Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding behind the Facade of Certainty

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INTRODUCTION

Over the last two decades, individuals who lack biological or adoptive links to children whom they have helped raise have repeatedly asked courts for the opportunity to establish that it would be in the children’s best interests for them to be awarded custody and visitation.1 Many of these cases have arisen in the context of dissolving relationships between unmarried partners (frequently, though not always, same-sex ones).2

* Professor of Law & Judge Frederick Lacey Scholar, Rutgers University School of Law (Newark). This Article is dedicated to Harry Krause, my former colleague at the University of Illinois College of Law, whose scholarship was instrumental in ending decades of legal discrimination against children born outside of marriage. I would like to thank Richard Storrow for his extremely helpful comments on an earlier draft of this Article.

1. See sources cited infra notes 3-4.
2. See id.
Appellate courts in several jurisdictions have allowed unmarried partners the opportunity to show that they established, with the legal parents’ consent, parental bonds with the children and that it would be in the minors’ best interests for those relationships to continue. In contrast, appellate courts in other jurisdictions have refused to grant standing in these types of cases. Some of these courts have done so on the ground that legislatures are better able than courts to account for the many factors involved in determining who should have standing in custody and visitation cases. From this perspective, if the custody and visitation statutes do not provide standing to former unmarried partners, courts should not do so on their own.

Other courts have relied on the constitutional rights of legal parents to deny standing to former partners in custody and visitation cases. These courts have concluded that, unless the legal parents are unfit or neglectful, they would not have standing to intervene in custody disputes.


5. See, e.g., A.B., 723 N.E.2d at 321 (suggesting that a legislative solution is necessary because of the complex social significance of the visitation issue); Jones, 154 P.3d at 817 (noting that courts do not have access to the same investigative tools as legislatures, and therefore cannot determine policy as well).

6. See sources cited supra note 5.

7. See, e.g., Wakeman, 921 So. 2d at 671 (“[U]nder the privacy provision in the Florida Constitution, a third party . . . cannot be granted by statute the right to visitation with minor children, because, absent evidence of a demonstrable harm to the child, such a grant unconstitutionally interferes with a natural parent’s privacy right to rear his or her child.”) (footnote and citation omitted); Janice M., 948 A.2d at 74-75 (holding that the constitutional rights of parents to control their children’s upbringing trump the rights of de facto parents in the absence of exceptional circumstances).

8. See sources cited supra note 7.
they enjoy a constitutional right to cut off all contact between their children and so-called “third parties,” that is, individuals who have neither biological nor adoptive links to the children.

A third rationale for denying standing to former partners in parenting cases focuses on considerations of certainty. From this perspective, the use of equitable parenthood doctrines (such as de facto parenthood, psychological parenthood, and in loco parentis) to grant standing opens up a Pandora’s Box of uncertainties, requiring case-by-case factual determinations of whether particular individuals established sufficiently close relationships with particular children to justify their being permitted to seek custody and visitation. This uncertainty, it is argued, is harmful to children because legal parents are unable to determine ex ante which of the adults whom they permit to establish relationships with their children will be able to claim parentage status in the future. It is also argued that granting standing to individuals who lack biological or adoptive links to the children is harmful to them because it engenders protracted litigation.

This Article assesses the certainty-based objections to granting custody and visitation standing to the former partners of legal parents. Those objections were the principal reasons why the New York Court of Appeals, in its recent decision of Debra H. v. Janice R., reaffirmed the bright-line rule it adopted twenty years earlier in Alison D. v. Virginia M., namely, that an individual who lacks biological or adoptive links to the child cannot be deemed a parent. It also appears that certainty considerations were the

9. In this Article, I sometimes use quotation marks around “third parties” because, although courts frequently use that term to describe individuals who lack biological or adoptive links to children, see, e.g., Wakeman, 921 So. 2d at 671; Janice M., 948 A.2d at 81, it fails to capture the close parental relationship that many former partner litigants had with the children prior to the dissolution of their relationships with the legal parents. See Bethany v. Jones, 2011 Ark. 67, 2011 WL 553923, at *8-9 (Feb. 12, 2011) (holding that the constitutional rights of legal parents limit the rights of grandparents but not of individuals, including former same-sex partners, who established parental relationships with the children).

10. See, e.g., Jones, 154 P.3d at 816 (noting that a de facto parent rule “rests upon ambiguous and fact-intensive inquiries” that “do[] not fulfill the traditional gatekeeping function of rules of standing”). Certainty considerations were also the main reason why the New York Court of Appeals recently refused to rely on its equitable powers to grant former partners standing to seek custody and visitation. Debra H. v. Janice R., 930 N.E.2d 184, 193 (N.Y. 2010). I discuss this aspect of Debra H. in infra notes 81-101 and accompanying text.

11. See infra notes 81-101, 112-119 and accompanying text.

12. See id.

13. See id.

14. 572 N.E.2d 27, 29 (N.Y. 1991); see infra notes 55-66 and accompanying text.

15. Debra H., 930 N.E.2d at 193 (rejecting a flexible parenthood rule in favor of Alison D.’s bright-line rule because the former would cause uncertainty for parents regarding when third parties would “reach the tipping point” and gain rights in the upbringing of the children).
main reasons why the Debra H. court created an exception to this bright-line rule by granting standing to petitioners who entered into legally recognized relationships with the legal parents.16

The certainty concerns raised by the Debra H. court are superficially appealing because it is generally more difficult to establish, as a factual matter, whether someone has attained the status of a functional parent under equitable parenthood principles than it is to determine whether someone is the child’s biological or adoptive parent, or whether the two adults in question entered into a legally recognized relationship.17 I argue in this Article, however, that concerns regarding uncertainty in the application of equitable parenthood doctrines are greatly overblown18 and that whatever gains in certainty may accompany a narrow understanding of parenthood that is linked exclusively to (1) biology or (2) adoption or (3) the entering into a legally recognized relationship do not outweigh the harm to children that follow a categorical refusal to recognize the parentage status of individuals who have helped to raise them with the consent and encouragement of their legal parents.19

Since the New York Court of Appeals has been the court of last resort that has been the most explicit in defending a narrow definition of parenthood based on certainty considerations, I focus much of my attention in this Article on parenting law developments in New York. The implications of my arguments, however, go beyond developments in that state.

I begin in Part I by providing a brief history of how the New York Court of Appeals has tackled, in three important rulings, the question of who is entitled to seek standing in parenting cases. In doing so, I criticize the court for improperly distinguishing between custody and visitation disputes. I also criticize it for failing to distinguish between cases in which legal parents agree to raise children jointly with other individuals and cases in which they do not.

In Part II, I explore the court’s ruling in Debra H., paying particular attention to the emphasis that the majority opinion—and two concurring

16. See infra notes 102-111 and accompanying text.
17. I here use “functional parent” to describe an individual who gains parentage status through the application of equitable doctrines such as de facto parenthood, psychological parenthood, and in loco parentis. Although there can be some differences in the ways these doctrines are understood and applied, those differences are not relevant to this Article. For a detailed discussion of the different functional parenthood theories, see Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Nontraditional Families, 78 GEO. L.J. 458, 491-522 (1990).
18. See infra Part III.B.
19. See infra Part V.
opinions—gave to certainty considerations. In Part III, I question the New York Court of Appeals’ assertion in *Debra H.* that its decisions in parenting cases in the last twenty years have created a great deal of certainty and predictability. I also in Part III question that same court’s claim that multi-part functional parenthood tests, such as the one adopted by the Wisconsin Supreme Court, are unworkable and unpredictable.

In Part IV, I compare the doctrine of functional parenthood with that of intent-based parenthood, and argue that a standing rule which only looks to the parties’ pre-conception intent cannot satisfactorily resolve all disputes over who may seek custody and visitation in former partner parenting cases. I then, in Part V, provide a normative critique of the preference for legal certainty and predictability over the protection of relationships that children have established with individuals whom they consider their parents. In doing so, I describe how considerations of certainty played an important role in the legal privileging of so-called legitimate children over illegitimate ones in decades past. I then explain how courts, when they prioritize certainty in adjudication over all other values in parenting standing cases, create a new class of illegitimate children.

Finally, in the Conclusion, I explain how the recognition of same-sex marriage by states like New York has brought us back full-circle to the question of illegitimacy. Children raised by married same-sex couples who lack biological or adoptive links with one of those individuals will likely benefit from having the law recognize the parental status of both adults. Yet, a state’s recognition of same-sex marriage does nothing to help children raised by same-sex couples who choose not to marry. We need to be careful, therefore, that the recognition of same-sex marriage does not lead us back to the days when our society denied children benefits because of their being born and raised out of wedlock.

I. NEW YORK PARENTING CASES BEFORE *DEBRA H. V. JANICE R.*

The current troubling state of parentage law in New York has its origins in *Bennett v. Jeffreys*, an otherwise unimpeachable New York Court of

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20. See infra Part II.
21. See infra Part III.
23. See infra Part IV.
24. See infra Part V.
25. See infra Conclusion.
26. See infra notes 259-63 and accompanying text.
27. See id.
Appeals decision from 1976.28 Bennett involved a custody petition filed by a twenty-three year old mother who was seeking to regain custody of her child.29 Eight years earlier, the then teenage mother (with her parents’ encouragement) informally and voluntarily turned over custody of her newborn to a friend of the family.30 After the mother became an adult, she filed for custody, over the objection of the friend of the family who had cared for the child for several years.31

Each of the two lower courts in Bennett adopted different bright-line rules. The trial court held that when a nonparent has informal custody of the child for an extended period of time, she is entitled to keep custody.32 In contrast, the intermediate appellate court held that a third party could never seek (or retain) custody over the objections of a legal parent.33

The Court of Appeals rejected both of these polar positions and instead ruled that third parties could seek custody of children in cases in which “extraordinary circumstances” were present.34 In doing so, the court made clear that the rights of legal parents must sometimes give way in order to protect the children’s interests. As the court put it:

The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody.35

Bennett has become a leading case in New York family law because it introduced the “extraordinary circumstances” doctrine, one that has received much attention from courts and commentators.36 But, as Professor

29. Id. at 280.
30. Id.
31. Id.
32. Id. at 284 (“In reaching its conclusion that the child should remain with the nonparent custodian, the Family Court relied primarily upon the seven-year period of custody by the nonparent and evidently on the related testimony of a psychologist.”).
33. Id. (“[T]he Appellate Division, in awarding custody to the mother, too automatically applied the primary principle that a parent is entitled to the custody of the child.”).
34. Id. at 281 (noting that examples of such circumstances include “surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time”).
35. Id.
Martin Guggenheim has argued, the ruling in *Bennett* was not particularly novel because it was entirely consistent with decades of New York common law parenting decisions that preceded it. Indeed, “[h]ad *Bennett* simply applied well-worn common law principles, the court could have reached the same result, reminding everyone that common law courts have the power to award custody to non-parents over a fit parent’s objection provided such an order was essential to the child’s welfare.”  

The problematic parenthood rulings by the New York Court of Appeals began, then, not with *Bennett*, but with cases that followed it. In those cases, the court improperly distinguished between custody and visitation disputes. The court also failed to properly distinguish between what I would designate as true third party cases—those in which the petitioner seeking standing did not jointly raise the child with the legal parent—from cases in which the petitioner helped raise the child alongside the legal parent. I discuss both of these points below.

**A. Custody vs. Visitation**

A little over a decade after *Bennett*, the New York Court of Appeals, in *Ronald FF. v. Cindy GG.*, was faced with the question of whether the extraordinary circumstances doctrine applied to visitation disputes. Ronald and Cindy, who never married, were in a relationship for most of the period between 1979 and 1983, except for a few months in late 1981 when Cindy dated another man and became pregnant by him. After the couple reunited in 1982, Ronald attended childbirth classes with the expectant mother, was present during childbirth, agreed to be listed as the father on the child’s birth certificate, saw the child regularly for several months, and considered himself to be the child’s father. The couple

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37. *Id.* (internal reference and footnote omitted). Guggenheim adds that no one can doubt that the common law weighted parental rights heavily. But this weighting was applied substantively when courts had to rule for one party or the other. The common law would not deny individuals the opportunity to persuade a court that it should intervene to protect a child or to enter an order superseding a parent’s view on child-rearing. *Winning* was difficult for the non-parent, but getting to court was not.

38. *Id.* at 158-59 (footnote omitted) (second emphasis added).

39. *Id.* (internal reference and footnote omitted). See, *e.g.*, *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28-29 (N.Y. 1991) (rejecting the argument that petitioner’s care of the child, while sharing family home with the child’s legal parent, granted her standing to seek visitation).

40. *Ronald FF.*, 511 N.E.2d at 76.

41. *Id.*

42. *Id.*
eventually broke up and Ronald sought visitation rights.\textsuperscript{43} The trial court concluded (1) that Bennett’s extraordinary circumstances test should be applied; (2) that such circumstances existed in the case; and (3) that it would be in the child’s best interests if visitation was granted.\textsuperscript{44} The intermediate appellate court affirmed,\textsuperscript{45} but the New York Court of Appeals reversed after holding that the Bennett doctrine was unavailable to nonparents in visitation cases.\textsuperscript{46} The court noted that visitation is a subspecies of custody, but the differences in degree in these relational categories is so great and so fundamental that rules like the Bennett rule, which have been carefully crafted and made available only to custody disputes, should not be casually extended to the visitation field. Thus, we expressly decline to do so.\textsuperscript{47}

Although the court was undoubtedly correct that there are important differences between custody and visitation, those differences do not support its conclusion that the extraordinary circumstances doctrine applies in custody cases but not in visitation ones. In fact, an argument can be made that the opposite should be the case. This is because granting custody to a non-legal parent constitutes a greater interference with the discretion of legal parents to determine what is best for their children than does the granting of visitation rights.\textsuperscript{48} As a result, it can be argued that it should be more (rather than less) difficult for someone claiming to be a non-legal parent to acquire custodial rights than visitation rights.\textsuperscript{49}

Martin Guggenheim has noted that, unlike Bennett v. Jeffreys, Ronald FF. “is a striking departure from the well-established common law rule [in New York] that courts have the authority to grant visitation to a non-parent over a fit parent’s objection when such visitation is essential to the child’s well-being.”\textsuperscript{50} This departure is particularly surprising given the lack of explanation in Ronald FF. of why visitation cases should be treated differently from custody ones.\textsuperscript{51}

A lower New York court has explained the “legal dichotomy” of

\begin{itemize}
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{46} Ronald FF., 511 N.E.2d at 77.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} See Guggenheim, supra note 36, at 175 (“[U]ndeniably the interference [with parental prerogatives that visitation exacts] is less great than an order denying custody outright to a parent.”).
\item \textsuperscript{49} Id. at 169 (“[S]ince visitation represents a lesser intrusion compared with the outright denial of custody, courts should be permitted to order visitation based on a less compelling basis than would be needed to award custody.”).
\item \textsuperscript{50} Id. at 174.
\item \textsuperscript{51} Id. at 175 (arguing that the Ronald FF. ruling lacks both “analysis and reasoning”).
\end{itemize}
allowing standing under the extraordinary circumstances doctrine for custody but not for visitation as follows: “If a parent is so unfit that he or she cannot take care of a child, the interests of the child require that there must be a way for someone else to become legally charged with caring for that child in a custodial situation—not simply intermittently through visitation.” This explanation, however, does not support the holding in *Ronald FF*. Although it is of course sensible to create a mechanism whereby a third party may seek custody when the legal parent is unable or unwilling to care for a child, that reasoning does not explain why it should be easier to seek custody than visitation.

I want to make it clear that I am not arguing that it should necessarily be more difficult for a so-called “third party” to seek custody than visitation over the objections of a legal parent. There is a good argument to be made that standing rules should be the same in both custody and visitation cases. My point is simply that if there is going to be a difference in the standing rules for custody and visitation cases, it makes sense for it to be more difficult for third parties to seek the former than the latter. At the end of the day, it is illogical for the Court of Appeals to have recognized in *Bennett* that courts have the authority to grant custody to third parties even when the legal parent is fit, but then to have held in *Ronald FF* that courts lack the same power in visitation cases.

### B. “True” Third Parties vs. Co-Parents

*Bennett* involved a custody dispute between a true third party and a legal parent. As already noted, by “true” third party I mean someone who did not jointly raise the child with the legal parent. The New York Court of Appeals’ inability or unwillingness to distinguish cases in which (the party claiming to be) a non-legal parent helped raise the child alongside her legal parent from cases in which the party seeking parentage status did not co-parent alongside the legal parent, goes a long way in explaining its opinion in *Alison D. v. Virginia M*. The court in that case refused to rely on equitable principles to grant visitation standing to the former lesbian

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53. See Guggenheim, *supra* note 36, at 169 (“One of the core common law principles (perhaps the one which has been least appreciated in recent years) was the symmetry with which the law treated efforts to secure custody and efforts to secure visitation.”).

54. See *id.* at 176 (“In light of *Bennett*’s concern with the consequences for children of severing relationships with parent-like adults, *Ronald FF* is irrational.”); *see also id.* at 179 (noting “the bizarre result” that in New York “it is easier for courts to award custody of a child to a non-parent over the parents’ objection than it is to award visitation of a child to a non-parent over the parents’ objection”).

partner of a biological mother who, with the latter’s consent and encouragement, helped raise the child for his first two years of life.\textsuperscript{56} As the Court of Appeals put it in \textit{Alison D.}, in quoting from \textit{Ronald FF.} (and in citing to \textit{Bennett}), “[i]t has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity.”\textsuperscript{57}

The petitioner in \textit{Alison D.} was not similarly situated to the “third parties” in \textit{Bennett} and \textit{Ronald FF.} because she had jointly parented the child alongside the legal parent.\textsuperscript{58} As a result, the “third party” label did not fit the \textit{Alison D.} petitioner in the same way that it did in \textit{Bennett} (in which the party opposing the biological parent’s custody petition was a friend of the family)\textsuperscript{59} and in \textit{Ronald FF.} (in which the party seeking visitation was not involved in raising the child).\textsuperscript{60}

According to the court’s reasoning in \textit{Alison D.}, it is necessary to deny individuals who lack biological or adoptive links to children the opportunity to seek visitation because to rule otherwise “would necessarily impair the [legal] parents’ right to custody and control.”\textsuperscript{61} What the court failed to understand was that those rights are properly limited when the legal parent voluntarily agrees to raise the child jointly with another person and encourages that individual to establish a parental bond with the child.

Indeed, several courts have recognized that when a legal parent consents to and fosters a parental relationship between her partner and the child, she is no longer free to unilaterally sever that relationship if doing so would be inconsistent with the child’s best interests.\textsuperscript{62} Rather than assume, as the

\textsuperscript{56} Id. at 28; see also CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD 83-94 (2012) (providing a detailed discussion of the background and reasoning of \textit{Alison D.}).

\textsuperscript{57} \textit{Alison D.}, 572 N.E.2d at 29 (quoting \textit{Ronald FF.} v. Cindy GG., 511 N.E.2d 75 (N.Y. 1987)) (emphasis added). The fact that the legal parent in \textit{Alison D.} consented to and fostered the formation of a parent-like relationship between her (then) partner and the child was irrelevant because legal parents, in the court’s view, have a right to change their minds regarding who associates with their children. As the court put it, “in this State it is the child’s mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents’ consent.” \textit{Id.}

\textsuperscript{58} Id. at 28 (noting that for the first two years of the child’s life, both parties provided care for and made decisions regarding the child).


\textsuperscript{60} \textit{Ronald FF.}, 511 N.E.2d at 76.

\textsuperscript{61} \textit{Alison D.}, 572 N.E.2d at 29.

\textsuperscript{62} See, e.g., V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) (“By virtue of her own actions, the legal parent’s expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited the third party into their lives. Most important, where that invitation and its consequences have altered her child’s life by essentially giving him or her another parent, the legal parent’s options are constrained.”); Mason v. Dwinnell, 660 S.E.2d 58, 69 (N.C. Ct. App. 2008) (“A parent has the absolute control and ability to maintain a
Alison D. court did, that children’s interests are always served best by granting legal parents the unilateral right to terminate (at any time) the relationships between the children and other adults who helped raise them, these courts have recognized that the severing of all contact between children and individuals whom they consider to be their parents can harm them regardless of whether they share biological or adoptive links with those adults.63

Alison D. was distinguishable from Bennett and Ronald FF. because the legal parent in the latter two cases never agreed to co-parent with the party who later claimed parentage status. This difference is crucial because it highlights how the initial wishes of legal parents create parental expectations in their children. Once a legal parent agrees to co-parent a child with someone else, and that person functions as a parent for a significant period of time, the child comes to view both adults as her parents.64 The recognition of functional parenthood doctrine in this context is necessary to protect the children’s interests and expectations.65

It is important to emphasize that the sharing of parental responsibilities

zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she voluntarily invites a third party to function as a parent to the child.” (quoting Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006)); Rubano v. Dicenzo, 759 A.2d 959, 976 (R.I. 2000) (“[T]he fact that [the legal parent] not only gave birth to this child but also nurtured him from infancy does not mean that she can arbitrarily terminate [the petitioner’s] de facto parental relationship with the boy, a relationship that [the former] agreed to and fostered for many years.”). 63. See, e.g., In re E.L.M.C., 100 P.3d 546, 560 (Colo. App. 2004) (“[I]nherent in the bond between child and psychological parent is the risk of emotional harm to the child should that relationship be significantly curtailed or terminated.”); Mullins v. Picklesimer, 317 S.W.3d 569, 579 (Ky. 2010) (“[T]he applicability of the doctrine of waiver in a child custody situation is legally justified as well as necessary in order to prevent the harm that inevitably results from the destruction of the bond that develops between the child and the nonparent who has raised the child as his or her own.”) (internal quotation marks omitted); E.N.O. v. L.M.M., 711 N.E.2d 886, 894 (Mass. 1999) (“The only family the child has ever known has splintered. The child is entitled to be protected from the trauma caused by the disruption of his relationship with the [non-legal parent].”) (internal quotation marks omitted).

64. Courtney G. Joslin, The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law, 39 Fam. L.Q. 683, 695 (2005) (“The ability to maintain a relationship with both parents in the event of the parents’ separation is critical for children; having this ability protected by law undoubtedly has served to prevent the wrenching spectacle of children being separated from parents with whom they have lived and on whom they have depended for years.”); see also V.C., 748 A.2d at 550 (“At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.”).

65. See E.N.O., 711 N.E.2d at 891 (“[T]he best interests calculus must include an examination of the child’s relationship with both his legal and de facto parent.”); V.C., 748 A.2d at 550 (recognizing that children have an interest in maintaining ties to psychological parents because such parents love and provide for them).
can take place outside of sexually intimate relationships. A legal parent may choose to co-parent with one (or presumably more) individual(s) without being in such a relationship. The crucial factor is not the type of relationship that existed between the adults, but is instead whether the legal parent agreed to share parental responsibilities with another person in ways that led the child to view both as her parents. Once it is reasonable to believe that the child considers the non-legal parent to be a parent and that this occurred with the consent and encouragement of the legal parent, then the former should be granted standing to seek custody and visitation.

The New York Court of Appeals had the opportunity to rectify its misguided decision in *Alison D.* twenty years later in *Debra H. v. Janice R.* The court, however, refused to do so. In reaffirming *Alison D.*, the *Debra H.* court gave some weight to the right of legal parents to decide who associates with their children. But, as discussed in the next section, the main reason why the court (again) refused to use its equitable powers to grant standing to a former lesbian partner seeking parental rights was because of the concern that doing so would bring a great deal of uncertainty and unpredictability to parenting law.

II. CERTAINTY AS THE NORMATIVE POLESTAR IN *DEBRA H V. JANICE R.*

The facts in the *Debra H.* case are similar to many other former partner parenting cases. In seeking custody and visitation, Debra, the petitioner, alleged that she and her partner, Janice, had together decided to start a family by having the latter become pregnant through alternative insemination. Debra also alleged that she helped choose the anonymous sperm donor, accompanied Janice to all of the pregnancy-related medical appointments, and was present in the delivery room when the baby was born. In addition, Debra alleged that the couple represented themselves to others as the child’s parents, that she contributed financially to support him, and that from the time the boy was born until he was two years old, she “performed all of the typical parenting responsibilities for a young child . . . including[] feeding him, changing him, dressing him, reading to


68. *Id.* at 193.

69. *See infra* notes 81-101 and accompanying text.


71. *Id.* at *3-4.
him, and playing with him.”  

In seeking to have her parenthood status legally recognized, Debra also emphasized that she and Janice had entered into a civil union in Vermont a month before the child’s birth.  

For her part, Janice denied Debra’s allegations regarding the couple’s joint intent to raise a child together, as well as her former partner’s contention that she had been closely involved in the raising of the child. Janice also claimed that she had entered into the civil union “because petitioner insisted upon it and coerced her into it when she was eight months pregnant.” Finally, the biological mother, who was an attorney, contended that she “tolerated petitioner’s attempts to create the appearance of a family in reliance on the Court of Appeal’s decision in Matter of Alison D. v. Virginia [M.], which . . . she had researched and determined precluded petitioner from claiming any rights as [the child’s] parent.” 

The trial court disagreed with Janice’s assessment of the impact of Alison D. on her case, ruling that it was not determinative of the standing question. The court also held that principles of equitable estoppel provided Debra with standing to sue for custody and visitation. After the intermediate appellate court reversed, the New York Court of Appeals agreed to hear the case.

In her appeal, Debra urged the state’s high court to overrule Alison D. by granting her standing to seek custody and visitation through the application of the functional parenthood doctrine. During the oral argument, several judges inquired whether that doctrine provided a predictable and workable test. One of the judges, for example, expressed concern that the functional parenting standard might “embrace step-parents, nannies, and . . . people” other than former partners. Another judge wanted to know whether the functional parenthood tests adopted by other states provided “a predictable

72. Id. at *4-5.
73. Id. at *4.
74. Id. at *6, *9.
75. Id. at *6.
76. Id. at *7.
77. Id. at *15-16.
78. Id. at *16. As we will see later in this Article, the trial court’s ruling, along with that of several other New York courts, belies the notion, defended by the New York Court of Appeals in Debra H., that the bright-line test announced in Alison D. has led to a great deal of certainty in the determination of who qualifies for parenthood status in New York. See infra Part III.A.

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set of criteria that one could use to determine parenthood.”

A third judge asked Debra’s attorney whether it was not the case that “there is a very strong public interest in knowing who a kid’s parents are.” The judge also inquired whether the attorney had a test in mind “that would allow a great majority of children to know who their parents are without six years of litigation on the subject.” That same judge later asked the guardian ad litem, who supported Debra’s effort to gain standing, the following question: “Aren’t bright lines good . . . when you are trying to figure out how many parents you’ve got and who they are? . . . Isn’t it true that for many children it is better to know the answer [of who their parents are] than what the answer is?”

The court’s majority opinion in Debra H., as well as two of the three concurring opinions, reflected the concern with certainty and predictability expressed by several judges during the oral argument. In writing for the majority, Judge Susan Read noted that Alison D., along with a subsequent ruling allowing unmarried partners to seek second-parent adoptions, “creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of ‘disruptive . . . battle[s]’ over parentage as a prelude to further potential combat over custody and visitation.” Although Judge Read acknowledged that many had criticized Alison D. for being “formulaic, or too rigid, or out of step with the times,” the court “remain[ed] convinced that the predictability of parental identity fostered by Alison D. benefits children and the adults in their lives.”

As the majority saw it, the case presented a stark choice between, on the one hand, reaffirming “the bright-line rule in Alison D.” and, on the other, replacing it “with a complicated and nonobjective test for determining so-called functional or de facto parentage at an equitable-estoppel hearing to be conducted by the trial court after discovery and fact-intensive inquiry in the individual case.” The court rejected the latter option because “[t]hese hearings . . . are likely often to be contentious, costly, and lengthy.” The type of adjudicative flexibility in determining who should have standing to sue for custody and visitation that the petitioner was urging the court to embrace, Judge Read claimed, “threatens to trap single biological and

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82. Id. at 9:30.
83. Id. at 5:57.
84. Id. at 6:02.
85. Id. at 15:44.
88. Id. at 192 (emphasis added).
89. Id.
90. Id.
adoptive parents and their children in a limbo of doubt.”\textsuperscript{91} She added that the functional parenthood determination was “inherently unpredictable”\textsuperscript{92} because legal “parents [can]not possibly know for sure when another adult’s level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party.”\textsuperscript{93}

For all these reasons, the court explicitly rejected the petitioner’s request that it follow the approach taken by the Wisconsin Supreme Court.\textsuperscript{94} In 1995, that court applied a four-part test to determine when to grant visitation standing to someone who lacks a biological or adoptive connection to the child.\textsuperscript{95} Under that test, the petitioner must prove:

1. that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child;
2. that the petitioner and the child lived together in the same household;
3. that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and
4. that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.\textsuperscript{96}

For the New York court, this type of “complicated and nonobjective”\textsuperscript{97} test was unworkable because it led to protracted litigation and denied

\textsuperscript{91} Id. at 193.
\textsuperscript{92} Id. at 193 n.4.
\textsuperscript{93} Id. at 193 (footnote omitted).
\textsuperscript{94} Id. at 192 n.3 & 193.
\textsuperscript{95} Holtzman v. Knott (In re Custody of H.S.H.-K.), 533 N.W.2d 419, 437 (Wis. 1995).
\textsuperscript{96} Id. at 435-36 (footnote omitted); see also In re E.L.M.C., 100 P.3d 546, 559 (Colo. App. 2004) (“Who may be deemed a psychological parent for the purposes of seeking and receiving an award of parental responsibilities has been variously defined. Common to these definitions is a relationship with deep emotional bond such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance.”). The Massachusetts Supreme Judicial Court, in E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999), defined a de facto parent as:

One who has no biological relation to the child, but has participated in the child’s life as a member of the child’s family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of care taking functions at least as great as the legal parent. The de facto parent shapes the child’s daily routine, answers his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.

Id. at 891.

\textsuperscript{97} Debra H., 930 N.E.2d at 192.
children the benefits of knowing which individuals are their parents. A better alternative, the court insisted, was to stick by its bright-line rule: if an individual does not have a biological or adoptive link to the child, then she does not have standing to claim parental rights unless there are extraordinary circumstances (in the case of custody) or the legal parent is unfit (in the case of visitation).

Even though the Court of Appeals in *Debra H.* once again refused to adopt the concept of functional parenthood, it nonetheless proceeded to grant standing to the petitioner on the ground that she had entered into a Vermont civil union with the legal parent before the child’s birth. In the court’s view, the existence of that union meant that the petitioner would have standing to seek custody and visitation under Vermont law. And principles of comity, the court held, required it to apply that state’s law.

In assessing Vermont’s parentage law, the New York court correctly looked to the Vermont Supreme Court’s opinion in *Miller-Jenkins v. Miller-Jenkins*, the leading case in that state on the parental rights of former partners. The New York court, however, misread *Miller-Jenkins* on one crucial point: Although the Vermont Supreme Court concluded in *Miller-Jenkins* that the parties’ civil union was “an extremely persuasive evidence of joint parentage,” it did not hold that such a union was dispositive of the standing question. The court did not rule, in other words, that the only way in which an individual who lacks a biological or adoptive link to a child can be granted standing to seek parental rights is if he or she had entered into a legally-recognized relationship with the legal parent. Indeed, the Vermont court pointed to other factors that supported granting parentage status to the petitioner in *Miller-Jenkins*, including the intent and expectations of both women, the petitioner’s participation in the decision to have her partner inseminated, and the fact that the biological mother held her partner out as the child’s parent before the relationship dissolved. In contrast, the New York court turned the civil union, which for the Vermont court was an important though not essential evidence of parentage status,

98. *Id.* at 192-93.
103. *Id.*
104. *Id.* at 197.
106. *Id.* at 971.
107. *Id.* at 970. For a more detailed discussion of the background and reasoning of *Miller-Jenkins*, see *Ball*, supra note 56, at 103-11.
It seems to me that the New York court’s misreading of *Miller-Jenkins* was the result of its normative prioritization of certainty and predictability above all other considerations in determining who has standing to raise parenting claims. It is not surprising that a court which is mostly concerned with certainty and the “ease of application” of parental standing rules would deem the existence of a legally-recognized relationship between the two adults to be *determinative* of whether a petitioner who lacks biological or adoptive links with the child should be granted standing to exercise parental rights.108

Indeed, the weight that the New York court gave to the civil union in *Debra H.* was a logical extension of its rejection of Wisconsin’s four-part standing test.109 As a factual matter, it is much easier to determine whether two individuals have entered into a civil union than it is to determine whether a party seeking custody and visitation successfully established a parent-like relationship with the child. It is not surprising, therefore, that the *Debra H.* court, in explaining why the civil union “support[ed] the non-biological partner’s parentage,” emphasized that its existence meant that there was “no potential for misunderstanding, ignorance or deceit.”110

As we will see in Part V, there is a heavy price to pay for the “ease of application” gains that come with requiring, before recognizing parentage status, that the individual in question either (1) established biological or adoptive links with the child or (2) entered into a legally-recognized relationship with the legal parent. This is because the application of either bright-line rule in former partner cases denies children second parents, effectively rendering them illegitimate.111

An overarching concern with certainty and predictability was not only evident in the *Debra H.* majority opinion; it also played a crucial role in

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108. Other courts have specifically rejected the notion that a former partner’s parentage status should be determined by the legal nature of her relationship with the legal parent. The Arkansas Supreme Court, for example, refused to accept the legal parent’s argument that the state’s failure to recognize same-sex marriages or domestic partnerships was relevant to the determination of whether her former partner was entitled to seek visitation. *Bethany v. Jones*, 2011 Ark. 67, 2011 WL 553923 (Feb. 17, 2011). In doing so, the court made clear that the focus should not be on the nature of the relationship between the two adults, but “on what, if any, bond has formed between the child and the nonparent.” *Id.* at *11; see also *T.B. v. L.R.M.*, 786 A.2d 913, 918 (Pa. 2001) (noting that “the nature of the relationship between Appellant and Appellee has no legal significance to the determination of whether Appellee stands in loco parentis to” the child).


110. *Debra H. v. Janice R.*, 930 N.E.2d 184, 195 (N.Y. 2010). The court noted that this was especially true when the union was entered into (as it was in *Debra H.*) before the child was born. *Id.*

111. *See infra* Part V.
two of the three concurring opinions. In fact, it would seem that the main reason why Judge Victoria Graffeo wrote a concurring opinion was to emphasize the point that “[f]or 19 years the rule articulated in Alison D. has provided certainty and predictability to New York parents and their children.”

Judge Graffeo added that under Alison D., when a romantic relationship ends, whether the parties were same-sex or heterosexual partners, a hearing to determine who is the child’s legal parent is generally unnecessary as the parentage issue can readily be determined as a matter of law based on objective genetic proof or documentary evidence. Thus, protracted litigation on the standing of a party hoping to obtain custodial rights or visitation is avoided, which further promotes the settlement of these issues rather than the contentious litigation that is all too frequently harmful to children.

Even Judge Robert Smith, whose concurring opinion called for the overruling of Alison D., used certainty as his normative polestar in explaining what should have been the correct approach in Debra H. After claiming that “[t]here are few areas of the law where certainty is more important than in the rules governing who a child’s parents are[,]” Judge Smith proceeded to agree with the majority that the type of multi-part test endorsed by the Wisconsin Supreme Court was unworkable because its “vague formulas [are] a recipe for endless litigation, which would mean endless misery for children and adults alike.”

Instead of following the Wisconsin court’s lead, Judge Smith would have adopted “a different ‘bright-line rule’” than that called for by Alison D. Smith would have held “that where a child is conceived through [alternative insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both.”

Judge Smith deserves credit for his willingness to overrule Alison D.

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112. Debra H., 930 N.E.2d at 197-98 (Graffeo, J., concurring); see also id. at 198 (reasoning that the Alison D. “rule has avoided confusion, particularly in the event a relationship is dissolved years later, as to whether the party lacking biological or legal ties to the child (i.e., who failed to pursue an adoption) would have standing to petition for custody or visitation”).

113. Id. at 198-99; see also id. at 199 (“[T]he criteria for establishing parental rights should be objective to ensure certainty for the parties and consistency in application.”).

114. Id. at 204 (Smith, J., concurring).

115. Id.

116. Id.

117. Id. at 205. I will later explore the merits of Judge Smith’s proposed rule. See infra Part IV.

118. Id. at 204 (explaining that although “the interest in certainty is extremely strong in this area[,] . . . society’s interest in assuring, to the extent possible, that each child
Indeed, it was Smith, as we will see in Part V, who recognized that the court’s upholding of *Alison D.* essentially rendered an entire class of children illegitimate. But for now, I want to emphasize that Smith’s opinion agreed with the majority and with Judge Graffeo’s concurring opinion on two crucial points: first, that *Alison D.* created a great deal of certainty and predictability in the law of parenthood in New York and, second, that the type of multi-factor test adopted by the Wisconsin Supreme Court is so vague and amorphous that it inevitably leads to uncertainty and unpredictability in answering the question of who has standing to sue for custody and visitation. I take issue with both of these claims in the next part of the Article.

III. THE CONTRASTING CERTAINTIES IN THE APPLICATION OF STANDING RULES IN NEW YORK AND WISCONSIN PARENTING CASES

It would be reasonable to believe, given the *Debra H.* court’s claims regarding the high degree of certainty in parenting cases that followed *Alison D.*, that New York courts in the last two decades have had little difficulty determining who has standing to seek custody and visitation. The story, however, is considerably more complicated than that. *Alison D.* engendered a great deal of uncertainty among lower New York courts because its rigid formula seemed so inconsistent with children’s best interests. In addition, the New York Court of Appeals created a great deal of confusion when it rejected the doctrine of functional parenthood while at the same time embracing the application of equitable estoppel principles in parenting cases.

In contrast, Wisconsin courts seem to have had little difficulty applying their state’s multi-part functional parenthood test. This should lead us to question the claim made by the *Debra H.* majority (and by the authors of two concurring opinions in that case) that functional parenthood tests are unworkable, unpredictable, and ultimately harmful to children.

A. Uncertainties in New York Parenting Law

It cannot be disputed that, on its face, the rule emanating from *Alison D.*

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119. See *infra* notes 248-50 and accompanying text.
120. See *infra* notes 125-37 and accompanying text.
121. See *infra* notes 138-56 and accompanying text.
122. That test is set forth in *supra* note 96 and accompanying text.
123. See *supra* notes 86-101, 112-19 and accompanying text.
is easy to apply and that, if applied consistently, it would lead to certainty and predictability in the case law. The *Alison D.* court, after all, held that only individuals who enjoy a biological or adoptive link to a child may be considered "parents" for standing purposes. The actual application of that rule, however, has not been so straightforward, in part because, as one of the concurring judges in *Debra H.* put it, its harshness has led some judges to "engage in deft legal maneuvering to explain away [its] apparent applicability . . . ."

A critical crack in *Alison D.*'s veneer became apparent in 1998 when an intermediate appellate court refused to follow its holding in a case called *Jean Maby H. v. Joseph H.* When the female plaintiff in that case started dating the male defendant in 1987, she was already pregnant with another man's child. Two years after the child was born, the couple married and later had a child together. Several years later, the woman filed for divorce. She also sought a judicial ruling that her husband was not her first child's father. The husband then countered by filing an action for custody and visitation without alleging that the mother was unfit.

The trial court in *Jean Maby H.* reasoned that the husband was categorically precluded from seeking either custody or visitation because the New York Court of Appeals had held (1) in *Bennett* that a person who is not a biological parent cannot seek custody unless there are extraordinary circumstances; (2) in *Ronald F.F.* that the extraordinary circumstances exception was unavailable in visitation cases; and (3) in *Alison D.* that someone who lacked a biological or adoptive link to the child could not be deemed a "parent."

The intermediate appellate court, however, concluded that these New York Court of Appeals precedents should not be "blindly applied" because doing so would be inconsistent with the best interests of children in some cases.  

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124. Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (holding that the petitioner has "no right to petition the court to displace the choice made by this fit parent in deciding what is in the child’s best interests").
127. *Id.* at 678.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. See supra notes 34-35 and accompanying text.
133. See supra notes 46-47 and accompanying text.
134. See supra notes 55-57 and accompanying text. The trial court’s ruling is summarized in *Jean Maby H.*, 676 N.Y.S.2d at 679.
In order to understand the outcome in Jean Maby H., we need to know that the New York Court of Appeals, at around the same time that it adopted the Alison D. bright-line rule, endorsed the use of equitable estoppel doctrine to prevent women from denying the paternity of men who had established functional parent-child relationships with their children. The court, in the 1984 case of Sharon GG. v. Duane HH., summarily affirmed an intermediate appellate court ruling holding that a wife was estopped from questioning her husband’s paternity despite the fact that a blood test showed that her boyfriend (and not her husband) was in all likelihood the child’s biological father. The wife in Sharon GG., who wanted to deny the husband the ability to visit with the child, was not permitted to question his paternity because “throughout the period of the


137. Id; see also Christopher S. v. Ann Marie S., 662 N.Y.S.2d 200, 205 (Fam. Ct. 1997) (noting that neither Alison D. v. Virginia M. nor Ronald FF. v. Cindy GG. “squarely addressed the issue of equitable estoppel”). Although equitable estoppel was initially applied in paternity cases, some New York courts, as Jean Maby H. shows, eventually also applied the doctrine in custody and visitation ones. As a New York court explained:

No logical reason [exists] for allowing the doctrine of equitable estoppel to be used to advance the best interests of the child in a paternity case and to disallow application of that doctrine in the context of a custody [or visitation] case, not involving issues of paternity . . . [since] the fundamental rights sought to be protected and the reasons advanced for protecting those rights are identical—the best interests of the child. Christopher S., 662 N.Y.S.2d at 203; see also Multari v. Sorrell, 731 N.Y.S.2d 238, 244 (App. Div. 2001) (Peters, J., concurring) (“[I]f a biological mother can assert the parental bond between a nonbiological or nonadoptive father and her child as a shield against prosecution of a paternity proceeding by a putative biological father, such nonbiological or nonadoptive father should have the ability to use the parental bond as a sword to establish standing in a visitation proceeding to ensure that the best interest of a child is secured.”).

marriage, she held the child out as her husband’s son, Designating him as the father in the birth certificate and baptismal rites; . . . she accepted support for the child while they lived together and after they separated; and . . . she permitted a strong parent-child bond to be formed between the husband and the child.139

The doctrine of equitable estoppel is grounded in considerations of fairness, preventing parties from asserting otherwise cognizable rights after they allow others to reasonably rely on assurances that they will refrain from doing so. As the New York Court of Appeals has explained, “[t]he purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted.”140 Another New York appellate court has elaborated on this point by explaining that

[the] doctrine of equitable estoppel may successfully be invoked, in the interest of fairness, to prevent the enforcement of rights which would ultimately work fraud or injustice upon the person against whom enforcement is sought . . . . An estoppel defense may also be invoked where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time. Similarly, an equitable estoppel may be imposed to prevent injustice suffered by a person who, in justifiable reliance upon the words or conduct of another, is induced to act or forbear.141

It may seem at first glance that the doctrine of equitable estoppel, concerned as it is with questions of fairness and reliance, is distinct in important ways from that of functional parenthood, which focuses inter alia on the issue of whether the individual in question served as a parent for a sufficiently lengthy period of time. Yet, the distinction between the two doctrines, as I discuss in more detail below, is not so stark because whether equitable estoppel principles apply in parenting cases frequently depends on factors that are similar to those relevant in determining whether functional parenthood principles are applicable.142 As a result, if it is

139. Sharon GG., 467 N.Y.S.2d at 943. The applicability of equitable estoppel principles meant that the wife could not challenge the husband’s paternity unless she presented evidence as to why doing so would be in the child’s best interests. Id. at 944 (“Once the husband had claimed paternity and had made the requisite showing of operative facts to support an estoppel, it was incumbent upon the wife to show why an estoppel should not be applied in the best interests of the child.”) (citation omitted). It is important to note that the New York Court of Appeals has not limited the application of the equitable estoppel doctrine to parenting cases in which the non-legal parent was married to the legal one. See Shondel J. v. Mark D., 853 N.E.2d 610 (N.Y. 2006). I discuss Shondel J. in infra notes 143-156 and accompanying text.

140. Shondel J., 853 N.E.2d at 613.


142. See infra notes 153-56 and accompanying text.
possible, without much difficulty, to apply the doctrine of equitable estoppel to prevent a legal parent from denying the parentage status of another person who has functioned as a parent, then it would also seem possible, without much difficulty, to apply the doctrine of functional parenthood to determine whether someone should be granted the opportunity to seek custody and visitation over a legal parent’s objections.

There is, then, significant tension between the New York Court of Appeals’ embrace of equitable estoppel in Sharon GG and its forceful rejection of functional parenthood in Alison D. That tension, and the confusion it created, was exacerbated in 2006 when the same court, in Shondel J. v. Mark D., strongly reaffirmed the appropriateness of applying equitable estoppel principles in parenting cases.143

The year after Shondel and Mark started dating, the former gave birth to a baby girl in Guyana.144 For several years after that, Mark supported the child financially and visited with her frequently when Shondel brought her to New York.145 Mark also “signed a Guyana registry, stating that he was her father and authorizing the change of her last name to his[, and] named the child the primary beneficiary on his life insurance policy, identifying her as his daughter.”146

Eventually, Mark stopped financially supporting the child, leading Shondel to bring a paternity and support action in New York family court. At first, Mark not only refused to contest his paternity, but he also sought the right to visit with the child.147 Later in the proceedings, however, he asked that a DNA test be conducted, the result of which indicated he was not the child’s biological father.148 Despite the test result, the family court concluded that Mark should be estopped from disclaiming his paternity because he had “held himself out as [the] child’s father, and behaved in every way as if he was the father, albeit a father who didn’t reside for a good part of the child’s life, in the same country.”149 The Court of Appeals affirmed, agreeing with the lower court’s determination that it was proper to apply equitable estoppel principles in order to assign Mark parentage status.150

Notice the similarities between the circumstances of cases such as Shondel J. and those of ones like Alison D. In both instances, the crux of

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144. *Id.* at 611.
145. *Id.*
146. *Id.*
147. *Id.* at 612.
148. *Id.*
149. *Id.*
150. *Id.* at 612-14.
the legal dispute is whether someone who does not have a biological or adoptive connection to a child should be granted (or required to accept) parentage status. Yet, while the Court of Appeals applied a categorical rule in *Alison D.*, concluding that a so-called “third party” should never be granted parentage status under functional parenthood principles, it ruled in *Shondel J.* that such a party may be granted parentage status on equitable estoppel grounds.

It bears noting that in the same way that there is no bright-line rule establishing when a non-legal parent has sufficiently acted as a parent with the consent of the legal parent so as to make it appropriate to invoke the doctrine of functional parenthood, there is also no bright-line rule establishing when equitable estoppel principles require that someone who has acted as a parent and established a relationship with a child should be estopped from denying his parentage status. Indeed, the facts that New York courts look to in equitable estoppel cases are similar to those that courts in other jurisdictions consider when applying the functional parenthood doctrine. This similarity is evident from the facts emphasized by the New York Court of Appeals in *Shondel J.* to support its conclusion that equitable estoppel principles prevented Mark from denying his parentage status. The court noted that

Mark held himself out as the child’s father, and behaved in every way as if he was the father. Mark and the child had a close relationship, in which he referred to himself as her “daddy,” and which involved regular telephone conversations, frequent visits when she and Mark were in the same city, and contact with his parents. Moreover, Mark named the child as the primary beneficiary on his life insurance policy and sent money monthly for the child’s support until June 1999 and then less regularly through the summer of 2000. The record also establishes that the child justifiably relied on Mark’s representations, accepting and treating him as her father.

151. *See supra* notes 55-57 and accompanying text.

[to effectively establish standing [under equitable estoppel principles, a] nonbiological or nonadoptive parent . . . must show, inter alia, that the actions or encouragement of the biological or adoptive parent caused the creation of the parental bond between the petitioner and the child in the first instance; that he or she has assumed “the full panoply of parental obligations . . . [; and] that the child is [now] actually psychologically bonded or dependent upon that person as a ‘parent.’”]

*Id.* (internal citations omitted).
154. *Shondel J.*, 853 N.E.2d at 614. As we have seen, the question of whether the legal parent consented to and fostered the relationship between the child and the so-called third party is a crucial aspect of the functional parent analysis. *See supra* notes 62-65 and accompanying text. Similarly, the question of whether the legal parent
Notice that the facts found relevant by the New York Court of Appeals in applying the equitable estoppel doctrine are similar to those that are relevant under the Wisconsin multi-part functional parenthood test. That test asks inter alia whether the individual had ongoing contact, and successfully established a parental relationship, with the child.\textsuperscript{155} It is illogical for New York’s highest court to have concluded in \textit{Debra H.} that the factual determination called for by the functional parenthood doctrine is cumbersome and unpredictable, while essentially looking to the same factors to determine the applicability of the equitable estoppel doctrine in \textit{Shondel J.}\textsuperscript{156}

It also bears emphasizing that children in both kinds of cases are likely to have enjoyed ongoing parent-child relationships with the so-called “third parties,” meaning that they are likely to be harmed in similar ways if those relationships are permanently disrupted. It is therefore also inconsistent for the Court of Appeals to have been (appropriately) concerned about the negative impact on children of being denied continued access (and support from) non-legal parents in the equitable estoppel context while ignoring that same impact in functional parenthood ones.\textsuperscript{157}

Although the court in \textit{Alison D.} recognized that the petitioner in that case had “nurtured a close and loving relationship with the child,”\textsuperscript{158} it did not 

\begin{footnotesize}
\footnotesize \textsuperscript{155} See supra note 96 and accompanying text.
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\footnotespace \textsuperscript{156} The Court of Appeals in \textit{Debra H.} tried to explain away the seemingly clear tension between \textit{Alison D.} and \textit{Shondel J.} by noting that the legislature had enacted a statute specifically authorizing the use of equitable estoppel in paternity cases. As the court put it: We see no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought. \textsuperscript{[T]he Legislature has drawn the distinction for us: sections 418(a) and 532(a) of the Family Court Act [which address questions of paternity] direct the courts to take equitable estoppel into account before ordering custody testing, while section 70 of the Domestic Relations Law [which allows a “parent” to seek custody and visitation] does not even mention equitable estoppel.\textsuperscript{156} \textit{Debra H. v. Janice R.}, 930 N.E.2d 184, 191 (N.Y. 2010). Note, however, that even if we assume \textit{arguendo} that it was appropriate for the court to limit its equitable powers in custody and visitation cases because of the absence of legislative guidance on the subject, that contention does not undermine the point that I am making here, namely, that the application of equitable estoppel principles brings with it a similar degree of certainty as does the application of functional parenthood principles.\textsuperscript{157} See infra notes 62-65 and accompanying text.
\footnotespace \textsuperscript{157} See infra notes 62-65 and accompanying text.
\footnotespace \textsuperscript{158} \textit{Alison D. v. Virginia M.}, 572 N.E.2d 27, 28 (N.Y. 1991).
\end{footnotesize}
consider legally relevant the effect on the child of not being able to continue enjoying a parent-child relationship with a woman who had helped care for him during the first two years of his life.\textsuperscript{159} In stark contrast, the same court stated in \textit{Shondel J.} that “[t]he potential damage to a child’s psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given.”\textsuperscript{160} The court’s recognition that children are harmed when they are cut off from those whom they have come to depend on as parents in \textit{Shondel J.} only makes more perplexing its unwillingness to take into account the same harm to children in cases like \textit{Alison D.} and \textit{Debra H.}

It should be noted that the New York Court of Appeals has also held, in \textit{Juanita A. v. Kenneth Mark N.}, that “the doctrine of equitable estoppel may be used by a purported biological father to prevent a child’s mother from asserting [his] biological paternity—when the mother has acquiesced in the development of a close relationship between the child and another father figure, and it would be detrimental to the child’s interests to disrupt that relationship.”\textsuperscript{161} As the court put it, the doctrine of equitable estoppel works to “protect[] the status interests of a child in an already recognized and operative parent-child relationship.”\textsuperscript{162} As in \textit{Shondel J.}, but unlike in \textit{Alison D.}, the court in \textit{Juanita A.} focused on the nature of the relationship between the non-biological parent and the child, as well as on the impact that a disruption in that relationship would have on the child’s well-being.\textsuperscript{163}

The unwillingness of some lower courts to apply \textit{Alison D.} in ways that were clearly inconsistent with the best interests of children,\textsuperscript{164} when coupled with the Court of Appeals’ embrace of equitable estoppel principles in parenting cases,\textsuperscript{165} created a great deal of confusion and made it difficult to predict how lower courts would rule. In 2008, for example, a trial judge relied on equitable estoppel principles to reject a biological mother’s attempt to use \textit{Alison D.} to deny parentage status to her former

\begin{itemize}
\item \textsuperscript{159} See \textit{id.} (noting that despite the apparently close relationship between the petitioner and the child, the former was nonetheless “not a parent within the meaning of Domestic Relations Law § 70”).
\item \textsuperscript{160} \textit{Shondel J. v. Mark D.}, 853 N.E.2d 610, 615-16 (N.Y. 2006).
\item \textsuperscript{161} \textit{Juanita A. v. Kenneth Mark N.}, 930 N.E.2d 214, 216-17 (N.Y. 2010).
\item \textsuperscript{162} \textit{Id.} at 216 (emphasis added).
\item \textsuperscript{163} See \textit{id.} at 216-17. Ironically, the court issued its ruling in \textit{Juanita A.} on the same day that it strongly reaffirmed \textit{Alison D.} in \textit{Debra H.}
\item \textsuperscript{164} See \textit{supra} notes 125-37 and accompanying text.
\item \textsuperscript{165} See \textit{supra} notes 138-56 and accompanying text.
\end{itemize}
partner. That court, pointing to both Shondel J. and Jean Maby H. (the earlier intermediate appellate court ruling that relied on equitable estoppel principles to grant standing in a visitation case to a non-legal parent), granted visitation standing to the biological mother’s former female partner. As the court explained, “if the concern of both the legislature and the Court of Appeals is what is in the child’s best interest, a formulaic approach to finding that a ‘parent’ can only mean a biologic or adoptive parent may not always be appropriate.”

The confusing, and unequal, application of parenting law in New York following Alison D. is perhaps most clear when we compare two cases decided about a year apart by two panels of the same intermediate appellate court department. In the first case, involving a dissolved lesbian relationship, the court held that the legal parent’s former partner was categorically precluded from seeking custody and visitation. In that case, the same-sex couple, after living together for seventeen years, decided to have a child, with one partner becoming pregnant through alternative insemination. After the child was born, the petitioner “participated in rearing the child and contributed to her financial support.” When the child was three and a half years old, the couple jointly filed adoption papers seeking to have the petitioner adopt the child, but the adoption was not finalized because the couple separated a few months later. The appellate court ruled that the petitioner lacked standing to seek custody and visitation unless she could show the existence of extraordinary circumstances. The court further explained that those circumstances did not exist simply because “the child has bonded psychologically with the nonparent.”

But less than a year later, the same court held that a man who was not the biological father of a child born to his wife during their marriage was entitled to show that he should be granted standing to seek custody of the child under the extraordinary circumstances exception. The court did not base its ruling on the fact that the couple was married at the time the child

167. See supra notes 126-137 and accompanying text.
169. Id. (footnote omitted).
171. Id. at 990.
172. Id.
173. Id.
174. Id. at 991.
175. Id.
was born.177 Instead, after ruling (as it had in the case discussed in the
previous paragraph involving the lesbian couple) that the formation of a
parent-child bond is not enough to support a finding of extraordinary
circumstances,178 it proceeded to hold that the legal parent’s consent to and
fostering of the relationship between the non-biological parent and the
child did constitute an extraordinary circumstance.179 The court then
remanded the case for a hearing on the husband’s custody petition.180

It simply makes no sense for the court to have given the party claiming
to be the non-legal parent in the second case the opportunity to establish
standing based on the fact that the legal parent consented to and fostered
his relationship with the child, while denying that opportunity to the
petitioner in the first case. Indeed, it would seem that that petitioner would
have had little difficulty showing that the legal parent, with whom she had
shared a home for almost two decades, consented to and fostered her
relationship with the child.181

As these and other cases illustrate, there was great inconsistency in New
York parenting case law following Alison D., with some lower courts
rejecting efforts by biological parents to rely on that case to deny standing
to their former partners,182 while others reached the opposite conclusion by
ruling that Alison D. categorically prevented former partners who lacked a
biological or adoptive link to the child from gaining standing regardless of
the nature or extent of their relationship with that child.183

177. In remanding the case, the court did point out “that there is a Supreme Court
judgment adjudging that [the boy] is a child of the marriage.” Id. at 811. The court,
however, did not take that fact into account in its legal reasoning.
178. Id.
179. See id. (“[A] mother’s direct involvement in the creation and development of a
father-son relationship . . . which puts the child in a situation where his welfare could
be affected drastically, can be an extraordinary circumstance.”) (citation omitted).
180. Id.
J., concurring) (“If in custody and visitation disputes, common sense, reason and an
overriding concern for the welfare of a child are to prevail over narrow selfish
proclamations of biological primacy, the assertion of equitable estoppel by a nonbiological or nonadoptive parent must be given credence by the courts.”); K.B. v. J.R.,
887 N.Y.S.2d 515, 528 (Sup. Ct. 2009) (holding that female to male transsexual who
helped raise child with legal mother’s consent and encouragement had standing to seek
custody under the extraordinary circumstances doctrine); Ms. H. v. Ms. L., 843
N.Y.S.2d 790, 793 (Fam. Ct. 2007) (holding that the biological mother’s female
partner, who lived with the child for eight months and helped care for him with consent
of biological mother, had standing to seek custody under the extraordinary
circumstances doctrine); see also judicial rulings discussed in supra notes 126-37, 17680 and accompanying text.
183. See, e.g., Behrens v. Rimland, 822 N.Y.S.2d 285, 286-87 (App. Div. 2006);
It is clear, then, that by the time the Court of Appeals agreed to hear *Debra H.*, there was much disagreement among lower New York courts over who qualified for standing in parenting cases.\(^{184}\) This state of affairs belied the confident assertion made by the *Debra H.* court that there was much certainty and predictability in New York parenting law following *Alison D.*\(^ {185}\)

At the same time, as we will see in the next Section, there seems to have been little confusion in Wisconsin on the question of who qualifies for parentage status under the doctrine of functional parenthood. This contrast in certainty is, of course, ironic since the New York Court of Appeals in *Debra H.* explicitly rejected the Wisconsin Supreme Court’s approach to the standing issue because of the supposed confusion and unpredictability engendered by functional parenthood tests.\(^ {186}\)

**B. Not Exactly Chaos: Functional Parenthood in Wisconsin**

In discussing the type of standing rule adopted by the Wisconsin Supreme Court, the New York Court of Appeals in *Debra H.* questioned both its advisability and its ease of application. The majority opinion referred to multi-part functional parenthood tests like Wisconsin’s as “complicated and nonobjective,”\(^ {187}\) inevitably leading to “disruptive . . . battle[s]”\(^ {188}\) and “further potential combat”\(^ {189}\) between the parties. The New York court added that the tests are “inherently unpredictable,”\(^ {190}\) encouraging “contentious, costly, and lengthy”\(^ {191}\) litigation that “threatens to trap single biological and adoptive parents and their children in a limbo of doubt.”\(^ {192}\) For her part, one of the concurring judges in *Debra H.*
claimed that such tests lead to “contentious litigation that is all too frequently harmful to children,"193 while another concurring judge contended that they are unworkable because their “vague formulas [are] a recipe for endless litigation, which . . . mean[s] endless misery for children and adults alike.”194

In making these claims, none of the judges cited any cases or findings from Wisconsin (or from the other jurisdictions that have adopted similar functional parenthood tests). This is not surprising since there is little evidence that the application of the functional parenthood test in Wisconsin has led to the type of uncertainty and unpredictability that so concerned New York’s highest court.

The Wisconsin Supreme Court first faced the standing question in a former partner parenting case in In re Interest of Z.J.H.195 The relevant facts in that 1991 case were not in dispute—the legal parent, who had adopted the child, conceded that her former partner had developed a “‘parent-like’ relationship” with the child.196 The legal parent, however, insisted that despite that relationship, her former partner should be denied standing as a matter of law, a position accepted by the Wisconsin Supreme Court.197 To grant the former partner the opportunity to seek parental rights under the state’s in loco parentis doctrine, the high court concluded, would be inconsistent with “this state’s adherence to the ‘parental preference’ standard . . . in the resolution of custody disputes. The ‘parental preference’ rule gives great deference to the rights of [legal] parents . . . to raise their children.”198 While this rule recognizes the rights of children, it also assumes that normally it is in the best interests of the child to be raised by his or her parent.199 The court also worried that the application of the in loco parentis doctrine in former partner cases “would open the doors to multiple parties claiming custody of children[,]” leading to the possibility that “a child could have multiple ‘parents,’ and could find himself or herself subject to multiple custody and visitation arrangements.”200

Only four years later, however, the state supreme court changed its mind, ruling in In re Custody of H.S.H.-K. that Wisconsin courts did, after all, have the equitable power to grant visitation standing to a non-legal parent

193. Id. at 199 (Graffeo, J., concurring).
194. Id. at 204 (Smith, J., concurring).
196. In re Interest of Z.J.H., 471 N.W.2d at 206.
197. Id. at 204.
198. Id. at 207.
199. See id. (“To the extent that we award custody rights to one who stands in loco parentis, we diminish the rights of legal parents . . . .”) (citations omitted).
200. Id. at 208.
who had established a parent-like relationship with the child with the legal parent’s consent and encouragement.\textsuperscript{201} The court this time around rejected the notion that legal parents “have absolute rights in their children,”\textsuperscript{202} while adding that “[t]he state’s public policy, established by the legislature, directs the court to respect and protect parental autonomy and at the same time to serve the best interest of the child.”\textsuperscript{203}

The \textit{H.S.H.-K.} court reasoned that parental autonomy and the granting of standing to former partners through the doctrine of \textit{in loco parentis} were not inconsistent because that doctrine could be applied only if there was evidence that the legal parent consented to and fostered the relationship between the petitioner and the child.\textsuperscript{204} At the same time, the court recognized that the doctrine helped “protect[] a child’s best interest by preserving the child’s relationship with an adult who has been like a parent.”\textsuperscript{205}

The Wisconsin court held that a petitioner should be given the opportunity to show that granting her visitation rights would be in the child’s best interests if she satisfied a four-part test.\textsuperscript{206} This test, as we have seen, requires a petitioner to show that the legal parent consented to and fostered her relationship with the child; that she and the child lived in the same household; that she assumed the traditional responsibilities of parenthood; and that she established a parental bond with the child.\textsuperscript{207}

If the New York Court of Appeals had been correct in its assessment that functional parenthood tests such as the one adopted by the Wisconsin court are unworkable and unpredictable,\textsuperscript{208} one would expect to find a great deal of litigation in Wisconsin following \textit{H.S.H.-K.} as courts there struggle with —what the New York court claimed to be—its vague and amorphous multi-part functional parenthood test. But a study of Wisconsin appellate opinions shows that there has been very little appellate litigation since 1995 involving the application of that test. Indeed, I have been unable to find a single post-\textit{H.S.H.-K.} appellate ruling in Wisconsin raising the issue of whether the four-part test was properly applied or whether any given individual qualified (or not) for standing under that standard.

There has been appellate litigation in Wisconsin involving the question

\begin{itemize}
  \item \textsuperscript{201} Holtzman v. Knott (\textit{In re Custody of H.S.H.-K}), 533 N.W.2d 419, 434 (Wis. 1995).
  \item \textsuperscript{202} \textit{Id.} at 435 (footnote omitted).
  \item \textsuperscript{203} \textit{Id.}
  \item \textsuperscript{204} \textit{Id.}
  \item \textsuperscript{205} \textit{Id.} at 436.
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} See supra note 96 and accompanying text.
  \item \textsuperscript{208} See supra notes 94-101 and accompanying text.
\end{itemize}
of which types of cases merit the application of the *H.S.H.-K.* multi-part test.\(^{209}\) A Wisconsin appellate court, for example, has held that *H.S.H.-K.* does not apply when a legal parent requests that a guardian be appointed, that guardianship is later terminated, and the guardian then seeks visitation.\(^{210}\) Another Wisconsin appellate court has held that *H.S.H.-K.* does not provide original grandparents with the opportunity to seek visitation after the legal parents’ rights have been terminated and the children are adopted by new parents.\(^{211}\) But the issue in these cases was whether the *H.S.H.-K.* test applied; it did not involve disputes over how the *H.S.H.-K.* test should be applied. There appear to have been no reported Wisconsin appellate opinions on the latter question in the seventeen years since *H.S.H.-K.* was decided. This lack of case law suggests that the multi-part test adopted in that case—despite the New York Court of Appeals’ claim to the contrary—has not led to protracted litigation on the question of who has standing to claim parental rights.\(^{212}\)

It is also instructive to look at parenting litigation in New Jersey because that state’s supreme court in 2000 explicitly adopted the four-part test formulated by the Wisconsin court in *H.S.H.-K.*\(^{213}\) A review of New Jersey appellate opinions since then suggests that New Jersey courts have not experienced undue difficulty in determining whether a particular petitioner satisfies the functional parent criteria.\(^{214}\)

In one case, for example, the court held that a great aunt, who cared for the child temporarily, did not qualify as a psychological parent because the child’s grandmother, who had legal custody, never intended for the aunt to serve as a parent.\(^{215}\) In another case, the court held that the psychological parenting test was “clearly met” in a case in which the legal parent consented to and fostered the relationship between the petitioner and the child, and in which the petitioner “acted as a father to [the child] in every way—caring for and teaching him as a father would.”\(^{216}\) In a third case, a


\(^{210}\) See *id.* at 107-08.

\(^{211}\) *In re Custody and Visitation of Jeffery A.W.*, 539 N.W.2d 195 (Wis. Ct. App. 1995).


\(^{213}\) See *V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000).


\(^{215}\) *Id.* at *1*.

biological father’s former girlfriend was deemed the children’s psychological parent, a factual finding the father did not contest.217

In one New Jersey case in which the extent of the petitioner’s involvement in the child’s life was disputed, the appellate court concluded that the trial court had properly granted summary judgment on behalf of the legal parent without holding a plenary hearing.218 This ruling is important because it belies the suggestion made by the Debra H. court that every case in which a party alleges that she qualifies as a functional parent requires the holding of an extensive and protracted hearing.219 As the New Jersey court explained, a hearing is not required when the petitioner’s alleged facts, even if taken as true, would be insufficient to satisfy the functional parenthood test.220

217. See Hatskins v. Hernandez, 2010 WL 1926550 (N.J. Sup. Ct. App. Div. May 5, 2010) (unpublished decision); see also Vogel v. Balkus, 2006 WL 1512010 (N.J. Sup. Ct. App. Div. June 2, 2006) (unpublished decision) (suggesting that trial court may have failed to give petitioner sufficient opportunity to establish that he was a psychological parent, but holding that such a failure was not reversible error because petitioner, who was a convicted child molester, would not have been able to establish that granting him visitation would be in the child’s best interest).

Courts in other jurisdictions also seem to have run into few difficulties applying functional parenthood principles. For example, following the Rhode Island Supreme Court’s recognition of de facto parenthood in a former same-sex partner parenting case, see Rubano v. DiCenzo, 795 A.2d 959, 967 (R.I. 2000), there seems to have been only two reported appellate cases in that state involving whether a particular individual qualified for the status of de facto parent. In one of them, the state supreme court had no difficulty concluding that there was enough evidence in the record to support the trial court’s determination that the petitioner, who was incarcerated while his wife adopted the child in question, did not meet the de facto parent standard because he had never lived with the child and his contact with him was “intermittent and quite insignificant.” de Bont v. de Bont, 826 A.2d 968, 970 (R.I. 2003). Similarly, in the second case, the state supreme court easily concluded that a petitioner who had never lived with the legal parent and the child, and who did not introduce evidence that the legal parent fostered a parental relationship between the petitioner and the child, did not have standing to seek visitation. Keenan v. Somberg, 792 A.2d 47, 49 (R.I. 2002).


Ask[ing] us to replace the bright-line rule in Alison D. with a complicated and nonobjective test for determining so-called functional or de facto parentage at an equitable-estoppel hearing to be conducted by the trial court after discovery and fact-intensive inquiry in the individual case. These equitable-estoppel hearings—which would be followed by a second, best-interest hearing in the event functional or de facto parenthood is demonstrated to the trial court’s satisfaction—are likely often to be contentious, costly, and lengthy.

Id.

220. See A.F., 771 A.2d at 698 (“Once it became clear that plaintiff could not meet any one of the first three prongs [of the functional parenthood test], the relationship between plaintiff and the child became legally irrelevant. It was therefore appropriate to deny plaintiff’s application for appointment of an expert to perform a bonding evaluation and to dismiss the complaint without a plenary hearing.”) (footnote omitted); see also R.B. v. A.P., 2007 WL 1388187 (N.J. Sup. Ct. App. Div. May 14, 2007) (unpublished decision) (holding that since the petitioner did not establish that she
If multi-part functional parenthood tests like the one adopted by the Wisconsin Supreme Court (and later embraced by the New Jersey Supreme Court) had led to the kind of protracted litigation feared by the New York Court of Appeals in *Debra H.*, one would expect to find evidence of that in appellate opinions. However, that is not the case—far from instilling confusion and years of court proceedings, the Wisconsin (and New Jersey) courts seem to have had little difficulty in applying the test. If anything, there appears to have been significantly more uncertainty during the last two decades over who qualifies for parenthood status in New York than in Wisconsin.221 This suggests that the New York Court of Appeals was wrong in defending its approach to parenthood cases as one that promotes certainty and predictability while criticizing that of jurisdictions like Wisconsin for doing the opposite.

IV. INTENT VS. FUNCTION IN PARENTING DETERMINATIONS

There is one additional aspect of *Debra H.* that is worth mentioning given our interest here in the intersection of parenthood and certainty. In his concurring opinion, Judge Robert Smith, after rejecting functional parenthood tests as unworkable and harmful to children,222 called for the application of what he categorized as “a bright-line rule.”223 According to Judge Smith, when “a child is conceived through [alternative insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other, the child [should be] as a matter of law—at least in the absence of extraordinary circumstances—the child of both.”224

221. Compare supra notes 121-81 and accompanying text (discussing New York parentage cases following *Alison D.*), with supra notes 208-12 and accompanying text (discussing Wisconsin parentage cases following *H.S.H.-K.*).

222. See *Debra H.*, 930 N.E.2d at 204 (Smith, J., concurring) (arguing that functional parenthood doctrine’s “vague formulas [are] a recipe for endless litigation, which would mean endless misery for children and adults alike”).

223. *Id.*

224. See *id.* at 205. Judge Smith explained that his proposed parentage rule would be limited to female same-sex couples only:

I would leave for another day the question of what rules govern male couples, for whom ADI [artificial donor insemination] is not possible. This limitation

[Page dimensions: 612.0x792.0]
For judges who prioritize certainty in parenting determinations, Judge Smith’s proposed rule might still be unacceptable. This is because, under that rule, there would still need to be a determination of whether “knowledge and consent” were present and whether “extraordinary circumstances” existed. Judge Smith did not elaborate on the meaning of either.) But for those who believe that certainty should not be the normative polestar in parentage cases, Judge Smith’s rule is clearly an improvement over the one adopted by the majority in *Debra H.* because it would result in fewer instances of children being denied the legal, economic, and emotional benefits of having a second parent.

It is helpful to compare Judge Smith’s proposed rule not only to the one adopted by the *Debra H.* majority, but also to the type of functional parenthood test explicitly rejected by both the majority and by Judge Smith. Although Judge Smith did not specifically label it as such, his proposed test brings to mind intent-based understandings of parentage.  

may give some pause, for it seems intuitively that all people, male and female, gay and straight, should be treated the same way. Yet it is an inescapable fact that gay and straight couples face different situations, both as a matter of law and as a matter of biology. By the choice of our Legislature, a choice we have held constitutionally permissible, same-sex couples in New York have neither marriage nor domestic civil unions available to them. And, pending even more astounding technological developments than we have yet witnessed, it is not possible for both members of a same-sex couple to become biological parents of the same child. These differences seem to me to warrant different treatment. Indeed, different treatment already exists, for both a statute and the common law give a measure of protection to the children of married opposite-sex couples who are conceived by ADI. The rule I propose would give the children of lesbian couples similar, though not identical, protection.

*Id.* (internal citations omitted).

225. Judge Smith did not elaborate on the meaning of either criterion. Judge Graffeo’s concurring opinion complained that Judge Smith’s proposed rule,

[1]like the equitable estoppel test, . . . invites litigation over whether the parties were “living together” (presumably, they must be living together in a romantic relationship, not merely as roommates) at the time of insemination, whether the insemination was “with the knowledge and consent” of the other partner, and whether “extraordinary circumstances” exist, whatever those might be. Under this set of factors, the same types of factual controversies that typify the equitable estoppel analysis would ensue.

*Id.* at 199 (Graffeo, J., concurring) (footnote omitted).

226. I elaborate on the role that the prioritization of certainty over other considerations in parentage rules plays in the creation of a new class of illegitimate children in *infra* Part V.


228. *See* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity For Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (“Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.”); *see also* Jenni Millbank, *The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family*, 22 INVL. J.L. POL’Y & FAM. 149, 150 (2008) (“[I]t is the intention to have children together that is the essence
By requiring that the child be conceived with the “knowledge and consent” of the non-conceiving partner, Judge Smith suggested that if the partner intended to become a parent, that is enough to legally recognize her as such.229

One benefit of a parentage test that focuses on the parties’ intent at the time of conception is that it avoids the factual inquiry, required by functional parenthood tests, aimed at determining the extent and strength of the relationship between the petitioner and the child.230 Although the need to make such a determination has not, as claimed by the Debra H. court,231 led to extensive unpredictability and uncertainty in the case law,232 it is nonetheless true that functional parenting hearings can be emotionally charged and unpleasant affairs, especially when the legal parent seeks to minimize the role played by the petitioner in the child’s life. As one commentator has noted, it is common in these cases to

see birth mothers in court claiming that the co-mother, with whom they jointly planned, conceived and raised a child, is an “aunty” or “extended family member,” “family friend” or “significant other” in relation to the child, or that she is a helpful source of former support to herself akin to a “best friend,” “nanny” or “baby sitter;” but not in any way the child’s

of family formation.”).

229. Professor Jenni Millbank, while arguing in favor of “a form of automatic, universal and stable legal recognition for co-mothers based on pre-conception intention,” Millbank, supra note 228, at 163, calls for the adoption of a rule that is quite similar to that proposed by Judge Smith in Debra H. According to Millbank, there should be a “bright line presumption[]” that “[i]f two women are in a committed cohabiting relationship (whether or not formalised) and the non-birth mother consents to her partner’s attempt to conceive through assisted conception, she is the second parent of the resulting child or children.” Id. at 165.

Professor Nancy Polikoff has praised two recent statutory enactments that incorporate, in the area of assisted reproduction, an intent-based understanding of parenthood. Polikoff explains that

[w]hen a lesbian couple decides to have a child, one woman commonly conceives using donor semen. A statute delineating that her consenting partner is also the child’s parent is a simple means of establishing her parenthood, and this is exactly what recent legislation in New Mexico and the District of Columbia accomplishes. The D.C. legislation reads: “A person who consents to the artificial insemination of a woman as provided in subparagraph (A) or (B) with the intent to be the parent of her child, is conclusively established as a parent of the resulting child.” The New Mexico statute reads: “A person who . . . consents to assisted reproduction as provided in Section 7-704 . . . with the intent to be the parent of a child is a parent of the resulting child.”


230. See supra note 96 and accompanying text.

231. See supra notes 97-101 and accompanying text.

232. See supra Part III.B.
other parent or other mother.\textsuperscript{233}

There is much to be said for a parentage rule that renders unnecessary allegations aimed at belittling the role of co-parents in children’s lives. At the same time, however, there are limits to using pre-conception intent as the dispositive criterion for establishing standing in former partner parenting cases. First, the issue of intent may not always be clear; former partners sometimes dispute each other’s account of the extent to which they both agreed to be the child’s parents before conception.\textsuperscript{234} It therefore makes sense, in cases in which there are conflicting claims of intent, to expand the factual inquiry to include the intent and conduct of the parties \textit{after} the child’s birth. If, for example, the legal parent fostered and encouraged the formation of a parent-child relationship between her partner and the child, it would undermine her claim that the couple never intended to raise the child jointly.

Indeed, this example suggests that it is problematic to view intent and function as mutually exclusive criteria in determining parentage status.\textsuperscript{235} It seems highly relevant, in establishing a couple’s true intent, to determine whether the party who lacks a biological or adoptive connection to the child \textit{functioned} as a parent with the legal parent’s consent and encouragement. At the same time, courts that have embraced a functional parenting approach have looked to considerations of intent by requiring, as a threshold matter, that the legal parent have consented to and encouraged the establishment of a parent-child relationship between the petitioner and the child.\textsuperscript{236} This shows that functional parenthood, as currently

\begin{itemize}
  \item \textsuperscript{233} See Millbank, \textit{supra} note 228, at 151 (footnotes omitted).
  \item \textsuperscript{234} See, e.g., K.M. v E.G., 117 P.3d 673, 676 (Ca. 2005) (noting that one party “testified that she and [her former lesbian partner] planned to raise the child together, while [the partner] insisted that . . . [she] made it clear that her intention was to become ‘a single parent’”); V.C. v. M.J.B, 748 A.2d 539, 542 (N.J. 2000) (explaining that the biological parent claimed that “she made the final decision to become pregnant independently and before beginning her relationship with” her partner, while the latter “claimed that the parties jointly decided to have children”).
  \item \textsuperscript{235} See Millbank, \textit{supra} note 228, at 150 (“Functional family and intentionality are inter-related: shared intention and shared enterprise in planning a child and trying to conceive is the platform on which the caring work of functional family is later built.”); \textit{id}. at 165 (“It is important to note that in the vast majority of lesbian-led families [pre-birth] intentions as to the family form are followed through by actual family function after birth, so intention and functionality are linked elements of a continuum rather than dichotomous modes of recognition.”); Richard F. Storrow, \textit{Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage}, 53 \textit{HASTINGS L.J.} 597, 640 (2002) (arguing that the concept of functional parenthood should include “expressions of intention made before the child’s birth”).
  \item \textsuperscript{236} See Holtzman v. Knott (\textit{In re Custody of H.S.H.-K.}), 533 N.W.2d 419, 435 (Wis. 1995) (stating that the first factor in the four-part functional parenthood test is “that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child”).
\end{itemize}
understood by courts, cannot exist without the requisite intent.237

A second limitation of a parentage rule such as the one proposed by Judge Smith in his Debra H. concurrence is that it excludes individuals who entered the picture after the child’s birth. The prioritization of intent over function denies parentage to someone whose relationship with the legal parent began after the child was born regardless of whether she eventually established, with the legal parent’s consent and encouragement, a parental relationship with the child.238 It is unlikely that a child under

237. The courts, in applying functional parenthood doctrines, have focused on the legal parent’s intent rather than on that of the co-parent. There are at least two explanations for why this has been the case. The first is the legal parent’s initial constitutional right to determine who associates with her children. In applying functional parenthood doctrines, courts have inquired whether the legal parent has limited her constitutional rights by agreeing to have another individual serve as a co-parent. As the Washington Supreme Court explained, “[c]ritical to our constitutional analysis here, a threshold requirement for the status of the de facto parent is a showing that the legal parent ‘consented to and fostered’ the parent-child relationship.” Carvin v. Britain (In re Parentage of L.B.), 122 P.3d 161, 179 (Wash. 2005) (internal citation and footnote omitted). The New Jersey Supreme Court made a similar point when it noted that

[t]he requirement of cooperation by the legal parent is critical because it places control within his or her hands. That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.

V.C., 748 A.2d at 552.

A second reason for the courts’ focus on the legal parents’ intent rather than on that of their partners is that the latter’s intent can be gleaned from whether they chose to function as parents. For these individuals, in other words, function is evidence of intent. See supra notes 235-36 and accompanying text (noting interrelationship between function and intent in parentage status determination).

Interestingly Judge Smith’s proposed parentage rule focuses on the intent of the co-parent rather than on that of the legal parent. See supra note 224 and accompanying text. Professor Millbank has argued that this is the better approach because “the focus of [the] inquiry [should] not [be] about the birth mother giving rights to the co-mother, it [should be] about a shared enterprise undertaken by both women.” Millbank, supra note 228, at 166. Millbank explains that, under this approach

[t]he birth mother’s intention is not irrelevant, rather it is presumed: she is attempting to conceive while in a relationship with someone who will, almost inevitably, undertake a significant share of parenting work with her, and so it is presumed that she intends to share parental status. This does not prevent a birth mother from having sole parental status if that is her true intention—but this is no longer the baseline position, and must instead be explicitly chosen by her. Such a birth mother would need to engage in a clear process in order to exclude her partner from parental status. Equally, the birth mother’s partner could refuse consent and avoid being ascribed parental status if she did not wish to be a parent.

Id.

238. The New Jersey Supreme Court elaborated on this scenario as follows:

Although joint participation in the family’s decision to have a child is probative evidence of the legally recognized parent’s intentions, not having
these circumstances will consider the adult in question to be any less of a parent—especially if she served in that capacity for an extended period of time—than an individual who would qualify for parentage status under Judge Smith’s proposed rule because she participated in the initial decision to have the child.

In fact, it is unclear why the intent to become a parent should be legally relevant only if it takes place before the child’s conception. Whether that intent existed, and whether it was demonstrated through particular understandings and conduct, would seem to be more important than its precise timing (i.e., whether it was manifested before or after conception).239

All of this suggests that a parentage rule that focuses exclusively on intent might be appropriate when it can be shown that the couple made a joint decision, prior to the insemination, that they would both be the child’s parents, or alternatively, that only the biological parent would be a parent. Yet, focusing only on pre-conception intent is not enough in cases where the parties (1) have conflicting accounts of their joint intent or (2) began their relationship after conception. Considerations of functional parenthood have a legitimate role to play in both of these scenarios. As a result, intent-based parentage rules such as the one proposed by Judge Smith should not be the sole mechanism through which parties who lack a biological or adoptive link to a child are given the opportunity to show that granting them custody and visitation would be in the child’s best interests.

Professor Melanie Jacobs has noted that intent-based parenting theories are inadequate in cases where “the parties did not intend to coparent pre-birth, but actively coparented the child for a period of time thereafter.” Melanie B. Jacobs, Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents, 25 N. Ill. L. Rev. 433, 438 (2005). Jacobs suggests that in those cases, “the initial intent should not be used to preclude parentage determination and the current intent to coparent should be considered as an element of functional parenthood.” Id. For her part, Jenni Millbank, in defending an intent-based understanding of parenthood, “acknowledge[s] that roles may alter or evolve in a positive and consensual manner after conception in a way not anticipated by the [parties’] agreement. If disputes arise years later, it would be antithetical to a functional family approach to formally hold people to an earlier agreement that does not accord with their lived experience or actual relationships.” Millbank, supra note 228, at 164-65.

239. See Jacobs, supra note 238, at 437 (“A . . . difficulty of the intent doctrine as currently applied is that it focuses purely on pre-birth parenting intention; it does not encompass the intent to parent that may accompany functional parenting that begins after the child’s birth.”).
V. CERTAINTY AND ILLEGITIMACY

In Part III, I questioned whether accounting for considerations other than biology, adoption, and the existence of a legally recognized relationship in assigning parentage status inevitably leads to unpredictability and uncertainty in the determination of who qualifies for that status. There is little evidence that it does. However, even if I am underestimating the difficulty of applying multi-part functional parenthood tests, the rejection of those tests on certainty and predictability grounds comes at the immense cost of denying children the benefit of having a second parent. Indeed, categorically denying a child a second parent in former partner parenting cases is the contemporary equivalent of the past practice of denying so-called “illegitimate” children a legal relationship with their (unwed) fathers.

Professor Harry Krause, in his influential 1967 article on the unconstitutionality of the government’s differential treatment of “illegitimate” children, explored and criticized several reasons for drawing legal distinctions on legitimacy grounds.240 Interestingly, the first such reason discussed by Krause related to certainty considerations. “It may be argued,” he wrote, “that illegitimate birth furnishes less convincing evidence of paternity than does birth in wedlock, or that illegitimate paternity often cannot be established with the degree of certainty with which a child of a marriage may be ascribed to his father.”241

240. Harry D. Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 489-500 (1967). As Professor Nancy Polikoff has noted, “Krause took his ideas to the U.S. Supreme Court, where children and parents harmed by the different status given marital and nonmarital children invoked the Equal Protection Clause to argue that the distinctions were unconstitutional.” Polikoff, supra note 229, at 210. Polikoff adds that

Harry Krause also influenced the National Conference of Commissioners on Uniform State Laws (NCCUSL) to address the issue of nonmarital children. His work led to the Uniform Parentage Act (UPA), written between 1969 and 1972. It was adopted in some form in nineteen states, and it greatly influenced new laws in every state. In less than a decade, the legal doctrine of “illegitimacy” had all but disappeared.

Id. at 212 (footnotes omitted).


Professor Krause noted how improved scientific technologies were making it easier to establish biological paternity, thus undermining the certainty-based justifications for
The same focus on certainty is evident, as we have seen, in the New York Court of Appeals’ reasoning in *Debra H.* Similar to the argument that the assignation of parental rights and obligations were more certain and predictable when children were born in wedlock, the New York Court of Appeals now contends that biological and adoptive links, or, in their absence, participation in legally recognized relationships, are essential markers of parenthood because of the ease with which it is possible to determine their existence. As in earlier times, this focus on certainty helps render some children illegitimate.

The New York Court of Appeals’ role in creating a new class of illegitimate children is at its clearest when it chose in *Debra H.* to recognize the petitioner’s parentage status because she had entered into a legally-recognized relationship (in her case, a civil union) with the child’s legal parent. In prioritizing the certainty that comes with being able to easily determine whether petitioners in parenting cases entered into legally recognized relationships with legal parents over other considerations (such as the actual relationship between the adults in question and the children), the court disregarded the interests of children raised by couples who are either unable or unwilling to have their relationships legally recognized.

The rule adopted by the *Debra H.* court divided children who lack biological or adoptive links to both of the individuals who care for them into two categories: the privileged ones who get to keep both parents because those parents had the opportunity and inclination to have their relationships legally recognized, and the non-privileged children who, through no fault of their own, miss out on the legal, financial, and emotional benefits of having a second parent. It bears remembering that the old legal regime that granted illegitimate children significantly fewer benefits than legitimate ones similarly punished an entire class of children for a condition—that of “illegitimacy”—that was no fault of their own.

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242. See supra notes 80-101 and accompanying text.
243. Id.
244. See supra notes 102-111 and accompanying text.
245. I have argued here that the New York court’s use of the existence of a legally recognized relationship as a marker of parentage status can be explained by its normative prioritization of certainty over other considerations. See supra notes 105-10 and accompanying text.
246. See Matter of Hoffman, 385 N.Y.S.2d 49, 57 (App. Div. 1976) (“[T]he law will not be required to discriminate against children labeled illegitimate through no fault of their own.”).
Yet, it is not only the part of *Debra H.* that deems the existence of a legally recognized relationship between the adults to be determinative of the parenthood question which effectively renders some children illegitimate. When the *Debra H.* court reaffirmed *Alison D.*, it also divided children who have parent-child relationships with two adults into two classes: those who have biological or adoptive links with both adults and those who have such links with only one. As Judge Smith explained in his *Debra H.* concurrence, the application of *Alison D.* to cases in which “couples make a commitment to bring a child into a two-parent family,” is problematic “not only [because it] disappoints the expectations of the adults involved: much worse, it leaves each child with only one parent, rendering the child, in effect, illegitimate.” Judge Smith added that “[t]o apply the rule of *Alison D.* to [these] children . . . is to permit either member of the couple to make the child illegitimate by her whim . . . .”

The Court of Appeals in *Debra H.* seemed oblivious to the harm inflicted on children who—again, through no fault of their own—are denied the support of, and a relationship with, a second parent. Paradoxically, the same court seemed acutely aware of the importance of having a second parent a few years earlier when it grappled with the issue of second-parent adoptions. In that context, the court recognized that the best interests of children are

> [a]dvanced in situations like those presented here by allowing the two adults who *actually function* as a child’s parents to become the child’s legal parents. The advantages which would result from such an adoption include Social Security and life insurance benefits in the event of a parent’s death or disability, the right to sue for the wrongful death of a parent, the right to inherit under rules of intestacy and eligibility for coverage under both parents’ health insurance policies. In addition, granting a second parent adoption further ensures that two adults are legally entitled to make medical decisions for the child in case of emergency and are under a legal obligation for the child’s economic support.

Even more important, however, is the emotional security of knowing that in the event of the biological parent’s death or disability, the other parent will have presumptive custody, and the children’s relationship with their parents, siblings and other relatives will continue should the coparents separate.

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247. See *supra* notes 86-93 and accompanying text.
249. *Id.*
250. *Id.*
In stark contrast, when the same court fifteen years later reaffirmed *Alison D.* in *Debra H.*, it concluded, in effect, that the benefits that accompany bright-line rules in this area of the law outweigh the benefits to children of having a second parent. The court was normatively wrong in privileging certainty and predictability above all else, in the same way that policymakers and courts were wrong in decades past in relying on certainty considerations, among other factors, to render some children illegitimate because their fathers were not married to their mothers.

As noted in Part II, during the oral argument in *Debra H.*, one of the judges asked whether it was not “true that for many children it is better to know the answer [of who their parents are] than what the answer is?” The logic behind this reasoning seeks to create a false dichotomy between the predictability of the answer to the question of who a child’s parents are and the specific content of that answer. Although it is undoubtedly true that it is better for a child to know who his or her parents are than not to know at all, that is not what is at issue in former partner parenting cases. Those cases do not raise the question of whether the child has parents; instead, the issue is who those parents are. In that context, having an

The Court in *Debra H.* pointed to the fact that New York law allows unmarried partners of legal parents to adopt children they are helping raise as proof that there was no pressing need to grant them other mechanisms through which to exercise parental rights. *See Debra H.*, 930 N.E.2d at 190 n.2 (N.Y. 2010) (noting that “our subsequent decision in *Jacob* softened any . . . ‘hard line’ [arising from *Alison D.*] by permitting second-parent adoption”). The problem with this reasoning is that the adoption option is a viable one only so long as the legal parent’s partner is (1) aware of her legal rights, (2) has the financial ability to pursue an adoption, and (3) has the consent of the legal parent to adopt. Adoption does not constitute a viable option for co-parents when any one of these conditions is missing. *See Deborah L. Forman, Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23, 46 (2006) (“There can be many reasons why partners who can adopt choose not to. The question is whether the failure to adopt reflects either lack of consent on the part of the legal parent, . . . which . . . would seem to be relevant, or a lack of interest or commitment on the part of the partner, which would also seem germane.”); *see also Debra H.*, 930 N.E.2d at 186 (noting that the legal parent “repeatedly rebuffed [her partner’s] requests to become [the child’s] second parent by means of adoption.”); *Debra H.*, 930 N.E.2d at 204 (Smith J., concurring) (noting that it “can[not] . . . be said that adoption by the nonbiological parent . . . is an adequate recourse, for adoption is possible only by the voluntary act of the adopting parent, with the consent of the biological one.”). Ultimately, as Deborah Forman has argued, “[i]f we look at these cases from the children’s perspective, it becomes clear[] that whether the partner adopted or not, the completion of a formal adoption seems beside the point, especially if she functioned as a parent and developed the resulting psychological attachment with the child.” *Id.* Or, as Nancy Polikoff succinctly puts it, a mother should not have “to adopt her own child . . . .” Polikoff, *supra* note 229, at 267.

252. *See supra* notes 86-101 and accompanying text.

253. *See supra* notes 240-41 and accompanying text.

answer is clearly not more important than the answer itself. If an adult has acted as a parent to a child for an extensive period of time, it is reasonable for that child to consider him or her to be a parent, an expectation which—as the New York Court of Appeals has recognized in other contexts—needs to be protected in order to avoid harming the child.255

Most children understand, from a very young age, who their parents are. Indeed, that understanding is in place well before they comprehend the legal implications of biological and adoptive links. Young children, therefore, do not make distinctions between their legal and non-legal parents. Since in the former partner parenting cases there is always at least one legal parent, the relevant issue is not whether the child has a parent; the issue is instead whether both individuals whom the child considers to be his or her parents are recognized as such by the law (at least for some purposes such as the opportunity to seek custody and visitation).256

In his article criticizing the law’s differential treatment of illegitimate children, Professor Krause noted how the privileging of legitimacy was not based on the actual relationships that fathers had with their children:

Whether living in a family setting or not, the legitimate child enjoys broader rights against his father (whom he might never have seen) than does the illegitimate (who might, in fact, live with his father and mother in a permanent family-like situation.) Therefore, even if children might reasonably be classified on the basis of whether they live and share their lives with their fathers, the definition of these two groups by means of


256. One of the limitations of functional parenthood doctrine is that, as Professor Courtney Joslin notes, even when courts rely on it to grant the party lacking a biological or adoptive link to the child standing to sue for custody and visitation, “he or she may not be given the rights or responsibilities of a full legal parent, and the child’s legal relationship with the second parent may not be clear or secure.” Joslin, supra note 64, at 696. Professor Joslin adds that

[t]he significance of being an in loco, de facto, or psychological parent is tremendously unclear. For example, is an in loco parent entitled to make medical decisions regarding a child? Is the child entitled to child’s survivor benefits if the in loco parent passes away? Is the child entitled to health insurance through the de facto parent? There are a host of situations in which rights and protections flow to a child through the existence of a legal-parent child relationship. The child’s rights to these important protections is unclear when the person is only entitled to protections under . . . equitable principles.

Id. One of the few courts that has explicitly recognized the “legal parity” between a de facto or functional parent and a legal one is the Washington Supreme Court. See Carvin v. Britain (In re Parentage of L.B.), 122 P.3d 161, 176 (Wash. 2005) (“[R]eason and common sense support recognizing the existence of de facto parents and according them the rights and responsibilities which attach to parents in this state.”); see also Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768, 780 (Vt. 2010) (noting that biological mother’s former partner “was a legal parent of [child] and was entitled to all parental rights flowing therefrom”).
the criterion of birth in or out of wedlock is over-inclusive in that it covers children who are legitimate but who do not live with their fathers and under-inclusive in that it excludes illegitimates who do live with their fathers.

The same kind of over- and under-inclusivity results from the application of a rule that uses the existence of biological or adoptive links between the adult and the child, or of a legal relationship between the two adults, as a necessary pre-condition for the granting of parentage status. The rule is overinclusive because it affords legal protections to children even in circumstances in which the adults in question play no meaningful roles in their lives. And it is underinclusive because it denies protections to children who have established parent-child bonds with individuals who are unable to meet the courts’ bright-line rules aimed at promoting certainty.

In the end, the problem with the categorical application of bright-line rules in determining standing in parenting cases is that they do not allow for the type of flexibility needed to account for the many different ways in which individuals in our time assume the responsibilities of parenthood. Even if most children have biological or adoptive links to all of the adults who function as their parents, that still leaves many children for whom that is not the case. The latter children do not have any fewer needs for the emotional and financial support of all of their parents than do the former.

Finally, it bears noting that although bright-line rules, by definition, eschew flexible ones, the opposite, at least in the context of parenting cases, is not true. The doctrine of functional parenthood does not displace the bright-line rules related to the existence of biological or adoptive links, or of a legally-recognized relationship between the adults. The application of the doctrine, in other words, does not prevent courts from using biology, adoption, and the entering into legally-recognized relationships as means through which to grant parentage status. Instead, the doctrine serves as an alternative means of acquiring that status, one that recognizes the diversity of American families at the beginning of the twenty-first century without jeopardizing the ability of the majority of individuals to be recognized as

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257. Krause, supra note 240, at 495. Those who defended the privileging of legitimate children might have done so based on concerns that unwed fathers were less likely than wed ones to play a meaningful role in the children’s lives. It bears noting that even if we were to concede for purposes of argument that this concern was a reasonable one in the context of unwed biological fathers, it has little applicability in former partner parenting cases. Far from representing instances of absent parents, these cases instead usually involve individuals who have played an ongoing and extensive parental role in the children’s lives. See, e.g., Bethany v. Jones, 2011 Ark. 67, 2011 WL 553923, *7 (Feb. 17, 2011) (noting the finding by circuit court that the non-biological mother “cared for the child’s every need every day for three and one-half years . . . fed, bathed, clothed, nurtured, supervised, and supported [the child], and performed every other act a parent would do for their child”); In re Parentage of L.B., 122 P.3d at 164 (recognizing how the non-biological mother shared parenting responsibilities with the biological mother).
parents through the application of bright-line rules.

CONCLUSION

I have argued in this Article that considerations of certainty in the determination of who is a parent are not enough to justify categorically denying individuals who have functioned as parents—with the consent and encouragement of legal parents—the opportunity to demonstrate that granting them custody and visitation rights would be in the children’s best interests. In doing so, I have tried to show that concerns expressed by some judges regarding the unpredictability and unworkability of the doctrine of functional parenthood are overblown. That doctrine, I have argued here, has an important role to play in the allocation of parental rights. I have also explained how the application of the doctrine, by assuring children the emotional and financial support of a second parent, avoids the perils of creating a new class of illegitimate children.

It may seem at first blush that the recognition of same-sex marriage can resolve most, if not all, of the issues that I have addressed in this Article. After all, an important reason why the doctrine of functional parenthood has been at issue in so many former same-sex partner parenting cases is because same-sex couples have traditionally been unable to marry and have therefore been unable to benefit from the parentage presumption that accompanies marriage.258 Now that some states, including New York,259 have recognized same-sex marriage, individuals residing in those jurisdictions who lack biological or adoptive links to the children in question, but who were married to the legal parents at the time of conception or birth, should be able to use the marriage to establish their parental status.260 If the New York Court of Appeals in Debra H., for example, was willing to recognize the petitioner’s parental status based on her Vermont civil union with the legal parent,261 then New York courts will presumably be willing to do the same for future petitioners who married their same-sex partners under New York law but who lack biological or adoptive links to the children.

But there will be some same-sex couples who, like some different-sex

258. For a discussion of the marital parentage presumption (also known as the legitimacy presumption) at a time when same-sex couples are increasingly visible, see Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 B.U. L. REV. 227 (2006).
260. See Polikoff, supra note 229, at 215 (noting that in states that recognize same-sex marriage, as well as in those that have civil unions or comprehensive domestic partnership laws, the presumption of parentage that accompanies marriage should apply to “a female spouse or domestic/civil union partner of a woman who bears a child”).
261. See supra notes 102-04 and accompanying text.
ones, decide to have children outside of marriage. This reality brings us back full circle to the question of illegitimacy. If we make marriage a precondition for the recognition of the parental status of lesbians and gay men who lack biological or adoptive links to children, we risk making the same error in the context of same-sex couples that we made in earlier decades in the context of heterosexual ones, that is, of recognizing a second parental figure in a child’s life based on whether that individual was married to the child’s legal parent.

Even if society prefers that parents be married, it is a policy preference that should not be pursued at the expense of the children of unmarried parents.\(^262\) It took our country a long time to recognize, in the context of heterosexual relationships, that depriving so-called illegitimate children of benefits is not an appropriate or just way of promoting births in wedlock.\(^263\) We should be careful not to repeat the same mistake in the context of same-sex relationships.

\(^{262}\) As Nancy Polikoff has noted, the State of Louisiana in the 1960s argued that “[s]uperior rights of legitimate offspring are inducements or incentives to parties to contract marriage, which is preferred by Louisiana as the setting for producing offspring.” Polikoff, supra note 229, at 210 (quoting Brief for the Attorney General, State of Louisiana as Amicus Curiae, Levy v. Louisiana, 391 U.S. 68 (1968)). The Supreme Court, however, concluded that it was unconstitutional to deny benefits to illegitimate children based solely on their mothers’ marital status. Levy v. Louisiana, 391 U.S. 68, 72 (1968) (“Why should the illegitimate child be denied rights merely because of his birth out of wedlock?”).

\(^{263}\) See Polikoff, supra note 229, at 231 (“Since Harry Krause’s transformative efforts of the 1960s and 1970s, the guiding tenet of parentage law reform has been equality for children born to married and unmarried parents.”) (footnote omitted).