the one between Leslea and Michelle White, or any one of a large number of surprisingly similar cases in which a biological or adoptive mother and her partner raised children jointly as co-parents, manifesting every possible attribute of shared parenting.<sup>255</sup> The very fact that the couples in question shared caretaking and financial responsibility equally would defeat a claim brought by the non-legal mother to be recognized as a de facto custodian under a statute like Kentucky's. Whatever its merits, the statute is simply inadequate for the task of recognizing and adjudicating true co-parenthood.<sup>256</sup>

Other states permit the recognition of a de facto parent who has co-parented the child alongside the child's legal parent, but limit the rights that can flow from such recognition, allowing de facto parents

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not meet the de facto custodian standard in § 403.2701(1)(a). *See* B.F. v. T.D., 194 S.W.3d 310, 310-11 (Ky. 2006) (holding that a partner who lived with mother and mother's adopted child as a family did not have standing to seek custody because the child was in the physical custody of the legal parent); *Satterly v. Meredith*, No. 2011-CA-001862-ME, 2012 WL 967502, at \*3, \*5-6 (Ky. Ct. App. Mar. 23, 2012); *Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky. Ct. App. 2001), *abrogated on other grounds by* *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

255. Such attributes include jointly planning and paying for the adoption or insemination; giving the children hyphenated last names; sending out birth or adoption announcements listing both parties as parents; taking maternity leave; shouldering financial responsibility; attending school conferences, extracurricular activities, and doctor's appointments; and otherwise participating in daily nurturing and decision making regarding the children. *See, e.g., In re E.L.M.C.*, 100 P.3d 546, 548-50 (Colo. App. 2004); *Embry v. Ryan*, 11 So. 3d 408, 409 (Fla. Dist. Ct. App. 2009); *Debra H. v. Janice R.*, 930 N.E.2d 184, 188 (N.Y. 2010); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28-29 (N.Y. 1991); *Rubano v. DiCenzo*, 759 A.2d 959, 961 (R.I. 2000); *In re Wells*, 373 S.W.3d 174, 175-76 (Tex. Ct. App. 2012); *In re K.K.C.*, 292 S.W.3d 788, 791-92 (Tex. Ct. App. 2009); *In re Smith*, 262 S.W.3d 463, 465 (Tex. Ct. App. 2008); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956 (Vt. 2006); *In re H.S.H.-K.*, 533 N.W.2d 419, 421-22 (Wis. 1995).

256. In one case, the Supreme Court of Kentucky acknowledged that someone could not be a de facto custodian when she had co-parented the child with her former partner, the child's biological mother. *Mullins v. Picklesimer*, 317 S.W.3d 569, 571, 574 (Ky. 2010). The co-parent was able to obtain standing through a different statute, however, which confers standing on a person "acting as a parent" when the person:

- (a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and
- (b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

*Id.* at 574-75, 577 (citing § 403.800(13)). *Mullins* was able to satisfy the requirement of claiming "a right to legal custody under the law of this state" by pointing to an agreed judgment of custody executed jointly by the parties and signed by the court prior to the biological mother's refusal to allow visitation. *Id.* at 575-77.

to seek visitation but not to obtain custodial rights.<sup>257</sup> Again, the difference between being able to obtain visitation as a de facto parent and being positioned to litigate the full scope of parental rights and responsibilities as a legal parent should be plain. Statutes like these provide some protection for the rights of functional parents, but they certainly do not place them on equal footing with formal legal parents.<sup>258</sup>

Moreover, as Professor Leslie Joan Harris has recognized, the legal mechanisms available to render legal status on functional parents are expensive and:

[generally] available only if, in hindsight, a court determines that an unrelated adult has become a functional parent. The latter feature alone means that unrelated adults who develop relationships with children cannot rely on these devices to protect those relationships. Exacerbating this problem is that all the doctrines that allow courts to protect functional parent-child relationships are indeterminate and discretionary.<sup>259</sup>

The upshot, as Professor Harris observes, is that “these doctrines require that a claimant be able to bear the burden of extensive litigation, and even then, outcomes are unpredictable.”<sup>260</sup> This should bring to mind the decades of criticism of the best-interests standard and the multiple varieties of trouble associated with the indeterminate and discretionary standards that have, to varying

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257. Grossman, *supra* note 193, at 677 (citing *H.S.H.-K.*, 533 N.W.2d at 420 (holding that a de facto parent cannot obtain custody unless the legal parent is unfit)).

258. For an exploration of the benefits of treating functional and formal parenthood as separate domains with differing rights and obligations, see Laufer-Ukeles & Blecher-Prigat, *supra* note 198, at 449. The authors critique the assumption that parental rights and obligations should be identical whether obtained through functional assessments or traditional formal means, asserting that “functional parenthood should be its own status, not simply an equitable tool when a person functionally mirrors the idealized notion of formal parenthood.” *Id.*

259. Harris, *supra* note 195, at 471; *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 198, at 436 (“A functional approach to parenthood, on the other hand, relies on the actual care of children. As such, it can *only* be determined ex post and involves a considerable degree of judicial discretion to determine what parental care actually is, what activities a person must perform, and which behavior to demonstrate in order to gain recognition as someone who functioned as a parent.”).

260. Harris, *supra* note 195, at 475; *see also* Julie Shapiro, *Counting from One: Replacing the Marital Presumption with a Presumption of Sole Parentage*, 20 AM. U. J. GENDER SOC. POL’Y & L. 509, 518 (2012) (noting that “functional/de facto parenthood ... lacks ... clarity”).



degree, governed modification, jurisdiction, and child support.<sup>261</sup> It should raise the same skepticism about whether such an approach is the best way to do justice for separating families.

There is, however, something even more troubling here than the familiar shortcomings of indeterminate standards for family law decision making. It is important to recognize that, whatever the result, most of these cases reveal a recurring theme: in the face of overwhelming evidence about the couple's mutual intent to function as joint parents, and a history of doing just that, the parent privileged by her formal legal status wields that against her former partner, exploiting it for all that it is worth procedurally and substantively.<sup>262</sup> Notably, this includes both cases in which the legal parent is adoptive and those in which she is biologically related, revealing that the current regime privileges formal legal status rather than simply biology.<sup>263</sup> In none of these cases are both of the adults battling over custodial rights and responsibilities required to establish that they were functional parents. The unequal status creates an enormous power differential between co-parents, with

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261. *See supra* Part II.

262. The legal mothers in these cases uniformly assert that their former partner has no standing to initiate an action concerning their child and that the court is without power to assess the claims on the merits. *See, e.g., In re E.L.M.C.*, 100 P.3d 546, 553 (Colo. App. 2004); *Smith v. Guest*, 16 A.3d 920, 928 (Del. 2011); *Debra H. v. Janice R.*, 930 N.E.2d 184, 188 (N.Y. 2010); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991); *Rubano v. DiCenzo*, 759 A.2d 959, 963 (R.I. 2000); *In re Wells*, 373 S.W.3d 174, 175 (Tex. Ct. App. 2012); *In re C.T.H.S. and C.R.H.S.*, 311 S.W.3d 204, 205 (Tex. Ct. App. 2010); *In re K.K.C.*, 292 S.W.2d 788, 790-92 (Tex. Ct. App. 2009); *In re Smith*, 262 S.W.3d 465, 465 (Tex. Ct. App. 2007); *In re H.S.H.-K.*, 533 N.W.2d at 423. Other stratagems vary. In one case the biological mother married the sperm donor, had him sign a paternity affidavit, and requested an amended birth certificate for the child listing him as the father, in spite of the fact that the sperm donor and the two partners had all signed notarized documents agreeing that the women would be the parents of the child and the sperm donor would have no involvement. The marriage was admittedly in response to her former partner's efforts to obtain judicial protection of her relationship with the child. *In re Parentage of L.B.*, 122 P.3d 161, 164 nn.1 & 3 (Wash. 2005). In another case the biological mother sought to block her former partner's access to the child even though the partner had become a legally recognized parent via second-parent adoption. In an unsuccessful effort to take advantage of interstate differences in adoption policy, the biological mother urged the Florida court to disregard the Washington court's adoption decree. *Embry v. Ryan*, 11 So. 3d 408, 409 (Fla. Dist. Ct. App. 2009). *See generally* Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 Rutgers L.J. 825 (2001) (explaining the impact of *Troxel v. Granville* on planned families with same-sex parents and those parents' conflicts with third-party relatives).

263. *See, e.g., Smith*, 16 A.3d at 924, 936 (adoptive); *Alison D.*, 572 N.E.2d at 28 (biological).

every advantage residing in the hands of the parent who intends to sever the relationship between her child and her former partner.

This inequity should garner more attention than it has. Even when the co-parent succeeds in gaining some protection for her relationship with the children,<sup>264</sup> a fair assessment of the law's turn toward recognizing functional parenthood would compare the burdens shouldered by the functional parent against the burdens shouldered by the legal parent when the two are in conflict over child custody. In the best case scenario, the co-parent has to litigate under an indeterminate and unpredictable test twice, the legal parent only once.<sup>265</sup> In embracing the functional turn and proposing its expansion, scholars have neglected to address the profound procedural injustice visited upon co-parents who are forced to litigate in the posture of a legal stranger just to gain access to a judicial forum that can resolve the disputed custody issues on the merits.<sup>266</sup>

Although the growing recognition of functional parenthood is praiseworthy in many ways, and certainly does more to further the fundamental goals of family law than allowing a legally recognized

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264. And then, it is not equivalent to full legal status. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 355 (2002) ("Notwithstanding the positive effect of applying these quasi-parental doctrines to the petitioners, the result of these decisions is that the lesbian coparent clearly occupies a much inferior status to that of the biological parent, because quasi-parental doctrines do not confer a status comparable to legal parenthood.").

265. See *supra* notes 233-34 and accompanying text; see also Harris, *supra* note 195, at 474 (discussing *Smith*, 16 A.3d 920). In fact, this considerably understates the legal wrangling in *Smith*. After the state supreme court held that the statutory scheme did not permit courts to recognize someone in the former partner's position as a de facto parent, the legislature amended the statute to provide that someone in her position could be recognized as such. *Smith*, 16 A.3d at 928. The legal mother then asserted that the provision violated due process, equal protection, separation of powers, and the state constitution's "single-subject" requirement; she also asserted that the new custody petition was barred by res judicata and the principle against retroactive application of statutes. *Id.* at 923, 925-27, 933, 935. What all of these disparate legal theories had in common was that each would have barred the court from even holding a custody hearing. By the time the state supreme court rejected these assertions and affirmed the family court's award of joint custody, the parties had been litigating for nearly seven years. See *id.* at 920, 923-24.

266. See JOSLIN & MINTER, *supra* note 200, at 455 ("In jurisdictions that permit non-legal parents to establish standing by demonstrating that they meet the criteria for de facto parentage or similar equitable doctrines cases, courts may bifurcate the proceedings, requiring the petitioner to prove that a de facto parent-child relationship exists before determining whether custody or visitation is in the child's best interests.").

parent to sever the ties between a child and a separated co-parent because the latter lacks formal legal status, lauding these developments as evidence of family law's "functional turn" obscures the extent to which formal legal status is still the hard currency in parentage disputes. Having the opportunity to demonstrate that one has functioned as a parent is better than nothing, but the practical difference between being formally recognized as a legal parent and being adjudicated the functional equivalent is enormous. As several scholars have observed, those in the former category enjoy their status automatically and immediately, whereas those in the latter category need to call on the state, subjecting themselves to a process that can be lengthy, intrusive, costly, and unpredictable.<sup>267</sup>

That this is so should not be surprising, in light of what we have learned about family law's experiences with flexible and discretionary frameworks in child custody and child support.<sup>268</sup> At least in those contexts, however, it can be said that the parties to the dispute share those costs more or less equally, in the sense that they are similarly situated with respect to the burden of litigation and the risk of loss.<sup>269</sup> In the parentage context, we should be particularly hesitant to accept the costs of a lengthy, intrusive, expensive, and unpredictable process, given that they are primarily borne by the parent who has been cut off from her children by the formal legal parent.

This utterly one-sided burden complicates the assumption that a functionalist approach tracks with a substantively progressive agenda.<sup>270</sup> As compared to the traditional formalist approach that treats co-parents as legal strangers, a functionalist approach reflects a willingness to recognize and adapt to social change and advance values of inclusion and equity. But obtaining recognition as a functional parent is an uncertain and extraordinarily burdensome

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267. See Appleton, *supra* note 179, at 233-34; Polikoff, *supra* note 200, at 207; Shapiro, *supra* note 200, at 518.

268. See *supra* Parts II.A, II.C.

269. Shapiro, *supra* note 183, at 823 ("In a custody dispute between two legally-recognized parents, the parties begin the litigation on an equal footing. While one parent may ultimately demonstrate that she or he should be awarded sole custody, neither parent begins with any special advantage over the other. In contrast, when lesbian mothers litigate custody, the legal mother begins with a nearly insurmountable advantage over the non-legal mother.") (footnotes omitted).

270. See Kessler, *supra* note 197, at 52.

endeavor. It is a manifestly inferior route to parental status than the immediate and automatic vesting of parental rights that formal legal parents enjoy. That it is the best some parents can hope for reflects the persistence of inequality, not the repudiation of inequality.<sup>271</sup>

We should be concerned about this gap, and we should endeavor to close it. And so the question that has to be addressed is whether the law can continue to rely on a functional approach to parentage for nontraditional families—one that assigns parental rights to some on the basis of an inquiry that is necessarily retrospective and indeterminate—without perpetuating this inequity.<sup>272</sup> One possibility, of course, is to rework parentage altogether, eliminating determinate routes to legal parenthood for everyone in favor of a universal functional approach—one that accords no privilege to biology or marriage, places all potential parental claimants on the same footing, and allows multiple adults to be vested with

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271. See Bix, *Domestic Agreements*, *supra* note 230, at 1756 (“It is hard to find the words to describe the removal of a parent—if some would object that this begs the question, let one say the removal of ‘someone who is acting in the role of a parent’—from a child’s life, and the child from that person’s life, and this after a solemn promise was made not to engage in this action. Many appalling things happen in this world, but I doubt that there are many harms more shameful than this, where it is also the case that the perpetrator publicly seeks judicial approval for her actions, and has a good chance of obtaining it.”).

272. Readers might query whether the universal recognition of marriage rights for same-sex couples would provide a sufficient solution to the problems discussed in this section. Certainly, extending the marital parentage presumption to same-sex couples provides automatic and immediate protection for relationships between non-biological co-parents and their children, making marriage equality especially important from a child welfare perspective. As courts, scholars, and advocates have emphasized, the children of same-sex couples suffer tangible and unjustifiable harms from the unequal treatment their parents receive under traditional marriage laws. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that such treatment “humiliates tens of thousands of children now being raised by same-sex couples”); Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 412 (1999); Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589 (2013). It would be misguided, however, to focus exclusively on marriage in searching for ways to better protect parent-child relationships. Marriage is not the sole determinant of legal parentage for opposite-sex couples, see Jacobs, *supra* note 177, at 346 (“Statutes in every state provide for the custody, support, and maintenance of children born to heterosexual parents, whether married or unmarried.”), and in fact, constitutional principles prohibit this, see Grossman, *supra* note 193, at 672-73. So although equalizing access to marriage is an indisputably important aspect of achieving equality in family law, there are good reasons to consider simultaneously alternative paths to legal parentage for same-sex couples.

protectable rights to parent the children with whom they have relationships.<sup>273</sup>

For a variety of reasons, this is the wrong way to equalize access to parental status. Simply put, this would be equalizing down, relegating more rather than fewer families to the discretion and indeterminacy that has proven so troubling in other areas of family law. Whatever differences we may sustain regarding how best to promote child welfare both generally and in individual cases, it is difficult to argue that children are best served by a regime that cannot identify their parents prospectively and cannot ensure that any given individual is vested with parental status without a complex, multi-factor judicial determination.<sup>274</sup>

Although advocates of the functional turn have acknowledged the difficult line drawing it entails,<sup>275</sup> their recognition seems to pertain to the first-order business of drafting definitions and setting parameters for the allocation of parental rights, rather than the second-order business of applying the definitions in particular cases,<sup>276</sup> even though the latter stage is where individual families sustain process costs. When evaluating the two stages in combination, the

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273. To be sure, not all proponents of multi-parentage would go this far. Katharine Bartlett, in the original scholarly treatment of multi-parentage, specified that she would allow nonparents to exercise parental rights when the child's relationship with the legal parent has been disrupted in some way, making clear that she would retain notions of formal legal parenthood. See Bartlett, *supra* note 182, at 946. But scholars who advocate an expansion of parenthood beyond the "rule of two" are often unclear about the extent to which they see a continued role for notions of formal legal parenthood. The proposals do not explicitly call for an abandonment of formal legal parenthood; rather, multi-parentage supporters argue for the expansion of functional parenthood without attempting to locate or defend the line that would remain between formal and functional parenthood. Other advocates propose tiers of parenthood, according relative rights on the basis of the amount of caretaking someone has provided. Jacobs, *supra* note 177, at 333. But this does not actually specify whether some individuals start from the profoundly advantaged position of a formal legal parent, begging the question of who should benefit from formal legal status and who, by contrast, must invoke the state's judicial machinery to obtain recognition as a functional parent.

274. *But see* Appleton, *supra* note 179, at 275 (suggesting that a woman gestating a pregnancy will always meet a functional test for parenthood, "given the unique parental functions she has performed during pregnancy, including prenatal shelter, nurture, sustenance, and protection of the child-to-be").

275. Appleton, *supra* note 2, at 27.

276. Kessler, for example, acknowledges that it will "require careful line drawing" to avoid "elevating sperm donors, mere ex-lovers, and babysitters to the status of parent" and characterizes this as a "law reform project" that is "delicate and difficult" but ultimately "achievable." Kessler, *supra* note 197, at 76.

astonishing degree of state involvement necessary to operationalize a truly functionalist regime becomes apparent. One need not reify the justifiably disputed notion of family privacy to be troubled by this aspect.<sup>277</sup> As Professor James Dwyer has pointed out, state intervention in parentage is inescapable, regardless of how parentage is defined, given that the rules governing the recognition of parenthood always come from the state.<sup>278</sup> But viewed from the perspective of families for whom it may become important to ascertain legal parentage, there is a material difference between a mode of state involvement that sets forth categories of parenthood that are automatically and immediately applicable and a mode of state involvement that requires judicial determinations on an individualized, case-by-case, and typically retrospective basis. The weakness of the latter model is particularly acute in light of the fact that many families, even those that have consulted with lawyers or memorialized their intentions in written agreements, do not turn to the courts for parentage determinations until junctures of conflict and strife—often, in a posture of total disagreement about the rights and responsibilities of each parent.<sup>279</sup> A system in which both parents were required to demonstrate that they had earned legally recognizable and enforceable parental status by functioning in that role would resolve the equality concerns raised above, but has little else to commend it—the law should endeavor to offer these families more than the uncertainty and unpredictability of an evenhanded functionalist approach.

Instead, access to determinate mechanisms for formalizing parent-child relationships should be expanded, making stability and certainty accessible to all—regardless of gender, sexual orientation,

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277. For an influential critique of the concept of family privacy, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); see also David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527 (2000).

278. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 26 (2006).

279. Although some of the cases reflect disagreement about the amount of visitation or the conditions under which a court should award it, all too many of them reflect a posture in which the legal parent is asserting that her former partner has absolutely no right ever to see her children again. See *supra* note 262 and accompanying text. It is revealing that some of the cases that the multi-parentage advocates repeatedly invoke present scenarios in which the three parties agree that they should each enjoy some legally recognized relationship with the child in question. See, e.g., *Jacob v. Schultz-Jacob*, 923 A.2d 473, 477 (Pa. Super. Ct. 2007). Cases in which there is no opposition to the recognition of parental status are not the norm and do not provide an effective template for crafting a parentage regime.

or marital status.<sup>280</sup> Scholars have expressed skepticism about the weight to be accorded the values of stability and certainty in crafting a parentage regime;<sup>281</sup> to be sure, these values have been invoked in favor of unjust legal rules and exclusionary results.<sup>282</sup> And I agree that “whatever gains in certainty may accompany a narrow understanding of parenthood” do not justify the “categorical refusal to recognize the parentage status of individuals” who have raised children as equal partners with the children’s legal parents.<sup>283</sup> But taking this position does not require that we reject certainty as a value to embrace and prioritize when doing so is compatible with, rather than hostile to, the recognition of co-parents.

There are reasons to preserve the certainty, stability, and exclusivity that compose the parental prerogative in a formalist regime even as we reject the hetero-normativity and bio-normativity of previous frameworks. Professor Emily Buss, for example, has argued persuasively that an approach that allows courts to divvy up “fragments of parental authority” among numerous potential claimants is harmful to children because it diffuses the child-specific expertise that, for the most part, makes parents the most competent decision makers for their children.<sup>284</sup> Professor June Carbone offers the insight that parenthood is “constitutive of the child’s identity” and that therefore the determination of parenthood must provide a measure of permanence, continuity, and stability.<sup>285</sup> Professor Elizabeth Bartholet has similarly argued that children do better

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280. Polikoff, *supra* note 200, at 216 (“[My] primary goal ... is certainty and stability of a child’s relationship with both parents without requiring those parents to spend the money or time necessary for a court proceeding. Parentage based on presumption requires no court involvement; that is its strength.”).

281. *See, e.g.*, Ball, *supra* note 237, at 625-26. Ball argues that “concerns regarding uncertainty in the application of equitable parenthood doctrines are greatly overblown.” *Id.* at 626; *see also* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 318 (“Consistency for its own sake, however, is not a virtue.”).

282. William C. Duncan, “Don’t Ever Take a Fence Down”: The “Functional” Definition of Family—Displacing Marriage in Family Law, 3 J.L. & FAM. STUD. 57, 60-61 (2001); *see* Duncan, *supra* note 210, at 263; Shapiro, *supra* note 260, at 522 (characterizing the two parent dyadic model as “one of the most entrenched family values constraining formation of queer families”).

283. Ball, *supra* note 237, at 626.

284. Buss, *supra* note 78, at 682.

285. *See* Carbone, *supra* note 185, at 1334.

when parental authority is concentrated in two clearly identified parents who enjoy that status from the time of the child's birth.<sup>286</sup>

Moreover, although scholars may disagree about the optimal level of fluidity and flexibility in legal definitions of parenthood, the very cases in which a court is asked to recognize and protect a co-parent's relationship with her children show a remarkably uniform model of parenting, in which caretaking and financial responsibility were shared equally and exclusively between two people in a committed relationship. This model has not lost its salience as same-sex relationships and reproductive technology have become more prevalent. To the contrary, what is perhaps most remarkable about many of the wrenching custody disputes between former partners is how fully the couple embraced a vision of parenthood similar in most regards to the now thoroughly critiqued "nuclear family." Especially in the face of these lived experiences, a legal regime that offers only the protection of a retrospective functional assessment to one of the parents is inadequate. Not only does it fail to reflect the intent upon which these families were formed, but it relies upon exactly the sort of discretionary and indeterminate frameworks that have proven so troubling in other areas of family law.

In reforming the law of parentage to meet the needs of these families, courts and lawmakers should seek to build a new formalism, one that provides the same level of certainty, stability, and exclusivity that married, heterosexual parents have traditionally enjoyed. Scholars have identified some mechanisms that work toward this goal; I mention some highlights here without attempting to recreate their detailed and comprehensive efforts. Professor Nancy Polikoff has proposed that the law confer parental status on a woman who consents to the artificial insemination of her partner with the intent to be the parent of the resulting child.<sup>287</sup> Professor Leslie Joan Harris has proposed that same-sex couples be afforded the same opportunity to execute voluntary acknowledgments of parentage that unmarried opposite sex couples currently enjoy.<sup>288</sup>

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286. Barholet, *supra* note 231, at 338, 342; *see also* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 895 (2000) (asserting that law should be guided by two principles: "children's interests come first and two-parent care is generally preferable to that of one parent alone").

287. *See* Polikoff, *supra* note 200, at 233.

288. *See* Harris, *supra* note 195, at 470.



These reforms, offered alongside the marital parentage presumption that will grow in relevance as same-sex couples obtain increased access to marriage,<sup>289</sup> will start to close the gap between parents who enjoy the security of formal legal status and those who currently have neither the opportunity to obtain such recognition nor the accompanying protection for their parent-child relationship.

Much work remains to be done. As Professor Susan Frelich Appleton has pointed out, parentage rules that provide a tolerable balance between determinacy and context-sensitivity for lesbian co-parents might not transfer seamlessly to gay male couples who engage the assistance of a surrogate to create their families.<sup>290</sup> For these scenarios, when the surrogate's role in gestation provides a powerful counterpoint to the couple's intent to serve as the child's parents, it is more difficult to craft default rules that can balance the competing interests without judicial intervention. Nonetheless, even in these situations, the law can offer improved access to determinate mechanisms for formalizing family relationships; Appleton envisions a pre-birth registration procedure that would allow gay male couples and the women who agree to bear their children an opportunity to show who will serve as the child-to-be's parents.<sup>291</sup>

There are certainly considerable challenges to operationalizing a new formalism. It will not only require the identification of new categories of people who might warrant formal legal status as parents—partners of artificially inseminated women, for example, or gay husbands of men whose biologically related child is being carried by a surrogate—but will also entail complex and contestable assessments about the extent to which individuals in those categories should enjoy such status automatically and with little or no judicial intervention. At this stage, what is essential is to recognize that such a project is undergirded by compelling equality concerns that are simply not as well effectuated in a regime that relies on

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289. *But see* Appleton, *supra* note 179, at 260-93 (explaining that the functional approach to the presumption cannot justify extending the presumption to gay male couples).

290. *See id.* at 294.

291. *See id.* at 289; *see also* Fink & Carbone, *supra* note 230, at 3-4 (suggesting “pre-birth identification”).

post hoc functionalist assessments for disputes involving nontraditional families.<sup>292</sup>

### CONCLUSION

The procedural values of simplicity, certainty, and minimal judicial intervention should be accorded great weight in the design of legal regimes governing the family. That in itself is not a novel proposition; scholars have long recognized the need for predictability and stability in family law. But the association of these values with traditionalist regimes, and the deeply felt reluctance to jettison sensitivity to context in the family law realm, has tempered the willingness to embrace determinacy as a metric by which family law frameworks should be judged. Particularly in areas of family law that uniquely concern nontraditional families, flexibility and sensitivity to context appear to be a welcome antidote to the kind of formalism that ratifies a legal parent's choice to destroy a fully formed parent-child relationship.

Be that as it may, scholars and lawmakers should aspire to offer these families something better than post hoc functionalist assessments of the relationships in question. Such a solution accepts the very indeterminacy and judicial discretion that reformers have labored to diminish in other areas of family law. Not only does the functionalist approach present enormous process costs for nontraditional families, but as currently practiced it imposes these unevenly, forcing some parents to litigate in the posture of a legal stranger while their former partners leverage the procedural and substantive advantages of formal legal status. These defects militate in favor of a parentage reform agenda that deploys formalist principles to advance fundamental equality concerns. Building out the new formalism will demand difficult judgments about the categories of parents who ought to enjoy the stability and certainty of formal legal status. We must start, however, by acknowledging that nontraditional families will be better served by such a regime and

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292. See, e.g., Bartholet, *supra* note 231, at 338 (considering a variety of substantive factors the law should incorporate in assigning legal parenthood, but observing that “[m]ore important than the weight given to particular substantive factors is for the system to have clear rules establishing permanent parenthood early”).

that it is a reimagined formalism, rather than an expanded functionalism, to which we should aspire.