Parent Zero

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When a child is born, the law makes a critical determination regarding who will be recognized as the child's legal parent(s). This determination carries immense importance both for children and for individuals who are, or seek to be, identified as legal parents. Essential rights, protections, and obligations attach to a legally recognized parent-child relationship, and in the vast majority of cases an individual who is recognized at birth as a child's legal parent will retain that status permanently. The determination of the child's first legal parent historically has been a straightforward one, and this largely remains true today outside of the narrow context of enforceable surrogacy agreements. Namely, the individual who gives birth to the child long has been, and continues to be, recognized as the child's initial legal parent as a matter of course. The determination of a child's second legal parent at birth, however, is far less straightforward. In situations where the individual who gave birth desires for the law to recognize a second legal parent, that individual's ability to exercise meaningful choice within the determination of who is deemed the child's second legal parent differs drastically depending on factors such as their marital status, the method of the child's conception, and the gender of the desired second parent. This Article argues that the law's vastly differing treatment of individuals who give birth based upon these factors is problematic. Importantly, there is no underlying theory that provides a consistent explanation for the law's current approach to this issue. Reform is necessary to create a more coherent and just legal framework governing the degree of meaningful choice individuals who give birth have in at-birth determinations of the child's second legal parent.

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INTRODUCTION

The determination of who is entitled to recognition as a child's legal parent at the time of the child's birth carries great significance. Legal parentage provides an individual with critical rights and obligations relating to the child. For example, legal parents enjoy rights relating to important matters such as custody, visitation, and medical decision-making, as well as core obligations that relate to caring for and supporting the child.[1] The legally recognized parent-child relationship also provides the child with essential rights and protections in areas such as, *inter alia*, inheritance, healthcare, support, and social security.[2] Importantly, in most cases the parentage of an individual identified as the child's legal parent at birth will never be challenged,[3] and even when challenges are initiated, success is far from guaranteed.[4] The result is that in the vast majority of cases, an individual recognized at birth as the child's legal parent will remain the child's legal parent permanently.

In addition to the significance of the at-birth parentage determination for the parent in question and the child, the determination also carries great significance for the child's other legally recognized parent in situations where the law recognizes two individuals as the child's legal parents at birth. When two individuals are recognized as a child's legal parents, they will each have the core rights and obligations relating to the child that accompany legal parentage.[5] In many cases in which both parents seek to play a role in the child's life, along with the other rights and obligations of legal parentage will come the requirement that the parents communicate with each other and coordinate on a variety of matters relating to the child.[6] As one scholar aptly noted, "the child's

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[1] Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 113-14 (2018) [hereinafter *A Logical Step Forward*].

[2] *Id.*

[3] *See* Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 254 (2019) (discussing the infrequency of challenges to the marital presumption and voluntary acknowledgements of parentage, which are the most common ways of establishing an individual other than the gestating parent as a child's legal parent) [hereinafter *Restructuring Rebuttal*]; Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 480-81 (2012) (same).

[4] *See* Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 252-54; *infra* notes 35–37, 82–89 and accompanying text.

[5] *See* Feinberg, *A Logical Step Forward*, *supra* note 1 and accompanying text.

[6] *See, e.g.*, Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J.L. & GENDER 119, 127 (2018) ("Today, live-apart parents are expected to cooperate in co-parenting their children.").

existence will make the parents interdependent for the next eighteen years."[7] The at-birth determination of legal parentage thus has long-term implications of critical significance for both the child and the individuals who are, or seek to be, recognized as the child's legal parents.

The legal framework governing the at-birth determination of a child's legal parents generally employs a straightforward approach for identifying the child's first legal parent.[8] The law long has automatically recognized the individual who gestated and gave birth to the child ("the gestating parent") as the child's initial legal parent, i.e., parent zero.[9] With the notable exception in some states of births that occur via enforceable surrogacy agreements, the act of giving birth continues to bestow automatic legal parentage today.[10] The law's approach to the determination of who is recognized as the child's second legal parent at birth, however, and the gestating parent's role in that determination, is significantly more complicated.[11] The current legal framework governing at-birth determinations of a child's second legal parent provides differing rules and procedures depending on factors such as the gestating parent's marital status, the manner through which the child was conceived, and the gender of the potential second parent.[12]

An important consequence of the current legal framework is that there are significant differences among various categories of gestating parents regarding the degree of meaningful choice that the gestating parent has within the determination of the child's second legal parent.[13] While many gestating parents want a second legal parent to be identified at birth, the law does not accord all gestating parents' wishes regarding who should be recognized as the child's second legal parent the same weight.[14] For example, current law provides an automatic, mandatory

[7] Merle H. Weiner, *Family Law for the Future: An Introduction to Merle H. Weiner's "A Parent-Partner Status for American Family Law*," 50 FAM. L.Q. 327, 329 (2016).

[8] *See* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMPAR. L. 125, 127 (2006).

[9] *Id.*

[10] *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2300 (2017).

[11] *See infra* Part II.

[12] *Id.*

[13] *Id.*

[14] Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 64 (2004) ("The evidence suggests that the vast majority of mothers want to share the rights and responsibilities of parenthood with someone else."). This Article focuses on the law's approach to at-birth determinations of the child's second legal parent in situations where the gestating parent desires for someone to be deemed the child's second legal parent. The law's approach

presumption of legal parentage to the individual to whom a gestating parent was married at the time of the child's conception or birth ("the gestating parent's spouse").[15] While the strength of the presumption and ability to overcome it at the time of the child's birth differs depending on the jurisdiction and method of conception, married gestating parents generally have either limited or no meaningful choice in the determination of who is deemed the child's second legal parent at birth.[16] In most jurisdictions, unmarried gestating parents who wish for a woman to be deemed the child's second legal parent at birth also lack meaningful choice.[17] This is because voluntary acknowledgements of parentage ("VAPs"), the primary method of establishing an individual who is not married to the gestating parent as a child's second legal parent at birth,[18] extend only to men in the vast majority of jurisdictions.[19] At the other end of the spectrum, gestating parents who were not married at the time of the child's conception or birth and who wish for a man to be recognized as the child's other legal parent are able to exercise a much greater degree of meaningful choice under current law.[20]

The law's vastly differing treatment of gestating parents' choice in at-birth determinations of the child's second legal parent based upon factors such as marital status, method of conception, and the potential second legal parent's gender, is problematic. Notably, there is no underlying theory guiding the law's approach to this issue that provides a coherent, consistent explanation for the differing treatment of the various categories of gestating parents. While there are a number of theories that, at first glance, could plausibly be guiding the law's approach, a more detailed analysis demonstrates that the current legal framework governing gestating parents' ability to exercise meaningful choice in at-birth determinations of the child's second legal parent is

to the determination of the child's second legal parent in situations where the gestating parent does not desire for the child to have a second legal parent, while an equally important issue, is beyond the scope of this Article.

15 *See infra* Part II.A.

16 *See id.*

17 *See* COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 3:3 (2021).

18 45 C.F.R. § 303.5(g)(1)(i) (2022) ("The hospital-based portion of the voluntary paternity establishment services program must be operational in all private and public birthing hospitals statewide and must provide voluntary paternity establishment services focusing on the period immediately before and after the birth of a child born out-of-wedlock.").

19 *See id.*

20 *See infra* Part II.B.

inconsistent with each of these theories.[21] There are, however, core principles that emerge from the analyses of the plausible theories that will be helpful in guiding future reform. First, the gestating parent should have a significant degree of meaningful choice in determinations of the child's second legal parent. Second, the law should facilitate at-birth parentage establishment in individuals who, at some relevant point after the child's existence has become a reality, share with the gestating parent a cooperative relationship and commitment to raising the child as co-parents. These core principles should guide efforts to reform current law to create a more coherent, consistent, and just legal framework governing gestating parents' choice.

This Article examines the law's approach to the issue of the degree of meaningful choice gestating parents have in at-birth determinations of the child's second legal parent. Part I sets forth the current state of the law and highlights the vastly differing degrees of meaningful choice gestating parents are able to exercise under current law depending on characteristics such as their marital status, the method of the child's conception, and the gender of the potential second legal parent. Part II explores whether there is any guiding theory that provides a consistent justification for the law's differing treatment of the various categories of gestating parents. After engaging in an in-depth analysis of each of the most plausible potential theories, it concludes that there is no underlying theory that provides a coherent, consistent explanation for the current legal framework. Part III begins by identifying the core principles that emerge across the plausible guiding theories. It concludes with initial thoughts regarding potential reforms aimed at better aligning current law with these core principles and creating a more coherent legal framework governing gestating parents' choice.

I. THE GESTATING PARENT'S DEGREE OF MEANINGFUL CHOICE IN AT-BIRTH DETERMINATIONS OF THE SECOND LEGAL PARENT

The law has long provided gestating parents with automatic legal parentage at the time of the child's birth.[22] With the notable exception in some jurisdictions of births that occur pursuant to enforceable surrogacy agreements, the act of giving birth generally continues to provide the gestating parent with automatic legal parentage at the time of the child's birth.[23] The law's approach to the determination of the child's second legal parent at birth, and the gestating parent's role in

[21] *See infra* Part II.

[22] *See* Meyer, *supra* note 8, at 127.

[23] *See* NeJaime, *supra* note 10, at 2300.

that determination, however, is more complex.[24] The ability of the gestating parent to exercise meaningful choice with regard to who the law deems to be the child's second legal parent at the time of birth differs significantly depending upon the marital status of the gestating parent, the method through which the child was conceived, and the gender of the potential second legal parent.[25]

A. Married Gestating Parents

1. Married Gestating Parents Who Conceive via Sexual Means

When a gestating parent who was married at the time of the child's conception or birth conceives via sexual means, the law across jurisdictions automatically provides a second individual with a presumption of parentage at the time of the child's birth.[26] As a general matter, married gestating parents lack any significant degree of meaningful choice with regard to who will be deemed the child's second legal parent at birth (at least beyond the choice they made at some point regarding who to marry).[27] This is a result of the longstanding marital presumption of parentage, which provides an at-birth presumption of legal parentage to the individual to whom the gestating parent was married at the time of the child's conception or birth.[28]

Since the nation's inception, the marital presumption has provided automatic at-birth legal parentage to a gestating parent's spouse regardless of the wishes of the gestating parent or the spouse.[29] The spouse's status as a legal parent remains in place unless a party is able to later rebut the marital presumption through the relevant legal proceedings.[30] In its earliest form, the marital presumption provided a virtually irrefutable presumption of legal parentage to the husband of a woman who conceived or gave birth to a child during the marriage.[31] Rebutting the presumption required the initiation of legal proceedings in which the husband or wife had to prove that the husband did not

[24] *See infra* Parts II.A–D.

[25] *See id.*

[26] Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 252 (noting that the marital presumption of parentage exists in some form in every state).

[27] *See infra* notes 53–57 and accompanying text.

[28] Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 243.

[29] *Id.* at 248; *see* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 564-65 (2000).

[30] Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 252-54.

[31] *Id.* at 248; *see* Glennon, *supra* note 29, at 564-65.

"have access" to his wife during the time of conception, and neither the wife nor the husband was allowed to testify to this fact.[32]

While the marital presumption remains firmly in place in every jurisdiction, the rules for rebuttal have changed over the years. The spouses are no longer prohibited from testifying in actions to rebut the marital presumption.[33] In addition, in approximately two-thirds of states, not only do wives, husbands, and child support enforcement agencies have standing to challenge the marital presumption, but an individual outside of the marriage who claims to be the child's biological father also may seek to rebut the presumption.[34] Rebuttal usually requires, at a minimum, DNA testing results indicating that the gestating parent's spouse does not share a genetic connection with the child.[35] In many states, however, courts can refuse to admit DNA evidence or otherwise deny rebuttal if the court determines that rebuttal would be contrary to the child's best interests or that the party seeking to rebut the marital presumption should be estopped from doing so on

[32] Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 248-49; Glennon, *supra* note 29, at 564-65.

[33] Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 249.

[34] *Id.* at 252.

[35] *Id.* For an argument regarding the need to change the bases for rebuttal given the application of the marital presumption to same-sex couples, see generally *id.* at 254.

equitable grounds.[36] In addition, many jurisdictions have adopted time limitations on actions to challenge the marital presumption.[37]

[36] *See, e.g.*, *In re* Jesusa V., 85 P.3d 2, 6, 13, 15, 20 (Cal. 2004) (holding that another man's biological paternity does not necessarily rebut the husband's presumption of parentage and that considerations based upon policy and logic, such as the welfare of the child, factor into the determination of who should be deemed the legal father); N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000) ("We hold that the best interests of the child must be of paramount concern throughout a paternity proceeding, and therefore, must be explicitly considered as a part of the policy and logic analysis that is used to resolve competing presumptions of fatherhood [between a genetic father and the husband of the child's mother]."); Kelly v. Cataldo, 488 N.W.2d 822, 827 (Minn. Ct. App. 1992) (stating that the child's best interests should be considered in determining whether the mother's husband or the genetic father should be deemed the child's legal father); *In re* Marriage of K.E.V., 883 P.2d 1246, 1252 (Mont. 1994) (refusing on equitable grounds to allow the mother to rebut the marital presumption where the husband assumed the role of the child's parent after the mother led him to believe that he was the child's father and encouraged him to act on that belief); M.H.B. v. H.T.B., 498 A.2d 775, 778 (N.J. 1985) (Handler, J., concurring) (refusing on the grounds of equitable estoppel to allow the husband to rebut the marital presumption where he "[b]y both deed and word, [] repeatedly and consistently recognized and confirmed the parent-child relationship between himself and K.B. [and] acted in every way like a father toward his own child"); Manze v. Manze, 523 A.2d 821, 825 (Pa. Super. Ct. 1987) (refusing on the grounds of equitable estoppel to allow the husband to rebut the marital presumption where he "acknowledged [the child] as his daughter and assumed the responsibilities of parenthood throughout a ten-year marriage"); Pettinato v. Pettinato, 582 A.2d 909, 912-13 (R.I. 1990) (refusing on equitable grounds to allow the mother to rebut the marital presumption where the mother represented to the man in question that he was the child's father, the parties married with the intent to raise the child together as a family unit, the parties lived together with the child and represented themselves as a family, and the mother did not question her husband's paternity until he commenced divorce proceedings); *In re* J.W.T., 872 S.W.2d 189, 197 (Tex. 1994) (stating that in actions to rebut the marital presumption, "the focus should more properly be directed toward what is best for the child — it may be in best interest of the child to allow development of a relationship with the natural father and it may not"); *see also* Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 623 (2009) ("If the presumption is challenged by the offer of genetic evidence, a number of states have held that a court can refuse to admit that evidence if contrary to the child's best interests. Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped to deny parentage because of the detrimental reliance of the other party or, sometimes, the child."); Paula A. Monopoli, *Inheritance Law and the Marital Presumption After* Obergefell, 8 EST. PLAN. & CMTY. PROP. L.J. 437, 448 (2016) ("Courts do retain the equitable power to declare that, even despite a genetic connection and the rebuttal of the presumption, the child's best interests require the husband to retain legal parentage."); Rhonda Wasserman, *DOMA and the Happy Family: A Lesson in Irony*, 41 CAL. W. INT'L L.J. 275, 283 (2010) ("Some states permit the presumption of parentage to be rebutted only if doing so would serve the child's best interests. In these states, when alleged biological fathers claim paternity of children born during an intact marriage, courts decline to order blood tests or DNA tests to determine paternity unless the determination would be in the child's best interests.").

Importantly, pursuant to the Supreme Court's 2015 decision in *Obergefell v. Hodges*, which mandated that states provided marriage rights to same-sex couples on the same terms accorded to different-sex couples, it seems clear that state marital presumption laws must be interpreted to provide a presumption of legal parentage to both the different- and same-sex spouses of gestating parents.[38] The Supreme Court's decision two years later in *Pavan v. Smith*, which held that if a state provides the different-sex spouses of individuals who give birth with the right to be listed on the child's birth certificate it must do the same for same-sex spouses, further supports the mandatory application of state marital presumption laws to same-sex spouses of individuals who give birth.[39] Indeed, most courts that have addressed the issue have reached the conclusion that, even if written in gendered terms, state marital presumptions apply equally to same-sex spouses, and a number of states have formally amended their marital presumption laws to make them gender neutral.[40]

Today, the marital presumption remains the most common way of establishing legal parentage in someone other than the gestating parent.[41] In the vast majority of cases, the marital presumption is never challenged — meaning it conclusively establishes the gestating parent's spouse as the child's second legal parent.[42] This is likely because in most cases the gestating parent and their spouse mutually desire for the spouse to be the child's second legal parent.[43] As a result, in many instances the marital presumption protects the choice a married gestating parent likely would have made regarding the determination of the child's second legal parent at birth if given the opportunity: their spouse.[44] It does this not only by providing the spouse with a presumption of legal parentage, but also by making it difficult for a biological father to establish parentage against the wishes of the gestating parent and their spouse. This is accomplished by rules

37 Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 270.

38 Obergefell v. Hodges, 576 U.S. 644, 680-81 (2015).

39 Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017).

40 Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 256.

41 *Id.* at 254.

42 Leslie Joan Harris, Obergefell's *Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 67 (2017) ("In the great majority of cases . . . no effort is made to rebut the presumption.").

43 *See* Karen Syma Czapanskiy, *Reforming Parentage Laws: To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty*, 14 WM. & MARY BILL RTS. J. 943, 953 (2006).

44 *See id.* ("If the mother is married at the time the child is born, she is likely to designate her husband as her parental partner.").

allowing courts to deny rebuttal of the marital presumption, regardless of the genetic evidence, where it would be inequitable or contrary to the child's best interests, as well as the time limitations that many jurisdictions place on challenges to the marital presumption.[45] However, not all gestating parents desire the person to whom they were married at the time of the conception or birth to be the child's second legal parent, and these gestating parents will find that they have little to no ability under current law to exercise meaningful choice regarding who will be deemed the child's second legal parent at birth.

A married gestating parent may wish for someone other than their spouse to be deemed the child's second legal parent at birth for a variety of reasons. The process of obtaining a divorce can take years, particularly in contested cases.[46] At the time the child was conceived or born, the gestating parent and their spouse may long have been living as if the marriage was over, and the gestating parent may never have intended for the spouse to be the child's legal parent.[47] Additional reasons for why a gestating parent may desire that legal parentage attach at birth to someone other than the spouse may include, for example, that the spouse has been physically or emotionally abusive or, for other reasons, the gestating parent believes that providing legal parentage to their spouse would lead to unhealthy or dangerous results for them and/or their child.[48] The marital presumption, however, does not take into account the gestating parent's wishes prior to bestowing a presumption of legal parentage to the spouse; the spouse is presumed to be the child's second legal parent based solely on the fact of their marriage to the gestating parent at the time of the child's conception or birth.[49]

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[45] Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 258-59*; see also* Wasserman, *supra* note 36, at 283 ("Courts are quite reluctant to undercut the marital presumption when the mother and her husband have co-parented the child, the husband has provided financial and emotional support to the child, and the child has bonded with the husband.").

[46] Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149, 176 (2011).

[47] *See, e.g.*, Dana McKee, *An Illegitimate Child Conceived or Born During Separation – Who is the Legal Father?*, BROWN, GOLDSTEIN & LEVY (July 27, 2020), https://browngold.com/blog/an-illegitimate-child-conceived-or-born-during-separation-who-is-the-legal-father/ [https://perma.cc/JLP9-3E96].

[48] *See* Czapanskiy, *supra* note 43, at 950, 953 (stating that "[i]f the mother is married at the time the child is born, she is likely to designate her husband as her parental partner. If she does not, there is likely a reason for her decision that is important to her and that is likely to be important to the child").

[49] *See supra* note 29 and accompanying text.

The law's provision of at-birth legal parentage to the gestating parent's spouse is of great consequence. It means that from the time of birth, that individual will have all of the important rights and obligations that accompany legal parentage.[50] Rebutting the presumption requires the initiation of legal proceedings, something that many people may be unable or unwilling to undertake.[51] As discussed above, even if a party is able to file an action to rebut the marital presumption, there are only narrow circumstances under which such actions will be successful.[52] The marital presumption's automatic, mandatory provision of legal parentage to the spouses of gestating parents thus has significant, enduring effects.

It should be noted, however, that in around half of states married gestating parents arguably have a somewhat greater degree of meaningful choice with regard to who the law deems the child's second legal parent at the time of birth. Specifically, in approximately half of states, a married gestating parent is allowed to execute a VAP at the time of the child's birth with someone other than their spouse, but only if the spouse is willing to execute a document declaring that they are not the child's biological father and waiving their presumed legal parentage.[53]

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[50] Feinberg, *A Logical Step Forward*, *supra* note 1, at 113-14 (describing the rights and obligations that accompany legal parentage).

[51] *See supra* notes 33–37 and accompanying text; *see also* Czapanskiy, *supra* note 43, at 956 ("Judicial proceedings can be beyond the means of low-income or middle-income families . . . .").

[52] *See supra* notes 35–37 and accompanying text.

[53] *See, e.g.*, ARIZ. DEP'T OF HEALTH SERVS., ACKNOWLEDGEMENT OF PATERNITY 1 (2017), http://www.azdhs.gov/documents/licensing/vital-records/register-acknowledgement-paternity.pdf [https://perma.cc/U3VE-W7X5]; ARK. OFF. OF CHILD SUPPORT ENF'T, ACKNOWLEDGEMENT OF PATERNITY, http://www.dfa.arkansas.gov/offices/childSupport/Documents/aopPage1English.pdf (last visited Dec. 21, 2021) [https://perma.cc/8ATR-US6J]; STATE OF COLO., VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY 1 (2016), https://www.colorado.gov/pacific/sites/default/files/CHED_VR_Form_Acknowledgement-of-Paternity_English0916.pdf [https://perma.cc/C74Q-MKQU]; ME. DEP'T OF HEALTH & HUMAN SERVS., MAINE CTR. FOR DISEASE CONTROL & PREVENTION, FORM NO. VS27-A, ACKNOWLEDGEMENT OF PATERNITY 3 (2016), https://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/documents/pdf-files/VS27-A.pdf [https://perma.cc/N622-4MJB]; *Frequently Asked Questions*, ILL. HEALTHCARE & FAMILY SERVS., CHILD SUPPORT SERVS., https://www.illinois.gov/hfs/ChildSupport/hospitals/Pages/FAQs.aspx#other (last visited Jan. 8, 2021) [https://perma.cc/ZWP3-WEPW]; *Glossary of Family Law Terms*, ALASKA CT. SYS., SELF-HELP CTR.: FAM. L., http://www.courts.alaska.gov/shc/family/glossary.htm#aff-pat (last updated Mar. 21, 2019) [https://perma.cc/MVJ8-S8HN]; *Voluntary Acknowledgement of Paternity*, DEL. CHILD SUPPORT SERVS., https://www.dhss.delaware.gov/dcss/volack.html#:~:text=Voluntary%20Acknowledgement%20of%20Paternity%20(VAP,the%20parents%20are%20not%20married.&text=There%20is%20no%20fee%20for,placed%20on%20the%20birth%20certificate (last visited Dec. 21, 2021) [https://perma.cc/978A-J9C3]. Federal law requires only that states make VAPs

If the spouse is not willing to execute the document, the law will continue to recognize the spouse as the child's second legal parent at birth pursuant to the marital presumption.[54] If the spouse is willing to waive their legal parentage, it has the effect of establishing the individual named in the VAP, and not the spouse, as the child's second legal parent at the time of the child's birth.[55] Even in the jurisdictions that allow married gestating parents to, with their spouse's consent, execute VAPs with someone other than their spouse, the availability of VAPs is limited to certain categories of people. Specifically, in the vast majority of jurisdictions, VAPs can only be used to establish the parentage of men.[56] Consequently even in jurisdictions that allow a married gestating parent to utilize a VAP to establish at-birth legal parentage for someone other than their spouse in situations where the spouse is willing to waive their presumed parentage, this avenue is only available if the person who the gestating parent desires to be deemed the child's other legal parent at birth is a man.[57]

2. Married Gestating Parents Who Conceive via Assisted Reproductive Technology

When a married gestating parent conceives via assisted reproductive technology ("ART"), laws in most jurisdictions provide an additional mechanism, beyond the traditional marital presumption, for the at-birth

available to unmarried individuals who give birth, and a number of state VAP forms specify that VAP procedures are unavailable when a child is born to a married mother. Feinberg, *A Logical Step Forward*, *supra* note 1, at 128-29.

[54] *See* sources cited *supra* note 53. In West Virginia, a married gestating parent also is able to execute a VAP with someone other than their spouse if they submit DNA evidence demonstrating that the alleged father is the biological father. *Adding and Removing Fathers*, W. VA. DEP'T OF HEALTH AND HUMAN RES., http://www.wvdhhr.org/bph/hsc/vital/paternity.asp (last updated Mar. 15, 2012) [https://perma.cc/Y53U-TJZ2]. The spouse's consent is not required in this situation. *Id.*

[55] *See* sources cited *supra* note 53. If the parentage of the gestating parent's spouse is later disestablished through post-birth legal proceedings, the gestating parent may then be able to utilize a VAP to establish the parentage of someone other than their spouse without their spouse's consent. *See, e.g.*, MICH. DEP'T OF HEALTH & HUMAN SERVS., AFFIDAVIT OF PARENTAGE 1, https://www.michigan.gov/documents/Parentage_10872_7.pdf (last visited Feb. 22, 2022) [https://perma.cc/QX8R-RHDM] ("Further, the mother states that she was not married when this child was born or conceived; or that this child, though born or conceived during a marriage, is not an issue of that marriage as determined by a court of law.").

[56] JOSLIN ET AL., *supra* note 17, § 5:22.

[57] *See id.*

determination of a second legal parent.[58] Like the marital presumption, however, this avenue of establishing parentage functions solely to grant an at-birth determination of legal parentage to the person to whom the gestating parent was married during the relevant time period. Specifically, these laws state that a husband who consents to his wife's use of assisted reproduction with the intent to be the resulting child's parent is the child's legal parent regardless of whether his genetic materials were used to conceive the child.[59] Some of the spousal consent to ART laws explicitly require consent from both parties, while the language of others only expressly identifies the spouse's consent as a requirement.[60] Unlike the marital presumption, which generally

[58] Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology,* 83 S. CAL. L. REV. 1177, 1184-85 (2010) (describing states' approaches).

[59] JOSLIN ET AL., *supra* note 17, §§ 3:3, 3:4; Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 165 (2000).

[60] *Compare* ALASKA STAT. § 25.20.045 (2022) ("A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses."); CONN. GEN. STAT. § 45a-774 (2022) ("Any child or children born as a result of A.I.D. shall be deemed to acquire, in all respects, the status of a naturally conceived legitimate child of the husband and wife who consented to and requested the use of A.I.D."); FLA. STAT. § 742.11(1) (2022) ("[A]ny child born within wedlock who has been conceived by the means of artificial or in vitro insemination is irrebuttably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination."); GA. CODE ANN. § 19-7-21 (2022) ("All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination."); *and* KAN. STAT. ANN. § 23-2302 (2022) ("Any child or children heretofore or hereafter born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique."), *with* ARK. CODE ANN. § 9-10-201(a) (2022) ("Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination."); IDAHO CODE § 39-5405(3) (2022) ("The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same as for all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband, if the husband consented to the performance of the artificial insemination."); LA. CIV. CODE art. 188 (2022) ("The husband of the mother may not disavow a child born to his wife as a result of assisted conception to which he consented."); MASS. GEN. LAWS ch. 46 § 4B (2022) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.").

provides a rebuttable presumption of parentage, the parentage that attaches to a gestating parent's spouse pursuant to spousal consent to ART laws is conclusive in most jurisdictions.[61] While many of the spousal consent to ART laws are written in gendered terms, most courts that have addressed the issue have held that under *Obergefell* and *Pavan*, these laws extend to a woman who, with the intent to be the resulting child's parent, consents to her spouse's use of assisted reproduction to conceive.[62]

Avoiding the application of a jurisdiction's spousal consent to ART law to the gestating parent's spouse may require proof that the necessary consent was lacking or that the law's technical requirements were not satisfied.[63] In terms of technical requirements, some states' spousal consent to ART laws mandate that the required consent be set forth in writing and/or that the procedure involve a physician.[64] However, even

Viewing the approach of the latter jurisdictions charitably, perhaps it is based on the assumption that if a spouse knew of the gestating parent's use of ART and was given the opportunity to provide consent, both parties must have desired for the spouse to be the child's other legal parent. This, however, is far from clear. Regardless, the better approach would be for states to make this requirement explicit. *See* Joslin, *supra* note 58, at 1225 ("Under a contrary rule, the gestational/intended parent would have no control over who would be her child's other parent; it could even be someone unknown to or estranged from her. To remove any remaining uncertainty about this issue, this requirement [that the gestating parent also consent] should be made explicit. Specifically, the law should provide that an individual who consents to alternative insemination by a woman with the intent to be a parent of the resulting child and with the consent of the woman is a parent of the resulting child.").

[61] JOSLIN ET AL., *supra* note 17, § 3:4.

[62] *Id.*

[63] The law may presume that the spouse has consented to the gestating parent's use of ART. *See* Blecher-Prigat, *supra* note 6, at 138 ("While most of these statutes condition the husband's paternal status on his consent to the insemination, there is a strong presumption that the husband gave such consent."); Bernard Friedland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act's Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 448 (1997) ("Where the husband contends that he did not consent to the procedure or that he withdrew consent before conception, courts tend to place the burden of proof upon the husband to show that consent was not given or was withdrawn. Sometimes the husband must prove the lack of consent by clear and convincing evidence."); Marla J. Hollandsworth, *Gay Men Creating Families. Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 230 (1995) ("Some states impute consent to the husband absent evidence to the contrary, while others provide that consent of the husband is presumed."); Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th § 2[a] (2020) ("It has also been recognized that the consent of the husband, out of which his support obligation arises, may be presumed unless convincing proof is offered that he did not in fact give such consent.").

[64] Feinberg, *A Logical Step Forward*, *supra* note 1, at 106.

if a spousal consent to ART law does not establish the spouse's legal parentage at birth, the marital presumption of parentage, which provides the gestating parent's spouse with a rebuttable presumption of legal parentage at birth regardless of the method of conception, exists in every state.[65] Overall, spousal consent to ART laws do not expand the class of individuals who can be established at birth as the second parent of a child born to a married gestating parent; like the marital presumption, spousal consent to ART laws can only be utilized to establish the spouse as the child's second parent.

In sum, regardless of the method of conception, a gestating parent who is married at the time of conception or birth has little choice with regard to who will be deemed the child's other legal parent at birth. With one narrow exception that exists in only half of jurisdictions, the law generally provides a mandatory at-birth determination of legal parentage to the gestating parent's spouse, regardless of whether this is what the gestating parent desires. Not all gestating parents, however, are similarly constrained. Compared to married gestating parents, certain categories of gestating parents who were not married at the time of the child's conception or birth ("unmarried gestating parents"), have significantly greater meaningful choice with regard to who is deemed the child's second legal parent at birth.[66]

B. Unmarried Gestating Parents

1. Unmarried Gestating Parents Who Conceive via Sexual Means

Unmarried gestating parents who conceive via sexual means and desire a male co-parent enjoy a significant degree of meaningful choice with regard to who will be deemed the child's second legal parent at birth. Today, VAPs, which are usually executed at the hospital at the time of the child's birth,[67] are the most common way of establishing a second legal parent for a child born to an unmarried gestating parent.[68] The federal guidelines governing VAP procedures stem from reform to

[65] *See*, *e.g.*, Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845, 853-55 (Sup. Ct. 2014) (holding that although the parties had not complied with the formal requirements of the spousal consent to assisted reproduction statute, the marital presumption provided a separate means for establishing the spouse's parentage).

[66] *See infra* Parts II.C.–D.

[67] Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 920 (2006) ("[A] recent study indicates six of seven paternities are voluntary, virtually all of which are acknowledged at the hospital.").

[68] Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 469 (2012).

federal child support and welfare laws in the 1990s,[69] although a number of states had established VAP procedures well before that point.[70] Federal guidelines mandate that VAPs are offered by all birthing hospitals, both public and private, as well as all birth records offices.[71] The federal government's goals in requiring states to adopt VAP procedures included decreasing government spending on welfare programs by facilitating the identification of two legal parents from whom child support could be sought as early as possible following the child's birth.[72] Prior to the implementation of VAP procedures in the United States, children born to unmarried gestating parents generally could have only one legal parent — the gestating parent — at the time of birth, establishing a second legal parent required the initiation of legal proceedings after the child's birth.[73]

To execute a VAP, the gestating parent and the man who they seek to identify as the child's second legal parent simply must sign a document acknowledging the man's paternity and have their signatures authenticated by a notary or witness.[74] Prior to the VAP's execution,

[69] Jeffrey A. Parness, *No Genetic Ties, No More Fathers: Voluntary Acknowledgement Rescissions and Other Paternity Disestablishments Under Illinois Law*, 39 J. MARSHALL L. REV. 1295, 1298 (2006); Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgements at Birth*, 40 U. BALT. L. REV. 53, 56-57 (2010); Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws*, 21 MICH. J. GENDER & L. 67, 75-77 (2014).

[70] *See*, *e.g.*, *In re* J.W.T., 872 S.W.2d 189, 193 (Tex. 1994) ("With the enactment of the Texas Family Code in 1973, a method was statutorily afforded a putative father to establish his paternity voluntarily."); Rogus, *supra* note 69, at 78 (describing the establishment of VAPs in Washington, D.C. in the 1970s).

[71] 45 C.F.R. § 303.5(g)(1)(i)-(ii) (2022); Harris, *supra* note 68, at 476.

[72] *See* Susan F. Paikin & William L. Reynolds, *Parentage and Child Support: Interstate Litigation and Same-Sex Parents*, 24 DEL. LAW. 26, 28-29 (2006) ("Spurred to action by the burgeoning number of nonmarital children and the attendant child poverty and welfare dependence associated with single-parent families, Congress required states to enact and use expedited procedures to streamline paternity establishment . . . to ensure that nonmarital children gained the financial and emotional benefit of two parents."); Julia Saladino, *Is a Second Mommy a Good Enough Second Parent?: Why Voluntary Acknowledgements of Paternity Should be Available to Lesbian Co-Parents*, 7 MOD. AM. 2, 2 (2011) (explaining that the goals of the federal government in adopting VAP requirements included the establishment of legal parentage for two individuals "as early in a child's life as possible," in order to facilitate the collection of child support); *see also* Jayna Morse Cacioppo, Note, *Voluntary Acknowledgements of Paternity: Should Biology Play a Role in Determining who Can be a Legal Father?*, 38 IND. L. REV. 479, 481 (2005) ("Thus, in an effort to ensure support for a child born out of wedlock, the government has made it virtually effortless to become a legally recognized father.").

[73] Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 475-76 (2016).

[74] 45 C.F.R. § 303.5(g)(4).

notice must be provided to the parties, both orally and in writing, "of the alternatives to, the legal consequences of, and the rights . . . and responsibilities" of acknowledging parentage.[75] While generally either signatory may rescind the VAP within sixty days of its execution, after that point VAPs can only be challenged on the grounds of duress, material mistake of fact, or fraud.[76] A VAP that is not rescinded within sixty days must be "considered a legal finding of paternity"[77] and states must give full faith and credit to validly executed out-of-state VAPs.[78]

Importantly, while many states' VAP forms or accompanying instructions state that in signing the VAP the parties are attesting under penalty of perjury that, to the best of their knowledge, the man is the child's biological father,[79] states cannot require putative fathers to submit to genetic testing before signing a VAP at the time of the child's birth.[80] As a result, a biological tie between the man and the child does not need to be proven in order for a man's legal parentage to be established through the execution of a VAP.[81] As Professor Jeffrey Parness has explained, "VAP statutes usually are employed by birth mothers and unwed men, with or without biological ties to [the child], who seek to establish legal paternity."[82] Indeed, one study found that even when given the opportunity to take a free DNA test before signing the VAP, the vast majority of men refused.[83] Federal law's prohibition on requiring genetic testing before executing a VAP has resulted in a system in which VAPs can be, and are, utilized in situations where the parties desire to establish the man as the child's second legal parent regardless of whether he shares biological ties with the child.

The nationwide availability of VAPs to establish a man as the second legal parent of a child born to an unmarried gestating parent provides

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[75] *Id.* § 303.5(g)(2)(i).

[76] 42 U.S.C. §§ 666(a)(5)(D)(ii)-(iii) (2018). States differ with regard to which categories of individuals have standing to challenge VAPs. Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325, 351-53 (2019) [hereinafter *Faithful Parents*].

[77] 42 U.S.C. § 666(a)(5)(D)(ii).

[78] *Id.* § 666(a)(5)(C)(iv).

[79] *See* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1686-87 (2015). As Leslie Harris has explained, "Federal statutes that require states to establish VAPs do not provide that the man signing a VAP must aver that he is the child's biological father." Harris, *supra* note 68, at 479.

[80] *See* 45 C.F.R. § 302.70 (a)(5)(vii) (2022).

[81] *See* Baker, *supra* note 79, at 1687 ("Congress did not mandate that the VAP be tied to genetics.").

[82] Parness, *Faithful Parents*, *supra* note 76, at 345-46.

[83] Harris, *supra* note 68, at 477.

unmarried gestating parents with a significant degree of choice within the determination of who will be deemed the child's second legal parent at birth. At the time of the child's birth, the gestating parent can choose who they want to be the child's other parent, and as long as they choose a man who is willing to sign the VAP, the law will recognize the individual chosen as the child's second legal parent. As discussed above, that individual will remain the child's legal parent unless the VAP is rescinded within sixty days or successfully challenged after that point, which is allowed in only narrow circumstances involving duress, material mistake, or fraud.[84] While the most frequent challenges to VAPs are based upon claims "that the [gestating parent] committed fraud by misleading the man about his biological paternity or that there is a material mistake of fact because the man is not the biological father," proof that the man identified in the VAP is not the child's biological father will not necessarily result in the disestablishment of the man's legal parentage.[85] Some courts require evidence of fraud or mistake in addition to the genetic testing results and/or deny the disestablishment of paternity if doing so would be inequitable under the circumstances or contrary to the best interests of the child.[86] As Professor Katharine Baker has explained, "[m]any courts are growing increasingly comfortable with treating VAPs as final, legal judgments, regardless of what the genetic evidence might show."[87] While there is, of course, always a chance that a VAP will be successfully challenged, over one million VAPs are executed each year, and in most cases the VAP will never be challenged and the person with whom the gestating parent chose to execute the VAP will remain the child's legal parent permanently.[88]

While VAPs provide many unmarried gestating parents with significant, meaningful choice in the determination of who will be deemed the child's second legal parent at birth, this is not true for all unmarried gestating parents. As noted above, in the vast majority of states VAP procedures can only be utilized to establish the legal

[84] *See supra* notes 76–78. Some states also employ time limitations for challenges to VAPs. *See* Parness, *Faithful Parents*, *supra* note 76, at 353.

[85] Harris, *supra* note 68, at 479-80.

[86] *Id.* at 480-81.

[87] Baker, *supra* note 79, at 1687.

[88] OFF. OF CHILD SUPPORT ENF'T, ANNUAL REPORT TO CONGRESS 144 (2016), https://www.acf.hhs.gov/sites/default/files/documents/ocse/fy_2016_annual_report.pdf [https://perma.cc/5GBA-GYP2] (setting forth the number of VAPs executed in the United States each year).

parentage of men.[89] As a result, in most states unmarried gestating parents who wish for a woman to be deemed the child's second legal parent at birth cannot utilize VAPs to establish the legal parentage of their desired co-parent.[90]

2. Unmarried Gestating Parents Who Conceive via Assisted Reproductive Technology

For unmarried gestating parents who conceive via ART, there is one other potential mechanism besides the VAP that provides for at-birth determinations of a second legal parent. This mechanism, however, is only available in a relatively small minority of states. Specifically, as of 2021, approximately sixteen jurisdictions have adopted consent to ART laws that extend to an individual who consents to an unmarried gestating parent's use of ART with the intent to be the resulting child's parent.[91] Similar to the spousal consent to ART laws discussed above, a conclusive presumption of parentage generally attaches under these laws to the individual who consents to an unmarried gestating parent's use of ART.[92] In thirteen of the sixteen jurisdictions, the law is written in gender neutral terms with regard to the individual who is deemed a legal parent at birth based upon their consent to the unmarried gestating parent's use of ART.[93] This means that (assuming these laws also require the gestating parent's consent) unmarried gestating parents who conceive via ART in these thirteen jurisdictions can choose an individual of any gender to be the child's second legal parent.[94]

In sum, the degree of meaningful choice unmarried gestating parents are able to exercise in the determination of who is deemed the child's second legal parent at birth depends largely on the gender of their desired co-parent. Across jurisdictions, unmarried gestating parents who desire a man to be deemed the child's second legal parent at birth

[89] JOSLIN ET AL., *supra* note 17, § 3:3 (identifying seven states as having extended parentage establishment through VAPs to women).

[90] Instead, after the child is born, an unmarried gestating parent and the woman who the gestating parent wishes to be the child's second legal parent generally must pursue a second parent adoption in order to establish the woman as the child's second legal parent. Feinberg, *A Logical Step Forward*, *supra* note 1, at 111-12. Unfortunately, second parent adoptions are not permitted in a number of jurisdictions, and, even in jurisdictions that grant second parent adoptions, the process can be lengthy, expensive, and onerous. *Id.* at 112-13.

[91] JOSLIN ET AL., *supra* note 17, § 3:3.

[92] *Id.*

[93] *Id.*

[94] *See supra* note 60 and accompanying text.

enjoy a significant degree of meaningful choice under current law. Regardless of the method of conception and the availability of non-spousal consent to ART statutes, unmarried gestating parents who desire a man to be deemed the child's second legal parent at birth can utilize VAPs to establish at-birth legal parentage for their desired co-parent.[95] Unmarried gestating parents who desire a woman to be deemed the child's second legal parent at birth, however, are left without meaningful choice in most jurisdictions. This is because in the vast majority of jurisdictions, neither VAPs nor non-spousal consent to ART statutes can be utilized to establish the parentage of women.[96]

C. A Note on Gestating Parents' Degree of Choice in Post-Birth Parentage Establishment

This Article focuses primarily on the degree of meaningful choice gestating parents are able to exercise in *at-birth* determinations of the child's second legal parent. However, a brief discussion of parentage establishment mechanisms that gestating parents may be able to utilize to establish an individual as the child's second legal parent *after* birth will provide context that is useful in understanding why parentage determinations that attach at birth are so important. When a gestating parent cannot or does not establish their desired co-parent as the child's second legal parent through the at-birth mechanisms discussed above, the additional parentage establishment methods that arise after birth generally are limited and, importantly, require the initiation of legal proceedings.[97] For married gestating parents who conceived via ART and desire someone other than their spouse to be the child's second legal parent, if the jurisdiction's consent to ART statute applies, the spouse is conclusively deemed the child's second legal parent at birth and the gestating parent will not have ability to choose someone else post-birth.[98] For married gestating parents whose spouse is recognized as the child's other legal parent at birth pursuant to the marital presumption, the first step the gestating parent will need to take to establish someone else as the child's second legal parent is to bring an

[95] *See supra* Part I.B.

[96] *See supra* notes 89–90, 93 and accompanying text.

[97] This proposition refers to mechanisms that become available only after birth. VAPs, on the other hand, become available *at* birth and may also be executed post-birth at state birth records offices; VAPs do not require the initiation of legal proceedings. *See supra* notes 70, 77–78.

[98] *See supra* note 61 and accompanying text.

action to rebut the marital presumption.[99] As discussed above, this will generally require proof that the child and the spouse do not share genetic ties, and, if the gestating parent seeks to establish the child's biological father as the child's second legal parent, proof of the alleged biological father's genetic ties to the child.[100] However, courts may deny rebuttal, despite the spouse's lack of genetic ties to the child, if the court determines that it would be contrary to the child's best interests or inequitable.[101] If the spouse's legal parentage is rebutted and the rebuttal proceedings do not involve establishing the child's biological father as the second legal parent, the married gestating parent could then utilize the post-birth mechanisms available to unmarried gestating parents to establish a second legal parent.

For unmarried gestating parents who could not or did not utilize VAPs or consent to ART laws to establish an individual as the child's second legal parent and who do not already have a legally recognized co-parent, there are a couple of additional post-birth parentage establishment mechanisms available.[102] The first mechanism can be used only to provide parentage to the child's biological father. If an unmarried gestating parent desires the child's biological father to be deemed the child's second legal parent, the gestating parent can initiate legal proceedings (on their own or through a child support enforcement agency) to establish the biological father's legal parentage on the basis of DNA evidence.[103] Federal law requires that state procedures "create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child."[104] Importantly, even if

[99] This would be the case if the VAP processes available in around half of jurisdictions to married gestating parents, which require the consent of the gestating parent, the spouse, and the alleged biological father, were not utilized. *See supra* notes 52–57 and accompanying text.

[100] *See supra* note 35 and accompanying text.

[101] *See supra* note 36 and accompanying text.

[102] While VAPs are available after birth, not every unmarried gestating parent will be able to utilize the VAP to establish their desired co-parent as the child's second legal parent. As discussed above, in the vast majority of jurisdictions, VAPs cannot be utilized to establish the parentage of women. *See supra* notes 89–90. In addition, the period of time following birth for which VAPs can be utilized to establish an individual's legal parentage differs by jurisdiction. *How to Establish Paternity*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/living-together-book/chapter7-4.html (last viewed Jan. 8, 2021) [https://perma.cc/33JD-CT69]. Finally, some VAP forms require the individual who seeks to establish parentage to swear that they are the child's "natural" or biological father. Baker, *supra* note 79, at 1686.

[103] Glennon, *supra* note 29, at 569.

[104] 42 U.S.C. § 666(a)(5)(G) (2018).

the gestating parent does not wish to establish the biological father as the child's second legal parent, other interested parties such as the biological father or, if the gestating parent receives public benefits, a child support enforcement agency, may seek to establish the biological father's legal parentage through this mechanism.[105]

The other parentage establishment mechanism available to unmarried gestating parents who could not or did not utilize VAPs or consent to ART laws to establish the child's second legal parent and who do not yet have a legally recognized co-parent, involves adoption.[106] While this option provides a greater degree of choice to the unmarried gestating parent with regard to who can be deemed the child's second legal parent, adoption can be an expensive, intrusive, and lengthy process.[107] If a gestating parent marries their desired co-parent after the child's birth, the couple can pursue a stepparent adoption to establish the gestating parent's spouse as the child's second legal parent without terminating the gestating parent's parental rights.[108] If the gestating parent remains unmarried, a second parent adoption would allow the parties to establish the gestating parent's desired co-parent as the child's legal parent without terminating the gestating parent's rights.[109]

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[105] *See* Glennon, *supra* note 29, at 569. Specifically, if a gestating parent receives public benefits and the child does not have a second legal parent, then the gestating parent can be required to assist the child support agency in establishing the legal paternity of the child's biological father. Czapanskiy, *supra* note 43, at 955.

[106] There are also function-based methods of establishing parentage in some jurisdictions. More specifically, if the gestating parent allows another individual to live with the child and to function in the role of the child's parent for a sufficient period of time, then that individual may be able to eventually obtain legal parentage or certain parental rights through holding out provisions or other equitable parenthood doctrines. *See generally* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55 (2017) (discussing the importance of maintaining function-based avenues of establishing parental rights).

[107] *Id.* at 81-82 (describing the costs and procedures involved in step- and second-parent adoptions).

[108] *Id.* at 80 ("Even in jurisdictions that waive requirements such as financial accountings and home studies, the stepparent adoption procedure can nonetheless be costly and complicated. Many individuals require the assistance of an attorney to navigate the process and thus incur attorney's fees, and the procedure often requires, inter alia, submitting various documents, paying court fees, appearing in court, and submitting to a background check.").

[109] *See id.* at 81-82 ("[U]nlike for stepparent adoptions, home studies, which can be intrusive and costly and can prolong the adoption process, are generally required for second parent adoptions (although some states grant courts discretion to waive the home study requirement). Second parent adoptions cost between $2,000 and $3,000 on average and, depending on the jurisdiction, can cost upwards of $5,000.").

Unfortunately, however, second parent adoptions are only available on a statewide basis in a minority of states.[110]

II. POTENTIAL THEORIES UNDERLYING CURRENT LAW'S APPROACH TO THE GESTATING PARENT'S DEGREE OF CHOICE IN AT-BIRTH DETERMINATIONS OF THE SECOND LEGAL PARENT

As the discussion above illuminates, under current law, the degree of choice that gestating parents have in at-birth determinations of the child's second legal parent differs significantly depending on the gestating parent's marital status, the method of conception, and the gender of the potential second legal parent. For example, married gestating parents and unmarried gestating parents who desire a woman to be the child's second legal parent generally have the least amount of meaningful choice, with the degree of choice sometimes differing based on the method of conception. On the other end of the spectrum, unmarried gestating parents who desire a man to be the child's second legal parent are able to exercise the greatest amount of meaningful choice within at-birth determinations of the child's second legal parent, regardless of the method of conception. In considering whether the current legal framework governing the degree of choice gestating parents have in at-birth determinations of the child's second legal parent is need of reform, it is important to determine whether there is any coherent underlying theory guiding the law's approach to this issue that would explain the vastly differing treatment of various categories of gestating parents.

Throughout the years, jurists, scholars, and commentators have set forth a range of ideas, analyses, and proposals regarding both what is and what should be the underlying theory guiding the law's approach to parentage determinations. A number of these theories conceivably could be guiding the law's current approach to the more narrow issue of the gestating parent's degree of meaningful choice within determinations of the child's second legal parent at birth. This Part identifies the most plausible potential theories and analyzes whether any of the theories provides a consistent, coherent explanation for current law's approach to gestating parents' choice in at-birth determinations of the child's second legal parent.

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[110] *Id.* at 81. Step- and second-parent adoption mechanisms are available only if there is no existing second legal parent or the second legal parent's rights are terminated. *Id.* at 79-80.

A. The Constitutional Law Theory

One possibility is that the underlying theory guiding the law's current approach to the degree of meaningful choice gestating parents may exercise in at-birth determinations of the child's second legal parent is based in constitutional law considerations. The starting point for the constitutional law theory is that the gestating parent enjoys a constitutionally protected relationship with the child at the time of birth.[111] The constitutional relationship derives from the act of gestating and giving birth to the child, which necessarily involves both a biological connection between the gestating parent and child[112] and significant parental functioning on the part of the gestating parent.[113] As scholars have described, "the process of gestation [] creates a two-way biological connection . . . since cells pass between fetuses and their gestational [parent] in both directions"[114] and "the constant physical proximity of [the gestating parent] and fetus and their interaction during gestation necessarily gives rise to an everyday actual relationship, allowing for bonding . . . even before birth."[115]

The notion of constitutionally protected parent-child relationships deriving from the combination of biological ties and parental

[111] *See, e.g.*, E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 107 (2006) ("A biological mother necessarily develops a constitutionally meaningful relationship with her child by the time of the child's birth.").

[112] Even where the gestating parent does not share a genetic connection with the child, there is still a biological connection between the child and the individual who gestates the child. *See* Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 499-500 (2017) [hereinafter *Fathers and Feminism*] (describing the biological connection between the gestating parent and the child that occurs regardless of the source of the genetic materials used to conceive the child). The biological tie stemming from the gestational relationship is significant, regardless of genetic ties. *See* Baker, *supra* note 14, at 47 ("Although courts have never put it in these terms, the above suggests that the gestational mother gains parental status through her gestational investment, not through her genetic contribution.").

[113] Spitko, *supra* note 111, at 107-08 ("Given that parental labor gives rise to constitutional parental rights, the acts of carrying and delivering the child should qualify the biological mother-child relationship for constitutional protection. During her pregnancy and the birth of the child, the mother endures physical stresses and changes to her body, a significant possibility of health complications, and the pains of pregnancy and childbirth to give life to the child. Moreover, the constant physical proximity of mother and fetus and their interaction during gestation necessarily gives rise to an everyday actual relationship, allowing for bonding between mother and child even before birth.").

[114] Hendricks, *Fathers and Feminism*, *supra* note 112, at 499.

[115] Spitko, *supra* note 111, at 108.

functioning can be traced back to a series of Supreme Court decisions regarding the rights of unwed biological fathers.[116] This series of opinions established the "biology-plus standard," under which a biological father who is not married to the individual who gave birth establishes a constitutionally protected parent-child relationship only if he "grasp[s] the opportunity to develop a relationship with his child" and "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'"[117] In the unwed fatherhood cases, the Supreme Court appeared to recognize that gestating parents' share a constitutionally protected relationship with the child, but did not explicitly apply the biology-plus standard to gestating parents.[118] While the Court did not expressly identify satisfaction of the biology-plus standard as the basis for recognizing the gestating parents' constitutional rights, it appears that the Court simply presumed that the acts of gestating and birth to the child satisfy the biology-plus standard.[119]

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[116] Lehr v. Robertson, 463 U.S. 248, 262 (1983); Caban v. Mohammed, 441 U.S. 380, 389 (1979); Quilloin v. Walcott, 434 U.S. 246, 256 (1978); Stanley v. Illinois, 405 U.S. 645, 654 (1972).

[117] *Lehr*, 463 U.S. at 248, 261 (quoting *Caban*, 441 U.S. at 392); *see also Caban*, 441 U.S. at 392-94; *Quilloin*, 434 U.S. at 255-56. The Court has indicated, however, that the constitutional protection for unwed fathers who satisfy the biology-plus standard does not extend to situations where the gestating parent is married to someone else at the time of the child's conception or birth. Michael H. v. Gerald D., 491 U.S. 110, 142-43 (1989).

[118] *See* Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405, 436 (2013) (stating that in *Lehr*, "the only relevant criterion for the mother was, by default, the fact that she gave birth to her child; just the father had to supplement the fact of biology with the establishment of a perceptible relationship").

[119] Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 441 (2007) ("All of the [Supreme Court's] fatherhood cases assumed that the birth of a child establishes the mother's rights."); Hendricks, *Fathers and Feminism*, *supra* note 112, at 478 ("The biology-plus-relationship test recognized that a birth mother, by gestating and giving birth, satisfied both criteria, but that for fathers, biological parenthood did not automatically create a relationship that demanded full parental rights."); *see also* Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. STATE U. L. REV. 909, 957-58 (2019) ("Unlike paternity, the Supreme Court has never addressed the factual ground for mothers' constitutional rights. Nevertheless, simple extensions of the biology plus test can support tentative conclusions. A woman who gives birth to her own genetic child has full parental rights at birth, because she accepts a measure of responsibility by performing the work of pregnancy and childbirth. . . . Sometimes the Justices suggests pregnant women form emotional bonds with the fetus in utero, which comes perilously close to gender stereotyping, but other times the Court recognizes that pregnancy and childbirth are work that can justify additional rights.").

Under the constitutional law theory, because the acts of gestating and giving birth to the child create a constitutionally protected parent-child relationship, the gestating parent necessarily is "the child's initial 'constitutional parent.'"[120] It is well established that the Constitution's Due Process Clause provides parents with the fundamental right to make decisions regarding the care, custody, and control of their child.[121] The gestating parent's fundamental right to make decisions regarding the care, custody, and control of the child, which the gestating parent enjoys at birth as the initial constitutional parent, logically includes the right to exercise meaningful choice in at-birth determinations of the child's second legal parent.[122] There are differing views regarding how much weight the law must afford the gestating parent's choice in order to avoid running afoul of the gestating parent's constitutional rights. Under some articulations of the constitutional law theory the law must afford the gestating parent's choice "special weight,"[123] while under other articulations of the theory the gestating parent's wishes must be determinative.[124] Either way, the gestating parent's right as the child's initial constitutional parent to exercise meaningful choice in the at-birth determination of the child's second legal parent exists unless or until either the gestating parent has exercised that right or a second party has been able to develop an offsetting constitutionally-protected parental relationship with the child.[125]

One may argue that the law's current approach to the degree of choice gestating parents have in at-birth determinations of the child's second legal parent is consistent with the constitutional law theory. The argument would proceed as follows. With regard to current law's

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[120] Spitko, *supra* note 111, at 108; *see also* Baker, *supra* note 14, at 47; Hendricks, *Fathers and Feminism*, *supra* note 112, at 476.

[121] Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

[122] Spitko, *supra* note 111, at 99, 111 (stating that "labor gives [the gestating parent] a constitutionally protected voice in the child's upbringing, including a right to decide generally who else shall be allowed to develop a parental relationship with the child" and "the existing constitutional parent's constitutional right to direct the moral upbringing of her child should include the power to invite another to become a co-parent to her child and even more certainly should include the power to prevent another from becoming a parent to her child"); *see also* Hendricks, *Fathers and Feminism*, *supra* note 112, at 482 ("Moreover, the mother's actual, established relationship at the time of birth should also be protected, meaning that the state should not impose an additional parent (genetic father or otherwise) without her consent.").

[123] *See* Hendricks, *supra* note 112, at 512.

[124] Spitko, *supra* note 111, at 111-12.

[125] *Id.*

treatment of married gestating parents, while married gestating parents, like unmarried gestating parents, enjoy a constitutionally-protected relationship with the child that includes the right to exercise meaningful choice in determinations of the child's other parent, married gestating parents necessarily have exercised that right by the time of the child's birth.[126] Specifically, a married gestating parent already has chosen their spouse as the second legal parent of any child born or conceived during the marriage simply by virtue of their decision to marry their spouse.[127] If married gestating parents necessarily have exercised their constitutional right to exercise meaningful choice within the determination of the child's second legal parent simply by marrying, then a legal framework that provides automatic legal parentage to spouses and denies married gestating parents the ability to utilize mechanisms like VAPs to choose someone other than their spouse as the child's legal parent (either completely or absent the spouse's consent), is consistent with the constitutional law theory.[128]

An alternative argument for why current law's approach to married gestating parents is consistent with the constitutional law theory stems from the contention that, at the time of the child's birth, spouses of married gestating parents have their own constitutional rights relating to the child that offset those of the gestating parent. While not squarely addressing the issue, the Supreme Court has, within its series of cases on the rights of unwed biological fathers, made passing references to the constitutional rights of a gestating parent's spouse. For example, in *Quilloin v. Walcott*, an unmarried biological father attempting to veto his child's adoption argued that the same constitutional standards that would apply to a married biological father in this situation should apply to him.[129] In rejecting this argument, the Court seemed to suggest that, unlike unwed biological fathers, spouses of gestating parents can be presumed to satisfy both the biology- and function-related requirements

[126] *See* Spitko, *supra* note 111, at 114; *see also* Baker, *supra* note 14, at 47 ("If the gestational mother has not . . . previously agreed (through marriage or another form of contract) to share parental rights, then she has exclusive control. Once she agrees, either explicitly or implicitly, to share that control, she has a co-parent.").

[127] *See* sources cited *supra* note 126.

[128] *See* Spitko, *supra* note 111, at 114 ("When the mother married her husband, she implicitly contracted to allow that man to act as father to any child born of her during their marriage."). However, it is important to note that Professor Spitko further argued that "the biological mother maintains the right to revoke her implicit consent arising from her marriage at any time prior to the vesting of constitutional parental rights in her husband" and that the husband's constitutional rights would arise only after he had engaged in sufficient parental functioning. *Id.*

[129] Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

of the biology-plus standard.[130] Specifically, the Court stated that "even a father whose marriage has broken apart [and who is no longer living with the child] will have borne full responsibility for the rearing of his children during the period of the marriage," while an unmarried father, like the one here, may have "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[131]

In another Supreme Court case, *Michael H. v. Gerald D.*, an unwed biological father sought to be determined the legal father of a child born to a married woman over the objection of the woman and her husband, who wished to continue to raise the child within their marriage.[132] Both the husband and the biological father had engaged in some degree of parental functioning.[133] In a plurality opinion holding that the law's provision of parental status to the husband and denial of parental status to the biological father did not violate the Constitution, the Court seemed to suggest that marriage to the gestating parent was equivalent to biological ties for purposes of meeting the first prong of the biology-plus standard and that the husband in this case shared a constitutionally protected relationship with the child.[134] The court stated that when "the child is born into an extant marital family, the natural father's unique opportunity [to develop a constitutionally protected relationship with the child] conflicts with the similarly unique opportunity of the husband of the marriage."[135]

The constitutional law theory recognizes that the gestating parent no longer has the exclusive right to make decisions regarding the child's care, custody, and control after another individual has established an offsetting constitutionally protected relationship with the child.[136] If,

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130 Hendricks, *Fathers and Feminism*, *supra* note 112, at 505 n.126 (citing *Quilloin*, 434 U.S. at 256) ("The Supreme Court, however, has suggested that the biology-plus-relationship may apply to all fathers; married fathers are simply presumed to have satisfied it.").

131 *Quilloin*, 434 U.S. at 256.

132 Michael H. v. Gerald D., 491 U.S. 110, 110 (1989).

133 *Id.* at 114-15.

134 *See id.* at 129; *see also* Spitko, *supra* note 111, at 114 ("[M]arriage alone does not give rise to constitutional parental rights in the husband under the labor-with-consent theory. Rather, the husband must first labor sufficiently as a father before his constitutional parental rights vest."). Professor Gary Spitko has argued that in determining constitutional protection for the parent-child relationship, the constitutional significance of the marriage is akin to that of biological paternity because both merely are proxies for the gestational parent's consent to the individual being the child's other parent. *Id.*

135 *Michael H.*, 491 U.S. at 128.

136 *See* Spitko, *supra* note 111, at 114-15; *supra* text accompanying note 125.

from the time of the child's birth, spouses enjoy constitutional rights that offset those of gestating parents, then laws that prevent married gestating parents from unilaterally choosing someone other than their spouse as the child's second legal parent at birth not only would be consistent with a theory based on constitutional considerations, they would be required under such a theory.[137] Similarly, if the Constitution provides protection to the spouses of gestating parents from the time of the child's birth, then the laws in around half of states that allow a married gestating parent to execute a VAP at birth with someone other than their spouse, but only if the spouse consents, also are consistent with a theory based on constitutional considerations.[138]

In addition, current law's approach of providing significantly greater choice to unmarried gestating parents regarding the determination of the child's second legal parent at birth through mechanisms like VAPs also could be viewed as consistent with the constitutional law theory.[139] For example, providing unmarried gestating parents with a significantly greater degree of meaningful choice at the time of the child's birth could be seen as consistent with a constitutional law theory if the lack of a spouse necessarily means that a gestating parent has not yet exercised their constitutional right to choose the second legal parent prior to the child's birth.[140] Similarly, providing unmarried gestating parents with a significantly higher degree of choice in at-birth determinations of the child's second legal parent arguably is consistent with a constitutional law theory if the absence of a spouse necessarily means that there is no other person who shares an offsetting constitutionally protected relationship with the child at birth.[141] Overall, if married and unmarried gestating parents categorically differ from each other in such constitutionally significant ways, then a framework that provides unmarried gestating parents with a substantially greater degree of meaningful choice in at-birth determinations of the child's second legal parent arguably is consistent with a guiding theory based on constitutional considerations.

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[137] Spitko, *supra* note 111, at 115 ("*Michael H.*, therefore, is simply a case of the mother being unable to impair the existing constitutional right of another — the right of her husband to be the father to a child born during their marriage.").

[138] *See supra* notes 53–55 and accompanying text. The constitutional theory would not, however, explain the approach of the other half of states, wherein the gestating parent cannot execute a VAP with someone other than their spouse regardless of the spouse's consent.

[139] *See infra* Part II.B.

[140] *See supra* notes 126–128 and accompanying text.

[141] *See supra* notes 129–138 and accompanying text.

A closer analysis, however, demonstrates that constitutional considerations do not provide a coherent, consistent theory for the law's current approach to the degree of meaningful choice gestating parents are able to exercise in at-birth determinations of the child's other legal parent. The vastly differing treatment of married and unmarried gestating parents under current law is not consistent with the constitutional law theory.[142] The argument that, by virtue of their decision to marry, a married gestating parent necessarily has exercised their right to meaningful choice within the determination of the child's second legal parent, is unpersuasive.[143] If gestating parents obtain a constitutionally protected parent-child relationship as a result of the combination of biological ties and parental functioning necessarily involved in the gestation process, their constitutional right to exercise meaningful choice regarding the child's other legal parent would not arise prior to gestation.[144] The gestating parent may have married their spouse months, years, or decades before the child was conceived. It is illogical to say that married gestating parents necessarily have exercised their constitutional right to meaningful choice within the determination of the child's second legal parent simply by virtue of the decision to marry, when in many cases the constitutional right does not yet exist at the time the gestating parent entered into the marriage.

Moreover, it is hard to argue that in making the decision to marry, which, again, may be done months, years, or decades before the child is conceived, the gestating parent necessarily is also at that time choosing, in any real way, the child's other legal parent.[145] Notably, allowing decisions that are critical to the child's wellbeing to be made at a time that is often long before the child is even conceived is out of line with well-established family law policies. For example, while courts give great deference to provisions in divorcing parents' marital settlement agreements addressing each party's custodial rights to their existing children, a provision in a prenuptial agreement that purports to address the custody of future children born to the marriage is void for public policy reasons.[146] The law recognizes that a person should not be considered to have made a sufficiently informed, meaningful decision

142 *See supra* Part I.A (describing the marital presumption).

143 *See supra* notes 126–127 and accompanying text.

144 *See supra* notes 111–113 and accompanying text.

145 *See* Czapanskiy, *supra* note 43, at 952 ("[T]he decision to marry has little to do with legal parenthood").

146 Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 319 (2012).

regarding something as important to their child's wellbeing as custodial rights at a time when the child often has not yet even been conceived.[147]

The alternative argument for why the mandatory at-birth provision of legal parentage to spouses is consistent with the constitutional law theory — that at the time of the child's birth spouses are entitled to constitutional rights and protections that offset those of the gestating parent — is also unpersuasive. The standard articulated by the Supreme Court for establishing a constitutionally-protected parent-child relationship centers on biology and function.[148] Even assuming that spouses are entitled to a presumption that they satisfy the biology part of the standard either due to assumed biological ties or because the marriage acts as a substitute for biological ties, there is still the function-based requirement.[149] Importantly, the Supreme Court's statements in *Quilloin* and *Michael H.* suggesting that spouses may be presumed to satisfy the function-based requirement of the standard were made in reference to spouses who had lived in an intact family unit with the gestating parent and child for some significant period of time.[150] It is a wholly different matter to conclude that the Court's statements mean that spouses categorically can be presumed to have satisfied the function-based aspect of the standard at the moment the child is born. It is highly unlikely that at the time of the child's birth — a time when the spouse would have had no prior direct contact with the child — the spouse could have satisfied the function-based requirement of the biology-plus standard.[151]

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147 *See id.*; *see also* Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 76 (2014) ("A further objection expressed in the context of premarital agreements is that a premarital custody agreement should be given especially little deference by custody courts, because it is highly unlikely to be either knowing or voluntary. . . . Courts are quick to assert the absurdity of permitting parents to bind themselves, and to limit the discretionary power of the courts on matters of custody, on the basis of 'an agreement entered into before the child in question has come into the world.").

148 *See supra* notes 116–117 and accompanying text.

149 Spitko, *supra* note 111, at 114 ("Just as with biological paternity, marriage alone does not give rise to constitutional parental rights in the husband . . . . Rather, the husband must first labor sufficiently as a father before his constitutional parental rights vest.").

150 *See supra* notes 130–135 and accompanying text (discussing the Supreme Court's statements in *Quilloin* and *Michael H.*).

151 Spitko, *supra* note 111, at 111-12 ("The biological mother's status as initial constitutional parent necessarily vests prior to any possible vesting of constitutional rights in the biological father . . . [because], in all but the most extraordinary circumstances, the biological father is unable to perform sufficient labor to become a constitutional parent by the time of the child's birth.").

Even if a spouse's pre-birth actions can be considered evidence of parental functioning, at the time of the child's birth, it is difficult to imagine that a spouse could have engaged in anywhere close to the level of parental functioning that a gestating parent necessarily has undertaken during the (often) nine-plus months of gestating the child and the process of giving birth.[152] It is unlikely that the degree of constitutional protection that would arise from the spouse's pre-birth conduct would be enough to offset the constitutional protections arising from the gestating parent's pre-birth conduct.[153] This would mean that the gestating parent's wishes still would be entitled to some level of constitutional protection in determinations of who is deemed the child's second legal parent at birth. Moreover, if pre-birth conduct could satisfy the function requirement of the biology-plus standard, it would mean that both spouses and unwed individuals who shared a biological tie with the child could achieve constitutionally-protected rights prior to the child's birth. For the current legal framework's differing treatment of married and unmarried gestational parents to be

[152] Baker, *supra* note 14, at 47-48 ("At a very basic level, there is simply no comparison between what a mother necessarily gives during pregnancy and what a man can give. Thus, by virtue of her sole responsibility and labor, the mother obtains sole parental rights."); Spitko, *supra* note 111, at 107-08, 112, 125-26 (stating that "[d]uring her pregnancy and the birth of the child, the mother endures physical stresses and changes to her body, a significant possibility of health complications, and the pains of pregnancy and childbirth to give life to the child. Moreover, the constant physical proximity of mother and fetus and their interaction during gestation necessarily gives rise to an everyday actual relationship, allowing for bonding between mother and child even before birth" and "[i]n all but the most extraordinary circumstances, the biological father is unable to perform sufficient labor to become a constitutional parent by the time of the child's birth"); *see also* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 276 (2006) ("I would find it impossible to conclude that the men's pre-birth conduct (or anyone else's behavior during that time) could so overwhelm the parental contributions of the gestating woman that they would satisfy a functional test more certainly than she would."); Leslie Bender, *"To Err is Human" ART Mix-Ups: A Labor-Based, Relational Proposal*, 9 J. GENDER RACE & JUST. 443, 487-90 (2006) (describing the gestating parent's "incomparable type and amount of labor in creating the child"); Hendricks, *Fathers and Feminism*, *supra* note 112, at 523-24 ("Birth creates a biologically unique relationship between mother and child. Women should have greater decision-making authority over certain reproductive decisions because that authority is a necessary correlate of their greater burden. It is not a matter of tit for tat, or payment for services, but a matter of acknowledging the entanglement of bodies and souls that inheres in pregnancy and birth. Without denigrating the 'deep and proper concern' that a man may have in a pregnancy, he is not situated to make initial decisions over whether a new being should be brought into the world, and if so into what family.").

[153] *See* sources cited *supra* note 152 (describing the unparalleled contributions that the gestating parent makes prior to the child's birth).

driven by constitutional considerations, there would have to be an assumption that all spouses engage in sufficient functioning to satisfy the biology-plus standard prior to birth and anyone who is not a spouse does not. Even under the most generous assumptions about spouses and the least generous assumptions about unmarried biological parents, this seems untenable.

It is important to note that the same type of problem arises even if the Supreme Court's unwed fatherhood cases are read to suggest that biological fathers and spouses have a constitutionally protected *opportunity interest* in forming a parent-child relationship that satisfies the biology-plus standard (a reading with which many scholars disagree).[154] If married gestating parents cannot utilize mechanisms like VAPs at birth to choose a child's second legal parent because someone else, the gestating parent's spouse, may have a constitutionally protected opportunity interest at the time the child is born, it would follow that unmarried gestating parents also cannot utilize such mechanisms because someone else, a person who shares a biological tie to the child, may have a constitutionally protected opportunity interest at the time of the child's birth. Overall, current law's vastly differing treatment of married and unmarried gestating parents with regard to the ability to exercise meaningful choice in at-birth determinations of the child's second legal parent is inconsistent with a theory based upon constitutional considerations.

Finally, the constitutional law theory is inconsistent with the general restriction of the use of VAPs to the establishment of parentage for men. Under the constitutional law theory, unmarried gestating parents retain a constitutionally protected right to exercise meaningful choice in determinations of the child's other legal parent at birth.[155] There is no constitutional law consideration that would compel states to limit this right to unmarried gestating parents who desire a man to be the child's second legal parent. Not only do constitutional considerations fail to explain current law's approach to the availability of VAPs, but the current approach may actually violate the Constitution. While a full discussion of the constitutionality of existing VAP laws is beyond the scope of this Article, there is a strong argument that the Due Process and Equal Protection considerations that resulted in the *Obergefell* Court striking down laws that prevented same-sex couples from exercising the fundamental right to marry apply to laws that restrict

[154] *See*, *e.g.*, Hendricks, *Fathers and Feminism*, *supra* note 112, at 479-83, 481 n.24 (examining whether "the Constitution also protect[s] a genetic father's *opportunity* to form such a relationship with the child" and concluding that it does not).

[155] *See supra* notes 111–125 and accompanying text.

individuals in same-sex relationships from exercising other family-related fundamental rights.[156] If the gestating parent has a fundamental right to exercise meaningful choice within the determination of their child's other legal parent, then restricting that fundamental right based upon the gender of the potential second parent may well run afoul of current constitutional law principles.[157] In sum, the constitutional law theory does not provide a consistent, coherent explanation for current law's approach to the degree of choice gestating parents may exercise in at-birth determinations of the child's second legal parent.

B. The Gestating Parent Knows Best Theory

Because the gestating parent knows best theory overlaps in significant ways with the constitutional law theory, only a brief discussion of this theory is necessary. Under both theories, the law should recognize the right of gestating parents to exercise meaningful choice in the determination of who is deemed the child's second legal parent at the time of birth.[158] The major difference is that while under the constitutional law theory the right stems from constitutional considerations, under the gestating parent knows best theory the right stems from policy considerations. Specifically, under the gestating parent knows best theory, gestating parents should have the right to exercise meaningful choice in the determination of who is deemed the child's second legal parent at birth because gestating parents are in the best position to make decisions that will further the best interests of the child.[159] At the time of the child's birth, the gestating parent will have engaged in significantly more parental functioning than anyone else.[160] Moreover, by going through the intensive process of gestating the child for nine months and giving birth to the child, the gestating parent will have demonstrated a greater investment in and commitment to the child

156 *See* Harris, *supra* note 68, at 482-87 (laying out constitutional arguments in favor of extending VAPs to same-sex couples).

157 *Id.* at 487.

158 *See* Czapanskiy, *supra* note 43, at 948 ("Under my proposal, it is the right of the birth mother to designate a second parent.").

159 *Id.* at 943 ("My proposal centers on the birth mother because, in my view, doing what is good for young children usually means doing what seems best to the child's key caretaker. In the case of infants, the key caretaker is almost always the birth mother. . . . If she decides to designate a partner, she can designate whomever she wants").

160 *See supra* note 152 and accompanying text (discussing the parental functioning performed by the gestating parent during the process of gestating and giving birth to the child).

than anyone else.[161] As a result, as a policy matter, the law should trust the gestating parent to make a decision regarding the child's second legal parent that furthers, and is guided by, the best interests of the child.[162]

The current legal framework governing gestating parents' degree of choice in at-birth determinations of the child's second legal parent is inconsistent with the gestating parent knows best theory for reasons similar to those discussed in the context of the constitutional law theory. Under the current legal framework, married gestating parents do not have the right to exercise meaningful choice within the determination of who is deemed the child's other legal parent at the time of birth.[163] The gestating parent's spouse will be deemed the child's legal parent at birth pursuant to the marital presumption, even if the gestating parent believes that establishing parentage in someone other than their spouse would promote the child's best interests.[164] Married gestating parents cannot (either at all or absent their spouse's consent) utilize mechanisms like VAPs to establish someone other than their spouse as the child's second legal parent at birth.[165]

Any argument that the current approach to married gestating parents is consistent with the gestating parent knows best theory because married gestating parents necessarily have exercised their right to choose the child's other legal parent by marrying their spouse, is unconvincing. As discussed above, the gestating parent's decision to marry their spouse may occur well before the child is even contemplated, let alone conceived.[166] This reality renders unpersuasive any argument that all married gestating parents necessarily have already exercised meaningful choice regarding the child's parentage.[167] Relatedly, if the gestating parent should, as a matter of policy, have the right to choose the child's second legal parent because of their parental functioning and the great commitment and investment in the child they have demonstrated through gestation, it would be illogical to say they have exercised that right prior to having engaged in any gestation.

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161 *See* Bender, *supra* note 152, at 486-90.

162 Czapanskiy, *supra* note 43, at 949 (arguing that the gestating parent "has more capacity than anyone else in the world to make decisions for the child that are beneficial to the child").

163 *See supra* Part II.A.

164 *See supra* Part I.A.

165 *See id.*

166 *See supra* notes 143–144 and accompanying text.

167 *See supra* notes 145–147 and accompanying text.

Restricting the use of VAPs to the establishment of parentage for men also is inconsistent with the gestating parent knows best theory. If the law is guided by the theory that the gestating parent — as a result of the incomparable degree of parental functioning, commitment, and investment they have demonstrated by the time of the child's birth — is in the best position to determine the child's second legal parent, then it makes sense to allow the gestating parent to choose the child's second legal parent by executing a document with that person at the time of the child's birth. However, the same reasoning dictates that if the gestating parent, as the person who knows best, determines the child's interests are best served by establishing someone who happens to be a woman as the child's second legal parent, the law should respect that decision. Denying gestating parents the use of VAPs to establish the child's second legal parent based solely on the gender of the desired co-parent is inconsistent with the gestating parent knows best theory. In sum, like the constitutional law theory, the gestating parent knows best theory fails to provide a coherent, consistent explanation for the current legal framework governing gestating parents' choice in at-birth determinations of the child's second legal parent.

C. The Mutual Intent Theory

Another possibility is that the law's current approach to gestating parents' degree of choice in at-birth determinations of the child's second legal parent is guided by a theory that prioritizes mutual intent. Under the mutual intent theory, if, at the relevant point in time, the gestating parent and another party mutually agree that the party will be the child's other legal parent, then the law should provide at-birth legal parentage to that party.[168] The mutual intent theory is less focused on the unique rights of the gestating parent than the previously-discussed theories, and more focused on protecting the interests of both the gestating parent and the individual who the parties intended to be the child's second legal parent.[169] It should be noted, however, that even under this

[168] *See generally* Baker, *supra* note 14 (proposing a contracts-based theory for determining parentage); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990) (describing the intent-based approach and advocating for its usage in parentage determinations that arise in the assisted reproduction context).

[169] *See* Shultz, *supra* note 168, at 302-03 ("Accordingly, I propose that legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where

theory the gestating parent and the non-gestating parent are not on equal footing — mutual intent is only required to establish the legal parentage of the non-gestating parent.[170]

Proponents of intent-based theories to parentage determinations contend that relying on the parties' demonstrated mutual intent in determinations of who should be deemed a legal parent promotes fairness and protects the expectations and reliance interests of the parties.[171] Proponents also maintain that providing parentage to the individuals who intended to serve as the child's parents generally promotes children's best interests because a person's demonstrated intent to become a child's parent has "great importance as indic[ia] of desirable parenting behavior."[172] In addition, the parties' mutual intent to serve as the child's co-parents at a time when the child was contemplated demonstrates that the parties share a cooperative relationship and a commitment to raising the child together.[173] This is important because having two legal parents who are committed to a collaborative co-parenting relationship also furthers children's best interests.[174]

There are a number of aspects of the current legal framework governing the degree of choice gestating parents have in at-birth determinations of the child's second legal parent that arguably are consistent with the mutual intent theory. In terms of married gestating parents, if the parties' mutual consent to the marriage also necessarily encompasses their mutual consent to the non-gestating spouse being the second legal parent of any child born to or conceived by the gestating spouse during the marriage, then the at-birth provision of legal parentage to spouses pursuant to the marital presumption is consistent with the mutual intent theory.[175] In addition, if a theory based on mutual intent allows the parties to mutually withdraw their

they are the catalyst for reliance and expectations, as is the case in technologically-assisted reproductive arrangements, they should be honored.").

[170] *See* Baker, *supra* note 14, at 47 ("[The second parent] gains parental status through [their] relationship with the mother. If the gestational mother has not contracted her labor out (in a gestational surrogacy contract) or previously agreed (through marriage or another form of contract) to share parental rights, then she has exclusive control. Once she agrees, either explicitly or implicitly, to share that control, she has a co-parent.").

[171] Shultz, *supra* note 168, at 302-03.

[172] *Id.* at 343.

[173] *Id.*

[174] *See infra* Part II.D.

[175] *See* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 89 (2016); Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 261-62.

consent to the spouse being the second legal parent up until the time the spouse otherwise would attain legal parentage (generally the time of the child's birth), then the approach of the approximately half of states that allow a married gestating parent to execute a VAP at birth with a male third party if the gestating parent, the spouse, and the third party all mutually consent, also seems consistent with such a theory.[176]

Moreover, it seems clear that spousal consent to ART laws — assuming that such laws explicitly or implicitly require consent from both parties — are consistent with the mutual intent theory.[177] These laws provide a conclusive presumption of legal parentage at birth to the spouse of a gestating parent who conceives via ART if the parties provided the requisite consent to the spouse being the child's second legal parent.[178] Under most states' consent to ART laws, the parties' mutual consent must exist at the time the gestating parent undertakes the ART procedure.[179] Under the most recent Uniform Parentage Act's consent to ART standard, however, mutual consent that occurs after the ART procedures are undertaken also can satisfy the standard.[180] Under either approach, the focus is the existence of the parties' mutual consent at the relevant point or period in time.

In terms of unmarried gestating parents, the parties' expression of mutual intent is the core component of the most common method of establishing the child's second legal parent at birth, the VAP.[181] VAP procedures allow for a man to be established as the child's second legal parent at birth through the unmarried gestating parent and the man consenting in a signed, witnessed writing to the man being recognized as the child's second legal parent.[182] It is important to note, however, that in order to be effective in establishing the child's second legal parent, the mutual consent expressed through the VAP must continue to exist (i.e., not be rescinded) for sixty days following its execution.[183] More specifically, either party can unilaterally rescind the VAP within sixty days,[184] but after sixty days the VAP must be considered a legal finding of paternity.[185]

176 *See supra* notes 53–55 and accompanying text.
177 *See supra* note 60 and accompanying text.
178 *See supra* Part I.A.2.
179 Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 278-79.
180 UNIF. PARENTAGE ACT §§ 704, 707 (UNIF. L. COMM'N 2017).
181 *See* Harris, *supra* note 68 and accompanying text.
182 *See supra* note 74 and accompanying text.
183 *See supra* note 76 and accompanying text.
184 *See supra* note 76 and accompanying text.
185 *See supra* note 78 and accompanying text.

While a number of important aspects of the current legal framework governing the degree of choice gestating parents have in at-birth determinations of the child's second legal parent are consistent with the mutual intent theory, there are some core aspects that are not. First, the current legal framework's automatic, mandatory provision of legal parentage to the spouses of married gestating parents at birth pursuant to the marital presumption, which does not require any expression of mutual consent or intent from the parties aside from the consent required to enter the marriage, does not comport well with the mutual intent theory.[186] As discussed above, the decision to marry may occur years before the child is conceived or even contemplated by the parties.[187] An approach to at-birth parentage determinations that is guided by a theory based upon mutual intent would require, at the least, a meaningful manifestation of intent that relates to the question actually at issue, the child's parentage. In fact, the existence of spousal consent to ART laws, which provide legal parentage to spouses based upon the existence of mutual intent at the time the ART procedures are undertaken, indicates that the law recognizes that the existence of the marriage at the time of conception or birth, standing alone, is not necessarily an effective proxy for the parties' mutual intent regarding a child's legal parentage.[188] Yet not only does current law fail to inquire into the intent of married gestating parents and their spouses before providing automatic parentage to the spouse at birth, in half of states this result cannot be avoided even where all interested parties agree that the requisite mutual intent does not exist between the gestating parent and the spouse and does exist between the gestating parent and a third party.[189]

In addition, the limitation of consent to ART statutes to married couples in most states is also inconsistent with the mutual intent theory.[190] It is indisputable that, like many married couples who conceive via ART, there are unmarried couples who undertake ART with the mutual intent for the non-gestating partner to be the resulting child's second parent. If spousal consent to ART standards are consistent with the mutual intent theory because the law recognizes that parties can express meaningful, informed mutual intent regarding the child's legal parentage at the time of undertaking ART procedures, then it is inconsistent to limit this mechanism for establishing the child's

186 *See supra* Part I.A.1.

187 *See supra* notes 145–147 and accompanying text.

188 *See supra* Part I.A.2.

189 *See supra* notes 53–55 and accompanying text.

190 *See supra* note 91 and accompanying text.

second legal parent at birth to married people who undertake ART.[191] A legal framework guided by considerations based upon fairness and protecting the parties' expectations stemming from their mutual intent for the non-gestating partner to be the child's second legal parent would not exclude parties from that protection based solely on their marital status.

The limitation of the use of VAPs to individuals who wish to establish a man as the child's second legal parent is similarly inconsistent with the mutual intent theory.[192] Mutual intent between a gestating parent and another individual for that individual to be the child's second legal parent undoubtedly can exist regardless of the individual's gender. The gender of the potential second parent has nothing to do with the question of whether the parties mutually intended for that person to be the child's second legal parent. A legal framework governing the gestating parent's degree of choice in at-birth determinations of the child's second legal parent that is guided by a theory based upon mutual intent would not refuse to recognize an intended second parent as the child's legal parent based solely on their gender.

Finally, even among the current mechanisms of establishing at-birth legal parentage that are broadly consistent with the mutual intent theory, there exist important discrepancies relating to the timing at which the parties' mutual intent becomes legally relevant. Namely, under most spousal consent to ART laws, the requisite mutual intent must exist at the time of undertaking the ART procedures involved in conceiving the child.[193] VAPs, on other hand, generally require that the mutual intent exists at or after the child's birth and continues for sixty days following the execution of the VAP — most states do not allow for the execution of VAPs prior to the child's birth.[194] If legally relevant mutual intent regarding the determination of the child's second legal parent can exist at the time of undertaking conception and at the time of birth, then the law should provide parties with legal mechanisms to demonstrate their requisite mutual intent at either point, regardless of

191 *See supra* note 179 and accompanying text.

192 *See supra* note 89 and accompanying text.

193 *See supra* note 179 and accompanying text. As noted above, the 2017 Uniform Parentage Act does not follow this approach. *See supra* note 180 and accompanying text.

194 Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgements of Paternity*, 92 CHI.-KENT L. REV. 177, 181 (2017) ("Thus, while a few states permit post-conception, pre-birth VAPs, many do not.").

the parties' marital status or the method of conception.[195] It is hard to see why, under a theory based upon fairness and protecting the parties' expectations stemming from their mutual intent, the timing at which the parties could utilize the existing mechanisms for establishing at-birth parentage based upon mutual intent would differ depending on these characteristics. Moreover, whereas mutual intent under the current legal framework is measured at either the time of undertaking conception or the child's birth, a legal framework guided by considerations relating to the parties' mutual intent likely also would provide mechanisms that allow the parties to establish parentage based upon mutual intent that arises in the period between conception and birth.[196]

D. The Intact, Harmonious Family Theory

Another possibility is that the law's current approach to the degree of choice gestating parents have in at-birth determinations of the child's second legal parent is guided by considerations that relate to furthering the rearing of children in intact, harmonious familial relationships. The choice to utilize this type of guiding theory would stem from the belief that children and families benefit when the child's two legal parents share an intact, low conflict relationship.[197] Because under current law the gestating parent generally is the child's initial legal parent,[198] a theory based upon promoting the rearing of children in intact, harmonious family relationships would provide at-birth parentage to the individual who is considered most likely to raise the child alongside the gestating parent in a harmonious, unified family unit.[199] In addition,

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[195] *See* Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Facade of Certainty*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 623, 660-61 (2012).

[196] *See id.* at 661 ("In fact, it is unclear why the intent to become a parent should be legally relevant only if it takes place before the child's conception. Whether that intent existed, and whether it was demonstrated through particular understandings and conduct, would seem to be more important than its precise timing . . . .").

[197] Gregory M. Herek, *Evaluating the Methodology of Social Science Research on Sexual Orientation and Parenting: A Tale of Three Studies*, 48 UC DAVIS L. REV. 583, 587-88 (2014). This is one of the common justifications for the marital presumption of parentage. Feinberg, *Restructuring Rebuttal*, *supra* note 3, at 258-59.

[198] *See supra* notes 9–10 and accompanying text.

[199] *See* Jessica Feinberg, *After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples*, 54 UC DAVIS L. REV. 1507, 1552-53 (2021); *cf.* Dowd, *supra* note 67, at 913 (suggesting that the law assign at-birth parentage to individuals who "have demonstrated acts of nurture toward the child and an affirmative commitment to cooperative parenting with the mother").

by providing legal parentage at birth to this individual, the law also decreases the chance that the child's birth will create conflict in the relationship between the gestating parent and the individual, who as a practical matter, is most likely to rear the child alongside the gestating parent.[200]

There are a number of aspects of the current legal framework governing gestating parents' degree of choice in at-birth determinations of the child's second legal parent that arguably are consistent with a theory that is based on promoting the rearing of children in intact, harmonious family relationships. In fact, on a broad scale, one could argue that under current law, the more stable and committed the relationship between the gestating parent and another individual appears, the more likely it is that the individual will be deemed the child's second legal parent at birth. For example, marriage long has been viewed as the most stable type of intimate adult relationship.[201] This is not only because of the public commitment the parties make to each other, but also because of the wide variety of legal rights, benefits, and obligations afforded on the basis of marriage that serve to promote stability in the relationship.[202] If the fact of marriage to the gestating parent serves as an effective proxy for identifying the individual most likely to raise the child alongside the gestating parent in a unified, stable family structure,[203] then a legal framework that automatically assigns parentage at birth to spouses is consistent with a theory based upon promoting child rearing in intact, harmonious family relationships.

There also are aspects of current law's approach to unmarried gestating parents that arguably are consistent with the intact,

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[200] For example, avoiding disruption to the marital relationship long has been cited as one of the justifications for the marital presumption. *See* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989).

[201] *See* Obergefell v. Hodges, 576 U.S. 644, 669 (2015) ("[T]his Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."); Marcia Zug, *Mail Order Feminism*, 21 WM. & MARY J. WOMEN & L. 153, 156 (2014) ("For Americans, marriage continues to represent the essential values that are important to intimate relationships, and as a result, in America, marriage represents the highest form of commitment.").

[202] *See Obergefell*, 576 U.S. at 669-70 ("[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities.").

[203] *See* Dowd, *supra* note 67, at 929 (suggesting that the fact of marriage could satisfy the requirement under the parentage proposal set forth in the Article that the individual share "a positive, caring relationship with the other parent").

harmonious family theory. For example, one could argue that outside of marriage, the best indication that the gestating parent and another individual share the type of stable relationship that renders that individual the person most likely to raise the child alongside the gestating parent in a unified family unit, is that the parties are mutually willing to consent to the individual establishing legal parentage at the time of birth. The joint execution of a legal document in which the gestating parent and another individual agree that the individual should be deemed the child's second legal parent arguably evidences not only the parties' strong desire to raise the child together, but also their shared, serious commitment to doing so.[204] If this is the case, then it would explain the use of VAPs as the core at-birth mechanism for establishing the second legal parent of a child born to an unmarried gestating parent.[205]

The intact, harmonious family theory also could explain why the law generally provides the earliest-available, simplest, and most efficient mechanisms for establishing parentage to individuals who share either a marital or cooperative relationship with the gestating parent. The marital presumption, spousal consent to ART laws, and VAPs, which require either no action or merely executing a document with the gestating parent, only can be utilized to provide at-birth legal parentage to individuals who share a marital or cooperative relationship with the gestating parent at the time of conception or birth.[206] Individuals who do not share a marital or cooperative relationship with the gestating parent at the time of conception or birth generally must initiate post-birth legal proceedings and demonstrate, at a minimum, genetic ties to the child in order to establish parentage.[207] If individuals who share a marital or cooperative relationship with the gestating parent at the time of conception or birth are most likely to raise the child in an intact, harmonious family structure with the gestating parent, it makes sense for the law to promote at-birth parentage establishment in these individuals over other potential second parents.[208]

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[204] *See id.* at 921 ("The empirical data thus strongly suggests that men present at birth, birthfathers, are committed to the child and the mother, and intend to remain an active presence in the lives of both mother and child."); Hendricks, *Fathers and Feminism*, *supra* note 112, at 517 ("The VAP process thus substitutes for marriage by allowing for the creation of a coparenting relationship by mutual consent.").

[205] *See supra* note 68 and accompanying text.

[206] *See supra* Part II.C.

[207] *See supra* notes 51, 84 and accompanying text.

[208] *See* Dowd, *supra* note 67, at 935 (suggesting that requiring either marriage to the gestating parent or the consent of the gestating parent in order for an individual to

While the outer contours of the current legal framework governing gestating parents may seem consistent with the intact, harmonious family theory, there are a number of key aspects of current law that are inconsistent with such a theory. As an initial matter, the current approach to married gestating parents, under which legal parentage automatically attaches to spouses pursuant to the marital presumption and gestating parents cannot (either at all or absent the spouse's consent) utilize mechanisms like VAPs to establish someone else as the child's second legal parent at birth, is inconsistent with the intact, harmonious family theory. While in most cases the spouse is the person who is most likely to raise the child in an intact, harmonious relationship with the gestating parent, and most married gestating parents, if given the choice, would choose their spouse as the child's other legal parent at the time of birth, this simply is not true across the board.[209] As discussed above, at the time of the child's birth a gestating parent may not share an intact, harmonious relationship with the person to whom they were or are married at the time of conception or birth and, for various reasons, may not want that person to be the child's second legal parent.[210] These reasons may include, for example, that because of a lengthy divorce process, the parties were living as if the marriage was over at the time of the child's conception or birth, and the gestating parent may never have intended for the spouse to be the child's legal parent; the spouse is abusive; or the gestating parent, for another reason, believes that providing legal parentage to the spouse will have unhealthy or dangerous consequences for them or the child.[211]

Importantly, if at the time of the child's birth a married gestating parent and a third party wish to raise the child together, it is unlikely that current law's approach of mandating an at-birth determination of legal parentage for the spouse will increase the probability that the child will be raised by two legal parents who share an intact, harmonious relationship.[212] In this situation, where it is unlikely that the gestating parent and their spouse share an intact, harmonious relationship, but the gestating parent and the individual who they would like to be the child's second legal parent do share such a relationship, the current legal framework likely has the opposite effect. Moreover, even when the

establish legal parentage through voluntary acknowledgment procedures is a "means to ensure that the relationship between [the legal parents] is cooperative and affirmative").

209 *See* Czapanskiy, *supra* note 43, at 953 ("If the mother is married at the time the child is born, she is likely to designate her husband as her parental partner.").

210 *See supra* note 48 and accompanying text.

211 *See supra* note 48 and accompanying text.

212 *See supra* Part II.A.

gestating parent, a third party, and the spouse *all* agree that the third party should be the child's second legal parent, which may be an even clearer indication that the spouse is not the person most likely to be raising the child in an intact, harmonious relationship with the gestating parent, around half of states nonetheless require that legal parentage attach to the spouse at birth.[213] The current legal framework's mandatory at-birth determination of legal parentage for spouses regardless of the gestating parent's wishes and its overall failure to account for situations in which the spouse is not the individual who is most likely to raise the child in a unified family unit with the gestating parent, is inconsistent with the intact, harmonious family theory.

In addition, current law's approach of limiting the use of VAPs to the establishment of parentage for men also is inconsistent with the intact, harmonious family theory.[214] It is indisputable that in a significant number of cases, the individual who is the most likely to raise the child in an intact, harmonious family with the gestating parent is a woman or non-binary individual. There are tens of thousands of same-sex couples who are raising children together,[215] many of whom undoubtedly would take advantage of VAP procedures to establish the legal parentage of the non-gestating parent if given the opportunity.[216] In addition, transgender men who are gestating parents also may desire for a woman or non-binary individual to be the child's second legal parent.[217] If VAPs are consistent with the harmonious, intact family theory because the willingness of a gestating parent and a second individual to consent at birth to that individual obtaining legal parentage effectively identifies the person most likely to raise the child in a unified family unit with the gestating parent, then prohibiting women from establishing parentage through VAPs is inconsistent with this theory.

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213 *See supra* note 52–53 and accompanying text.

214 *See supra* note 89 and accompanying text.

215 *U.S. Census Bureau Releases CPS Estimates of Same-Sex Households*, U.S. CENSUS BUREAU (Nov. 19, 2019), https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html [https://perma.cc/W4EB-CW4E].

216 *See generally* Feinberg, *A Logical Step Forward*, *supra* note 1 (proposing the extension of VAP procedures to same-sex couples).

217 *See* Rob Bailey-Millado, *Transgender Man Gives Birth to Baby Using Sperm from Trans Woman*, N.Y. POST (Dec. 30, 2019), https://nypost.com/2019/12/30/transgender-man-gives-birth-to-baby-using-sperm-from-trans-donor/ [https://perma.cc/D8GD-HF6U]; Nara Schoenberg, *In a First for Illinois, Transgender Man Who Gave Birth Will Be Listed as the Father on His Baby's Birth Certificate*, CHI. TRIB. (Jan. 14, 2020), https://www.chicagotribune.com/lifestyles/ct-life-first-transgender-birth-certificate-tt-01132020-20200114-qfbbf3dvufhppid5shjru6l5xu-story.html [https://perma.cc/6QQU-8SHJ].

E. A Note on a Less Plausible Theory: The Genetics-Based Theory

Considerations relating to genetic connections historically have played a significant role in both legal and societal conceptions of parentage.[218] It therefore is necessary to briefly address the possibility that a genetics-based theory is guiding the law's current approach to the degree of choice gestating parents may exercise in at-birth determinations of the child's second legal parent, even though this theory does not share the plausibility of the theories discussed above. More specifically, it may be tempting to argue that the law's current treatment of gestating parents is guided by the theory that the law should seek to establish the child's biological father as the child's second legal parent at birth.[219] Although this argument may be tempting, it is not persuasive. In the context of both married and unmarried gestating parents, the core mechanisms used to provide at-birth legal parentage to a second person under current law are inconsistent with the genetics-based theory.

In terms of married gestating parents, current law's automatic, mandatory provision of legal parentage to the gestating parent's spouse at birth pursuant to the marital presumption and/or spousal consent to ART laws is inconsistent with the genetics-based theory. While before the advent of DNA testing, one could argue that a core purpose of the marital presumption was to provide legal parentage to the individual most likely to be the child's biological father,[220] today there are widely-available, efficient DNA tests that determine if an individual is the child's biological father with a high degree of accuracy.[221] The marital presumption's automatic provision of legal parentage to spouses without any inquiry into whether the spouse shares a genetic tie to the child, despite the widespread availability of DNA tests, is not consistent with a theory grounded in providing at-birth legal parentage to the child's biological father.[222] In addition, the approach in half of states of prohibiting married gestating parents from designating someone other than their spouse as the child's legal parent at birth, even when the gestating parent, the spouse, and a third party all aver that the third

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[218] Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 340-46 (2016) [hereinafter *Consideration of Genetic Connections*].

[219] *See infra* notes 220, 228 and accompanying text.

[220] Feinberg, *Consideration of Genetic Connections*, *supra* note 218, at 341.

[221] *Paternity Tests: Blood Tests and DNA*, FINDLAW (Oct. 2, 2018), https://family.findlaw.com/paternity/paternity-tests-blood-tests-and-dna.html [https://perma.cc/DKT4-BD9R].

[222] *See supra* Part I.A.1.

party is the child's biological father, directly contradicts the genetics-based theory.[223] Moreover, with the extension of the marital presumption to female spouses of gestating parents, it is illogical to claim that the marital presumption's automatic provision of legal parentage to spouses continues to be grounded in providing parentage to the child's biological father.[224] While, as discussed above, genetic connections may play a significant, though not necessarily determinative, role in actions challenging the marital presumption, they do not play any role in establishing parentage through this mechanism.[225]

Spousal consent to ART laws, which provide a conclusive presumption of legal parentage to spouses who consent to the gestating parent's use of ART with the intent to be the resulting child's parent, represent an even clearer contradiction of the genetics-based theory. Spousal consent to ART laws are aimed at ensuring that, if the requisite consent was provided, the spouse conclusively is deemed the child's legal parent at birth even if the child was conceived using sperm from a third party donor.[226] When an individual's parentage is recognized pursuant to a spousal consent to ART law, a lack of genetic ties to the child cannot later be used as a basis to challenge that individual's status as the child's second legal parent — the parties' consent is the only consideration in establishing the individual's parentage and genetic ties (or lack thereof) are irrelevant.[227] Consequently, the conclusive provision of legal parentage to spouses pursuant to spousal consent to ART laws clearly is inconsistent with a theory that is based upon establishing the child's biological father as the child's second legal parent.

In terms of unmarried gestating parents, VAP procedures, which provide unmarried gestating parents who desire a man to be the child's second legal parent with a significant degree of choice in determining who is deemed the child's second legal parent at birth, also are inconsistent with the genetics-based theory. While many states' VAP forms or accompanying instructions state that the parties are attesting under penalty of perjury that, to the best of their knowledge, the man is the child's biological father, states cannot and do not require that a man undergo a DNA test before his parentage can be established

223 *See supra* notes 53–55 and accompanying text.
224 *See supra* notes 38–40 and accompanying text.
225 *See supra* notes 35–36 and accompanying text.
226 *See supra* note 59 and accompanying text.
227 *See supra* notes 59–61 and accompanying text.

through a VAP executed at the time of the child's birth.[228] The result is a system in which an unmarried gestating parent can utilize a VAP to establish the parentage of their desired male co-parent, regardless of the man's genetic ties to the child or lack thereof.[229] While, as discussed above, genetic ties may play a significant, though not necessarily determinative, role in actions challenging VAPs, proof of genetic ties (despite the accessibility of genetic testing) is not a requirement of establishing parentage through VAPs.[230]

For all of the reasons set forth above, the current legal framework governing the degree of choice gestating parents have in at-birth determinations of the child's second legal parent clearly is inconsistent with the genetics-based theory. Genetic connections do not play a significant role in the core mechanisms that exist under current law to establish a child's second legal parent at birth: the marital presumption, spousal consent to ART laws, and VAPs.[231] While genetics-related considerations may play a more significant role in establishing an individual as the child's legal parent *after* birth, either when there is no existing second legal parent[232] or when the parentage of the individual established as the child's second legal parent at birth is challenged,[233] the argument that the genetics-based theory is guiding current law's approach to gestating parents' degree of choice in *at-birth* determinations of the child's second legal parent is unconvincing.

Overall, although there is no one theory that provides a fully consistent, coherent explanation for the law's current approach to gestating parents' choice in at-birth determinations of the child's second legal parent, there are some core principles that emerge among the plausible theories. These core principles should play an important role in guiding efforts to reform current law to create a more coherent, consistent, and just legal framework governing gestating parents' choice. The following Part first identifies and explains the core principles that emerge among the plausible theories. It concludes by providing some initial thoughts regarding potential reforms to better align current law with these core principles and create a more coherent legal framework governing gestating parents' choice.

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228 *See supra* note 80 and accompanying text.

229 *See supra* notes 81–82 and accompanying text.

230 *See supra* notes 85–86 and accompanying text.

231 *See supra* Parts I.A.1, I.B.1.

232 *See supra* notes 103–105 and accompanying text.

233 *See supra* Parts I.A.1, I.B.1.

III. BEGINNING THE PROCESS OF BRINGING CONSISTENCY AND COHERENCE TO THE CURRENT LEGAL FRAMEWORK

A. Core Principles that Emerge Across the Plausible Theories

In analyzing the plausible guiding theories for the law's approach to the degree of meaningful choice gestating parents can exercise in at-birth determinations of the child's second legal parent, certain core principles emerge. Identifying and understanding these principles is an essential initial step in determining the type of legal reform that is necessary to bring coherence and consistency to the legal framework governing this issue. The first core principle is that the gestating parent should be able to exercise a significant degree of meaningful choice in the determination of who is deemed the child's second legal parent at birth. Under the constitutional law and gestating parent knows best theories, the substantial parental functioning and commitment to the child demonstrated by the acts of gestating and giving birth to the child provide the gestating parent with the right to exercise a significant degree of meaningful choice in the determination of who is deemed the child's second legal parent at birth.[234] Specifically, under these theories, the gestating parent's wishes must be, at the least, given special weight in at-birth determinations of the child's second legal parent.[235] The gestating parent's ability to exercise significant meaningful choice also is central to the mutual intent theory. Under this theory, an individual cannot become the child's second legal parent unless, at the relevant point in time, the gestating parent actually intended for the individual to be the child's legal parent.[236] Finally, considerations based in respecting the gestating parent's choice play a key role under the intact, harmonious family theory. By providing parentage to the individual who is most likely to raise the child in an intact, harmonious family with the gestating parent, this theory places the plans and wishes of the gestating parent at the center of the determination of the child's second legal parent.[237]

As the analyses of the plausible theories in the previous Part highlight, providing the gestating parent with a significant degree of meaningful choice in determining who will be deemed the child's second legal parent at birth makes sense for a number of reasons.[238] It is hard to

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[234] *See supra* Parts II.A, II.B.

[235] *See supra* notes 123–124 and accompanying text.

[236] *See supra* Part II.C.

[237] *See supra* Part II.D.

[238] *See supra* Parts II.A-D.

dispute that leading up to the child's birth, gestating parents undertake an unmatched level of commitment to and care of the child.[239] To say that another party's rights to determine who should be deemed the second legal parent at birth are as strong as the rights of the gestating parent, would be to erase the incomparable, imperative work that gestating parents undertake.[240] Furthermore, as the person who has shown an unparalleled commitment to the well-being of the child, it is logical to conclude that the gestating parent is in a better position than anyone else (including the state) to determine who should be deemed the child's second legal parent at birth in accordance with the child's best interests.[241] Relatedly, providing the gestating parent with significant meaningful choice in at-birth determinations of the child's other legal parent also is consistent with the furtherance of children's best interests for the reason that children generally benefit when their parents share a cooperative relationship.[242]

A related core principle that emerges from the analyses of the plausible theories is that, in the determination of who should be deemed the child's second legal parent at birth, the type of relationship the potential second parent shares with the gestating parent should play an important role.[243] More specifically, all of the theories indicate that the law should promote at-birth parentage establishment in individuals who, at some relevant point after the child's existence (current or future) has become a reality,[244] share with the gestating parent a cooperative relationship and commitment to raising the child as co-parents. In terms of the constitutional law and gestating parent knows best theories, if given the choice, gestating parents almost certainly would identify as the child's second legal parent an individual with whom they share a positive, cooperative relationship and a commitment

[239] *See supra* note 152 and accompanying text.

[240] *See* Baker, *supra* note 14, at 63 ("Refusing to honor what is unquestionably a greater contribution [on the part of the gestating parent] smacks more of oppression than equality."); Hendricks, *Fathers and Feminism*, *supra* note 112, at 498-500 ("[D]isregarding gestation in the definition of parenthood is, literally, patriarchal; it is the 'law of the father.'"); *see also* Bender, *supra* note 152, at 486-88; *supra* note 152 and accompanying text.

[241] *See supra* notes 159–162 and accompanying text.

[242] *See supra* note 197 and accompanying text.

[243] *See* Blecher-Prigat, *supra* note 6, at 122 ("This Article, therefore, revisits the contested question of at-birth parentage determination and argues that the relationship between potential joint parents should be a central factor in determining a child's parentage."); *supra* Parts II.A–D.

[244] Depending on the theory, the relevant point could range from the time the parties undertake the procreative endeavor to the time of the child's birth.

to co-parenting.[245] Thus, by providing gestating parents with the right to exercise a significant degree of meaningful choice in determinations of who is deemed the child's second legal parent at birth, these theories increase the likelihood that the child's legal parents share a cooperative relationship and commitment to co-parenting.[246] Moreover, the mutual intent theory, by making the parties' shared intent for an individual to be the child's second legal parent the essential requirement, is completely dependent on the existence of a cooperative relationship and commitment to co-parenting between the gestating parent and potential second parent at the relevant point in time.[247] Promoting at-birth parentage establishment in individuals who share with the gestating parent a cooperative relationship and commitment to co-parenting also is undoubtedly at the core of the intact, harmonious family theory, which strives to establish at-birth legal parentage in the individual who is most likely to raise the child together with the gestating parent in a harmonious family unit.[248]

There are a number of important considerations that support prioritizing the establishment of at-birth parentage in individuals who, at the relevant point in time, share a cooperative relationship and commitment to co-parenting with the gestating parent. As an initial matter, it is well established that co-parenting relationships that are high in conflict and low in cooperation can result in significant harm to a child's wellbeing and that children generally benefit when their parents share a cooperative, low conflict co-parenting relationship.[249] If the gestating parent wishes for a certain individual to be the child's second legal parent, but the law mandates an at-birth parentage determination in someone else — i.e., someone who the gestating parent does not want to be the child's other legal parent — it creates a situation where conflict between the child's parents likely will inhere from the start.[250] In addition to the harm to the child, parental conflict

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[245] *See* Czapanskiy, *supra* note 43, at 950.

[246] *See supra* Parts II.A, II.B.

[247] *See supra* Part II.C.

[248] *See supra* Part II.D.

[249] Herek, *supra* note 197, at 587-88; Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 763-64 (2016); Nancy Ver Steegh, *The Unfinished Business of Modern Court Reform: Reflections on Children, Courts, and Custody by Andrew I. Schepard*, 38 FAM. L.Q. 449, 452 (2004) (book review).

[250] *See* James G. Dwyer, *A Child-Centered Approach to Parentage Law*, 14 WM. & MARY BILL RTS. J. 843, 852 (2006) ("[I]t might be that a [gestating parent's] objection to a particular other person's becoming a parent should be respected regardless of [their] reasons, simply because [their] objection in and of itself makes harmonious co-parenting with that person unlikely . . . .").

also can negatively affect the wellbeing of the parents and burden the legal system.[251]

Moreover, it is also arguably in the child's best interests to have as a second parent an individual who has explicitly "opted in" to being the child's legal parent and raising the child cooperatively with the gestating parent.[252] As discussed above, advocates of intent-based approaches to parentage determinations have stressed that intent to be a child's parent is an important indicator of positive parenting behavior, explaining that "[t]he concept of intent . . . embodies desirable and positive values by focusing on those who willingly and lovingly undertake parenthood."[253] Importantly, research suggests that an individual's agreement with the gestating parent to become the child's second parent is a significantly better indicator that the individual will be an active parent who supports the child than other considerations, such as genetic ties.[254]

Certain aspects of the current legal framework — including its approach to married gestating parents and its restriction of VAPs to parentage establishment for men — clearly violate the core principles that emerge from the plausible theories. Specifically, they run afoul of the principles that: (1) the gestating parent should have a significant degree of meaningful choice in determinations of the child's second legal parent; and (2) the law should facilitate at-birth parentage establishment in individuals who, at some relevant point after the child's existence (current or future) has become a reality, shares with the gestating parent a cooperative relationship and commitment to raising the child as co-parents. In fact, in the analyses of the plausible theories set forth in Part III, these aspects of current law were identified as inconsistent with every one of the theories.

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[251] *See* Sanford L. Braver, Irwin N. Sandler, Liza Cohen Hita & Lorey A. Wheeler, *A Randomized Comparative Effectiveness Trial of Two Court-Connected Programs for High-Conflict Families*, 54 FAM. CT. REV. 349, 350 (2016); Laufer-Ukeles, *supra* note 249, at 764.

[252] Baker, *supra* note 14, at 51-52; *see also* Dowd, *supra* note 67, at 913 (stating that to promote the well-being of children, "I propose that at birth we identify a 'birthfather' in order to confer parentage. I use the term 'birthfather' here not to identify the biological father, but rather to establish whether a social father is present at birth. A 'birthfather' would have demonstrated acts of nurture toward the child and an affirmative commitment to cooperative parenting with the mother. This status would be based on his actions during the pregnancy, his presence at childbirth, and his voluntary acknowledgment of paternity").

[253] *See* Blecher-Prigat, *supra* note 6, at 176; *supra* note 172 and accompanying text.

[254] Baker, *supra* note 14, at 51-52; *cf.* Dowd, *supra* note 67, at 921 ("The empirical data thus strongly suggests that men present at birth, birthfathers, are committed to the child and the [gestating parent], and intend to remain an active presence in the lives of both [the gestating parent] and child.").

As discussed above, under the current approach to married gestating parents, legal parentage automatically attaches to spouses at birth and the gestating parent lacks the ability (either at all or absent the spouse's consent) to choose someone else as the child's second legal parent at birth.[255] This is directly contrary to the core principle that the gestating parent should have a significant degree of meaningful choice in at-birth determinations of the child's second legal parent. Moreover, current law's failure to provide for situations in which the gestating parent and spouse have shared neither a cooperative relationship nor a commitment to co-parenting, but the gestating parent shares such a relationship with someone else, clearly runs afoul of the core principle of promoting parentage establishment in individuals who share a cooperative relationship and commitment to co-parenting with the gestating parent.

The restriction in the vast majority of states of the use of VAPs to gestating parents who wish to establish a man as the child's second legal parent also runs counter to the core principles that emerge from the plausible theories. It is well established that there are gestating parents — including many gestating parents who are in same-sex relationships — who desire and plan to raise their child with someone who is a woman or non-binary individual.[256] In the vast majority of states, however, anyone who is not a man is categorically excluded from obtaining parentage through VAP procedures. [257] Restricting the use of VAPs to the establishment of parentage for men denies unmarried gestating parents who desire a woman or non-binary individual to be the child's second legal parent the ability to exercise meaningful choice in at-birth determinations of the child's second legal parent. In addition, this aspect of current law also runs afoul of the second core principle by denying parentage to an individual who shares a cooperative relationship and commitment to co-parenting with the gestating parent simply because that individual happens to be a woman or non-binary person.

Overall, the core principles that emerge across the plausible legal theories offer a clear indication that certain aspects of the current legal framework governing gestating parents are in urgent need of legal reform. These areas, which include the law's approach to married gestating parents and the eligibility requirements for establishing parentage through VAPs, undoubtedly should be a primary focus of

[255] *See supra* Part II.A.

[256] *See supra* notes 215–217 and accompanying text.

[257] *Supra* note 56 and accompanying text.

initial reform efforts. As will be discussed in more detail below, other aspects of the current legal framework, such as the restriction of consent to ART laws to spouses, also are problematic in light of the core principles. However, the level of urgency for reform of such laws is less clear given the alternative methods of parentage establishment that are (or will be under the proposed initial reforms) available to the categories of individuals that such laws exclude.

B. Starting Points for Legal Reform

It is important to make clear at the outset that the discussion in this Section centers on proposed legal reforms to the laws governing the determination of the child's second legal parent at the time of the child's birth. There undoubtedly will be, as there are now, various considerations that states determine are important enough to provide a basis for post-birth challenges to the parentage of the person identified as the child's second legal parent at the time of birth.[258] Extensive analysis of the potential substantive and procedural rules for post-birth challenges, however, is beyond the scope of this Article. The focus of this Article is the law governing at-birth determinations of the child's second legal, which retains immense importance because in the vast majority of cases the legal parentage of the individual identified as the child's second legal parent at the time of birth will never be challenged. It is also important to make clear that the discussion that follows is not intended to provide a comprehensive proposal for reforming current parentage law. Rather, the goal is to provide a starting point for further discussion regarding potential steps that could be taken to create a more coherent legal framework governing gestating parents' choice and to better align current law with the core principles identified above.

As the discussion above highlights, there are two areas of the law — the framework governing married gestating parents and gender-based VAP eligibility restrictions — that are most clearly in need of legal reform.[259] These areas of the law are inconsistent with each of the plausible theories for the law's approach to the gestating parent's degree of choice in determinations of the child's second legal parent as well as the core principles that emerge across the theories.[260] For one of these areas — the restriction of VAPs to the establishment of parentage for men — the type of legal reform necessary is fairly straightforward. VAP laws should be amended so that men, women, and non-binary

[258] *See supra* Part I.C.

[259] *See supra* Part I.A.

[260] *See supra* Parts I.A, I.B.1.

individuals who comply with the relevant procedures are able to establish parentage through VAPs.[261]

Remedying the problematic gender-exclusionary aspects of VAP laws and procedures could be accomplished, for the most part, through modest reforms such as making the language of VAP statutes, forms, and instructions gender neutral and eliminating the requirement on some states' VAP forms relating to the signer attesting to being the child's biological parent.[262] Otherwise, existing standards set forth by the federal government governing VAP procedures, such as the sixty-day rescission period, the legal effect of unrescinded VAPs, and the limited grounds for challenges to VAPs (fraud, duress, and material mistake), could remain the same.[263] The 2017 Uniform Parentage Act, for example, establishes VAP procedures for women, men, and non-binary individuals who qualify under the Act as intended or presumed parents (provided there is no other individual who is already recognized under the Act as the child's second legal parent),[264] and maintains the sixty-day rescission period and limited grounds for challenges following the rescission period.[265] For those aspects of VAP procedures for which states currently have some leeway to adopt their own standards, such as the rules governing who has standing to challenge VAPs, states could maintain their existing rules or decide to adopt new ones.[266] However, it is important that such rules apply uniformly regardless of the gender of the individual identified as the child's second legal parent through the VAP.

Adopting gender-neutral VAP laws would align the primary method of parentage establishment for children born to unmarried gestating parents with the two core principles that emerge from the plausible theories underlying the law's approach to gestating parents' choice in determinations of the child's second legal parent. More specifically, it would significantly enhance the degree of meaningful choice provided to unmarried gestating parents who wish for a woman or non-binary individual to be the child's second legal parent — a category of gestating

261 *See generally* Harris, *supra* note 68 (proposing the extension of VAPs to same-sex couples).

262 *See supra* note 79 and accompanying text.

263 *See supra* notes 74–80 and accompanying text.

264 UNIF. PARENTAGE ACT §§ 301-302, 308-309 (UNIF. L. COMM'N 2017). If there is an existing presumed parent, the gestating parent can execute a VAP with someone else if the presumed parent executes a denial of parentage. *Id.* § 302(b)(1).

265 The 2017 Uniform Parentage Act requires that challenges to VAPs after the rescission period occur within two years from the execution of the VAP. *Id.* § 309.

266 State laws currently differ with regard to the categories of individuals who have standing to challenge VAPs. Parness, *Faithful Parents*, *supra* note 76, at 351-53.

parents that is largely denied meaningful choice under the current legal framework governing at-birth parentage determinations.[267] In addition, by providing parentage to the individual who mutually agrees with the gestating parent to be the child's other legal parent at the time of birth, it would facilitate at-birth parentage establishment in individuals who share with the gestating parent a cooperative relationship and commitment to raising the child as co-parents.

With regard to the other area of the legal framework governing gestating parents that is most clearly in need of legal reform — the treatment of married gestating parents — determining the type of reform that will be most effective is a more complex undertaking. It is important to note at the outset that any proposal that involves changes to the longstanding marital presumption, particularly ones that give gestating parents greater power in identifying someone other than their spouse as the child's second legal parent, likely will face significant pushback. It would be a mistake to ignore the role that historical views regarding gender roles within the family may play in this context. It long has been the case, and remains true today, that the vast majority of gestating parents are women[268] and that the vast majority of spouses of gestating parents are men.[269] While there may be legitimate reasons for maintaining the current legal framework governing married gestating parents' choice, it is likely that some degree of the resistance to considering changes to the marital presumption stems from entrenched and lingering gendered attitudes regarding the rights of married women.

The United States adopted both the marital presumption[270] and the legal doctrine of coverture from English common law.[271] Under the legal doctrine of coverture, women who married lost their independent legal existence — married women's legal rights and obligations were

[267] *See supra* note 96 and accompanying text.

[268] Transgender men can also gestate and give birth to children, which is why this Article uses the gender-neutral term "gestating parent."

[269] *U.S. Census Bureau Releases CPS Estimates of Same-Sex Households*, *supra* note 215 (explaining that, as of 2019, there were approximately 543,000 same-sex married couple households as compared to 61.4 million different-sex married couple households in the United States).

[270] Glennon, *supra* note 29, at 563-65.

[271] Sandra R. Zagier Zayac & Robert A. Zayac, Jr., *Georgia's Married Women's Property Act: An Effective Challenge to Coverture*, 15 TEX. J. WOMEN & L. 81, 83-84 (2005).

subsumed by their husband.[272] The law of coverture remained widespread until the latter half of the nineteenth century.[273] As a result, both the marital presumption and the subordination of married women to their husbands are deeply rooted in the nation's history. This history may help to explain why the law has developed in a such a way that, while unmarried gestating parents enjoy a significant degree of meaningful choice in at-birth determinations of the child's second legal parent, married gestating parents remain unable (either at all of absent their spouse's consent) to identify someone other than their spouse as the child's second legal parent at birth. It is important to recognize that the attitudes and beliefs underlying the historical subordination of married women to their husbands may linger, and to be mindful of not allowing these problematic attitudes and beliefs to prevent serious consideration of potential reforms to the legal framework governing married gestating parents' choice.

There are a number of potential options to consider for restructuring the law governing married gestating parents to better align it with the core principles of: (1) providing gestating parents with a significant degree of meaningful choice, and (2) facilitating parentage establishment in individuals who, at some relevant point after the child's existence has become a reality, shares with the gestating parent a cooperative relationship and commitment to raising the child as co-parents. One potential option is to maintain a presumption that the individual to whom the gestating parent is married at the time of conception or birth is the child's second legal parent, but to provide gestating parents who desire someone other than their spouse to be the child's second legal parent with a mechanism for opting out of the presumption at birth.[274] Maintaining the marital presumption in some form seems logical — it is likely that in the vast majority of cases the gestating parent and their spouse mutually desire for the spouse to be the child's second legal parent and share a cooperative relationship and commitment to co-parenting.[275] The marital presumption thus provides an extremely efficient method of establishing legal parentage in the individual who, in most cases, all of the relevant parties agree should be

[272] Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 460-61 (2002).

[273] *Id.* at 461.

[274] *See* Dwyer, *supra* note 250, at 852 ("In my proposal, I do this by giving the birth mother a veto over automatic conferral of parental status on her husband if she is married.").

[275] *See supra* notes 42–44 and accompanying text.

the child's second legal parent. It also ensures that children born to married gestating parents have two legal parents from the time of birth.[276] However, if the marital presumption is maintained in some form, providing a mechanism for gestating parents to opt out is essential.

Though it will not be the norm, there undoubtedly will be instances in which the gestating parent and the individual to whom they were married at the time of the child's conception or birth do not share a cooperative relationship or commitment to co-parenting the child, and the gestating parent desires for someone else to be deemed the child's second legal parent at birth.[277] To promote the core principles of providing gestating parents with meaningful choice and facilitating parentage in individuals who share with the gestating parent a cooperative relationship and commitment to co-parenting, there must be a mechanism that allows gestating parents to opt-out of the marital presumption regardless of whether their spouse consents. This would be a significant change to current law — married gestating parents cannot execute VAPs with a third party under any circumstances in half of states and in the other half of states the spouse's consent is required in order for a married gestating parent to execute a VAP with a third party.[278]

There are various options for structuring the procedural and substantive components of an opt-out mechanism. For example, the packet of documents that gestating parents routinely fill out at the hospital following the child's birth could include a form that allows the gestating parent to opt out of the marital presumption by executing some version of a voluntary acknowledgement of parentage with someone other than their spouse. Since federal law does not require states to extend federal VAP procedures to married gestating parents, states presumably would have discretion in establishing the rules governing voluntary acknowledgements executed by married gestating parents with someone other than their spouse.[279] The rules would not have to mirror those required by federal law for unmarried gestating parents, which mandate that VAPs constitute a legal finding of

[276] *See supra* Part I.A.

[277] *See supra* note 48 and accompanying text.

[278] *See supra* note 53 and accompanying text.

[279] 45 C.F.R. § 303.5(g)(1)(i) (2022) ("The hospital-based portion of the voluntary paternity establishment services program must be operational in all private and public birthing hospitals statewide and must provide voluntary paternity establishment services focusing on the period immediately before and after the birth of a child born *out-of-wedlock*." (emphasis added)).

parentage after sixty days and limit subsequent challenges to claims of fraud, material mistake, or duress.[280] States could establish different rules governing the legal effect of voluntary acknowledgments executed by a married gestating parent with someone other than their spouse. This could include, for example, having the acknowledgement create a presumption of parentage as opposed to the equivalent of a legal finding of parentage or requiring that a longer time period pass before the acknowledgement is considered a legal finding of parentage. States could also explicitly grant spouses in this situation standing to seek to rebut the acknowledgement on a wider range of grounds and establish rules that govern parentage determinations when there are competing claims of parentage involving a VAP executed by a married gestating parent with someone other than their spouse.

It is important to note that the proposed opt-out mechanism would provide gestating parents with the ability to utilize voluntary acknowledgement procedures to opt out of the marital presumption only. It would not extend to the other marriage-based ground for establishing at-birth parentage in the spouse — spousal consent to ART laws.[281] Assuming that spousal consent to ART laws require both parties' consent, a mechanism to allow gestating parents to opt-out of the operation of such laws is not necessary;[282] this is because spousal consent to ART laws align with the core principles identified above. In terms of the first principle, spousal consent to ART laws provide the gestating parent with meaningful choice in the at-birth determination of the child's second legal parent. In a situation where, at the time of undertaking ART procedures, both parties consent to the spouse being the resulting child's second legal parent, the gestating parent has made a choice directly regarding the question at issue, the child's parentage, at a time when the child is contemplated. In terms of the second core principle, by requiring both parties' consent to the spouse attaining parental status at (or after) the time of undertaking the procreative endeavor, spousal consent to ART laws facilitate at-birth parentage establishment in individuals who share with the gestating parent a cooperative relationship and commitment to co-parenting at a point when the child's future existence has become a reality.[283] This type of restriction on the use of voluntary acknowledgements is consistent with the approaches taken by the 2017 Uniform Parentage Act and a number

[280] *See supra* notes 76–77 and accompanying text.

[281] *See supra* Part I.A.2.

[282] *See supra* note 60.

[283] *See supra* notes 179–180 and accompanying text.

of states, under which a VAP is void or voidable if, when executed, another individual was entitled to recognition as the child's legal parent pursuant to a consent to ART provision.[284]

Another possibility would be for states to do away with the marital presumption entirely and extend some form of voluntary acknowledgment of parentage procedures to spouses of married gestating parents.[285] This would result in VAPs being a primary mechanism of at-birth parentage establishment for second parents, regardless of the parties' marital status. There are persuasive justifications for adopting this type of approach. A tempting argument for maintaining the marital presumption is that, in the vast majority of cases, it seamlessly provides parentage to the individual who the gestating parent desires to be the child's second legal parent and who is committed to raising the child together with the gestating parent.[286] However, replacing the marital presumption with voluntary acknowledgement procedures arguably would accomplish the same goal, but with greater precision. In instances where the gestating parent desires for the spouse to be the child's second legal parent and the couple is committed to raising the child together, merely requiring the parties to execute a simple document available at every birthing hospital and birth records office likely would not pose a barrier to the spouse establishing parentage. At the same time, by not presuming the spouse's parentage or requiring the gestating parent to take affirmative action to opt out of the presumption, this approach would more effectively avoid at-birth parentage determinations in spouses in situations where the gestating parent does not want the spouse to be the child's second legal parent and the parties do not share a cooperative relationship or commitment to co-parenting. As discussed above, states could adopt specific rules governing voluntary acknowledgements entered into between a married gestating parent and someone other than their spouse.[287]

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[284] *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 1862(3) (2022) (stating that a VAP is voidable if there is an acknowledged, adjudicated, or intended parent or a presumed parent who has not executed a denial of parentage); UNIF. PARENTAGE ACT § 302(b)(2) (UNIF. L. COMM'N 2017) (describing how an acknowledgement of parentage may be void if, when signed, "an individual, other than the woman who gave birth to the child or the individual seeking to establish parentage, is an acknowledged or adjudicated parent").

[285] Feinberg, *A Logical Step Forward*, *supra* note 1, at 128-30; *see generally* Jacobs, *supra* note 73, at 469 (advocating for "[i]ntentional parenthood as the default framework to establish all at-birth parent-child relationships").

[286] *See supra* note 42 and accompanying text.

[287] *See supra* notes 279–280 and accompanying text.

On the other hand, it is important to address a significant potential downside to wholly abolishing the marital presumption and adopting VAPs as the primary method of establishing the second legal parent of children born to married gestating parents. Namely, that there likely would be fewer children who, from the time of birth, have two legal parents. This is because, although it likely would be rare, at least some married gestating parents would choose not to execute a VAP with anyone, including their spouse, at the time of the child's birth. In addition, there will be some spouses who refuse to execute a VAP despite the gestating parent's willingness to do so. As a result, there will be children who have only one legal parent at birth, but who would have had two legal parents at birth if the marital presumption had been in place. This is a significant concern, as "a child with two legally recognized parents has access to important financial support and inheritance, healthcare, social security, and other benefits from two sources instead of just one."[288]

One response to this concern is that in the rare cases where a married gestating parent does not designate their spouse (or anyone else) as the child's second legal parent at birth, the gestating parent likely has reasons for doing so that are important to both the gestating parent and the child.[289] In addition, states have well-established mechanisms for establishing an individual as the child's second legal parent post-birth, particularly for purposes of providing the child with financial support.[290] Even so, the potential decrease in the number of children who have two legal parents from the time of birth is a concern with which states will need to grapple in deciding which type of approach to adopt for married gestating parents.[291] It is important to note that the opt-out mechanism option discussed above does not raise the same

[288] Feinberg, *A Logical Step Forward*, *supra* note 1, at 113; *see also* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 346-47 (2002) ("[L]egal parenthood . . . entitles a child to receive child support, qualify as a dependent on her parent's health insurance, collect Social Security benefits from her parent, sustain an action for wrongful death, recover under a state worker's compensation law, and in many states, to inherit from her parent.").

[289] Czapanskiy, *supra* note 43, at 953.

[290] *See supra* notes 103–105 and accompanying text.

[291] *Compare* Baker, *supra* note 14, at 16 ("A child is best off with two parents and if no other man fills the role, the biologically connected man should."), *with* Czapanskiy, *supra* note 43, at 949-54 (setting forth a number of reasons for why the designation of a second parent at birth should not be required for children born to married gestating parents without the gestating parent's consent, despite the potential implications for child support).

concern regarding fewer children having two legal parents from the time of birth. Under the opt-out approach, the law will recognize the spouse as the second legal parent at birth unless the opt-out mechanism is utilized, in which case the law instead will recognize the individual who executes the VAP with the gestating parent as the second legal parent. While there are pros and cons to adopting either approach, each represents a potentially viable option for aligning the legal framework governing married gestating parents with the core principles identified above.

There are other areas of the law governing gestating parents for which the need for reform exists, but the level of urgency for engaging in such reform may be less clear (particularly if states adopt the reforms proposed above). The primary example of this is consent to ART laws, which provide parentage to an individual who consents to the gestating parent's use of ART with the intent to be the resulting child's parent, but extend only to spouses in most jurisdictions.[292] As discussed above, assuming consent to ART laws are interpreted to require both parties' consent, these laws are consistent with the core principles of providing meaningful choice for gestating parents and facilitating at-birth parentage establishment in individuals who, after the child's existence has become a reality, share with the gestating parent a cooperative relationship and commitment to co-parenting.[293] It undoubtedly is problematic to categorically exclude individuals from establishing parentage through a mechanism that furthers these core principles based solely on their marital status. Reform to expand consent to ART laws arguably is somewhat less urgent, however, because a significant portion of the category of excluded individuals — unmarried couples who wish to be the child's legal co-parents — long has been able to utilize an easily accessible, efficient alternative method of establishing parentage at birth: VAPs.[294] Importantly, while not all unmarried couples have had access to VAPs, since in most jurisdictions parentage establishment through VAPs has been limited to men, under the reform proposed above VAPs would be available to establish the parentage of individuals of any gender.[295]

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[292] *See supra* notes 58–59, 91 and accompanying text.

[293] If a state's consent to ART law is not interpreted as requiring the gestating parent's consent, then reforming the law to require the gestating parent's consent is absolutely necessary to align the law with the core principle that the gestating parent should have a significant degree of meaningful choice in determinations of the child's second legal parent.

[294] *See supra* Part I.A.

[295] *See supra* notes 261–267 and accompanying text.

The level of urgency for reform to consent to ART laws also differs depending on the primary theory that a jurisdiction determines should guide its approach to the role of gestating parents in determinations of the child's second legal parent. For example, under the intent-based theory, reform to extend consent to ART laws to unmarried individuals would have a high level of urgency regardless of the availability of VAPs to all unmarried individuals. The intent-based theory focuses in large part on protecting the reliance interests and expectations stemming from the parties' agreement at the time of undertaking the ART procedures to be the parents of any resulting children.[296] While VAPs recognize the mutual intent that exists between the parties at the time of the child's birth, VAPs generally do not provide parentage based upon the intent that the parties shared at the time of undertaking the ART procedures.[297] As a result, if between the time of undertaking ART procedures and the child's birth one of the parties changes their mind about whether the non-gestating parent should be the child's second legal parent, a legal framework for parentage establishment that employs VAPs, but not consent to ART laws, will fail to protect the other party's reliance interests and expectations.

If, however, a jurisdiction adopts the intact, harmonious family theory to guide its approach to the legal framework governing gestating parents' choice, extending consent to ART laws to unmarried individuals likely would have significantly less urgency. Where the gestating parent and the individual who intended to be the child's second legal parent at the time of undertaking the ART procedures still plan to raise the child together in an intact, harmonious family at the time the child is born, they can become the child's legal parents by executing a VAP. If that relationship has broken down prior to the child's birth, however, and the gestating parent shares an intact, harmonious relationship with someone else who desires to be the child's parent, establishing parentage in that person arguably would be a preferable result under the intact, harmonious family theory.[298] As a result, jurisdictions that adopt the intact, harmonious family theory may opt to focus primarily on legal reform that makes VAP procedures available to all couples regardless of marital status or gender; reforming consent to ART laws may be a lower priority.

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[296] *See supra* note 171 and accompanying text.

[297] *See* Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641, 665 (2008) ("[P]re-birth voluntary paternity acknowledgments are often not allowed.").

[298] *See supra* Part II.D.

Overall, however, intent has become an increasingly important concept under the law governing parentage establishment.[299] This is especially true in the ART context, where today intent commonly plays a core role in parentage determinations.[300] It is almost certainly the case that intent-based theories will continue to play a significant guiding role in parentage determinations for children conceived via ART. As a result, it is likely that in most jurisdictions that choose to take steps to create a more consistent, coherent, and just legal framework governing gestating parents, extending consent to ART laws to unmarried individuals will be a high priority. Finally, while most states that have extended their consent to ART laws to unmarried individuals have done so in a gender neutral manner, this is not true across the board.[301] As discussed above, to align the law with the core principles relating to providing meaningful choice for gestating parents and facilitating parentage establishment in individuals who share a commitment to co-parenting with the gestating parent, it is essential that mechanisms for establishing an individual as a child's second legal parent at birth do not categorically exclude women and non-binary people.[302]

CONCLUSION

While current law provides some categories of gestating parents with a significant degree of meaningful choice in at-birth determinations of the child's second legal parent, other categories of gestating parents may find that they have no meaningful choice in this consequential determination. The differing treatment of gestating parents based upon marital status, the method of the child's conception, and the potential second legal parent's gender, is problematic. There is no underlying theory that provides a consistent, coherent explanation for the law's current approach to the degree of choice gestating parents have in at-birth determinations of the child's second legal parent. Legal reform that provides all gestating parents with sufficient meaningful choice and promotes parentage determinations in individuals who share a cooperative relationship and commitment to co-parenting with the gestating parent is necessary to create a more fair and consistent framework governing the rights of gestating parents.

299 Feinberg, *supra* note 3, at 263-64.

300 *Id.*

301 *See supra* note 93 and accompanying text.

302 *See supra* Part III.A.