

15 Private Ordering under the ALI PRINCIPLES: As Natural as Status

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The PRINCIPLES begin by observing that “[o]ne expects a nation’s family law to reflect its cultural values.”¹ But left unspecified are the particular cultural values that the PRINCIPLES incorporate. Freedom of contract, also known as private ordering, is one important cultural value that is expressed. This chapter identifies a number of provisions that incorporate private ordering, namely the ALI’s domestic partnership, parenthood by estoppel, and de facto parenthood proposals, and articulates reasons that deference to private ordering makes sense. The strengths of private ordering are both functional and linguistic. Functionally, family law doctrine already defers to private ordering in many instances, and indeed increasingly tends toward privatization.² Moreover, private ordering can facilitate equality in families and accounts for the fact that people form families in different ways.

The linguistic point requires a bit more explanation. Abstract ideas, such as family – understood as the kind of social affiliation that the law recognizes as legitimate – can only be discussed in metaphorical terms because it is difficult, if not impossible, to explain complex concepts like intimate affiliation and legal recognition without resorting to other concepts.³ While metaphors imperfectly capture the notion of family and other abstractions, they are the best tools we have, making analysis of their mechanics particularly important.⁴ Metaphors work by identifying a target problem and then identifying a source analog to understand it. For example, scientists wondering how sound works (the target) compared it to waves of water (the source), concluding that the metaphor of sound waves works because both sound and water waves exhibit periodicity and amplitude. Obviously, the

¹ PRINCIPLES, Ira Mark Ellman, *Chief Reporter’s Foreword*, at xvii.

² For a concise description of status-based family law that gave way to individualism and contractarianism, see MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 291 (1989). Discussions of deference to private ordering in family law include Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979); Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443; Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998–1999); Margaret F. Brinig, *Unhappy Contracts: The Case of Divorce Settlements*, 1 REV. L. & ECON. 241 (2005).

³ George Lakoff, *The Contemporary Theory of Metaphor*, in METAPHOR AND THOUGHT 205 (Andrew Ortony ed., 2d ed. 1993) (observing that “as soon as one gets away from concrete physical experience and starts talking about abstractions . . . metaphorical understanding is the norm”).

⁴ Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U. C. DAVIS L. REV. 779, 799 (2002) (observing that “[i]n reality, nothing is the same as anything else. Mapping can be done only between abstractions, not between messy realities. Because analogy and metaphor use abstracted portraits to stand in for more complex real phenomena, they always make use of a kind of metonymy . . . the name of a thing or concept is used to refer to something less than the whole and that essentialized part is taken to stand for the whole.”).

sound wave metaphor is not an equation; waves of sound are neither blue-green, wet, nor cool. But that particular metaphor works because there are deep structural commonalities between sound and waves of water.⁵

Because this volume and the PRINCIPLES concern families, the relevant metaphoric investigation identifies the target as “what constitutes a family,” in particular whether cohabitants and intimates of legal parents who assume parental responsibilities count as family. This chapter contends that contract is an appropriate source for metaphors relating to family, and further that legal regulation already adopts this metaphor through rules that embrace private ordering.

Contractarianism in its various forms employs at least two distinct understandings of contract, which Thomas Joo has labeled “K” and “R.” “K,” following the law school classroom abbreviation, refers to a legally enforceable agreement, while “R,” the understanding of contract that prevails among economists, refers to “a voluntary ‘relationship[] characterized by reciprocal expectations and behavior.’”⁶ The contractarianism discussed in this chapter includes both “K” and “R,” but focuses more on the latter.

Some metaphors are never really accepted, such as the economic model of families as firms.⁷ But the metaphor of marriage and contract is already deeply rooted in legal and social discourse, its adoption having begun more than 150 years ago as part of the general pattern of status giving way to contract.⁸ Just as sound waves and water waves share structural similarities, both family and contract bring to mind voluntariness, reciprocity, and bodies, in particular bodily proximity. This third structural commonality between families and contract, bodily proximity, may seem counterintuitive. But further consideration confirms the similarity. An image commonly associated with contract – a handshake – best illustrates the structural commonality.⁹ A handshake is the meeting of two bodies to represent or enact the meeting of the minds of two people entering an agreement.¹⁰ In other words, handshakes and families both involve parties voluntarily binding themselves to a reciprocal relationship.¹¹ The richness and power of the handshake image is further explained by cognitive linguistic theory suggesting that people often think in metaphors that relate to the body, investing the handshake image with imaginative force.¹² Once we

⁵ For an elaboration of the sound wave metaphor, see *id.* at 785.

⁶ Joo, *supra* note 4, at 789 (quoting Melvin Eisenberg, *The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 822–23 (1999)).

⁷ MARGARET BRINIG, *FROM CONTRACT TO COVENANT* 138 (2000).

⁸ HENRY SUMNER MAINE, *ANCIENT LAW* 168–70 (1996). For a critique of the focus on individuals in family law, see Glendon, *supra* note 2, at 297–302. The metaphor of marriage as a partnership contract informs various statutes, including the Uniform Probate Code and the Uniform Marriage and Divorce Act. Martha M. Ertman, *The Business of Intimacy*, in *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, & SOCIETY* 467, 476 (Martha Albertson Fineman & Terence Dougherty eds., 2005). Of course, contractual notions of relationships regarding children differ from discussions of contract in marriage. For a discussion of how contractarianism affects parent-child relationships, see notes 11 and 21–24, *infra*, and associated text.

⁹ Contract might bring to mind other images, such as a signature on a dotted line. See *Specht v. Netscape Communication*, 150 F. Supp. 2d 585 (2001).

¹⁰ For a discussion of mutual assent in contract law, see JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 26–27 (5th ed. 2003).

¹¹ Of course children do not voluntarily bind themselves to their parents. This pattern coheres with contractualism, in that children lack the capacity to enter legally binding agreements. AMERICAN LAW INSTITUTE, *RESTATEMENT (SECOND) OF CONTRACTS* § 14 (1981).

¹² GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987) (hereinafter *LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS*); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980). Other linguists might counter Lakoff's claims regarding the mapping metaphors onto bodily

consider these structural similarities between family and contract, it becomes apparent that contractual metaphors are as natural a model as any other, such as status, for regulating family.

This chapter first describes the ways that domestic partnership, parenthood by estoppel, and de facto parenthood rely on principles of private ordering, and then briefly applies George Lakoff's cognitive linguistic research on metaphors to demonstrate how private ordering provides a coherent conceptual basis for these provisions. The chapter concludes by observing how the PRINCIPLES' private ordering provisions are consistent with current doctrine as expressed in a trio of California cases that recognize a range of ways that same-sex couples can, through various kinds of agreement, become families in which both parents have full parental rights and responsibilities.¹³ This exercise suggests that the PRINCIPLES' provisions on private ordering resonate with existing legal doctrine by accounting for the way real-world families are structured.

I. The Elasticity of Contract

What is private ordering? Certainly, private ordering includes formal contracts such as the premarital and postmarital agreements governed by Chapter 7 of the PRINCIPLES – agreements that could be described in shorthand as “K.” But private ordering also includes less formal arrangements, arrangements that focus on voluntariness and reciprocity and might be evidenced by, in place of formalities, conduct and implicit understanding. These agreements can be distinguished from those defined by legal enforceability by using the shorthand “R,” as already noted. In short, contract provides a conceptual frame that reflects the PRINCIPLES' general tendency to defer to arrangements partners and parents have reached on their own.¹⁴

Thus contract informs the PRINCIPLES' doctrine and the theory behind it. Contract serves this function in other areas. Just as contract is a well-established metaphor for understanding corporations,¹⁵ it provides a powerful heuristic in philosophical discussions of the social contract. No one seriously contends that our ancestors entered an actual contract that binds us to pay taxes and obey laws. Instead, John Rawls and other social contractarians analyze a *hypothetical* agreement, asking what we would have agreed to had such a negotiation occurred.¹⁶ The continued vitality of social contract theorizing reflects the elasticity of contract-based analysis, in particular the way that contractual concepts embrace both actual and metaphoric agreements.¹⁷

experience with arguments that language, and signs generally, are arbitrary. See, e.g., FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 74 (Charles Bally & Albert Harris, translation 1990) (1916).

¹³ *Elisa B. v. Emily B.*, 117 P.3d 660 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); and *K. M. v. E. G.*, 117 P.3d 673 (Cal. 2005).

¹⁴ For example, the PRINCIPLES' Introduction begins by defining a “primary challenge” in family law as facilitating “thoughtful planning by cooperative parents,” PRINCIPLES at 1, and explains that it does this in part by giving preference to private ordering by parents over judicial supervision. PRINCIPLES at 4, 8.

¹⁵ For a description and critique of the nexus of contracts approach to corporations, see Joo, *supra* note 4.

¹⁶ JOHN RAWLS, *A THEORY OF JUSTICE* 11–12 (1971).

¹⁷ See, e.g., Jeremy Waldron, *John Locke: Social Contract Versus Political Anthropology*, in *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* 51 (David Boucher & Paul Kelly eds., 1994); Ann Cudd, *Contractarianism*, *The Stanford Encyclopedia of Philosophy*, (Edward N. Zalta ed. Spring 2003) (*available at* <http://plato.stanford.edu/archives/spring2003/entries/contractarianism>); Fred D'Agostino, *Contemporary Approaches to the Social Contract*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed. Spring 2003) (*available at* <http://plato.stanford.edu/archives/sum2003/entries/contractarianism-contemporary>). It is worth noting that philosophical

This chapter similarly exploits the many meanings of contract. Most concretely, it addresses explicit agreements between parties, which courts may enforce. But it also includes parties acting as if they have entered an agreement, and perhaps also entering informal agreements, which the law might recognize. Most abstractly, at the level of metaphor, a handshake operates as a symbolic embodiment of contract and family norms such as consent, affiliation, and the freedom to order one's own affairs. I use the terms contract, private ordering, and agreement variously to invoke these meanings, all of which might be summed up as contractarianism.

Contractarianism already appears in family law generally and the PRINCIPLES in particular.¹⁸ For example, Section 2.03 of the PRINCIPLES provides that by making a coparenting agreement with the legal parent and "accepting full and permanent responsibilities as a parent," a person can become a parent by estoppel.¹⁹ The private ordering of Section 2.03 does not require a written contract, but instead turns on a prior coparenting agreement which may not satisfy the requirements of contract doctrine (such as offer, acceptance, consideration, and a writing),²⁰ since domestic arrangements tend to lack the formality of commercial life.

To be sure, private ordering is not the only cultural value expressed in the PRINCIPLES. Status-based values, such as protecting children because of their vulnerability, are expressed, for example, in the provisions providing that agreements limiting child support will not receive the same deference as other agreements.²¹ Moreover, being designated as a parent by estoppel, based on a coparenting agreement, requires that the agreement be in the child's best interests.²² However, even to the extent that status remains a strong operating principle, it is blended with contractual arrangements.²³ For example, the PRINCIPLES set the amount of child support by guidelines,²⁴ but allow a child to have two mothers, two fathers, or even three parents by virtue of private ordering.²⁵ Along the same lines, the PRINCIPLES' domestic partnerships provisions create rights and liabilities between the intimates themselves, which need not be recognized by third parties such as the State or

approaches to contractarianism have been distinguished from contractualism, with the latter holding "that rationality requires that we respect persons, which in turn requires that moral principles be such that they can be justified to each person. Thus, individuals are not taken to be motivated by self-interest but rather by a commitment to publicly justify the standards of morality to which each will be held." Cudd, *supra*. Contractualism may be especially pertinent to family contexts, in which love and obligation accompany self-interested behavior.

¹⁸ See notes 2 and 14, *supra*, and associated text. ¹⁹ PRINCIPLES § 2.03.

²⁰ RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 24, 50, 71, 110 (1981).

²¹ PRINCIPLES § 7.06 ("The right of a child to support may not be affected adversely by an agreement."). The PRINCIPLES show similar solicitude for victims of domestic violence. PRINCIPLES Introduction 10–11; PRINCIPLES §§ 2.06(2) & 2.07(3).

²² PRINCIPLES § 2.03(b).

²³ While this chapter focuses on contractarianism, one also might say that the PRINCIPLES' provisions on domestic partnership, parenthood by estoppel and de facto parenthood adopt status models that are grounded in contract principles, or that the provisions elevate agreement to the level of status through state recognition.

²⁴ PRINCIPLES ch. 3.

²⁵ For example, a lesbian can have a baby with a gay male friend, and also have a female partner with whom she raises the child, pursuant to a coparenting agreement. In these circumstances the PRINCIPLES provides that the child can have two legal parents (a biological mother and father) and either a de facto parent or parent by estoppel. See PRINCIPLES §§ 2.03(b)(iii) and (iv) (providing that coparenting agreements must be with child's legal parent "or, if there are two legal parents, both parents" for parenthood by estoppel to arise). See also PRINCIPLES § 2.03 cmt. b(iii), at 114–15 (suggesting that either two women or two men can be parents of the same child under the parenthood by estoppel provisions, skirting the ban on same-sex couples adopting in some jurisdictions and noting that the number of parents is not dispositive, and further that the real issue is the strength of bonds with the child, and the extent of parental involvement).

employers.²⁶ In doing so, the PRINCIPLES retains a special status for marriage, and relegates domestic partners to a contract-like relationship that centers on the partners themselves rather than third parties. This braiding of contract and status is consistent with the nearly universal recognition that families, and thus family law, include elements of both status and contract.²⁷

II. Private Ordering under the PRINCIPLES: Domestic Partnership, Parenthood by Estoppel, and De Facto Parenthood

Domestic partnership, parenthood by estoppel, and de facto parenthood are instances of private ordering in the PRINCIPLES.²⁸ This part elaborates the private ordering elements of each, focusing on how private ordering recognizes the differences in the way that people order their lives. Recognizing different kinds of agreements is consistent with contract law. The Uniform Commercial Code “UCC,” a staple of contract law, is predicated on the idea that there are different kinds of agreements and that the sale of goods, debtor-creditor relations, and contracts relating to negotiable instruments are governed by different rules.²⁹ This approach recognizes that life, commercial and social, is too complex to fit into one tiny little box.³⁰

At first glance, it seems that domestic partnership is a status rather than a contract because it does not require parties to make an implied or express agreement.³¹ However, further analysis reveals that domestic partnership rests in large part on contract. The PRINCIPLES acknowledge as much, explaining that the definition “identifies the circumstances that would typically lead . . . a court to find a contract, and defines those circumstances as giving rise to a domestic partnership.”³²

Section 6.03 of the PRINCIPLES begins by providing that two people, same-sex or opposite sex, are domestic partners if they are not married to one another and “for a significant period of time share a primary residence and a life together as a couple.”³³ One way to share a life together as a couple is to live with a common child for a statutorily determined time, which the comments suggest could be two years, and the other way is to cohabit for a statutorily determined time, which the comments suggest could be three years.³⁴ However, merely living together for the requisite period is insufficient; the presumption of domestic partnership can be rebutted by evidence that the parties did *not* share a life together,

²⁶ PRINCIPLES § 6.01 cmt. a, 908 (noting that the PRINCIPLES’ proposals “are confined to the inter se claims of domestic partners”).

²⁷ See, e.g., *DeMatteo v. DeMatteo*, 762 N. E.2d 797, 809 (Mass. 2002); Ertman, *supra* note 8, at 469; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. REV. 65, 110–111 (1998).

²⁸ Not everyone agrees. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 U. C. L. A. L. REV. 815 (2005); Carbone, this volume (contending that domestic partnership imposes a status on unwilling cohabitants rather than deferring to people’s private ordering).

²⁹ UNIFORM COMMERCIAL CODE (2005) [hereinafter UCC].

³⁰ For a discussion of how law could recognize a range of intimate affiliations as it recognizes a range of business entitles, see Ertman, *supra* note 8.

³¹ PRINCIPLES § 6.03 cmt. b, at 919.

³² PRINCIPLES § 6.03 cmt. b, at 918–19.

³³ PRINCIPLES § 6.03(1). One can see the burden-shifting framework of the domestic partnership provisions as recognizing that certain cohabitants have the status of domestic partners if they share a life together as a couple. If, however, they do not share a life together as a couple, the person resisting this label can assert facts set out in Section 6.03(3) and (7) to counteract the presumption of domestic partnership that arises once the parties live together for the requisite time.

³⁴ PRINCIPLES § 6.03(3) and cmt. d, at 921.

based on thirteen factors.³⁵ These factors indicate that a domestic partnership comes into being when parties either form agreements related to sharing a life together as a couple, or act as if they have. Four of these factors seem quite contractual: making statements or promises to each other regarding the relationship; naming one another as beneficiary of an insurance policy or will; participating in a commitment ceremony or registering as domestic partners; and entering a void or voidable marriage.³⁶ The other nine factors rest on implied agreements to share a life together as a couple, including intermingling finances; becoming economically dependent or interdependent; specializing in roles; changing life circumstances due to the relationship; treating the relationship as qualitatively different from other relationships; being emotionally or physically intimate; being known in the community as a couple; having a child, adopting, or jointly assuming parental functions toward a child; and maintaining a common household.³⁷

It makes sense to infer an agreement to share gains and losses from sharing a life together as a couple. When business partners intermingle finances as they jointly operate a business for profit, the law recognizes the joint entity thus created.³⁸ Just as would-be business partners can contract out of that status, cohabitants can contract out of domestic partnership under the PRINCIPLES.³⁹ Some cohabitants maintain financial and other kinds of independence, thus contracting out of domestic partnership informally, through conduct. But when cohabitants do share a life together as well as a mailbox, it makes more sense for the law to treat them as partners than as strangers.

³⁵ PRINCIPLES §§ 6.03(3) and (7). These factors are:

- (a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
- (b) the extent to which the parties intermingle their finances;
- (c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
- (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
- (e) the extent to which the relationship wrought change in the life of either or both parties;
- (f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee-benefit plan;
- (g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;
- (h) the emotional or physical intimacy of the parties' relationship;
- (i) the parties' community reputation as a couple;
- (j) the parties' participation in a commitment ceremony or registration as a domestic partnership;
- (k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
- (l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child; [and]
- (m) the parties' maintenance of a common household[.]

PRINCIPLES § 6.03(7).

³⁶ PRINCIPLES §§ 6.03(7)(a), (f), (j), (k).

³⁷ PRINCIPLES §§ 6.03(7)(b–e), (g–i), (l–m). "Persons *maintain a common household* when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household." PRINCIPLES § 6.03(4) (emphasis added).

³⁸ UNIFORM PARTNERSHIP ACT § 202(a) (1997), 6 U. L. A. 53 (Supp. 2000).

³⁹ PRINCIPLES § 6.01(2). Further demonstrating the contractual nature of the domestic partnership scheme, parties can contract into domestic partner status pursuant to Section 6.01(3), even if their circumstances do not satisfy the other elements of Section 6.03. See also PRINCIPLES § 7.01(2) (noting that the provisions governing agreements apply also to domestic partners).

Parenthood by estoppel represents another instance of private ordering because it turns on a prior coparenting agreement. Sections 2.03(b)(iii) and (iv) provide that a parent by estoppel is someone who lived with a child, either from birth or for at least two years, and assumed “full and permanent responsibilities as a parent” as part of a “prior agreement with the child’s legal parent (or, if there are two legal parents, both parents).”⁴⁰ This is clearly private ordering. It may be a contract in the “R” sense that focuses on voluntariness and reciprocity rather than the “K” sense that focuses on legal enforceability, because it is subject to the child’s best interest. However, to the extent that the law *does* recognize the prior coparenting agreement, it *is* enforceable, at least more so than under prior law, which treated coparents who were not legal parents as strangers to the children.⁴¹ The comments to Section 2.03(b) clarify the importance of a coparenting agreement, providing that where a lesbian couple “decided to raise a child together” and “agreed that . . . [they] would be equally involved and responsible for” the child, the nonbiological mother is a parent by estoppel.⁴² In contrast, a nonbiological mother is not a parent by estoppel where she “agreed to help out, but she assumed no financial responsibilities.”⁴³

A third instance of private ordering is *de facto* parenthood. A *de facto* parent under Section 2.03(c) is someone who lives with a child “for a significant period of time not less than two years,” doing as much or more caretaking of the child than the legal parent “with the agreement of a legal parent to form a parent-child relationship.”⁴⁴ Illustration 22 demonstrates that the agreement necessary to become a *de facto* parent is considerably less formal than the coparenting agreement necessary for parenthood by estoppel since it rests merely on the division of caretaking responsibility:

For the past four years, seven-year-old Lindsay has lived with her mother Annis and her stepfather, Ralph. During that period, Ralph and Annis both worked outside the home, and divided responsibility for Lindsay’s care roughly equally between them. Annis’s sharing of responsibility for Lindsay’s care with Ralph constitutes an implied agreement by her to the role assumed by Ralph.⁴⁵

However, if Annis, as the legal parent, retains authority over all important matters such as discipline, bedtime, television, after-school activities, and friends, Ralph does not become a *de facto* parent.⁴⁶ The distinction rests on the nature of the relationship agreed to,

⁴⁰ PRINCIPLES § 2.03(b) (defining a “parent by estoppel” as “an individual who, though not a legal parent . . . (iii) lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior coparenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child’s best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child’s parent (or, if there are two legal parents, both parents), when the courts finds that recognition of the individual as a parent is in the child’s best interests”). Section 2.03(b)(i) also provides that a person obligated to pay child support is a parent by estoppel.

⁴¹ Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002).

⁴² PRINCIPLES § 2.03 cmt. b(iii), illus.9, at 115.

⁴³ PRINCIPLES § 2.03 cmt. b(iii), illus.11, at 116.

⁴⁴ PRINCIPLES § 2.03(c) (“A *de facto* parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.”) (emphasis added).

⁴⁵ PRINCIPLES § 2.03 cmt. c, illus.22, at 122.

⁴⁶ PRINCIPLES § 2.03 cmt. c, illus.23, at 122.

glorified babysitter or de facto parent.⁴⁷ This distinction allows parties to privately tailor their arrangements to suit their needs. It is, in short, private ordering.

III. Private Ordering as a Conceptual Basis for Family Law

Private ordering provides a key conceptual basis for both family and family law because it can account for life's complexities. Other chapters in this volume raise the importance of a clear conceptual basis for legal doctrine.⁴⁸ This is an important issue, since the success of other projects synthesizing and updating a legal area, such as the UCC, has turned on the project having one or more central themes. The key concept around the UCC, more evident in some Articles than in others and perhaps more evident in the original Articles than in more recent revisions, is a legal realist idea that agreements are formed both formally and informally and that legal doctrine provides gap-fillers to make up for the fact that people often do not even consider some terms of their agreement.⁴⁹ This idea translates into a common sense rule for sales of goods that if buyers and sellers act as if they have an agreement – if they deliver goods, for example, or pay for them – then legal doctrine treats them as having entered into a contract, even if the boilerplate terms of a preprinted form say otherwise.⁵⁰ In other words, if it looks like a duck, walks like a duck, and talks like a duck, the law treats it as a duck, even if it is wearing a collar saying “this is not a duck.”

Admittedly, not all contracts are alike: there is a big difference between buying a car and getting married. Accordingly, different bodies of law govern the two transactions. Still, a contractual principle, a legal realist view that the law should recognize people's conduct as well as their words, could, and arguably does, inform family law.⁵¹ The major competitor to this view is status, a theme that historically dictated that one's condition of birth, such as sex, determined rights and responsibilities, such as child custody and alimony.⁵² If there is a coherent theme to the PRINCIPLES, contractual or status-based, this project might be as successful as the UCC. If not, the PRINCIPLES may share the fate of other uniform law efforts, languishing unadopted by courts or legislators.⁵³ The next part argues that private ordering provides a conceptual basis for provisions governing domestic partnership and parental rights, leaving for another day the question of whether it provides a conceptual basis for the PRINCIPLES as a whole.

IV. Equality, Plurality, and Nature

The benefits of private ordering are twofold. First, private ordering can account for equality and plurality within relationships, and among different kinds of relationships. Second,

⁴⁷ Of course these are extremes, and the messy realities of actual lives tend to fall somewhere between babysitter and full parent. See cases discussed at notes 102–17, *infra*, and associated text.

⁴⁸ See, e.g., Garrison, this volume; Carbone, this volume; Scott, this volume.

⁴⁹ UCC § 1–303 cmt. 1 (2003) (rejecting a conveyancer's reading of a commercial agreement, and providing instead that “the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances.”). See also Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L. J. 421, 429 (1993); Michael Korybu, *Searching for Commercial Reasonableness Under the Revised Article 9*, 87 IOWA L. REV. 1383, 1454 (2002).

⁵⁰ UCC § 2–207 (2000).

⁵¹ See note 2, *supra*.

⁵² Danaya C. Wright, *The Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 COLUM. J. GENDER & L. 175, 195 (2002).

⁵³ See, e.g., UNIFORM LAND SECURITY INTERESTS ACT, 7A U.L.A. 403 (1999).

based on both common sense and cognitive linguistic theory, private ordering is as natural as other ways of thinking about families. This part addresses each point in turn.

Aristotle defined equality as treating likes alike and treating nonalikes differently.⁵⁴ Private ordering facilitates this kind of equality among different types of relationships.⁵⁵ Equality, of course, does not require that every married couple be treated the same for all purposes, since people have different kinds of families. Bill and Hillary Clinton, for example, seem quite independent of each other, while George and Laura Bush seem more interdependent. But both couples are married, which means that there is a need for legal rules that account for the different ways that spouses order their lives. For example, legal doctrine could recognize the significance of Laura Bush's more modest income-producing potential after divorce and grant her part of George Bush's postdivorce income.

Private ordering also furthers equality among different types of relationships by requiring that the State recognize a range of intimate relationships, rather than have regulation that functions like an on/off switch, recognizing only one relationship, that of spouses, and treating the participants in all other kinds of relationships as strangers to one another.⁵⁶ Spouses and domestic partners are more "like" one another than "unlike" in that they share a life together by cohabiting, perhaps raising children and/or intermingling finances, and thus merit similar, if not identical, treatment.⁵⁷ This distinction between similar and identical treatment is key and routine for law. All property owners are taxed, for example, but the amount differs depending on factors such as the property's value and the owner's status as an individual or a business. If a relationship is really "unlike" committed long term relationships – a casual dating relationship, for example – legal doctrine can treat it differently without violating principles of equality.

Private ordering thus accounts for plurality among different kinds of relationships, providing a conceptual basis for recognizing the different ways they function. Unlike marriage, domestic partnership under the PRINCIPLES does not require the parties to comply with the formality of filing a document with the State. Functionally, this difference in formality signifies a difference in kind, namely that domestic partnership is simply less formal, just as business partnerships are less formal than corporations.⁵⁸ This difference

⁵⁴ 3 ARISTOTLE, NICOMACHEAN ETHICS 1131a-1131b (2d ed., Terence Irwin translation, 1999).

⁵⁵ At the metaphorical level, private ordering can serve equality within relationships by treating the members of a couple, male or female, as similarly capable of engaging in wage labor, raising children, and other things. Status, in contrast, suggests men and women are "unlike" and therefore should be governed by different rules that, for example, give fathers custody of children because of their greater capacity to engage in moral reasoning. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982). In addition, couples whose relationships are not legally recognized, such as same-sex couples, can create rights and obligations through contract to share wealth and thus create a more equitable balance of power in the relationship than provided under background legal rules. See, e.g., *Posik v. Layton*, 695 So.2d 759 (Fla. App. 1997). However, private ordering can also facilitate inequality in couples, as when a socially and economically powerful partner won't marry unless the other, less powerful partner, executes a prenuptial agreement waiving entitlements to support or property upon divorce. Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996).

⁵⁶ On the incongruity of treating intimates as if they were strangers, see Milton C. Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L. J. 2303 (1994).

⁵⁷ But see Garrison, *supra* note 28. Professor Garrison overlooks the difference between identical and similar in suggesting that recognizing any rights of cohabitants treats cohabitation exactly the same as marriage. There are various kinds of long-term committed intimate relationships, some married and some not. The law could and should recognize both similarities and differences among various kinds of committed long-term relationships. Contractual reasoning accommodates this kind of plurality. Ariela Dubler, *In the Shadow of Marriage*, 112 YALE L. J. 1641, 1710 (2003).

⁵⁸ A business partnership comes into being when two or more people jointly operate a business for profit. A corporation, in contrast, cannot come into existence until the people forming it file Articles of Incorporation with the

between an arrangement that arises by default, as opposed to formal opting-in, justifies treating domestic partners differently from spouses. Logically, Chapter 6 of the PRINCIPLES makes domestic partners responsible to one another but does not mandate recognition by third parties, such as the State or employers.⁵⁹ But there is a problem with this analysis, because in every U.S. state except Massachusetts, only opposite-sex couples can marry.⁶⁰ If marriage was open to all couples, it would make sense to allow people to select more or less formal arrangements. Setting aside for the moment the unfairness of banning same-sex marriage, a position that can be partly justified by the fact that legislation and litigation are pending in several jurisdictions to recognize same-sex marriage, it does make sense to govern different kinds of relationships with different rules. We are complex social beings who organize our lives in different ways. The sheer number of ways to order coffee at Starbucks indicates that there are a lot of ways to approach even minor aspects of life. How odd it would be if intimate affiliation came in one size when we can order a double shot skinny latte with no foam.

Indeed, major parts of statutes such as the Uniform Marriage and Divorce Act and the Uniform Probate Code go some distance toward adopting contractual metaphors for family by embracing the partnership model of marriage.⁶¹ Yet many people resist this way of thinking about intimate affiliation.⁶² This resistance may erode once people realize that private ordering is no less natural than other models. The natural link between private ordering and family becomes clear when one considers the work of cognitive linguist George Lakoff, who suggests that people often think in terms of body-based metaphors.⁶³ Using the association of handshakes with contracts, the next part illustrates that private ordering is far more intimately associated with family than most people imagine.

V. Body-Based Metaphors, Families, and Private Ordering

Professor Lakoff's theory of embodied cognition contends that common bodily experiences inform thought and language by providing metaphors to describe that experience. For example, anger creates physiological effects, including increased body heat and increased blood pressure and muscular pressure.⁶⁴ Consequently, people think and talk about anger in ways that reflect this embodied experience. Idioms relating to anger (i.e., "he lost his cool," "he was foaming at the mouth," "you make my blood boil," and "he's just letting off steam") refer back to the physiological experience of anger.⁶⁵ Under Professor Lakoff's analysis, one would also expect metaphors for intimate affiliation to refer to the body.⁶⁶

State. In this way, cohabitation is more like a partnership, and marriage is more like a corporation. *See generally* Ertman, *supra* note 8.

⁵⁹ PRINCIPLES § 6.02 and cmt. b, at 915–16.

⁶⁰ *See generally* Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

⁶¹ For further discussion of the partnership analogy to intimate affiliation, see Ertman, *supra* note 8, at 476.

⁶² *See, e.g.*, Ann Laquer Estin, *Can Families Be Efficient?*, in FEMINISM CONFRONTS HOMO ECONOMICUS 423 (2005).

⁶³ LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS, *supra* note 12.

⁶⁴ *Id.* at 381.

⁶⁵ *Id.* at 380–81. In America, anger also is associated with wild animals ("he has a *ferocious* temper") and insanity ("I'm *mad*"). According to Lakoff, all of these metaphors refer to bodily experiences associated with anger, such as increased body heat, increased internal pressure—blood pressure and muscular pressure—agitation, and interference with accurate perception. *Id.* at 381–94.

⁶⁶ I use the term metaphor loosely, while linguists distinguish among metaphor, analogy, and metonym. *See* LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS, *supra* note 12, at 19. A metaphor is a figure of speech in which a term is transferred from the object it ordinarily designates to another object by implicit comparison, such as "foot of the mountain." *Id.* at 825. Analogy is defined as a logical inference that if two things are alike in some respects they

And they do. We talk about a one-time sexual encounter as a one night stand, for example, invoking the image of standing up and, presumably, being ready to go. When a person falls in love, she might be head over heels, that is until she falls out of love. Body-based metaphors, Professor Lakoff contends, are not limited to social relations; even if I miss a step in my analysis of private ordering, that very turn of phrase supports his premise that much of our cognition rests in metaphors whose meaning lies in the body.

Clearly, we think of family in terms associated with bodies and bodily proximity. For census and tax purposes, for example, there are heads of households, and it is sometimes said that the kitchen is the heart of a home. Wedding vows include promises “to have and to hold,” invoking images of arms and bodily proximity.⁶⁷

In law, this bodily proximity is sometimes expressed with reference to nature. Family law refers to “natural mother[s]” and “natural children,” meaning people bound together by biology,⁶⁸ and estates and trusts law uses the phrase “natural beneficiaries” of one’s bounty to describe close relations, such as a spouse or child.⁶⁹ Proximity, however, is not always deemed natural; statutes have dubbed skin-to-skin proximity between people of the same sex a “crime against nature.”⁷⁰ The category “natural” is further complicated by the fact that nature is generally set up in opposition to culture, and family is commonly understood as being both natural and cultural. Less ambiguously, bodies, especially unclothed bodies, are conceived as being on the natural side of the equation. One possible manifestation of this linking of bodies, nature, and families is the importance of bodily intimacy in families. In families, we care for the sick, we nurse babies, we have sex, we roughhouse with siblings and children.

Logically, then, legal doctrines have generally used metaphors relating to the body to give a coherent conceptual basis to those doctrines.⁷¹ In order to take hold, a metaphor should feel like a familiar and convincing way to think about families and intimacy. One long standing and old fashioned metaphor is coverture, which provided a conceptual basis for family law until the late nineteenth century. According to the OXFORD ENGLISH DICTIONARY, coverture refers to a cover, specifically a bed cover.⁷² It is not surprising that marriage would be associated with beds, which invoke rich images of home, warmth, safety, rest, and comfort, as well as sex.⁷³

are alike in other respects. AMERICAN HERITAGE DICTIONARY 47 (New College ed. 1979). A metonym, in contrast, exists when a part of a whole stands for the whole, as when a nurse says “the C section in Room 107 needs meds.” LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS, *supra* note 12, at 77.

⁶⁷ The etymology of this vow, however, stems from terms of conveyance in property law, echoing the sale-like qualities in a wedding ceremony; “to have and to hold” originally referenced the decidedly unromantic notion of possessing and controlling. Maya Grosz, *To Have and to Hold: Property and State Regulation of Sexuality and Marriage*, 24 N.Y.U. REV. L. & SOC. CHANGE 235 (1998).

⁶⁸ See, e.g., *Johnson v. Calvert*, 5 Cal.4th. 84 (1993).

⁶⁹ See, e.g., *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983).

⁷⁰ *Bowers v. Hardwick*, 478 U.S. 186 (1986), *rev'd by Lawrence v. Texas*, 539 U.S. 558 (2003). A rich body of literature challenges the conventional wisdom that crimes against nature were extramarital, since a genealogy of sodomy and other crimes against nature indicate that the common law proscribed sexual acts such as anal penetration regardless of whether the people performing them were married to one another.

⁷¹ Attempts to use the firm as a metaphor for the family have been largely unsuccessful, perhaps because of the lack of association with bodies. See BRINIG, *supra* note 7.

⁷² I OXFORD ENGLISH DICTIONARY 535 (New Shorter ed. 1993). It also refers to a garment, or other covers (a lid, canopy, or disguise). *Id.*

⁷³ This last association is particularly important as it brings to mind the image of a man covering a woman in what is commonly known as the missionary position. If a central concern of marriage is sexual exclusivity, as Professor Spaht argues in this volume, then under coverture it is the exclusive covering by men of women, both literally and figuratively. Katherine Spaht, this volume.

Under coverture, married women had no independent legal identity so that the man, literally and figuratively, covered the woman. This lack of independence has been on the decline since the nineteenth century, when Sir Henry Maine famously declared that the move in progressive societies was one from status to contract.⁷⁴ Family law, like other areas, has followed this trajectory, increasingly recognizing the independent personhood of women and children. This tremendous transformation both spawned and required a new metaphor. Contract emerged as that metaphor to replace the status-based system of coverture, and to reflect the alteration of household arrangements due to the abolition of slavery and the increased equality of women.⁷⁵ Part of this transition involved the passage of Married Women's Property Acts, which authorized married women to make and enforce contracts. Thus, contract has been increasingly central to our thinking about family, especially about spouses, for over a century.⁷⁶ As a result, married women now have an independent legal identity. Indeed, the demise of coverture and the rise of contractual understandings of intimate affiliation were necessary for married women to enjoy that identity. The images associated with the metaphors for coverture and contract, a bed cover and a handshake, reveal the sharp contrast between the old and new regimes. Coverture, the bed cover, is based on vertical, hierarchical, status-based understanding of marriage, while contract, as illustrated by the image of the handshake, is based on a horizontal, equal, consensual view of marriage. While either could be called natural, since that term is used to describe a wide range of things,⁷⁷ most people persist in thinking of coverture metaphors of family as more "natural" than contract.⁷⁸

The main obstacle to seeing that contract is a natural way to describe family, as natural as status, is that contract implies distance as much as bodily closeness.⁷⁹ Contracts are, to use another body-based metaphor, arm's length transactions. Professor Lakoff suggests that the phrase "to keep someone at arm's length" means "to keep someone from becoming intimate, so as to avoid social or psychological harm."⁸⁰ However, he also notes that an idiom can have nearly opposite meanings: the phrase "a rolling stone gathers no moss"

⁷⁴ See note 8, *supra*.

⁷⁵ AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* (1998); LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998). These transformations, however, were not complete, as courts and legislatures often constrained the new rights. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

⁷⁶ Contract, despite its increased importance, does not exhaust the metaphors we associate with marriage and family; the focus on marriage as sacrament – one body taking another body, albeit a divine one, metaphorically into itself – continues to be foundational for opponents of same-sex marriage. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 617 (1999). Another example of noncontractual analysis in family law is the PRINCIPLES' proposals about alimony or "compensatory payments," which is grounded in the idea of compensation for losses rather than contractual analysis. PRINCIPLES § 5.04 cmt. b, at 807–08.

⁷⁷ See JOHN STUART MILL, *Nature*, in *THREE ESSAYS ON RELIGION* 64–65 (1969).

⁷⁸ One example of the prevalence of status-based understandings of marriage, and resistance to private ordering, is the fact that most states and the federal government have passed Defense of Marriage Acts, which define marriage as a relationship between one man and one woman, and further refuse to recognize same-sex marriages entered in other jurisdictions. See, e.g., 28 U.S.C. § 1738C (2000). These measures defend the special status of opposite-sex marriage, and thus of heterosexuals, as well as men and women, since the only reason to mandate that every marriage include one man and one woman in marriage is to mandate that the husband play the role of *the man* and the wife play the role of *the woman*. Andrew Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 Cornell J. L. & Pub. Pol'y. 203 (1997). A contractual understanding of marriage, in contrast, recognizes the importance of choice and autonomy, and allows spouses to order their intimate lives in different ways, for example with less rigid division of labor along gendered lines.

⁷⁹ Indeed, coverture arguably is less closely associated with the body than contract given that the bed cover is neither a human body nor a part of one, while a handshake is a connection between two bodies.

⁸⁰ LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS*, *supra* note 12, at 448.

suggests both that moss is good, representing stability or roots in a community, and that moss is bad, representing encumbrance or lack of freedom.⁸¹ The legal phrase “arm’s length transaction” similarly seems to connote both distance and closeness. As discussed above, not all contracts are the same. Some, like employment contracts, are more about an ongoing connection than about separation. Others, like discrete, one-time transactions – buying a Coke, for example – are more about distance. Even so, the phrase “arm’s length” connotes closeness, since being a mere arm’s length away – within spitting distance – is quite close. This invocation of connection by the phrase “arm’s length *transaction*” is a function of the last word in the phrase, since parties would not be in a transaction in the first place unless they wanted or needed to bind themselves together. While others have articulated the ways that contractual metaphors signal separation, and thus inadequately capture love and obligation inherent in family life,⁸² there are ways in which contract can involve at least as much connection as separation. A handshake, the image associated with contract, demonstrates this closeness, since it represents a literal connection of two bodies.

Mythic handshakes illustrate the importance of hands touching. The high drama of Michelangelo’s famous depiction of the Creation on the ceiling of the Sistine Chapel, for example, centers on the image of the two hands coming together, one divine and one human, signaling both closeness and separation at the moment of Creation. Part of the excitement generated in that image turns on the fact that the hands are not quite touching, so Creation has either just occurred, or is about to occur, and we do not know which. This



image of a highly stylized handshake, implying a covenant between God and humanity, perhaps, is extraordinarily moving because it is simultaneously immanent and transcendent, human and aspirational, just like intimate affiliation.

But that is Creation. What are the associations of a handshake with marriage? A young man traditionally asks for a woman’s hand in marriage. If accepted – note the contractual term – he takes her hand, and she gives her hand. Not surprisingly, putting the ring on the fourth finger, known as the ring finger, is a key part of both engagement and the wedding ceremony. The importance of hands in marriage is further illustrated by the fact that a newly engaged woman sometimes shakes hands with her left hand to show off her ring and new status. Even phrases that seem unrelated to hands can be traced back to handshake images. For example, the phrase “tying the knot” derives from a Celtic ritual called hand fasting in which people getting betrothed or married bind their hands together as a central part of the ceremony.⁸³ Moreover, in most faiths and in civil ceremonies, contractual terms

⁸¹ *Id.* at 451.

⁸² Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989 (1995).

⁸³ Clan Ross Association of Canada, Inc., *Hand Fasting*, in *Contemporary Items, Notes and FAQs*, available at <http://www.greatclanross.org/htext8~Q4.html> (last visited August 3, 2005).

define a marriage ceremony: each person makes vows and consents to take the other as a spouse. At a minimum, marriage is a relational contract.⁸⁴

The history of handshakes further demonstrates the rich association of marriage with contract. Historically, convention dictated that only equals would shake hands. Men would shake other men's hands, but a master and servant would not shake hands, nor would a man and woman, nor a black man and a white man.⁸⁵ Instead, at least among men and women of a particular class, men might kiss a hand in greeting, signaling social hierarchy and status.⁸⁶ Indeed, one way to trace the evolution of civil rights is through the expansion of who gets to shake hands, which in turn tells us who had the capacity to form contracts and other kind of agreements. In the last fifty years, roughly the period of the second wave of the women's movement and the black civil rights movement, there probably has been more handshaking across sex and race than ever before. Not coincidentally, during this period, the U.S. Supreme Court also overturned state bans on interracial couples marrying and Massachusetts lifted the ban on same-sex marriage.⁸⁷

Moreover, unlike a man kissing a woman's hand, a handshake signals physical contact but not necessarily sexual contact. Consistent with the expanding range of intimate affiliations, there is a trend away from coverture's sexual imagery of covering and toward recognizing non-sexual unions. Yet this idea is not entirely new. The biblical story of Ruth and Naomi is often read at weddings, despite the fact that Ruth and Naomi, as a couple, were neither hetero nor sexual, but instead mother-in-law and daughter-in-law: "Whither thou goest I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God: Where thou diest I will die and there will I be buried."⁸⁸ Although not a sexual affiliation, these vows state the aspirational goals of marriage. Professor Martha Fineman persuasively articulates this vision, suggesting that our understandings of family be retooled to center not around sexual unions but around dependency, mainly between mothers and children.⁸⁹ Legal doctrine increasingly recognizes this pattern. Hawaii and Vermont, for example, both recognize that people can be "reciprocal beneficiaries." This status covers people who are barred from marrying and conveys some rights usually accorded to spouses, such as hospital visitation.⁹⁰ While the two states define reciprocal beneficiary differently, both states include non-sexual affiliates, such as a widowed mother and her adult son.⁹¹ Similarly, some de facto parents under the PRINCIPLES are non-sexual affiliates of the

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

⁸⁵ C. DALLET HEMPHILL, *BOWING TO NECESSITIES: A HISTORY OF MANNERS IN AMERICA, 1620-1860* 185 (1999); BERTRAM WILBUR DOYLE, *THE ETIQUETTE OF RACE RELATIONS ON THE SOUTH: A STUDY IN SOCIAL CONTROL* 13 (1971); STETSON KENNEDY, *JIM CROW GUIDE TO THE U.S.A.* 212 (1959) ("Under no circumstances does interracial etiquette permit you to shake hands with a person of the other race anywhere in segregated territory.").

⁸⁶ HEMPHILL, *supra* note 85, at 27, 191, 200, 203.

⁸⁷ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); see also *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Other states, such as Vermont, Connecticut, and California, recognize many of the rights of marriage through relationships called civil unions and domestic partnerships. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); 2005 CONN. PUB. ACT No. 05-10, An Act Concerning Civil Unions (effective Oct. 1, 2005); CAL. FAM. CODE §297.5 (West, Supp. 2004).

⁸⁸ HOLY BIBLE, BOOK OF RUTH 16-17. The popularity of this material for weddings is evident by its listing at <http://www.ezweddingplanner.com>.

⁸⁹ MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

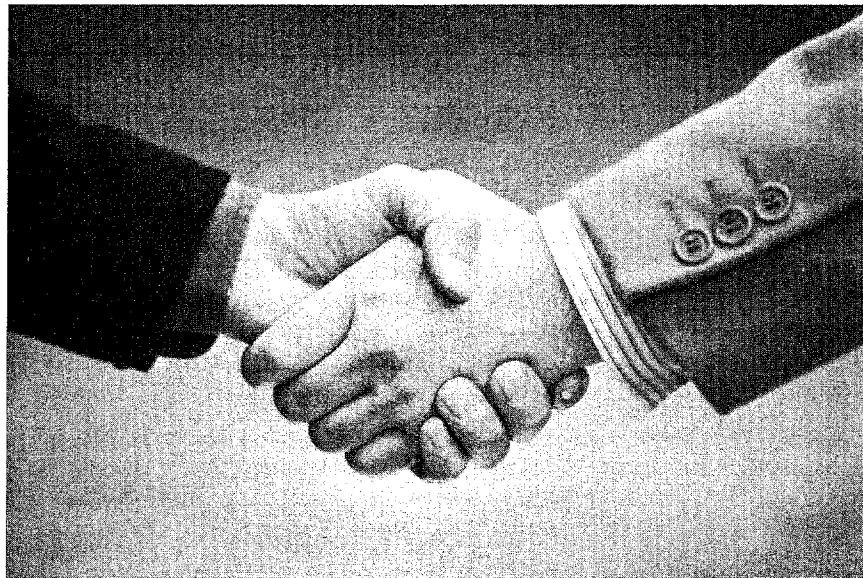
⁹⁰ HAW. REV. STAT. §§ 572C-1-7 (1997); VT. STAT. ANN. tit. 15, §§1301-06 (2002).

⁹¹ In Hawaii, reciprocal beneficiaries are any two people barred from marrying, such as relatives and same-sex romantic partners. HAW. REV. STAT. §§ 572C-1-7 (1997). In Vermont, reciprocal beneficiaries must be barred from marrying and also from entering civil unions (thus precluding same-sex romantic partners from being reciprocal beneficiaries). VT. STAT. ANN. tit. 15, §§ 1301-06 (2002).

legal parents – for example, grandparents caring for their grandchildren in a parent-like relationship.⁹²

Like the plurality of relationships, handshakes take different forms. Cognitive science suggests that most categories include both basic examples and radial examples. For something to be a basic example, there must be other, less central, instances of the same thing. For example “chair” is the basic level example of the category “furniture” because it is the best example of that category – the thing that comes to most people’s mind when asked to give an example of furniture. In contrast, “rocker” is a radial example, a variant of the central category.⁹³ So while “dog” is the basic level example of “animal,” “retriever” is a radial example.⁹⁴ While general categories (furniture, animals) are not characterized by specific images or associated motor actions, people do have an abstract mental image of the basic level example of the category. Thus, people have an abstract image in their mind of a chair that does not fit any particular chair, as well as a general motor action for sitting in chairs.⁹⁵ Radial level examples (rocker, retriever) are too specific to be basic examples of something. Setting aside for the moment the normative problem of seeing one form of relationship as better than others,⁹⁶ Professor Lakoff’s rubric of basic level and radial categories provides a way to understand why contractual ordering of families makes sense. Most interesting, this scheme of basic and radial categories helps explain both why private ordering is a natural metaphor for the family, and why some people resist thinking about family in this way.

The quintessential handshake is the kind of image that might show up in a PowerPoint presentation at a business meeting: two white hands, meeting horizontally, both apparently



⁹² PRINCIPLES § 2.03(c).

⁹³ LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS, *supra* note 12, at 91. Variants are generated one by one, by convention, rather than through general rules. *Id.*

⁹⁴ *Id.* at 46, 51. Lakoff further explains that basic-level categories “are ‘human-sized.’ They depend not on objects themselves, independent of people, but on the way people interact with objects: the way they perceive them, image them, organize information about them, and behave toward them with their bodies.” *Id.* at 51.

⁹⁵ *Id.* at 51–52.

⁹⁶ Of course, labeling something a basic example always raises the spectre giving primacy to it, colluding with systems of invidious discrimination, just as dated definitions of marriage as between persons of the same race spawned the old ban on interracial marriage.

male and equal as indicated by the cuff of a button-down shirt and suit jacket. It is the quintessential handshake because it is the first thing that many people think of when hearing the term “handshake.” It could be described in Professor Lakoff’s terms as a basic category. But being a basic category, the best example of something, does not mean that this quintessential handshake is the only item in the category.

According to cognitive science research, most people agree on what constitutes the basic category for many things. For example, people who are shown 320 paint chips tend to agree that the best example of red is a particular shade that cognitive scientists call “focal red.”⁹⁷ Researchers believe that neurons fire in a particular way in response to focal colors, so that this designation of focal red as the best example of red is determined partly by biology.⁹⁸ Thus, although burgundy is a shade of red, focal red represents the best example of the color.

A rash of statutes and constitutional amendments banning same-sex marriage at both the state and federal level reflect an intense anxiety on the part of many heterosexuals about the definition of marriage.

One can see this anxiety as an investment in the basic category of marriage, and in particular a fear that a radial category, whether same sex marriage or domestic partnership, will destroy that basic category. In the terms of cognitive linguistics, these “defenders” of marriage seek to create a world in which there is only a basic category by abolishing radial categories, the equivalent of outlawing burgundy to protect the special status of focal red, or banning high fives to protect the special status of handshakes. This position cannot withstand scrutiny, at least if one accepts the legal realist premise that law should reflect the way people actually live.

Just as there is more than one shade of red, there is more than one kind of intimate relationship. Handshakes mirror this plurality. There is the high five, there is the neighborhood handshake for urban hipsters, there is the feminine handshake in which one offers only fingers for clasping instead of a whole hand. Children pinky swear.⁹⁹

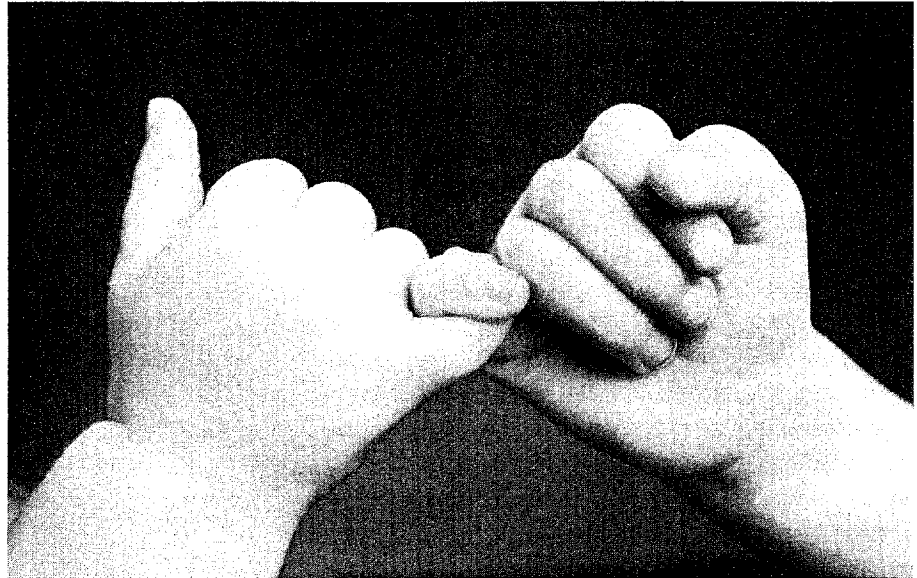
As with relationships, this very plurality is inextricably linked to the basic category.



⁹⁷ LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS*, *supra* note 12, at 26.

⁹⁸ *Id.* at 26–29. The best examples are also determined by culture, as evidenced by the fact that focal colors are not uniform across languages. *Id.*

⁹⁹ Interestingly, pinky swearing is typically done by people who lack contractual capacity, perhaps indicating that pinky swearing is a kind of minicontract.



Basic and radial categories in families further illustrate this point. The basic level example of “mother” is a woman who gives birth and raises a child. Radial extensions of this category include “adoptive mother,” “birth mother,” “foster mother,” and “surrogate mother.”¹⁰⁰ A legal doctrine that recognizes only marriage – ignoring, penalizing, or banning all other relationships – is as woefully inadequate as one that refuses to recognize the unique situations of adoptive, birth, foster, and surrogate mothers. Indeed, legal doctrine regulates these forms of motherhood because ignoring them would create uncertainty and encourage opportunism.¹⁰¹ In short, law has to recognize both basic level and radial categories to provide orderly and principled dispute resolution.

VI. Applying the Private Ordering Elements of the PRINCIPLES

Three recent cases decided by the California Supreme Court illustrate the ways that private ordering, as evidenced in the PRINCIPLES, reflects current trends in domestic relations law.¹⁰² While the court did not cite to the PRINCIPLES in reaching its conclusions, it did recognize that romantic couples can agree to be parents in a range of ways. Because these decisions turn on parties’ agreements and intent rather than marriage or, with one possible exception, biological ties to children, they incorporate private ordering, as much

¹⁰⁰ LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS*, *supra* note 12, at 91. Basic level categories include assumptions. For example, the basic level example of “bachelor” includes assumptions about marriageability and the desire to marry. Thus, John Kennedy, Jr. was often described as a bachelor prior to his marriage, while Liberace and the Pope were not. *Id.* at 70. Legal doctrine can and does regulate both basic and radical categories of motherhood. Carol Sarger, *Separating from Children*, 96 *COL. L. REV.* 375, 491–94 (1996).

¹⁰¹ Even if the state refrains from dictating rights and obligations of, say, surrogate mothers, that silence is a regulation in that it ratifies the state of affairs absent government involvement. Frances Olsen, *The Family and the Market*, 96 *HARV. L. REV.* 1497 (1983). While refusing to enforce cohabitation agreements, along the same lines, might be laissez faire regulation, it also rewards parties with title to property for keeping title in their own name, and punishes those who invest in property without getting title formally changed.

¹⁰² *Elisa B. v. Emily B.*, 117 P.3d 660 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); and *K. M. v. E. G.*, 117 P.3d 673 (Cal. 2005).

as status. A brief review of the cases reveals the natural progression of this line of reasoning, and further that these cases facilitate both equality and plurality, as well as the children's best interests.

In *Elisa B. v. Emily B.*, the court imposed child support obligations on a woman whose former lesbian partner had borne twins while the two were together.¹⁰³ The two women had been inseminated with sperm from the same donor, Emily bearing the twins and Elisa also giving birth to a child. Emily stayed home with all three children, while Elisa (whose income at the time of trial was \$95,000 a year) worked to support the family.¹⁰⁴ One of the twins had Down's syndrome; after the breakup Emily went on public assistance. The court's analysis turned on agreement and conduct reflecting an agreement that both women would be parents to the twins:

A woman who *agreed* to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own, is the children's parent under the Uniform Parentage Act and has an obligation to support them.¹⁰⁵

This focus on agreement, as opposed to marriage or biology, allows contract to supplement and redefine parental status. Status reasoning is hardly absent; the court recognized Elisa as the parent of her former partner's biological children because she acted like a parent. In this way, Elisa's conduct – which might be described as sharing a life together as coparents – gave rise to a set of legal rights and obligations in a similar way that sharing a life together gives rise to a domestic partner relationship under the PRINCIPLES:

All three children were given the same hyphenated surname. As they had planned, Emily stayed home and cared for the three children, while Elisa worked to support the family. Elisa claimed all three children as dependents for tax purposes, and on an application for health insurance, and she described herself in a job interview as the mother of triplets.¹⁰⁶

In short, the California Supreme Court did what it might have done in an analogous contract dispute. Just as contract law binds parties to a contract when their conduct indicates that they believe they have a contract (such as a buyer paying for goods, or a seller delivering goods), even if their standard forms say that they do not,¹⁰⁷ the court held that a woman who agrees to have children with her partner and then engages in parenting functions is treated as a parent under California law. This is not to say that every person who lives with a mother becomes a parent of the child living with them – the California Supreme Court carefully limited the application of its holding to those who wish to become parents by this route.¹⁰⁸ In short, like the PRINCIPLES' provisions on parenthood by estoppel and de facto parenthood discussed above, merely cohabiting is

¹⁰³ *Elisa B. v. Emily B.*, 117 P.3d at 662–64.

¹⁰⁴ *Id.* at 664.

¹⁰⁵ *Id.* at 662 (emphasis added).

¹⁰⁶ *Id.* at 672 (Kennard, J., concurring).

¹⁰⁷ UNIF. COMM. CODE. 2–207 (2003).

¹⁰⁸ *Elisa B. v. Emily B.*, 117 P.3d at 670 (“We were careful in *Nicholas H* therefore, not to suggest that every man who begins living with a woman when she is pregnant and continues to do so after the child is born necessarily becomes a presumed father of the child, even against his wishes. The Legislature surely did not intend to punish a man like the one in *Nicholas H.* who voluntarily provides support for a child who was conceived before he met the mother, by transforming that act of kindness into a legal obligation.”) (internal citation omitted).

insufficient to establish parenthood; there must be some kind of agreement with the other parent before the mother's romantic partner will become a parent.

Had the court refused to recognize that agreement can give rise to a parental relationship, it would have countenanced inequality between partners (giving Emily the power to cut off Elisa's access to the twins, and Elisa the power to cut off financial support), and also harmed the children by depriving them of financial and emotional support from the woman they knew as a parent since birth. Only the principle of plurality, which recognizes that families come to be in various ways, can counteract such opportunism.

Similarly, *Kristine H. v. Lisa R.* involves the California Supreme Court recognizing a lesbian couple's agreement to coparent a child by holding that Kristine, the biological mother, was estopped from denying her former partner's parental status.¹⁰⁹ When Kristine was seven months pregnant, the two women jointly filed a "Complaint to Declare Existence of Parental Rights" in Superior Court to declare that Lisa was "the joint intended legal parent" of the child.¹¹⁰ When the couple separated three years later, Kristine attempted to set aside the stipulated judgment. While the court did not use the language of contract or even intent, the parties could not have entered the stipulation absent an agreement to coparent. Thus its estoppel-based conclusion, based in equity, provides that Kristine was estopped from denying Lisa's parenthood because she agreed to coparent with Lisa and acted in ways that were consistent with that agreement.¹¹¹

In contrast to the first two cases, the third case, *K. M. v. E. G.*, employs status-based reasoning to the extent that it recognizes a genetic mother's parenthood in the face of resistance by the woman, her former partner, who gestated their twins.¹¹² However, contractual reasoning is central to the opinion, since the crucial question is whether a preprinted form on which the genetic mother waived parental rights (and also promised not to have any contact with the gestational mother) trumps the genetic mother having intended to coparent the twins, which she in fact did for the first five years of their lives. In short, the case resolves a conflict between a writing waiving parental rights and years of conduct in which both women acted like parents. Inevitably, contractual reasoning would be central to its conclusion.

K. M. and E. G. undertook to conceive a child through E. G. gestating K. M.'s eggs, intending to raise the children in their common household.¹¹³ The parties disagreed, however, as to whether they intended that they would both be legal parents in that household. E. G. contended that they orally agreed that she would be the sole legal parent, a claim that K. M. denied.¹¹⁴ The strongest evidence supporting E. G.'s claim that K. M. waived her parental relationship to the twins was K. M. having signed the form at the beginning of the IVF procedure waiving her parental rights, which also included the statement "I agree not to attempt to discover the identity of the recipient[.]"¹¹⁵ During the five years they

¹⁰⁹ *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

¹¹⁰ *Id.* at 692.

¹¹¹ *Id.* at 696. ("Kristine then stipulated to entry of a judgment naming Lisa as the child's other parent, obtained a birth certificate naming Lisa as the child's other parent, and co-parented the child with Lisa for nearly two years.")

¹¹² *K. M. v. E. G.*, 117 P.3d 673 (Cal. 2005).

¹¹³ *Id.* at 678.

¹¹⁴ *Id.* ("K. M. contends that she did not intend to donate her ova, but rather provided her ova so that E. G. could give birth to a child to be raised jointly by K. M. and E. G. E. G. hotly contests this, asserting that K. M. donated her ova to E. G., agreeing that E. G. would be the sole parent. It is undisputed, however, that the couple lived together and that they both intended to bring the child into their joint home.")

¹¹⁵ *Id.* at 676. The women's doctors knew that the women were partners. But E. G. swore K. M. to secrecy about the twins' parentage; E. G. claimed she did it because she was the only legal parent, and K. M. claimed she did it because E. G. worried that she would not be recognized as the "real" mother if people knew that K. M. was the

raised the twins together their social circle – friends, their nanny – viewed both women as mothers, although K. M.’s genetic tie to them remained a secret pursuant to E. G.’s request.

The women split up at least in part because K. M. wanted to be recognized as the girls’ genetic mother. The trial and appellate courts refused to recognize K. M. as a legal parent, relying heavily on the form waiver she signed in the hospital.¹¹⁶ The California Supreme Court redefined the question from whether they intended to be legal parents to whether they intended to raise the children together in their common home:

even accepting as true E. G.’s version of the facts (which the superior court did), the present case . . . does not present a “true ‘egg donation’” “situation. . . K. M. did not intend to simply donate her ova to E. G., but rather provided her ova to her lesbian partner with whom she was living so that E. G. could give birth to a child that would be raised in their joint home.¹¹⁷

Intent, a central component of private ordering, was key to this reasoning. The court determined intent in a way that could be dubbed legal realist since it focused on the partners’ intent to raise the children together in a common home, rather than a more legal formalist intent to become legal parents as determined by the hospital’s waiver form. In analysis not so different from that used in a contractual battle of the forms, the court gave greater weight to conduct between domestic partners raising children together than to a waiver of parental rights in the hospital’s preprinted form.¹¹⁸ In short, it paid attention to how the parties actually shared a life together.

These three cases illustrate that the California Supreme Court is heading in much the same direction as the PRINCIPLES, at least to the extent that it recognizes that families come into existence in a range of ways and that coparents’ agreements play a crucial role in distinguishing between family – those who have continuing rights and responsibilities after a romantic relationship sours – and others. Thus contractual reasoning allows legal doctrine to recognize a range of relationships, and in doing so promotes equality within relationships as well as between types of relationships. In addition, it serves the central purpose of family law in protecting children by recognizing functional parenthood and

twins’ genetic mother. To support her claim that they orally agreed that she would be the sole parent, E. G. relied heavily on the consent form. K. M. disagreed, saying she saw the consent form for the first time a few minutes prior to beginning the egg retrieval procedure and viewed the form as “something for the clinic – it wasn’t anything between my partner and me. We were having a family.” Peggy Orenstein, *The Other Mother*, NEW YORK TIMES MAGAZINE July 25, 2004, at 27. The facts support both women’s claims. On the one hand, both women went to every prenatal appointment. K. M. cut the umbilical cord. E. G. proposed to marry K. M. shortly after the birth, and the two exchanged rings under the Christmas tree in a private ceremony. There is evidence that the twins called both women “Mama” and also called K. M.’s parents “Granny” and “Papa.” Moreover, E. G. listed K. M. as a “co-parent” on school forms and both women took the children to pediatric appointments. K. M. took off Fridays to spend with the girls. Both women paid for lessons, haircuts, birthday parties, and child care. On the other hand, E. G. added the children as beneficiaries to her life insurance policy and to her retirement plan, while K. M. did not, though K. M. may not have done this because her health problems may have prevented additional life insurance. K. M. was not listed on the birth certificate, but said that the hospital would not list two mothers. Similarly, K. M. was not listed on the baptismal certificate, nor was she mentioned at the ceremony. Moreover, the twins have Irish names after E. G.’s grandmothers, as well as her last name. But the girls have the two mothers’ names as their middle names.

¹¹⁶ K. M. v. E. G., 13 Cal. Rptr. 3d 136, 146 (Cal. App. 1st. Dist. 2004) (emphasis in original).

¹¹⁷ K. M. v. E. G., 117 P.3d at 679 (citation omitted).

¹¹⁸ UCC § 2–207.

thus protecting children who would otherwise lose not only the emotional relationship of someone central to their formative years, but also financial support.¹¹⁹

VII. Conclusion

The PRINCIPLES do not radically depart from the ways that people form families, nor even from legal doctrine. Rather, they build on a trend to move away from a unitary status and more toward private ordering of intimate affiliation. Doing so is consistent with the way people think about family, grounded as it is in images of handshakes, which in turn account for equality, consent, physical closeness, and plurality. Thus private ordering is as natural as any other conceptual basis for regulating intimate affiliation. Professor Wardle observes in this volume that “if we ignore fault, we are inconsistent with what is happening in people’s lives.”¹²⁰ Similarly, ignoring the range of the way people are living in relationships is inconsistent with what is happening in people’s lives. If the State mandates that there is only one kind of legitimate intimate affiliation, and treats everyone else in other relationships as strangers, it fails to govern all citizens on an equal basis, failing its essential purpose.

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¹¹⁹ One potential downside of contractual reasoning is that it also allows a range of rights and responsibilities to children. See Katherine Baker, this volume (criticizing the PRINCIPLES’ allocation of child support to parents by estoppel but not de facto parents).

¹²⁰ See Wardle, this volume.