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## Parentage Agreements Are Not Contracts

Gregg Strauss

*University of Virginia School of Law*

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# PARENTAGE AGREEMENTS ARE NOT CONTRACTS

*Gregg Strauss\**

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\* Class of 1966 Research Professor of Law; Director, Family Law Center, University of Virginia School of Law. This Essay was prepared for the Symposium entitled *The Law of Parents and Parenting*, hosted by the *Fordham Law Review* on November 5, 2021, at Fordham University School of Law.

## INTRODUCTION

Parentage agreements are proliferating. In a fertility clinic, an egg donor, sperm donor, and gestational surrogate may agree to waive their parental rights, and the intended parents may agree to share parenthood. In a maternity ward, a birth mother may agree to acknowledge a partner as a parent. In an adoption agency, birth and adoptive parents may agree to an open adoption with ongoing visitation. In a home, a parent may agree to share parentage with a cohabitant, enabling the cohabitant to become a legal parent later after raising the child and developing parental bonds.

Good reasons underlie this drift toward “private ordering” in parentage law. Many parentage agreements should be enforced to promote child welfare, reproductive liberty, LGBTQ+ equality, and familial pluralism. Unfortunately, a strand of contractual rhetoric threatens to divert the current to different ends. It is tempting to think about parentage agreements as if they are contracts: adults have expressed their *ex ante* intention about legal parenthood, and the law ought to treat their intentions as binding unless it will impede child welfare. This Essay urges scholars, judges, and lawyers to avoid being carried away by this contractual analogy.

The analogy between contracts and parentage agreements is shallow at best. Characteristic doctrines of contract law play only a minor role in parentage because the reasons for enforcing contracts against parties do not apply to parentage agreements.<sup>1</sup> At worst, the analogy may mislead parentage reforms. Because contract law enforces parties’ *ex ante* intentions irrespective of their content, the analogy may lend undue support to novel agreements that tailor parental rights or divide parenthood among many adults.<sup>2</sup> Such novel familial arrangements might be permissible, even salutary. However, this conclusion should rest on evidence that they fulfill the child’s relational needs as well as fulfill more traditional forms of parenthood, not on a hasty contract analogy.

Despite the “agreement” label, lawyers and theorists should resist the temptation to understand parentage agreement law by analogy to contract

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1. Many readers may find this Essay takes the law and morality of contract too seriously. Despite efforts by “new private law theorists” to discern the conceptual core of the traditional doctrinal categories, many scholars still doubt that contract has any distinctive unity. *See, e.g.*, Andrew S. Gold, *Internal and External Perspectives: On the New Private Law Methodology*, in *THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW* 3, 15 (Andrew S. Gold et al. eds., 2020). Even if it is impossible to specify necessary and sufficient conditions for identifying a contract, it will suffice for my purposes if contract is a “family-resemblance” concept comprised of overlapping practices with characteristic doctrines and values. Too few of contract law’s characteristic norms are at play in parentage agreements for the analogy to guide parentage law. On the other hand, this Essay has little to say to a full-fledged contract pluralist who believes “contract” is a nominal kind—merely an empty label for distinct relationships governed by distinct values. Any consensual arrangement that the law will enforce, for whatever reasons, is a contract. On this perspective, an analogy with contract can, by hypothesis, offer little real guidance. Instead, we should evaluate directly whether the values that govern relationships between a child, current parents, and prospective parents encourage or allow legally enforceable agreements.

2. *See, e.g.*, Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2088 (2016).

law. This Essay surveys the moral foundations of contract law to explain why contract principles have limited use in parentage agreements. After Part I briefly surveys the modern law of parentage agreements, Part II argues that these agreements share few moral similarities with legal contracts. That does not mean the law should not enforce parentage agreements, only that the justifications for legal enforcement lie elsewhere.

## I. PARENTAGE AGREEMENT LAW

Over the last few decades, family law has slowly added mechanisms that allow adults to declare who will be a child's legal parent. Many private parentage agreements serve as a substitute for adoption, so it is helpful to begin with a review of this more traditional way to share or transfer parentage.

### A. Adoption

Adoption gives a child a new legal parent who is not the child's biological or presumed parent. It may create a new family if the child's biological or legal parents are deceased, have consented to terminate their parental rights, or had their rights terminated involuntarily for neglect or abandonment.<sup>3</sup> Alternatively, if the child has one legal parent, the parent may consent to a "second-parent adoption."<sup>4</sup>

Many adoption rules protect existing parents. Any legal or biological parent who has demonstrated commitment to parenthood has a constitutional right to contest the adoption.<sup>5</sup> For infant adoptions, the gestational mother must consent in writing after the birth, sometimes after a waiting period of a few days.<sup>6</sup> The gestational mother can revoke consent for a short period, from a day to a few weeks,<sup>7</sup> or until a judge enters the final decree, after which it can be challenged only for fraud or duress.<sup>8</sup> If the birth parent does revoke consent, some states return the child, but others authorize a court to use a best-interests test.<sup>9</sup> Genetic fathers receive fewer protections. Some states treat a father's consent during the pregnancy as binding, and some courts conclude fathers have "waived" their rights unless they demonstrate firm commitment soon after the birth or even early in the pregnancy.<sup>10</sup> Birth

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3. See 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 14:5 (2021).

4. I use the term "second-parent adoption" rather than "stepparent adoption" because it includes states that allow adoption by a parent's nonmarital partner.

5. See Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1499 (2018).

6. See 1 ADOPTION LAW AND PRACTICE § 2.11(1)(a) (2021).

7. *Id.*; Elizabeth J. Samuels, *Time to Decide?: The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 541 (2005) (noting the growing trend of reduced time for revocation).

8. See 2 ADOPTION LAW AND PRACTICE § 8.02(1)(a)(iii) (2021).

9. See *id.* § 8.02(1)(a)(i).

10. See generally Mary M. Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the Supreme Court and Thirty-Four States*, 24 MICH. J. GENDER & L. 53 (2017); 1 ADOPTION LAW AND PRACTICE § 2.11 (2021).

parents may also consent to waive parental rights contingent on adoption by a particular parent, which effectively empowers the birth parents to choose adoptive parents.<sup>11</sup>

Other regulations screen adoptive parents to ensure they will provide appropriate care. Screening rules have two layers: categorical limits and ad hoc review.

All states maintain some status requirements. The least controversial are minimum age limits. An adoptive parent must be at least eighteen years old, sometimes twenty-one.<sup>12</sup> Other categorical rules rest on questionable assumptions about who can raise a child well, often based on controversial family ideals. Until recently, some states required or encouraged matching by race or religion, and some adoption agencies persist in these policies.<sup>13</sup>

Another set of controversial rules concerns marriage. Most states allow a single person to adopt.<sup>14</sup> Most also allow unmarried couples to adopt jointly or complete a second-parent adoption.<sup>15</sup> Many statutes, however, still authorize joint adoptions only by married couples.<sup>16</sup> This rule precluded same-sex adoption until recently, but now all states allow same-sex spouses to adopt jointly, as constitutional precedent requires.<sup>17</sup> The remaining marital rules, shorn of their homophobic assumptions, rest on an empirical assumption that marriage is a proxy for coparenting commitment, more resources, and increased family stability.<sup>18</sup> Many scholars question the efficacy or sincerity of this policy, arguing that marriage is not otherwise a requirement for someone to become a parent and that courts could directly

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11. See 1 ADOPTION LAW AND PRACTICE § 2.11(4)(a) (2021).

12. See CHILD WELFARE INFO. GATEWAY, U.S. CHILD.'S BUREAU, WHO MAY ADOPT, BE ADOPTED, OR PLACE A CHILD FOR ADOPTION? 2 (2020), <https://www.childwelfare.gov/pubPDFs/parties.pdf> [<https://perma.cc/VC3J-L47H>]; Mary Kate Kearney & Arrielle Millstein, *Meeting the Challenges of Adoption in an Internet Age*, 41 CAP. U. L. REV. 237, 246 (2013).

13. See 1 ADOPTION LAW AND PRACTICE § 3.06(3)–(4) (2021); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1875 (2021).

14. See 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 14:4 (2021).

15. See NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 2–3 (2019), [https://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf) [<https://perma.cc/WL3G-XFBU>] (updated list).

16. See, e.g., ALASKA STAT. ANN. § 25.23.020 (West 2021); see also COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:2 (2021) (citing ten states that do not permit joint adoption by unmarried couples). *But see id.* § 5:11 (arguing that statutes that mention joint adoption only for spouses should still permit adoption by unmarried couples).

17. See *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (reasoning that the equal right to marry requires states to extend all marital “benefits” to same-sex couples); *Campaign for S. Equal. v. Miss. Dep’t of Hum. Servs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016); see also *Fla. Dep’t of Child. & Fams. v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (violates state constitution).

18. See *In re Jason C.*, 533 A.2d 32 (N.H. 1987). This is a sanitized version of the sex and procreation argument used to defend gendered marriage laws. See Vanessa A. Lavery, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 287 (2007).

evaluate adoptive parents without relying on marriage as a poorly tailored proxy.<sup>19</sup>

Prospective adoptive parents must also complete an ad hoc judicial review process. Ultimately, a court must conclude adoption is in the child's best interests.<sup>20</sup> Most states require a social worker or counselor to investigate the parents and their home to ensure it is "suitable."<sup>21</sup> These inquiries can be wide-ranging. Florida, for example, "considers such factors as physical and mental health, income and financial status, duration of marriage, housing, and neighborhood, among others."<sup>22</sup> Courts argue the state's *parens patriae* role obligates it to investigate adoptive parents to ensure they will care for the child adequately.<sup>23</sup> Adoptive parents, unlike gestational or genetic parents, have no special claim to raise the child.<sup>24</sup>

Critics of adoption respond that the process is too slow, costly, intrusive, and discriminatory.<sup>25</sup> A home study can take months and cost a few thousand dollars.<sup>26</sup> Further, vague standards allow the social workers' and judges' biases and value preferences to shape outcomes, often in ways that disfavor single adults, adults of a different religion, ethnicity, or race than the child, LGBTQ+ adults, and adults with special needs.<sup>27</sup> Scholars argue the process of investigating potential adoptive parents sends the message that nonbiological parents are second-class parents.<sup>28</sup> Criticism of adoption's marital preferences and screening processes is a central motivation for new forms of parenthood by agreement.

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19. See, e.g., Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 824 (2009); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 336–48 (2006).

20. See *In re Adoption of A.A.B.*, 877 N.W.2d 355, 362–63 (S.D. 2016) (holding that a court has ultimate responsibility to determine if adoption is in the best interest of the child, the "paramount" consideration).

21. See 1 ADOPTION LAW AND PRACTICE § 4.12 (2021).

22. *Lofton v. Sec'y of Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 810 (11th Cir. 2004) (citing FLA. ADMIN. CODE ANN. r. 65C-16.005(3) (2003)).

23. See, e.g., *id.* at 809–11.

24. See *id.*

25. See Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 112 (2018).

26. See *id.* at 112–13.

27. See Leah Whetten-Goldstein, *Building Up Families by Breaking Down Marital Status as a Barrier to Adoption*, 54 U.S.F. L. REV. 373, 388–90 (2020) (discussing three cases denying adoption to single parents based on concerns that also track bias against nontraditional family structures and less wealthy living arrangements); Rachel H. Farr & Abbie E. Goldberg, *Sexual Orientation, Gender Identity, and Adoption Law*, 56 FAM. CT. REV. 374, 378 (2018); Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1111 (2014).

28. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2318–19 (2017).

*B. Agreements by Gestational Mothers to Share Parentage of Newborns*

The first three types of agreements allow birth mothers to bypass adoption by consenting to share parentage with their partners before birth, at birth, or soon thereafter.

1. Consent to ART by a Birth Mother and a Partner

In thirty-eight states, a female who undergoes donor insemination or in vitro fertilization (IVF) may agree to share parenthood with a partner.<sup>29</sup> These preconception agreement statutes center on the birth mother. The statutes apply only if a female conceives through assisted reproductive technology (ART) intending to parent the child and, thus, do not cover surrogates.<sup>30</sup> Most states authorize preconception agreements only for spouses; only ten include unmarried couples.<sup>31</sup> Many still use the gendered terms “husband” and “wife,” but at least twenty apply to spouses without regard to gender, either by legislative amendment or judicial order.<sup>32</sup>

How does one enter a preconception agreement? The spouse of a birth mother becomes a parent if the spouse “consents to assisted reproduction”<sup>33</sup> or “agreed . . . to the insemination.”<sup>34</sup> Often, the consent must be in writing.<sup>35</sup> Although these consent locutions are awkward as a matter of ordinary language, most statutes say nothing else about the agreement’s content.<sup>36</sup> The Uniform Parentage Act of 2017<sup>37</sup> (“UPA 2017”) adds a little more. An individual is a parent if the individual “consents . . . to assisted reproduction by a woman with the intent to be a parent of a child.”<sup>38</sup> The intent phrase seems like an additional requirement rather than a clarification of the consent. The UPA 2017 prioritizes written consent, but it also allows parties to prove “by clear-and-convincing evidence the existence of an express [oral] agreement entered into before conception that the individual and the woman intended that they both would be parents of the child.”<sup>39</sup>

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29. *Id.* at 2260, app. B at 2367–69.

30. *See, e.g.*, MO. ANN. STAT. § 210.824 (West 2021).

31. NeJaime, *supra* note 28, app. B.

32. *Id.* at 2260.

33. TEX. FAM. CODE ANN. § 160.703 (West 2021).

34. ARIZ. REV. STAT. ANN. § 25-501(B) (2022). Other statutes apply if a married female conceived or is artificially inseminated “with consent of her husband.” MICH. COMP. LAWS ANN. § 333.2824(6) (West 2022); MO. ANN. STAT. § 210.824.

35. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-501; MO. ANN. STAT. § 210.824.

36. First, person A can “consent” to person B’s conduct only if A has a right to insist that B refrain from this conduct. Spouses have no legal right to insist their partner not conceive a child through ART, although they likely have a moral right to be consulted in the decision. Second, given the ordinary operation of consent, consent to the medical procedure would not imply an agreement to coparent the child. Statutes appear to rely on marital norms to infer that a spouse who consents to ART also consents to coparent the child—clarifying this point may be why the Uniform Parentage Act adds its intent clause.

37. *See* UNIFORM PARENTAGE ACT (UNIF. L. COMM’N 2017) [hereinafter UPA 2017].

38. *See id.* § 703.

39. *Id.* § 704(b)(1).

Most statutes envision parties planning conception together, but a few allow them to enter parentage agreements during pregnancy. Arizona, for instance, treats a spouse as a parent if the spouse “agreed . . . to the insemination . . . after the insemination occurred.”<sup>40</sup> It is unclear how someone can consent to an act that has already occurred. It is also unclear precisely when parties become bound by their agreement. States vary widely in their response to embryo disputes, where the parties plan conception and create embryos, but one party later wants to withdraw consent.<sup>41</sup> The UPA 2017 provides that a partner is not a parent if the partner withdraws consent before implantation.<sup>42</sup>

## 2. Voluntary Acknowledgement of Parentage

Some states allow birth mothers to agree to share parentage with their partners *after* the birth through an “acknowledgment of parentage.”<sup>43</sup> These agreements evolved from paternity acknowledgments pushed by Congress. To receive federal subsidies for child welfare programs, a state must maintain a “simple civil process for voluntarily acknowledging paternity,” including giving all parents paternity forms at the hospital.<sup>44</sup> After a sixty-day rescission period, a signed paternity form receives the same preclusive effect as a judicial order of parentage.<sup>45</sup> Paternity acknowledgments are not an example of parentage by agreement but instead are a cheap way to establish genetic paternity.<sup>46</sup>

Nevertheless, unmarried parents sometimes use these forms “to memorialize their relationship as co-parents,”<sup>47</sup> and state law follows their lead. Many courts have held that an acknowledgment of paternity binds its signatories, even if the parties knew the male signatory was not the genetic father.<sup>48</sup> Ten states and the UPA 2017 have gone even further down this route, allowing birth mothers to sign a “Voluntary Acknowledgement of

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40. ARIZ. REV. STAT. ANN. § 25-501(B). The UPA 2017 provides that *oral* express agreements must be “entered into before conception.” See UPA 2017 § 705(b)(1). But “consent in a record [may be entered] before, on, or after the birth of the child.” *Id.* § 705(b). The provision regarding implicit agreements, which applies only after two years of coresidence and holding out, does not specify a timeframe for the initial agreement. *Id.* § 705(b)(2).

41. See 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 9:8.50 (2021).

42. UPA 2017 §§ 102(22), 707; see also I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1124 (2008) (discussing laws treating genetic parents as not the legal parents when they consented to creation of embryo but withdrew consent before implantation).

43. See, e.g., CONN. GEN. STAT. ANN. §§ 17b-27; 46b-476; 46b-477 (West 2022).

44. 42 U.S.C. § 666(C)(1); see Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 475–76 (2012) (summarizing federal law governing VAPs).

45. See 42 U.S.C. § 666(a)(5)(D)(ii).

46. Harris, *supra* note 44, at 478.

47. *Id.* at 478.

48. See Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1330. But see *Bedell v. Price*, 828 S.E.2d 263, 268 (Va. Ct. App. 2019).



Parentage” with any other adult, regardless of sex, as long as the child has no other presumed parent.<sup>49</sup> For the remainder of this Essay, when I refer to a VAP, I will be referring to these broader statutes.

States rarely dictate the content of these VAPs. Federal law states that parties must receive oral and written notice of “the legal consequences of, and the rights . . . and responsibilities that arise from, signing the acknowledgment.”<sup>50</sup> Nevertheless, state forms often focus on *procedural* consequences, some almost exclusively.<sup>51</sup> For example, in New York’s model form, the parties must affirm they “understand that signing this Acknowledgement of Parentage is voluntary and will establish parentage of our child.”<sup>52</sup> The rest of the form explains the processes to rescind or challenge a finalized VAP. Other states have forms that at least describe parental duties or rights. Maryland’s model form, for example, explains that the form “constitutes a legal finding of parentage” and that “legal parents . . . are the joint natural guardians of their minor child,” which “means that both parents are jointly responsible for the support of their child” and “have equal rights to custody of the child.”<sup>53</sup>

### 3. Marital Presumption

The third way for a birth mother to agree to share parentage is through marriage. A birth mother’s spouse is presumed a parent, whether the birth mother married before the conception, during the pregnancy, or soon after the birth.<sup>54</sup> The spouse will remain a parent unless someone successfully rebuts the presumption in court.<sup>55</sup> This presumption has served many functions: protection for children from the stigma and legal harms of illegitimacy, an inference to genetic paternity, a tool to promote marriage,

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49. UPA 2017 § 301; *FAQ: Voluntary Acknowledgment of Parentage*, GLBTQ LEGAL ADVOCS. & DEFS., <https://www.glad.org/voluntary-acknowledgment-of-parentage/> [<https://perma.cc/4N47-8X9A>] (last visited Apr. 2, 2022) (maintaining up-to-date list of statutes with forms).

50. 42 U.S.C. § 666(C)(1).

51. *See, e.g.*, WASH. STATE DEP’T OF HEALTH, ACKNOWLEDGMENT OF PARENTAGE DOH 422-159 (2021), <https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs//422-159-AcknowledgmentOfParentage.pdf> [<https://perma.cc/5JXN-F26E>].

52. N.Y. OFF. OF TEMP. & DISABILITY ASSISTANCE, ACKNOWLEDGEMENT OF PARENTAGE LDSS-5171 (2021), <https://otda.ny.gov/programs/applications/5171.pdf>. [<https://perma.cc/BEH3-PZHY>].

53. MD. DEP’T OF HEALTH, AFFIDAVIT OF PARENTAGE (2020), [https://dhs.maryland.gov/documents/CSA/CSA%20Forms/Affidavit%20of%20Parentage%20\(English\).pdf](https://dhs.maryland.gov/documents/CSA/CSA%20Forms/Affidavit%20of%20Parentage%20(English).pdf) [<https://perma.cc/D3V3-CEXT>]; *see also* DEP’T OF CHILD SUPPORT SERVS. PARENTAGE OPPORTUNITY PROGRAM, VOLUNTARY DECLARATION OF PARENTAGE (2020), [https://childsupport.ca.gov/wp-content/uploads/sites/252/POP/DCSS-0909\\_ENG.pdf](https://childsupport.ca.gov/wp-content/uploads/sites/252/POP/DCSS-0909_ENG.pdf) [<https://perma.cc/6Q75-NUQT>]; MASS. DEP’T OF REVENUE, CHILD SUPPORT ENF’T DIV., VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE, R-130-02112011, <https://web.archive.org/web/20210101023825/https://www.mass.gov/doc/voluntary-acknowledgment-of-paternity/download>.

54. *See* UPA 2017 § 204(a).

55. *See id.* § 204(b).

and a reflection of spousal agreement.<sup>56</sup> Some scholars argue that the modern marital presumption rests primarily on a presumed agreement.<sup>57</sup> Given marriage's social norms, the law can justifiably infer that the birth mother consents to share parentage and the spouse commits to coparent.

Agreements to coparent have always played a role in the marital presumption. Until late in the twentieth century, only the spouses themselves had standing to challenge the husband's paternity, so even if everyone knew he was not the genetic father, spouses could preserve their family by agreeing to raise the child and exclude the genetic father.<sup>58</sup> About a third of states still retain this strict rule.<sup>59</sup> Marital agreements also take center stage in ART cases, where it is impossible for the spouse to be a genetic parent. In early cases, courts held husbands liable for child support when their wives conceived with donor sperm because the men helped cause the child who needed financial support to exist.<sup>60</sup> More recent cases elevate the presumed agreement above the causal role, allowing spouses to jointly disavow the marital presumption when they separate after conception but before the birth.<sup>61</sup>

On the other hand, genetic ties remain relevant because most parents who rely on the marital presumption are heterosexual husbands whose wives conceived through sexual intercourse. Husbands and alleged fathers often use DNA tests to challenge paternity, particularly of young children.<sup>62</sup> In these conflict cases, the determining factor seems to be state policies about the value of marriage or genetic heritage, not the parties' agreements.<sup>63</sup>

### C. Agreement to Transfer Parentage

The previous three types of agreements are available only to gestational mothers. No states have sought to make these doctrines sex-neutral. For example, if a married man conceives a child with someone other than his spouse, whether in an affair or with a surrogate, the man's spouse is not a presumed marital parent.<sup>64</sup> This male also cannot sign a VAP with a nonbiological intended parent because VAPs must be signed by the female

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56. See Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 249–51 (2019).

57. See Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 25 (2004); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 89 (2016).

58. See, e.g., *Brinkley v. King*, 701 A.2d 176 (Pa. 1997).

59. Cf. June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 224 n.26 (2011) (two-thirds of states give genetic fathers standing to rebut the marital presumption). *But see* Jessica Feinberg, *supra* note 56, at 269 (finding only six statutes that expressly deny standing).

60. See, e.g., *People v. Sorensen*, 68 Cal. 2d 280, 285 (1968).

61. See, e.g., *Chimienti v. Perperis*, 98 N.Y.S.3d 251, 254 (App. Div. 2019).

62. See Feinberg, *supra* note 56, at 252; Carbone & Cahn, *supra* note 59, at 222–30 (describing state approaches).

63. See June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 536–37 (2017).

64. Jessica Feinberg, *After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples*, 54 U.C. DAVIS L. REV. 1507, 1523 (2021).

who gave birth to the child.<sup>65</sup> Similarly, when a genetic mother supplies eggs to the gestational parent, the genetic mother cannot use a traditional VAP or the marital presumption to share parenthood with a third party. These rules affect any couple who can conceive a child only using a surrogate, including gay male couples and lesbian and heterosexual couples if the female partners cannot carry a child.

Plausible reasons exist not to extend VAPs or the marital presumption to these cases, even if that reticence is ultimately unjustified. In all these cases, the gestational parent may have constitutional parental rights already by virtue of her work carrying the child and giving birth.<sup>66</sup> Any agreement by the genetic parent and a third party would purport to alter the gestational parent's rights unilaterally. Instead, in this circumstance, a nonbiological intended parent may become a legal parent only with the gestational parent's consent, either by adoption or by a surrogacy agreement.

### 1. Surrogacy Agreements

Most states allow *some* surrogates to enter agreements to waive parental rights before the birth.<sup>67</sup> Nearly all distinguish between a genetic surrogate, who conceives a child using her own eggs, and a gestational surrogate, who carries a child conceived from the egg of an intended parent or an anonymous donor. Typically, genetic surrogates cannot enter binding agreements before the child is born. They are presumed parents who must follow traditional adoption processes.<sup>68</sup> In contrast, twenty-four states allow gestational parents to establish parenthood for the commissioning parents before the birth.<sup>69</sup> In states without statutes, the enforceability of gestational surrogacy contracts is highly uncertain.<sup>70</sup>

Surrogacy statutes subject these agreements to additional regulations, which Professor Courtney Joslin has nicely surveyed in a recent article.<sup>71</sup> Some regulations seem designed to ensure informed consent. For example, the parties may need to undergo a medical or psychological evaluation, often the surrogate must have had a prior successful birth, and the surrogate may need an independent lawyer.<sup>72</sup> Other requirements seem designed to

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65. See UPA 2017 § 302(a).

66. See Baker, *supra* note 2, at 2057–61.

67. This summary is heavily indebted to Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401 (2021). See also JOSLIN ET AL., *supra* note 16, § 4:1.

68. UPA 2017 § 201(1); see Joslin, *supra* note 67, at 464–73 (appendix listing all surrogacy statutory schemes). Even states that permit genetic surrogacy have different rules for withdrawing consent that retain adoption law's typical protections for birth parents. *Id.* at 436; see also Richard B. Vaughn, *UPA (2017): An Improvement—Except Where Genetic Surrogacy Is Concerned*, 52 FAM. L.Q. 471, 475 (2018).

69. See JOSLIN ET AL., *supra* note 16, § 4:2.

70. *Id.* § 4:3 (survey of case law with dominant theme that enforceability remains unsettled).

71. See Joslin, *supra* note 67.

72. See JOSLIN ET AL., *supra* note 16, § 4:2.

facilitate public policies regarding family life.<sup>73</sup> Five states insist that intended parents be married, have a medical need for surrogacy, and complete a home study.<sup>74</sup> All statutes allow commissioning parents to reimburse medical expenses, and many authorize them to offer compensation or “reasonable compensation.”<sup>75</sup>

Half of the states treat the intended parents as legal parents automatically based only on the agreement.<sup>76</sup> Others require a judicial hearing, although some allow parties to obtain a judgment of parentage during the pregnancy that is effective at birth.<sup>77</sup> Courts must enter the requested parentage order, usually having no discretion to evaluate the parents or the interests of the future child.<sup>78</sup>

Last, as Joslin and Professor Rachel Rebouché have detailed, many surrogacy contracts also contain medical and lifestyle provisions.<sup>79</sup> Lifestyle provisions dictate the surrogate’s behavior during the pregnancy regarding matters like drinking, smoking, or exercise.<sup>80</sup> Some even empower intended parents to monitor the surrogate’s daily activity.<sup>81</sup> Medical provisions allocate authority over decisions such as selective reductions, abortions, pregnancy treatments, and birth procedures.<sup>82</sup> Most statutes protect surrogates’ authority over such matters relating to their bodily integrity,<sup>83</sup> but others authorize contracts to transfer medical decision-making to intended parents, sometimes in sweeping language that appears to include whether a surrogate has an abortion or a Cesarean section.<sup>84</sup>

## 2. Known Donors and Open Adoption

For the most part, this Essay does not consider anonymous sperm or egg donation. “Donors” sell their gametes to a fertility clinic and waive their

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73. Joslin, *supra* note 67, at 433–39 (describing restrictions that regulate family structures).

74. *Id.* app. B.

75. *Id.* at 452–53.

76. *See id.* at 439.

77. *See, e.g.*, Joseph R. Williams, *New Surrogacy Law Brings Opportunities but Practitioners Beware*, N.Y. STATE BAR ASS’N (Mar. 9, 2021), <https://nysba.org/new-surrogacy-law-brings-opportunities-but-practitioners-beware/> [<https://perma.cc/UR54-3PZV>] (discussing New York State Family Court Act §§ 581-201, 581-203); Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634–35 (2005).

78. *See* Joslin, *supra* note 67, at 439.

79. *Id.*; Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1596 (2020).

80. *See* Joslin, *supra* note 67, at 446–47; Rebouché, *supra* note 79, at 1611–12.

81. *See* Joslin, *supra* note 67, at 447 (citing Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC’Y REV. 143, 156–57 (2015)).

82. *Id.* at 444–45.

83. *See id.* at 446–47.

84. *Id.* at 447 (authorizing contractual provisions that require the surrogate to “undergo all medical . . . treatments . . . recommended for the success of the pregnancy by the physician” (quoting OKLA. STAT. tit. 10, § 557.6(D)(1) (2020)); Rebouché, *supra* note 79, at 1614–23.

parental rights.<sup>85</sup> I do not regard this contract as a parentage agreement because it neither creates nor transfers parentage. Recipients of the gametes will become parents through a parentage presumption or a statute. The waiver by the genetic parent poses no novel problems; parents have long waived parental rights, yielding their children to the state or adoption agencies.

Agreements reenter the picture with “known donors,” such as when a person conceives a child using sperm or eggs from a friend. Many known donors waive their parental rights just like anonymous donors, but some purport to retain a right to contact or visitation with their genetic child.<sup>86</sup> The duties and rights of known donors, and their ability to contract around them, vary dramatically by states with little consistency.<sup>87</sup>

In an open adoption, adoptive parents agree to provide birth parents with ongoing information, permit communication, or even maintain visitation.<sup>88</sup> Traditionally, such contracts were unenforceable. The adoption severed all legal relationships between the child and the birth parents, and adoptive parents could not bind themselves to future visitation that they might later regard as contrary to the child’s best interests.<sup>89</sup> But in the early 2000s, the tide turned. Twenty-nine states now enforce some agreements for ongoing contact between the biological parents and the child.<sup>90</sup> Almost all birth mothers now choose open adoption in some form, selecting and meeting the birth parents in person.<sup>91</sup> Two-thirds of private adoptions involve agreements for post-adoption contact.<sup>92</sup> About half of the states have statutes specifying that these agreements are enforceable, although what “enforceable” means is the agreement will be incorporated into the decree, giving the court authority to decide whether ongoing visitation over the objection of the adoptive parent is in the child’s interests.<sup>93</sup>

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85. Rene Almeling, *Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation*, 72 LAW & CONTEMP. PROBS. 37, 57 (2009) (describing “donor” compensation); NeJaime, *supra* note 28, at 2300.

86. Lauren Gill, Note, *Who’s Your Daddy?: Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1742–43 (2013) (describing cases).

87. See NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* 95–96 (2013).

88. See 3 ADOPTION LAW AND PRACTICE § 13-B.01 (2021).

89. See *id.*; Lisa A. Tucker, *From Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements*, 100 B.U. L. REV. 2317, 2349–50 (2020).

90. See CHILD WELFARE INFO. GATEWAY, U.S. CHILD.’S BUREAU, *POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 2* (2019), <https://www.childwelfare.gov/pubPDFs/cooperative.pdf> [<https://perma.cc/AB65-Q46B>]; see also Mary Kate Kearney & Arrielle Millstein, *Meeting the Challenges of Adoption in an Internet Age*, 41 CAP. U. L. REV. 237, 243–44 (2013).

91. See Tucker, *supra* note 89, at 2324.

92. See *id.*

93. See *id.* at 2352–53.

#### D. *Agreements to Tailored Parenthood*

In rare scenarios, adults enter agreements that purport to alter traditional features of parenthood. One such example is an agreement to parenthood by more than two adults, either in the case of ART with a preconception agreement or through complex de facto family forms. Only a handful of states authorize three parents by statute, but functional parent tests also open the door to these arrangements.<sup>94</sup>

Legal scholarship contains anecdotes about agreements to specify the adult's parental rights and duties. Professor Martha Ertman, for example, describes her contract with Victor, a friend, prospective sperm-donor, and eventual coparent.<sup>95</sup> They entered a preconception agreement akin to a custody agreement.<sup>96</sup> Her model contract details the child's living arrangements, assigns decisional authority, allocates responsibility for day-to-day and significant expenses, and commits to therapy and mediation to resolve disagreements.<sup>97</sup> They agreed that the child would live with Ertman, who would have the most decisional authority and pay daily expenses, and that Victor would visit on holidays and summers and help with significant expenses.<sup>98</sup> I am unaware of any cases deciding whether such contracts would be enforceable. Even custody agreements among separated parents in divorce are "enforceable" only in the limited sense that the court will consider the agreement when deciding what arrangement serves the child's best interests.<sup>99</sup> The arrangements are always subject to revision for substantial change in circumstances.<sup>100</sup>

#### E. *Agreements to Share Parentage by Legal Parents with Physical Custody*

The last two rules concern agreements by parents with physical custody. In some states, a legal parent may allow another adult to become a legal parent by living with and coparenting the child.

In nineteen states, an individual is a presumed parent if the individual resides with a child and holds the child out as their own (sometimes only if they do so for the child's first two years).<sup>101</sup> Although conceived as a way to establish paternity for unmarried genetic fathers,<sup>102</sup> the modern residential presumption often applies without regard to the sex of the parties or their

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94. See Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399, 402–03 (2018).

95. See MARTHA ERTMAN, *LOVE'S PROMISES* 8, 199–207 (2015).

96. *Id.* at 8, 18.

97. *Id.* at 8, 199–207.

98. *Id.*

99. See Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 80–81 (2014).

100. *Id.* at 84–85.

101. See Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI. KENT L. REV. 55, 85 (2017).

102. See, e.g., *L.P. v. L.F.*, 338 P.3d 908, 915 (Wyo. 2014); *Pippin v. Pippin*, No. M201800376COAR3CV, 2020 WL 2499633, at \*6 (Tenn. Ct. App. May 14, 2020).

biological ties to the child.<sup>103</sup> As a result, a custodial parent may allow a partner to become a legal parent by acting as such for several years (as long as the child does not have another established legal parent). Technically, no doctrinal element of the residential presumption requires consent by the custodial parent; it is simply presumed from the coresidence and holding out.

De facto parenthood offers a similar standard. An adult is a de facto parent if, with the parent's consent, the adult lives with and cares for the child sufficiently to develop a parental relationship.<sup>104</sup> Many states give de facto parents visitation as third parties, but a substantial minority treat them as full legal parents.<sup>105</sup> All de facto parenthood tests require some agreement by the legal parent(s); however, this element is expressed in different ways, ranging from the parent "consented . . . to . . . establishment of a parent-like relationship"<sup>106</sup> to the parent "fostered or supported the bonded and dependent relationship" that is "parental in nature."<sup>107</sup> Many seminal de facto parenthood cases involved same-sex couples who decided to have a child together and coparented the child for years before separating, yet the nonbiological parent had to rely on this standard because the law excluded them from all formal parentage rules, including adoption, the marital and residential presumptions, and preconception agreements.<sup>108</sup>

## II. PARENTING AGREEMENTS ARE NOT CONTRACTS

Given the many ways adults can now become parents by consent, it may be tempting to turn to familiar contract principles to understand this emerging law.<sup>109</sup> Many parentage scholars are sympathetic to contractual approaches to parentage. Professor Marjorie Shultz argues that "bargained-for intent" should settle parental status for children born through ART.<sup>110</sup> Katherine Swift goes further, arguing that courts should also honor pre-birth agreements that allocate custody, on the presumption that parents who take the time to memorialize their intentions in a formal document will typically be acting in the child's best interests.<sup>111</sup> The contract analogy is sometimes broader and more theoretical. Professor Katherine Baker argues not that all

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103. See UPA 2017 § 204(a)(2); *Elisa B. v. Superior Ct.*, 117 P.3d 660, 670 (Cal. 2005); *Chatterjee v. King*, 280 P.3d 283, 288 (N.M. 2012); *Partanen v. Gallagher*, 59 N.E.3d 1133, 1135 (Mass. 2016); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 501 (N.H. 2014).

104. See Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 916–17 (2019).

105. See *id.* at 918–20.

106. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435–36 (Wis. 1995).

107. UPA 2017 § 609(d).

108. See Strauss, *supra* note 104, at 931–40.

109. See generally ERTMAN, *supra* note 95; Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 266 (2011); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1222 (2010) (advocating a looser consent model that does not require written contracts but still focuses on parties' intentions).

110. See generally Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

111. See Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 954–57 (2007).

parentage agreements are classic contracts or even that they should all be enforceable according to their terms, but rather that “contract theory and doctrine provide a superior framework for determining parental status” and offer a better “structure of argument” as we choose what rules to apply to these agreements.<sup>112</sup>

In contrast, I believe family law should eschew this analogy with contract law. The emerging body of parentage agreement law has few doctrinal similarities with contract law, partly because these agreements do not satisfy the moral justifications for treating a person as legally bound by their ex ante expressed intentions.

#### *A. The Insights Driving the Contract Analogy*

The analogy to contract law is not without appeal. Moral theories of contract center on autonomy, and parentage agreements promote autonomy in reproduction and family formation. One might argue that both promote autonomy in a similar way by holding parties to their shared ex ante choices. A contract manifests the parties’ mutual assent to binding legal duties, and a parentage agreement manifests the prospective parents’ mutual assent to legal parenthood. In a sense, both empower individuals to voluntarily create enforceable legal rights and duties.

Indeed, contract is the paradigm of voluntary legal obligations. Other areas of law impose duties on actors for their voluntary conduct. Criminal and tort law impose liability for an agent’s voluntary actions. Yet, contract law’s voluntarism runs deeper. Contracting parties choose their obligations. Professor Charles Fried famously described contractual duties as “essentially self-imposed.”<sup>113</sup> A promisor had no duty to do anything until he chose to make an offer and the promisee accepted. Similarly, many intended parents have no rights or duties concerning the child until they and their partner assent to share parenthood.<sup>114</sup> Like contracts, parentage agreements confer on private individuals the legal power to create the legal rights and duties of parenthood.

This recognition is vitally important. Parentage agreement laws give adults the normative power to create legal rights and duties of parenthood through private acts without judicial oversight. The similarity to contracts, however, ends here. The legal powers, their justifications, and their effects are fundamentally different. Crucial differences arise at each moment of contract, whether we consider questions of formation, interpretation, modification, breach, or remedies.

#### *B. Contracts Arise When Parties Exchange Promises*

The first significant difference lies in the acts that count as exercising legal powers and their relationship to the justification of coercive enforcement. In

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112. Baker, *supra* note 57, at 42–43.

113. CHARLES FRIED, CONTRACT AS PROMISE 2 (2d ed. 1981).

114. See *supra* Part I.B (discussing preconception agreements and VAPs).



short, contracts but not parentage agreements enforce promises between the parties.

Since Fried's *Contract as Promise*, promissory theory has been the leading moral theory of contract law. Contracts arise from a promissory exchange. A person incurs a contractual duty when the person promises to do something in exchange for another person doing or promising to do something.<sup>115</sup> Morality enables us to deliberately create new moral obligations to other people by making promises to them.<sup>116</sup> Promissory theorists argue that this explains why the law may enforce contractual duties. If a promisor fails to perform as promised, then it is morally fair that the promisor "should be made to hand over the equivalent of the promised performance."<sup>117</sup>

Of course, many theorists deny that contracts can be reduced to moral promises. Not all promissory exchanges create legal duties, and the legal duty to perform a contract can diverge from the moral duty to fulfill corresponding promises. What facts, instead, might give rise to a contract? Professor Randy Barnett, for example, argues that contracts arise when parties manifest their intent to incur a legal obligation to another to perform specific actions.<sup>118</sup> As it turns out, this distinction makes little difference for the comparison with parentage agreements. Barnett's consent theory rests on legal powers analogous to the moral powers of promising.<sup>119</sup> Contract law empowers individuals to deliberately alter their legal duties by consenting to be bound to another person, much like promises do for moral obligations. Consent theory also justifies enforcement for similar reasons: a plaintiff may sue for damages because that is precisely what the defendant accepted by consenting to a legal duty.

Can an exchange of promises or mutual consent to binding duties give rise to parental duties or rights? It is difficult to see how.

With notable exceptions, most parentage agreements do not involve promises or consent to specific duties. The operative provision in most VAPs is a simple declaration, something like "[s]igning . . . this form will establish parentage of our child."<sup>120</sup> Preconception agreement statutes do not require promises or consent to duties. The birth mother's partner need only "consent" to assisted reproduction.<sup>121</sup> In unwritten agreement cases, such as

115. See RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981); Dan Markovits & Emad Atiq, *Philosophy of Contract Law*, STAN. ENCYCLOPEDIA OF PHIL., Winter 2021, at 1, <https://plato.stanford.edu/archives/win2021/entries/contract-law/> [<https://perma.cc/KTU4-4XDJ>].

116. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 497 (1989). Another strand of moral theory attempts to ground contract in reliance induced by the promise. See *id.* at 499–503.

117. FRIED, *supra* note 113, at 17.

118. See Randy Barnett, *Contract Is Not Promise; Contract Is Consent*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 42, 48–49 (2014); see also J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEGAL THEORY 325 (1996).

119. See Gregory Klass, *Promise, Agreement, Contract*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 39, 54–56 (Hanoch Dagan ed., 2020).

120. See, e.g., N.Y. OFF. OF TEMP. & DISABILITY ASSISTANCE, *supra* note 52.

121. In California's model agreement, the nonbiological parent avers:

de facto parenthood cases, the courts look for evidence of a shared plan to coparent, but they do not look for anything like promises.<sup>122</sup> When these three types of agreements break down, disaffected parents do not demand enforcement of their partner's promises. Enforcement of their parental duties is not justified as a form of private promissory morality.<sup>123</sup>

The last three types of parentage agreements look more like contracts. Consider Professor Ertman's tailored parenting agreements.<sup>124</sup> She and Victor exchanged promises to specify how they would cooperate to fulfill their duty to the child. She received custody and promised to pay daily expenses, while he promised to spend holidays with the child and share significant expenses. Both promised to resolve disputes amicably or with mediation. They even promised to support each other's romantic relationships.

Surrogacy and open adoption also involve formal promissory exchanges.<sup>125</sup> In an open adoption, a birth parent promises to waive parental rights; in exchange, an adoptive parent promises to allow ongoing contact or visitation.<sup>126</sup> In gestational surrogacy, a surrogate promises to gestate the fetus, comply with instructions about the pregnancy and childbirth, and waive any parental rights; in exchange, a commissioning parent promises to pay expenses and compensation.<sup>127</sup> It is noteworthy that even in these contracts, the *duty to parent* rarely arises from an express promise. Adoptive parents promise to allow post-adoption contact. Commissioning parents

I, \_\_\_\_\_ (print name of parent providing sperm), plan to use assisted reproduction to conceive a child using my sperm with the parent giving birth. I am not married and am not in a registered domestic partnership (including a registered domestic partnership or civil union from another jurisdiction), and I INTEND to be a parent of the child to be conceived.  
CAL. FAM. CODE § 7613.5 (West 2022).

122. For example, the New York Court of Appeals ruled that a nonbiological parent has standing as a "parent" to seek custody if the parties "entered into a pre-conception agreement to conceive and raise a child as co-parents," but the opinion focuses on the parties' conduct during and after the pregnancy without every identifying the terms of any *ex ante* promises. *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 491–92, 500 (N.Y. 2016); *see also In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435–36 (Wis. 1995) (articulating the seminal *de facto* parenthood test, which requires the legal parent to consent to a parent-like relationship but focuses primarily on the relationship that develops between the child and the *de facto* parent).

123. Even if adults do not become parents by making promises, consent is likely a necessary condition on public justification for parentage in these contexts. The rights of a parent or presumed parent might include a power to share parenthood and a claim against being forced to share parenthood without consent, and the unrelated adult might have a similar claim against incurring parental duties without consent. *See* Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421, 482–502 (2020) (surveying constitutional doubts raised by expansive conceptions of "consent" to parentage).

124. *See supra* text accompanying notes 96–99.

125. *See, e.g., In re Baby*, 447 S.W.3d 807, 813 (Tenn. 2014).

126. Tucker, *supra* note 89, at 2360 (describing current legal norms); *id.* at 2360–61 (arguing these promises should generate a familial right to visitation, rather than contractual rights).

127. *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); Rebouché, *supra* note 79, at 1596.

promise to pay. Neither promises to parent per se. Instead, the general parental duties rest on provisions that declare who will be the child's legal parents—similar to a declaration in a VAP or preconception agreement. Nevertheless, surrogacy and open adoption look like contracts and style themselves as such. It is worth taking this language at face value.

The divide among parentage agreements then leaves two options for the contractual analogy. Perhaps parentage agreements are not a unified category. Some are promissory but others are not. This disparity would have one counterintuitive consequence. Legally uncertain agreements, like traditional surrogacy, open adoptions, and tailored parenthood, would rest on a solid moral foundation of promising; the legally certain agreements, VAPs, and preconception agreements, would have to find some other, perhaps less morally certain foundation. Another option would be to reinterpret VAPs and preconception agreements to look more like a promissory exchange. How might a contractualist do that?

One might begin with a suspicion that Ertman's tailored parenting contract is simply a more perspicuous version of all coparenting arrangements. Few adults make detailed promises about their parental roles, but surely some promise one another that they will parent together. This promise is quite general, but it is no more abstract than other promises to fulfill a conventional social role, such as a contract to serve as a private assistant or chef. Of course, preconception agreements and VAPs do not even include an abstract promise to be a parent, so their operative clauses must also be reinterpreted. Perhaps a reasonable person would interpret a VAP that says it "establishes parenthood" as meaning that (1) the partner makes a promise to the birth mother to parent the child, and in exchange (2) the birth mother promises to allow the partner to be a parent. Perhaps a reasonable person would reach a similar conclusion whenever a female and a partner "consent[] to artificial insemination." Finally, whenever parties plan to coparent a child together as in de facto parenthood, or simply parent together as in the residential presumption, perhaps a reasonable person would interpret such conduct as an implicit exchange of promises to coparent. The presumptions look like implied-in-fact parentage agreements.<sup>128</sup>

Despite its apparent promise, this reinterpretation of parentage agreements obscures our understanding further. Parties form an implied-in-fact contract without communicating promises orally or in writing when their conduct clearly demonstrates mutual assent to promises.<sup>129</sup> A plaintiff must still prove the same elements as an "express contract: mutual assent or offer and acceptance, consideration, legal capacity, and a lawful subject matter."<sup>130</sup> This doctrine does not turn all cooperative activity into contracts. People can cooperate without developing clear expectations about each other's roles, much less by exchanging promises or consenting to legal duties. By analogy,

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128. See Baker, *supra* note 57, at 31–35.

129. See *Express Contracts Including Contracts Inferred or Implied in Fact*, 1 WILLISTON ON CONTRACTS § 1:5 (4th ed. 2021).

130. See *id.*

two adults may coparent without creating an implied-in-fact parentage contract. A parent may enlist a cohabitant to help raise a child without promising or consenting to share parenthood, and a cohabitant may parent a child without promising or consenting to permanent duties. States may have adequate reasons to treat de facto parents as legal parents, but those reasons do not rest on contract-like duties of the parents.

I find the reinterpretation of VAPs and preconception agreements doubtful for similar reasons. As a matter of conventional meaning, these agreements do not express promises. It is unlikely that parties who sign these forms understand themselves to be making promises. On any natural reading, these declarations make clear that the parties are signing up for permanent parenthood and for the assumption of a status. Treating all consensual duties as contractual unduly flattens the normative landscape. It is a stretch to argue that all parentage agreements are contracts in which one party promises to parent and the other promises to permit parenting.

### C. Contracts Fix the Content of the Parties' Duties

The ground of contractual duties affects how we specify their content. Contractual duties do not merely arise *because* parties exchange promises or consent—their promises or consent *determine the content* of their duties.<sup>131</sup> This control is what makes contract law the paradigm of private ordering. The typical justification for this control appeals to autonomy: the state holds promisors to their expressed ex ante promises because that is necessary to respect them as agents who have exercised their authority over their moral lives. This reason to enforce contractual duties is, to a large degree, independent of the content of those duties.<sup>132</sup> The function of contract law is not to enable people to pursue ends that the state considers valuable; instead, it is to respect the parties' authority to pursue their own ends by controlling their interpersonal obligations.<sup>133</sup>

Parentage agreements, in contrast, do not empower adults to fix the content of parental rights and duties. Preconception agreements, VAPs, and surrogacy agreements establish parentage, full stop. Tailored parentage contracts, such as Professor Ertman's, are unlikely to be enforceable in family court. This is not meant to disrespect nontraditional families. Even when traditional parents draft contracts covering similar matters, the contracts do not create binding duties enforceable in custody disputes. A parent cannot reduce a child's right to financial support or agree to binding custody commitments.<sup>134</sup> At most, a court will consider custody agreements as evidence of what the parties believed at the time was best for the child.

Even if Ertman's contract was enforceable, the relation between its promises and parenthood's default obligations differs fundamentally from

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131. See Klass, *supra* note 119, at 40.

132. See *id.* at 43.

133. Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1608–09 (2009).

134. See *Bassett v. Saunders*, 835 So. 2d 1198, 1201 (Fla. Dist. Ct. App. 2002).

contract law and its defaults. Contract law typically assumes that parties do not have prior legal obligations to one another. Their duties are fixed by their promises or consent. Moral theorists admit that contract law sometimes imposes duties with gap-filling rules, but these defaults require special justification. Barnett, for instance, argues that parties express their assent to implied terms by not opting out of widely known default rules.<sup>135</sup> Tailored parentage flips this relationship between the express agreement and the default. Ertman and Victor began with default rules about what parents owe their children and then used their promises to reallocate how they would meet this duty. Parentage agreement law may enable adults to enter parenthood voluntarily and to tinker with those duties at the margins, but the parties' intentions do not determine the content of their core parental duties.

Parentage agreement law cannot be content-neutral because parenthood is a fundamentally public legal status. Becoming a parent is not just an exercise of autonomy; it establishes authority over the child, an independent person with rights. The law must design parenthood's rights and duties to secure children's rights to care and guidance. Instead, becoming a parent is more like entering a constitutional office. A prospective officeholder promises to fulfill the duties of the office, and in exchange, the government promises to pay for her work. This is a contract. However, the official's duties and powers arise from the constitution—not the contract—so the party's promises cannot alter their content. Similarly, even if parentage agreements allow parties to acquire parental duties by expressing a shared intention to coparent, it does not follow that the parties have the power to alter the content of those parental rights and duties.

Some scholars argue the law should give adults more power to tailor parental rights and duties. Professor Lisa Tucker argues courts should enforce open adoption agreements to prevent exploitation of birth or adoptive parents,<sup>136</sup> and Professor Naomi Cahn argues that the law should enforce agreements among intended parents and gamete donors to create novel quasi-parent agreements.<sup>137</sup> I am not contesting the merits of these reforms. They warrant careful consideration, as they may realize valuable new forms of kinship. Maybe the law of parenthood can be refined to facilitate these values while still ensuring children's rights. It is even possible that the best way to achieve this balance is to empower adults to tailor their parental rights through consensual agreements. I only insist that these reforms not receive undue momentum from a misaligned contract analogy. Unlike contract law, parentage law should not begin with a default assumption that the intentions or promises expressed in an agreement fix the content of an adult's right and duties to the child. The reason to enforce parental duties is not content neutral.

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135. See, e.g., Barnett, *supra* note 118, at 53; accord Charles Fried, *The Ambitions of Contract as Promise*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 37 (2014).

136. See generally Tucker, *supra* note 89.

137. See CAHN, *supra* note 87, at 127–31.

*D. Aside: Might Parentage Agreements Be Relational Contracts?*

Some contract theories are less wary of the vague and flexible duties in long-term, open-ended relationships. Attempts to accommodate such relationships have led some theorists and courts to loosen certain classical elements of contract that form central pillars of deontological theory. Instead of demanding that the parties manifest assent to specific duties, these theorists may allow more vague norms to create a contract. Instead of fixing the contract terms through ex ante agreement, they may allow the contract's terms to evolve during a relationship. These conceptual moves may be appealing to contractualists about parentage.

Baker, for example, argues that parents can enter explicit contracts orally or in writing; explicit contracts through marriage; and informal and implicit contracts that evolve organically with the family's experiences.<sup>138</sup> All these parentage contracts can create rights and duties that license legal enforcement. As Baker recognizes, she is operating with an expansive notion of contract.<sup>139</sup> Nevertheless, like many legal theorists, she insists "relational contract theory" has demonstrated that contract law need not be constrained by classical paradigms of discrete promises with specified terms.<sup>140</sup>

Responding to this looser contract model requires an aside into economic contract theory. According to relational contract theory, we should understand a "contract" as the ongoing exchange relationship embedded within other complex systems of exchange relations.<sup>141</sup> Only special analytical or normative reasons can justify limiting our focus to the specific terms of one transaction isolated from a relationship and its context. Otherwise, focusing on discrete transactions will distort our understanding of that isolated moment in the relational contract.

This capacious conception of contract shifts the grounds of the discussion, both descriptively and normatively. Descriptively, it is an improvement. It captures common experiences of coparenting better than a traditional contract model. Coparents enter their relationship with expectations, some clear and some vague. The terms of their arrangement evolve as the child ages and as the family pursues their shared life. Sometimes parents expressly renegotiate coparenting duties, but their arrangements often evolve by give-and-take or by acquiescence to de facto patterns of behavior. Baker's contractualism, however, is not merely descriptive.

I find it difficult to discern the normative implications of relational contract theory for parentage agreement law. Given its richness, it is unlikely to support any simple normative conclusions. The founder of relational contract theory, Professor Ian Macneil, conceives it as a model for analyzing all exchange relationships. This theory is not just an interpretation of contract

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138. See Baker, *supra* note 57, at 25–27, 32–33.

139. See *id.* at 42–43.

140. See *id.* at 41–43.

141. See generally Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 *Nw. U. L. Rev.* 877, 881–82 (2000).

law, much less a justification for enforcing all relational norms.<sup>142</sup> Nevertheless, legal theorists deployed the theory to evaluate which doctrines facilitate the norms, attitudes, and behaviors likely to serve the parties' cooperative ends.<sup>143</sup> When operating in this quasi-normative key, legal theorists tend to adopt consequentialist and welfarist moral perspectives. A central question in their research agenda is which relational norms can be supported effectively by law and which tend to be undermined by formal legal procedures and coercive enforcement.<sup>144</sup>

The fact that parties consent to certain relational norms at a point in time is never sufficient to justify enforcement. Sometimes parties find it more efficient to treat the terms of an exchange as provisional, or even to leave those terms unspecified so that they can adapt to new circumstances and information. Even if parties can fix *ex ante* terms, sometimes relationships rely on motives of reciprocity that may get "crowded out" by the blunt incentive of legal coercion.<sup>145</sup> In such cases, the law has several options. Sometimes law should stay its hand entirely. Parties can rely instead on social enforcement and interpersonal strategies to maintain trust and insure against defection and breakdown. The law may still police the parties' behavior by insisting on duties of loyalty or good faith. Other legal tools permit vagueness or flexibility while constraining parties' substantive discretion. One is to retain vague duties but police a minimal floor. Another is a reasonableness norm. Reasonableness standards allow the norms to evolve with context, while still empowering judges to settle disputes using substantive *ex post* judgments. The law should decide which terms are enforceable and how, based on whether it encourages parties to enter efficient exchange relationships and to invest in those relationships efficiently.

Accordingly, relational contract law is unlikely to support a blunt rule of thumb that parentage agreements should be enforceable according to their terms simply because the parties consented expressly or implicitly. Instead, the question is: what type of legal enforcement of formal and informal caregiving norms will encourage adults to enter and sustain caregiving relationships that will increase the welfare of the parents, the child, and other family members? An abstract analogy to classical contracts cannot answer this question. It requires context-sensitive investigation into the interests of adults and children, both at the initiation of the relationship and as it evolves. It must consider interpersonal strategies that parents have to sustain trust and cooperation, as well as social norms around parenting that can reinforce—or hinder—these efforts.

Unfortunately, I have not found anyone who has developed detailed models of the many contexts in which adults enter these parentage

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142. *See id.*

143. *See, e.g.,* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1306 (1998).

144. *See generally* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1643 (2003).

145. *Id.* at 1689–90.

agreements. Professors Elizabeth Scott and Robert Scott have used relational contract theory to develop a fiduciary model of parenthood, but to my knowledge, they have not applied the model to parentage agreements.<sup>146</sup> In subsequent work, I intend to engage this question directly by developing models of the distinct circumstances in which parentage agreements arise. For purposes of this Essay, I think it is sufficient to say that a detailed relational model of parentage agreements is unlikely to yield a simple conclusion that formal or informal parentage agreements should enjoy a presumption of legal enforceability remotely similar to classical legal contracts.

### E. Contracts Create Bilateral Rights and Duties

The different role that autonomy plays in contract and parentage agreements also helps explain another difference in the structure of the resulting duties. In a contract, the exchange of promises alters the parties' rights and duties to one another. Contracts create private, bilateral relations between the parties to the contract. A promisor owes a duty *to the promisee*. She incurred it because she exercised authority over her own duties by making the promise to the promisee, not because fulfilling this promise makes the world a better place. The promisee has a correlative claim on the promisor. She also acquires two legal powers over the promisor's duty: a power to waive the promisor's duty and a power to sue if the promisor breaches the contract. The promisee acquires her claim and powers because she exercised her moral power over her life by accepting the promise.

Parentage agreements have none of these features. Parentage agreements purport to create rights and duties with respect to a third party: the child. Once the agreement is final, neither party obtains the power to waive the other's performance later. Parental duties are owed to the child, and the adults remain parents until a judicial order terminates their status. Moreover, neither party ever sues for rights under the agreement. In case of separation, they would sue for custody as parents. A parent can sue for child support, but the right to support belongs to the child.<sup>147</sup> Of course, I am not denying that parents make reciprocal commitments.<sup>148</sup> Those commitments, however, justify horizontal duties running between the parents, not the vertical duties running between the parents and the child. Promissory morality and its legal kin do not empower adults to create duties to a child by making promises to one another, much less give the adults a power to confer rights over the child. The child is not a party to these promises. Some distinct source of moral authority—beyond contractual ideas grounded in promises

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146. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2433–36 (1995). Elizabeth Scott evaluated the politics of evolving surrogacy laws in *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009).

147. *Varner v. Varner*, 588 So. 2d 428, 432 (Miss. 1991).

148. See, e.g., MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW 169–79 (2015) (arguing constructive consent justifies horizontal coparenting duties).



or consent—is necessary before an agreement between adults can alter rights and duties regarding the child.

Another way to see this problem is to ask: whom has a prospective parent *wronged* if she breaks her promise to be a parent? Consider the following hypothetical. A single woman, Ann, undergoes IVF expecting to raise the child independently.<sup>149</sup> Soon afterward, she meets Betty and they fall in love. During the pregnancy, Betty promises Ann that she will coparent the child, and Ann accepts. Unfortunately, Betty panics on the day of the birth and moves out.

Betty has wronged Ann by breaking her promise, but has she also violated a duty that she owed to the newborn? I do not see how. When Betty made her promise, the child was a mere fetus, incapable of accepting the promise or developing an expectation of future care or financial support. The child's life might improve if Betty provides this assistance, but many other adults could help equally despite making no promises. Promissory morality does not empower two adults to create duties to a child by making promises to one another.

Nor does it empower adults to confer rights on the child. Suppose instead that Ann had decided she wanted to be a single parent and asked Betty to leave. Has Ann violated the child's right to be parented by Betty? Again, I do not see how. Ann was at liberty to make whatever parenting arrangements she preferred. She would have done nothing wrong if she had politely rejected Betty's promise or if she had chosen to break off their relationship entirely. I do not see why Ann's acceptance of Betty's promise gives the child a claim against Ann's later interference with Betty's caregiving.

One might object that this reflects an unduly narrow model of contract law. Contract law has long recognized third-party beneficiary contracts. If Cleo promises Dru that she will build a house for Eli, and both Cleo and Dru intend the promise to benefit Eli, then Eli can sue Cleo to enforce the promise.<sup>150</sup> According to the *Restatement (Second) of Contracts*, "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."<sup>151</sup> Similarly, one might think of a child as a beneficiary of the parents' promises. Ann and Betty promise one another that they will coparent, and they intend their promises to benefit the child, so Betty has a duty to the child.

Parentage agreements have another intriguing similarity to third-party beneficiary contracts. A promisor and promisee can agree to modify the third-party beneficiary contract or even release the promisor until the third party relies on the contract to his detriment.<sup>152</sup> This suggests an explanation

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149. I frame the timing in this manner because if Ann underwent IVF relying on Betty's promises of support, then Betty's voluntary action was a cause of the child's existence, in which case Betty does have a causal duty to ensure the child receives adequate care and support. *See People v. Sorensen*, 437 P.2d 495, 499 (Cal. 1968).

150. *See, e.g., Donee, Creditor, Intended, and Incidental Beneficiaries, Generally*, 13 WILLISTON ON CONTRACTS § 37:7 (4th ed. 2021).

151. *See* RESTATEMENT (SECOND) OF CONTS. § 304 (AM. L. INST. 1981).

152. *See id.* § 311.

for why Ann and Betty can back out. Their agreement creates horizontal promissory duties, but the child does not acquire her own claims until she develops relational bonds in reliance on their promises. When the child is a few days old without relational ties, Betty still has no duty to the child to remain a parent, and Ann has no duty to allow it.

While intriguing, this third-party wrinkle cannot resurrect the contract analogy. The third-party beneficiary model fails to explain parental rights or parental duties adequately. First, the model is insufficient to explain how nonbiological parents acquire rights. A contract between two people cannot confer rights over a third. Contract theory assumes that each person has authority over their duties and leverages that moral power to enable them to give another person a limited authority over their lives.<sup>153</sup> It would undermine this basic structure if two people could enter an agreement that gave them authority over a third. Cleo can promise to help Eli, and Dru can promise to pay Cleo for helping Eli, but Dru has no power to promise that Eli will accept Cleo's help. Dru cannot wield this kind of inherent authority over Eli's liberty. This paradox is the central challenge to parentage law. Two adults cannot—through a normative power grounded in their authority over their own lives—give themselves rights over the child.

Of course, parties might have other sources of moral and legal authority independent of the third-party contract. If Dru were Eli's employer, for example, then Dru would have the authority to direct Eli to accept Cleo's assistance. Similarly, parentage agreement law presumes one adult has a power over the child's rights. Preconception agreements, surrogacy agreements, and VAPs all assume that a biological parent (typically the gestational parent) has the authority to share parenthood with a nonbiological parent. Whatever principles justify biological parents' power to share parental rights will be fundamentally different from the autonomy principles that justify contracting parties' authority to create new rights, whether in ordinary or in third-party beneficiary contracts.<sup>154</sup>

Second, the third-party beneficiary model is inadequate to capture the nonbiological parent's duty to the child. The *Restatement (Second) of Contracts* conflates the claim that a third party can sue to enforce a contract with the claim that *the contract* creates a duty from the promisor to the third party.<sup>155</sup> On the contrary, the law often allows individuals to sue to enforce duties not owed to them directly. If a third party's right to sue does not rest on a contractual duty, where does it come from? Stephen Smith has argued persuasively that conventional wisdom misunderstands the relation between

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153. See *supra* Part I.C; see also ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 127 (2009).

154. Baker, who treats parentage contracts as consensual transfers of parental entitlements, recognizes the initial assignment cannot rest on contract, so she instead concludes it will "emanate" from gestational labor. See Baker, *supra* note 57, at 45–47. It is not sufficient, however, to fix an initial allocation and assume entitlements can be transferred via consent. The basis of the initial allocation (the gestational theory of parentage) must justify a private power to transfer parental entitlements, or at least be shown consistent with the autonomy justifications for contractual transfers.

155. See RESTATEMENT (SECOND) OF CONTS. § 304.

a promisor and a third-party beneficiary.<sup>156</sup> To clarify the justification for allowing a third party to sue, compare the following three scenarios.

First, imagine Eli refuses Cleo's help to build the house. If Cleo's promise created a duty to Eli, this release would end Cleo's duties. Nevertheless, as a matter of promissory morality, Cleo may still have a duty to Dru to find other ways to help Eli. Maybe they should try again to convince Eli to accept help, or maybe they should find a less intrusive way to help. Second, imagine instead that before Eli hears about the promise, Dru directs Cleo not to build the house. Dru's release eliminates Cleo's reason to help Eli, which arose only from the promise to Dru. If Eli later finds out about the promise, they just missed out on potential good fortune. Last, imagine instead that Eli hears Cleo and Dru enter their contract, and Eli immediately buys land to build the house. Perhaps Dru now has a duty not to exercise their power to release Cleo, and perhaps Cleo has some responsibility to complete the project. These duties *to Eli* seem to arise not from the promise, but from potential harm caused by reliance.

Together, the scenarios suggest that the duty to the third party does not arise from the contractual promise itself. Instead, it is a duty to prevent harm caused by reliance on the promise, more akin to promissory estoppel.<sup>157</sup> The contractual and tort duties are easy to conflate because once the third party relies on the promised performance, the terms of the promise help determine what counts as the reasonable reliance that fixes the moral baseline and determines what counts as harm to the third party.

What does this mean for parentage? There are interesting parallels. If not for the agreement, the nonbiological parent would have no liberty to raise the child, and the child would never come to depend on the nonbiological parent for a parental relationship. This suggests the duty of the nonbiological parent is not promissory; instead, it is grounded in need caused by the adult promises. There is, however, a substantial difference. Unlike a third-party beneficiary, the child does not rely on *the specific terms* of the adults' agreement. The child relies on the adults for parental care, as the community understands this role. In our society, children can flourish only if their custodial caregivers provide consistent, loving care and support. This social expectation, not the terms of the adults' agreement, fixes the moral baseline that determines what counts as harm to the child. An agreement may be necessary to explain how the nonbiological parent had permission to perform caregiving, but horizontal relations that explain this permission as between the adults cannot ground vertical duties to the child. More accurately, the agreement provides the occasion for the law to impose public parental duties on both adults.

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156. See Stephen A. Smith, *Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule*, 17 OXFORD J. LEGAL STUD. 643, 648 (1997).

157. See *id.* at 655.

*F. Contract Law Ensures Entitlements Through an Expectation Remedy for Breach*

The final—and perhaps largest—divide between parentage agreements and contracts concerns how law protects the rights that emerge from an exchange, agreement, or contract.

The nature of a substantive right can be reflected in the remedies that ensure it, and contract law has a distinct remedial structure. In moral contract theory, a primary function of law is to ensure a promisee’s right. A promisee can sue to enforce a promise only if the promisor breaches the contract or declares an intention to do so.<sup>158</sup> After a breach, how the relationship proceeds depends on the significance of the breach and the choice of the aggrieved party. When a breach is “relatively minor,” parties must complete performance and the aggrieved party can sue for damages. For a “material” breach going to the essence of the contract, the aggrieved party may choose to suspend performance and sue immediately. Moreover, as civil recourse theorists emphasize, a breach does not justify compensatory public fines; instead, a breach gives the promisee the power to bring suit—the promisee may choose to exercise the power or to release the promisor.<sup>159</sup> This reflects the promisee’s ongoing power over the entitlement transferred in the contract.<sup>160</sup> Finally, if the plaintiff’s suit is successful, the typical remedy is expectation damages designed to make a promisee indifferent, as much as possible, between performance and legal remedy.<sup>161</sup>

Parentage agreement law has no similar concerns. Courts do not ask which parent breached their parentage agreement to care for the child, much less whether the breach was material. Noncustodial parents must pay child support, but it is not a compensatory duty triggered by a breach. They must pay support even if they were an ideal parent and lost custody through no fault of their own, such as if the other parent relocated. Moreover, a parent’s duty to care for and support the child is not conditioned on reciprocity of performance. A noncustodial parent owes child support even if the custodial parent or the child refuses to participate in parenting time.<sup>162</sup> Child support differs in other ways from private law rights of a promisee. Children cannot waive their rights, releasing a parent from obligations.<sup>163</sup> The law also imposes an affirmative duty to pay child support, which executive officials enforce and which failure to pay may be a crime.<sup>164</sup>

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158. See *Degree of Breach: “Material Breach” or “Total Breach,”* 23 WILLISTON ON CONTRACTS § 63:3 (4th ed. 2021).

159. Paul MacMahon, *Contract Law’s Transferability Bias*, 95 IND. L.J. 485, 497 (2020).

160. See Curtis Bridgeman, *Civil Recourse or Civil Powers?*, 39 FLA. ST. U. L. REV. 1, 14 (2011).

161. See *Compensation as Basic Principle of Damages*, 23 WILLISTON ON CONTRACTS § 64:1.

162. See *Hester v. Hester*, 663 P.2d 727, 729 (Okla. 1983).

163. See *Berryhill v. Rhodes*, 21 S.W.3d 188, 191 (Tenn. 2000).

164. See Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. U. L. REV. 137, 153 (2011).

The calculation of child support awards has a counterfactual flavor that might seem reminiscent of expectation damages. Most states have adopted a “continuity of expenditure” approach, the core principle of which is that children should receive the same level of financial support they would have received had they lived with the parent.<sup>165</sup> However, this level of expenditures is not determined by expectations set by the parents in *this* family. Instead, it reflects averages derived from consumer expenditure surveys of families at that income level.<sup>166</sup> Child support effectively enforces a social norm of income sharing, rather than claims built on specific parental agreements. Perhaps most important, child support and contract remedies serve fundamentally different goals. Unlike contract remedies, child support does not seek to preserve a child’s right to a parent by making the child indifferent between damages and actual parental performance. Even a contractual remedy designed to protect a child’s reliance on the parental contract would have to at least compensate for the costs of losing a parental relationship.<sup>167</sup> Child support vastly undercompensates a child’s relational loss.

#### CONCLUSION

At a high level of abstraction, parentage agreements and contracts seem similar. Both facilitate autonomy by enabling adults to consent to new legal duties. On closer examination, the similarity dissolves. Contract law respects parties’ authority over their own lives by empowering them to fix the content of their own rights and duties through an exchange of promises. Parentage agreements rarely involve promises and instead simply declare one person a parent of the child. This declaration does not create bilateral duties between the parties; it creates rights and duties to the child. The content of those parental duties is fixed, not by the parties’ expressed intentions, but by public family law designed to meet the child’s needs.

Nevertheless, parentage agreement laws do empower one person, typically a gestational parent, to designate another as their coparent. This power over the child’s rights cannot be justified by contractual principles like promise or consent, all of which respect a person’s authority over their own duties. This brings us back to the central puzzle of parentage law: how may one person obtain private authority over a child?

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165. See J. Thomas Oldham & Jane Venohr, *The Relationship Between Child Support and Parenting Time*, 54 FAM. L.Q. 141, 143 (2020).

166. See Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 161 (1999).

167. Israel, by contrast, allows children to sue an absent parent in tort for emotional costs. See Benjamin Shmueli, *Love and the Law, Children Against Mothers and Fathers: Or, What’s Love Got to Do With It*, 17 DUKE J. GENDER L. & POL’Y 131, 157–60 (2010) (discussing CA 2034/98 Amin v. Amin (1999) (Isr.)).