THE EQUAL RIGHT TO PARENT: PROTECTING THE RIGHTS OF GAY AND LESBIAN, POOR, AND UNMARRIED PARENTS

SAMANTHA BEI-WEN LEE[∞]

ABSTRACT

Parents are legally recognized in three ways: through marriage, adoption, and biology. While gay partners may now legally marry throughout the United States, not all states have provided an equal opportunity for gay parents to obtain parental rights, whether through biology, legally recognized partnership, adoption, or other means.

In August 2016, the New York Court of Appeals overturned its prior decisions and found that an unmarried, gay, female co-parent of a biological mother had standing as a parent to seek parental rights to the ex-couple's child. This change reflects the growing understanding that gay individuals and couples should be treated equally to straight individuals and couples. Few commentators have addressed the interaction of this expanded recognition of parental status with the existing rights of the parents most at risk of losing their parental rights—those involved in child welfare cases. These parents are overwhelmingly poor people and/or people of color. While there is significant overlap between poor parents and parents of color on the one hand, and gay parents on the other, commentators and advocates typically focus on just one group's distinct interests and not on both groups together.

As states develop laws to ensure equal protection for gay parents who choose to have children together and not to marry, lawmakers must also consider how those laws affect existing parents' rights. Any new law must be narrowly tailored to avoid inserting courts and non-parents into families, which would undermine parents' constitutional right to make choices for their children and their families.

This article will address the need for an equal default rule for unmarried, gay parents to be recognized in the same way as unmarried, straight parents. It

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will describe the existing strong constitutional protections for parental rights and the situations in which those rights are at risk. Then it will discuss various proposed rules and the ways in which they fail to achieve both equality for gay parents and strong protections for parents at risk of losing their parental rights. It will analyze the New York Court of Appeals' recent decision in *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (2016), and draw conclusions about the best rule to protect all groups. Lastly, it will propose avenues for strategic litigation to ensure an equal right to parent for all parents nationwide.

I.
INTRODUCTION

Brooke B. thought she was a parent. She and her partner decided to have a child together, conceived, and jointly planned for the birth. Brooke was present for the birth in June 2009 and cut the umbilical cord. She and her partner Elizabeth began to raise the child together and introduced themselves as co-parents. The child called Brooke "Mama B." But under the law in the state of New York, Brooke B. was not a parent and could not even appear in court to argue that she was.[1]

Today, after the United States Supreme Court has declared that all couples have the equal right to marry[2] and state laws have shifted increasingly to support adoption by gay couples,[3] many people think this outcome is wrong; Brooke should be recognized as a parent.[4] The fact that she does not have a biological tie to the child—or that she and her partner are both female—should not preclude Brooke from also being considered a parent of their child.

In August 2016, the New York Court of Appeals, the highest court in New York State, expanded the definition of "parent" to include gay and lesbian parents who had not been legally recognized via the existing avenues—biology, adoption, or marriage. In *Brooke S.B. v. Elizabeth A.C.C.*, the court promulgated a new rule "that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological,[5] non-adoptive partner has standing to seek visitation and custody

1. *See* Barone v. Chapman-Cleland, 10 N.Y.S.3d 380, 381 (App. Div. 4th Dep't 2015), *rev'd sub nom* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

2. *See* Obergefell v. Hodges, 575 U.S. __, 135 S. Ct. 2584 (2015).

3. *See infra* notes 31–33 and accompanying text.

4. The fact that eight amicus briefs were filed only on behalf of Brooke while no amicus briefs were filed on behalf of Elizabeth indicates this broad support. *See, e.g.*, Brief for Lawyers for Children et al. as Amici Curiae Supporting Petitioner-Respondent, *Brooke S.B.*, 61 N.E.3d 488. However, the ways in which the expansion of these rights should be enacted is a continued subject of debate and the subject of this article.

5. The terms "biological mother" and "non-biological mother" do not incorporate the full complexity of modern families; two women could choose to use the ovum of one and implant it in the other, thus giving both a type of biological tie. However, it is unclear which mother would obtain legal status in that situation and it is certainly not clear that both would. *See generally* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005). In that context, it is helpful to differentiate the parties along the lines that are currently recognized—"biological" and "non-biological" parent—in order to understand how to expand the current rule.

under Domestic Relations Law § 70."[6] This was a sharp reversal of the long-standing New York law, promulgated in *Alison D. v. Virginia M.* and affirmed in *Debra H. v. Janice R.*, that ex-partners who were not biologically related to the child of the partnership, did not adopt, and were not married at the time of the birth not only lacked rights to the child but also lacked even standing to argue for rights to that child.[7] Instead, the ex-partner—who may have been a crucial part of the legally recognized parent and the child's life since the child's conception and through several subsequent years—was considered a "legal stranger" to the child[8] and could only seek rights as a "third party," not as a parent.[9] In promulgating the new rule, the Court of Appeals attempted to raise the status of Brooke and other similarly situated parents to their rightful place as legally recognized parents, while also protecting the rights of parents generally.[10]

While the nationwide legalization of gay marriage has changed the legal landscape for gay couples, gay parents are still not assured equal recognition. Courts increasingly face the question of whether a gay parent can be legally recognized, or whether two women or two men can both be parents. Many authors have discussed the need to change the law to recognize modern family structures: LGBT parents, parents by artificial reproductive technology, adoptive parents, and stepparents. But no one has discussed how expanding the definition of "parent" may harm the parents and families most at risk of being torn apart, such as families facing child welfare cases.

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6. *Brooke S.B.*, 61 N.E.3d at 490 (promulgating the rule proposed in Brief for Sanctuary for Families, The Battered Mothers Custody Conference, Brooklyn Defender Services, The Center for Family Representation, The Domestic Violence Legal Empowerment and Appeals Project, My Sisters' Place & New York University School of Law Family Defense Clinic as Amici Curiae Supporting Petitioner-Respondent at 39, *Brooke S.B.*, 61 N.E.3d 488 [hereinafter "Brief for Sanctuary for Families"]). *See also* N.Y. DOMESTIC RELATIONS LAW § 70 (McKinney 2012) (providing the basis for "either parent" to ask a court to determine "guardianship, charge and custody of such child").

7. Alison D. v. Virginia M., 572 N.E.2d 27, 31 (N.Y. 1991); Debra H. v. Janice R., 930 N.E.2d 184, 194 (N.Y. 2010). Note that although Debra H. would have lacked standing under New York law, New York granted comity to Vermont law granting parental standing based on Debra H.'s Vermont civil union to Janice R. *Debra H.*, 930 N.E.2d at 188, 197.

8. A legal stranger is someone without a relationship recognized by law. *See* Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1489, 1597 n.38, 1602 n.62, 1604 (2013) [hereinafter "Smith 2013"]; MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 100–01 (2005); Kendra Huard Fershee, *The Prima Facie Parent: Implementing a Simple, Fair, and Efficient Standing Test in Courts Considering Custody Disputes by Unmarried Gay or Lesbian Parents*, 48 FAM. L.Q. 435, 449 (2014).

9. A third party is anyone other than a parent or the child, e.g., a grandparent, sibling, or foster parent. *See, e.g.*, GUGGENHEIM, *supra* note 8, at 100–01; 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, 42–43 (2006); Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 6 (2013)

10. *See infra* Part V.B.

This article seeks to fill that gap by bringing a family defense[11] perspective to the pursuit of equal rights for gay and lesbian parents. The ultimate goal is to afford unmarried,[12] gay parents the same certainty as straight ones—given the different reproductive capacity of the couples—while maintaining strong protections for parents against the intervention of courts or other adults into their families' lives. A narrow rule that focuses on the parents' pre-conception joint intent to co-parent protects the rights of parents generally and also protects the equal rights for unmarried gay couples relative to straight ones.[13]

Section II describes the current inequality in parentage law for gay and straight[14] couples. Section III presents the constitutional basis of strong parental rights and the existing threats to those rights. That presentation expands to discuss at-risk families' concerns with expanding the definition of "parent." Section IV analyzes current and proposed rules and how they fail to achieve equal rights for gay parents and simultaneously maintain strong protections for parental rights. Section V discusses a proposed narrow rule that will satisfy both equality and parental rights concerns. Section VI concludes with arguments for why this narrow rule must be promulgated nationwide, and legal bases to achieve nationwide protections. Two recent New York Court of Appeals cases about lesbian couples—*Brooke S.B. v. Elizabeth A.C.C.* and *Estrellita A. v. Jennifer L.D.*[15]— will serve as a framework for this analysis, but examples and solutions will be drawn from and applied to laws and experiences nationwide.

II.
THE LEGAL RECOGNITION OF A PARENT

A. The Three Ways to Become a Legally Recognized Parent

As a straight person, there are three ways to become a legally recognized parent: biological tie, marriage, and adoption.

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11. "Family Defense" is the practice of representing parents in child welfare—also called "dependency"—cases, in which parents face allegations of abuse or neglect of their children or termination of their parental rights to their child. Families in this position are almost exclusively poor and racial minorities, and are frequently facing what amounts to a prosecution of their poverty, rather than true neglect or abuse. MARTIN GUGGENHEIM & VIVEK SUBRAMANIAN SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS xix-xxiv (2016).

12. Academic literature more commonly uses the term "unwed." However, that term seems archaic and carries a history of negative connotations. Therefore, this paper will use the more modern term "unmarried."

13. Obviously, there is significant overlap between these two groups. I seek to highlight that both groups' interests must be respected, and the two are not considered simultaneously in the current literature.

14. Throughout this paper, I use the more colloquial terms "gay" and "straight" rather than the terms more commonly used in legal scholarship and judicial opinions—"same-sex" and "heterosexual"—because these are the terms people use in everyday life. Part of obtaining equal treatment is being treated as normal, everyday, and commonplace. This is my small contribution.

15. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

The most commonly recognized method of becoming a legally recognized parent is by biological tie. Most people presume that a woman who gives birth to a child is the child's mother and the man who gave sperm is the father, unless an alternate agreement was made. Traditionally at common law, this is true for the woman; a woman who gives birth to a child is automatically the parent of that child, with all of the attendant rights and responsibilities.[16] On the other hand, a man is not automatically entitled to full parental rights.[17] Unmarried fathers have automatic responsibilities but may only obtain constitutionally protected rights if they assert paternity and take advantage of the opportunity to develop an attachment with their children after the birth of the child.[18] Those fathers' responsibilities have been upheld after they have been asserted and relied upon, even when it is later discovered that the fathers are not the biological fathers.[19]

The second way a person can become a legally recognized parent is via marriage. At common law, when a married woman gives birth to a child, there is a rebuttable presumption that the child is the child of that woman and her husband.[20] This presumption exists regardless of the husband's biological connection to the child[21] and automatically defeats the parental rights of an unmarried biological father, unless the biological father asserts his parental rights.[22] Many states have extended this "marriage presumption" to the husband

16. *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, 5 STAN. J. C.R. & C.L. 201, 227 (2009) ("If a woman is unmarried, she is the child's sole parent."); GUGGENHEIM, *supra* note 8, at 59.

17. *See* Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U.J. GENDER SOC. POL'Y & L. 671, 700 (2012) (citing Lehr v. Robertson, 463 U.S. 248, 250, 262 (1983) ("[U]nwed fathers—unlike unwed mothers—were not automatically entitled to full parental rights. They have to assert paternity and take advantage of the opportunity to develop an attachment with their children.")).

18. *Lehr*, 463 U.S. at 262 ("[A] biological father has 'inchoate' parental rights; he could have constitutional rights to his child only if he 'grasped the opportunity' to develop a relationship with the child."). *See* discussion *infra* Part II.C.

19. *See, e.g.*, Shondel J. v. Mark D., 853 N.E.2d 610, 615–16 (N.Y. 2006) (estopping a man from denying paternity even when DNA test indicated he was not the child's biological father).

20. Michael H. v. Gerald D., 491 U.S. 110 (1989) (prioritizing marital presumption in favor of the mother's husband and rejecting the biological father's petition to establish legal parental status with his daughter, even when he had an established relationship with his daughter); *see also* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 232–33, 243 n.83 (2006) (noting that the presumption is based on the possibility of a biological tie, and traditionally the marriage presumption could not be rebutted, in order to avoid inheritance disputes (Levy v. Louisiana, 397 U.S. 68 (1968)*; cf.* Laura WW. v. Peter WW., 856 N.Y.S.2d 258 (App. Div. 3d Dep't 2008) (holding husband equitably estopped from denying he was the legal father because he failed to rebut common law presumption that he consented to wife's artificial insemination by donor during their marriage).

21. *See* Polikoff, *supra* note 16, at 208 & n.18.

22. *See* Appleton, *supra* note 20, at 234–35 nn.34–37 (describing marriage presumption laws in the fifty states as of 2006); N.Y. FAM. CT. ACT § 418(a) (McKinney 2010) (governing paternity where there is marriage); N.Y. FAM. CT. ACT § 532(a) (McKinney 2010) (governing paternity where there is no marriage).

where he has consented to his wife's artificial insemination and has no biological tie to the child.[23]

Third, an adult can become a parent via adoption. Adoptive parents have equal legal rights and responsibilities as other legally recognized parents.[24]

B. Unequal Access to Parent Status—Gay and Lesbian Parents

The institution of marriage is available to almost all couples,[25] but whether the attendant parental rights go with it has yet to be fully litigated. Historically, the marital presumption—recognizing that a married person is the parent of his or her spouse's child—did not apply to married gay and lesbian couples.[26] However, the Supreme Court in *Obergefell* reasoned that gay marriage should be legalized in part because marriage provides "recognition, stability, and predictability" and "safeguards" that should be available to all children and families.[27] Those safeguards only exist if both parents are legally recognized; otherwise, a child could be deemed parentless if something happened to the sole, legally recognized parent.

Some states support greater protection.[28] In New York, the statute that legalized gay marriage in the state declares that no government treatment, benefit, or protection of any kind "relating to marriage . . . shall differ based on the parties to the marriage being or having been of the same sex."[29] Thus, the parental presumption for married couples applies to gay couples in New York as of 2011. However, this statutory protection is not available nationwide. Furthermore, other states do not need to grant comity to New York or other

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23. *See* Polikoff, *supra* note 16, at 234 & n.136 (citing unpublished manuscript of Courtney G. Joslin, Assisted Reproductive Technology and the Marriage Requirement: Harming the Well-Being of Children Through Exclusionary Parentage Rules 9 n.21 and accompanying text).

24. *See* NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 1 (2016), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [https://perma.cc/45EJ-VCKG].

25. *See* Obergefell v. Hodges, 575 U.S. __, 135 S. Ct. 2584 (2015) (holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee same-sex couples the right to marry).

26. *See* NAT'L CTR. FOR LESBIAN RIGHTS, PROTECTING YOUR FAMILY AFTER MARRIAGE EQUALITY 1 (2015), http://www.nclrights.org/wp-content/uploads/2015/01/Protecting-Your-Family-After-Marriage-Equality.pdf [https://perma.cc/98MV-AHXU] ("Being married to a birth parent does not automatically mean your parental rights will be fully respected if they are ever challenged. There is no way to guarantee that your parental rights will be respected by a court unless you have an adoption or court judgment."). *See, e.g.*, Alison D. V. Virginia M., 572 N.E.2d 27 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

27. Obergefell, 575 U.S. __, 135 S. Ct. at 2600, 2599–2601 (one of four bases for legalizing gay marriage); *see also* Appleton, *supra* note 20, at 241.

28. *See, e.g.*, Hunter v. Rose, 975 N.E.2d 857, 861 (Mass. 2012) (holding that both partners in a same-sex marriage were considered legal parents of child).

29. N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2011).

states' similar statutory or common law protections. As a result, this is precarious protection for parents.[30]

Most states permit gay individuals and single adults to adopt, but, oddly, some states do not permit adoption by both parents in an unmarried gay couple.[31] While the rights of unmarried gay couples remain uncertain in many states,[32] the law is rapidly developing in favor of gay couples having equal rights to adopt and to have their adoptions recognized.[33]

Even if it is legal in their state, not all families have the means or inclination to adopt children, to have both parents adopt their joint children, or to have one

30. *Compare* Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016) *and* McLaughlin v. Jones, No. CV-16-0266-PR (Ariz. argued June 27, 2017), *with* Turner v. Steiner, No. 1 CA-SA 17-0028, 2017 WL 2687680 (Ariz. Ct. App. June 22, 2017). *See generally Protecting Your Family*, *supra* note 26.

31. Jeanne Howard & Madelyn Freundlich, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care, Policy & Practice Perspective*, EVAN B. DONALDSON ADOPTION INSTITUTE 6 (Sept. 2008), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2008_09_Expanding_Resources_Legal.pdf [https://perma.cc/W42N-BQH9]; NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS 2 (2016), http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf [https://perma.cc/5R75-PB99] (Alabama and Mississippi bar adoption by same-sex couples and Kansas, Kentucky, Nebraska, North Carolina, Ohio, Utah, and Wisconsin bar adoption by unmarried couples).

32. Only fifteen states and the District of Columbia affirmatively permit, via state statute or appellate court decision, adoption by both partners; others have not addressed the issue. *See Adoption by LGBT Parents*, *supra* note 31, at 1 (noting the jurisdictions that affirmatively support adoption by both partners: California, Colorado, Connecticut, District of Columbia, Idaho, Illinois, Indiana, Maine, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Oklahoma, Pennsylvania, and Vermont); David Brodzinsky, *The Modern Adoptive Families Study*, EVAN B. DONALDSON ADOPTION INSTITUTE 6 (Sept. 2015), http://www.adoptioninstitute.org/wpcontent/uploads/2015/09/DAI_MAF_Report_090115_R7_Edit.pdf [https://perma.cc/85CX-GZ6T] (addressing specific adoption laws for couples in civil unions in New Hampshire and Oregon). *See generally* NAT'L CTR. FOR LESBIAN RIGHTS, PROTECTING YOUR FAMILY AFTER MARRIAGE EQUALITY, *supra* note 26, at 1.

33. *See* Abby Lynn Bushlow, *Information Packet: Gay and Lesbian Second Parent Adoptions*, NAT'L RES. CTR. FOR FOSTER CARE & PERMANENCY PLANNING AT HUNTER COLL. SCH. OF SOC. WORK (May 2004), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/gay_lesbian_second_parent_adoption.pdf [https://perma.cc/9RXV-K78H] (second parent adoption began in the 1980s and about half of states permitted second parent adoption by 2004). All but three states permitted second parent adoption by 2008, *see* Brodzinsky, *supra* note 32, at 6. Additionally, Florida has legalized adoption by gay couples since the Donaldson article was published. *See* Fla. Dep't of Children & Families v. X.X.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (finding Florida's ban on adoption by gay couples unconstitutional). That ruling is binding on all Florida trial courts. The Florida Department of Children and Families issued a memorandum instructing its staff to immediately cease questioning prospective adoptive parents about their sexual orientation and not to consider sexual orientation as a factor in determining fitness to adopt. However, private agencies still impose barriers to adoption. New York established in 1995 that an unmarried partner in either a gay or straight relationship has standing to seek adoption of the partner's biological child. *In re* Jacob, 660 N.E.2d 397, 399 (N.Y. 1995). The Court of Appeals explicitly stated that this was meant to allow "children to achieve a measure of permanency with both parent figures and avoid[] the sort of disruptive visitation battle the court faced in [*Alison D.*]." *Id.* at 399.

parent adopt the other parent's biological child. Couples should not be forced to marry and, similarly, gay couples not be forced to adopt their own children.[34]

The biological method of gaining legally recognized status as a parent and the attendant presumptions attached to parent status are not equally available to gay parents. Gay couples will have a different biological relationship with their children than a typical straight, fertile couple.[35] Biological connection need not be considered when defining the parental status of both parents in a gay couple.[36] Law makers should consider how to ensure that gay couples have equal opportunity to obtain parental status outside of a formal legal process, as straight parents already do through the potential biological tie doctrine.[37]

Gay couples have tried a variety of methods to create biological relationships with their children. For example, a lesbian couple may choose to use the egg of one mother and have the other carry the child.[38] A gay male couple may choose to use the sperm of one with a surrogate. Ultimately, the issue is not whether or how to manufacture a biological tie, but rather whether parental status should be predicated on biology at all.[39]

C. Comparing the Rights of the Unmarried Straight Man with the Unmarried Lesbian Woman

Unmarried men have had a financial obligation to support their children since the 1930s,[40] and they gained matching rights through strategic litigation in

34. *See* Polikoff, *supra* note 16; NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS, *supra* note 31, at 1 ("[A] same-sex partner who plans the birth or adoption of a child with his or her partner is a parent—not a stepparent. Parents should not have to adopt their own children . . . .").

35. For discussion, *see* Debra H. v. Janice R., 930 N.E.2d 184, 203–05 (N.Y. 2010) (Smith, J., concurring) ("[I]t is an inescapable fact that gay and straight couples face different situations, both as a matter of law and as a matter of biology . . . . These differences seem to me to warrant different treatment.").

36. *Parentage Act Summary*, UNIFORM LAW COMMISSION (2016), http://www.uniformlaws.org/ActSummary.aspx?title=Parentage+Act [https://perma.cc/VQ43-3AZM] (discussing Article 5 of the UPA).

37. *See* discussion *supra* notes 20–23 and accompanying text.

38. Forman, *supra* note 9, at 42–43 ("Splitting the Process of Procreation to Ensure Both Women are Biologically Related to the Child"); Jacobs, *supra* note 5, at 433, 442–43 (discussing whether two women can establish legal parentage and how the law recognizes mothers when one is a genetic and one a gestational mother).

39. *See* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d. 488, 498–99 (N.Y. 2016) ("Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child. By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court's determination [that] a proper test for standing . . . ensures equality . . . .") (citations omitted).

40. GUGGENHEIM, *supra* note 8, at 61 (New Deal policies required the federal government to support children whose fathers were deceased or disabled; the government therefore sought to ensure that able fathers supported their children).

the 1970s.[41] During that legal fight, the United States Supreme Court found that "this undifferentiated distinction between unwed mothers and unwed fathers" violates equal protection principles.[42] The Court subsequently limited this finding, stating that a biological father could have constitutional rights to his child only if he "grasp[ed] the opportunity" to develop a relationship with the child.[43] In contrast, until its 2016 decision in *Brooke S.B.*, the New York Court of Appeals had adamantly maintained that, absent marriage, adoption, or biological tie, a woman had no rights to a child of her partnership with another woman, regardless of the role she played in the child's life or the family unit or her commitment to parenting.[44]

In *Alison D.*, the court found that two women, Alison and Virginia, had lived together for two years in an intimate relationship, jointly planned to have and raise a child together, agreed to share all rights and responsibilities, decided one partner would carry the child, conceived, and given the child both of their last names. Alison and Virginia purchased a house together and proceeded to live together and raise the child jointly for two additional years. When they ended their relationship, the women continued to share visitation, mortgage payments, and household expenses for three more years. Nonetheless, the court found that Alison, the woman who did not carry the child, did not even have standing to seek custody or visitation with her child.[45]

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41. *See* Stanley v. Ill., 405 U.S. 645 (1972) (finding, for the first time, that unmarried fathers were constitutionally entitled to parental standing); Caban v. Mohammed, 441 U.S. 380 (1979) (finding that a biological father has an equal right as a biological mother to veto adoption of his children); Lehr v. Robertson, 463 U.S. 248, 261 n.17, 262 (1983) (narrowing biological fathers' rights by finding that "a biological father has 'inchoate' parental rights; he could have constitutional rights to his child only if he 'grasped the opportunity' to develop a relationship with the child").

42. *Caban*, 441 U.S. at 394; *see also* Gomez v. Perez, 409 U.S. 535, 538 (1978) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.").

43. *Lehr*, 463 U.S. at 262.

44. Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) ("[S]he is not the biological mother of the child nor is she a legal parent by virtue of an adoption. Rather she claims to have acted as a 'de facto' parent . . . . [However, she] concedes that respondent is a fit parent. Therefore she has no right to petition the court to displace the choice made by this fit parent . . . ."), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Debra H. v. Janice R., 930 N.E.2d 184, 194 (N.Y. 2010) (affirming *Alison D.*), *overruled by Brooke S.B.*, 61 N.E.3d 488. *See also* Palmatier v. Dane, 948 N.Y.S.2d 181, 182 (App. Div. 3d Dep't 2012) ("[A] nonbiological, nonadoptive parent does not have standing to seek visitation when a biological parent who is fit opposes it, and . . . equitable estoppel does not apply in such situations even where the nonparent has enjoyed a close relationship with the child and exercised some control over the child with the parent's consent.") (citations omitted).

45. *Alison D.*, 572 N.E.2d at 29.

In *Debra H.*, two women, Janice and Debra, met in 2002 and entered into a civil union in Vermont in November 2003 while Janice was pregnant.[46] Janice gave birth to a child in December 2003.[47] It was unclear and undecided whether the women were in a relationship when the child was conceived and whether Debra was involved in Janice's decision to conceive. The court found that Janice "repeatedly rebuffed" Debra's requests to become the child's second parent by means of adoption.[48] Three years after the birth, the couple separated but continued visits and daily conversations. Janice then attempted to terminate all contact between the child and Debra, arguing that her intent to exclude Debra from parent status—as evidenced by her refusal to allow Debra to adopt the child—should be respected by the court.[49] The Court of Appeals affirmed the decision in *Alison D.* but found that Debra did have standing because the couple's civil union prior to the child's birth granted Debra standing as a parent in Vermont,[50] and New York would grant comity to Vermont's law.[51]

Alison D. and Debra H. each were in relationships with their partners when the children in question were conceived and born, and they exerted their parental rights and created a "developed relationship" with their children.[52] If they had been in straight couples, they would have had sufficient basis to obtain standing to seek parental rights.[53] Yet in these cases, as the female partner of the biological mother, Alison and Debra could not even argue for their parental rights (although Debra achieved standing through another method).[54]

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46. *Debra H*, 930 N.E.2d at 186. Between the Court of Appeals' decision in *Alison D.* and its decision in *Debra H.*, the court decided that a female co-parent with no biological ties to her partner's child could adopt that child and thus become the legally recognized second parent of the child. *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995).

47. *Debra H*, 930 N.E.2d at 186.

48. *Id.*

49. *Id.* at 187.

50. *Id.* at 194–96 (based on the marital presumption extended to civil unions in Vermont).

51. *Id.* at 196–97.

52. *See supra* text accompanying note 43, describing the requirements for an unmarried man to be considered as a parent (citing Lehr v. Robertson, 463 U.S. 248, 261–62 (1983)). Note, however, that unmarried men who are in relationships with women and are not the biological father of a child lack standing to seek visitation or custody. Palmatier v. Dane, 948 N.Y.S.2d 181, 182 (App. Div. 3d Dep't 2012) (an unmarried, non-biological, non-adoptive father could not use equitable estoppel or prior relationship with the child to gain standing to seek visitation against the wishes of the fit biological mother); White v. Wilcox, 973 N.Y.S.2d 498, 499 (App. Div. 4th Dep't 2013) (quoting *Debra H.*, 930 N.E.2d at 191) ("It is well settled that parentage under New York law derives from biology or adoption . . . .") (citations omitted). In this, men and women are treated equally; if the partner enters the mother and child's life after conception, he or she has no standing absent adoption or pre-birth marriage.

53. *See supra* notes 20, 22 and *infra* text accompanying notes 56, 57.

54. Alison D. v. Virginia M., 572 N.E.2d 27 (1991); *Debra H.*, 930 N.E.2d at 188. For further discussion of how Alison D. and Debra H. fare under the new *Brooke S.B.* rule, *see* discussion *infra* Part V.C.

D. In Support of an Equal Default Rule—Parents, Not Third Parties

Societal conceptions of how families are formed do not comport with a rule barring Brooke, Alison, and Debra standing as a parent. A man who accidentally becomes a father via a one-night stand should not have rights as a parent while a long-term partner with whom the mother jointly planned to have a child does not.[55]

Some argue that difference in biological reproductive capacity warrants some inequality in the law and that therefore, marriage and adoption are sufficient methods of becoming a parent.[56] Additionally, the existing bright-line rules—requiring marriage before the birth, adoption, or biological relation in order to have automatic parental rights—are easy to measure and to adjudicate.[57] The bright lines ensure clarity in contentious disputes to determine who is a parent or is a member of a family.[58]

However, this bright-line rule ignores a person's intent to become a parent, limits a person's choice of co-parent, and unnecessarily creates a second-class group of parents.[59] In this generation, more couples, gay and straight alike, are choosing to forgo marriage and to have children outside of marriage. The United States Census Bureau reports that the unmarried partner population "grew 41 percent between 2000 and 2010, four times as fast as the overall household population."[60] "Opposite-sex unmarried partner households increased by 40 percent" in the same time period, and "same-sex households increased by 80

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55. *See* Grossman, *supra* note 17, at 700 (comparing lesbian co-parents and unmarried fathers, arguing marriage is an insufficient source of parenthood); Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 662 (2012) ("[C]ategorically 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.").

56. This is what the court found in *Debra H.*, 930 N.E.2d at 194 ("*Alison D*., coupled with the right of second-parent adoption secured by *Jacob*, furnishes the biological and adoptive parents of children—and, importantly, those children themselves—with a simple and understandable rule by which to guide their relationships and order their lives."). For discussions finding this unpersuasive, see Forman, *supra* note 9, at 45–46; Appleton, *supra* note 20, at 265, 292–93 (discussing how it is harmful to treat women differently from men because of differences in biological capacity, namely, pregnancy, and stating that "different treatment marginalizes male couples and sends a signal that nurturing and parenting do not come 'naturally' to gay men . . . reinforcing negative stereotypes").

57. *See, e.g.*, *Debra H.*, 930 N.E.2d at 191–92 (2010) ("*Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of disruptive battles over parentage as a prelude to further potential combat over custody and visitation.") (citations omitted) (internal quotation marks omitted). Note, by nature, the only cases that appear in court and will require the legal rule are those that are contested.

58. *Id.*; *see also* Brief for Sanctuary for Families, *supra* note 6, at 7.

59. *See* Grossman, *supra* note 17, at 672–73.

60. Atkinson, *supra* note 9, at 1 (citing U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, C2010BR-14 3 (Apr. 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf [https://perma.cc/7BQK-KVQ8]).

percent."[61] As of 2015, almost twenty-one million unmarried couples have children.[62] The Supreme Court has determined as a matter of law that unmarried couples and their children should not be treated differently from married ones,[63] nor should gay couples be treated differently from straight ones.[64] Family law needs to adapt to protect families headed by gay individuals and gay couples. The law should protect people who choose to become parents together, regardless of sex, gender, sexual orientation, or marital status.

The third party and legal stranger frameworks are misplaced in this context.[65] Alison D. was not a third party, brought in by her partner, Virginia, to assist with raising the child, as a friend assists a friend. Virginia and Alison planned to have a child together and to parent that child jointly. The National Center for Lesbian Rights stated it succinctly: "[A] same-sex partner who plans the birth or adoption of a child with his or her partner is a parent—not a stepparent. Parents should not have to adopt their own children . . . ."[66] Alison was the co-parent with Virginia of the child in question. Thus, this is not a "third party rights" issue but rather a parental rights issue.

Unmarried gay parents—and unmarried straight parents—should be assured equal treatment under an equal default rule.[67] The concern is how to expand the legal definition of "parent" to ensure that these people—who are parents—are included, without undermining existing parental rights.

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61. Atkinson, *supra* note 9, at 1 (citing U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, C2010BR-14 3 (Apr. 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf [https://perma.cc/7BQK-KVQ8]).

62. U.S. CENSUS BUREAU, SELECTED POPULATION PROFILE IN THE UNITED STATES, 2015 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (S0201), HOUSEHOLD BY TYPE, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_3YR_S0201&prodType=table [https://perma.cc/PS57-6ZM2?type=image]; *see also* U.S. CENSUS BUREAU, SAME-SEX COUPLES: CHARACTERISTICS TABLES: 2015, *available at* https://www.census.gov/topics/families/same-sex-couples.html [https://perma.cc/43BD-2KGQ] (comparing statistics of married opposite-sex, unmarried opposite-sex, total same-sex, male-male, and female-female couple characteristics, e.g. children, household income, race, age).

63. *See supra* text accompanying notes 41–43.

64. *See, e.g.*, Obergefell v. Hodges, 575 U.S. ___, 135 S. Ct. 2584, 2600 (2015); United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675, 2695 (2013) (discussing the unconstitutional harm that the Defense of Marriage Act had on families headed by gay couples, spouses, and individuals whose marriage was recognized by their home state but not by the federal government). *See* Alison D. v. Virginia M., 77 572 N.E.2d 27, 30–33 (N.Y. 1991) (Kaye, J., dissenting); Debra H. v. Janice R., 930 N.E.3d 184, 201–05 (2010) (Ciparick, J., concurring) (Smith, J., concurring); Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016) (majority).

65. *See supra* text accompanying notes 8–9 for definitions of "third party" and "legal stranger."

66. NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS, *supra* note 31, at 1.

67. Polikoff, *supra* note 16, at 234; Ball, *supra* note 55, at 662; Grossman, *supra* note 17, at 671.

III.
THE CURRENT STATE OF PARENTAL RIGHTS

A. The Fundamental Right to Parent—the Constitutional Basis of Expansive, Exclusive Parental Rights

Parents' rights to retain custody of their children and to make choices regarding their care are expansive, exclusive, and constitutionally protected. By law, parents' rights can only be overcome in extreme circumstances. Thus, who is considered a legal parent—or has standing to argue they should be—is of paramount importance.

Courts have consistently protected "the parent's fundamental constitutional right to make decisions concerning the rearing of that child."[68] The Supreme Court has found that parents have the right to decide how to educate their children,[69] what language to teach their children,[70] and with whom their children can associate.[71] The Court has protected those rights against the government's interest in having its citizens receive a standard, minimum education.[72] Even as it found, for the first time, that parental authority is not absolute and can be restricted by the government in order to protect a child's welfare, the Court stated, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[73]

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68. *Debra H.*, 930 N.E.2d at 193 (citing Troxel v. Granville, 530 U.S. 57, 69–70 (2000)) (citations omitted) (internal quotation marks omitted). "Custody" rights are decision-making rights about how to raise the child (education, religion, location, etc.); "visitation" rights affect the right to decide with whom your child associates. *See Alison D.*, 572 N.E.2d at 32 (Kaye, J., dissenting) (citing Ronald FF. v. Cindy GG., 511 N.E.2d 75, 77 (N.Y. 1987)). Both are crucial parental rights.

69. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding, in case brought by a private school, that state cannot require public school attendance, rather than attendance at an institution of the parents' choice); Wisconsin v. Yoder, 406 U.S. 205, 236 (1971) (holding the Free Exercise Clause protected Amish and Mennonite parents' choices to remove children from school prior to the state's compulsory school age).

70. Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding the state cannot obstruct parents' right to have their children learn the German language).

71. *Troxel*, 530 U.S. at 72–73.

72. *Yoder*, 406 U.S. at 221–26 (Wisconsin argued that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence," but the Court found that Amish education after eighth grade—when Amish parents were removing their children from school—was sufficient even if, and perhaps because of, its difference from "usual" or "formal" American education); *Pierce v. Soc'y of Sisters*, 268 U.S. at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

73. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding a mother in violation of laws banning child labor where she brought her nine-year-old daughter with her to preach in the streets, distribute literature, and obtain voluntary contributions). This case is also noteworthy for its decision that child labor bans are constitutional even against religious freedom arguments. *Prince*

Similarly, the New York Court of Appeals has established that parents have exclusive decision-making power for their children until or unless the parent is deemed unfit or other extraordinary circumstances are found.[74] Parents have the right to care and custody of their child against the interests of nonparents, "even where the nonparent has enjoyed a close relationship with the child and exercised some control over the child with the parents' consent."[75]

Bennett v. Jeffreys defines the term "extraordinary circumstances," holding that "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances."[76] "Absent extraordinary circumstances, narrowly categorized, it is not within the power of a court . . . to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition."[77] Similarly, "[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."[78] Only after a parent is found unfit may a court reach the second question of who may care for the child, based on the best interests of the child.[79]

Additionally, parental rights in the United States traditionally have been limited to two people.[80] For example, if two parents of a child divorce and each remarries, typically, their new partners have no parental rights to the child of the first marriage.[81] Even though the stepparent may have a parent-like interest in that child, or exert parent-like power over the child when that child is in her

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remains good law; however, the Court reaffirmed its commitment to parents' freedom of religious choice for their children's lives and educations in *Yoder* in 1971.

74. *See* Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976).

75. *See* Palmatier v. Dane, 948 N.Y.S.2d 181, 182 (App. Div. 3d Dep't 2012). *See also*, White v. Wilcox, 973 N.Y.S.2d 498, 499 (App. Div. 4th Dep't 2013).

76. *Bennett*, 356 N.E.2d at 280.

77. *Id.* at 281.

78. Ronald FF. v. Cindy GG., 511 N.E.2d 75, 77 (N.Y. 1987) (citations omitted).

79. *Bennett*, 356 N.E.2d at 283 (noting that where change in custody is involuntary for the parents, the "best interests" test is "met only with great difficulty").

80. *See* Alison D. v. Virginia M., 572 N.E.2d 27, 29–30 (1991) (stating that the term "either parent" in Domestic Relations Law § 70, which defines how parents may bring custody proceedings, refers only to two people, a "mother" and a "father"); *In re* M.C., 123 Cal. Rptr. 3d 856, 877 (Ct. App. 2011) ("M.C. does have three presumed parents . . . . But the juvenile court must . . . reconcile the competing presumptions to determine which of them are founded on the weightier considerations of policy and logic."); Appleton, *supra* note 20, at 264 n.207 (noting that in California in 2006, the court "makes clear that the law prefers two parents but, for now, rejects three") (*but see* CAL. FAM. CODE § 3040 (West 2014) (recognizing a child could have more than two parents)); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1264 (noting the "common assumption that a child has only two parents" and reasons that expectation might be rolled back to reflect modern families); Le Trinh, *Where Can a Child Have More Than Two Parents?*, FINDLAW (May 11, 2015), http://blogs.findlaw.com/law_and_life/2015/05/where-can-a-child-have-more-than-two-parents.html [https://perma.cc/GYZ7-MXTC].

81. *See, e.g.*, N.Y. DOM. REL. L. § 70–74; *but see* CAL. FAM. CODE § 3040 (West 2014) ("Order of preference; child with more than two parents") (creating basis to recognize more than two parents, and how to decide between them).

home, that daily interaction does not translate into legal rights for the stepparent.[82] The stepparent typically can adopt only by replacing one of the two legally recognized parents; if the stepparent does not adopt, she may have no rights to the child.[83]

Therefore, parental rights are exclusive, expansive, and supersede the interests of nonparents in a child. Giving parental rights to one person inherently infringes on the other parent's rights. In the situation presented in both *Alison D.* and *Debra H.*, where the child would have a single mother absent additional intervention, that single mother's parental rights are diminished by granting her ex-partner and alleged co-parent parental rights.[84] When a court awards visitation or custody to an additional person or the state intervenes in the family's life, it necessarily impairs the existing parent's right to custody and control.[85]

Against this backdrop, it is crucial to carefully define any expansion of who qualifies as a "parent," and has standing to challenge a fit parent's rights.

B. When Parents' Rights Are Challenged

Parents' rights are challenged in court in three situations: when a third party seeks visitation with the child, when the state intervenes because of allegations of abuse or neglect, or when adults have a contentious breakup (as in *Alison D.*, *Debra H.*, and *Brooke S.B.*).

Regarding third party rights, the courts have addressed the questions of whether grandparents,[86] foster parents,[87] or "adoptive" parents who adopted in contravention of state law[88] can argue that they are comparable to parents and

82. Atkinson, *supra* note 9, at 7–8 (discussing stepparent rights, including the few states that do permit stepparents to seek visitation after a breakup).

83. Trinh, *supra* note 80.

84. Note, in past years, courts have found that it is better to have two parents than one, and that was an argument in favor of legalizing gay marriage in *Obergefell*. *See, e.g.*, *supra* note 27 and accompanying text. However, the law also protects single parents' choice to remain single parents. Furthermore, the law does not preference any of the three ways to establish parentage for two straight parents and it should not for gay parents. *See supra* Part II.A. The law on who should have status as a parent should be based on an adult's solo decision to become a parent or two adults' joint decision to become parents together.

85. *See generally* Ronald FF. v. Cindy GG., 511 N.E.2d 75, 77 (N.Y. 1987); Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976).

86. Troxel v. Granville, 530 U.S. 57, 63, 68–69, 72–73 (2000) (finding that grandparents did not have standing to seek visitation against wishes of fit parent and that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made").

87. Smith v. Organization of Foster Families for Equality & Reform ("OFFER"), 431 U.S. 816, 847, 855 (1977) (procedure afforded to foster parents prior to the removal of a foster child—which was less than what was required to remove a child from a legally recognized parent—was constitutionally sufficient).

88. *In re* Clausen, 502 N.W.2d 649 (Mich. 1993) ("Baby Jessica" case) (where woman signed adoption agreement in contravention of state's mandatory seventy-two-hour "cooling off" period and without biological father's knowledge, and baby remained with "adoptive" parents through

have parental standing to seek rights to a child. In each case, the answer has been no.[89]

If a parent is suspected of being unfit or endangering the child, the state may interfere with that parent's rights.[90] When the state receives a call on its child abuse hotline or a report from a mandatory reporter alleging child abuse or neglect, the state must investigate the allegations and decide whether to interfere with the parent's typically exclusive rights and remove the child from her home, remove a parent from the home, or require the family to undergo supervision, classes, or other services to support a safe and nurturing environment for the child.[91] Only after a parent is found unfit may a court reach the second question of who should care for the child.[92]

Lastly, a court may be asked to adjudicate custody and visitation rights between two fit parents who cannot decide the arrangement amongst themselves.[93]

Each of these situations offers an opportunity to challenge a parent's expansive and exclusive rights to her child. The courts' involvement has been limited to deciding whether a parent is fit or adjudicating disputes between fit

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two-year lawsuit, the biological parents prevailed because the adoption was not legally sufficient under Iowa law). The decision was in line with the Supreme Court's respect for strong parental rights and with state protections of those rights, like the seventy-two-hour cooling off period. For discussion of whether this was the correct outcome, *see* GUGGENHEIM, *supra* note 8, at 50 (citing Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 56; Nancy Gibbs, *In Whose Best Interest?*, TIME, Jul. 19, 1993, at 44; Don Terry, *Tug-of-War Ends as Child Is Moved*, N.Y. TIMES, Aug. 3, 1993, at A13); Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2014); Gregory A. Kelson, *In the Best Interest of the Child*, 33 J. MARSHALL L. REV. 353 (2000); David D. Meyer, *Family Ties*, 41 ARIZ. L. REV. 753 (1999); Mariel L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict between Children's and Parents' Rights*, 40 WAYNE L. REV. 285 (1994); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995). The tensions in the Baby Jessica case highlight just how crucial it is to determine at the outset who has rights as a parent against any other party, because parental rights are so powerful.

89. *See supra* notes 86–88. *See also* Debra H. v. Janice R., 930 N.E.2d 184, 189 (N.Y. 2010) (citing Alison D. v. Virginia M., 572 N.E.2d 27, 29 (1991)) ("Citing Domestic Relations Law §§ 71 and 72 (permitting siblings and grandparents respectively to petition for visitation), we emphasized that '[w]here the Legislature deemed it appropriate, it gave other categories of persons standing to seek visitation and it gave the courts the power to determine whether an award of visitation would be in the child's best interests.' Thus, we refused to 'read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child.'").

90. For discussion of the limits of this doctrine, *see* GUGGENHEIM, *supra* note 8, at 17–49, 63–74.

91. *See A Parent's Guide to a Child Abuse Investigation*, NYC ADMIN. OF CHILDREN'S SERVICES, http://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page [https://perma.cc/5JDB-VU65]; *Child Protective Proceedings*, NEW YORK CITY FAMILY COURT, https://www.nycourts.gov/courts/nyc/family/faqs_abusedchildren.shtml [https://perma.cc/ZE3H-3DQX].

92. *See* Bennett v. Jeffreys, 356 N.E.2d 277, 283 (N.Y. 1976) (noting that where change in custody is involuntary for the parents, the court applies a stringent "best interests" analysis).

93. *See supra* Section II.C.

parents. Expanding courts' inquiry regarding who has standing to bring these claims creates more opportunities for both individuals and courts to weaken the strong, constitutional protection of parental rights.[94]

C. Parental Rights in Practice—The Reality for Poor Parents and Parents of Color and the Risks of Expanding the Definition of "Parent"

There are two major concerns about expanding the definition of "parent." First, a new rule could increase the risk of replacing parent choice with court judgment, with the attendant institutional bias, political pressure, and concerns of undermining parents' constitutional right to make choices for their children and families. Second, expanding the definition of "parent" could strengthen the ability of abusive ex-partners to use family court as a way to harass or abuse parents and children.

1. Court Judgment or Parent Choice

Child welfare or "dependency" cases occur when the state believes a child is in danger of abuse or neglect.[95] The state may offer or impose mandatory services and may remove a child from her parents' custody if it does not believe the risk can be remedied with the child in the home.[96] Statistically, this happens to black,[97] Latino,[98] and American Indian[99] families in disproportionate

94. *See, e.g.*, *In re* Clausen, 502 N.W.2d 649 (Mich. 1993); Brooke S.B. v. Elizabeth A.C.C., 61 NE.3d 488 (N.Y. 2016); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

95. *See Will ACS Take My Child?*, NYC ADMIN. FOR CHILDREN'S SERVICES, http://www1.nyc.gov/site/acs/child-welfare/will-acs-take-my-child.page [https://perma.cc/6A39-HL3C]; N.Y. FAM. CT. ACT, art. 10 ("Child Protective Proceedings") (McKinney 2011) (granting family court jurisdiction over proceedings alleging the abuse or neglect of a child).

96. *See supra* note 95.

97. Nationwide, black children represent twenty-nine percent of the foster care population, but only fourteen percent of the United States child population. *Facts about Foster Care: NYC, the U.S., & Outcomes*, CENTER FOR FAMILY REPRESENTATION, https://www.cfrny.org/news-blog/foster-care-facts/ [https://perma.cc/26P3-DV5A] (citing Casey Family Programs' research). In San Francisco County, over fifty percent of children in foster care are black, while the population of the city is less than six percent black. *Number of Children in Foster Care, by Race/Ethnicity, San Francisco*, KIDSDATA.ORG: A PROGRAM OF THE LUCILE PACKARD FOUNDATION FOR CHILDREN'S HEALTH, http://www.kidsdata.org/topic/22/fostercare-race/table#fmt=19&loc=2,127,347,1763,331,348,336,171,321,345,357,332,324,369,358,362,360,337,327,364,356,217,353,328,354,323,352,320,339,334,365,343,330,367,344,355,366,368,265,349,361,4,273,59,370,326,333,322,341,338,350,342,329,325,359,351,363,340,335&tf=79&ch=7,11,8,10,9,44 [https://perma.cc/7RK6-C52B]; U.S. CENSUS BUREAU, QUICKFACTS, SAN FRANCISCO COUNTY, http://www.census.gov/quickfacts/table/PST045215/06075,06001 [https://perma.cc/C8BZ-VHYK]. New York City is 25.5 percent African American and its foster care population was 54.9 percent black in 2014. CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK, Keeping Track Online: The Status of New York City Children, Foster Care Population (2014), http://data.cccnewyork.org/data/table/28/foster-care-population#1197/1338/20/a/a [https://perma.cc/MP2R-4Q46]; U.S. CENSUS BUREAU, QUICKFACTS, NEW YORK CITY, https://www.census.gov/quickfacts/table/PST045215/3651000,06075,06001 [https://perma.cc/3BEQ-PNLV]. State-wide, African Americans make up five percent of the population and forty-five percent of the foster care population. Duncan Lindsey, *New York*, CHILD WELFARE, http://www.childwelfare.com/new_york.htm [https://perma.cc/4DJL-ASLQ].

numbers, and almost exclusively to poor families.[100] In some of the poorest neighborhoods in New York City's five boroughs—Brownsville, Brooklyn and parts of the South Bronx—more than thirty percent of children under the age of eighteen were seen in an investigation at least once over a five-year period.[101]

More calls are made reporting alleged abuse of poor children and children of color, and in these cases investigators are more likely to find that the allegations warrant removal.[102] Many of the reported issues would not be considered dangerous or red flags if they occurred within a wealthier or a white family.[103] A range of authors have discussed whether this is due to reporting bias, failure to

98. In New York state, Latinos make up six percent of the population and sixteen percent of the foster care population. Lindsey, *New York*, *supra* note 97.

99. I use the term, "American Indian," to include American Indian and Native American children. *See* STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES, at xi–xiii, 1 n.* (4th ed., Oxford Univ. Press 2012) (1983) (Pevar and John Echohawk, Executive Director of the Native American Rights Fund, both preference the use of "Indian" or "American Indian" over "Native American," and Pevar notes, "many Indians use the terms *Indian* and *Native American* interchangeably, but there seems to be a preference for the word *Indian*."). In South Dakota, thirteen percent of the population under the age of eighteen is Native American or American Indian, and those children make up sixty-four percent of the children in foster care. Lindsey, *South Dakota*, *supra* note 97, http://www.childwelfare.com/south_dakota.htm [https://perma.cc/W28G-MPP8]. *See generally* PEVAR, at 291–306.

100. *See* GUGGENHEIM & SANKARAN, *supra* note 11, xix-xxiv.

101. Internal Analysis by Administration for Children's Services, Div. of Policy, Planning, & Measurement Data (2010–2014) (on file with author). *See generally* Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023 (2003); Jacobus tenBroek, *California's Dual System of Family Law: Its Origins, Development and Present Status (pt. I)*, 16 STAN. L. REV. 257 (1964); *(pt. II)*, 16 STAN. L. REV. 900 (1964); *(pt. III)*, 17 STAN. L. REV. 614 (1965).

102. *See* Marsha B. Freeman, *Lions Among Us: How Our Child Protective Agencies Harm the Children and Destroy the Families They Aim to Help*, 8 J.L. & FAM. STUD. 39, 41 & n.17 (2006); Bullock, *supra* note 101, at 1024 (citing Douglas J. Besharov, *Child Abuse Realities: Over-reporting and Poverty*, 8 VA. J. SOC. POL'Y & L. 165, 183–84 (2000)) (suggesting that the child welfare system is inappropriately involved in the surveillance of families who receive public assistance); DANA MACK, THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY 67 (1997) (arguing that poor children disproportionately suffer impositions of child welfare because families on public assistance are four times more likely than others to be investigated and have their children removed from the family home on the basis of child maltreatment).

103. Wendy G. Lane, David M. Rubin, Ragin Monteith & Cindy W. Christian, *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. AMER. MED. ASS'N 13, 1603–09 (2002) ("Minority children . . . with accidental injuries were more than 3 times more likely than their white counterparts to be reported for suspected abuse" and "more than 5 times more likely to have a skeletal survey obtained than were their white counterparts.") (a skeletal survey is a x-ray survey of all of the bones in the body); *see also* Michelle Goldberg, *Has Child Protective Services Gone Too Far?*, THE NATION (Sept. 30, 2015), https://www.thenation.com/article/has-child-protective-services-gone-too-far/ [https://perma.cc/84DM- WDFR] (arguing that if a child goes to the hospital with a broken collarbone, a wealthy, white father is unlikely to be questioned but Child Protective Services will likely be called for a poor black parent).

recognize cultural difference, improper imposition of the court's values on parents' choice, or actual differential incidence of abuse and neglect.[104]

Families of color are statistically more likely to be poor and poverty is often conflated with neglect.[105] Poverty is detrimental to a child's development and well-being. However, removing children simply because of their families' poverty—rather than addressing the underlying problem—infringes on indigent parents' right to raise their children and places children in the foster care system, where many children are both neglected and abused.[106] Even authors who shade toward removing children from the effects of poverty note that removing a child ignores the crucial role that continuity with caring adults plays in a child's psychological development.[107] Disruptions "may not only cause 'grief, terror, and feelings of abandonment' but may also 'compromise' a child's very 'capacity to form secure attachments' and lead to other serious problems."[108] Furthermore, "the trauma may be magnified if the child is actually suffering abuse or neglect in the home,"[109] and is increased "when reunification with loved ones does not occur quickly."[110]

While constitutional law and scientific studies agree that a child should stay in the home if possible and receive necessary supports there, child protective

104. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (Civitas Books 2002); Bullock, *supra* note 101, at 1040–44; Freeman, *supra* note 102, at 41 n.17 (listing relevant sources).

105. Bullock, *supra* note 101, at 1041–44.

106. *Id.* at 1041.

107. American Academy of Pediatrics, Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1145–46 (2000) ("[E]motional and cognitive disruptions in the early lives of children have the potential to impair brain development . . . . Disruption . . . for even 1 day may be stressful . . . . Any intervention that separates a child from the primary caregiver who provides psychological support should be cautiously considered and treated as a matter of urgency and profound importance."); Mark D. Simms, Howard Dubowitz & Moira A. Szilagyi, *Health Care Needs of Children in the Foster Care System*, 106 PEDIATRICS 909, 912 (2000) ("Removal from one's family, even an abusive one, is generally traumatic for children.").

108. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 458 (2003) (quoting Ellen L. Bassuk, Linda F. Weinreb, Ree Dawson, Jennifer N. Perloff & John C. Buckner, *Determinants of Behavior in Homeless and Low-Income Housed Preschool Children*, 100 PEDIATRICS 92, 92–100 (1997)).

109. *Id.* at 458 n.9 (citing Nicholson v. Williams, 203 F. Supp. 2d 153, 199 (E.D.N.Y. 2002) (quoting expert testimony that removal in such circumstances may be "tantamount to pouring salt on an open wound")).

110. *Id.* at 458 & n.10 (citing JOSEPH GOLDSTEIN, ALBERT SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 41 (1996)) ("[C]hildren have a built-in time sense based on the urgency of their instinctual and emotional needs . . . . Emotionally and intellectually, an infant or toddler cannot stretch her waiting more than a few days without feeling overwhelmed by the absence of her parents . . . . For children under the age of five years, an absence of parents for more than two months is intolerable. For the younger school-age child an absence of six months or more may be similarly experienced.")).

services ("CPS") agencies face internal bias and external political pressure that encourage using removals preemptively rather than as a drastic remedy.[111]

When a child dies, that is a tragedy. When a child dies on a child protective services agency's watch, that is seen as an absolute failure of the agency and is typically highly publicized.[112] Those at fault are publicly condemned, morally chastised, and may be fired or forced to resign.[113]

This reaction feeds a bias towards removing children preemptively[114] and disregarding the real and lasting harm that removals have on children and their development into well-adjusted adults.[115] Harm by removal is dispersed, less publicized, and less conducive to publicity and response. But the harm is quite

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111. Sarah H. Ramsey, *Guest Editorial Notes*, 41 FAM. CT. REV. 428, 429 (2003) ("[O]ne cause for unnecessary removals is . . . fear of liability, discipline, and adverse publicity that may accompany a failure to intervene when needed.") (describing Paul Chill's arguments, *supra* note 108); Freeman, *supra* note 102, at 40 ("[Florida's Department of Children and Families is] infamous for the number of children hurt or even killed by its caretakers, to say nothing of those that agency simply cannot keep track of . . . . [T]he agency is so anxious, or as some would say overzealous, to show its aggressive 'protection' of children it apparently seizes children from good parents, and then fights their return.").

112. *See, e.g.*, Editorial, *The City Could Have Saved This 6-Year-Old*, N.Y. TIMES, Dec. 16, 2016, http://www.nytimes.com/2016/12/16/opinion/the-city-could-have-saved-this-6-year-old.html; *Neighbors saw repeated abuse of Zymere Perkins, 6, before he died*, N.Y. DAILY NEWS, Sept. 28, 2016, http://www.nydailynews.com/new-york/manhattan/neighbors-witnessed-warning-signs-long-zymere-perkins-died-article-1.2810670; Yoav Gonen, Kirstan Conley & Danika Fears, *The gruesome details of Zymere Perkins' abuse—and how ACS failed him*, N.Y. POST, Dec. 14, 2016, http://nypost.com/2016/12/14/the-gruesome-details-of-zymere-perkins-abuse-and-how-acs-failed-him/ [https://perma.cc/D37N-JYV9]. The New York Times alone published ten articles on Zymere Perkin's death and the fallout in the three months following. For other case examples, see Freeman, *supra* note 102, at 41–50.

113. *See* Nikita Stewart, *New York City's Child Welfare Commissioner, Gladys Carrión, Resigns*, N.Y. TIMES, Dec. 12, 2016, https://www.nytimes.com/2016/12/12/nyregion/new-york-citys-child-welfare-commissioner-gladys-carrion-resigns.html?_r=0 [https://perma.cc/T8WC-WHS4]; Nikita Stewart, *State Orders Monitor for New York City's Child Welfare Agency*, N.Y. TIMES, Dec. 13, 2016, http://www.nytimes.com/2016/12/13/nyregion/child-welfare-agency-monitor-zymere-perkins.html [https://perma.cc/A54H-FXEN]; *3 ACS Employees Fired, Independent Monitor Ordered After Probe of Zymere Perkins Case*, CBS N.Y., Dec. 13, 2016, http://newyork.cbslocal.com/2016/12/13/zymere-perkins-acs-report/ [https://perma.cc/89EW-JK9Q].

114. Zymere Perkins' case led to increased filings New York City-wide. *See* The Brian Lehrer Show, *The Debate About Taking Children out of Allegedly Abusive Homes*, WNYC (Dec. 22, 2016), at 1:18–1:28, http://www.wnyc.org/story/debate-about-taking-children-out-allegedly-abusive-homes [https://perma.cc/G99A-CJMC] (discussing the effect of Zymere Perkins' death on child welfare case filings in New York City with Lauren Shapiro, Director, Family Defense Practice at Brooklyn Defender Services); *ACS Worker Caseloads Increase Amid High-Profile Child Deaths*, NBC NEW YORK (Feb. 17, 2017, 9:30 PM), http://www.nbcnewyork.com/on-air/as-seen-on/ACS-Worker-Caseloads-Increase-Amid-High-Profile-Child-Deaths_New-York-414124773.html [https://perma.cc/NPV6-B6XW]; Nora McCarthy, *Letter to the Editor, The Tragic Death of Zymere Perkins*, N.Y. TIMES, Dec. 21, 2016, https://www.nytimes.com/2016/12/21/opinion/the-tragic-death-of-zymere-perkins.html?_r=0 (director of Rise, a nonprofit by and for parents to help parents speak about their experience with the child welfare system, noting that in her experience "[t]here has already been an increase in removals").

115. *See supra* notes 106–110 and accompanying text; The Brian Lehrer Show, *The Debate About Taking Children out of Allegedly Abusive Homes*, WNYC (Dec. 22, 2016), *supra* note 114, at 4:00–7:08, 11:28–12:00.

widespread. According to the U.S. Department of Health and Human Services, more than 100,000 children who were removed in 2001—more than one in three—"were later found not to have been maltreated at all";[116] in 2014, the number was 94,000.[117] Commentators believe this statistic is low because the "definitions of maltreatment are extremely broad and substantiation standards low . . . [so] a significant number of children who are found maltreated" likely could receive some intervention short of removal but are nonetheless removed.[118]

Removals from fit parents violate their rights and the family's constitutional interest in family integrity.[119] Emergency removals—without prior notice or hearing—must be done "sparingly," only when there is "imminent danger to a children's life or health,"[120] "immediate physical danger,"[121] or the child's "life or limb is in immediate jeopardy."[122]

Expanding the court's role from deciding whether a parent is fit to care for her child and settling disputes between fit parents to also deciding who is a parent increases the risk that courts will extend these biases. This expansion of judicial power is most likely to harm poor, minority families caught in the system.[123]

2. Individual Abuse

The second threat to parents' rights comes from individuals, including ex-partners, who seek to harass parents using the child welfare system or the family courts.

Calls to the child abuse hotline can be "revenge" reports. In poor neighborhoods, allegations of child abuse and neglect are commonly used "to

116. Chill, *supra* note 108, at 458 (citing U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMIN. ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, NAT. CHILD ABUSE AND NEGLECT DATA SYS., 12 YEARS OF REPORTING CHILD MALTREATMENT 68, Table 6-5, (2001) http://archive.acf.hhs.gov/programs/cb /pubs/cm01/cm01.pdf [https://perma.cc/4XAL-FDLT]).

117. U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMIN. ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, NAT. CHILD ABUSE AND NEGLECT DATA SYS., CHILD MALTREATMENT 220, 78 (2014), https://www.acf.hhs.gov/sites/default/files/cb/cm 2014.pdf#page=31 [https://perma .cc/D3E8-VPAE].

118. *See* Chill, *supra* note 108, at 458.

119. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Parham v. J. R., 442 U.S. 584, 602 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wis. v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Ill., 405 U.S. 645, 651 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Neb., 262 U.S. 390, 399 (1923). *But see* Prince v. Mass., 321 U.S. 158, 167–70 (1944) (finding state law prohibiting children from selling and adults from providing magazines to be sold in a public place does not infringe on parents' right to teach a child their religion, where religion included child proselytizing and handing out pamphlets in public).

120. Chill, *supra* note 108, at 458.

121. P.C. v. Conn. Dep't of Children & Families, 662 F. Supp. 2d 218, 230 (D. Conn. 2009).

122. Tenenbaum v. Williams, 193 F.3d 581, 605 (2d Cir. 1999).

123. For further discussion, *see infra* Part IV.D "Standing Based on the Best Interests of the Child."

settle a grudge."[124] This might be a landlord who calls in child neglect complaints against a tenant whose housing support checks have not come through, a neighbor who reports another neighbor for neglect after a fight over a missing cellphone escalated, or a fellow shelter resident who calls in an allegation of abuse because the baby was keeping her up at night.[125] Middle and upper class people would not think to report a neighbor as a weapon against them because CPS investigations are not a part of their daily reality. But in poor neighborhoods, people know how damaging and disruptive a call can be, and how little basis they need to get an investigation started.[126] A call alleging domestic violence between shelter residents requires the housing authority to move the alleged victim, for safety reasons; if that person has children, that might mean the children have to change schools overnight. A child abuse allegation might lead to a job suspension or termination, which might lead a family to lose their housing, which leads to homelessness. Even if a call does not cause this level of disruptive spiraling, it disrupts a family's feeling of security,[127] which is harmful to the children's psychological development.[128]

Using the threat of a child welfare case as a weapon is especially concerning in the domestic violence context.[129] It is common for an abuser to use the threat of CPS to keep the victim from leaving the abuser. "When they realize just how important the children are to the victim, that threat—that 'I'll call [the Administration for Children's Services] and tell them you're an unfit mother'—holds a lot of weight."[130] This type of abuse compounds the trauma to the adult

124. Rachel Blustain, *False Abuse Reports Trouble Child Welfare Advocates*, CITY LIMITS, Oct. 4, 2013, http://citylimits.org/2013/10/04/false-abuse-reports-trouble-child-welfare-advocates/ [https://perma.cc/L66J-CQQY].

125. *Id.*

126. *Id.*

127. *Id.* ("[T]he fear that such investigations arouse within a whole community . . . has the most widespread impact. For people who are already vulnerable—feeling powerless because of poverty and past trauma—the realization that anyone can call in a report against them at any time can be particularly devastating.").

128. *See supra* notes 107–110 and accompanying text.

129. H. LIEN BRAGG, U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE ON CHILD ABUSE AND NEGLECT, CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE 25 (2003) ("Perpetrators commonly make threats to find victims, inflict harm, or kill them if they end the relationship . . . . It is also common for abusers to seek or threaten to seek sole custody, make child abuse allegations, or kidnap the children."); National Council of Juvenile and Family Court Judges, *Newsletter*, SYNERGY, Vol. 12 No. 8 (Winter 2008) ("Domestic violence service providers have long known that most women stay in abusive situations for the sake of the children and finally leave for the sake of the children."); *see also* Brief for Sanctuary for Families, *supra* note 6, at 24–30.

130. Blustain, *supra* note 124 (quoting Liz Roberts, Chief Program Officer for Safe Horizon, the largest provider of services to survivors of domestic violence in the country, and a ten-year veteran of ACS); *see also* Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053, 1055 (2011) ("[A]busive fathers are more than twice as likely to seek sole custody of their children as are nonviolent fathers."); Leora N. Rosen & Chris S. O'Sullivan, *Outcomes of Custody and Visitation Petitions When Fathers Are Restrained by Protection Orders:*

victim and to the children involved.[131] These threats are especially frightening because statistically abusers often win sole or joint custody of children, thereby forcing the victim to continue to interact with the abuser.[132]

Expanding the definition of parental standing could allow more abusers to gain access to the judicial process and exert even more leverage over their victims by arguing that they have status as parents.[133] Furthermore, "[b]ecause domestic violence affects same-sex and different-sex couples at similar rates, the unintended consequences of granting abusive former partners a new legal weapon will hurt LGBT parents just as it will non-LGBT parents."[134] On the flip side, a biological or legally recognized parent may attempt to withhold parental rights from her ex-partner—even when she originally intended to jointly parent the child—in order to exert power and control over the non-recognized parent.[135] The wealthier party may bring a case in order to pressure the ex-partner with the financial burden of defending a legal case.[136] Any rule must protect both of these groups—gay parents seeking legal recognition and poor, minority parents seeking to maintain their rights and relationships with their children.[137]

IV.
IN PURSUIT OF AN EQUAL RIGHT TO PARENT—HOW CURRENT AND PROPOSED RULES SCORE ON EQUAL TREATMENT FOR GAY COUPLES AND PROTECTION OF EXISTING PARENTS' RIGHTS

"We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and

The Case of New York Family Courts, 11 VIOLENCE AGAINST WOMEN 1054, 1069 (2005) (discussing how data might reflect the strong anecdotal evidence that abusive fathers use the threat of loss of child custody as a way to exert control over their victims, to intimidate the mother or punish her for leaving the relationship or securing an order of protection, or to harass the mothers and keep them coming back to court).

131. Przekop, *supra* note 130, at 1080–87 (discussing emotional trauma, financial impacts, risk of future abuse, and effects on cognitive and psychological development).

132. Przekop, *supra* note 130, at 1060 (referencing a study in which thirty-eight percent of fathers who were reported to have abused both the mother and the child or children were awarded sole or joint custody); Brief for Sanctuary for Families, *supra* note 6, at 24–30; *see* Blustain, *supra* note 124.

133. *See* Brief for Sanctuary for Families, *supra* note 6, at 23 ("Adopting a standard that too widely opens the gates to parental standing would place a powerful weapon in the hands of domestic violence perpetrators . . . ."); *id.* at 22–30 (specifically challenging the use of a functional parent standard); *see* discussion *infra* Part IV.A.

134. Brief for Sanctuary for Families, *supra* note 6, at 23 (citations omitted).

135. Brief for The National Center for Lesbian Rights, The American Civil Liberties Union, The New York Civil Liberties Union, and The New York City Gay & Lesbian Anti-Violence Project as Amici Curiae Supporting Petitioner-Respondent at 6, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

136. For further discussion of this phenomenon, *see* discussion of Gunn v. Hamilton, *infra* Part V.C and note 293.

137. As discussed, there is significant overlap between these groups. By considering them simultaneously, I seek to highlight the apparent conflict between their interests and to consider solutions that respect both.

rapidly changing. In such a context, restraint is appropriate on the part of courts called upon to adjudicate whether a particular procedural scheme is adequate under the Constitution."[138]

A new rule must remedy the current unequal protections for gay and lesbian families and avoid exacerbating the disproportionate consequences of state intervention that devastate poor families. As much as gay rights advocates tout the harm to the child when she is torn from the company of someone she considers a parent, so too are children harmed when they are unnecessarily torn from their parents due to child welfare allegations. The Supreme Court confirmed that parents' constitutional rights must be protected in any rule that governs custody and parent decisions, and thus, in any rule that establishes who has standing in those hearings.[139] In *Troxel*, the Court stated, "the burden of litigating a domestic relations proceeding can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."[140]

Where parental status is clear—as when the child is born into a marriage,[141] the adults have a biological tie to the child,[142] or the adults formally adopted the child[143]—it is similarly clear who may bring this type of challenge. With unmarried couples when one parent did not adopt and is not biologically related to the child, it is less clear if that person has standing to challenge the other's parental rights.[144] By nature, only the contentious cases will make it to court, and these are where the law governing who has standing as a parent will be applied. A more complex standing analysis adds an additional question in an already fraught moment.

This section will discuss the extent to which current and proposed rules achieve equal rights for gay and lesbian parents and maintain strong protections for the parents most at risk of losing their parental rights. This section will first analyze standing rules based on functional relationship, parent-child bond, equitable estoppel principles, and the best interests of the child. Then it will turn to alternate rules limiting standing to visitation only and other options.

138. Smith v. OFFER, 431 U.S. 816, 855–56 (1977).
139. Troxel v. Granville, 530 U.S. 57, 72–73 (2000).
140. *Id.* at 75 (citations omitted) (internal quotation marks omitted).
141. *See supra* notes 20–23, 25–30 and accompanying text.
142. *See supra* notes 16–19, 35–39 and accompanying text.
143. *See supra* notes 24, 31–33 and accompanying text.
144. *See supra* Part II.B.

A. Standing to Assert Parental Rights Based on Functional Relationship

Some states have adopted a "functional" or "de facto" parent rule.[145] The attorney for the child in *Brooke S.B.* argued below that "the standing accorded to parents should extend to those who have a recognized and operative parent-child relationship."[146] A similar doctrine is *in loco parentis*, which gives adults standing if they can demonstrate the actual assumption of a parental role and discharge of parental duties.[147] These are commonly referred to as the functional parent rule.[148]

Courts seek to determine the quality of a functional relationship based on a variety of factors, such as whether the functional parent: (1) has the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent; (2) has exercised parental responsibility for the child; and (3) has assumed parental responsibility or acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.[149] States have defined a sufficient period of time as something like "(1) six months if the child is less than three years of age; or (2) one year if the child is at least three years of age"[150] or "a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action" and "continued over a period exceeding 12 months."[151] Additionally, a court may consider whether "the petitioner and the child lived together in the same household . . . [and] the petitioner assumed obligations of parenthood without expectation of financial compensation."[152] Alternatively, if the person demonstrates actual assumption of the parental role and discharge of parental responsibilities, and the relationship with the child came into being with the

145. *See, e.g.*, *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995); IND. CODE §§ 31–17–2–8.5, 31–9–2–35.5 (2007) (custody may be awarded to a de facto custodian, defined as "a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least: (1) six (6) months if the child is less than three (3) years of age; or (2) one (1) year if the child is at least three (3) years of age"); DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6) (2009); *see* OR. REV. STAT. ANN. § 109.119 (West) (providing that anyone with a parent-child relationship, defined by factors, may seek standing against a legal parent).

146. Barone v. Chapman-Cleland, 10 N.Y.S.3d 380, 381 (App. Div. 4th Dep't 2015), *rev'd sub nom* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); *see generally* Brief for Family Law Academics as Amici Curiae Supporting Petitioner-Respondent, *Brooke S.B.*, 61 N.E.3d 488.

147. *See, e.g.*, Spells v. Spells, 378 A.2d 879, 881–82 (Pa. Super. Ct. 1977).

148. Grossman, *supra* note 17, at 677; Atkinson, *supra* note 9, at 10–13. However, some authors draw distinctions between these rules. *See, e.g.*, Appleton, *supra* note 20, at 271–72 (discussing definitions of a functional parent, de facto parent, parent by estoppel, and psychological parent).

149. *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2013) (West).

150. *See, e.g.*, IND. CODE § 31–9–2–35.5 (2007) (numerals omitted).

151. *See, e.g.*, OR. REV. STAT. § 109.119 (West).

152. Atkinson, *supra* note 9, at 10–11 (citing *In re* Parentage of L.B., 122 P.3d 161, 163 (Wash. 2005)); *see also* IND. CODE ANN. § 31–9–2–35.5 (2007) (numerals omitted).

consent of the biological or legal parent, that could be sufficient to afford parent status to the adult.[153] Several states have implemented this type of rule.[154]

The "functional" or "de facto" parent rule grants functional parents equal rights and responsibilities as other parents once the person satisfies the standard in a court of law.[155] This rule is attractive because it attempts to select the people who should have parental rights—the people who function as parents of a child.[156] However, it permits too many people to bring others to court for custody disputes. The fact-intensive balancing test places a heavy burden on courts to determine first, if the person has been involved enough to have standing as a parent, and second, if that "parent" should be granted visitation or custody.[157] It conflates the inquiries of whether a person is a parent with standing to argue for rights and whether a parent should be awarded visitation or custody.[158] It also burdens courts with an unnecessarily complex inquiry for the first question—defining who has standing to argue for parental rights[159]—and unnecessarily expands courts' role in that initial step, rather than reserving courts' energies to determine which parent should be awarded visitation or custody.[160]

Turning to the protection of strong parental rights, the functional parent rule does not protect parents' constitutional rights to make choices for their children and their families unless and until they are found to be unfit parents. The functional relationship rule would introduce great uncertainty into family relationships. "These parents could 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."[161] "[T]he parent cannot predict the inherently

153. *See* Spells v. Spells, 378 A.2d 879, 881–82 (Pa. Super. Ct. 1977); *see also* Gribble v. Gribble, 583 P.2d 64 (Utah 1978); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 946–47 (1984).

154. Atkinson, *supra* note 9, at n.65 (Maine, Minnesota, Nebraska, New Jersey, Colorado, Indiana, Kentucky, Montana, Ohio, Washington, Delaware, Pennsylvania).

155. Polikoff, *supra* note 16, at 224.

156. Forman, *supra* note 9, at 48 ("[A family] relationship is built on a commitment by the adults to live as a family, accompanied by the actuality of family life . . . . The relationship that develops between children and those who function as their parents . . . ordinarily creates a life-long bond between them.") (alteration in original) (quoting V.C. v. M.J.B., 748 A.2d 539, 557 (N.J. 2000) (Long, J., concurring)); *cf.* GUGGENHEIM, *supra* note 8, at 67 (discussing the expansion of parental rights to unmarried men) ("Under the new rules . . . the law would confer benefits on those men who engage in the socially desirable practice of parenting.").

157. Debra H. v. Janice R., 930 N.E.2d 184, 192 (N.Y. 2010) ("These equitable-estoppel hearings—which would be followed by a second, best-interest hearing in the event functional or de facto parentage is demonstrated to the trial court's satisfaction—are likely often to be contentious, costly, and lengthy.").

158. Fershee, *supra* note 8, at 436.

159. *Id.* at 437.

160. *Id.* at 438.

161. *Debra H.*, 930 N.E.2d at 193.

unpredictable—i.e., how a judge might someday rule on the question of whether or when there had been sufficient 'consent' such that, as a consequence, a 'parental relationship' had been 'formed.'"[162] For example, a single mother might move in with her new boyfriend, share apartment costs, and jointly plan how to bring the kids to school, prepare meals, etc. In so doing, she could unknowingly give up her exclusive parental rights to her child. The new boyfriend could gain functional parent status: he lived in the same household; he had the mother's consent to form a relationship with the child; he exercised parental control over the child; he did not expect monetary payment, as a babysitter might; he shared costs and played a parental role in the family. If he were around for the statutory time, he might have standing to seek rights as a parent. Possibly, any deep relationship between an adult and child could be sufficient to get that adult standing under a functional parent rule, which in turn could detract from the parent's exclusive parental rights.

If this functional-parent boyfriend is emotionally abusive and wants to keep the woman in the relationship, he can use his functional parent status to threaten the woman that he will contest her rights to her children in order to keep her in the relationship.[163]

Even if a court would determine that the boyfriend in this context should not have rights to the children, the very fact that he has standing to come to court and fight as a "parent" would severely limit parents' choices to foster relationships between their children and other adults, and might create severe and unnecessary risks for those families. However, "erecting a . . . wall to isolate the child from those adults who play a significant role in the parent's life is probably not practical, and is certainly not desirable for either the child or the parent."[164] Thus, a different rule will be necessary.

Furthermore, the functional parent rule does not bring gay parents to parity with straight ones. Straight parents have standing to seek parental rights, whereas unmarried gay parents under this rule must seek a court determination that their involvement with the child reached the requisite amount.

A tighter rule could ensure both: that adults have the ability to choose their parent-partners and only knowingly divide their parental rights, and that they have equal rights to other adults seeking parenthood. It is crucial that the parties be able to intentionally choose their co-parents, not accidentally fall into a contested, divided-parent-rights case.

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162. *Id.* at 193 n.4.

163. *See supra* note 130 and accompanying text; Brief for Sanctuary for Families, *supra* note 6, at 24–30.

164. *Debra H.*, 930 N.E.2d at 193 n.4.

B. Standing Based on the Parent-Child Bond

A similar rule is one that grants a person standing based on the bond between that person and the child, or their status as a "psychological parent."[165] In *Alison D.*, Alison argued that she should have standing to seek custody of the child due to her "established relationship with the child."[166] Judge Kaye, in her striking dissent, defined the sole issue in the case as "the relationship between Alison D. and ADM [the child]."[167]

A child may form significant, parent-like bonds with a range of adults—from babysitters, to grandparents, to roommates, to foster parents. However, courts have consistently found that bond to be, if not irrelevant, unnecessary to the decision of who should have parent status.[168]

Defining who has standing as a parent based on the bonds they have built with a child fails to provide equal rights to gay couples relative to straight couples, or unmarried couples with equal protections relative to married ones. Parental rights should not be dependent on whether the non-biological parent nurtured a close and loving relationship with the child. A married person need not have a close relationship with the child in order to have standing as a parent; an unmarried person should not need one either. Similarly, a member of a straight couple need not develop a strong emotional bond; a member of a gay couple should not be required to either. Additionally, a third party—such as a babysitter, a live-in boyfriend, or an aunt—could develop a close and loving relationship, but this law does not intend to confer parental rights on those people. As discussed above, even if the adult developed the close relationship with the child with the parent's consent or encouragement, that should not be sufficient to gain standing against a fit parent.[169]

Determining standing based on parent-child bonds is an unworkable and undesirable option that does not achieve equal rights to straight couples and unnecessarily expands the pool of people who could challenge parents' rights to their children, with disastrous effect for parents' rights.[170] As with the functional parent rule, a parent-child bond rule expands the courts' role in the first step, determining who has standing as a parent, rather than limiting the courts'

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165. Grossman, *supra* note 17, at 677 ("[F]ull parental or quasi-parental status based on a functional parent-child relationship . . . can fall under many different doctrinal labels—de facto parentage, psychological parentage, in loco parentis, or parent by estoppel, to name the most common ones . . . .") (discussing different states rules and applications); *In re* E.L.M.C., 100 P.3d 546, 559 (Colo. App. 2004) (referencing a definition of "'psychological parent' as 'someone other than a biological parent who develops a parent-child relationship with a child through day-to-day interaction, companionship, and caring for the child.'")

166. Alison D. v. Virginia M., 572 N.E.2d 27, 28, 30 (N.Y. 1991).

167. *Id.* at 30.

168. *See* discussion *supra* Part III.B.

169. *See supra* notes 86–89.

170. *See* Troxel v. Granville, 530 U.S. 57, 75 (2000) (recognizing that "litigating a domestic relations proceeding can itself be so disruptive of the parent-child relationship" and burdensome in terms of stress and litigation costs).

involvement to a necessary determination of who should have custody in the case.

C. Standing Based on Equitable Estoppel

An alternative rule is that the legally recognized parent should be equitably estopped from arguing the alleged co-parent is not a parent, if the couple has acted like co-parents and have both treated the alleged co-parent as an equal parent for a significant period of time. The doctrine of equitable estoppel is a principle to enforce fairness; it "prevents [a party] from asserting a claim or right that contradicts what [the party] has said or done before, or what has been legally established as true" in order to gain an advantage.[171] In this instance, it is invoked to argue that a legally recognized parent cannot say that her partner is a co-parent in one instance but then deny co-parentage when she no longer wants to share custody.

Brooke B. argued for this rule through the lower courts.[172] In that case, Brooke and Elizabeth got engaged in 2006, before gay marriage was legal in New York.[173] Shortly after, they jointly decided to have a child and for Elizabeth to carry the child.[174] Together, they went through the process of choosing a donor, getting pregnant, and attending prenatal appointments.[175] Brooke went with Elizabeth to the emergency room for a complication during the pregnancy and was with her for the birth; Brooke cut the umbilical cord.[176] They gave the child Brooke's last name and continued to live together and raise the child jointly.[177] Brooke stayed home with the child for a year while Elizabeth returned to work.[178] The child called Brooke "Mama B."[179]

When Brooke and Elizabeth broke up, Brooke continued to visit the child regularly.[180] However, when the child was about four years old, Elizabeth terminated the relationship entirely.[181]

Brooke argued that because Elizabeth held Brooke out as a co-parent for years and Brooke planned for the child, paid his expenses, and took leave to care

171. *Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

172. *See* Barone v. Chapman-Cleland, 10 N.Y.S.3d 380, 381 (App. Div. 4th Dep't 2015); Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 491 (N.Y. 2016).

173. *Brooke S.B.*, 61 N.E.3d at 490.

174. *Id.* at 491.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

for him as a baby, Elizabeth should be equitably estopped from arguing now that Brooke was not a parent.[182]

Similarly, in *Brooke S.B.*'s companion case, *Estrellita A.*, Estrellita argued that she could not be required to pay child support as a parent and then denied standing to seek custody and visitation because she was not a parent.[183] In that case, Estrellita and Jennifer were domestic partners who jointly decided to become parents, sought a sperm donor, attended medical appointments, referred to themselves "Mama" and "Mommy" respectively, resided together with the child, and shared parental responsibilities.[184] After the breakup, Jennifer sought a child support order against Estrellita; Estrellita first denied responsibility and then filed a petition for visitation with the child.[185] The family court in the child support case determined that Estrellita was "a parent to [the child] and as such is chargeable with the support of the child."[186] Estrellita then argued that she had been "adjudicated the parent" of the child and thus had standing to seek visitation on that basis.[187]

The Family Court agreed,[188] and was unanimously affirmed by the Second Department Appellate Division.[189] Judge Whelan at the Family Court stated, "Colloquially, this is known as 'having your cake and eating it too'. Judicially, it is referred to as 'inconsistent positions' which this court will not countenance."[190]

Employing equitable estoppel principles to give a non-adoptive, non-biological, unmarried adult standing to seek parental rights in the *Brooke S.B.* context carries the same problems as a functional parent or parent-child bond rule. It bases parental standing on elusive metrics applied by courts attempting to determine what level of action constitutes treating a person as a co-parent.

However, the judicial estoppel applied in *Estrellita A.* is distinct and does not carry the same problems. Jennifer sought legal recognition that Estrellita was a parent for the purpose of financial support and simultaneously attempted to seek a finding that Estrellita was not a parent for custody purposes in order to protect her custody and control of the child.[191] Where the parent who contests the other's parental status affirmatively sought an adjudication that the other was

182. *See* Barone v. Chapman-Cleland, 10 N.Y.S.3d 380, 381 (App. 2015); *Brooke S.B.*, 61 N.E.3d at 490.

183. *See* Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843, 845 (Fam. Ct. 2013); Estrellita A. v. Jennifer L.D., 61 N.E.3d 488, 492 (N.Y. 2016).

184. *Estrellita A.*, 963 N.Y.S.2d at 844; *Estrellita A.*, 61 N.E.3d at 491–92.

185. *Estrellita A.*, 963 N.Y.S.2d at 844; *Estrellita A.*, 61 N.E.3d at 492.

186. *Estrellita A.*, 61 N.E.3d at 492; *see Estrellita A.*, 963 N.Y.S.2d at 844 (citing Order dated January 16, 2013, Hon. T. Whelan, docket No. F–20626–12); Arriaga v. Dukoff, 999 N.Y.S.2d 504, 506 (App. Div. 2d Dep't 2014).

187. *Estrellita A.*, 61 N.E.3d at 490; *see Estrellita A.*, 963 N.Y.S.2d at 845.

188. *Estrellita A.*, 963 N.Y.S.2d at 847.

189. *Arriaga*, 999 N.Y.S.2d at 507.

190. *Estrellita A.*, 963 N.Y.S.2d at 847.

191. *See supra* notes 185–190.

a parent, the estoppel argument is based on a clear choice by the parent, and does not require a lengthy inquiry into the family's past or relationships.[192] The parent chose to have another recognized parent and cannot attempt to impose responsibilities and simultaneously deny rights.[193]

D. Standing Based on the Best Interests of the Child

Some child advocates[194] and courts[195] argue that parental status should be determined based on the "best interests of the child." The argument is that a best interests rule would support children's "opportunity to maintain bonds that may be crucial to their development" and would "take the children's interests into account."[196]

However, in New York, as in other states, the "best interests" of the child standard was introduced as a method of determining the appropriate outcome of a custody dispute "when there [was] a conflict" between the child and the parent or between parents.[197] It was never intended to be used as a way to determine *who* should be considered a parent to the child.[198]

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192. For another example of a type of adjudication a woman might seek to obtain and then deny her female partner parental rights, *see* Forman, *supra* note 9, at 39–40.

193. Compare unmarried fathers, who have automatic responsibilities and may exercise parental rights. *See* discussion *supra* note 18 and accompanying text.

194. *See, e.g.*, Barone v. Chapman-Cleland, 10 N.Y.S.3d 380, 381 (App. Div. 4th Dep't 2015) (Attorney for the Child contending that "the best interests of the child are paramount"); *see generally* Smith 2013, *supra* note 8; S.J. Barrett, *For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights?*, 73 BROOK. L. REV. 695 (2008); Kathleen Nemechek, *Child Preference in Custody Decisions*, 83 IOWA L. REV. 437 (1998).

195. *E.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 31 (N.Y. 1991) (overruled by Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016)) (Kaye, J., dissenting) ("The Legislature has made plain an objective in section 70 to promote 'the best interest of the child' and the child's 'welfare and happiness.'"); Debra H. v. Janice R., 930 N.E.2d 184, 201 (N.Y. 2010) (Ciparick, J., concurring) ("Since *Alison D.*, our decisions and the decisions of many of the lower courts have properly focused on the best interests of the children when determining questions of parentage . . . ."); *see* discussion *infra* Part V.B.1.

196. *Alison D.*, 572 N.E.2d at 30 (Kaye, J., dissenting).

197. Bennett v. Jeffreys, 40 N.Y.2d 543, 546 (finding that the "best interests" doctrine "reflect[ed] more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest"); *see also In re* Custody of H.S.H.-K., 193 Wis. 2d 649, 697 (1995) (held that "when a parent consents to and fosters another person's establishing a parent-like relationship with a child and then substantially interferes with that relationship," a court may order visitation if it is in the best interests of the child).

198. Fershee, *supra* note 8, at 451–52 ("Even though it might be tempting to jump directly into an analysis of whether it is in the best interests of the children to spend time with their grandparents, applying the best-interests-of-the-child factors can only come after a proper standard has been applied to determine whether the party seeking visitation should even be permitted to ask for access to the children in the first place. Otherwise, it would be permissible for anyone who might have more money, a bigger house, better access to educational opportunities, etc. than the parents of a child to seek custody of a child who is, literally, a stranger.") (internal citations omitted); Forman, *supra* note 9, at 32 ("Once a third party has been determined to be a psychological parent to a child . . . he or she stands in parity with the legal parent. Custody and visitation issues between them are to be determined *on a best interests standard* . . . .") (citations omitted) (alterations in original) (emphasis added). *Cf. Alison D.*, 572 N.E.2d at 31 (Kaye, J.,

The United States Supreme Court has emphasized that parents have a constitutionally protected liberty interest to determine what is best for their children.[199] Someone must determine what is best for a child; the law has enforced the idea that parents make that determination unless and until they are deemed unfit.[200] Therefore, the best interests standard violates a fit parent's substantive due process rights when used to determine who has standing as a parent.[201]

The use of a "best interests" rule to determine who has parental standing would be particularly damaging to the parental rights of the most vulnerable parents. If a court could define who has standing to seek parental rights based on the best interests of the child, that would strengthen the use of the "best interests" rationale in all aspects of child welfare cases.[202] Courts could second-guess poor parents even more than they already do.[203]

Furthermore, as with the functional parent rule and the parent-child bond rule, the "best interests" rule does not place gay parents on equal footing with straight ones. Under this rule, straight parents would still enjoy the presumption of standing to seek parental rights, whereas unmarried gay parents would need to seek a court determination that the best interests of the child are in favor of them having standing to protect their parental rights.

A "best interests" of the child rule, or a rule that puts primacy on the child's perspective and rights generally, is attractive because people understandably want to protect children. But children with straight, wealthy parents typically do not have the power to decide who is going to be their parent. The child's perspective and best interests are only considered at step two, deciding which parent should get custody. Therefore, here, the best interests of the child should not be allowed to interfere with deciding who is a parent in the first place. Straight and married couples have that choice, and gay and unmarried parents should, too.

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dissenting) (arguing that "when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody"), which is an example of applying the best interests standard at the second step of deciding who should receive custody, although Judge Kaye argues that the best interests standard should be used in step one, determining who is a parent.

199. *See* GUGGENHEIM, *supra* note 8, at 30, 114. *See also id.* at 40–41 ("The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best . . . . When we recall that the parental rights doctrine was formed in part because our constitutional scheme prohibits state officials from becoming too involved in childrearing decisions, it is especially important that judges be authorized as infrequently as necessary to decide child custody disputes based on a child's best interests.").

200. *See generally* GUGGENHEIM, *supra* note 8, at 63–74 (Chapter 2: The Rights of Parents, Chapter 3: Getting and Losing Parental Rights, The Supreme Court Cases).

201. Forman, *supra* note 9, at 29 ("[U]sing the child's best interests as the deciding factor may insufficiently protect parental rights under *Troxel*.").

202. *See* Fershee, *supra* note 8, at 451–53.

203. *See* Brief for Sanctuary for Families, *supra* note 6, at 31–38, Parts II.C & II.D.

E. Expansive Standing to Seek Visitation

Some scholars have argued that the law should be different for custody and for visitation, and that it would be acceptable to expand standing to seek visitation with a child.[204] Judge Kaye, in her dissent, argued that the rule should be more expansive for standing to seek visitation than it is for custody. She argued, "Logically, the fitness concern present in custody disputes is irrelevant in visitation petitions, where continuing contact with the child rather than severing of a parental tie is in issue."[205] The rule could be more expansive than the *Bennett v. Jeffreys* extraordinary circumstances test.

However, both visitation and custody are crucial parental rights. Expanding the rule for who has standing for visitation also "would necessarily impair the parents' right to custody and control"[206] and the parents' constitutional liberty interest in choosing with whom their children associate.[207] Parental fitness is not irrelevant to deciding who should associate with a child. That choice is one of the many constitutionally protected liberty interests that parents have in deciding how to raise their child.[208]

Some scholars argue that standing to seek visitation cannot be more expansive than standing for custody because that creates a slippery slope; if standing for visitation is more expansive, it will open the door to more infringement on parental rights.[209] It is possible to draw lines, but here, the law has been clear for decades that where a parent is fit, the courts will not second-guess her decisions about how to raise her child. Therefore, associational decisions must be one of the protected decisions and visitation actions should not have a different standing rule than custody disputes.

F. Other Proposed Rules and the Child's Perspective Generally

Other proposed rules include standing based on prior relationship with the child's parent, alleged agreement or contract with the biological mother, *ex ante* court recognition of status, or pure consent of the legally recognized parent.

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204. "Custody" rights are decision-making rights about how to raise the child (education, religion, location, etc.); "visitation" rights affect the right to decide with whom your child associates. Alison D. v. Virginia M., 572 N.E.2d 27, 32 (N.Y. 1991) (Kaye, J., dissenting).

205. *Alison D.*, 572 N.E.2d at 32 (Kaye, J., dissenting).

206. *Id.* at 656–57.

207. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 72 (2000); *see also* Weiss v. Weiss, 52 N.Y.2d 170, 174–75 (1981) (discussing the importance of noncustodial parents' rights and role in their children's lives).

208. *Troxel*, 530 U.S. at 69–72.

209. Forman, *supra* note 9, at 29 ("Imposing ongoing visitation against a parent's wish hardly seems a 'minimal' intrusion and using the child's best interests as the deciding factor may insufficiently protect parental rights under *Troxel*."); *see also* Fershee, *supra* note 8, at 451–53 (discussing how granting visitation to grandparents against a fit mother's wishes infringes on her parental rights).

Alternatively, a person could gain presumptive standing if the child is born during a live-in relationship.[210]

Granting standing based on a person's prior relationship with the child's parent causes the same problems described in the de facto parent rule discussion,[211] but in an even more pronounced fashion. Single parents could not enter a new relationship without considering whether their partner could have rights to their child.[212] Standing to assert parental rights must be subject to a higher test than mere existence of a relationship with the parent.

Scholars have rejected parental standing based on contract or alleged agreement with the biological mother as distasteful.[213] Adoption is parenthood by contract and clearly defines who is and is not a parent, but it does require an extra step that is not required of straight, fertile parents who have biological children.

The National Center for Lesbian Rights suggests—if they are not going to marry or adopt—that gay couples seek court-recognition of their parental status.[214] A court order is a powerful tool for parents; it grants legal protections, is relatively inexpensive, and must be granted full faith and credit across state lines.[215] Yet this is an additional step that gay parents are advised to take that is unnecessary for straight parents. Thus, this rule also fails to provide gay couples with equal rights.

Pure consent by the legally recognized parent provides equal rights as compared to straight, fertile parents who gain their status via consensual coital conception. However, in the absence of consensual sex as the indicator of conception, this rule faces similar issues as a functional parent rule in defining

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210. For discussions of parental agreements, *see* Grossman, *supra* note 17, at 712; Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 704 (2005) (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002)); *see also* NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 24, at 6. For discussion of a parental presumption, *see* Polikoff, *supra* note 16, at 206; Appleton, *supra* note 20, at 264–68 (B. Presuming Women Only), 282–91 (D. The Presumption (and a Woman-Centered Rule) Redux); Debra H. v. Janice R., 930 N.E.2d 184, 205 (N.Y. 2010) (Smith, J., concurring).

211. *See supra* Part IV.A.

212. *See supra* notes 129–137 and accompanying text.

213. Forman, *supra* note 9, at 40–41 ("[Courts] stopped short of recognizing parental status arising from a contract . . . and simply declare such agreements unenforceable as a matter of public policy, reasoning that the law does not allow 'parenthood by contract.'").

214. NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 24, at 4.

215. Polikoff, *supra* note 16, at 264–65 (arguing that adoptions must be given full faith and credit and "[c]ourt orders of parentage should be equally unassailable, although they have been tested in fewer circumstances and have not yet been the subject of extensive scholarly attention"). *But see id.* at 265 n.266 and accompanying text, n.278 (noting that adoptions specifically, rather than any court order, are the "gold standard" and that "[g]iven the uncertainty surrounding interstate recognition of parentage in the absence of a court order, [the author] still advise[s] the mother to consult a lawyer and obtain such a court order, either of parentage or adoption").

intent and what constitutes consent.[216] Furthermore, the inquiry is one-sided; it puts all the power in the hands of the currently recognized parent.

Lastly, some authors propose a rebuttable presumption of parenthood for both parties if an unmarried couple has a child while residing together.[217] Judge Smith, in his *Debra H.* concurrence, stated that he "would hold that where a child is conceived through [artificial donor 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."[218] This rule is comparable to the marriage presumption, but applies to couples who use artificial insemination. It achieves a level of equal treatment because it does not require a "court determination that the partner of the biological mother is a parent."[219] However, marriage indicates an intent to create a life together; this rule does not include the same protections for single parents and may constrain parents' choices about who to allow into their lives.

V.
A NARROW RULE SOLUTION

The law must differentiate between committed unmarried couples who intend to co-parent and adults with children who are in a relationship, but do not intend to share their parental rights.

Both members of unmarried, straight couples have presumptive standing as parents where the woman is the birth mother of the child and the man (1) was in a relationship with her at the time of conception, (2) could be the biological father, and (3) exerted his parental rights.[220] They would each have standing to argue for their rights as parents, without court intervention at that stage. The Supreme Court has consistently held that the parent or parents—not the state—make decisions for a child, unless and until the parent is found unfit.[221] Part III.C.1 discussed how state intervention in parent choice is harmful to poor

216. *See generally* Polikoff, *supra* note 16.

217. *Id.* at 206 (arguing for the "[non-biological] mother to be a legal parent-to-be from the moment of conception and a legal parent from the moment of birth" with "[n]o adoption necessary"); Appleton, *supra* note 20, at 233.

218. Debra H. v. Janice R., 930 N.E.2d 184, 205 (N.Y. 2010) (Smith, J., concurring).

219. Polikoff, *supra* note 16, at 206 (arguing that the Delaware statute fails to provide equal treatment because it requires a court determination); *see also id.* at 206–07 ("Those reforms should include a gender-neutral and marital status-neutral provision creating parentage for the partner of a woman who conceives using donor insemination; a presumption of parentage based on a couple's marriage, civil union or domestic partnership; the basis for rebutting that presumption; and instructions for proper registration of parentage on a child's birth certificate."); Appleton, *supra* note 20, at 233 (describing that the advantage of the presumption of legitimacy is that it instantly designates a parent at the time of birth and does not require the passage of time in order to accrue—the person becomes "automatically and immediately a full-fledged parent, without the need for any additional state intervention").

220. *See supra* Part II.A.

221. *See supra* Part III.A.

families. Thus, the question is: how can we afford unmarried, gay couples the same certainty as straight ones—given the different biological scenario—while minimizing additional court intervention and avoiding giving non-parents parental rights, which could be harmful to parental rights generally?

A. Satisfying Both Equality and Parental Rights Concerns

Now that marriage is available to all gay couples nationwide[222] and adoption is following close behind,[223] a gay adult who enters a relationship with a birth parent *after* the child's conception has or will soon have the same rights and ability to become that child's parent as a new male partner would with his pregnant, female partner. That person can marry the biological parent before the birth or adopt the child.[224] Therefore, while advocates should push for that equal treatment, a more expansive right at the post-conception or adoption stage is not necessary to achieve equal rights and treatment for gay couples. As discussed above, more expansive rights risk undermining and putting existing parents' rights at risk.[225] Therefore, an expansive, post-conception rule—which is unnecessary to achieve equal rights for gay couples—should be avoided in order to protect parental rights more broadly.

A different, pre-conception rule *is* necessary to ensure gay parents equal rights to their children as compared with the rights of straight parents. This rule must simultaneously protect existing parents' rights. A parent should have choice and agency in deciding with whom she has a child and with whom she might fight for rights to that child. For a straight, fertile, unmarried couple, that line is defined by consensual sex.[226] If a child results, the mother has automatic presumed rights and the father has "inchoate" rights, which he can assert by grasping the "opportunity . . . to develop a relationship with his offspring."[227] The father's inchoate standing is based in his biological tie.[228]

Scholars have rejected applying the grasped inchoate rights standard to unmarried female partners of a biological mother because it is harder to adjudicate who could assert those inchoate rights.[229] There is not a bright-line metric—like consensual sex—defining when two women jointly planned for a child, rather than when a woman was simply present in a person's life when that person decided to have a child. Any rule should protect a parent's choice of co-parent, including the choice to have a child as a single parent, "even if they have

222. Obergefell v. Hodges, 575 U.S. ___, 135 S. Ct. 2584 (2015).

223. *See supra* notes 31–33 and accompanying text.

224. *See* discussion *supra* Part II.A. *But see* notes 25–30 and accompanying text.

225. *See* discussion *supra* Part III.C.

226. Obviously and unfortunately, a woman can become a mother via non-consensual sex with a man.

227. Lehr v. Robertson, 463 U.S. 248, 262 (1983); discussion *supra* note 18.

228. *See* GUGGENHEIM, *supra* note 8, at 61.

229. *See* Appleton, *supra* note 20, at 238, 268–82 (Part IV.C); Grossman, *supra* note 17, at 705–06.

permitted or encouraged another adult to become a virtual parent of the child."[230]

Thus, the rule must focus on intent in order to select for co-parents who agreed to jointly have the child. The rule must be narrow, to avoid an abusive ex-partner using it as a tool for control or an overreaching court from interfering in families' lives. Ideally, the rule will determine parents' joint intent with minimal interference by courts and maximum predictability for families.[231] Scholars have described an intent-based analysis as "a modern successor to the presumption of legitimacy that works without regard to the sex of the parents."[232]

B. Analyzing the Brooke S.B. *Rule—Success and Three Concerns*

In *Brooke S.B.*, the New York Court of Appeals promulgated a new rule "that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70."[233] This rule is exciting in that it gives unmarried gay parents a way to be recognized as legal parents without marrying their partner or adopting their child. It is more limited than other proposed rules—like the de facto parent rule or a broad application of equitable estoppel—and narrows the time period under consideration to the time of conception, which protects post-conception parental choice. It protects parental rights to a child; parental rights cannot be taken without the biological parent's consent or knowledge. Additionally, the rule includes an inquiry into the parents' joint intent to parent this child, which elevates parents' choice and further supports strong parental rights.

This rule gives gay parents the same right as straight ones to be heard at step one on whether they are parents. Requiring the co-parent to show that the parties "agreed to conceive a child and to raise the child together" replaces the biological tie for the unmarried man. Thus, the Court of Appeals' rule treats gay parents equally.

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230. Debra H. v. Janice R., 930 N.E.2d 184, 193 (N.Y. 2010).

231. *See* Appleton, *supra* note 20, at 284 (presenting a strong case for an intent-based rule, but ultimately prefers a functional parent rule because she sought an "automatic" rule and valued the role of the gestational parent above all); Fershee, *supra* note 8, at 466 ("the level of evidentiary analysis to decide whether a person is a psychological or de facto parent is more in-depth than a typical threshold procedural question").

232. Appleton, *supra* note 20, at 278. *See also id.* at 276–78 (discussing Marjorie Shultz's analysis of why intent-based parenthood makes sense in the age of reproductive technology and the search for equality and gender neutrality); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (analyzing the benefits of an intent-based parenthood definition for a variety of artificial reproductive techniques).

233. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) (promulgating the rule proposed by Sanctuary for Families, et al. in their amici brief (Brief for Sanctuary for Families, *supra* note 6, at 38–39)).

This "clear and convincing evidence of joint intent" rule continues to give unmarried couples with children lesser protections than married ones. However, the presumption of parentage for married couples is predicated on the fact that the marriage serves as an indicator of intent by both parties to build a life jointly and create a family together. This step one, of proving in court by clear and convincing evidence a joint intent to co-parent, replaces the joint intent indicator of marriage. Unmarried couples can obtain legal status as co-parents without getting married, adopting, or having other formal status.

However, three aspects of the *Brooke S.B.* decision are concerning and should be discussed: the use of a "best interests" rationale, the efficacy of the evidentiary standard used, and the remaining uncertainty for families.

1. The Best Interests Rationale

First, the court emphasized throughout the opinion, in dicta, that the "best interests of the child" should be the guiding force for the courts.[234] The court cited Judge Kaye's dissent in *Debra H.*, the court's decision in *Matter of Jacob*,[235] and the court's historical decisions dating back to 1856[236] to establish that that court decisions and precedential law concerning matters of custody, visitation, and support, and establishing who is a parent, are resolved in a manner that serves the best interests of the child.[237] The court found that the *Alison D.* rule, which narrowly defined the term "parent" in a way that foreclosed "all inquiry into the child's best interest," was ill-advised for that reason.[238] The court reasoned that children's best interests are served by having both of their parents legally recognized, whether they were gay or straight and married or unmarried, and thus *Alison D.* should be overruled.[239]

Inserting courts into this first step—determining who is a parent—is contrary to law. Parents are, by law, the best decisionmakers of what is in the best interests of their children unless and until they are found to be unfit, whether because of abuse, neglect, or other circumstances.[240] Therefore, to ground

234. *Brooke S.B.*, 61 N.E.3d at 493, 497.

235. *Id.* at 495.

236. *Id.* at 497–98 (citing Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925); Wilcox v. Wilcox, 14 N.Y. 575, 578–79 (1856); Guardian Loan Co. v. Early, 392 N.E.2d 1240, 1243 (N.Y. 1979); People ex rel. Lemon v. Supreme Ct. of State of N.Y., 156 N.E. 84 (N.Y. 1927); De Coppet v. Cone, 92 N.E. 411, 414 (N.Y. 1910)).

237. *Brooke S.B.*, 61 N.E.3d at 497–98.

238. *Id.*

239. *Id.* at 500 ("We will no longer engage in the deft legal maneuvering necessary to read fairness into an overly-restrictive definition of 'parent' that sets too high a bar for reaching a child's best interest and does not take into account equitable principles.") (citations omitted) (internal quotation marks omitted). Note, an alternative close reading of this statement is that the Court recognized that the "best interests" inquiry only occurs at step two, determining who should receive custody, not at this first inquiry into who is a parent. However, the Court's lengthy discussion of children's best interests throws this reading—which would be better for parents' rights—into doubt.

240. *See supra* Part III.

whether a parent has standing on whether it is in the best interests of the child for this adult to have parental standing guts the heart of parents' rights—to make best interests decisions for their child—and impermissibly hands parents' choices squarely over to courts,[241] which in these cases may have no right to interfere in constitutionally protected parental decisions.[242] Determining who is a parent based on an inquiry into the child's best interests allows a court to insert its own judgment of who should be considered by the court as even eligible for parent status. This approach primarily threatens the rights of the parents who most often face government inquiries into their families' lives—black, Latino, American Indian, and poor families.[243] This is concerning for parent advocates, who worry that these arguments support courts' use of the best interests standard to second-guess a variety of parent decisions—from schooling, to nutrition, to health care—where the courts have no right to be.[244] The insertion of the best interests rule at this first step—deciding who has standing to argue she is a parent—would create a scary precedent for at-risk parents.

2. The Evidentiary Standard

The second concern with the *Brooke S.B.* rule is whether a "clear and convincing" standard is the proper balance between affording parents proper recognition and protecting parents from abuse. This is an area of dispute, but the clear and convincing standard likely provides the best protections for both parental rights generally and gay and lesbian parents' rights specifically.[245]

Scholars have presented a spectrum of evidentiary standards ranging from a presumption of parenthood[246] to a prima facie showing[247] to a clear and convincing standard.[248] Those in favor of a presumption of parental standing argue that a higher standard unnecessarily requires a court-determination of

241. *See supra* Part III.A.

242. *See supra* discussion in Part III.A of parents expansive rights (citing *e.g.*, Meyer v. Neb., 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Wis. v. Yoder, 406 U.S. 205, 224 (1971); Troxel v. Granville, 530 U.S. 57, 72–73 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.")) and Part IV.D of the problems of using the best interests rule at this stage.

243. *See* discussion *supra* Part III.C.1.

244. Fershee, *supra* note 8, at 451–52 ("Even though it might be tempting to jump directly into an analysis of whether it is in the best interests of the children to spend time with their grandparents, applying the best-interests-of-the-child factors can only come after a proper standard has been applied to determine whether the party seeking visitation should even be permitted to ask for access to the children in the first place. Otherwise, it would be permissible for anyone who might have more money, a bigger house, better access to educational opportunities, etc. than the parents of a child to seek custody of a child who is, literally, a stranger.") (internal citations omitted).

245. *See supra* pp. 35–36.

246. Polikoff, *supra* note 16, at 206; Appleton, *supra* note 20, at 233, 271, 289.

247. Fershee, *supra* note 8.

248. Brief for Sanctuary for Families, *supra* note 6, at 38–43 (Part III).

parentage,[249] whereas a presumption provides equal protections for unmarried couples as married couples currently enjoy.[250] It is not dependent on the passage of time nor is it only recognized upon family dissolution.[251] However, unmarried men do not have a presumption of legal parental status; they have to argue for standing based on their assertion of their "inchoate" parental rights.[252] Unmarried straight men do have standing to argue that they are parents, based on biology and involvement with the child, but they do not have a presumption of parental standing.[253] Thus, a presumption of parentage is not necessary from an equality standpoint.

Furthermore, a presumption of parentage may be undesirable in terms of protecting existing parental rights. It widens the possibility that an abusive new partner could use a custody action as a weapon against a partner or ex-partner and unnecessarily limits parents' choices for how to conduct their lives around the time of conception and birth of their child.[254]

One scholar, Kendra Fershee, argues that—rather than a presumption of parenthood from the moment of conception or birth—courts should employ a prima facie showing standard.[255] She supports the parameters of the *Brooke S.B.* inquiry—determining whether the legally recognized parent consented to co-parent the child, in order to protect against unconstitutional infringement of that parent's rights—and supports a prima facie showing of agreement. She argues that the prima facie showing is in keeping with other standing rules and ensures a limited inquiry at the standing stage, rather than blurring into a full-blown de facto parent analysis.[256] This rule is effective at minimizing court involvement and providing similar rights to those currently provided to unmarried biological fathers. However, while this is more stringent than a presumption of parentage, a prima facie standard is such a low bar that it also risks misuse by abusers. An abuser or vindictive ex could easily make sufficient allegations to survive a prima facie showing, even if the ex's role was not that of a parent.[257]

While a higher evidentiary standard inherently creates a more burdensome legal process and may allow an abuser to drag a parent through a lengthy factual inquiry, it also avoids the likelihood that the people without a claim will make it to court. In order to achieve that balance, courts must avoid keeping parents in

249. Polikoff, *supra* note 16, at 206; *see* Appleton, *supra* note 20, at 271, 289; *supra* note 219 and accompanying text. *But see* Stanley v. Ill., 405 U.S. 645, 656–57 (1972) ("Procedure by presumption is always cheaper and easier than individualized determination. But when . . . it needlessly risks running roughshod over the important interests of both parent and child[, i]t therefore cannot stand.").

250. Appleton, *supra* note 20, at 233.

251. *Id.*

252. Lehr v. Robertson, 463 U.S. 248, 262–65 (1983); *supra* note 18.

253. *See supra* Part II.B.1.

254. *See supra* Part III.C.2.

255. Fershee, *supra* note 8.

256. *Id.* at 438, 464–65.

257. *See* discussion Part III.C.2.

court unnecessarily and limit this inquiry to a true standing inquiry, rather than extend it into a full-blown adjudication of step two's inquiry into who should receive rights to the child.

A clear and convincing evidentiary standard, which was proposed by amici in the *Brooke S.B.* case,[258] imposes a higher burden than the typical civil case showing of a preponderance of the evidence. It is a high bar for a standing inquiry. However, properly tempered by the fact that it is being used in a standing inquiry only, a clear and convincing evidence standard could provide legally recognized parents with a sense of security that they only will be called to court and courts only will consider cases that are truly close-calls between possible parents. Cases would only proceed if they were "clear." Thus, the clear and convincing evidentiary standard would limit the frivolous or abusive cases that are brought under this rule, as well as courts' involvement in families.[259]

3. The Uncertainty

The third concern with the *Brooke S.B.* rule is that parents will not necessarily know what their legal status is until it becomes contentious and is adjudicated at step one in court. The uncertainty is harmful to the family and to the children's development.[260] Furthermore, if straight couples do not have to tolerate this insecurity, gay couples should not have to either.[261]

The ABA Model Act uses gender-neutral language: "consent by an individual who intends to be a parent of a child born by assisted reproduction must be in a signed record" or, "in the absence of a writing, if the two people live with the child and hold the child out as their own during the first two years of the child's life."[262] Similarly, the Uniform Parentage Act requires consent in signed writing by both parties to establish joint intent unless two years of joint habitation and co-parenting are established.[263] These rules certainly would create a clearer line defining who has standing in a parental dispute. However, it is likely unrealistic in terms of how parents interact and make choices prior to a birth, and it still fails to provide gay parents with equal recognition as straight ones.

Some uncertainty is perhaps inherent in choosing not to gain legal status *ex ante* by marriage, adoption, or court adjudication. The clear and convincing,

258. Brief for Sanctuary for Families, *supra* note 6, at 38–43 (Part III).

259. *See* discussion *infra* note 264.

260. *See supra* notes 107–110 and accompanying text.

261. *See supra* Part II.

262. Polikoff, *supra* note 16, at 237 (internal citations and quotation marks omitted); *see* discussion at notes 149–52 and accompanying text (discussing how to determine consent to partner's artificial insemination (ABA MODEL ACT § 614(1) and UPC § 2-120(f) (2008)); ABA MODEL ACT § 604(2) (2008) and UPC § 204(a)(5) (2002) (discussing how to determine intent to co-parent such that there should be a presumption of parentage).

263. UNIF. PARENTAGE ACT § 704a (2002); Polikoff, *supra* note 16, at 237 & *supra* note 148 and accompanying text.

conception-focused rule minimizes that uncertainty by limiting the inquiry to a narrow time frame and excluding frivolous cases.[264]

The criteria for showing that the couple had a joint intent remain gray, but some indicators could include what was seen in *Alison D.*, *Debra H.*, *Brooke S.B.*, *Jean Maby*, and other cases, such as living together at the time of conception,[265] attending prenatal appointments,[266] sharing joint responsibilities prior to birth,[267] cutting the umbilical cord,[268] being listed as the second parent on the birth certificate,[269] giving the child both parents' last names,[270] and presenting socially as joint parents.[271] Alternatively, it could require a written agreement signed by both parties.[272] This will be the next subject of litigation, and courts will have to take care to avoid falling into a "functional parent"[273] or "best interests of the child"[274] analysis, rather than staying focused on determining the joint intent to co-parent.[275]

C. Applying the New Rule

The *Brooke S.B.* rule is broader than that afforded to unmarried men prior to this decision. It does not require the partner to assert his or her rights within a certain amount of time after the child's birth, as was previously required for unmarried biological fathers seeking rights against the wishes of the biological mother.[276]

The focus of this article has been on the application of the rule to lesbian couples, in cases like *Alison D.*, *Debra H.*, and *Brooke S.B.* However, this rule's

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264. The "clear and convincing" evidentiary standard should eliminate the "close call" cases, which require a wide ranging inquiry and create the risk that a parent accidentally gives up her exclusive rights by inviting friends to support her. Similarly, limiting this method of becoming a legally recognized parent to the time of conception limits single parents' concerns about whether inviting a new partner into their lives will result in accidentally giving up exclusive parental rights. A gay single parent's new partner, who comes into the family after the child is conceived, would be treated the same as a similarly situated straight parent; she can only claim parental standing if she marries the parent before birth or legally adopts the child.

265. Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991).

266. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 491 (N.Y. 2016).

267. *Allison D.*, 573 N.E.2d at 28.

268. *Brooke S.B.*, 61 N.E.3d at 491.

269. *See* Kristine H. v. Lisa R., 117 P.3d 690, 692, 696 (Cal. 2005); *see generally* Polikoff, *supra* note 16, at 238–40 (discussing the use of birth certificates as "commonly accepted evidence" of parentage).

270. *Brooke S.B.*, 61 N.E.3d at 491.

271. *Id.*

272. *See supra* notes 262–263 and accompanying text.

273. *See supra* Part IV.A.

274. *See supra* Part IV.D.

275. Fershee, *supra* note 8, at 438.

276. Grossman, *supra* note 17, at 700 ("[U]nwed fathers—unlike unwed mothers—were not entitled automatically to full parental rights. They have to assert paternity and take advantage of the opportunity to develop an attachment with their children.") (citing Lehr v. Robertson, 463 U.S. 248, 250, 262 (1983)).

expanded definition of "parent" need not be exclusive to female partners of a biological mother. It could apply to the non-biological co-parent in gay male couples where the partner is biologically related to the child carried by a surrogate and has formal, legal rights that exclude the surrogate. If the non-biological father can show by clear and convincing evidence that he and his partner jointly intended to conceive and raise the child, he would have standing as a parent.[277] The *Brooke S.B.* rule could apply to unmarried men in straight couples when they do not have a biological tie to the child and jointly pursued an alternate form of conception.[278] Lastly, it might even be applicable to the second parent when one parent formally adopts into a partnership, where the two parties intended joint parentage and chose not to jointly adopt due to legal barriers, cost, or other choice.

Under this rule, Alison D., who showed that both partners intended for her to be a co-parent, would have parental rights. However, Debra H. might not. Janice R. alleged that she had explicitly asked a lawyer if her civil union with Debra H. in Vermont would affect her parental rights to her child, and was told it would not. Furthermore, the court found that Janice repeatedly rebuffed Debra's requests to adopt the child. However, this is complicated by the fact that Janice conceived the child while dating Debra, but alleges that conception occurred early in the relationship and that the two women did not form a joint intent to conceive and raise a child. Additionally, regardless of its formal legal ramifications, a civil union was and is a strong indicator of intent to create a joint life, especially before marriage was universally available to gay couples. Thus, perhaps it is reasonable to expect Janice—or any parent-to-be who wants to rebut her current significant other's potential parental rights—to avoid civil unions or other such formal indicators of intent to join lives, if she wants to prevent her partner from gaining parental status. Clear intent manifested in a legal action should be binding even if prior or subsequent action suggests a different choice. For example, where two women choose to use the egg of one and implant it in the other, and the egg donor signs a donation form articulating her choice to sign away any rights to the resulting child and the gestating mother articulated a clear

277. For discussion of the concern that a biological father in a gay couple must take affirmative steps to have parental rights exclude the surrogate mother, unlike a parent in a straight, fertile couple, *see* Appleton, *supra* note 20, at 288–89, 260–65. Appleton argues for "presuming" a female partner of a biological mother is the second parent, but rejects applying that presumption to male couples due to the biological differences between gay male couples and lesbian couples. However, she notes that "different treatment marginalizes male couples and sends a signal that nurturing and parenting do not come 'naturally' to gay men . . . . In addition to reinforcing negative stereotypes . . . this different treatment burdens precisely those men who can most effectively resist the patriarchal norms and gendered expectations that feminists have sought to challenge." *Id.* at 292–93.

278. This might already be happening. *See* Polikoff, *supra* note 16, at 221.

intent to be a single parent, that choice should be adhered to even where the women subsequently live together with the resulting child.[279]

Courts will inevitably face tough cases applying this rule. Already, New York courts face a test of the new *Brooke S.B.* rule. In fall 2016, a Manhattan court heard arguments over whether Kelly Gunn, the former partner of Circe Hamilton, is the second mother of Ms. Hamilton's adopted child or simply a "friend" who was "offering help."[280] Ms. Hamilton adopted the child from Ethiopia in 2011. In the original adoption paperwork, completed in early 2009, Ms. Hamilton is listed as a single woman with a boyfriend and Ms. Gunn is described as her roommate. However, both women concede that this was because Ethiopia does not allow gay couples to adopt. The two women actually planned to raise the child together and their application included a description of their joint assets.[281] Ms. Gunn said she planned to one day co-adopt in a second-parent adoption proceeding.[282] However, the couple broke up in December 2009.[283] The women remained friendly.[284] Ms. Gunn met Ms. Hamilton and the child for the flight back from Ethiopia, and she proceeded to babysit often and attend doctors' appointments.[285]

Ms. Hamilton argued that she thought these were the gestures of a trusted friend who was offering to help with the challenges of parenting.[286] Ms. Gunn said, "[The child] wouldn't have come into our lives without me . . . . He is a product of our mutual intention, our mutual efforts."[287] She argues that the adoption agreement was like a conception, and she and Ms. Hamilton had formed a joint intent to create and parent this child.[288] Of course, the rule articulated in *Brooke S.B.* did not specifically address whether it applied when the child was adopted rather than conceived by the parent or parents.

Ms. Gunn accepted the title of "godmother" to the child in 2012, and said in an email, "Despite my own sadness and regret over not being one of [his] adoptive parents, I long ago made peace with my role as a godmother . . . . I have never inferred or articulated to [the child], or to anyone, that I am his mother."[289]

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279. *Contra* K.M. v. E.G., 13 Cal. Rptr. 3d 137, 149–50, 153–54 (2004), *rev'd by* K.M. v. E.G., 37 Cal. 4th 130 (2005) (holding that despite having signed a donor consent form including a waiver of parentage claims when she donated her eggs to E.G., K.M.'s role as a functional parent gave her standing to seek custody and visitation with twins who were born from those eggs).

280. Sharon Otterman, *A Complex Case Tests New York State's Expanded Definition of Parenthood*, N.Y. TIMES, Oct. 18, 2016, https://www.nytimes.com/2016/10/19/nyregion/new-york-state-case-expanded-definition-of-parenthood.html.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

The trial went on for more than three weeks,[290] and the court clearly did a full factual investigation into the minutiae of the family members' lives since the adoption. Judge Frank P. Nervo, who presided over the hearing, provided a list of questions to the lawyers that revealed his disregard of the Court of Appeals' rule, which limited the inquiry at the standing stage. The judge conflated this narrow inquiry with broader rules such as a functional parent test or a best interests inquiry. He delved far into the post-conception analysis, asking the parties what role the child thought Ms. Gunn held, whether Ms. Gunn assumed the duties of a parent, and what impact it would have on the child if his relationship with Ms. Gunn ended.[291] This is exactly the slippery slope that worries family defense attorneys and threatens the families they represent. If the courts conflate steps one and two, if they expand their use of a best interests standard and inquire into all aspects of a family's life at a hearing to decide if someone has standing to argue they are a parent, that invasive and constitutionally improper analysis could easily bleed into family court judges' understanding of their role and inquiry into whether a parent or the state should take custody of a child who is alleged to be abused, which should be a step two analysis.

On April 14, 2017, the court found that the two women did not have an "unabated plan" to adopt and raise the child together.[292] Ms. Gunn's attorney has appealed.[293]

In order to maintain the protections that the narrow *Brooke S.B.* rule attempts to provide, appellate courts and the Court of Appeals must ensure that all lower courts understand and follow the limits of the *Brooke S.B.* rule and do not expand their inquiry at the standing stage to include other, broader standards such as the best interests of the child or functional parenthood. The appellate courts must emphasize the distinction between applying such standards in the second step—deciding which of two fit parents obtains custody—and applying such standards in the first step—determining who has standing to seek parental rights at all. Because of all the misconceptions and complexities around parental rights issues, the Court of Appeals will need to be vigilant and prepared to issue a series of consistent opinions to reinforce the principles articulated in *Brooke S.B.*

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290. Barbara Ross, *Two Women in Custody Battle Over Adopted Ethiopian Boy Make Final Arguments Before Manhattan Judge*, N.Y. DAILY NEWS (Nov. 23, 2016, 6:30PM), http://www.nydailynews.com/new-york/manhattan/nyc-women-final-bid-custody-battle-ethiopian-boy-article-1.2885569 [https://perma.cc/2B3U-QCYV].

291. Otterman, *supra* note 280.

292. Gunn v. Hamilton, 51 N.Y.S.3d 838 (N.Y. Sup. Ct. 2017), *appeal docketed*, No. 309154/2016 (N.Y. App. Div. Apr. 18, 2017); Julia Marsh, *Woman Loses Landmark Same-Sex Custody Battle*, N.Y. POST (Apr. 14, 2017, 2:17PM), http://nypost.com/2017/04/14/woman-loses-custody-battle-in-first-of-its-kind-case/ [https://perma.cc/3XHQ-378Q].

293. *Id.* For a detailed discussion of this case, *see* Ian Parker, *What Makes a Parent?*, THE NEW YORKER (May 22, 2017), http://www.newyorker.com/magazine/2017/05/22/what-makes-a-parent [https://perma.cc/7KX7-KMYA].

VI.
NEXT STEPS—NATIONWIDE IMPLEMENTATION

A. The Basis of Nationwide Implementation—Equal Protection Arguments to Protect These Parents' Rights

Domestic relations laws are typically the purview of the states,[294] and Congress cannot pass an overarching law guaranteeing parental protections for gay couples and their families because it lacks jurisdiction over family law issues. In the meantime, laws supporting the parental rights of gay couples are evolving piecemeal, state by state. In order to gain nationwide protections and consistency on this issue, advocates should bring constitutional challenges of these laws to the Supreme Court and gain a ruling that must be respected nationwide.

While family law is typically the purview of the states, the Supreme Court can and should intervene where there are clear violations of the federal constitution and major conflicts between state laws. Gay parents' rights issues implicate both the due process rights and equal protections guaranteed by the United States Constitution, namely parents' liberty interest in parenting their children and families' right to be free from discrimination based on the "legitimacy" of children, the gender of parents, and the sexual orientation of parents.[295] Due process protections for parents generally are too broad; they do not address the meat of the issue in these cases—the differential treatment of parents and families based on the gender or sexual orientation of the parents. Furthermore, it is difficult to design a due process argument for these parents, where the dispute is about who is entitled to the substantive due process rights as a parent or about whether the recognized-parent did in fact choose this co-parent and that choice should be protected. Equal protection arguments are a stronger basis for nationwide equal treatment specific to gay couples and their families.[296] Thus, equal protection arguments will be presented here.[297]

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294. *See* Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) (holding that the domestic relations exception to diversity jurisdiction limits the power of federal courts to issue divorce, alimony, and child custody decrees).

295. *See* Brief for National Center for Lesbian Rights et al. as Amici Curiae Supporting Petitioner-Respondent at 26–30, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Smith 2013, *supra* note 8; Catherine Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307 (2010).

296. *See, e.g.*, NeJaime, *supra* note 80, at 1194 (discussing the use of equal protection doctrine to expand recognition of non-marital parent-child relationships).

297. Parent advocates could bring a constitutional claim challenging laws that fail to give unmarried, non-biological, non-adoptive parents equal rights as their co-parents because it fails to recognize parents' constitutionally protected choice about who will be their co-parent. This argument would be a new one in constitutional law, and thus harder to make than an argument under existing equal protection case law. The failure to treat gay parents equally to straight ones, or to treat the children of each equally, is a relatable existing legal narrative on which advocates should rely.

The Equal Protection Clause in the Fourteenth Amendment protects groups from government action that treats that group differently than others similarly situated. The Court has articulated three levels of scrutiny depending on whether the group is a "suspect class," whom the law has decided is more worthy or in need of protection.[298] There are three suspect classes that may form a basis for an equal protection argument that gay, unmarried parents cannot be discriminated against as compared with other parents: legitimacy, gender, and sexual orientation. Litigants can use these arguments to challenge laws that fail to recognize their familial ties as compared with the recognition of other families.

1. Legitimacy

The Supreme Court has found that issues of legitimacy—the rights of children born to a married couple compared with the rights of children born to unmarried people—are subject to intermediate scrutiny.[299] In *Stanley v. Illinois*, the Court found that it is unconstitutional to recognize parentage only when a child is born to a marriage.[300] Furthermore, it is unconstitutional discrimination to protect children's attendant rights—such as the right to inherit—only when the child is born to a marriage.[301]

In the case at hand, a child of married gay parents is treated differently from the child of unmarried ones, and a married couple's child conceived via artificial insemination and biologically related only to one parent is treated differently from an unmarried couple's child in a similar situation. Children of married gay couples should be presumed to be the child of both parents based on the marriage presumption discussed above and the Supreme Court's rationale in *Obergefell*.[302] Children of unmarried gay couples do not have presumptive ties to their non-biological parent because their parents are not married. This difference, based on the marital status of the parents or the "legitimacy" of the children, is afforded intermediate scrutiny. To overcome intermediate scrutiny, the government action—laws treating children of unmarried gay couples

298. For discussion of the levels of scrutiny afforded to different suspect classes, *see* JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 323–25, 332–34 (West, 9th ed. 2017).

299. *See* BARRON & DIENES, *supra* note 298, at 390–92.

300. 405 U.S. 645, 650, 658 (1972) (noting that parents can have their children taken from them after the parents are found unfit in a neglect proceeding, but by use of the proceeding at issue, "the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law" and that result was unconstitutional under the Due Process Clause); *see also* Grossman, *supra* note 17, at 671; Smith 2013, *supra* note 8, at 1609.

301. Levy v. La., 391 U.S. 68, 72 (1968).

302. NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 24, at 1; Obergefell v. Hodges, 575 U.S. ___, 135 S. Ct. 2584, 2600 (2015) ("A third basis for protecting [same sex couples'] right to marry is that it safeguards children and families . . . .")*; see* discussion *supra* Part II.B. However, that presumption has yet to be fully litigated nationwide.

differently from married gay couples—must be substantially related to an important government interest.[303]

The Supreme Court doctrine has clearly stated that treating a parent's right differently based on her marital status is contrary to the government's interest.[304] Furthermore, the Court has forsworn an interest in encouraging marriage and discouraging extramarital children,[305] or an interest in discouraging gay couples from having children.[306] Thus, these laws treating children of unmarried, gay couples differently from children of married gay couples based on the marital status of their parents would fail an intermediate scrutiny inquiry.

The laws affecting families headed by unmarried gay couples also discriminate against infertile unmarried couples generally, as compared with married ones. The same analysis applies: "[A] litigant seeking to maintain a parent-child relationship deriving from an assisted reproduction statute should be able to argue that recognizing such a relationship only when the biological mother is married to the other parent is unconstitutional discrimination against children born outside marriage . . . ."[307] The equal protection violation in these laws could be fixed by a universal rule governing all couples who cannot or choose not to procreate together. Thus, while a challenge based on the equal protection violation against a gay unmarried couple could work, strategically, impact litigators may seek to challenge these laws with an infertile straight couple as their clients in order to avoid the possible prejudice against gay parents and to still achieve the same outcome.[308]

Although a "legitimacy" argument inherently focuses on the impact on children, it can also result in establishment of parental rights. Further, children create a compelling narrative and may enhance the likelihood of success for this impact litigation. A challenge of these laws based on a violation of the equal rights of children of unmarried, infertile, straight parents may be the most likely

303. *See* BARRON & DIENES, *supra* note 298, at 390–92 (noting that this is the typical intermediate scrutiny standard, but that the Court has presented a variety of language regarding the significance of the state interest, from "permissible" (Trimble v. Gordon, 430 U.S. 762 (1977)) to "legitimate" (Mills v. Habluetzel, 456 U.S. 91 (1982)) to simply "a" state interest).

304. Stanley v. Ill., 405 U.S. 645 (1972) (finding an unmarried father was entitled as a parent to a fitness hearing in order to avoid his children becoming wards of the state); *supra* notes 20–22, 42–44.

305. *See supra* notes 42–44.

306. *Obergefell*, 135 S. Ct. at 2600 ("A third basis for protecting [same sex couples'] right to marry is that it safeguards children and families . . . .").

307. Polikoff, *supra* note 16, at 264.

308. Compare this with Justice Ruth Bader Ginsburg's strategy of using male clients to highlight equal protection concerns based on gender and to challenge harmful sex stereotypes. *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff [https://perma.cc/GDP4-VQLK] (discussing *Frontiero v. Richardson*, 411 U.S. 677 (1973) and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), in which the ACLU argued that sex-based distinctions harm men as well as women); *see also* Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970–80*, 25 Colum. J. Gender & L. 41–49 (2013) (arguing that other scholars' statements that Justice Ginsburg selected mostly male clients are an overstatement of the facts); BARRON & DIENES, *supra* note 298, at 380.

to succeed. However, advocates may choose to disregard the legitimacy argument in favor of a gender or sexual orientation-based one in order to avoid using children's rights-based arguments rather than parents' rights-based ones.[309]

2. Gender

Discrimination on the basis of gender is also subject to intermediate scrutiny.[310] In the present scenario, male partners are afforded parental standing if they were involved with the biological mother at conception and asserted their parental rights after birth.[311] Female partners are not afforded that standing.[312] Thus, this different treatment by law is subject to intermediate scrutiny.[313]

In order to overcome intermediate scrutiny, the law's differential treatment of a female partner of a biological mother versus a male one must be substantially related to an important government interest.[314] Similar to the outcome in the legitimacy analysis, the Supreme Court has stated that the government does not have an interest in discouraging gay couples from having children, but rather wants children to have a stable family life.[315] As the Supreme Court stated in *Stanley v. Illinois*, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents."[316] Classifying lesbian co-parents of the biological mother as being invariably less qualified and entitled than male co-parents to exercise a concerned judgment as to the fate of their children will therefore not bear a substantial relationship to the

309. For a discussion of why advocates should avoid children's rights-based arguments, *see generally* GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 8.

310. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."); *id.* at 533 ("The State must show 'at least that the challenged classification serves important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'") (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). However, the Court explicitly stated: "The heightened review standard our precedent establishes does not make sex a proscribed classification." *Id.* at 533. For discussion of gender suspect classification, see BARRON & DIENES, *supra* note 298, at 378–89.

311. Lehr v. Robertson, 463 U.S. 248, 262 (1983) (finding a biological father has inchoate parental rights that can become constitutional rights to his child if he "grasp[ed] the opportunity" to develop a relationship with the child); *see supra* notes 20–22.

312. *See supra* Part IV.C.

313. *See* BARRON & DIENES, *supra* note 298, at 388–89; Caban v. Mohammed, 441 U.S. 380, 394 (1979) (finding that unmarried fathers could not be afforded fewer rights than mothers to grant permission for adoption of their joint child).

314. See *Caban*, 441 U.S. at 380 (citing Craig v. Boren, 429 U.S. 190 (1976)).

315. Obergefell v. Hodges, 575 U.S. ___, 135 S. Ct. 2584, 2600 (2015) ("By giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.' Marriage also affords the permanency and stability important to children's best interests.") (internal citations omitted) (quoting United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675, 2694 (2013)).

316. Stanley v. Ill., 405 U.S. 645, 652 (1972).

State's asserted interests.[317] The different treatment of a parent-child relationship when the biological mother's partner is female rather than male is "unconstitutional discrimination on the basis of gender."[318]

3. Sexual Orientation

The Supreme Court has addressed discrimination on the basis of sexual orientation in two recent cases.[319] While the Court does not articulate a standard of scrutiny, it appears to apply rational basis review or a slightly heightened form of rational basis review.[320]

Unmarried gay couples do not enjoy the same presumption or grant of parental rights as straight unmarried couples. This difference is ostensibly based on the fact that there is no biological tie, but the law has found a presumption of parenthood for married persons who do not have a biological tie,[321] so that argument must fail.

In order to survive rational basis review, a law must have a rational relationship to a legitimate government interest.[322] Given the Supreme Court's statement legalizing gay marriage in part in order to support children of gay couples and families with gay heads of household,[323] it appears that the Court is open to an argument that there is not a rational basis for the government to deny gay parents standing as parents. Therefore, differential parental rights for unmarried couples who are gay rather than straight may be found unconstitutional if a challenge is brought.[324]

B. Interim State Implementation—Judicial or Legislative Action?

While the end-goal should be to obtain a Supreme Court ruling that protects these parents and families nationwide, that litigation will take time and will likely only ban discrimination on the basis of marital status, gender, or sexual

317. *Cf. Caban*, 441 U.S. at 394 (finding that unmarried fathers could not be afforded fewer rights than mothers to grant permission for adoption of their joint child).

318. Polikoff, *supra* note 16, at 264.

319. *See* BARRON & DIENES, *supra* note 298, at 395–98; *Obergefell*, 135 S. Ct. 2584; *Windsor*, 133 S. Ct. 2675.

320. *Obergefell*, 135 S. Ct. at 2590 (holding that laws banning same-sex marriage "burden the liberty of same-sex couples and . . . abridge central precepts of equality" but not declaring sexual orientation a suspect classification); *Windsor*, 133 S. Ct. at 2696 ("[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *id.* at 2706 (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. . . . [However], its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases . . . .").

321. *See supra* notes 20–23.

322. *See* BARRON & DIENES, *supra* note 298, at 325, 395, 397.

323. *See Obergefell*, 135 S. Ct. at 2600.

324. *See generally* NeJaime, *supra* note 80.

orientation. It will not define how such a rule will be implemented, and if the new rule will protect existing parents' rights. It will be up to the state lawmakers to decide how to eliminate discrimination against gay families and, hopefully, also protect all families' interests. States should support their strong interest in promoting stable families, regardless of whether the parents are straight or gay, rich or poor.

Advocates should seek implementation of this narrow, protective rule in every state. The next question is whether advocacy in states should target judicial or legislative action. A change in definitional law, e.g. who qualifies as a parent, is typically a legislative function. In 2010, the New York Court of Appeals unequivocally stated, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent."[325] Many courts feel similarly.[326] However, when the legislature is frozen on an issue, the courts may adjudicate it pending legislative action. The New York Court of Appeals decided it could do so in this *Brooke S.B.* opinion[327] and other courts can, too.

Furthermore, the judiciary's role is to interpret ambiguity in existing laws. Thus, where a statute does not define the sex of a parent, the judiciary has authority to interpret the ambiguous meaning.[328] A court should use the legislature's statutory objectives—and in the absence of that, the Supreme Court's decisions—as guidance to help define terms.[329] The New York legislature exhibited a clear intent to promote equality for gay couples and gay families when it passed the Marriage Equality Act in 2011.[330] Specifically, the legislature said:

> No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex.[331]

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325. Debra H. v. Janice R., 930 N.E.2d 184, 193 (2010).

326. *See, e.g.*, Nancy S. v. Michele G., 279 Cal Rptr. 212, 219 (Dist. Ct. App. 1991) (declining to recognize functional parent status, reasoning that such a "novel" theory with "complex practical, social and constitutional ramifications" should be left to legislative consideration), *overruled by* Elisa B. v. Super. Ct., 117 P.3d 660, 672 (Cal. 2005) (quoting *In re* Marriage of Lewis & Goetz, 203 Cal. App. 3d 514, 519–20 (1988)).

327. *See* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498, 500 (effectuating the Legislature's intent, or expanding on the legislation enacted).

328. *See id.* at 494 (citing Alison D. v. Virginia M., 77 N.Y.2d 651, 656–57 (1991)).

329. *See id.* at 498–99; Forman, *supra* note 9, at 34 ("[T]he court could adapt the common law to fill the gap in the existing legislative scheme."); *see also*, *id.* at 31, 36.

330. N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2011); *see* discussion *supra* note 29 and accompanying text.

331. DOM. REL. LAW § 10-a(2).

The Supreme Court exhibited similar goals in its *Obergefell* decision, stating:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. . . . [T]his denial to same-sex couples of the right to marry works a grave and continuing harm[]. . . [and] serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.[332]

Thus, New York courts, and now courts nationwide, have strong guidance to promulgate rules that promote family equality in pursuit of equal treatment for gay couples and their families. Courts can interpret "parent" to include two people who have chosen to co-parent, regardless of gender or marital status. And if a law does limit parental status to a man and a woman, courts also have a strong basis to find that definition unconstitutional.

VII.
CONCLUSION

We must devise laws that protect the equal rights of gay parents to be legally recognized as parents, regardless of their marital status or biological relationship to the child. However, those laws must also respect and protect existing parents' rights. Many of the proposed or recently promulgated rules that create a path for the non-biological parent in an unmarried, gay couple to obtain legal recognition as a parent do not afford that parent equal rights to those she would have if she were in a straight couple. Furthermore, these rules might endanger existing parents and their families by allowing abusive partners an additional opportunity to drag them to court. They undermine parents' rights more broadly by expanding the courts' role at an earlier stage of the analysis—determining who is a parent or person with parental standing—rather than mostly excluding the courts until the second inquiry of who should be awarded custody or visitation.

A new rule that focuses on the parents' joint intent to become co-parents can both respect parents' rights generally and obtain equal rights for unmarried, gay couples compared with unmarried, straight ones. The rule must provide equal protection for gay and straight couples, as well as for unmarried and married couples; it must be a default rule that does not unnecessarily involve the courts at this first stage, determining who is a parent; and it must not undercut parental rights broadly, to the detriment of children and families. Parental standing should not be defined by emotional ties, contributions to the care of the child, or even impact on the child. Standing as a parent should be defined by clear and

332. Obergefell v. Hodges, 575 U.S., 135 S. Ct. 2584, 2604 (2015) (citations omitted).

convincing evidence of the adults' pre-conception decision to become co-parents.

Parental rights and equal rights for gay couples need not be in opposition. The next step for parental rights equality—whether achieved through strategic constitutional litigation, state-by-state lawsuits, or legislative advocacy—is the establishment of a consistent rule that separates the decision to become a parent with another person from other decisions about relationships, living situations, and child care-giving. Such a rule will move us further towards the goal of equal rights for all parents.