How Functional Parent Doctrines Function: Findings from an Empirical Study

by
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Today, approximately two-thirds of U.S. states have a functional parent doctrine—a doctrine that extends parental rights and/or parental responsibilities to a person based on the conduct of forming a parental relationship with the child and parenting the child, even in the absence of a biological, adoptive, or marital tie.[1] These doctrines arise under a number of different labels—including de facto parentage, psychological parenthood, *in loco parentis*, and "holding out" parentage. They have been created by courts and codified by legislatures. Under some of these doctrines, a functional parent is a full legal parent;[2] under others, the person receives only some parental rights and responsibilities.[3] A growing number of jurisdictions now maintain more than one functional parent doctrine.[4]

Even though functional parent doctrines are common and, in many states, long-standing, they remain contested. Scholars, advocates, legislators, and judges have raised a variety of concerns. Although these objections are framed as normative ones,

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1 *See infra* Part I.

2 *See, e.g.*, Cal. Fam. Code Ann. § 7611(d) (parentage based on "holding out" the child as the person's child).

3 *See, e.g.*, *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995) (providing that a "de facto parent" has standing to seek visitation).

4 For example, Maine has a statutory "holding out" presumption, Me. Rev. Stat. Ann. tit. 19-a, § 1881(3) (West 2022), and a codified de facto parent provision. Me. Rev. Stat. Ann. tit. 19-a, §1891 (West 2022). Prior to the enactment of these statutory provisions, Maine recognized an equitable de facto parent doctrine. *See, e.g.*, C.E.W. v. D.E.W., 845 A.2d 1146, 1151 (Me. 2004).

they routinely rest on a set of empirical claims and assumptions about who the doctrines serve and how they operate. Our nationwide empirical study of functional parent doctrines allows us to test these empirical claims and assumptions and to develop a more comprehensive and accurate account of functional parent doctrines on the ground.[5]

In our study, we collected and coded every electronically reported judicial decision over a forty-year period in every U.S. jurisdiction with a functional parent doctrine. Our data set is comprised of 669 cases. Our study reveals that common empirical assumptions—assumptions that undergird normative objections to the doctrines—about when, how, and to whom these doctrines are applied are not significantly supported by the data. While commentators typically treat LGBTQ parents as the paradigmatic claimant, we find that relatives constitute the largest share of functional parents in our data set. While commentators often assume that post-dissolution custody disputes are the dominant setting in which functional parent claims are asserted, we find functional parent claims arising in a range of scenarios, including cases involving parental death and child welfare intervention. While commentators worry about unleashing meritless and abusive claims, we find that in the overwhelming majority of cases, the functional parent appears to have been the child's primary caregiver. While commentators fear that recognition of functional parents will introduce instability in children's lives, we find that courts routinely apply the doctrines to protect children's relationships with the person who is parenting them.

In addition to undermining purportedly empirically-based objections to functional parent doctrines, our findings lend support to normative arguments *in favor of* functional parent doctrines. We find that courts commonly apply the doctrines in ways that make children's lives more stable and secure by protecting their relationships with their primary caregivers, preserving their home placements, and shielding their families from further state intervention. Indeed, we see that functional parent doctrines serve many families not envisioned in contemporary debates—families facing poverty, families subject to state intervention

[5] *See* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 Colum. L. Rev. 319 (2023). Our data is available at the following website: https://documents.law.yale.edu/functional-parent-doctrines/.

through the child welfare system, families in which the biological or legal parents are struggling with substance use disorders, housing insecurity, or incarceration, and families in which the biological or legal parent has died. Ultimately, our empirical analysis should reorient normative debates over functional parenthood among scholars, judges, and lawmakers.

This Article draws on the more extended and comprehensive analysis that we offer in a longer law review article, *How Parenthood Functions*, recently published in the *Columbia Law Review*.[6] Here, we focus on a narrower set of findings and discuss these findings explicitly in response to common objections to functional parent doctrines. In Part I, we describe existing functional parent doctrines. In Part II, we survey commonly asserted concerns regarding functional parent doctrines. We explain how these concerns typically rest on empirical assumptions about when and how courts apply these doctrines, as well as their potential implications. In Part III, we show how our empirical analysis of all electronically available functional parent decisions challenges descriptive and predictive claims commonly made in debates over parentage laws.

I. Functional Parent Doctrines

As Figure 1 shows, thirty-four jurisdictions have one or more functional parent doctrines. We identify each jurisdiction's functional parent doctrine(s) in the appendix.[7]

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[6] *See id.*

[7] We generally do not regard as functional parent doctrines third-party custody and visitation statutes, which treat claimants as *nonparents*. *See, e.g.*, Mass. Gen. Laws Ann. ch. 209C, § 10(d) (permitting the award of custody to a nonparent upon a showing of consent by or unfitness of the legal parents). *See also* Unif. Nonparental Child Custody & Visitation Act § 4(a) (Unif. Law Comm'n 2018) (providing that a court "may order custody or visitation to a nonparent" if that person "has a substantial relationship with the child and denial of custody or visitation would result in harm to the child."). Nor do we regard statutes that grant rights to seek custody or visitation based on a specific nonparent status, such as grandparent or stepparent, as functional parent doctrines. *See, e.g.*, Cal. Fam. Code § 3101(a) (authorizing an award of visitation to a stepparent).

Figure 1. Jurisdictions with Functional Parent Doctrine(s)

The most frequently cited common law and equitable doctrines come under the rubric of de facto parent,[8] psychological parent,[9] *in loco parentis*,[10] equitable parent,[11] and parent by estoppel.[12] But there are other common law and statutory doctrines. In some states, courts enforce agreements that shift custody to the functional parent.[13] In others, courts may determine that the legal parent waived their superior right to custody.[14]

Functional parent doctrines also arise out of statutes. Many states have so-called "holding out" presumptions based on various iterations of the Uniform Parentage Act. These provisions

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8 *See, e.g.*, Conover v. Conover, 146 A.3d 433, 446-47 (Md. 2016); *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005).

9 *See, e.g.*, *In re* K.H., 773 S.E.2d 20, 26 (W. Va. 2015); V.C. v. M.J.B., 748 A.2d 539, 549–50 (N.J. 2000).

10 *See* T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001). *See also* Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 17 (Neb. 1991).

11 *See, e.g.*, Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999).

12 *See, e.g.*, Matter of L. v. P., 880 N.Y.S.2d 874 (Fam. Ct. 2008); Gulla v. Fitzpatrick, 596 A.2d 851, 858 (Pa. Super. Ct. 1991).

13 *See, e.g.*, Overfield v. Collins, 483 S.E.2d 27, 36 (W. Va. 1996).

14 *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494. 550-51 (N.C. 2010).

create a presumption of parentage if the person held the child out as their own child.[15] Some states have expressly applied this "holding out" presumption to nonbiological parents,[16] including, in some states, women.[17]

Other statutory doctrines also capture functional parents. A growing number of jurisdictions, for example, have codified de facto parentage.[18] Other jurisdictions have custody statutes that extend standing to individuals who stand in loco parentis or show that they are de facto custodians.[19]

In terms of the legal effects of this universe of doctrines, there is an emerging trend towards recognizing functional parents as legal parents.[20] In some jurisdictions, the relevant statutes

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15 UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973) ("[A] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child"); UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002) ("A man is presumed to be the father of a child if: . . . for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own[.]"); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017) ("An individual is presumed to be a parent of a child if . . . the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child.").

16 *See, e.g.*, *In re* Nicholas H., 46 P.3d 932 (Cal. 2002), *as modified* (July 17, 2002); Elisa B. v. Superior Ct., 117 P.3d 660 (Cal. 2005); Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016).

Indeed, the drafters of the UPA (2002) contemplated and intended this application of the presumption. *See* Joslin & NeJaime, *How Parenthood Functions*, *supra* note 5, at n.99.

17 *See, e.g.*, *Elisa B.*, 117 P.3d at 665. The most recent version of the UPA includes a gender-neutral version of the presumption. *See supra* note 15.

18 *See* CONN. GEN. STAT. ANN. § 46b-488(a)(3); DEL. CODE ANN., tit. 13, § 8-201(c); ME. REV. STAT., tit. 19-a, § 1891; 15 R.I. GEN. LAWS ANN. § 15-8.1-502; VT. STAT. ANN. tit. 15C, § 201(6); WASH. REV. CODE ANN. § 26.26A.440(4).

19 *See, e.g.*, 23 PA. STAT. ANN. § 5324 (2018) (providing that "[a] person who stands in loco parentis to the child" "may file an action under this chapter for any form of physical custody or legal custody"); KY. REV. STAT. § 403.270(1)(a) ("de facto custodian").

20 *See, e.g.*, Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495 (2014).

make clear that the functional parent is a legal parent.[21] In other jurisdictions, application of equitable doctrines yield the same "rights and responsibilities which attach to parents."[22] Yet variation across jurisdictions remains. Many common law and equitable doctrines yield only some parental rights[23]—for example, standing to seek custody or visitation under a best interest of the child standard.[24] In some states, a functional parent has an obligation to financially support the child, while in other states no such obligation exists.[25] Figure 2 shows the rights extended to functional parents in each jurisdiction with a relevant doctrine.

21 *See, e.g.*, ME. STAT. ANN. tit. 19-a, § 1891 (de facto parentage); ME. REV. STAT. ANN. tit. 19-a, § 1881(3) ("holding out" presumption). *See also* UNIF. PARENTAGE ACT § 201 (2017) (listing bases for establishing parentage).

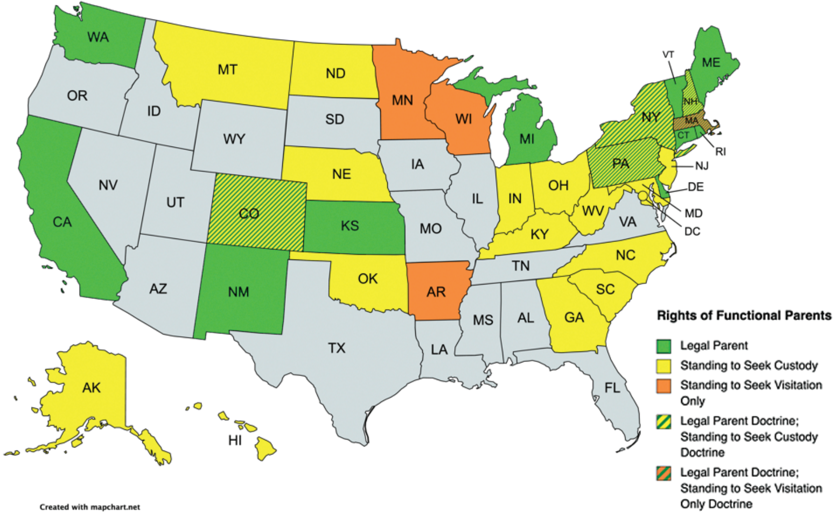
22 *See, e.g.*, Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011) ("[T]he rights, duties, and liabilities of [a person standing in loco parentis] are the same as those of the lawful parents."); Peters v. Costello, 891 A.2d 705, 710 (Pa. 2005) ("The rights and liabilities arising out of an in loco parentis relationship are, as the words imply, exactly the same as between parent and child.").

23 *See, e.g.*, Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31 (Spring 2018).

24 *See, e.g.*, *H.S.H.-K.*, 533 N.W.2d at 435 (visitation).

25 *Compare* Hamilton v. Hamilton, 795 A.2d 403, 406 (Pa. Super. Ct. 2002) ("Where a step-father holds the child out as his own, he nonetheless may be estopped from denying paternity."), *with In re* A.M.K., 838 N.W.2d 865, at *3 (Wis. Ct. App. 2013) ("[T]here is no statutory basis upon which a court may order a non-parent to pay child support to the biological parent.").

Figure 2. Legal Rights of Functional Parents in Jurisdictions with Functional Parent Doctrine(s)



An increasing number of states have more than one functional parent doctrine. For example, states such as Connecticut, Delaware, Maine, Rhode Island, Vermont, and Washington maintain both a statutory "holding out" presumption of parentage and a de facto parent statute.[26] Doctrines within the same jurisdiction do not necessarily cover the same individuals. For example, the "holding out" presumption might require that the individual resided with the child for the first two years of the child's life, while the de facto parent provision might apply so long as the person lived with the child for a sufficient period of time anytime while the child was under 18.[27]

II. Functional Parent Skepticism

As functional parent doctrines gained traction, some scholars, lawyers, judges, and legislators resisted.[28] In litigation and in

26 *See, e.g.*, Wash. Rev. Code Ann. § 26.26A.440(2)(a) (de facto parentage); Wash. Rev. Code Ann. § 26.26A.115(1)(b) (holding out presumption).

27 *Compare* Conn. Gen. Stat. Ann. § 46b-488(a)(3) (holding out presumption), *with id.* § 46b-490 (de facto parentage).

28 *See, e.g.*, Katharine K. Baker, *Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 Chi.-Kent L. Rev. 135 (2017)

policy debates, critics raise a range of concerns about the doctrines. While the objections are often aimed at the most prominent and established doctrine—de facto parenthood—the concerns generally apply to the full range of doctrines. As this Part elaborates, although criticisms of functional parent doctrines routinely present themselves as normative arguments, they are grounded in empirical assumptions.

At the most general level, critics raise concerns that functional parent doctrines result in unwarranted intervention into the protected realm of the family.[29] Such intervention is understood to implicate questions of constitutional magnitude, given the parental interests protected under principles of substantive due process. Consider an argument made by the biological parent in *V.C. v. M.J.B.*[30] In her petition seeking review by the U.S. Supreme Court, she argued that even when the functional parent had "exercised some control over the child with the [legal] parents' consent," awarding custody or visitation to a functional parent over a fit legal parent's objection "would necessarily impair the parents' right to custody and control" over their child.[31]

This concern about unwarranted and possibly unconstitutional interference with the legal parent's rights tends to imagine a paradigmatic scene like the one presented in the *V.C.* case itself—custody disputes between former partners.[32] In this vision, the claimant is a former intimate partner who had been caring for the child alongside the legal parent and now, after the adult relationship came to an end, seeks to gain custody or visitation over

[hereafter Baker, *Quacking*]; Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 Fla. St. U. L. Rev. 909 (2019).

29 *See, e.g.*, Katharine K. Baker, *Equality and Family Autonomy*, 24 U. Pa. J. Const. L. 412, 415 (2022) [hereafter Baker, *Equality*] (arguing that functional family doctrines involve "invasive, ineffective, and often damaging judicial interference in family relationships").

30 V.C. v. M.J.B., 748 A.2d 539 (N.J.), *cert. denied*, M.J.B. v. V.C., 121 S. Ct. 302 (2000).

31 M.J.B. v. V.C., No. 00-41 2000 WL 33999566 *13 (U.S. July 5, 2000).

32 *See, e.g.*, Baker, *Quacking*, *supra* note 28, at 166 (discussing "[c]ontested custody disputes" to critique functional parent doctrines and asserting that "[h]igh conflict legal disputes between parents are notoriously bad for children").

the legal parent's objection.[33] It is assumed that but for the action initiated by the functional parent, the state would have left the legal parent and child alone.[34] As explained by a Florida court in a case brought by a stepfather, under this view, rejection of a functional parent doctrine "demonstrates a respect for family privacy and parental autonomy."[35]

In critics' assessment, concerns about unwarranted interference with the rights of the "true" parents are exacerbated because the doctrines empower a wide range of claimants—"every Tom, Dick, and Harry."[36] Invoking the proverbial floodgates to litigation, courts and commentators assert that parents will be subject to frivolous, disruptive, and abusive litigation.[37] A Virginia court, for example, rejected a functional parent claim in 2018 relying on these floodgate concerns: "an ex-wife, ex-husband, ex-boyfriend, ex-girlfriend, former nanny, au pair or indeed virtually anyone not related to their child through biology or legal adoption, can be placed on equal footing as a biological or adoptive parent solely through a significant emotional bond with the child."[38] From this perspective, the mere fact of litiga-

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33 *See, e.g.*, Brian Bix, *Against Functional Approaches*, JOTWELL (Jan. 12, 2022), https://family.jotwell.com/against-functional-approaches/ ("[O]ften one member of a couple is resisting the claim . . . , and the resisting partner will *not* want the claim recognized and will almost certainly *not* want the intrusiveness of the inquiry.").

34 *See, e.g.*, Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 461 (2013) (while writing supportively of functional doctrines, observing that "functional parenthood makes formal parents uneasy about state interference with the parent-child relationship").

35 Meeks v. Garner, 598 So. 2d 261, 262 (Fla. Dist. Ct. App. 1992).

36 Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, *in* RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 99 (Robin Fretwell Wilson ed., 2006).

37 *See, e.g.*, Janice M. v. Margaret K., 948 A.2d 73, 74, 88 (Md. 2008), *overruled by Conover*, 146 A.3d 433 (holding that "de facto parenthood is not recognized in Maryland," and suggesting that if the doctrine was recognized it could give rise to a "myriad" of disputes, including those "involving step-parents, grandparents, and parties in a relationship with 'a significant other'").

38 Hawkins v. Grese, 809 S.E.2d 441, 448 (Va. App. 2018).

tion—even if it is ultimately unsuccessful—is harmful to families.[39]

For some critics, the doctrines threaten the interests not only of parents but also of children. Even in the context of potentially meritorious claims, critics envision bitter disputes that disrupt children's relationships with their legal parents.[40] The very fact of litigation becomes a reason to reject the doctrines.[41] Moreover, especially in the assumed context of a post-dissolution custody dispute, the legal recognition of functional parents allows the current conflict between the legal and functional parents to persist,[42] thereby making the child's life less stable.[43]

The problems, according to critics, run even deeper. Some fear that vexatious litigants will use the doctrines for abusive ends. For example, perpetrators of domestic violence will make functional parent claims to abuse and harass their victims.[44] Con-

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39 *See, e.g.*, Titchenal v. Dexter, 693 A.2d 682, 688 (Vt. 1997) (asserting that "various relatives, foster parents, and even day-care providers could seek visitation through court intervention"); Wilson, *supra* note 36, at 100 ("It may be important to encourage continuing relationships with Ex Live-In Partners, but long, expensive custody fights—even where the mother wins—have financial and emotional costs that hurt her and the child.").

40 *See, e.g.*, Baker, *Equality*, *supra* note 29, at 443 ("When the judicial system inserts itself into parental decision-making in the name of helping children, the results are at best ineffective and at worst catastrophic for children, parents and the polity.").

41 Baker, *Quacking*, *supra* note 28, at 168 ("[B]y the time the litigation was resolved, any benefit gained by honoring the functional relationship was outweighed by the costs of exposing the child to so much vitriol.").

42 This relates to the concern that, without biological connection and formal ties anchoring parenthood, the number of parents for any one child is without limit. We respond to these arguments in another article. *See* Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families: Real and Imagined*, 90 FORDHAM L. REV. 2561 (2022) (describing such cases based on our West Virginia data set) [hereinafter Joslin & NeJaime, *Multi-Parent Families*].

43 *See, e.g.*, Laufer-Ukeles & Blecher-Prigat, *supra* note 34, at 427 ("[F]unctional relations . . . create a potential multiplicity of claims that can upset the stable, private lives of children through state and court intervention.").

44 *See, e.g.*, Amicus Brief on Behalf of Sanctuary for Families, et al., Brooke S.B. v. Elizabeth A.C.C., APL-2015-00236, at 8 (N.Y. App. Apr. 22, 2016) ("A discretionary functional approach, requiring a case-by-case analysis, would empower former abusive partners with no biological or adoptive connection to the child to claim parental rights as a way to continue threatening their victims.").

sider the statement of prominent advocacy organizations in New York: "A discretionary functional approach, requiring a case-by-case analysis, would empower former abusive partners with no biological or adoptive connection to the child to claim parental rights as a way to continue threatening their victims."[45] Some commentators insist children, too, will be subject to harm. On this account, former nonmarital male cohabitants abuse—and will use these doctrines to continue to abuse—the children involved.[46]

Critics fear not only that people who have not really served as parents will bring actions based on these doctrines, but also that courts will credit these meritless claims. The doctrines, on this view, give too much discretion to judges:[47] "It is not at all clear that judges know what they are doing."[48] Invoking the classic legal trope of the slippery slope, commentators imagine that courts will award parental status to individuals who have not functioned as parents—from relatives to cohabitants, teachers to nannies.[49]

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45 *See, e.g.*, *id. See also* Testimony of Connecticut Coalition Against Domestic Violence Regarding HB 5178 (Mar. 6, 2020), https://www.cga.ct.gov/2021/juddata/tmy/2021HB-06490-R000308-Andrews,%20Liza-TMY.PDF ("For victims who are not married to their abuser or whose abuser is not the biological or legal parent of their child, this bill unfortunately provides the abuser with an opportunity to use presumption or de facto parentage against their victim.").

46 *See, e.g.*, Wilson, *supra* note 36, at 92 ("[G]iving men previously in relationships with a child's mother significant amounts of unsupervised parental access . . . will result in more children being sexually exploited and physically abused." (footnote omitted)).

47 *See, e.g.*, Baker, *Quacking*, *supra* note 28, at 168 ("Asking judges to assess the quality of the relationship between the functional parent and the child to see if it is a 'parent-child relationship' asks judges to determine what a family relationship is.").

48 Baker, *Equality, supra* note 29, at 464.

49 *Id.*, at 464 (arguing that proponents of functional parenthood "seem sure that [judges] know the difference between these kinds of bonds and the bonds a child might form with a paid caretaker, or a grandmother or a sibling."); Baker, *Quacking*, *supra* note 28, at 160 ("A romantic partner who develops a close bond with a child will be granted legal status as a parent unless the legal parent . . . made clear that she does not want to share legal parenthood."). *See also* Testimony of Shirley M. Pripstein on behalf of the Family Law Section, CBA [Connecticut Bar Association], Conn. H.B. 5178, Judiciary Comm., Conn. Gen. Assembly (Mar. 6, 2020) ("A permanent legal relationship should rest on a stronger foundation than one year of acting as a parent.").

Despite all of these criticisms and concerns, many skeptics of functional parent doctrines concede that the doctrines serve important ends in some cases.[50] On this view, the doctrines' primary beneficiaries were same-sex couples, who had been excluded from protections under discriminatory parentage rules.[51] But because parentage laws, at least to some extent, now include LGBTQ families, these critics see even these once "appropriate" uses of functional parent doctrines as now "redundant" and "unnecessary."[52] On this account, once the claims of former same-sex partners are addressed by the reform of previously discriminatory parentage laws, functional parent doctrines do more harm than good.[53]

Are the empirical assumptions that undergird normative objections to functional parent doctrines warranted? Courts and commentators relying on these assumptions routinely fail to cite supporting evidence. They proceed as though these doctrines are new, leaving us unable to know their effects.[54] Even when commentators rely on sources to support their criticisms, they tend to cite particular cases without giving reason to believe such cases are representative.[55] Ultimately, the growing literature on functional parent doctrines is grounded largely in speculation and unsupported generalization.

Yet, functional parent doctrines have been with us for decades. We can study and analyze their operation and effects. We can test empirical claims about who functional parents are, the contexts in which the doctrines will be invoked, and how the doctrines operate in practice. That is what we set out to do.

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[50] *See, e.g.*, Baker, *Quacking*, *supra* note 28, at 136; Strauss, *supra* note 28, at 911.

[51] *See, e.g.*, Baker, *Quacking*, *supra* note 28, at 135 (describing "[t]he typical functional parent doctrine claim in the same-sex parent context").

[52] *See, e.g.*, *id.*; Strauss, *supra* note 28, at 912–13.

[53] *See, e.g.*, Bix, *supra* note 33.

[54] *See, e.g.*, Wilson, *supra* note 36, at 100 ("[O]ne can easily imagine that the rights the ALI seeks to confer on Ex Live-In Partners could be exploited . . . .").

[55] *See, e.g.*, Baker, *Quacking*, *supra* note 28, at 145–59 (drawing primarily on cases involving same-sex couples).

III. Functional Parent Doctrines in Reality

We collected and coded every electronically available functional parent decision issued between 1980 and 2021 from every U.S. jurisdiction with a functional parent doctrine.[56] Ultimately, our empirical study includes 669 decisions from 32 jurisdictions.[57] (The doctrines in Georgia and Connecticut, effective in 2020 and 2022, respectively, yielded no electronically available cases during the period studied.) We coded the cases along multiple dimensions.[58]

In other work we provide more detailed and extensive analysis of our data as well as the limitations of our study.[59] Here, we focus on what our data reveal about the empirical assumptions upon which criticisms of functional parent doctrines rest. In short, our data suggest that these claims and assumptions are not significantly supported or are overstated.

A. *In What Contexts Do Functional Parent Claims Arise?*

As discussed above, a common objection to functional parent doctrines is that they authorize impermissible interference with the right of a legal parent to control the care and upbringing of their child. This objection implicates constitutional concerns.

The overwhelming majority of courts to consider this objection, however, have determined that functional parent doctrines *are* constitutional.[60] Functional parents are not third parties,[61] and existing Supreme Court precedents on the rights of legal par-

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[56] This includes all cases available through Oct. 5, 2021. The data set includes only electronically available judicial decisions, and about half of the cases are unpublished. Almost all of the cases are appellate decisions. Because electronic trial court decisions are not currently available in most jurisdictions, we cannot provide an account of all litigated functional parent cases. Nonetheless, given that the data set includes nearly 700 cases across multiple jurisdictions, we can make empirically grounded claims about features of functional parent court decisions and the operation of functional parent doctrines in court.

[57] Three states—California, Kentucky, and Pennsylvania—account for 47% of all cases, with 82, 122, and 108 cases, respectively.

[58] For a description of our coding and for more information about the data set, see our full-length treatment in Joslin & NeJaime, *How Parenthood Functions*, *supra* note 5, at *32–42.

[59] *See* Joslin & NeJaime, *Multi-Parent Families, supra* note 42.

[60] *See, e.g.*, Joslin, *supra* note 23 (describing case law); *Conover*, 146 A.3d 433 (discussing relevant precedents).

ents do not preclude states from treating functional parents as parents.[62]

For present purposes, though, we are focused not on the substantive merits of the constitutional objection but instead on the empirical assumptions on which it often rests. Objections to functional parent doctrines, including the constitutional one, tend to imagine a representative case—a post-dissolution custody action between the legal parent who has been a consistent primary caretaker for the child and the functional parent.[63] It is the functional parent, on this view, that invites the state into the family in ways that threaten the legal parent's stable relationship with their child.[64] Our data suggest that this imagined scene is not so representative.

Post-dissolution custody disputes constitute fewer than half—44%—of functional parent cases in our data set. Cases involving same-sex couples regularly feature custody disputes after a period of time in which the functional parent was caring for the child with the legal parent. So, too, do cases involving stepparents and different-sex unmarried partners.

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61 *See, e.g.*, *Troxel*, 530 U.S. at 100–01 (Kennedy, J., concurring) ("In short, a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a de facto parent may be another. The protection the Constitution requires, then, must be elaborated with care . . . .").

62 *See, e.g.*, *L.B.*, 122 P.3d at 178 ("Thus, *Troxel* does not . . . place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family.").

While the constitutional objection usually focuses on alleged interference with the legal parent's constitutional rights, one of us has argued that functional parents themselves possess constitutional rights with respect to the parent-child relationships they have formed. Douglas NeJaime, *The Constitution of Parenthood*, 72 Stan. L. Rev. 261, 269 (2020).

63 *See, e.g.*, Baker, *Equality*, *supra* note 29, at 451 (discussing the impact of functional parent doctrines in "custody determinations").

64 *See, e.g.*, *id.* at 463 ("[A] rule that justifies state interference whenever there is a change in the status quo is a rule that destroys any notion of family autonomy or non-interference in non-elite communities."); Bix, *supra* note 33 ("[O]ne member of a couple is resisting the claim . . . , and the resisting partner will *not* want the claim recognized and will almost certainly *not* want the intrusiveness of the inquiry."); Laufer-Ukeles & Blecher-Prigat, *supra* note 34, at 461 ("[F]unctional parenthood makes formal parents uneasy about state interference with the parent-child relationship.").

Yet, a wide swath of the cases in our data set do not feature this kind of conflict.[65] In many of these other cases, the functional parent is a relative. Often these relatives acted as primary caregivers for the children. In such cases, the relative typically is not seeking to remove children from a secure placement with a legal parent. Instead, it is often the legal parent who is attempting to remove the child from a stable placement with the functional parent.

In 13% of the cases in our data set, a legal parent of the child has died. In more than 60% of these cases, the functional parent had been the child's primary caregiver before the legal parent's death, often parenting the child alongside the legal parent before their death. Cases frequently arise when the surviving legal parent then seeks to remove the child from the functional parent's custody. Strikingly, though, in only a fifth of parental death cases was the surviving legal parent a primary caregiver at the time of the other parent's death.

A third of the cases in our data set (33%) arise in the context of a child welfare proceeding. Typically, in these cases, the original intervention was *by the state*.[66] In this context, the functional parent often becomes involved in the proceeding at a later

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[65] Moreover, even with regard to the cases that do involve the imagined scenario—a post-dissolution dispute—the assumption that there would be no state intervention in these families absent these functional parent doctrines is often inaccurate. The person seeking custody might have other legal avenues for pursuing contact. This may be true, for example, if the person is a stepparent, given that more than ten states have statutes that expressly permit stepparents to seek visitation post-divorce. *See Charts 2020: Family Law in the Fifty States, D.C., and Puerto Rico, Part 1*, 54 FAM. L.Q. 341, 364–76 (2021) (Chart 3: "Nonparent" Custody and Visitation Statutes in 2020). Or the action may have been filed by the legal parent or the government to secure child support, as is the case in 5% of the cases in our data set. In addition, in some cases, there are other children that are clearly the legal children of both parties. *See, e.g.*, Chandler v. Chandler, No. CA07-923, 2008 WL 2192809 (Ark. Ct. App. May 27, 2008). In these cases, even in the absence of functional parent doctrines, the state may be involved to resolve custody.

[66] As Dorothy Roberts powerfully shows, this system disproportionately harms families of color. Moreover, despite its name, this system often harms rather than furthers child welfare. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

point to protect their relationship with the child and to secure a stable and safe living arrangement for the child. These fact patterns—making up a significant share of all of the cases—tend to be omitted from consideration by critics.

Moreover, in suggesting that functional parent doctrines frequently allow outsiders to impermissibly interfere with a legal parent's right to control the care and upbringing of their child,[67] critics appear to assume that the legal parent has been exercising that right. That is, they imagine that the legal parent has been significantly involved in raising their child, such that a ruling in favor of the functional parent will fundamentally alter this parent-child dynamic. The data, however, show that in a large number of cases the legal parents were not consistently living with the child, and, often, the functional parent was the only person providing consistent care for the child.[68]

Figure 3 details the involvement of a legal parent in the child's life. (We coded the cases based on the legal parent who had the greater involvement, meaning that if one legal parent was the child's primary caregiver and the other was never involved, the case was coded as one involving a primary caregiving legal parent.)

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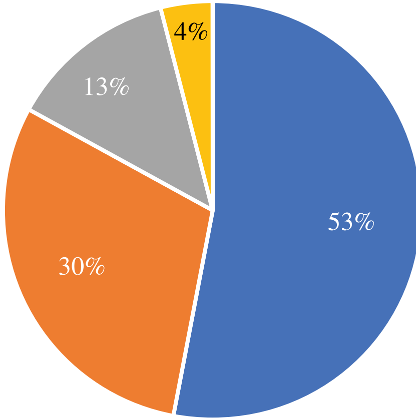
67 *See, e.g.*, Strauss, *supra* note 28, at 977 ("As applied in most stepparent or relative caregiver cases, de facto parenthood will often violate the constitutional rights of the existing legal parent."). On the constitutional issues, which we leave for other work, see *supra* note 62 and accompanying text.

68 Indeed, in West Virginia, 61% of the functional parent cases appear to involve situations in which "the legal parents had contact with their child, but the child was not living with either of their legal parents, and the legal parents were not making decisions for the child." Joslin & NeJaime, *Multi-Parent Families*, *supra* note 42.

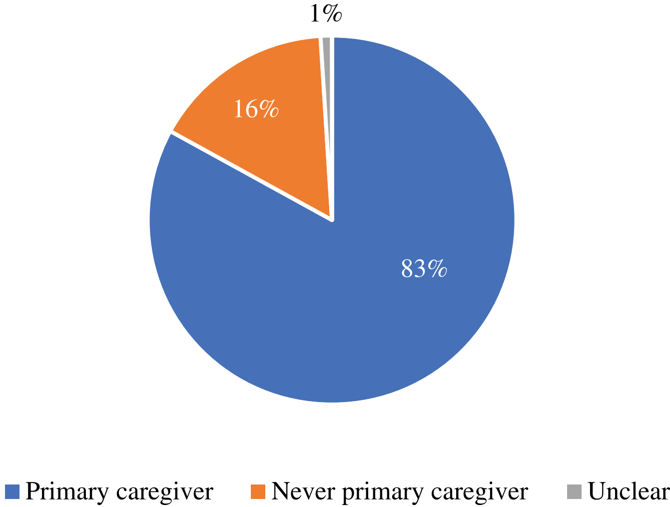
Figure 3. A Legal Parent's Role in the Child's Life



In more than half of the cases in our data set, a legal parent was the child's primary caregiver at the time the functional parent claim was asserted. But in 30% of cases in our data set, a legal parent had been, but was no longer, a primary caregiver of the child. In 17% of cases, no legal parent had ever served as the child's primary caregiver.

In addition to assuming that the legal parent *had* served as a consistent caretaker, some critics also suggest that the functional parent *had not*. Our data show, however, that in the overwhelming majority of cases, the functional parent had been a primary caregiver of the child.

Figure 4. The Functional Parent's Role in the Child's Life



As Figure 4 illustrates, in 83% of the cases in the data set, the functional parent appears to have served as a primary caregiver of the child. In 22% of the cases, the functional parent had been the child's primary caregiver and, at a different time, a legal parent had been the primary caregiver. In another 42% of all cases, the functional parent and a legal parent had been co-primary caregivers. In 16% of cases, the functional parent was the child's primary caregiver and no legal parent had consistently provided care for the child.

Cases involving relatives were more likely to feature situations in which the functional parent was serving as the primary caregiver when a legal parent was not serving as a primary caregiver. Consider cases involving grandparents. The court found the grandparent to be a functional parent in 72 of the 158 grandparent cases in the data set. In all but one of those 72 cases, the grandparent was serving as a primary caregiver of the child at the time the action was initiated. In 68 of those 72 cases, no legal parent was serving as a primary caregiver of the child at the time of the proceeding.

Ultimately, we are left with a picture of functional parent cases that looks unlike the one imagined by skeptics. In many cases, it was the functional parent who was exercising custody

over the child, caring for the child, supporting the child, and making decisions for the child. In these cases, the legal parents, if involved in the child's life, were frequently not the person *parenting* the child on a day-to-day basis.

* * *

In sum, critics worry that functional parent doctrines will result in inappropriate interference with legal parent-child relationships. This concern is rooted in an imagined paradigmatic case—a post-dissolution custody action between a functional parent and an involved legal parent. Our data reveal that this imagined scene omits consideration of more than half of the cases in our data set. Our data also reveal that functional parents overwhelmingly are primary caregivers, and that in a significant share of the cases, the functional parent is the only person truly parenting the child.

Ultimately, our data uncover a huge swath of families protected under functional parent doctrines who are generally overlooked in debates. These overlooked families are facing economic challenges, housing insecurity, and a range of physical and mental health challenges. Children in these families may be most in need of a stable parental relationship, and functional parent doctrines appear to be a critical mechanism for ensuring such stability.

A. *Who Claims Functional Parent Status?*

Critics also speculate as to the people who are invoking these doctrines. Some suggest that the primary beneficiaries of the doctrines are former same-sex partners who were previously excluded under discriminatory family law rules.[69] On this view, now that same-sex couples can marry and, as a result, can obtain protections under marriage-based parentage rules, functional parent doctrines are obsolete. Our data, however, show that that this imagined paradigmatic set of beneficiaries is not so paradigmatic.

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[69] *See, e.g.*, Baker, *Equality*, *supra* note 29, at 454 ("Contemporary functional parent doctrines grew out of these situations [involving same sex parents].").

Of course, these doctrines have benefited nonbiological parents in same-sex couples, especially before marriage equality. This is reflected in the data, which show that same-sex couples are overrepresented in functional parent cases as compared to their representation in the population.[70]

But the fact that the doctrines have been particularly important to this group does not mean that the doctrines are obsolete or unnecessary. First, even for same-sex couples, the doctrines remain critical. Yes, same-sex couples now have access to marriage—and thus to marriage-based parentage rules. And more states now have assisted reproduction statutes that recognize intended parents regardless of gender or marital status.[71] Nonetheless, a huge swath of same-sex couples remain vulnerable. Courts may resist applying parentage rules equally.[72] Couples may be unmarried and live in states without inclusive intended parent statutes.[73] And for many same-sex couples raising children, the nonbiological parent entered the child's life after birth.[74]

More fundamentally, even if more same-sex couples were covered by other parentage rules, this would not support the argument that functional parent doctrines are unnecessary. This is the case because *the overwhelming majority of families protected by the doctrines are not same-sex couples.* Only 17% of the cases in our data set involve same-sex partners.

Not all commentators focus on same-sex parents as the paradigm claimant. Some focus instead on former male nonmarital

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[70] LGBTQ people constitute 5.6% of adults in the United States, but same-sex couples constitute 18% of the cases in our data set. Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021).

[71] *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017) (surveying assisted reproduction law); Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401 (2021) (surveying surrogacy statutes).

[72] *See, e.g.*, In Int. of A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App. Apr. 27, 2017); *cf.* Gatsby v. Gatsby, 495 P.3d 996, 999 (Idaho 2021).

[73] *See, e.g.*, Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children*, WILLIAMS INSTITUTE (July 2018), https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/(finding that in 2016, about half of same-sex households consisted of unmarried cohabiting couples).

[74] Abbie E. Goldberg, Nanette K. Gartrell & Gary Gates, *Research Report on LGB-Parent Families*, WILLIAMS INSTITUTE (July 2014), https://williamsinstitute.law.ucla.edu/publications/report-lgb-parent-families/.

cohabitants.[75] These claimants, some objectors posit, are likely to use the doctrines to harass former female partners, and, if granted contact, are apt to subject the child to harm as well. While these concerns are serious ones, the data undermine the prevalence of this imagined scene.

As a preliminary matter, out of all the cases in our data set, unmarried different-sex partners represent only 18%. Our data also undermine suggestions that the claims of this group of petitioners typically are unworthy of protection. In 76% of the cases in which the court found that former nonmarital male partners qualified as functional parents, the partner seems to have served as a primary caregiver of the child.

With respect to asserted concerns that these men are using the doctrines for abusive ends, again, we find these important concerns are overstated. Starting with domestic violence against an adult, overall, 12% of cases in the data set involve such allegations. As Figure 5 shows, roughly half of these cases—representing 6% of all cases in the data set—involve allegations that the functional parent engaged in domestic violence. Only 3% of cases in the data set feature situations where the allegations of domestic violence are lodged against *only* the functional parent. In the remaining cases involving allegations of domestic violence asserted against the functional parent, there are also allegations of domestic violence against the legal parent.

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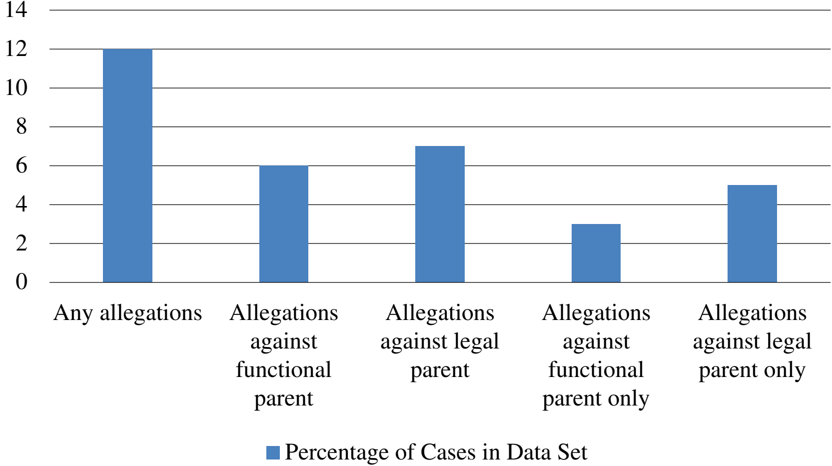
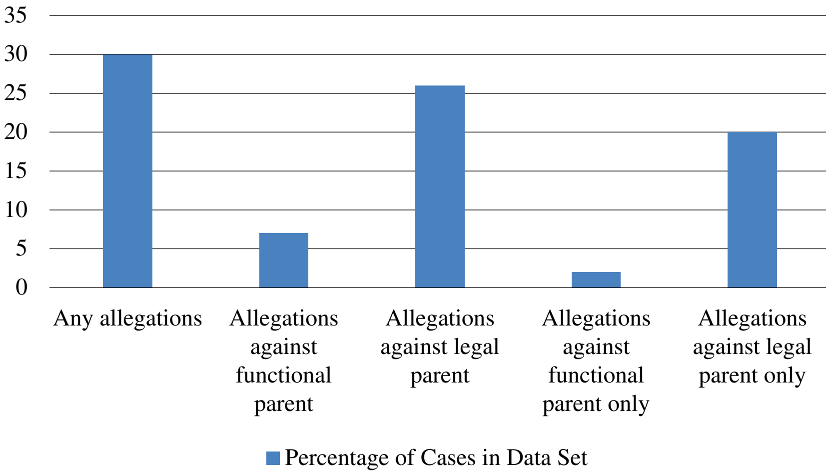
75 *See, e.g.*, Wilson, *Undeserved Trust*, *supra* note 36, at 99–100.

Figure 5. Allegations of Domestic Violence in Functional Parent Cases



Turning to child abuse or neglect, 30% of cases in our data set involve such allegations. As Figure 6 shows, only about a quarter of those cases involve allegations that the functional parent engaged in child abuse or neglect. And only about a third of those cases feature allegations against *only* the functional parent. In the remaining cases, there are also allegations against another person, including, in all but one case, a legal parent.

Figure 6. Allegations of Child Abuse or Neglect in Functional Parent Cases



Ultimately, our data show that imagined paradigmatic functional parents are less representative than assumed. Moreover, the harms imagined to arise in the context of cases involving former different-sex partners are overstated. It is rare that there are allegations of domestic violence and/or child abuse or neglect against the functional parent but not against the legal parent.[76]

* * *

We have seen that the paradigmatic functional parent claimants are not as representative as imagined. So who are the functional parents in the cases? Figure 7 provides answers.

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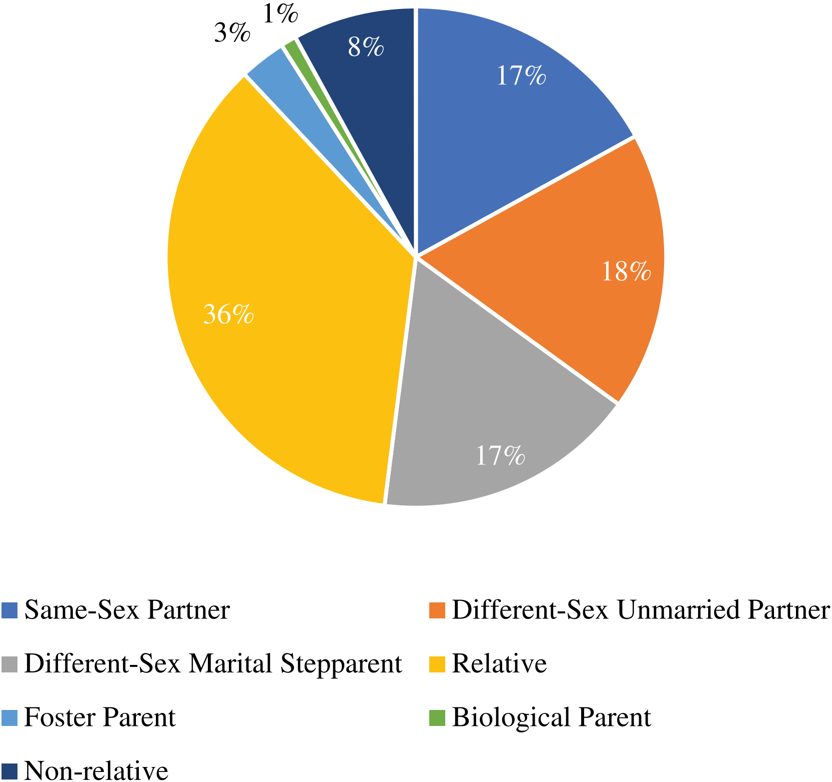
76 We discuss our findings regarding the allegations of domestic violence in functional parent cases in more detail elsewhere. *See* Courtney G. Joslin & Douglas NeJaime, *Domestic Violence and Functional Parent Doctrines*, _ VIR. J. SOC. POL'Y & LAW _ (forthcoming 2023).

Figure 7. Who Are Functional Parents?



The largest single category of persons alleged to be functional parents—more than a third of all cases in our data set—are relatives. Grandparents represent almost two-thirds of this group. Different-sex unmarried partners constitute 18% of the functional parents in the cases in our data set. Different-sex marital stepparents and same-sex partners each constitute 17% of the functional parents in the cases in our data set. A range of other individuals, including foster parents and biological parents, appear in the remaining cases. In our entire data set, *only one case* (out of the nearly 700) features a "nanny."[77] Even in this case,

[77] *In re* B.C., No. 14-1174, 2015 WL 3752039, at *1 (W. Va. June 15, 2015).

the functional parent was a relative (a grandmother of one of the children), and it was unclear whether she was in fact being paid.[78]

Rather than match the picture critics imagine or assume, our data reveal a more varied population of claimants and families. Moreover, the doctrines are most commonly applied to parent-child relationships that are not contemplated by other parentage rules.

A. *How Effectively Do Courts Sort Claims?*

Some courts[79] and commentators[80] express fears that functional parent doctrines will unleash a wave of litigation and that courts will treat as parents a range of people who should not be so recognized. Our data suggest that these concerns about floodgates and slippery slopes are overstated. The majority of petitions in our data set present credible, and certainly non-frivolous, claims.[81] More importantly, our data suggest that when courts recognize a person as a functional parent, that person almost always served as the child's primary caregiver—a feature shown by Figure 8.

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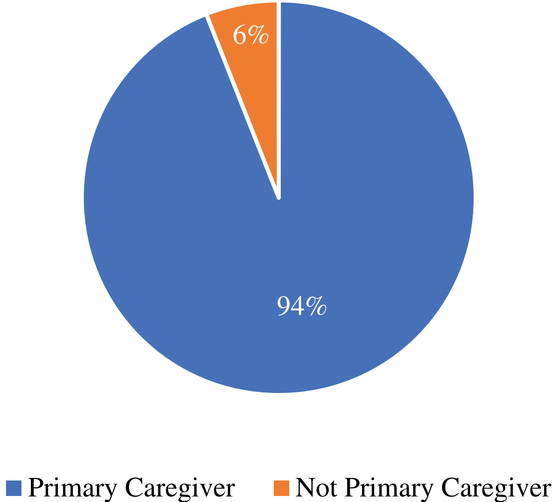
78 *Id.* (noting that the father of one of the children at issue was the "adult adoptive son of" the alleged de facto parent).

79 *See, e.g.*, Hawkins v. Grese, 809 S.E.2d 441, 448 (Va. Ct. App. 2018) (stating that adoption of the "'know it when we see it' . . . definition of parentage . . . would open up a Pandora's box of unintended consequences").

80 *See, e.g.*, Wilson, *supra* note 36, at 99 (raising fears that under these doctrines "many mothers will find themselves unable to excise former lovers from their lives and the lives of their children").

81 Again, we do not have data on all petitions filed at the trial court level. Still, our data set allows us to observe the prevalence of credible claims among electronically available cases.

Figure 8. Primary Caregiver Role of Functional Parents in Decisions Recognizing Functional Parent



Not all functional parents who served as primary caregivers are successful. Rates of recognition, however, are higher in cases where the functional parent was a primary caregiver. As Figure 9 shows, among the 556 cases in which the functional parent served as a primary caregiver, courts recognized the person as a functional parent in 53% of them.[82]

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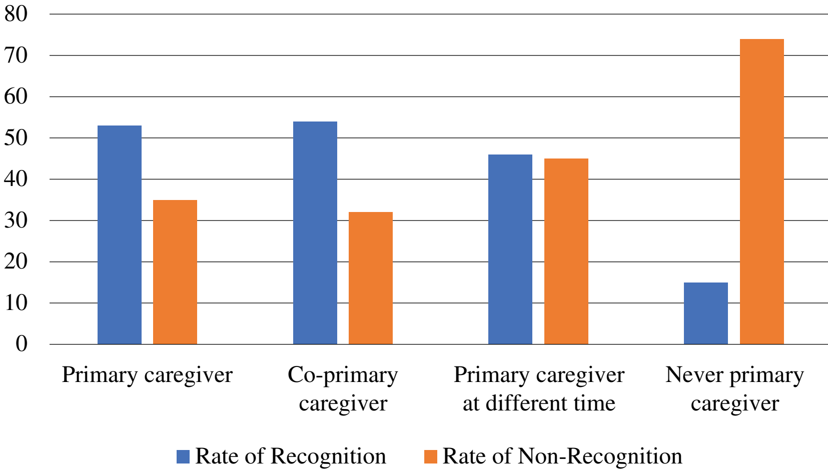
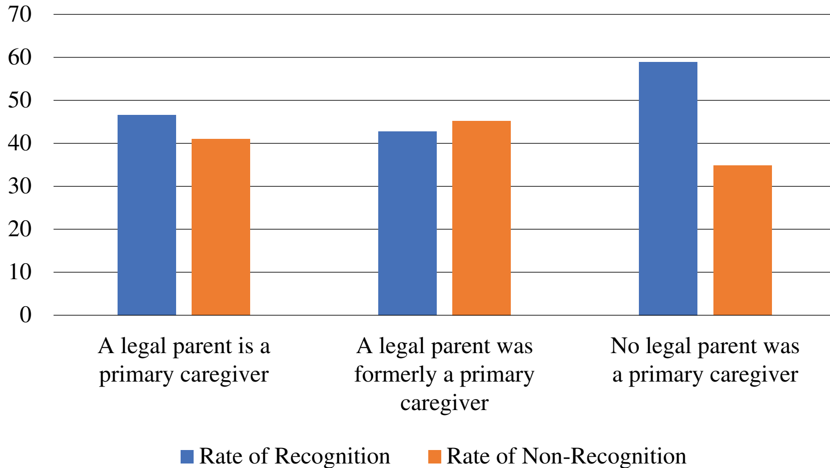
[82] In the data set as a whole, the court found a party to be a functional parent in 47% of cases and refused to recognize the party as a functional parent in 42% of cases. In the remaining cases, the court did not make a final determination.

Figure 9. Functional Parent Recognition Relative to Functional Parent's Role in the Child's Life



Rates of recognition are even higher when a legal parent has not been consistently involved in the child's life. As Figure 10 shows, in the 113 cases in which no legal parent was ever the child's primary caregiver, the court recognized a functional parent in 58%.

Figure 10. Functional Parent Recognition Relative to a Legal Parent's Role in the Child's Life



Conversely, courts in our data set overwhelmingly reject the functional parent claims of individuals who have not served as primary caregivers, recognizing the person as a functional parent in only 15% of the relevant cases.

Even if courts are correctly rejecting meritless claims, some commentators worry that the litigation itself is harmful to legal parents and children. While we do not have data on petitions filed at the trial court level, there are reasons to believe this concern is overstated. Many of the claimants in functional parent cases have other routes to petition for custody or visitation. Given that 42% of the cases in our data set involve grandparents or stepparents, it is likely that many of these claimants would be able to proceed under statutes that specifically cover grandparent and stepparent relationships.[83] Many of the remaining claimants could bring claims under third-party custody and visitation statutes, which are a common feature of state law. Accordingly, it is far from clear that functional parent doctrines open the flood-

83 *See* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L.Q. 1, 2–3, 7 (2013).

gates to *additional* litigation, since a large share of the claimants have other grounds upon which to litigate.[84]

Conclusion

Our study of functional parent doctrines suggests that common empirical claims and assumptions about when and how the doctrines operate are not supported by the data from electronically available judicial decisions. In short, the objections do not supply an adequate basis on which to reject functional parent doctrines altogether. Moreover, in addition to undermining the empirical bases for common objections, our study supports normative arguments in favor of functional parent doctrines. The data reveal that courts typically apply the doctrines to protect children's relationships with their primary caregivers and to preserve their home placements.

In this way, our findings suggest that the conversation should move beyond the question of *whether* functional parent doctrines should exist to questions about *how* they should be designed. It is here that critics' important substantive concerns—like those regarding domestic violence—can be addressed. The doctrines can be designed in ways that guard against unintended consequences while simultaneously authorizing courts to protect parent-child relationships that are so important to children.[85]

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[84] Some cases in our data set feature claims under both third-party statutes and functional parent doctrines. *See, e.g.*, *S.A.-M.*, 489 P.3d 259; *Antonio R.A.*, 719 S.E.2d at 862 (denying custody to the grandmother under the psychological parent doctrine but citing the grandparent visitation statute as a basis on which to maintain the relationship).

[85] *See, e.g.*, Conn. Gen. Stat. Ann. §§ 46b-489, 46b-490 (providing that "evidence of duress, coercion or threat of harm" can be used to contest a parentage claim based on the "holding out" presumption or de facto parentage).

Appendix: Functional Parent Doctrines by Jurisdiction

Jurisdiction	Functional Parent Doctrine	Source of Authority
Alaska	psychological parent	common law/ equitable[86]
Arkansas	*in loco parentis*	common law/ equitable[87]
California	"holding out" presumption	statutory[88]
Colorado	"holding out" presumption	statutory[89]
	psychological parent	common law/ equitable[90]
Connecticut	de facto parent	statutory[91]
	"holding out" presumption	statutory[92]
Delaware	de facto parent	statutory[93]
District of Columbia	de facto parent	statutory[94]
Georgia	equitable caregiver	statutory[95]
Hawaii	de facto custodian	statutory[96]
Indiana	de facto custodian	statutory[97]

86 *See* Kinnard v. Kinnard, 43 P.3d 150 (Alaska 2002).

87 *See* Robinson-Ford v. Robinson-Ford, 208 S.W.2d 140 (Ark. 2005).

88 Cal. Fam. Code § 7611(d).

89 Colo. Rev. Stat. Ann. § 19-4-105(1)(d).

90 *See In re* E.L.M.C., 100 P.3d 546, 559-62 (Colo. App. 2004) (applying Colo. Rev. Stat. Ann. § 14-10-123 to a person found to meet the standard of a "psychological parent").

91 Conn. Gen. Stat. Ann. § 46b-490.

92 *Id.* § 46b-488(3).

93 Del. Code Ann., tit. 13, § 8-201(c).

94 D.C. Code Ann. § 16-831.01.

95 Ga. Code Ann. § 19-7-3.1.

96 Haw. Rev. Stat. § 571-46(a)(2).

97 Ind. Code Ann. § 31-17-2-8.5.

Jurisdiction	Functional Parent Doctrine	Source of Authority
Kentucky	de facto custodian	statutory[98]
	acting as a parent	statutory[99]
	waiver of legal parent's superior rights	common law/ equitable[100]
Kansas	parentage presumption based on "notoriously" recognizing parentage	statutory[101]
Maine	de facto parent	statutory[102]
	"holding out" presumption	statutory[103]
Maryland	de facto parent	common law/ equitable[104]
Massachusetts	de facto parent	common law/ equitable[105]
	"holding out" presumption	statutory[106]
Michigan	equitable parent	common law/ equitable[107]

98 Ky. Rev. Stat. § 403.270(1)(a).

99 Ky. Rev. Stat. § 403.822(1) (granting jurisdiction to determine custody if the child and "a person acting as a parent" have "a significant connection to the state").

100 *See, e.g.*, L.W. v. M.P., No. 2008-CA-000760-ME, 2009 WL 485054, at *2 (Ky. Ct. App. Feb. 27, 2009) ("'[I]f the parent has waived his or her superior right to custody[,] . . . the trial court shall determine custody between the parent and nonparent based on the best interest of the child.'") (citations omitted).

101 Kan. Stat. Ann. § 23-2208(a)(4) ("The man notoriously or in writing recognizes paternity of the child[.]").

102 Me. Rev. Stat., tit. 19-a, § 1891. Maine also has a common law functional parent doctrine. *See* Stitham v. Henderson, 768 A.2d 598 (Me. 2001). It is unclear whether, in the wake of the enactment of the statutory de facto parent provision, the common law doctrine continues to supply an independent basis for a functional parent claim.

103 Me. Rev. Stat. Ann. tit. 19-a, § 1881(3).

104 *See* Conover v. Conover, 146 A.3d 433 (Md. 2016).

105 *See* Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1999).

106 Mass. Gen. Laws Ann. ch. 209C § 6(a)(4).

107 *See, e.g.*, Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999). The doctrine was announced by an intermediate appellate court in *Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. App. 1987), which we exclude because it involves a "child of the marriage" and thus a man who should be presumed to be a parent by virtue of the marital presumption.

Jurisdiction	**Functional Parent Doctrine**	**Source of Authority**
Minnesota	*in loco parentis*	statutory[108]
Montana	legal parent ceded parental authority and allowed parent-child relationship	statutory[109]
Nebraska	*in loco parentis*	common law/ equitable[110]
New Hampshire	"holding out" presumption	statutory[111]
	psychological parent	common law/ equitable[112]
New Jersey	psychological parent	common law/ equitable[113]
New Mexico	"holding out" presumption	statutory[114]
New York	de facto parent	common law/ equitable[115]
	equitable estoppel	common law/ equitable[116]

108 MINN. STAT. ANN. § 257C.08. The Minnesota Supreme Court has read this provision, which extends visitation rights to "unmarried persons" based in part on a showing that "the petitioner and child had established emotional ties creating a parent and child relationship," "as mandating the petitioner stand in loco parentis with the child." SooHoo v. Johnson, 731 N.W.2d 815, 822 (Minn. 2007).

109 MONT. CODE ANN. § 40-4-228 ("A court may award a parental interest to a person other than a natural parent when it is shown by clear and convincing evidence that: (a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and (b) the nonparent has established with the child a child-parent relationship, . . . and it is in the best interests of the child to continue that relationship.").

110 *See* Hickenbottom v. Hickenbottom, 477 N.W.2d 8 (Neb. 1991).

111 N.H. REV. STAT. § 168-B:2, V(d).

112 *See* Bodwell v. Brooks, 686 A.2d 1179 (N.H. 1996).

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

114 N.M. STAT. ANN. § 40-11A-204(A)(5).

115 *See, e.g.*, Dawn M. v. Michael M., 47 N.Y.S.3d 898 (N.Y. Sup. Ct. 2017). The New York high court's earlier rejection of de facto parenthood in *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991), was overruled in *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016).

116 *See, e.g.*, Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677, 682 (N.Y. App. Div. 1998) ("With the plaintiff's acquiescence, the defendant was named as Kelly's father on her birth certificate, he was held out as Kelly's father to others for over seven years, during which time he established a strong father-daughter relationship, and he supported Kelly financially throughout the marriage).

Jurisdiction	**Functional Parent Doctrine**	**Source of Authority**
North Carolina	legal parent ceded parental authority and allowed parent-child relationship	common law/ equitable[117]
North Dakota	psychological parent	common law/ equitable[118]
Ohio	parenting agreement	common law/ equitable[119]
Oklahoma	parenting agreement	common law/ equitable[120]
Pennsylvania	*in loco parentis*	common law/ equitable[121]
	paternity by estoppel	statutory[122]

117 *See* Boseman v. Jarrell, 704 S.E.2d 494. 550-51 (N.C. 2010). *See also* Price v. Howard, 484 S.E.2d 528 (N.C. 1997) ("When a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.").

118 *See In re* D.R.J., 317 N.W.2d 391 (N.D. 1982). In 2019, North Dakota enacted the Uniform Nonparent Custody and Visitation Act, which included de facto parent provisions, N.D. Rev. Stat. § 14-09.4-03, but there were no electronically reported decisions applying the new law during the period covered by our data set.

119 *See In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002) ("Parents may waive their right to custody of their children and are bound by an agreement to do so. The parents' agreement to grant custody to a third party is enforceable subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child.") (citations omitted).

120 *See* Eldredge v. Taylor, 339 P.3d 888 (Okla. 2014). Recently, the Oklahoma Supreme Court has required a showing of an "intent to parent jointly," as well as a showing that the functional parent "acted in a parental role for a length of time sufficient to have established a meaningful emotional relationship with the child, and resided with the child for a significant period while holding out the child as his or her own child." Schnedler v. Lee, 445 P.3d 238, 244 (Okla. 2019).

121 *See, e.g.*, T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001). While the doctrine was judge made, the legislature eventually incorporated the status into the state's custody statute. 23 Pa. Cons. Stat. Ann. § 5324 (eff. Jan. 24, 2011) (providing that a person standing in loco parentis to a child "may file an action . . . for any form of physical or legal custody").

122 23 Pa. Cons. Stat. Ann. § 5102(2). This statute codified the equitable doctrine.

Jurisdiction	**Functional Parent Doctrine**	**Source of Authority**
Rhode Island	de facto parent	statutory[123]
	"holding out" presumption	statutory[124]
South Carolina	psychological parent	common law/ equitable[125]
Vermont	de facto parent	statutory[126]
	"holding out" presumption	statutory[127]
Washington	de facto parent	statutory[128]
	"holding out" presumption	statutory[129]
West Virginia	psychological parent	common law/ equitable[130]
	parenting agreement or custody relinquishment	common law/ equitable[131]
Wisconsin	de facto parent	common law/ equitable[132]

123 15 R.I. GEN. LAWS ANN. § 15-8.1-502.

124 *Id.* § 15-8.1-401(a)(4).

125 *See* Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008). The state also has a de facto custodian statute. S.C. CODE ANN. § 63-15-60 (authorizing a court to "grant visitation or custody of a child to the de facto custodian if it finds by clear and convincing that the child's natural parents are unfit or that other compelling circumstances exist"). No relevant electronically available decisions applying this statute were issued during the period we studied.

126 VT. STAT. ANN. tit. 15C, § 201(6).

127 *Id.* tit. 15C, § 401(a)(4).

128 WASH. REV. CODE ANN. § 26.26A.440(4). Prior to that statutory enactment, Washington recognized a common law functional parent doctrine. *See In re* Parentage of L.B., 122 P.3d 161, 177, 176 (Wash. 2005).

129 WASH. REV. CODE ANN. § 26.26A.115(1)(b).

130 *See, e.g.*, *In re* Clifford K., 619 S.E.2d 138, 143 (W. Va. 2005).

131 *See, e.g.*, Overfield v. Collins, 483 S.E.2d 27, 36 (W. Va. 1996) ("When a natural parent transfers permanent custody of his or her child to a third person and thereafter attempts to regain custody of that child, the burden of proof shall rest exclusively upon the parent attempting to regain custody of his or her child by proving with clear and convincing evidence (1) that he or she is fit; and (2) that a transfer of custody so as to disturb the child's existing environment would constitute a significant benefit to the child.").

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