

2006

To Err is Human: ART Mix-Ups - A Labor-Based, Relational Proposal

Leslie Bender

Syracuse University, College of Law

Follow this and additional works at: <http://surface.syr.edu/lawpub>



Part of the [Law Commons](#)

Recommended Citation

Iowa Journal of Race, Gender & Justice, Vol. 9, No. 3, Spring 2006

This Article is brought to you for free and open access by the College of Law at SURFACE. It has been accepted for inclusion in College of Law Faculty Scholarship by an authorized administrator of SURFACE. For more information, please contact surface@syr.edu.

“To Err is Human”
ART Mix-ups: A Labor-Based, Relational Proposal*

Leslie Bender**

Any human endeavor is prey to human error. The consequences of human error in the area of assisted reproductive technologies are magnified by our playing in the field of creation of new human lives and lifelong relationships. Stories of assisted reproductive technology (ART) mistakes continue to fascinate the media and popular culture, pain their multiple victims, and haunt the nightmares of ART participants, past, present, and future. Though there are many kinds of mistakes that can arise in these complex processes, this Article focuses on mistakes or mix-ups involving the accidental use of incorrect gametes (sperm, ova, and embryos) during in vitro fertilization (IVF) procedures.¹

*© 2006, Leslie Bender. All rights reserved.

** Board of Advisors Professor of Law, Syracuse University College of Law. I am grateful for the hard work and thoughtfulness of the Journal student organizers of this conference, Professor Shelly Kurtz and his students who drafted the Model Act, and the other conference participants. Students in my Spring 2005 Bioethics and Law class at Syracuse, attendees at my workshop at the 2005 National Women Law Students Association conference, and attendees at my Syracuse University Women’s Studies Program Faculty Speaker’s Series presentation helped me refine my thinking on some of these issues. I am lucky to have one of the country’s top experts in family and children’s law as my colleague and dear friend. Sarah Ramsey unselfishly read through this Article for me on little notice and gave me valuable feedback. My summer 2005 research assistant, Kenneth R. Miller, Class of 2006, helped me clean up this article as an added task to his already full summer schedule. My 2005-6 research assistant, Liza Camellerie, Class of 2006, also lent her talents to editing this article. Dean Hannah Arterian and the Syracuse University College of Law supported this research with a generous summer grant.

I dedicate my continued writing on the children of ART mix-ups to my parents and to “all my children,” however they came to share their lives with mine: Benjamin Saller, Jola Hyjek, Todd England Nicodemus, Rachael Saller Bender, Jonathan Farmer, Nana Sang Bender, and Alida Sang Bender. I am happy to say, neither I, nor any of my children, were the result of a reproductive mix-up, though my children came to my family by various routes. My relationships with each and all of them inspire me to think about parentage issues differently than I would without having them in my life. Despite their vital contributions to my understandings, I freely admit that many of them may not agree with my conclusions in this article.

¹ I use the term IVF broadly to encompass a range of procedures, including procedures involved in hyperstimulation of the ovaries and extraction of eggs, ex utero creation of embryos and transfer of embryos to a woman’s uterus or fallopian tubes (GIFT, ZIFT), intracytoplasmic sperm injection (ICSI),

Susan Buchweitz was accidentally given Robert and Denise B's embryos during IVF.² Donna Fasano was mistakenly given the Rogerses' embryos in addition to her own during IVF.³ In other words, I am focusing on those mistakes where ova are mixed with sperm from the wrong man/donor, the wrong donated ova are mixed with the right sperm, or where one couple's embryos are transferred or implanted into a wrong woman's womb. These mistakes lead to contests over who the parents are or should be, rather than, or in addition to, tort lawsuits for damages. Though these mistakes may provide substantial recovery against the negligent fertility clinic and fertility doctors, those tort lawsuits are not the subject here. This analysis does not include cases where there is criminal conduct, such as when fertility doctor Cecil Jacobson used his own sperm to inseminate 120 women,⁴ or when doctors at University of California, Irvine sold eggs and embryos without the progenitors' knowledge to people in other countries.⁵ Nor does it include mistakes about the wrong sperm where there is no contest over parentage⁶ or when fertility clinics misrepresent their services and fail to adequately control gametes or

other drug treatment regimes to increase sperm motility, and the contemporaneous cryopreservation of the gametes or the subsequent cryopreservation of the embryos. Although preimplantation genetic diagnosis (PGD) can be practiced on the embryo after creation and prior to implantation during in vitro fertilization, I am not including that process in the term IVF.

² Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003).

³ Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

⁴ Unbeknownst to the many, many women that Cecil Jacobson artificially inseminated at his fertility clinic, he used his own sperm, rather than the sperm of anonymous donors as he represented. For more about this situation, see Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 8 n.24 (2003) [hereinafter Bender].

⁵ Stone v. Regents of Univ. of Cal., 92 Cal. Rptr. 2d 94 (Ct. App. 1999). See generally Aimee Welch, *Special Report: When Scientists Kidnap Embryos*, 16 INSIGHT MAG. 20, July 21, 2001; Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 LOY. L.A. L. REV. 381 (1999).

⁶ Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67 (Utah 1998) (involving a fertility clinic using sperm from a donor other than the one selected by the prospective parents).

embryos.⁷ Here I focus on which relationships between the ART-conceived child and the hopeful adults who engaged in the ART process will be recognized in law as parent-child relationships.

Of all the IVF procedures that occur everywhere each year,⁸ very few result in the kinds of horrific mistakes I discuss here.⁹ However, because of the generations-long consequences these mistakes cause, they could, without careful thinking, end up redefining families in ways not rooted in choice, but by happenstance, and sometimes even “force.” Our legal system must find appropriate and *just* ways to resolve the disputes that arise from these mix-ups. The solutions that the law applies must not unwittingly incorporate assumptions or hidden biases that do not inure to the benefit of the children and skew the resolutions in unjust, or even unpredictable, ways for the prospective parents. ART-related mix-ups or mistakes ultimately ask us to consider what the relevant prerequisite(s) for assigning legally recognized parenthood are and what they should be—genetic contribution of gametes, gestational contribution, consent and contract, intent to create a child, intent to rear a child as its parent, existing or pre-existing relationships with the baby/child, the labor of rearing, the parents’ needs, the child’s best interests, social and emotional parenting, economic support, legal adoption, or something

⁷ *Itskov v. N.Y. Fertility Inst., Inc.*, 782 N.Y.S.2d 584 (N.Y. Civ. Ct. 2004); *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. Ct. App. 2000) (involving a fertility clinic that used improperly screened sperm, resulting in a child with a serious genetic disability).

⁸ The Center for Disease Control (CDC) and the Society for Assisted Reproductive Technologies (SART) prepare an annual report of nearly 400 fertility clinics’ success rates and numbers of ART cycles. Dept. of Health and Human Serv.: Ctr. for Disease Control and Prevention, *available at* <http://www.cdc.gov/ART/ARTReports.htm> (last visited Apr. 3, 2006). For example, in 2003, the CDC reports that there were 112,872 cycles, resulting in 48,756 live births in 2003. Dept. of Health and Human Serv.: Ctr. for Disease Control and Prevention, *2003 Assisted Reproductive Technology (ART) Report: Section 1 -- Overview*, *available at* <http://www.cdc.gov/ART/ART2003/section1.htm> (last visited Apr. 3, 2006).

⁹ “Of all the gin joints in all the towns in all the world, she walks into mine,” says Humphrey Bogart in *Casablanca*. *CASABLANCA* (Warner Bros. 1942).

else. They require us to examine this question from a justice, equality, relational, and humanist perspective. They also ask us to examine the roles race and sex biases (and even economic privilege) play in distorting our legal conclusions about who is a parent.

I begin by telling some of the tales of woe that have occurred in this subcategory of ART mistakes involving gamete or embryo mix-ups. In Part II I look at the proposed ART statute created by a group of University of Iowa College of Law students for a class.¹⁰ For those readers not particularly interested in an analysis of the model statute, that section can be skipped without consequences to my argument. Part III briefly analyzes various courts' approaches to the roles of contract, intention, the Uniform Parentage Act and other statutes, and genetics in assigning parenthood. Part III focuses on recent cases only, in part because of the ever-evolving nature of parentage analysis in ART cases by courts. While my core arguments are addressed to ART mix-ups, I test the application of reasoning from other recent ART cases on surrogacy (collaborative mothering), frozen embryos, assisted insemination, paternity presumptions, and child support rulings. Hopefully these analogies do not lead us too far astray, because ultimately ART mix-ups are *sui generis*. If I am successful, my analysis will discredit each of the approaches that courts and commentators have employed and plant the seeds from which I grow a "labor-based, relational" theory of parental rights and responsibilities for mix-up cases in Part IV. This Article does not purport to be a comprehensive analysis of parentage cases, theories, and articles, but rather it is part of a

¹⁰ The Model Act created by the students served as the basis of the ensuing conference and symposium. Symposium, *Creating Life? Examining the Legal, Ethical & Medical Issues of Assisted Reproductive Technologies*, 9 J. GENDER RACE & JUST. (2005).

developing argument for choosing an alternative approach to resolving parentage disputes in cases of ART mix-ups.

I. ART MISTAKE AND MIX-UP STORIES

I offer this quick listing of reported ART mix-ups primarily to illustrate the range of problems that arise and the increasingly frequent rate at which these errors are reported.¹¹ Many of these cases, though clearly not all, are discovered because of mix-ups involving people of different races. When parents give birth to children of races different from their own or from the characteristics of the promised gamete donors, the evidence of the mix-up is frequently clearer at birth to the participants and the reproductive clinic and/or hospital staff than when all the parents and the child are of the same race. In other cases where race is not an issue, the mix-up may be discovered later because of the child's physical attributes, personality traits, talents, genetic diseases, blood type, or because the fertility clinic informs the parties of the error.

For purposes of convenience, and perhaps for the effect of the argument, I will refer to race in the cases below as black and white, even though many of the children may be biracial and should be understood as such.¹² Culturally, in the United States at least,

¹¹ The increased frequency of reporting no doubt correlates with the increased frequency of use of the technologies, not with a greater percentage of incidents of errors.

¹² Use of the terms "black" and "white" does more than inappropriately absorb people who are bi- or multi-racial. It would no doubt be better to use dark-skinned or light-skinned, but that may add to confusion as well, since there are dark-skinned "whites" and light-skinned "blacks," as well as dark-skinned peoples of South Asian and Pacific Island descent, for example. Pilar Ossorio & Troy Duster, *Race and Genetics: Controversies in Biomedical, Behavioral, and Forensic Sciences*, 60 AM. PSYCHOL. 115, 118 (2005) (citing E.J. Parra et al., *Color and Genomic Ancestry in Brazilians*, 100 PROC. OF THE NAT'L ACADEMY OF SCI., USA, 177–82 (2003), and Mark D. Shriver, et al., *Skin Pigmentation, Biogeographical Ancestry and Admixture Mapping*, 112 HUM. GENETICS 387–99 (2003)). Ah, the slipperiness of the concept of race and the "color-coding." In any case, the term black as I am using it here is able to serve as an umbrella for Americans, Caribbeans, Latinos, Africans, Asians, Pacific Islanders, Europeans, and Australians who exhibit dark skin; and the term white can be an umbrella for all of the same groups, who exhibit light skin, without requiring hyphenated terms, such as Italian-American, European-Latino, African-Caribbean, and German-African.

black and white have come to represent polar opposites on the continuum of race. This is especially ironic since Professors E.J. Parra, Mark D. Shriver, and R.A. Kittles, among others, have shown that a large percentage of African-Americans, for example, have at least one “white” forebearer,¹³ and who knows how many whites have black ancestors?¹⁴ These mix-ups no doubt occur in other racial contexts, but I have not found any reported cases of Asian, Latino/a, or Indigenous peoples in these mix-ups. Ironically, all the cases are presented in black and white, even in 2005. I wish it would be that the answers were as legally and ethically “black and white,” but instead we find ourselves enveloped in shades of gray, or more appropriately, pinks and browns.

Professor Cynthia Mabry reports the 1987 case of Julia Skolnick as the first known case of an ART mix-up.¹⁵ Ms. Skolnick, a white woman, wanted to achieve a pregnancy with her deceased husband’s frozen sperm. When she gave birth, she had a “dark-skinned” (black?) child that was clearly the result of a sperm mix-up.

¹³ E.J. Parra et al., *Ancestral Proportions and Admixture Dynamics in Geographically Defined African Americans Living in South Carolina*, 114 AM. J. OF PHYSICAL ANTHROPOLOGY 18, 25 (2000) [hereinafter Parra et al., *Ancestral Proportions*]; Parra et al., *Estimating African American Admixture Proportions by Use of Population Specific Alleles*, 63 AM. J. OF HUM. GENETICS 1839–51 (1998) [hereinafter Parra et al., *Estimating*]; Mark D. Shriver et al., *supra* note 11 (repeating the finding that European ancestry is 18.6% in African-Americans in Washington, D.C.); *see also* JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* xiii (1995).

¹⁴ The Parra and Shriver research groups found that in a population of European Americans in State College, Pennsylvania, there was just under 5% admixture with African and Native American populations. Parra et al., *Estimating*, *supra* note 13; Shriver et al., *supra* note 11. In some ways, the question in the text giving rise to this footnote is nonsensical, since modern science says all people alive today are children of people originally from Africa. *See generally* JONATHAN MARKS, *WHAT IT MEANS TO BE 98% CHIMPANZEE: APES, PEOPLE, AND THEIR GENES* (2002); JOSEPH L. GRAVES JR., *THE EMPEROR'S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM* (2001); MATT RIDLEY, *NATURE VIA NURTURE : GENES, EXPERIENCE AND WHAT MAKES US HUMAN* (2003).

¹⁵ Cynthia R. Mabry, “*Who Is My Real Father?*” – *The Delicate Task of Identifying a Father and Parenting Children Created From an In Vitro Mix-Up*, 18 NAT’L BLACK L. J. 1, 60 (2004–05).

The first heavily media-reported case is the Stuarts, a white couple from Utrecht in the Netherlands, who in 1993 gave birth to twins, one white and one black. It was determined that Mrs. Stuart was the victim of fertility clinic negligence. One of her ova was fertilized by the sperm of a black Dutch Antilles man who was at the clinic at the same time trying to create a viable pregnancy through ART with his wife.¹⁶ Fortunately for the Stuarts, the genetic father of the black twin did not seek legal custody, and the Stuarts are raising the boys together as the brothers that they are.¹⁷

In 1998 Donna Fasano gave birth to one white and one black twin when the embryo of a black couple (Deborah Perry-Rogers and Richard Rogers) was mistakenly implanted in her womb at a New York City fertility clinic (Central Park Medical Services). The black couple brought an action to get assigned exclusive parentage of the black twin. A New York appellate court ruled that Mrs. Fasano, as well as her husband Robert, and even the other twin, were legal, biological strangers to the black twin to whom she gave birth.¹⁸ Fasano and her husband also had their own genetic embryos created and the white twin was unquestionably considered “theirs.” The court interpreted the situation in a way that transformed the white mother’s role into a gestational surrogate for the black couple, even though she intended to bear and raise only her own children. The Rogerses and the Fasanos separately sued the fertility clinic. The Fasanos settled

¹⁶ Geoff Marsh & Tony Brookes, *We Had Black IVF Babies Too UK Couple Not First Whites to Get Wrong Children, Express Can Reveal*, EXPRESS (UK), July 9, 2002, at 6.

¹⁷ For a recent NBC interview of the Stuart family, including the boys, by Ann Curry, see *The Color of Love; Unidentical Dutch Twins Koen and Tuen Stuart’s unusual story of why one twin in black and the other white*, Dateline NBC, 8 AM EST, NBC NEWS TRANSCRIPTS, Sept. 23, 2005.

¹⁸ *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

with the clinic early in the summer of 2004,¹⁹ and the Rogerses reached a settlement on the day of jury selection in September 2004.²⁰ I wrote extensively on this ART mix-up case.²¹

In 2002 there was a publicized mix-up at St. George's Healthcare Trust, south London, when the "'good' embryos from one woman were implanted in a second, and her [the second woman's] embryos were then implanted in a third."²² This fertility unit was later closed.

In February 2003, a British court ruled that the husband in a white couple was not the legal father of black twins born to him and his wife after a sperm mix-up at the Leeds Hospital fertility clinic.²³ Since the sperm of a black man, who was also at the clinic trying to conceive a child with his wife, had been mistakenly mixed with the ova of the woman from the white couple, the white woman and the black man were declared the twins' legal parents.²⁴ The opinion by Dame Elizabeth Butler-Sloss wisely granted custody and parental responsibility to the white couple, but, unfortunately, required the

¹⁹ *Unwitting Surrogate Mom Settles Suit Against Clinic*, KITCHENER RECORD (ONTARIO), July 2, 2004, at A8.

²⁰ *Fasano v. Nash*, 723 N.Y.S.2d 181 (N.Y. App. Div. 2001); Samuel Maull, *Embryo mix-up lawsuit ends*, THE RECORD (N.J.), Sept. 14, 2004, at A04, 2004 WL 59071305; This case was settled with the physicians on the first day of jury selection. *Embryo Mix-up Lawsuit Ends*, N.J. REC., Sept. 4, 2004, at A4.

²¹ Bender, *supra* note 4 (criticizing the court's decision in *Perry-Rogers v. Fasano*).

²² Sarah Hall, *Two Women Given Wrong Embryos in IVF Mix-up*, THE GUARDIAN (London), Oct. 29, 2002, available at http://www.guardian.co.uk/uk_news/story/0,,821239,00.html.

²³ *Leeds Teaching Hosp. NHS Trust v. Mr. & Mrs. A & Others*, [2003] EWHC 259 (QB).

²⁴ Clare Dyer, *Judge backs adoption of IVF mix-up twins*, THE GUARDIAN (London), Feb. 27, 2003, http://www.guardian.co.uk/uk_news/story/0,,903677,00.html; Sarah Lyall, *Whites Have Black Twins in In-Vitro Mix-Up*, N.Y. TIMES, July 9, 2002, at A12. Professor Mabry and Chantal Gill'ard have written extensively on this mix-up. Cynthia R. Mabry, *supra* note 15; Chantal Gill'ard, *Law and Morality in Assisted Reproductive Technology Case Study on the Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others*, 4 J. PHIL. SCI. & L. (Aug. 12, 2004), available at www.psljournal.com/archives/.

white husband to adopt the twins in order to become their legal father.²⁵ This case did not turn out as badly as it could have for the white couple, because the black father did not seek physical custody. Nonetheless, he pursued legal paternity and visitation rights, which drastically disrupts their lives.²⁶ Speculation is that this mix-up may have been the result of a dirty pipette.²⁷ Because this case caused such an uproar a commission was appointed in 2002 to evaluate the IVF centers of the NHS trust. Brian Toft, who spent two years investigating and writing a detailed, nearly 200-page report that was published in summer 2004, came up with more than 100 recommendations to reduce the likelihood of gamete mix-ups and other clinic errors in the future.²⁸

In June 2003 the California Court of Appeals for the Sixth Appellate District ruled about parentage in an embryo or sperm mix-up case.²⁹ Robert B. and Denise B. contracted for some ova from an anonymous donor to combine with Robert's sperm to later be implanted in Denise's womb. The clinic created thirteen embryos for them.

Meanwhile, Susan B., an unrelated single woman, had embryos created at the same clinic

²⁵ A v. B., [2003] EWHC 259 (QB). Had the clinic not made a mistake, the white husband would not have been required to adopt the children in order to be deemed their father.

²⁶ *Id.*

²⁷ These speculations are made in articles cited in note 24, *supra*. A pipette is a glass tube used to select specific sperm for an insemination. If a pipette is not properly cleaned before reuse, it could contain some residue sperm from a different donor.

²⁸ A government Commission on Assisted Human Reproduction, chaired by Suzi Leather, had Professor Brian Toft, a risk analyst, investigate errors at the nation's fertility clinics after the facts of the Leeds clinic mix-up between Mr./Mrs. A and Mr./Mrs B was made public. He found that there were twenty-two 'category A' adverse events reported to the HFEA by British fertility units in the six months leading up to March 2004 and also announced other major errors at the fertility unit in Leeds, such as eleven eggs being inseminated with the wrong sperm and seven embryos being accidentally destroyed. Mike Waites, *Fertility Clinics Blasted for Failings*, YORKSHIRE POST June 22, 2004; *see also* Sarah Boseley, *Secrecy blamed for fertility mix-ups*, THE GUARDIAN (London), June 23, 2004, at 11; *New IVF Bungles*, THE SUN, June 23, 2004; Beezy Marsh, *'Shambles' That Led to Blunders Over IVF Babies*, DAILY MAIL (London), June 23, 2004; Beezy Marsh, *IVF mix-ups raise wrong baby fears*, THE ADVERTISER, June 24, 2004, at 43.

²⁹ Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003).

for implantation in her own womb. Susan B's embryos were created from an anonymous ova donor and an anonymous sperm donor. Susan B. specifically used anonymous donors to protect herself from any risks of paternity or parental claims by others. Susan became pregnant from the implanted embryos and gave birth to Daniel B. in February 2001. Robert and Denise also achieved a successful pregnancy and gave birth to Madeline ten days later. But, the best laid plans in the ART universe can be foiled by human errors.

In December 2001, eighteen months after the mistake, and when Daniel was already eight months old, the fertility doctor told Susan that a mistake had occurred.³⁰ The clinic had accidentally implanted Susan B. with three of Robert and Denise B's embryos. Apparently the same ova donor was used for each couple and due to the mistake, Robert was the sperm donor for both births. Therefore, Susan's son Daniel is the full genetic sibling of Robert and Denise's daughter Madeline. As soon as they learned of the mistake, Robert and Denise sought contact with the boy. Robert brought an action to declare his paternity and Denise to declare her maternity. The appeals court affirmed the trial court's finding that Robert B., a total stranger to Susan B., was the child's father and granted him visitation. However, Denise was found to have no standing in any action involving this child, because she was not the ova donor nor the gestational carrier, and thus, a legal stranger.³¹ Susan B. (Buchweitz) went public with her story in August 2004,³² after she reached a one million dollar settlement with her fertility doctor,

³⁰ *Id.*

³¹ *Id.*

³² Mary Anne Ostrom, *Mom Speaks Out on Embryo Mix-Up*, SAN JOSE MERCURY NEWS, Aug. 3, 2004, at 2.

Dr. Katz.³³ Despite the monetary settlement, Ms. Buchweitz's problems continue as she and Robert battle over parentage, custody, and visitation in family court.³⁴ Joan Ryan of the San Francisco Chronicle reports that a split custody agreement was mediated by a judge in March 2005.³⁵

The dramatic publicity given to Ms. Buchweitz's case prompted some west coast fertility centers specifically to reassure potential patients about the (im)possibility of such a mistake occurring during IVF treatments at their center.³⁶ In March 2005, Dr. Katz's medical license was revoked.³⁷ He had learned of the mistake ten minutes after it happened, but did not tell the parties until eighteen months later when he was threatened by a potential whistleblower.³⁸ The Medical Board refused to entertain his appeal, even though many of his patients rallied to his side.³⁹

In August of 2003, a thirteen-year-old boy, who was the product of a 1988 medically assisted insemination at a British fertility clinic north of London, finally got the proof he had been seeking: he is not, in fact, the child of his purported father who is his

³³ Chris Ayres, *Mother Wins \$1m for IVF Mix-up but may Lose Son*, THE TIMES (London), Aug. 5, 2004.

³⁴ *Id.*

³⁵ Joan Ryan, *Biology, technology in conflict*, S.F. CHRON., Apr. 14, 2005, at B1.

³⁶ See, e.g., Pacific Fertility Center, *Lab Mix-ups and PFC's Approach*, available at https://www.infertilitydoctor.com/fertilityflash/vol2_issue8.htm (last visited Sept. 20, 2005).

³⁷ Mary Anne Ostrom, *Fertility doctor's license revoked for misconduct*, CONTRA COSTA TIMES (Walnut Creek, CA) Mar. 30, 2005, at f4.

³⁸ *Id.* The ethics debate that ensued about whether a fertility doctor who knows about a mistake immediately ought or ought not tell the parties is worthy of another article. In part, Katz argued that if no one knew, everyone was better off. Susan would have gotten what she wanted, Robert and Denise would have gotten what they wanted and there would have been no dispute over parentage to disrupt all their lives. Mary Anne Ostrom, *Doctor Recounts Embryo-Mistake Drama: Fertility Expert Says 'Wrong Judgment' Led Him to Deceive Two Pregnant Women*, SAN JOSE MERCURY NEWS, Jan. 13, 2005.

³⁹ Mary Ann Ostrom, *California Medical Board Revokes License of San Francisco Doctor for Misconduct*, SAN JOSE MERCURY NEWS, Mar. 30, 2005, at B.

mother's former husband. His mother was supposed to have been inseminated with her husband's sperm. The parents were divorced when the boy was young, and the father went to court to get access to his son. The boy felt he was very different from the man who was believed to be his father and wanted DNA tests done. It took years and eighty hearings. Finally, a court ordered the DNA tests that proved there had been a sperm mix-up at the clinic.⁴⁰ Someone else is the boy's biological father.

In October 2003, Liverpool Women's Hospital admitted that a group of ova/embryos had been exposed to sperm from the wrong men.⁴¹

In June 2004 a jury awarded Kelly Chambliss \$85,000 in compensatory and \$350,000 in punitive damages against a fertility clinic that had inseminated her with the wrong sperm in 2002 in North Carolina.⁴² The fertility clinic challenged the award of punitive damages. A North Carolina Court of Appeals ruled in March 2006 that "'sufficient evidence existed' to support the award of punitive damages."⁴³

In July 2004 Laura Howard, an African-American nurse from Trumbull, Connecticut, filed suit against her fertility doctor's clinic/office for fertilizing her egg with the wrong person's sperm. Rather than her fiancé's sperm, she was possibly impregnated with the sperm of one of two white couples who were also at the doctor's

⁴⁰ Angelique Chrisafis, *Boy, 13, in IVF mix-up, wins six-year fight*, THE GUARDIAN (London), Aug. 23, 2003.

⁴¹ Chris Ayres, *Mother Wins \$ 1M for IVF Mix-Up but May Lose Son*, THE TIMES (London), Aug. 5, 2004, at 3.

⁴² Cheryl Welch, *Jury Awards \$435,000 to Plaintiff*, STAR NEWS (Wilmington, N.C.), June 29, 2004, at 1A.

⁴³ Cheryl Welch, *Sperm-lawsuit award upheld; But attorney for clinic, nurse practitioner says they'll appeal*, STAR NEWS (Wilmington, NC), March 9, 2006, at 1A, 4A.

office that day.⁴⁴ Although the doctor told her about the mistake almost immediately, she decided not to take the morning-after pill because she had been desperately trying to get pregnant for so long.⁴⁵ She brought a lawsuit for, among other things, access to information about the possible sperm donor's health.⁴⁶ During her pregnancy, Ms. Howard's fiancé, an African-American lawyer, declared his unwillingness to raise another man's child.⁴⁷ In January 2005 Ms. Howard gave birth to a healthy baby boy.⁴⁸ DNA testing that month revealed that her fiancé was, in fact, the father, to everyone's relief.⁴⁹

England is not the only part of Europe reporting these mix-ups. In addition to the Leeds Hospital case of *A. v. B.*, discussed above, in August 2004 there was a report of IVF errors giving women babies by the wrong men in Scotland.⁵⁰ In September 2004, it became public that an Italian woman in a white couple gave birth to twins with dark skin following fertility treatment four years ago. Three couples received treatment on the same day. Recent DNA tests have confirmed that the biological father of the twins is a North African man.⁵¹ This news came a few days after a newspaper reported that in

⁴⁴ *Experts Troubled by Case of Woman Who Says She was Given Wrong Sperm*, WOMEN'S HEALTH WEEKLY, Aug. 5, 2004, at 99.

⁴⁵ Daniel Tepper, *Fertility Doctor Admits Mistake in Sperm Mix-Up*, CONN. POST, July 15, 2004.

⁴⁶ Avi Salzman, *Looking for Answers After a Mistake At the Start of Life*, N.Y. TIMES, July 25, 2004, at 14CN.

⁴⁷ *Wrong Sperm Produces Baby*, THE RECORD (N.J.), Jan. 12, 2005..

⁴⁸ *Id.*

⁴⁹ Rita Delfiner, *'Wrong' Sperm Right – Fiancé Is Real Dad After All*, NEW YORK POST, Jan. 25, 2005, at 25.

⁵⁰ Ian Johnston, *IVF Errors Give Women Babies By Wrong Fathers*, THE SCOTSMAN, Aug. 6, 2004, at 6.

⁵¹ Sophie Arie, *Italian IVF Blunder Fuels Fertility Law Row: White Couple Seeks Damages after Alleged Egg Mix-Up*, GUARDIAN FOREIGN PAGES, Sept. 7, 2004, at 14.

Turin, Italy, two couples were given the morning-after pill half an hour after one of the couples noticed that the sperm used had another man's name on it.⁵²

ART mix-ups will continue to happen. Courts and legislatures must help the victims of these mistakes deal with the parentage issues. Clear rules in advance of the mix-ups appear to be the best method to help, since they may reduce family court contested parentage battles.

II. PROPOSED MODEL ACT'S PROVISIONS REGARDING PARENTAGE

I commend the drafters of the Model ART Act (hereinafter Model Act) for the fine effort they made in producing their first public draft of this Act.⁵³ They have conceived a statute that settles many areas of dispute that arise from the use of ARTs and collaborative reproduction (surrogacy). Unfortunately, the proposed Model Act fails to address what is and will be the ever-growing category of children and parents whose legal relationships are confused by traumatizing fertility clinic and medical mix-ups. This Part will comment generally on what the Model Act does and does not do in cases of parentage and "future reproduction" disputes. I urge the drafters of this Act, and legislatures in all states that may consider this Model Act, to revise some of the Act's provisions in order to accommodate concerns raised in this Part. I also urge inclusion of an additional, separate article specifically addressing issues of parentage in ART mix-ups. This proposed new article can supplement the Model Act, the Uniform Parentage

⁵² This Italian situation mirrors a case from 2002 at London's St. George's Hospital in which two women were given the wrong embryos during IVF procedures and required medical procedures to prevent pregnancies. *See supra* text accompanying note 20.

⁵³ Sara Cotton, et al., MODEL ASSISTED REPRODUCTIVE TECHNOLOGY ACT, 9 J. GENDER, RACE & J. (2005) [hereinafter Model Act].

Act (2000, revised 2002), or other laws regarding parentage that a state adopts. Thoughts about framing the needed additional article are addressed in Part IV.

The Model Act borrows from, but ultimately substitutes for, the revised Uniform Parentage Act (UPA),⁵⁴ which replaced the Uniform Status of Children of Assisted Conception Act⁵⁵ and the original UPA.⁵⁶ Unfortunately, states have been slow to adopt or utilize the revised Uniform Parentage Act.⁵⁷ The absence of legislation continues to vex courts who are forced to decide disputes between parties engaging in ARTs, including disputes about legal, “natural” and biological parentage, inheritance rights, posthumous conception, custody and visitation, child support, collaborative reproduction contracts, surrogacy, and more. Courts and commentators have repeatedly pled with legislatures to address these issues.⁵⁸ The student drafters take us a long way towards

⁵⁴ UNIF. PARENTAGE ACT (2002), *available at* <http://www.aaml.org/Articles/200011/UPA%20FINAL%20TEXT%20WITH%20COMMENTS%20.htm>.

⁵⁵ UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988), *available at* <http://www.law.upenn.edu/bll/ulc/fnact99/uscaca88.htm> (last visited Sept. 20, 2005).

⁵⁶ UNIF. PARENTAGE ACT (1973), *available at* <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa7390.htm> (last visited Sept. 20, 2005).

⁵⁷ The UPA (2000) has only been adopted in four states, although the 1973 version has been adopted in whole or in part in over fifteen. Juli Ann Aylesworth, *East vs. West: An Analysis of Connecticut and California Law Regarding Relationships Between Children and Those Who Function as Their Parents*, 23 QLR 1107 n.280 (2005). The ABA House of Delegates approved the UPA at their mid-year meeting in February 2003. Memorandum from Ernest Gelhorn & Judith Kaleta to Council, Section of Administration Law and Regulatory Practice (Feb. 21, 2003) (Report of the ABA Midyear Meeting), *at* http://www.abanet.org/adminlaw/spring2003/councilagenda/tab_3.doc (last visited Apr. 3, 2005).

⁵⁸ *In re C.K.G.* 173 S.W.3d 714 (Tenn. 2005)

(“Given the far-reaching, profoundly complex, and competing public policy consideration necessarily implicated by the present controversy [issue about maternity in case where couple had triplets using assisted reproductive technologies] we conclude that crafting a general rule to adjudicate all controversies so implicated is more appropriately accomplished by the Tennessee General Assembly... The General Assembly is better suited than the courts to gather data, to investigate issues not subject to current litigation, and to debate the competing values and the costs involved in such an issue as deciding whether generally to subject procreation via technological assistance to governmental oversight, and if so, to determine what kind of regulation to impose....Even courts which

solving many of these legal problems and make some marked improvements over the UPA, particularly in terms of gender-neutrality and accounting for nontraditional families of any sexes.

The Model Act prefers that all aspects of reproductive technologies between gamete donors, prospective parents,⁵⁹ and health care providers⁶⁰ be governed by the parties' consent and forethought, as memorialized in written contracts.⁶¹ This contract approach arguably may be the correct way to decide disputes that do not involve mix-ups. If a contractual approach is adopted in a particular jurisdiction, then these statutorily required, contractually binding provisions could become a powerful mechanism for

have crafted and applied the intent and genetic tests have been cognizant of the need for legislative action concerning technologically assisted human reproduction." *Id.* at . (See footnote 10, citing other courts' calls for legislative action.)

J.F. v. D.B., 66 Pa. D. & C.4th 1, 12, (Pa. Com. Pl. 2004) ("Unfortunately, H.B. 527 succumbed to the fate of several predecessors and died in judiciary committee Without an actual surrogacy statute in place, however, the court can only strongly urge the legislature to address the issues as soon as possible to prevent more complicated cases such as the one at bar."); *In re Parentage of A.B.*, 818 N.E.2d 126 (Ind. App. 2004) ("We encourage the Indiana legislature to help us address this current social reality by enacting laws to protect children who, through no choice of their own, find themselves born into unconventional familial settings." *Id.* at 131). The Court in *In re O.G. M.* stated:

This is a case of first impression without any statutory or precedential guidance. Because of the complexity of potential legal issues arising from the *in vitro* fertilization procedure, we will give deference to the Texas Legislature to enact legislation deciding the rights of parties involved in the *in vitro* fertilization process.

988 S.W.2d 473, 475 (Tex. App. 1999)

See, e.g., Tim R. Schlesinger, *Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support*, 61 J. Mo. Bar 22, 28 (2005) ("Thus far, every court that has been forced to deal with these issues has done so without guidance from the legislature. Hopefully, the Missouri legislature can give its citizens the guidance they need to make intelligent decisions about having children through assisted reproductive technologies.").

⁵⁹ Prospective parents are specifically defined in the Model Act at Article 1 (9):

'Prospective parent' means an individual who intends to be a parent at the time an assisted reproductive technology contract is entered into and has not subsequently relinquished the control of the gamete or embryo.

⁶⁰ Including fertility clinics. MODEL ACT, art. 4.

⁶¹ MODEL ACT, art. 4, 5.

resolving certain kinds of ART disputes.⁶² However, in certain parts the Model Act does not live up to its promise of implementing ART participants' intentions. Those parts would have to be modified before a legislature adopts them.

Even if the preconception contract was completely valid and the consents were voluntary and informed, the Model Act provides a parentage “out” for all prospective parents⁶³ and a reproductive “out” for most of the contract signatories who later change their minds prior to the introduction of gametes or embryos into the recipient.⁶⁴ This serious defect in the Model Act undermines the emphasis on the parties' intent as recorded in written contracts, even those contracts that anticipate the dispute at issue. For example, the Model Act privileges genetic prospective parents over nongenetic prospective parents in the event of a dispute over embryos.⁶⁵ I suggest that section 805 be amended to eliminate the “get out of jail free card” for any prospective parent who signs a contract that contemplated the kind of dispute the parties are experiencing. My critique is based on concerns about the Model Act's making the “advanced directive” contractual promises illusory and violating its own asserted preference for implementing the parties' intent.

⁶² See, e.g., *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (enforcing a written contractual preconception agreement about what to do with frozen embryos if the parties divorce and do not agree, even though the agreement no longer reflected the desires or preferences of either party).

⁶³ MODEL ACT, art. 4, § 403 (b): “A health care provider or a prospective parent may unilaterally revoke the assisted reproductive contract at any time prior to the introduction of gametes or embryos into the recipient.”

⁶⁴ I say “most” instead of “all,” because the Model Act, section 805(a)(1) does make the contract binding on both gamete-contributing prospective parents who anticipated the kind of dispute that arises and addressed the agreed-upon resolution in the contract, even if one of the parties later changes his or her mind prior to implantation of the embryo.

⁶⁵ MODEL ACT, § 805(2). The Model Act also privileges self-donors of gametes because they have the statutory right to unilaterally revoke their consent to use of their gametes at any time and without regard to the contractual commitments. *Id.* at § 804, comments to § 404.

Section 805 (a) of the Model Act declares that:

{[I]n the event any prospective parent provides a health care provider with notice in a record of a dispute between prospective parents concerning the disposition of embryos:

- (1) ... the health care provider shall not permit the embryo to be gestated unless the dispute is resolved by agreement or death of one prospective parent;
- (2) if only one prospective parent contributed genetic material to the embryo, the parent contributing genetic material controls the disposition of the embryo; or
- (3) if neither prospective parent contributed genetic material to the embryo, the health care provider controls the disposition of the embryo.⁶⁶

In subparagraph (2) of this section, the Model Act transforms otherwise enforceable and clear contractual agreements into unenforceable promises by giving a gamete donor a complete veto over use of the embryos for reproduction by the non-genetic prospective parent, if that gamete donor changes his or her mind.⁶⁷ Perhaps it is not surprising that students at the University of Iowa would craft a statute that reflects the sentiments of the Iowa Supreme Court as expressed in *In re Marriage of Witten*,⁶⁸ that public policy would be violated if an agreement to procreate is enforced after one party has changed his/her mind.

We think judicial decisions and statutes in Iowa reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values. They also reveal awareness that such decisions are highly emotional in nature and subject to a later change of heart. For this reason, we think judicial enforcement of an agreement

⁶⁶ MODEL ACT, § 805(a).

⁶⁷ Several recent commentators have criticized courts for making similar rulings on the grounds that revocability renders impotent frozen embryo use and disposition contracts. See, e.g., Sara D. Petersen, *Dealing with Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065 (2003); Fazila Issa, *To Dispose or Not to Dispose: Questioning the Fate of Preembryos After a Divorce in J.B. v. M.B.*, 39 HOUS. L. REV. 1549 (2003); Nanette R. Elster, *Assisted Reproductive Technologies: Contracts, Consents, and Controversies*, 18 AM. J. OF FAM. L. 193 (2005) (recommending that contracts be even clearer about controversial points so they can be enforced by courts).

⁶⁸ *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

between a couple regarding their future family and reproductive choices would be against the public policy of this state.⁶⁹

Several courts have done the same thing, giving gamete donors complete veto power over use of embryos if they change their mind, by relying on a public policy against forced reproduction and a constitutional right not to procreate.⁷⁰ In a recent article extensively documented with social science literature, Ellen Waldman makes powerful arguments discrediting the courts' reliance on "the myth of coerced parenthood" to prevent one prospective parent's post-divorce use of frozen embryos created during the marriage.⁷¹ She argues that data, studies, and anecdotal experience show that many fathers who are no longer in a romantic relationship with the children's mother and most sperm donors do not develop psychological, parental attachments to their biological children, so to give presumptive weight to the "myth of coerced

⁶⁹*Id.* at 782.

⁷⁰ *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) ("[S]ubject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo."); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000) ("[P]rior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions"); see also *id.* at 1056-57; *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992)

("For the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation. Undoubtedly, both are subject to protections and limitations. *See, e.g., Prince v. Mass.*, 321 U.S. 158 (1944) (finding that parental control over the education or health care of their children is subject to some limits); *Roe v. Wade*, 410 U.S. 113 (1973) (finding that the states' interests in potential life overcome the right to avoid procreation by abortion in later states of pregnancy).

The equivalence of and inherent tension between these two interests are nowhere more evident than in the context of *in vitro* fertilization. None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here.")

These courts allude to the weighing of constitutionally protected rights to procreate and to not procreate, with the "right not to procreate" always being weightier.

⁷¹ Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021 (2004).

parenthood” is misguided.⁷² She also challenges the courts’ claims that women who were intended parents of these frozen embryos have realistic options for reproductive alternatives.⁷³ If contracts, as the written embodiments of the parties’ intentions going into the embryo creation and preservation processes, cover future events like dissolution of the relationship, yet do not equally bind the prospective parents in cases of such disputes, it is hard to understand the Model Act’s claim to promote prospective parents’ intentions above all else. The New York Court of Appeals said as much in 1998 in *Kass v. Kass*:

[It is] particularly important that courts seek to honor the parties’ expressions of choice, made before disputes erupt, with the parties’ over-all direction always uppermost in the analysis. Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree.⁷⁴

It is not only the gamete donors who are given decisional authority to prevent reproductive use of the embryos. If neither prospective parent is a gamete donor, but they have had created embryos with an initial intention of creating a child, a dispute over the embryos removes decision-making authority from the intended parents and grants it to a health care provider.⁷⁵ This is true even if the contract terms contemplated the circumstances that gave rise to the dispute. The comments to this section note that the

⁷² *Id.* at 1040–54.

⁷³ *Id.* at 1052–56.

⁷⁴ *Kass v. Kass*, 673 N.Y.S.2d 350, 696 N.E.2d. 174, 180 (N.Y. 1998). The most recent case on a frozen embryo dispute was decided by a Texas intermediate appellate court. In *Roman v. Roman*, No. 01-04-00541-CV, 2006 WL 304922 (Tex. App.-Hous., Feb. 9, 2006), the court resolves the dispute by resorting to the “clear” terms of the contract with the IVF clinic.

⁷⁵ MODEL ACT § 805(a)(3).

health care provider is statutorily permitted to give the embryos to an infertile prospective parent, but need not do so.⁷⁶ In that case, the intention of the prospective parent who still desires to use the specially created embryo is slave to the health provider's unbridled and liability-proof discretion.⁷⁷ In essence this will often give one prospective parent, who changes his or her mind and creates a dispute over an embryo genetically unrelated to the couple, power to prevent the other party from achieving his/her contractually recorded intention to reproduce. Why should the contract not bind both prospective parents, at least with respect to the option to reproduce, the *raison d'être* for the contract in the first place? This provision is flawed in the same way and for the same reasons as the sections challenged in the previous paragraph.

If the parties do not change their minds and continue with the reproductive processes as planned, the prospective parents who intend to become the parents of the child become the legal parents.⁷⁸ This is absolutely the correct result. People who intentionally create children should be their legal parents, regardless of genetics or divorce or later changes of heart.⁷⁹ "Adults are in the position of making decisions to

⁷⁶ *Id.* § 805 cmt. (3).

⁷⁷ *Id.* § 805(b).

⁷⁸ *Id.* § 801. This is the same result that is dictated by the revised UPA (2000) (amended 2002), at least for fathers, in Article 7:

SECTION 703. PATERNITY OF CHILD OF ASSISTED REPRODUCTION.

A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.

The Model Act is an improvement upon the UPA section above because of its gender-neutrality. This improvement permits lesbian co-parents, non-biological co-parents, and single nongenetic, intending parents in gestational surrogacy contexts to consent to assisted reproductive technologies and thereby become legal parents.

⁷⁹ *Accord*, *Buzzanca v. Buzzanca*, 61 Cal. App. 4th Supp. 1410 (Cal. Ct. App. 1998) (finding nongenetic father and nongenetic mother of children born to a gestational mother to be the legal parents based on their intention to create the children).

create children and thus to create children’s dependency—decisions in which the children at issue can play no part. Accordingly, it is appropriate to hold adults responsible for the children.”⁸⁰ Elizabeth Bartholet further instructs that children have deep needs for nurturing and permanency, giving rise to concomitant duties or responsibilities of parents who created them to meet those needs.⁸¹ Whether or not the legal parents cohabit, the permanence of identifiable parents in lifetime relationships with children is essential. This Model Act, by automatically giving parental status to nonbiological, intentional parents once the child is born, prevents many of the grave injustices that have resulted from finding co-parenting partners of genetic progenitors to be legal strangers.⁸²

The Model Act is a significant improvement over some parts of the UPA. It also has flaws that make some of its provisions contradict its overriding principle of enforcing preconceptual intent. Before adopting this legislation or something similar, legislatures should make the changes recommended here.

III. STATUTORY AND COMMON LAW INADEQUACY IN ART MIX-UP CASES

The approaches in the proposed statute cannot be extended to mix-up cases, and the current approaches in the common law cannot be justly applied to mistake cases either. This leaves a significant gap in law’s response to ART mix-ups. Part III discusses

⁸⁰ Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L. J. 323, 340 (2004).

⁸¹ *Id.* at 337.

⁸² *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 790 (Cal. App. Ct. 6th Dist. 2003), (finding Robert B’s wife, Denise, to be a legal stranger to the child born of the embryo that they together created); *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (finding that despite lesbian co-parents’ agreement to create a child using ARTs, the former domestic partner of the biological mother was a legal stranger and could not be required to provide child support).

the dominant approaches to parentage created through collaborative, assisted reproduction—contract, intent, UPA, and genetics—and explains why each fails to achieve justice in mistake cases.

A. *Contract*

Traditional contract notions obviously cannot be applied to mistake cases. Whatever contracts each of the progenitors or prospective parents had between or among themselves, those contracts are unlikely to successfully govern ART mix-ups where embryos, eggs or sperm are negligently implanted in the wrong uterus or gametes are negligently handled so that they are mistakenly given to the wrong parties. Because the victims of these mistakes are unknown to each other, there can be no “meeting of the minds.” There is no offer, acceptance, consideration, nor breach of promise. To call victims of a clinic’s negligence third-party beneficiaries to the other couple/donor’s contract with the clinic makes a mockery of the concept. Worse yet would be application of equitable doctrines such as unjust enrichment, that insinuate wrongdoing/injustice on the part of the “unjustly enriched” party.⁸³

Two possible ways that contract terms could be legislatively imposed to govern resolution of mix-up cases are a choice-of-options approach or a mandated result approach. These contract terms, under either option, would have to be mandatory parts of clinic informed consent forms. However, if the terms are mandated, it is harder to understand these clauses in terms of contract law rather than regulation.

The Model Act could require health care providers to address the possibility of a mix-up in the consent forms that prospective parents must sign in order to participate in

⁸³ How can victims of negligence become unjustly enriched? At best their damages might be mitigated.

assisted reproductive technologies. The consents could require prospective parents to select among proposed parentage options in the event of a mix-up or mistake.

Theoretically, if the contractual alternatives selected by all parties to the mistake are, by some amazing coincidence, compatible, then the consents could control the resolution of any dispute (even if a party later changes his or her mind). For example, the consent forms can include a subsection devoted to clinic mix-ups or uses of wrong gametes or embryos. The consent form section can begin:

As a prospective parent utilizing assisted reproductive technologies offered by this health care provider, I realize that despite a health care provider's best efforts, mistakes are possible. I acknowledge that through negligence, recklessness, intent, criminality, or some outside force, my gametes or the gametes I receive may not be used as planned.

Then the consent provision can permit the prospective parent to check any of the appropriate options in subparagraphs 1 and 2:

1. In case I am mistakenly given the wrong gamete or wrong embryo:
 - a. I do not ever want to be told about the mistake. I want to continue the pregnancy and give birth to the child(ren), in accordance with the contract provisions, as if there had been no mistake.
 - b. I want to be told about the mistake as soon as it is realized, but I want to be given the choice to continue the pregnancy or implantation, based on anonymous information about the mistaken gamete providers' health and characteristics. I do not want the mistake reported to the gamete donors at all.
 - c. I want to be told about the mistake as soon as it is realized, but I only want to continue the pregnancy if the mistaken gamete donor will have no parental rights and make no legal claims to the child.
 - d. I want to be told about the mistake and want an opportunity to discuss our options with the other parties to the mistake before I make a final decision about what to do.
 - e. I want to be told about the mistake as soon as it is realized and I want to share custody and visitation with the gamete donors.
 - f. I want to be told about the mistake as soon as it is realized and I want to terminate the pregnancy (even if one of the gametes was mine) or destroy the embryo if it was formed using my gametes.

- g. I want to be told about the mistake as soon as it is realized and I want to carry the child to term, but relinquish all parental rights when the child is born.
 - h. I do not want to be told about the mistake until after the child(ren)'s birth. Then I would like to follow option 1 (__) above.
2. In case my gamete or embryo is mistakenly given to someone else:
- a. I do not ever want to be told about the mistake and do not want any relationship or responsibility for any child(ren) who may be born.
 - b. I want to be told about the mistake as soon as it is realized, and I want sole legal custody of any resulting child(ren).
 - c. I want to be told about the mistake as soon as it is realized, and I want visitation rights, but not custody, of any resulting child(ren).
 - d. I want to be told of the mistake as soon as it is realized, and I want to be guaranteed that I will have no parental rights or responsibilities for the resulting child(ren).
 - e. I want to be told of the mistake as soon as it is realized and to have no parental rights or responsibilities for the child(ren), but I want to be declared the parent on the birth records. I agree to terminate my parental rights immediately after the birth is recorded.
 - f. I want to be told of the mistake as soon as it is realized and to have no parental rights or responsibilities for the child(ren), but I want the resulting child(ren) to be told about me and how to reach me if they so desire.
 - g. I want to be told about the mistake and want an opportunity to discuss it with the other parties to the mistake before I make a final decision about what to do.
 - h. I want to be told about the mistake as soon as it is realized and I want the other party to terminate the pregnancy immediately.
 - i. I do not want to be told about the mistake, even if it is not realized earlier, until after the birth of the child(ren). Then I want to follow option 2 (__) above.

Subparagraph 3 of this section should notify the prospective parent that the options selected by him/her are binding and irrevocable after a mistake has been made, unless the options selected by all the prospective parents victimized by the mix-up are not compatible. In the event that the options are incompatible, the health care provider will immediately notify a court about the dilemma, and the court will have jurisdiction to resolve the dispute as quickly as possible. Subparagraph 4 should make clear that a

prospective parent victimized by a mistake does not relinquish any right or remedy against the health care provider for harms caused by the mistake. This choice-of-options alternative is excessively long, complex, and unlikely to succeed. Its major virtue is that it appears to preserve the idea that the parties are able to choose what they want as part of their contract.

A mandated-result contractual approach, which does not allow for prospective parent choices of options, would require all consents and contracts with IVF clinics to contain a conspicuous clause (in a required large font and red ink) that clearly informs the signers about what exact terms they are agreeing to in the event of a gamete or embryo mix-up. For example, the consent form could declare that:

In the event of an embryo or gamete mix-up or mistake, the woman who gestates the embryo and gives birth to the child is the legal mother, and her partner, if any, is the other legal parent of the child. The gamete donors do not have any parental rights or interests in the child and waive any rights to pursue actions for the declaration of parentage, custody or visitation.

This mandated result clause, whether the result mandated is as proposed above or different, would be most effective if the law only deems the contract/consent valid when all the signers write out the clause in free hand and sign it specially. A clear contract clause in the consents that each of the parties writes out manually can at least put the parties on notice about what will happen if there is an error.

Each of these suggested contractual approaches requires tinkering and input from others, but they are examples of what might be possible if a legislature chooses to address ART mix-ups through laws governing contractual agreements and/or informed consents. The best reasons to employ this contractual methodology are that it forces prospective parents to contemplate the consequences of a mix-up before engaging in ARTs, and if the

options are made binding, as they should be, it indicates the parties' intent while they are thinking most rationally, in advance of any mix-up. Parties who cannot agree to these terms can opt out of the treatment process before the embryos are created or the gametes are provided, and in that way avoid any possible mix-up with its contractual, or consented-to consequences.

On a more practical note, it is unlikely that health care providers will voluntarily use informed consent forms that raise contested issues of parentage in the event of a mistake or mix-up of gametes during the assisted reproduction. No fertility clinic wants to highlight these relatively rare events. Legislatures would have to require the inclusion of these contractual clauses in all fertility clinic informed consent forms. In the choice-of-options approach, it is even more unlikely that the consent forms signed by each of the prospective parents with an interest in the gametes or embryos will be completely compatible, so as to resolve the question of what the health care provider or a court should do in the event of a mix-up. Nevertheless, this preliminary options list indicates a second method that a legislature hoping to maximize parental intent might employ, if it decides to offer a contract regime for resolving parentage disputes in cases of ART mistakes.

Right-not-to-procreate and change-of-mind concerns that have convinced some courts not to enforce contracts in divorce-related frozen embryo disputes⁸⁴ are not relevant, because in ART mix-up cases, a pregnancy is already in progress or has resulted in a child. The only private party with the right to choose to procreate or not to procreate

⁸⁴ A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); In re Marriage of Witten, 672 N.W. 2d 768 (Iowa 2003).

at that point in time is the pregnant woman.⁸⁵ The reasoning in collaborative reproduction contract enforcement cases (surrogate contracts) brought against or by gestational or traditional mothers is not relevant either, because in collaborative mothering cases, the parties all intentionally created the situation in which they later found themselves. The parties made promises to one another that courts are being asked to enforce.⁸⁶ In mix-up cases, the parties did not know each other, did not make promises to one another, and did not intentionally create the situation.

B. Intent Standard

If the prospective parents do not reduce their intent to a written contractual form but still use a form of ART to create a child, many courts employ common law rules that define parentage by intent. Use of an intent standard in cases of disputed parentage of children of ARTs is typically attributed to Professor Marjorie Schultz⁸⁷ and the California court's approach in *Johnson v. Calvert*, where "intent to parent" was deemed the decisive factor in selecting a single legal mother from two women with biological (gestational or genetic) connections to the child.⁸⁸ In a later California case, *In re Marriage of Buzzanca*, "intent to parent" children created through ARTs was sufficient to find that a divorced couple were the legal parents of the children born to a commercial gestational mother, even though neither the man nor the woman in the couple was biologically

⁸⁵ *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833 (1992).

⁸⁶ *See, e.g., R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998) (refusing to enforce a traditional surrogacy contract and instead applying adoption law to give mother time for reconsideration); *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

⁸⁷ Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990).

⁸⁸ *Johnson v. Calvert*, 851 P.2d 776 (Cal.1993).

related to the children.⁸⁹ A growing body of case law has used “intent to parent” in cases of disputes about custody, visitation, or child support for children created by ARTs.⁹⁰

Mutual intent to create a child through ARTs and coparent (bring child into one’s home and assume the responsibilities of parenting) was a touchstone of recent state highest court decisions finding former domestic partners to be legal parents.⁹¹ In August 2005 the California Supreme Court decided three companion cases about parentage disputes between former lesbian couples who had functioned as coparents of children they created using ARTs.⁹² Though the circumstances and reasoning of each case differ, and the decisions are each fact-specific, the Court seems to rely heavily on the parties’ mutual intent to conceive the child and to coparent. For example, in *K.M. v. E.G.*, a

⁸⁹ In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. App. 1998) (stating that the children were created by the Buzzancas with anonymous donor gametes using a gestational mother).

⁹⁰ Interestingly, state intermediate appellate court uses of a common law intent standard relying on *Johnson*-type reasoning in 2004 were modified by state supreme courts in 2005 in various ways that were sensitive to the intent of the parties employing assisted reproductive technologies, but that relied on slightly different reasoning. In re C.K.G., 173 S.W. 3d 714 (Tenn. 2005) (involving a dispute between a husband and wife over their triplets, in which the appeals court applied an intent standard to declare the wife who served as the triplets’ gestational mother to be their legal mother, despite her lack of genetic consanguinity, the father’s genetic connection, and his claim that his ex-wife was a biological stranger to the children. The Tennessee Supreme Court combined the “intent” reasoning, with reasoning about gestation as an important aspect of maternity and this case’s posture where there was not a competing claim of maternity, to decide that the gestational mother was the legal mother); In re Parentage of A.B., 837 N.E.2d 965 (Ind. 2005) (involving a dispute about parentage between biological mother and former lesbian domestic partner in which the appeals court applied an intent test, but the Indiana Supreme Court later reversed the reasoning, sending the case back to a lower court to apply a best interests of the child standard instead of intent to determine whether the lesbian coparent was a legal parent); McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) (involving a dispute between gestational, non-genetic mother and her ex-husband, the genetic father, over custody of twins). *But see* Maria B. v. Super. Ct., 13 Cal. Rptr.3d 494 (Cal. Ct. App. 2004), *superceded sub nom.*, Elisa B. v. Super. Ct., 33 Cal.Rptr.3d 46 (Cal. 2005) (Because of intent to create a child together using ART and bringing the children into her home to raise, a lesbian co-parent was declared a presumed. parent obligated to pay child support. The appeals court used a common law approach but the California Supreme Court reached the same result, rooted in intent and conduct, based on its interpretation of the UPA).

⁹¹ In re C.K.G., *supra*; In re L.B., 122 P.3d 161 (Wash. 2005)(applying common law analysis to create a category of “de facto parent” for a nonbiological lesbian coparent in order to respond to a lesbian couple’s original mutual intent to create a child using ARTs and raise the child in their home).

⁹² *K.M. v. E.G.*, 33 Cal.Rptr.3d 61 (Cal. 2005); *Kristine H. v. Lisa R.*, 33 Cal.Rptr.3d 81 (Cal. 2005); *Elisa B. v. Superior Court*, 33 Cal.Rptr.3d 46 (Cal. 2005).

lesbian couple who were registered as domestic partners used IVF with K.M.'s ova and E.G.'s gestational mothering to create twins who were raised in their joint home until the couple separated.⁹³ After their separation, E.G. argued that she had specifically agreed with K.M. before conception that K.M. would not be the children's mother, but instead was an "ova donor." By applying a gender-neutral reading of the Uniform Parentage Act (UPA) sperm donor provision (which declares that sperm donors under certain conditions are not the legal fathers of the children resulting from use of their gametes), E.G. argued that K.M. had relinquished any parental rights claims as an ova donor. K.M. saw things differently. She petitioned to be declared one of the children's two parents, arguing that the UPA provision about gamete donors did not apply and that under the *Johnson* intent test she should prevail. Because the court specifically found that California law allows for two mothers in the companion *Elisa B.* case⁹⁴ and that the *Johnson* intent test only applied "to break the tie" when there were competing, mutually exclusive claims for a single parenting role,⁹⁵ application of the *Johnson* intent rule was ruled to be inappropriate. The court relies on a different provision of the UPA instead of *Johnson's* common law intent standard. But, the California Supreme Court does not find the concept of "intent" irrelevant. While not applying the *Johnson* intent test as the dissent urges,⁹⁶ the court's majority looks to the parties' intent "to produce children that would be raised in their joint home" as a tool to properly apply the UPA. The majority

⁹³ K.M. v. E.G., *supra*.

⁹⁴ *Elisa B.*, *supra* note 92.

⁹⁵ *Id.* The notion of the *Johnson* intent test being limited to breaking a tie between competing mothers originated in *In re Marriage of Moschetta*, 30 Cal.Rptr.2d 893 (Cal. 1994).

⁹⁶ *Id.* (Werdegar, J. dissenting).

determines that E.G.'s gender-neutral reading and application of the UPA anonymous sperm (gamete?) donor provision is inappropriate because K.M. was not a gamete donor as contemplated by the statute, but a person who intended to raise the child. In this way, "intent to parent" governs the interpretation of the statutory provision's relevance.

Ultimately the court applies a provision of the UPA defining maternity by either genetics or gestation, making both women the children's mothers and obviating the need for the court to decide the matter through common law intent or creative statutory interpretation of a "presumptive mother" status. The K.M. opinion is strewn with dicta about intent, both to address the parties' arguments and to respond to the dissent. Justice Moreno, writing for the majority, limits the "intent" aspect of its decision in one part ("It would be unwise to expand application of the *Johnson* intent test... beyond the circumstances presented in *Johnson*. Usually, whether there is evidence of a parent and child relationship under the UPA does not depend upon the intent of the parent."),⁹⁷ while reinstating the concept of intent using the language of "understanding" in another part ("A woman who supplies ova to be used to impregnate her lesbian partner, *with the understanding that the resulting child will be raised in their joint home*, cannot waive her responsibility to support the child ... [nor waive] her parental rights.")⁹⁸ To say that "intent" is no longer relevant would be to misread *K.M.*

This idea of intent to raise a child created through ARTs runs through *K.M.*'s companion cases, *Elisa B.* and *Kristine H.*, as well. In *Elisa B.* the county sued a lesbian partner for child support when her former domestic partner, the children's

⁹⁷ Id. at

⁹⁸ Id. at (emphasis added)

biological mother, needed public assistance. Elisa disclaimed fiscal responsibility for the children because she was neither the biological nor adoptive mother. The *Elisa B.* court declares unequivocally that a child may have two mothers and that a nonbiological lesbian coparent can be a “presumed mother” under the UPA, even against her will.⁹⁹ The critical facts relied upon to impose parenthood status were the couple’s intent to create the children and raise them together.

In the present action for child support filed by the El Dorado County District Attorney, we conclude that 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.¹⁰⁰

Though presumed mother status is created by a gender-neutral reading of the UPA’s section creating presumed father status, it is the intent of the parties in both situations that statutorily and interpretively govern parenthood , even (or maybe especially) when ARTs are used to create children¹⁰¹.

⁹⁹ *Elisa B. v. Superior Court*, *supra* note 92.

(We conclude, therefore, that Elisa is a presumed mother of the twins under section 7611, subdivision (d), because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins' parent with proof that she is not the children's biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent.) *Id.* at .

¹⁰⁰ *Id.*

¹⁰¹ *Kristine H.*, *supra* note 92, the third case in this California trilogy, was decided on grounds other than intent or the UPA specifically. The court decided this case on the basis of estoppel because the parties jointly used the courts to get a pre-birth declaration of parentage for both lesbian partners, Kristine H and Lisa R.. Most states do not utilize pre-birth court stipulated judgments of parentage, and the court in this case repeatedly noted that it did not decide whether these court declarations were valid, but the court did say that partners who go to court to get a declaration that a same-sex partner is a coparent are estopped from later denying that both same sex partners are parents. This may be about the parties’ consent to the judgment, but it seems also to be about the parties’ intent, as represented by the judgment, that both parties would be the parents. Impliedly, intent is again a foundation for determining parentage in an ART case.

In an *en banc* decision in November 2005, the Washington Supreme Court adopted a common law notion of “de facto” parent to fill in the legislative gap in statutory “parent” definitions.¹⁰² *In re L.B.* presents a claim by a former lesbian partner who coparented a child for six years with its biological mother, but was then denied visitation by the biological mother after the couple separated. In affirming the reasoning of the appeals court and finding that the common law contains a notion of de facto parent, Justice Bridge explains the couple’s joint efforts to conceive and deliver the child as well as details of the many ways in which the couple expressed their intent and understanding that both women were L.B.’s parents.¹⁰³ The criteria established by the Washington Supreme Court to determine if someone is a de facto parent include the natural and coparent’s consent/intent to the coparenting relationship and the coparent’s assumption of parenting responsibilities when she or he lived with the child.¹⁰⁴ As with the California trilogy, the court in *In re L.B.* does not say specifically that it is applying an intent standard, but such a standard seems to undergird its reasoning on these facts. Where same-sex couples jointly use ARTs to create a child that they intend to and do raise together, the nonbiological coparent in the couple is able to get legal standing as a “de facto” parent for purposes of visitation and custody in Washington and as a “presumed parent” in California.¹⁰⁵

¹⁰² *In re L.B.*, *supra* note 91.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *In re L.B.*, *supra*; *Elisa B. v. Superior Ct.*, *supra* note 92.

While an intent standard or reliance on a couple's intent to parent when creating a child through ARTs may perform adequately in assigning parentage in cases where there is an agreement that a specifically named and agreed upon woman will serve solely as a gestational mother for other "intending" parents or parent,¹⁰⁶ or where a gestational mother with intent to rear the child is implanted with a donor egg or embryo,¹⁰⁷ or where a domestic partner or spouse of a mother-to-be intends to co-parent the child-to-be,¹⁰⁸ it fails miserably as a device for assigning parentage in cases of mix-ups. A brief mention of a few of those cases in the next few paragraphs reveals the shortcomings of the intent standard in mistake cases.

In the Fasano and Perry-Rogers example mentioned in Part I, both the Fasanos and the Rogerses went to the fertility clinic intending to create a child(ren) from their own gametes that they would rear themselves as parents.¹⁰⁹ In fact, all the adults involved in this case had the same intent when they went to the clinic. Donna Fasano did not intend to be a gestational (surrogate) mother for another couple, and the Rogerses did not intend to use a gestational mother to bring their embryos to life. The Rogerses did not intend to donate an embryo to another couple, nor did the Fasanos intend to use a donated embryo. None of the parties' intents was implemented. An intent analysis does

¹⁰⁶ *Johnson*, 851 P.2d at 776. I have my doubts about the sole use of intent to determine maternity in this sort of case.

¹⁰⁷ *McDonald*, 608 N.Y.S. 2d at 477.

¹⁰⁸ In re L.B.; Elisa B.; Kristine H; In re C.K.G., all discussed *supra* in this section. See also In re the Parentage of A.B., 818 N.E.2d 126 (Ind. Ct. App. 2004) (Appeals court used agreement between lesbian couple – "intent" -- to declare former domestic partner a legal parent), *vacated and remanded*, King v. S.B., 837 N.E.2d 965 (Ind. 2005)(Indiana Supreme Court vacated the appeals court's conclusion that the parties' agreement was determinative, but noted that Indiana courts have the power to award parental rights and responsibilities to a domestic partner if a trial court determines it is in the child's best interest.).

¹⁰⁹ *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

not aid in resolving the two couples' and twins' dilemmas. However, the appeals court in *Perry-Rogers v. Fasano* stated:

Parenthetically, it is worth noting that even if the Fasanos had claimed the right to custody of the child, application of the “intent” analysis suggested in Professor Hill’s article, *supra* and employed in *Johnson v. Calvert, supra*, and *McDonald v. McDonald, supra*, would—in our view—require that custody be awarded to the Rogerses. It was they who purposefully arranged for their genetic material to be taken and used in order to attempt to create their own child, whom they intended to rear.¹¹⁰

This court’s application of an intent analysis to an embryo mix-up case seems clearly in error and presupposes the result that the court wanted to reach.

In the British *A. v. B.* case, both the As and Bs intended to use their own gametes to produce their own children that they would rear.¹¹¹ Neither couple intended to produce children with another couple’s gametes, nor did they intend to serve or have another serve as a gestational mother for a child. The mistake by the clinic confounded their intent. Under these circumstances it is irresponsible of a court or legislature to rely on intent.

In contrast to those cases looking to intent, other courts have formally rejected intent as a source of legal parentage in ART cases, particularly where the court deems the parties’ intent either ambiguous or contrary to some public policy. In *Belsito v. Clark*, a gestational surrogacy case, an Ohio Common Pleas court determined that intent was an

¹¹⁰ *Id.* at 24.

¹¹¹ *A v. B*, [2003] EWHC 259 (QB).

inappropriate measure of parentage.¹¹² The court defaulted to a genetics standard.¹¹³

The Ohio court rejected the intent test of *Johnson* for three reasons, among which is that:

Intent can be difficult to prove. Even when the parties have a written agreement, disagreements as to intent can arise. In addition, in certain fact patterns when intent is clear, the *Johnson* test of intent to procreate and raise the child may bring about unacceptable results. As an example, who is the natural parent if both a nongenetic-providing surrogate and the female genetic provider agree that they both intend to procreate and raise the child? It is apparent that the *Johnson* test presents problems when applied.¹¹⁴

In *T.F. v. B.L.*, a contest between former lesbian partners who had lived together and decided together to have a child using assisted insemination, the Massachusetts Supreme Judicial Court decides: “‘Parenthood by contract’ is not the law in Massachusetts, and to the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child, that agreement is unenforceable.”¹¹⁵ Even in a case such as *T.F. v. B.L.*, where the intent of the ART arrangement is not disputed, a state’s highest court would not let intent govern the allocation of parental rights and responsibilities. In other words, undisputed intent to create a child and coparent a child created through ARTs was not determinative of legal parenthood or legally enforceable child support obligations. Legislative adoption of the students’ Model Act would correct this sort of injustice. Likewise, legislative adoption of the American Law

¹¹² *Belsito v. Clark*, 644 N.E.2d 760, 766–67 (Ohio Com. Pl. 1994).

¹¹³ An Ohio Court of Appeals decision recently applied the *Belsito* two-part test in a dispute between a commercial gestational mother and the genetic, ova donor mother (although really the genetic father was the instigator of the action) by first determining parentage by genetics and then examining whether the genetic parent waived or relinquished her parental rights. *Rice v. Flynn*, 2005 WL 2140576 (Ohio App. 9 Dist. 2005).

¹¹⁴ *Id.* at 764–65.

¹¹⁵ *T.F. v. B.L.*, 813 N.E.2d 1244, 1251 (Mass. 2004).

Institute’s Principles of the Law of Family Dissolution: Analysis and Recommendations, section 2.03 would recognize “parent by estoppel” and “de facto parent” in cases where co-parenting occurred by agreement at the behest of the biological or adoptive parent, regardless of sex, biological connection, or legal adoption by the co-parent.¹¹⁶ Still, the Model Act and the ALI Principles remain impotent to address mistake or mix-up cases.

Perhaps one of the most egregious examples of intent being undermined in a mistake case is *Robert B. v. Susan B.*¹¹⁷ Rather than relying on California’s intent analysis from *Johnson v. Calvert*, the court finds that the Uniform Parentage Act (UPA) controls the case.¹¹⁸

C. Statutory Uniform Parentage Act (UPA) Provisions

Although the California courts originated the “intent” test, they now seem to find it inapplicable in almost every ART parentage dispute that arises.¹¹⁹ Instead, they focus on expansive readings of the UPA.¹²⁰ Returning to the *Robert B.* case mentioned at the end of the last subsection, the appellate court in that case insists that the language of the UPA is so clear that it is inappropriate to resort to statutory construction.¹²¹ Robert is not an anonymous sperm donor, by the statute’s definition, and therefore has not relinquished

¹¹⁶ Principles of the Law of Family Dissolution: Analysis and Recommendations, AM. LAW INST. § 2.03 (2002). And, if the state does not legislatively adopt these recommended standards, courts have found those concepts in the common law. In re L.B., supra note 91; In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995). T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

¹¹⁷ *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003).

¹¹⁸ *Id.* at 788.

¹¹⁹ They may still apply the *Johnson* test in commercial collaborative mothering (or “surrogacy”) cases, but not in other ART cases.

¹²⁰ Although the California courts claim to reject the “intent to parent” analysis, I have argued above that intent is still a driving force in their interpretive analyses.

¹²¹ *Id.* at 787.

his claim of paternity. If Susan wants a different policy promoted by the statute, the court argues, she should make her plea to the legislature.¹²² Evidently that clarity evaded another California appellate court in the same district, when it concluded that the legislative policy protecting single mothers using ARTs for which Susan argued was already part of the same UPA section.¹²³ Nonetheless, the UPA as drafted in either its 1973 or 2000 version is not designed to resolve mix-up cases. In *Robert B.*, the court's application of the UPA was really nothing more than a flawed intent analysis disguised as a statutory analysis.

When Susan, as a single woman, went to the clinic to purchase ova and sperm anonymously, she made it clear that her intent was to raise the child as a single mother and to prevent any potential claims of paternity by a third party.¹²⁴ She did not intend to be a gestational mother for another couple or a co-parent with anyone with parentage rights to her child. Her intent was completely frustrated by the fertility doctor's mistake and the court's decision. The California appellate court indisputably ignored her intent to be unburdened by paternity claims in determining that Robert B. was Daniel's legal father with visitation rights. The court relied upon a section of the Uniform Parentage Act as enacted in the California Family Code, section 7613,¹²⁵ but not in the way Susan interpreted it. Susan read the act to grant legislative support to her intention to be a single mother, so long as she was inseminated by a licensed physician, which she was. Rather

¹²² *Id.*

¹²³ *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 486 (Cal. Ct. App. 2005) (reinforcing the idea that the UPA policy is to provide single women with an option to avoid paternity claims, even with known donors, if they use a licensed physician).

¹²⁴ *Robert B.*, 135 Cal. Rptr. 2d at 786.

¹²⁵ CAL. FAM. CODE. ANN. § 7613(b) (West 2004).

than look to Susan's actions and intent to inform its reading of the UPA, the court relied solely upon Robert's.¹²⁶

The court emphasized that it was not Robert B.'s intent to donate sperm or create embryos for implantation in anyone but his wife. Robert's lack of intent justified not treating him as an anonymous sperm donor under the UPA, but for some reason Susan's lack of intent to share parenting with another person did not justify treating her as a single woman who intentionally is an unmarried mother. Instead, she became a co-parent or gestational mother under the Act. Both Susan B.'s and Robert B.'s intents conflicted, the UPA arguably supported either, and the court arbitrarily selected one interpretation. Despite the court's claim to be applying the clear meaning of the UPA, it was simply selecting one party's intent over the other's. Thus, the UPA failed to resolve this ART mix-up case fairly.

In addition, although her interests were inconsequential to the appellate court, Robert's wife, Denise, entered into the ART process intending to be a child's mother and nurturer. She argued that "intent to parent" as accepted in *Buzzanca* established her claim to maternity. A balanced application of an "intent to parent" analysis cannot work in this case because the clinic's mistake left each prospective parent's intent at cross-purposes. To favor one party's intent over the others' seems inherently unjust. Yet Denise's intent to parent and engage in the ART process, which was the same intent that rendered Mr. Buzzanca a parent (even against his later will), had no legal effect for Denise. According to the court, the UPA strips Denise of any parental connections

¹²⁶ *Robert B.*, 135 Cal. Rptr. 2d at 789.

despite her having the same intent and commitment that Robert did. As Chris Rock repeatedly bemoans in the movie, *Head of State*, “That ain’t right!”¹²⁷

The UPA analysis that undermined Susan B.’s desire to be a single mother without competing paternity claims and favored Robert B.’s parentage claim as the genetic father in the ART mix-up case worked well for K.M. in *K.M. v. E.G.*,¹²⁸ a case where the ART procedure went as planned. In both cases, the gamete donors were declared to be outside the gamete donor provision of the UPA that cuts off any parental rights or obligations. Because the gamete donor provision did not apply to either Robert B. or K.M., they were entitled to claim parental rights based on genetic consanguinity. The construction of the UPA in *K.M.* seems correct because K.M. had the intent to parent and welcome the specific child created through ARTs into her home as her own child. The parallel construction of the UPA gamete donor provision in Robert B. seems much more problematic, because in the mix-up case he had no intent to parent a child gestated by Susan B., they were not a couple who agreed to coparent the child in their home, and he had not done any parenting of the child prior to the judicial intervention. At a minimum, when applying the UPA to ART cases that fall outside the anonymous gamete donor category, courts should follow the *Elisa B.* strategy of looking to the statute’s “presumed parent” provisions (the “presumed father” section becomes a “presumed parent” section

¹²⁷ *HEAD of STATE* (Universal Studios 2003).

¹²⁸ *K.M. v. E.G.*, 33 Cal.Rptr.3d 61 (Cal. 2005).

when read gender-neutrally),¹²⁹ rather than reverting to the provision defining parentage by genetics,¹³⁰ as the courts did in *Robert B.* and *K.M.*

A different recent decision by a California appellate court seems to support Susan B.'s interpretation of the UPA, by finding that the UPA specifically supports single women using ARTs to become mothers without the burden of paternity claims, although the case did not involve an ART mistake or mix-up.¹³¹ Perhaps there is a significant difference between cases of parentage disputes arising from ART mix-ups and cases of parentage disputes arising from the use of ARTs without mix-ups that justifies these two California appellate courts taking contradictory approaches.¹³² Perhaps not. In *Steven S. v. Deborah D.*,¹³³ a March 2005 decision by the California Second District Court of Appeals, the court found that Steven, the biological father, was solely a "semen donor" despite an intimate sexual relationship between him and the unmarried mother, despite the facts that the child bears Steven's last name as his middle name, that Steven attended some doctor appointments with Deborah while she was pregnant and celebrated the

¹²⁹ *Elisa B. v. Superior Court*, 33 Cal.Rptr.3d 46 (Cal. 2005).

¹³⁰ This argument for preferring the presumed parent provisions of the UPA to the gamete donor provisions when dealing with ART parentage disputes, particularly between same-sex parents, is made more fully infra. That part of the argument must be delayed because this section of my argument relates to interpretations of the UPA gamete donor section.

¹³¹ *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005).

¹³² While one might argue that a distinction between parentage disputes from ART mistakes and ART processes may be relevant, scholars have persuasively argued that a distinction between parentage disputes arising from parentage by sexual intercourse and parentage disputes arising from parentage by ART should be abolished. See, e.g., Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1 n.318 (2004) (proposing a model that "eliminates . . . the distinction between 'technologically produced' children and 'regularly produced' children").

¹³³ *Steven S.*, 25 Cal. Rptr. 3d at 482.

child's birth with Deborah, that the child calls Steven "Daddy Steve," and that Deborah refers to Steve as the child's father. Judge Hastings reasons:

'Our Legislature has already spoken and has afforded to unmarried women a statutory right to bear children by artificial insemination (as well as a right of men to donate semen) without fear of a paternity claim, through provision of the semen to a licensed physician.' The Legislature 'has likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support.'¹³⁴

Deborah tried to get pregnant using a physician to medically inseminate her with Steven's semen and through sexual intercourse with Steven. Though Steven contends that Deborah became pregnant through sexual intercourse, the trial court specifically found that the child had been conceived through medically assisted insemination and not sexual intercourse.¹³⁵ In *Steven S. v. Deborah D.*, the semen that caused the pregnancy was administered by a licensed physician through assisted insemination, so under the UPA, the donor was not the child's father and had no legal standing to bring actions for visitation or custody of the child.¹³⁶ In this situation the statute, not the parties' intent, controlled. Had she been impregnated by sexual intercourse, even though the intents and understandings would have been the same, Steven would have had parental rights. Being a known, rather than anonymous, sperm donor did not affect Steven's rights under the court's interpretation of the UPA. Susan B. must wish that this court had decided her case or that her judges applied the UPA in this way that recognizes her right to remain a single mother without the threat of paternity claims.

¹³⁴ Steven S., *supra* at 486 (quoting *Jordan C. v. Mary K.*, 224 Cal.Rptr.3d 530).

¹³⁵ *Id.* at 484.

¹³⁶ CAL. FAM. CODE § 7613(b) (West 2004): "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

The issue of paternity and standing to assert it by a known sperm donor under the Uniform Parentage Act also surfaces in a Texas Court of Appeals case, *In re Sullivan*.¹³⁷ In *Sullivan*, the biological mother and biological father entered into a co-parenting agreement prior to his donating semen for the purpose of donor insemination. After conception, but before the child's birth, the parties had a serious falling out. The child was born on March 2, 2004 and on March 31, 2004, the man filed an action in trial court seeking to be adjudicated the child's father, to establish a parent-child relationship, to get joint custody of the child, to order genetic tests, to prevent the mother from hiding the child or removing it from the area, for breach of contract, and more.¹³⁸ The mother responded by challenging the man's standing under UPA section 702: "A donor is not a parent of a child conceived by means of assisted reproduction."¹³⁹ The man claims he has standing to maintain a parentage action under UPA section 602 as a "man whose paternity of the child is to be adjudicated."¹⁴⁰ Dealing solely with the issue of standing to adjudicate paternity, Justice Kem Thompson Frost of the Texas appeals court in Houston decides that an unmarried man who donates semen to an unmarried woman has standing to seek an adjudication of parentage, even if he may ultimately be denied parent status under the Texas version of the UPA.¹⁴¹ Chief Justice Adele Hedges concurs specially to emphasize her understanding that the UPA provision denies parenthood to a

¹³⁷ *In re Sullivan*, 157 S.W.3d 911 (Tex. Ct. App. 2005). The court never mentions in its opinion whether donor insemination was conducted by a licensed physician.

¹³⁸ *Id.* at 913.

¹³⁹ TEX. FAM. CODE ANN. § 160.702 (Vernon 2002).

¹⁴⁰ TEX. FAM. CODE ANN. § 160.602(a)(3) (Vernon Supp. 2004-05).

¹⁴¹ *In re Sullivan*, 157 S.W.3d at 911.

semen donor and hence would deny standing to the man in this case.¹⁴² However, she concludes that since the semen donor is also a signatory to a co-parenting agreement with the biological mother, it is through that instrument that he gains standing to adjudicate parentage.¹⁴³ She buys into a “parentage by contract” model, which was roundly rejected by the Massachusetts Supreme Judicial Court in *T.F. v. B.L.*¹⁴⁴ Susan Buchweitz does not fare well under the *Sullivan* majority’s analysis. She has a better chance of prevailing as a single mother in an ART mistake case under Justice Hedges’s interpretation of the UPA.

The UPA, if read gender neutrally, deals with both ova and sperm donor parentage. As mentioned earlier, the California Supreme Court, in *K.M. v. E.G.* in 2005, discussed the statute’s potential application to an ova donation situation.¹⁴⁵ In that case the court unequivocally concludes that the gamete donor provision of the UPA applies to ova donors in the same way it applies to sperm donors, but finds that *K.M.* was not an ova donor under the statute because she intended to raise the child in her home at that time she provided the ova.¹⁴⁶

Again reading the UPA in a gender neutral fashion, the same court decided in the companion case of *Elisa B.*, that a different the provision of the UPA was relevant to determine parentage in a dispute involving lesbian coparents. The court looked to the

¹⁴² *Id.* at 922

¹⁴³ *Id.* at 911.

¹⁴⁴ *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004). One cannot help but wonder whether the heterosexuality of the couple in Texas and the homosexuality of the couple in Massachusetts influenced the courts’ interpretations.

¹⁴⁵ *K.M. v. E.G.*, *supra* note 92.

¹⁴⁶ *Id.*

section of the UPA that creates “presumptive paternity,” California Family Code, section 7611. By reading that section gender neutrally, the court finds that it creates presumptive parentage in a nonbiologically related lesbian co-parent who openly received a child created through ARTs into her home and held that child out as her own.¹⁴⁷ Were the California courts that decided *Robert B.* and *K.M.*, and even *Steven S.*, to rely on a gender-neutral presumptive parent analysis, instead of a gender-neutral gamete donor analysis, the results in those cases would have been more consistent with the parties’ intended uses of ARTs and with the equities of the situation. The California Supreme Court’s focus on different UPA provisions in *K.M.* and in *Elisa B.* may be attributable to the different kinds of parenthood claims being made. In *Elisa B.*, the same-sex coparent is denying her parenting responsibilities rather than seeking recognition of her parental status in the face of her coparent’s resistance. In all the other cases discussed above, parties are asserting claims to parenthood status against the wishes of the gestating mother. Even in cases where coparents are claiming parental status to a child created through ARTs against the gestating mother’s wishes, justice would be better served if courts and parties focus their arguments on the presumed parent section of the UPA (or rely on “de facto” parent arguments from the common law or ALI recommendations).

The California Supreme Court and several California intermediate appellate courts have signaled in their recent ARTs-related parent cases that they will rely on interpretations of the UPA to resolve parentage disputes, unless the parties are estopped by their prior conduct from bringing their contested parentage claims to court.¹⁴⁸ The

¹⁴⁷ *Elisa B. v. Superior Court*, *supra* note 92.

¹⁴⁸ *Kristine H. v. Lisa R.*, *supra* note 92

Washington Supreme Court was less sanguine about their state UPA's application to same-sex couple parentage issues. Application of the gamete donation section of the UPA confounds parentage questions in cases of children of ARTs, even where the procedures go as planned but the parties later disagree about parentage claims. Since this UPA section is often ineffective in that simpler context of planned ART results, it necessarily is even more ineffective in resolving parentage disputes in cases of ART mix-ups. The most appropriate legislative response to resolving these parentage disputes is to supplement the UPA with an article devoted to ART mix-up situations, in the same way that an article addressing gestational surrogacy issues has supplemented the revised UPA.¹⁴⁹

D. Genetics

Some courts define legal parenthood by genetics in the first instance or by genetics when there is a conflict between parties, one of whom has a genetic relationship to the child and the other of whom does not.¹⁵⁰

[W]hat identifies a natural parent when a child is conceived by the use of in vitro fertilization and the surrogate who delivers the child provides none of the genetics of that child? The answer of this court is that the individuals who provide the genes of that child are the natural parents. However, this court further recognizes that a second query must be made to determine the legal parents, the individual or individuals who will raise the child. That question must be determined by the consent of the genetic parents. If the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents. By formulating the law in this manner, both tests, genetics and birth, are used in determining parentage. However, they are no longer equal. The birth test becomes subordinate and secondary to genetics.¹⁵¹

¹⁴⁹ UPA, art. 8 (2000) (“Gestational Agreement”).

¹⁵⁰ *Belsito v. Clark*, 644 N.E.2d 760, 762–63 (Ohio Ct. Common Pleas 1994).

¹⁵¹ *Id.* at 767.

If both parties claiming legal parenthood have the intent to parent, then a genetics-based approach uses genetic-biological parenthood as the tie-breaker.¹⁵²

While claiming not to rely solely on genetics, the court in *Perry-Rogers v. Fasano*, an ART mix-up case mentioned earlier, necessarily relies on genetics to define the black child's parents.¹⁵³ Since there was no agreement (or contract) between the Rogerses and Fasanos for Mrs. Fasano to serve as a gestational surrogate, and since the Rogerses did not adopt the child, there was no legal basis, other than a default to genetics as the primary meaning of parenthood, to permit the court to find that the Rogerses are the child's legal parents. Other than understanding genetics as the singular test of natural and legal parenthood, there are also no grounds for the court to find that the Fasanos were legal strangers who could not even seek visitation rights to the child they gestated for nine months and to whom they then gave birth.

Were the *Perry-Rogers v. Fasano* court not motivated to define parentage by genetics, it appropriately could have decided that Fasano was the legal mother because she gave birth to the child. Absent a genetic trump card for defining parenthood, the

¹⁵² In *Robert B. v. Susan B.*, 135 Cal.Rptr.2d 785 (Cal.Ct.App. 2003), the court uses the metaphor of a "tie-breaker," a metaphor that I borrow here, although the *Robert B.* court uses "tie-breaker" for the exact opposite analysis. I am arguing that genetics is the tie-breaker for some courts, like the *Perry-Rogers* court, where intent is tied; the *Robert B.* court, following the lead of the *Moschetta* court, argues that intent is the tie-breaker only where biology between two mothers is tied.

By reading *Johnson's* intent test as only applying to ties between two biological mothers, the *Robert B.* court selects an unnecessarily crabbed reading of the *Johnson v. Calvert* case. The California Supreme Court in *K.M. v. E.G.*, 33 Cal.Rptr.3d 61 (Cal. 2005), also reads *Johnson* narrowly, as applicable only to mutually exclusive, competing claims for a single parent position. *Johnson's* rationale should not be limited to a contest between biological mothers and has been applied in other kinds of ARTs situations. The gist of the *Johnson* rationale is that in a parentage contest arising out of a prior agreement between the disputants, the court should default to the parties' intent at the time they entered into the ART-related agreement in order to select the legal parent.

¹⁵³ *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000); Bender, *supra* note 4.

Rogerses are best understood as anonymous (or even known) embryo donors. Whether the court sees the ART mix-up as causing “forced gestational surrogacy” or “forced embryo donation” depends entirely upon its pre-conceived biases. There is nothing in the facts that makes one interpretation or image more legally valid than the other.¹⁵⁴ But there is something in the law that makes one interpretation better—the principle of equality.

In an earlier article I made the argument that equality demands the rejection of a genetics-based approach to parentage (at least for mix-up cases), because a genetics-based approach is sex-biased, and may be race-biased in some contexts like the *Perry-Rogers v. Fasano* case.¹⁵⁵ Unfortunately, New York courts are powerfully wed to genetics-based analyses of parenthood, even at the expense of children’s needs to maintain relationships with the people whom they know as their parents. New York appellate courts continue to declare co-parents, particularly in same-sex relationships or step-parent relationships, to be biological and legal strangers with no standing to seek visitation, even when that person was held out to the community as the child’s parent.¹⁵⁶

¹⁵⁴ I am reminded of those optical illusions where one view of the picture reveals an old woman in a headscarf, then a blink and another view shows a stylish young woman with her face turned away from the viewer. Or the illusion where at first glance one sees a vase in the center of the image, and later one sees two silhouettes facing each other with the “vase” becoming blank space between them.

¹⁵⁵ See generally Bender, *supra* note 4.

¹⁵⁶ In re Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (refusing to recognize parenthood by estoppel or de facto parenthood and denying a lesbian co-parent standing to seek visitation, was decided with a strong dissent by Chief Justice Judith Kaye who argued that the court was hurting millions of children by “fixing biology as the key to visitation rights”); In re Ronald FF. v. Cindy GG., 511 N.E.2d 75 (N.Y. 1987). See also cases cited in footnote 158. Sean H. v. Leila H., 783 N.Y.S.2d 785, (N.Y. Sup. Ct. 2004) provides a recent example of a trial court following the same rules. (see text accompanying fn 162 *infra*).

Donna Fasano, her husband and her son,¹⁵⁷ in the mix-up case, as well as the co-parents in cases like those just mentioned,¹⁵⁸ are designated “biological and legal strangers,” despite their substantial relationships with the children.

Certainly a “biological and legal stranger” approach cannot be the best analysis or solution for this sort of parentage dispute. It defies reality to claim that a woman who nurtured a child for nine months inside her body with all that that entails has no cognizable biological connection to the child.¹⁵⁹ She may have no genetic connection, but genetics is not the all-encompassing exclusive definition of biological connection. Nothing is more biological than the entire process of pregnancy.¹⁶⁰ The legal system loses credibility by making an assertion that a woman who gestates an embryo into a child has no biological or legal relationship to that child.¹⁶¹ Likewise, if anyone has ever seen newborn twins nestling together in an apparent attempt to reproduce some of the security and comfort they felt in the womb, she or he would know that there is a fierce biological connection between them, even if not a genetic one.

¹⁵⁷ The child at issue in the Fasano case grew in utero with his “twin brother” for nine months, and thereafter spent four months with him, but the New York appellate court also determined that this “wombmate” was not a genetic sibling and therefore was a biological stranger with no legal rights to seek visitation. See *Perry-Rogers*, 715 N.Y.S.2d at 24–27. For an article stressing the importance of sibling relationships, see Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319 (2004).

¹⁵⁸ See also *In re C.M. v. C.H.*, 789 N.Y.S.2d 393 (N.Y. Sup. Ct. 2004); *In re Janis C. v. Christine T.*, 742 N.Y.S.2d 381 (N.Y. App. Div. 2002); *In re Multari v. Sorrell*, 731 N.Y.S.2d 238 (N.Y. App. Div. 2001); *In re Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989 (N.Y. App. Div. 1998).

¹⁵⁹ Similarly, it defies reality that a child nurtured for years in its home by a stepparent or same-sex co-parent has no legally cognizable connection to that adult.

¹⁶⁰ That pregnancy is also emotional, intellectual, physical, and spiritual does not take away from the fact that it is a wholly biological process. In fact, it is *the* one biological process that has kept our species present on this earth from our beginnings.

¹⁶¹ *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994), is the only case that finds differently in New York, but it does so based on intent, not biological ties.

The concept of a “biological and legal stranger” continues to be pernicious in New York law in disputed parentage cases, whether or not they involve ARTs. A recent case is illustrative. At the end of August 2004, Judge Diane Kiesel of the Supreme Court of New York, Bronx County, ruled that Sean H., a man who “held himself out to be the father to his wife’s child [for over five years], even though they both knew he was not[,]” was a biological, and therefore also a legal, stranger without standing to seek visitation with his little girl.¹⁶² The court so found even though Sean (1) had married the child’s mother, Leila H., (2) had, in writing, officially acknowledged paternity, (3) had his name added to the birth certificate, and (4) the couple both held Sean out as the child’s father. After Sean and his wife Leila divorced, Leila married the little girl’s biological father, who had been absent for years and not a part of the child’s life.¹⁶³ The court found that Sean H. has no standing to seek visitation, and that Leila is not equitably estopped from seeking to vacate Sean’s acknowledgment of paternity, despite holding Sean H. out as the child’s father for five years.¹⁶⁴ New York’s appellate departments have rejected the doctrine of equitable estoppel and de facto parent to give standing to non-biological or non-adoptive parents in custody and visitation disputes ever since the *In re Alison D. v. Virginia M.* New York Court of Appeals decision.¹⁶⁵

¹⁶² Sean H. v. Leila H., 783 N.Y.S.2d 785 (N.Y. Sup. Ct. 2004) .

¹⁶³ Herrera v. Herrera, *Decision of Interest: Equitable Estoppel Does Not Confer Standing to Biological Stranger to Pursue Visitation*, N.Y. L.J., Sept. 10, 2004, at 18.

¹⁶⁴ Unlike the New York court, the California Supreme Court did apply estoppel in a similar type, though same-sex, coparenting case in 2005. Kristine H., *supra* note 92.

¹⁶⁵ *In re Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). The New York Court of Appeals said in *In re Alison D.*:

Petitioner concedes that she is not the child's "parent"; that is, she is not the biological mother of the child nor is she a legal parent by virtue of an adoption. Rather she claims to have acted as a "de facto" parent or that she should be viewed as a parent "by estoppel". Therefore, she claims she has standing to seek visitation rights. These claims, however,

Following the New York precedents, *In re C.M. v. C.H* declared that a former same-sex domestic partner was a legal and biological stranger to the second of two children she and her partner conceived during their eight-year union.¹⁶⁶ Although the lesbian partner adopted the first child, the second child's adoption was short-circuited by the couple's separation and "divorce."¹⁶⁷ The court finds that without an adoption, the lesbian co-parent has no standing to seek visitation, even though she would be considered a "parent by estoppel" of the younger child under the ALI Principles of the Law of Family Dissolution¹⁶⁸ and many states' more generous interpretations of their similar statutes.¹⁶⁹

A narrow genetic (or adoptive) definition of parenthood can obliterate existing parent-child relationships, as it does in this case. One wonders how these courts can, in good conscience, be so insensitive to a child's needs.¹⁷⁰ Chief Justice Judith Kaye's

are insufficient under section 70. Traditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent . . .

We decline petitioner's invitation to read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child (*accord, Nancy S. v. Michele G.*, 228 Cal.App.3d 831, 279 Cal.Rptr. 212 [1st Dist., 1991]). While one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so[.]*Id.* at 29.

¹⁶⁶ *In re C.M. v. C.H.*, 789 N.Y.S.2d 393 (N.Y. Sup. Ct. 2004)

¹⁶⁷ *Id.* at 364.

¹⁶⁸ American Law Institute, *supra* note 116 at § 2.03

¹⁶⁹ *See, e.g., V.C. v. M.L.B.*, 748 A.2d 539 (N.J. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

¹⁷⁰ Elizabeth Bartholet explains that children have powerful needs for permanence and consistency in who their parents are. Bartholet, *supra* note 80. at 324.

words say it well, as she dissents from the *In re Alison D.* decision denying a lesbian co-parent standing to seek visitation:

[The decision today] may affect a wide spectrum of relationships-- including those of longtime heterosexual stepparents, "common-law" and nonheterosexual partners such as involved here, and even participants in scientific reproduction procedures. Estimates that more than 15.5 million children do not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent, suggest just how widespread the impact may be. . . [T]he impact of today's decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development.¹⁷¹

New York courts are not alone in finding that genetics (or legal adoption) exclusively defines parenthood. At least one other state supreme court has recently found that a mutual intention to create a child through ARTs and to co-parent the child, even accompanied by years of nurturing and raising the child together, will not suffice to give the nonbiological co-parent standing.¹⁷²

On the opposite side of the coin are cases where genetic gamete donors donated under the condition that they would not have a relationship with the child, but were found to have one anyway. In a recent Pennsylvania case, *Ferguson v. McKiernan*, an office co-worker served as a known sperm donor, when requested to do so by a married woman who was his former lover.¹⁷³ The woman lied to everyone, including the fertility doctor who did the insemination. She actually went to the insemination procedure with another man who she falsely passed off as her husband and the sperm donor, though he was neither. Prior to and after the physician-assisted insemination, she assured her known

¹⁷¹ *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 30–31 (1991) (Kaye, C.J., dissenting).

¹⁷² *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004).

¹⁷³ *Ferguson v. McKiernan*, 855 A.2d 121 (Pa. Super. Ct. 2004). I will spare the reader the rest of the sordid details of this story, as they defy imagination.

sperm donor that he would have no parenthood status or obligations. Not citing to any UPA provision protecting a sperm donor when insemination is conducted by a licensed physician, the court found that a contract between parties to reproduce (and in this case allocate parental responsibilities for children created by ARTs) is unenforceable, because the parties cannot voluntarily “bargain[] away a legal right not held by either of them, . . . but belonging to the subject children”¹⁷⁴ Despite acknowledging the woman’s “despicable” outright fraud and deception to all parties involved, and despite the use of a licensed physician to conduct the insemination, a Pennsylvania appellate court finds the coworker sperm donor to be the legal father of the child.¹⁷⁵ The court reasons that since the marital presumption of paternity was rebutted by the woman’s husband, and since children are better off with fathers to help support them, the sperm donor’s genetic connection to the child makes him responsible for child support.¹⁷⁶

In *In re O.G.M.*, a Texas appellate court decides that a known sperm donor was the father, despite the fact that the parties were not married when the pregnancy began and according to the mother he had donated the gamete and waived all parental rights.¹⁷⁷ The Texas appellate court determines that the UPA does not apply because of the uniqueness of the situation. In *O.G.M.* a frozen embryo that became the child was created during the marriage between the genetic mother (Mildred McGill Schmit) and the genetic father (Donald McGill). However, it was not until three months after their divorce that Schmit conceived. McGill accompanied Schmit to the IVF clinic at the time

¹⁷⁴ *Id.* at 124.

¹⁷⁵ *Id.* at 123–24.

¹⁷⁶ *Id.*

¹⁷⁷ *In re O.G.M.*, 988 S.W.2d 473 (Tex. App. 1999).

of conception. Schmit claimed that McGill orally agreed to donate the embryo to her, but McGill claimed they agreed he would be the father. Three months after O.G.M.'s birth McGill sued for paternity rights and Schmit objected. Though the adults disagreed about what occurred, it seems odd that McGill would have divorced Schmit and then agreed to have another child with her as a coparent. Schmit argued that the UPA controlled and prevented McGill from being declared the father, citing section 151.101(b): "If a woman is artificially inseminated, the resulting child is not the child of the donor unless he is the husband."¹⁷⁸ McGill was not her husband, so he is not the father. The court disagrees. It refuses to apply the UPA, saying that section 151.101(b) applies to artificial insemination and not in vitro fertilization with a subsequent implantation of a frozen embryo.¹⁷⁹ Primarily because of McGill's genetic connection, but also because of his acknowledgement of paternity and his asserted desire to parent, his claims to paternity overpower the parties' prior agreement and reasonable interpretations of the UPA.

In *In re Thomas S. v. Robin Y.*¹⁸⁰ a known gay sperm donor is permitted to get an order of filiation, even though he made a preconception agreement with the lesbian couple donees that he would not be the child's parent. The court finds that his acknowledged biological/genetic relationship to the child, plus the couple's post-birth conduct permitting the man occasional visitation with the child, makes the man the legal father, not a nonpaternal sperm donor. Once the sperm donor is viewed as the father, the court decides it is required to apply due process standards for termination of parental

¹⁷⁸ Tex. Fam. Code Ann. § 151.101(b) (Vernon 1995). These sections were deleted when Texas adopted the revised UPA in 2001. §§ 151.101 to 151.103. Deleted by Acts 2001, 77th Leg., ch. 821, § 2.13, eff. June 14, 2001. V.T.C.A., Family Code, §151.101.

¹⁷⁹ *In re O.G.M.*, 988 S.W.2d at 477.

¹⁸⁰ *In re Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 356–57 (N.Y. App. Div. 1994).

rights, rather than look to the parties' preconception agreement, in deciding whether to grant the filiation order. Without the genetic trump card, this man would be no more than a friend of the family. Because the court determines that the biological connection takes precedence over intent and the existing, stable two parent lesbian family, a known sperm donor is again granted parental status.

Imagine if courts were so committed to genetic definitions of parenthood that they declared all formerly anonymous sperm donors to be legal fathers of the children they sired, at least for children of women who are or ended up being single mothers! A theoretically consistent genetics-based analysis leads to this consequence.¹⁸¹ The other consequence of applying a genetics-based approach in ART cases is that real strangers (persons unknown to the child), like Robert B., are transformed into legal and biological fathers,¹⁸² while real fathers (persons who function as fathers and have a paternal bond with the child), like Robert Fasano, are transformed into legal and biological strangers.¹⁸³

Surely true parenthood is much more than biology. However, even if for the moment we assume that courts, like the New York courts, Massachusetts' highest court

¹⁸¹ Though not declaring them legal fathers, in some ways, Britain has moved in this direction with a new law it implemented in 2005. The law gives children who are created from anonymous sperm donations after April 2005 the right to learn who their "father" is. Sophie Goodchild, *Agenda: This week's big issues: secrecy to be lifted on donors, Children Born Through 'Assisted Reproduction' Will Get Right to Trace Biological Parents*, INDEPENDENT ON SUNDAY (UK), Mar. 27, 2005, at 29. In the United States (so far at least), anonymous sperm donors are statutorily protected as non-fathers and declared to have no cognizable relationship to or responsibility for the child. *See, e.g.*, UPA § 702 (2000). Known donors often do not have the same kind of immunity from parenthood in the sperm donation setting. But anonymous donors are protected. Now, the new British law has brought waves of fear to the men who would anonymously donate sperm, resulting in a steep decline in anonymous sperm donations. The press reports that some ART clinics and participants are now forced to go out of Britain to purchase sperm. *Challenge to sperm bank law*, DAILY RECORD (Glasgow, Scotland) Mar. 30, 2005, at 25.

¹⁸² Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003).

¹⁸³ Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

in *T.F. v. B.L.*¹⁸⁴ and *Culliton v. Beth Israel Deaconess Medical Center*,¹⁸⁵ and the Ohio Common Pleas Court in *Belsito*,¹⁸⁶ or the Ohio Court of Appeals in *Rice v. Flynn*,¹⁸⁷ are correct in using a biological approach to legal parenthood, a genetics-based approach is inappropriate. The argument in this section is not that biology ought to be the only determinant of parenthood; rather, my argument is that when a court uses a biological definition of parenthood rooted in genetics, it uses biological parenthood in a sex-biased manner. In an earlier article focusing on the *Perry-Rogers v. Fasano* case, I argued that genetics-based solutions to resolving parentage dilemmas arising from fertility clinic errors are fundamentally flawed and must be rejected.¹⁸⁸ A genetics-based approach, by equating genetics and gametes with biological parenthood, but not equating pregnancy with biological parenthood, is sex-biased, promotes genetic essentialism, and in some cases, such as the *Perry-Rogers* case, can be race-biased as well. I will not reprise my entire argument here, but a small portion of it is offered below and in Part IV to support my proposed labor-based theory of parenthood.

A man's biological contribution to reproduction is purely genetic. His biological fatherhood is measured by the contribution of his gamete containing his complement of

¹⁸⁴ *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004).

¹⁸⁵ *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001) (finding that the probate court has jurisdiction to enter pre-birth order that the names of the genetic gamete donors be listed as the parents on the children's birth certificates, rather than the name of the contractual gestational mother); *See also* *J.R. v. Utah*, 261 F.Supp.2d 1268 (D. Utah, 2002) (declaring that once gamete donor parents in a surrogacy case prove their genetic consanguinity, the presumption favoring parentage in the gestational mother dissolves).

¹⁸⁶ *Belsito v. Clark*, 644 N.E.2d 760 (Ohio Ct. Common Pleas 1994).

¹⁸⁷ *Rice v. Flynn*, 2005-Ohio-4667, 2005 WL 2140576 (Slip Opinion, Ohio App., 9 Dist. 2005).

¹⁸⁸ Bender, *supra* note 4.

the genes and chromosomes used in creating the embryo. A woman's contribution to biological maternity parallels a man's contribution of a gamete and contains the other half of the child's genetic and chromosomal complement. A woman who contributes an ovum to reproduction makes the same kind of biological contribution (genetic) as a man does when he contributes sperm.¹⁸⁹ Yet women necessarily contribute more to human reproduction. Women also make a gestational contribution to reproduction, through pregnancy, intrauterine bonding, labor, delivery, lactation, and sometimes breastfeeding. In other words, men make only a genetic contribution to reproduction; women make a genetic contribution and a gestational contribution. An analysis that defines parenthood by genetics takes into account all that men contribute, but only part of what women contribute. In order to be just, an analysis must take into account all that each contributes. The only way it makes sense to count all that men can do (genetics), and only that, as the *sine qua non* of parenthood, is if one begins the analysis with a male norm of what it means to be human. But to be human is to be either female or male (or some combination of both). A fair analysis of biological parenthood must include both genetics and gestation. Katharine Baker agrees:

As discussed, men simply cannot invest what women must invest in pregnancy, and what women must invest is huge. Rewarding that investment with superior rights simply reflects a principle basic to the common law and to more recent trends in family law rewarding investment with rights. Refusing to honor what is unquestionably a greater contribution smacks more of oppression than equality. Thus, the reward that the proposed model offers to gestational mothers is not offered as a retreat from ideals of gender equality, but as an embrace of those ideals. Only if we recognize and reward the labor that women

¹⁸⁹ The work it takes to produce and extract multiple ova is significantly more intrusive and physically taxing than the work of providing sperm. In a genetics approach, these two would be of comparable weight. In a labor-based approach as I propose, *infra* Part IV, the extra labor provided by a woman gamete donor would be rewarded by a parentage priority.

have always done and, to a large extent, continue to do, can we expect a world of meaningful equality.¹⁹⁰

In cases like *Perry-Rogers v. Fasano*, a genetics-based analysis that decides between two mothers is just as sex-biased as a genetics-based analysis between a father and a mother. A woman who donates ova to reproduction does the same thing as a man who donates sperm—the person contributes half the genetic complement of the created embryo. A gestational mother nurtures that embryo into a child. Pregnancy is essential to reproduction. The embryo could sit in a freezer forever, be left in the sunlight, be submerged in the ocean, or float in a fresh water pond, but none of those methods allow it to grow into a child. An analysis that ends up dismissing the gestational contribution to the creation of a child and relies solely on the genetic contribution, which is what the court did in the *Perry-Rogers* case (a rose by any other name would smell as sweet), is fundamentally flawed and sex-biased. Therefore, I urge courts and legislatures to reject a genetics-based analysis of parenthood.

IV. PROPOSED ALTERNATIVE

I suggest in Part III that contract-based, intent-based, UPA-based, and genetics-based approaches to assigning legal parentage in cases of ART mix-ups do not work. In the absence of an existing approach that fairly balances all the relevant concerns and puts the interests of the children of ART mix-ups first, a new approach must be developed. I propose deciding ART mix-up parentage disputes through lenses of (1) labor-based contributions (caregiving and responsibility) and (2) existing relationships (child-

¹⁹⁰ Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 63 (2004) (internal citations omitted).

centeredness) *in utero* and *ex utero*.¹⁹¹ Ideally, legislatures can enact statutes that reflect the values and interests promoted by this alternative approach. Perhaps the drafters of the Model Act will be persuaded to revise or amend their Model Act in response to these concerns. Surely the Model Act would benefit from a separate section that responds to the painful contests between hopeful parents-to-be in ART mix-up cases.

A. *A Labor-Based Theory of Parentage*

In order for a mistakenly placed embryo or sperm cell to grow into a baby, a lot of labor is required. Maternity, or nine months gestation,¹⁹² minimally involves nurturing, physical carrying and transporting, oxygenation, toxin and waste filtering/excretion, nutrition transfer, hydration transfer, sheltering, body stretching and expanding, increased periods of fatigue, temperature regulation, exercise and motion, abstinence from other activities, indigestion, cravings and changing tastes, hormonal changes affecting moods, changes in the texture of a pregnant woman's hair and skin, swollen extremities, numerous blood and urine tests, sometimes varicose veins, often nausea, and often multiple medical or midwifery appointments with intrusive physical and privacy-invading procedures.. Then there is the arduous work of parturition (or labor and delivery, as it is commonly called) including expulsion of the placenta, and often the additional intrusion of fetal monitoring during labor. In cases where the child or children in utero are in distress, there may be the major surgery of a cesarean section. And post-birth there may be the additional intensive physical labor of breast-feeding, or lactation

¹⁹¹ The italicized phrases, meaning “in the womb” and “out of the womb” respectively, have become a part of the English language of assisted reproductive technologies and will not continue to be italicized in this article.

¹⁹² It is actually longer than nine months, or forty weeks, if the baby is full-term. Only someone who wasn't at the end of a pregnancy and counting every day would discard the extra week or more.

and nursing. Even if breastfeeding does not occur, there is the labor and physicality involved in restoring one's body to "normal" after pregnancy. Any realistic legal analysis of parentage issues cannot disregard, or even discount, this maternal work and contribution to the growth of the embryo into a child.

Undoubtedly, pregnancy, labor and giving birth are intensive work. These activities are primal and biological. They also involve conscious, often difficult, and sometimes life-threatening, physical labor. For every moment of a known pregnancy, the pregnant woman makes a conscious choice to stay pregnant "as it is her body that sustains the pregnancy."¹⁹³ One analogy might help clarify this. Because a man's body has the capacity to grow stronger chest and arm muscles than a woman's body, that does not convert lifting heavy loads into just "something natural" rather than the intense, physical work it is. Likewise, because a woman's body has the capacity to grow an embryo into a child does not convert pregnancy, labor, and delivery into just "something natural" rather than the intense, physical work it is.

Understanding and acknowledging the labor of gestation and birth is critical to any just analysis of parenthood disputes after an ART mix-up. To resolve parent disputes by assigning parenthood on the basis of genetic contributions alone, and ignoring pregnancy, labor, and delivery (hereinafter pregnancy), is blatantly sexist, whether intentionally or not. Both men and women make genetic contributions to the birth of a child. To that extent, an analysis that credits genetic contribution can be even-handed. However, as discussed above, women also make a pregnancy contribution to the birth of

¹⁹³ Julien S. Murphy, *Should Pregnancies Be Sustained in Brain-Dead Women?: A Philosophical Discussion of Postmortem Pregnancy*, in *HEALING TECHNOLOGY: FEMINIST PERSPECTIVES* 135, 137 (Kathryn Strother Ratcliff ed., Univ. of Mich. Press 1989) (arguing that respect for women requires an understanding of pregnancy as a conscious activity).

a child. An analysis that credits all of men's biological and labor-based contributions to the birth of a child, but only a small portion of women's biological and labor-based contributions to the birth of a child, is undoubtedly sex-biased. A just analysis must credit all of both sexes' biological and labor contributions or none of both sexes' biological and labor contributions to be fair. Only by working from the hidden assumption of a male norm can the biological and labor contribution of gestation to a child's existence be deemed irrelevant to determining parentage.

If an analysis of parentage claims uses a "human" norm, rather than a "male" norm, then we can assess all of the male and female biological and labor contributions fairly. If we select an approach that discounts, ignores or denigrates one group of people's labor contributions to parenthood, while we prioritize and value a different group's labor and biological contributions, we are acting in a biased or unequal way. A genetics-based approach to determining parenthood, at least in the context of ART mix-ups, does just that—it values one group of people's labor and biological contributions to reproduction (males and female ova donors) and discounts or ignores another group of people's labor and biological contributions to reproduction (gestating mothers).

The biological process of reproduction alone cannot create a child, particularly a child resulting from ARTs. Child creation involves conscious, emotional, labor-intensive activity. It is that labor aspect of creating a child upon which I want to focus now. My preferred analysis for determining parentage in ART mix-up cases is based on the actual labor contribution to the child's birth made by each person intending to parent the child.

Children are not commodities or property. The following argument is not intended to even imply that they are. I am completely opposed to any analysis of children that treats them as or like property. Yet there are some things about property concepts that by analogy seem particularly relevant to children created through ARTs.¹⁹⁴ John Locke famously developed something called the “labor theory of value” in his philosophizing about property and “natural law.”¹⁹⁵ While Locke’s theory has some serious flaws and has been subject to significant critiques,¹⁹⁶ particularly in its assumption that “nature” is just there for the taking, it also contains some nuggets of wisdom that make sense in the context of pregnancy and child-creation.¹⁹⁷ Locke’s theory, in its most simplified form, proposes that if one takes something from nature and adds his or her labor to it by improving it or changing it into something useful, then it becomes the laborer’s property. The value of the item as property comes from the labor that transformed it from its natural state into something useful.¹⁹⁸ Adam Mossoff argues

¹⁹⁴ Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159 (2005) (suggesting the combined applicability of property interests and personhood interests in embryos).

¹⁹⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT §27, at 287 (Peter Laslett ed., student ed. 1988). For some recent renditions of Locke’s labor theory of value, see Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715 (2003); Jessica Berg, *supra* note 194; Alex Geisinger, *Uncovering the Myth of a Jobs/Nature Trade-off*, 51 SYRACUSE L. REV. 115 (2001) (attributing the labor theory of value to Adam Smith and Karl Marx).

¹⁹⁶ See, e.g., MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993) (rejecting a Lockean theory of property and developing a Hegelian, personality-based theory of property). See also JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

¹⁹⁷ Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL’Y & L. 13 (1999) [hereinafter Fineman] (arguing a woman’s entitlement to property-like rights against the state for their caregiving labor).

¹⁹⁸ Karl Marx also developed a labor theory of value. He reasoned that labor is the source of all the “surplus value” that is created in property. Karl Marx, *Wage Labor and Capital*, reprinted in the MARX-ENGELS READER (Robert C. Tucker ed. 1978); Karl Marx, *Das Capital*, reprinted in the MARX-ENGELS READER at 344–61; Raj Bhala, *Marxist Origins of the “Anti-Third World” Claim*, 24 FORDHAM INT’L L.J.

that when Locke uses the term “labor,” he means “productive activity.”¹⁹⁹ Locke’s labor theory of value has often been analyzed as a theory rooted in values of “desert” or “reward.” The laborer deserves the property as a reward for the value his labor has added to it.

What could be more of a productive activity, more “labor deserving of reward,” than gestating a child? Parallel to how Locke’s labor theory of value was articulated above, if one takes gametes (genetic and biological parts of nature) and adds her labor to them (this time meaning reproductive activity, such as pregnancy, labor, and delivery, as described above), then that labor creates the utility or value that is the resulting child. As the person who adds her labor to nature to create something of value, a gestational mother gets first priority as parent under a labor-based theory of parenthood.²⁰⁰ This approach rewards reproductive labor with a priority of parenthood. As a theory for assigning parenthood, it has the advantage of tying parenthood to the notion of desert or reward for labor input. However, standing alone, it is too parent-centered, rather than child-centered, to deal with the whole issue. Holding in abeyance for a moment the ways in which this labor-based theory of parenthood combines with a relationship, child-centered basis for parenthood, it is useful to play out how a labor-based theory applies to others

132 (2000). Marx criticized capitalist economies for taking the surplus value created by labor and giving it all to the capitalists or bourgeoisie, instead of to the proletariat laborers.

¹⁹⁹ Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255 (2001).

²⁰⁰ Hypothetically, in cases of collaborative reproduction (gestational surrogacy, and even traditional surrogacy), a gestational mother may be able, with appropriate information given beforehand, voluntarily, with medical and legal advice, and appreciating the consequences of her actions, to contract in writing to waive her parental priority in exchange for a reasonable payment for her labor, services, and risk-taking. This very important issue cannot be addressed in the context of mix-ups, however.

than the gestational mother. Then I will take up the issue of the child-centered relational analysis.

B. Proposed Labor-Based Priorities

If legislatures or statute drafters decide that it is just to fashion an analytical response to ART mix-ups based on labor contributions, then I propose the following prioritized list.²⁰¹ As I suggested earlier, a new article governing parentage disputes in cases of ART embryo or gamete mix-ups should be added to the UPA or to the Model Act. This proposed article should expressly base parentage determinations on labor-based (and relationship-based, see *infra* Part IV.C) contributions in ART mix-up cases.²⁰² Applying a labor-based analysis will generate a presumptive list of priorities for assigning parenthood.

Under a labor-based approach for ART mix-up cases, the gestational mother gets first priority as the child's parent based on her incomparable type and amount of labor in creating the child. If the gestational mother chooses to have a child as a single woman, and chooses not to share parenting and caregiving responsibilities with another adult, then she is the sole legal parent.²⁰³ If the gestational mother plans and creates a child with another adult who shares the pregnancy process and will share parenting and caregiving responsibilities after the child's birth, the chosen co-parent is the person who

²⁰¹ Similar prioritized lists are crafted by legislatures for family health decisions/surrogacy acts, for example, where specific priorities are given to proxy decision-makers based on the legislative assumptions about relationship connections. *See, e.g.*, N.Y. PUBLIC HEALTH LAW § 2965 (2)(a) (McKinney 2002).

²⁰² The rules this article proposes for a statutory supplement to the UPA or Model Act are limited to cases of ART mix-ups. This article does not express an opinion about whether these rules should apply in different reproductive situations, whether technologically assisted or not.

²⁰³ Susan Buchweitz would win her lawsuit under this priority rule for single women. Robert B., *supra* note 2. Were this analysis to apply to non-mix-up disputes over children conceived by ARTs, Mildred Schmit and Deborah D. would also prevail. In re O.G.M., *supra* note 177; Steven S., *supra* note 131.

contributes the next most labor to a child's creation and birth. This adult, chosen by the gestational mother as a parenting partner and the next greatest labor contributor, is also the child's legal parent.²⁰⁴ The couple (the gestating mother and her chosen parenting partner, whether male, female, intersexed or transsexual) who chooses to create the child, who prepares for the child's birth, who plans to take the child into their home to nurture and love, and who jointly acknowledge the child as their own, should be statutorily granted parental priority over all others.²⁰⁵ They are the child's parents and a statutory article should entitle them to be listed as parents on the child's birth certificate. Neither of them should be required to adopt the child or go through any legal process to confirm their legal parental rights.

Once this parenting unit has been established, and if the parents in this unit want to parent the child, the analysis need go no further. No one else would have legally recognized parental rights, standing to challenge the parental assignments, or standing to seek third-party visitation. It does not matter that these legal parents were mistakenly given the wrong embryo or wrong gametes to nurture. The labor and nurturance they have invested in bringing the child to life entitles them to the privilege of being the child's legal parents, if they so want.

If the gestational couple does not want to parent the child because of the ART mix-up, then they must relinquish all rights to parent the child in a formal written document that is filed with a court. The validity of this relinquishment turns on its

²⁰⁴ In the cases of ART mix-ups, this gives second parent priority to the gestational mother's husband, domestic partner, civilly-united partner, significant other or an unmarried cohabiting male or female. As applied to the mix-up cases discussed earlier, this gives priority to Robert Fasano (and Mr. A in the British case) Perry-Rogers, *supra* note 18; A. v. B., *supra* note 25.

²⁰⁵ In some unusual cases of communal living arrangements, this parental unit may even consist of more than two people.

voluntariness and informed consent, not standards relating to parental terminations or parental fitness. In a case of an ART mix-up in which a gestational couple formally relinquishes their parental rights, a genetic mother who wants to parent the child of the ART mix-up, along with her chosen parenting partner, if she has one, has the next ranked priority as parents. A genetic mother achieves her legal parental priority in ART mix-up disputes through her labor and effort in creating and offering the ova for germination. If she wants to parent the child and the gestational couple has formally relinquished their parental rights, she becomes the legal parent without having to adopt. Her physical experiences of ova removal, her labor (including coping with hormone treatments and the physical and emotional changes they entail, ovarian hyperstimulation, temperature monitoring, travel to doctors, pharmacies and clinics), and her other mental and emotional contributions to the process of ova donation far exceed the labor contributed by others lower on the priority list who might want to parent the child.

If the genetic mother intends to co-parent with the genetic father, then he acquires her level of priority to be named a legal parent without adoption based on his cooperative labor with her to create and plan for the child. If the genetic mother intends to co-parent the child with someone other than the genetic father, her chosen co-parent (who endures the experience, and possibly contributes labor to the hormonal treatments and ova extraction procedures) is granted the same priority as she has to be declared a legal parent without adoption. If the genetic mother plans to parent as a single mother, no one else acquires a priority equal to hers. In other words, the genetic mother and her chosen coparenting partner, whether the genetic father or not, have priority directly under the gestational mother (and her chosen coparenting partner).

If the genetic mother donates her ova for monetary compensation or anonymously with no intention of parenting the ART-created child, then she and her relationship partner, if she has one at the time of donation, must relinquish all parental claims in a written document filed with a court immediately prior to or at the time of donation.²⁰⁶ If that document is properly filed, parental responsibilities, along with the right to be named the legal parent, would be offered to the next greatest labor contributor, and therefore the next ranked party, the genetic father (and his chosen co-parenting partner). Comparable to the rules applying to the gestational mother and her partner, if the genetic mother and her chosen co-parenting partner do not want to parent the child because of the ART mix-up, after they formally relinquish all parental claims, the genetic father who wants to parent the child, and his chosen co-parenting partner, if he has one, acquire legally cognizable parenthood claims, under a labor-based approach. If all the proper parental rights relinquishment documents are filed with the court (by the gestational mother and her partner and the genetic mother and her partner), the genetic father and his co-parent may be named the legal parents on the birth certificates without having to adopt. If the genetic father wants to be a single parent and has no partner, he alone will be named as the legal parent on the birth certificate, and will have the same statutory rights as a single woman to raise the child without a legally recognized coparent. If the genetic father is not willing to parent the child because of the ART mix-

²⁰⁶ This process would eliminate post-dispute manipulations of the ART controversies, particularly but not exclusively in the context of ART mix-ups, such as the one that arose in *Rice v. Flynn*, *supra* note 113 (finding that in competing claims for maternity, a formerly-anonymous ova donor is the legal mother of the children, instead of the gestational surrogacy, sending the case back to the lower court to determine whether the ova donor had waived her parental rights.)

up, he must formally relinquish his rights in a document filed with a court, as the other people in this priority list were required to do.

In each of the first three ranked parenting levels, the labor-based theory prioritizes a biological contributor and a co-parent, if there is one, who may have neither a gestational nor genetic relationship with the child, but is granted parenting priority equal to the biological parent. Biological contribution often correlates with the amount of labor contribution, but not exclusively. Labor also consists of the emotional and physical support of a gestating woman, and also all the organizing, planning, and implementing work that brings about the birth of the child and sets up a home for him or her. Thus, this parental priority ranking includes prospective parents engaged in ARTs who have no biological connection, but have contributed the labor required to create the child they intend to parent. This differs significantly from the ways courts respond to the nonbiologically connected coparent in ART disputes.²⁰⁷

Some people utilize ARTs to create children without ever making a biological (gestational or genetic) contribution. Couples even have the ability to create an ART-conceived child where neither couple member makes a biological contribution to the

²⁰⁷ See, e.g., *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 786 (Cal. Ct. App. 2003) (Denise B. made neither a genetic nor gestational contribution to the child because of the IVF mix-up); *Matter of Baby M*, 537 A.2d 1227, 1235 (N.J. 1988) (Elizabeth Stern made neither a genetic nor gestational contribution); *J.F. v. D.B.*, 66 Pa. D. & C.4th 1 (Pa.Com.Pl. 2004) (Mr. Flynn's fiancé made neither a gestational nor genetic contribution. As an aside, someone should write an entire article on this *J.F. v. D.B.* case. So far, it has had the following further permutations. See *Flynn v. Bimber*, 70 Pa. D. & C.4th 261 (Pa.Ct. Com.Pl. 2005); *Rice v. Flynn*, No. 22416, 2005 WL 2140576 (Ohio Ct. App. Sept. 7, 2005), and *J.F. v. D.B.*, 2006-Ohio-1175, 2006 WL 630009 (Ohio App. 9 Dist., March 15, 2006).) In each of the cited cases, the adult without a biological contribution was a woman who engaged in the ART process with her partner in order to create a child for her family. Despite the fact that courts did not recognize them as parents or persons with standing to assert maternity does not undermine the claim that they were people using ARTs to create children for their families. In addition, men like John Buzzanca also utilize the ART process to create children for their families, even though they do not have a genetic connection to the child. In re *Buzzanca*, 72 Cal.Rptr.2d 80 (Cal.App. 1998). Married men whose wives or partners are medically inseminated by sperm from anonymous donors also have no biological genetic connection to their child created using ARTs.

creation of the child,²⁰⁸ although this is more unusual since most couples use ARTs in order to have a biologically related child. In cases where people or couples without biological connections use these technologies to create a child, the couple or individuals are the intended parents.²⁰⁹ The intended parents' labor toward creating the child gives them the next level of parental priority, if all the parties with earlier priorities have formally relinquished their parental rights in a document filed with a court.

In the nearly unimaginable case that none of the parties who engaged in the assisted reproductive technologies to produce a child is willing to parent the child of a mix-up, and each has relinquished his or her parental claims in writing, the child should immediately be made available for adoption.²¹⁰

In sum, the parental priority list in cases of ART mix-up mistakes proceeds as follows:

- a. gestational mother (and her chosen co-parent, if there is one)²¹¹
- b. genetic mother (and her chosen co-parent, if there is one)
- c. genetic father (and his chosen co-parent, if there is one)
- d. intended parent (and chosen co-parent) with no genetic or gestational connections to the child

²⁰⁸ See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998). (Neither John nor Luanne Buzzanca made genetic or gestational contributions to Jaycee.)

²⁰⁹ The Model Act uses the term "prospective parents."

²¹⁰ In this last case, the adults who agreed to create the child should have fiscal responsibility for the child until an adoption is final.

²¹¹ If the gestating mother and the co-parent end their relationship soon after conception, then the labor contributed by the co-parent is not sufficient to give him/her the labor-based parental priority of the gestating mother. At that point, the former relationship partner of the gestating mother, because the relationship is terminated, falls down to a nonbiological "intended parent" priority for parenthood status.

- e. adoption by stranger uninvolved in the ART process that created the child.

Co-parents may be married, in civil unions, may be domestic partners, just co-habitors, share parenting but live apart, be same-sex or different sex, or may be very close friends. The co-parent relationship is created by the choice of the gestational, genetic or intended parent, not by any formal legal processes, and by active labor in the creation and/or parenting of the child.

Having presented this theory to several audiences, including my students, I repeatedly hear concerns that giving the gestational mother first priority due to her labor contribution is completely sex-biased, as well as inappropriately dismissive of the interests, commitments, and emotional trauma of the infertile female prospective parent (whether she is a genetic contributor or not) and/or the infertile male prospective parent (whether he is a genetic contributor or not). In response to the sex-bias claim, I have already argued that sex-based biases enter into the analysis when women's gestational contributions and labor are ignored or discounted, not when they are given their due. It is true that women who are gestational mothers will always get priority over men in the quest for legal parentage of children created through ART mix-ups.²¹² The labor-based priority given to the gestational mother is a function of the actual physical and emotional differences in labor contributed to the creation of the child. Men and infertile women who cannot gestate a child cannot achieve this level of priority in mix-up cases because they never contribute the labor, and for no other reason. A child simply cannot come into

²¹² The only man over whom a gestational mother will not have priority, because she shares her legal parental priority with him, is a man with whom she has chosen to have a committed co-parenting relationship.

existence without the invaluable nine-plus months of labor by the gestational mother.²¹³

The labor-based approach does give equal parental priority to the gestating mother's chosen coparent during the pregnancy and at the time of the birth. This chosen coparent can be a man or woman, so it is not only women who get the first parental priority.

In response to the claim that a labor-based theory is dismissive of the rights and pain of an infertile woman who cannot carry a child or an infertile man in the mix-up cases, I believe the critique is misplaced. A labor-based theory recognizes the terrible wrong suffered by the infertile women or men who are nongestational parties to the mix-ups. Their labors and investments in the creation of a child are not ignored or devalued. But no matter how seriously their contributions to a child's existence are valued, those contributions cannot be equated with the labor invested by a gestational mother and her partner. The ART mix-up has shattered the infertile couple's hopes and dreams without their consent. Their intense emotional and physical investment has come to naught, at least so far. Although their grief and the pain they suffer is worthy of our deepest sympathy and significant damages from the clinic whose mistake harmed them, their suffering ought not make them legal parents. Labor causing the growth and development of an embryo into a child deserves to be rewarded with legally recognized parental rights, not suffering, no matter how egregious the mix-up causing the suffering. The law

²¹³ Though I hesitate to cite these cases, because their reasoning is so flawed, the logic of *Geduldig*, *G.E. v. Gilbert*, and *Bray* all indicate that treating pregnant women differently from "non-pregnant persons" is not sex-biased under the Constitution or Title VII. *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 137–38 (1976); *Bray v. Alexandria Women's Health Clinic* 506 U.S. 263, 271 (1993). *See also* *Saks v. Franklin Covey*, 316 F.3d 337 (2d Cir. 2003)(deciding that a health insurance plan that excludes surgical implantation procedures for infertility treatments, but includes other infertility treatments, does not discriminate against women in violation of Title VII or violate the Pregnancy Discrimination Act, because both men and women suffer from infertility and need coverage.) Likewise, treating gestating women differently from non-gestating persons is not sex-biased. This marginal argument is made to persuade naysayers who are convinced that my proposal is sex discrimination under current interpretations. In truth, I strongly disagree with the logic in all of those cases, but still feel confident arguing about the sex equality, rather than perpetuated sex bias, promoted by my proposed priority rules.

compensates suffering caused by someone else's negligent, reckless or intentional actions with damages, not the assignment of legal statuses and the creation of new legal relationships.²¹⁴

The case of the Rogerses, for example, in the *Perry-Rogers v. Fasano* ART embryo mix-up, illustrates this best. Deborah Perry-Rogers was sadly unable to sustain a pregnancy when she was implanted with her and her husband's embryos. An embryo that does not implant in a womb cannot become a child, no matter how much one wishes it or hopes (or intends). The new reproductive technologies can do a lot to assist couples suffering from infertility, but they cannot guarantee a child, even if a healthy embryo is successfully created. Deborah and Richard Rogers were able to create embryos, but they were not able to create children. Only a multi-month pregnancy and birth can yield a child. Donna Fasano was the woman who provided the labor and means for the embryo to grow into a child. And so, as the woman who gestated and gave birth to the child, she should be the legal mother under a labor-based theory of parentage for ART mix-up cases.. Robert Fasano, who supported and planned with Donna Fasano all during the pregnancy and intended to co-parent, should be the legal father without having to adopt. Their legal rights should protect them from all parental rights claims by any third parties. The unclear rules in existence when Mrs. Fasano gave birth led the Fasanos to make a serious mistake when the Rogerses sued them. At that point in time the Fasanos, no doubt believing it was their "duty" and would be required by law, agreed to transfer custody on the condition that they were granted generous visitation. Had the labor-based theory of parentage in ART mix-up cases been the statutory law of New York, and had

²¹⁴ I have written elsewhere on the inadequacy of monetary damages to respond to tortiously-caused harms, and these mix-up cases seem to fall squarely within that concern. Leslie Bender, *Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 848 (1990).

they known they were absolutely protected by that law, they may never have signed the settlement with the Rogerses. The contractual settlement, for all its seeming force and the care that went into negotiating it, ended up not being worth the paper it was written on, because the Rogerses immediately undermined the agreement and left the Fasanos unable even to visit their child.

If a gestational mother plans to parent alone and engages in the ART process making that plan clear to the clinic, as Susan Buchweitz did, or absolutely clear to a known sperm donor, then the statute must allow her to parent alone, with no interference by any strangers. The result in the Buchweitz case, *Robert B. v. Susan B.*, was terribly wrong. Robert, who should have been eliminated as a legal parent under a labor-based priority system, undermined Susan Buchweitz's labor-based parental priority. It is wrong that Susan is forced to share her son with a stranger, and that the child is forced to have a relationship with Robert and a visitation schedule that interferes with the rhythms of their lives. I have no reason to doubt that Robert and Denise love Daniel very much and enrich his life in many ways, as does his relationship with his sister, Madeline. But they should not have been made part of Daniel's life. It is hard to balance the benefit they give Daniel against the damage Daniel suffers from the stresses and strains caused to his mother by the court's resolution of this mix-up. The result in *Robert B.* is not win-win as the court may have thought.

A labor-based theory alone, even with its clear priorities for mix-up cases, may not adequately protect a child's interest in maintaining existing relationships and stability, so the theory must be supplemented by a relational, child-centered component. That additional facet of the proposed analysis is discussed next.

C. *Relational, Child-Centeredness*

An appropriate and just theory of parentage in ART mix-up cases must put the child's needs and relationships at the center of the analysis. Children survive only because they have relationships with adults who care for them, who feed, shelter, clothe, and generally nurture them. Whether framed as an approach that respects caregiving²¹⁵ or one that respects relationships, child-centeredness requires that existing relationships of dependence and responsibility between children and adults be preferred over proven genetic connections or parents' needs.²¹⁶ Fortunately, and perhaps not coincidentally, this relationship-sustaining approach meshes very well with the labor-based analysis already proposed.

Pregnancy, if chosen and sustained, is an ongoing relationship between the growing child and mother. Children develop powerful bonds in utero.²¹⁷ In the best of all possible worlds, those bonds are reinforced after birth through a continuing relationship with their gestational mother.²¹⁸ During a mother's pregnancy, the child

²¹⁵ MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); *see also* Fineman, *supra*, note 197.

²¹⁶ Niccol Kording, *Nature v. Nurture: Child Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 814 (2004) [hereinafter Kording] (advocating a child-centered, rather than parent-centered approach to paternity, looking at relationships over biology.) Niccol Kording has written this persuasive article that makes the points I am making in this subsection much better than I do. *See also* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

²¹⁷ Marjorie L. Rand, *As it was in the Beginning: The Significance of Infant Bonding in the Development of Self and Relationships*, 7 ANNALS OF THE AMERICAN PSYCHOTHERAPY ASSOCIATION 40 (2004) [hereinafter Rand] (and articles cited therein).

²¹⁸ Sometimes mothers die or become incapacitated in childbirth, and sometimes mothers know that they cannot properly care for their child, so they relinquish the child to another by terminating their parental rights. Gestational mothers may also contract to gestate some other couple's embryo. In most of these cases, the effects on the child of severing the in utero bond seem to be surmountable. But severing that bond and not forming a substitute bond in the first three months may create permanent harm. There are indications that the absence of bond-formation impacts the child in attachment disorders. Terry Levy &

may also be able to form looser bonds with the co-parent, if as some scientists suggest, the child can hear and feel external things while in the womb.²¹⁹ But even if that is not so, from the birth onward, the gestating mother's parenting partner forms a relationship with the child through caregiving. The child becomes dependent on both caregiver parents, if there are two. They assume responsibility for the child's well-being. These relationships do not depend upon genetics at all. Legislatures ought to amend the UPA, adopt an amended version of the Model Act, or create a new statute to recognize that this relationship of caregiving and taking responsibility for the child, accompanied by preconception and prebirth labor in the case of ART mix-ups, is the foundation of legal parenthood.

Courts deciding ART mix-up cases have erred in their analyses because they take a parent-centered approach. No doubt this has a lot to do with the fact that the parties to the dispute before the court are the adults competing to be named the child's parent(s), and their lawyers shape the arguments from their clients' perspectives. However, if there is a child who has been born because of an ART mix-up, the law's first duty ought be to respond to the child's needs and further the child's interests. Children require physically and emotionally nurturing relationships;²²⁰ stable, consistent long-term relationships with adults who are their parents (and children who are their siblings); and parents who are

Michael Orlans, *Attachment Disorder, Antisocial Personality, and Violence*, 7 ANNALS OF THE AMERICAN PSYCHOTHERAPY ASSOCIATION 18 (2004).

²¹⁹ Rand, *supra* note 217.

²²⁰ Justice Kennard makes this point in her dissent in *Johnson v. Calvert*, 851 P.2d 776 (Cal.1993) (Kennard, J. dissenting):

Factors that are pertinent to good parenting, and thus that are in a child's best interests, include the ability to nurture the child physically and psychologically..., and to provide ethical and intellectual guidance.... Also critical to a child's best interests is the "well recognized right" of every child "to stability and continuity."
Id. at 800.

committed to working for their child's benefit—who desire to provide the labor necessary to rear the child and help him/her successfully grow into adulthood.²²¹ Children of ART mix-ups benefit from a single, loving home with one parent or one set of parents, if possible;²²² a family free of interference by strangers (who are not known to the child or the child's parents and with whom the child's parents have no relationship at all); and a parent or parents who do not have the stress and anxiety generated by the imminent threat that someone else might claim their children.²²³

A focus on the child and the child's needs for stability and existing relationships underscores the flaws in the ART mix-up cases that have reached the courts. Legal cases of ART mix-ups that have been decided by courts are few, but so far the courts within the United States that have heard these lawsuits seem to ignore the child's needs in favor of the disputing parents' interests.²²⁴ In *Perry-Rogers v. Fasano*, the baby was ripped from the stability and security of the only parents he knew, the mother in whose womb he grew, the father with whom he had bonded, and the brother with whom he shared that womb and the first months of his life, all in the name of privileging some parents' claims

²²¹ Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323 (2004).

²²² The stability of one home is often preferable to the disruptions of trying to maintain two or more homes, although if a child has an existing relationship with two adults who separate, it is important to allow the child to maintain that relationship if he or she wants and needs to.

²²³ Children also need medical and health information with genetic implications for their well-being; information about their genetic parents when they are old enough to independently inquire; and information about their genetic siblings at that time as well. Provisions for access to this information can be written into the statute. These concerns are addressed *infra*.

²²⁴ A. v. B. [2003] EWHC 259 (Q.B.), the Leeds Clinic mix-up case, does consciously preserve the relationship between the children and adults they know as parents, but worrisomely requires the gestational mother's husband to adopt the child and permits the genetic sperm donor, who became the biological father by virtue of the mix-up, to be declared the father on the birth certificate.

to genetic consanguinity.²²⁵ This is a parent-centered approach, for sure. Undoubtedly, this little boy was forced to suffer trauma by the court's ruling. In *Robert B.*, little Daniel's tranquil and loving home was brutally disrupted by the maelstrom of a contested child paternity, custody, and visitation battle that was aggravated by the court's rulings. The law encouraged the dispute in the first instance by its failure to say in advance what would happen in the event of an ART mix-up.²²⁶

While not an ART mix-up case, the *Sean H.* case reveals another court-imposed, parent-centered approach that separates a young child from the only father she knows, one who loves her and whom she loves, and one who has taken legal and fiscal responsibility for her as well.²²⁷ The court in *Sean H.* severs the existing parent-child relational bond, all in the name of genetics and parents' rights. In other cases, children are ripped from their relationships with a co-parent whom their biological parent had originally chosen for them (a same-sex partner or a stepparent), and from a child-parent relationship that their biological parent had nurtured. The law and disputing adults are wrong to disregard children's existing parental relationships in a battle over "ownership"; children are not property to be moved around to the person with "better title."²²⁸ Surely this is as true for children of ART mix-ups as any other children.

²²⁵ *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

²²⁶ *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003). As Professor Sarah Ramsey noted in her comments to this section of this Article, a clear rule that states in advance that Robert is the legal father would still lead to the disruptive custody/visitation dispute. Rule clarity is helpful, but the rule must be selected in a manner that avoids disputes between possible parents, rather than one that creates an opportunity for this kind of disruption in the child's life. The proposed labor-based, relational approach in this article meets both criteria of clarity and stability.

²²⁷ *Sean H. v. Leila H.*, 783 N.Y.S.2d 785 (N.Y. Sup. Ct. 2004).

²²⁸ *Accord*, Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 30 (2004) (discussing how inappropriate entitlement and property-like understandings of children and parentage are).

Making wrenching decisions for children's lives that destroy established physical, psychological, and emotional bonds in the name of genetics or the parents' interests is reminiscent of a regime where children were punished for their "illegitimacy." Children of ART mix-ups are being "punished" for the clinic's mistake. Illegitimacy and ART mix-ups both relate to their progenitors' or others' conduct over which the children have no control, yet potentially deprive innocent children of what they need most. No matter how wrongful the conduct causing the ART mix-up, we cannot justify a legal regime that puts the prospective parents' needs in front of the children's, if those needs conflict.²²⁹ The Rogerses' needs should not have been placed before the baby's. The court in *Perry-Rogers* punished the child for what the court believed was his gestational parents' wrongful conduct:

We are also cognizant that a bond may well develop between a gestational mother and the infant she carried, before, during and immediately after the birth. . . . In the present case, any bonding on the part of Akeil to his gestational mother and her family was the direct result of the Fasanos' failure to take timely action upon being informed of the clinic's admitted error. Defendants cannot be permitted to purposefully act in such a way as to create a bond, and then rely upon it for their assertion of rights to which they would not otherwise be entitled.²³⁰

This parent-centered approach painfully failed Akeil, who through no fault of his own formed relational bonds with his gestational mother, her husband, and his "twin" brother, bonds that the court even acknowledges, but freely severs.²³¹ At a minimum, our laws

²²⁹ Kording, *supra* note 216, at 862–63.

²³⁰ *Perry-Rogers*, 715 N.Y.S.2d at 19, 26.

²³¹ The *Perry-Rogers* case became inordinately more complicated when the Fasanos agreed to give up custody based on the consideration of the Rogerses' promises that they would have consistent and regular visitation rights. Once the Fasanos complied with their promise by relinquishing custody to the Rogerses, the Rogerses reneged on their promise and challenged the standing of the Fasanos to claim visitation. Ironically, the Fasanos, who were trying to be of generous spirit and to find a way to meet the parents'

should have evolved sufficiently to recognize that children should not be punished for their parents' misconduct.²³²

Family law suffers from a kind of schizophrenia. It tries to balance constitutional concerns about parental rights with concerns about a child's best interests.²³³ Sometimes those two concerns cannot peacefully coexist. In situations, for example, where two loving parents claim rights to a child's custody, visitation, and control in a divorce dispute, the judicial system prioritizes the needs of children by applying a "best interests of the child" approach. The parental desires must yield to the children's best interests.²³⁴

needs, ended up being labeled as bad actors, while the Rogerses, who were willing to manipulate the situation at all costs in order to get "their" genetic child, even to the extent of blatantly breaching their agreement with the Fasanos (one cannot help but wonder whether they ever intended to keep the promise in the first place), were not painted in a bad light in the court's opinion. *Id.* at 22.

²³² For a few examples of court language to this effect, see *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972):

But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise;

Plyler v. Doe, 457 U.S. 202, 220 (1982) (quoting *Trimble v. Gordon*, 430 U.S. 762 (1977)):

At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status."

²³³ *Troxel v. Granville*, 530 U.S. 57 (2000).

²³⁴ This Article is neither an endorsement nor critique of the best interests standard in co-parenting disputes, which requires a separate analysis. Here I only reflect on how courts claim to do their work at this time.

Parental disputes that are governed by the “best interests of the child” standard are generally between two or more adults (those who are the child’s biological, legal, and often functional, parents) who created and reared the child, and who are or have been in a relationship with one another and the child (emotional or even contractual, as in some collaborative reproduction cases.²³⁵) Children’s “best interests” usually involve preserving their relationships with their adult caregivers. Courts and legal scholars have recognized these children’s interests by developing concepts like psychological parent, parent by estoppel, de facto parent, and presumptive parent in order to preserve a child’s emotionally dependent relationship with a nonbiological co-parent.²³⁶ In many cases children’s needs and interests coincide with their parents’ constitutional liberty interests

²³⁵ See *In re Baby M.*, 537 A.2d 1227 (N.J. 1988) (involving a custody and visitation dispute between a traditional “surrogate mother” (genetic and gestational) and intended father (genetic) decided based on a “best interests” standard).

²³⁶ Relationship preservation for children informs notions like “psychological parent,” *V.C. v. M.L.B.*, 748 A.2d 549, 550-52 (N.J. 2000):

At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life. . . . [I]n order for a third party to be deemed a psychological parent, the legal parent must have fostered the formation of the parental relationship between the third party and the child. By fostered is meant that the legal parent ceded over to the third party a measure of parental authority and autonomy and granted to that third party rights and duties vis-a-vis the child that the third party's status would not otherwise warrant; and “de facto parent,” *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (internal citations omitted):

A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent.

See also *In re L.B.*, 122 P.3d 161 (Wash. 2005)(finding that Washington state common law contains the concept of “de facto” parent to cover nonbiological same-sex coparent); *Elisa B. v. Superior Court*, 33 Cal.Rptr.3d 46 (Cal. 2005) (finding that same-sex coparent can be a “presumptive parent” with legal parenting status); *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005)(finding that Indiana law can be construed to award parenting rights and responsibilities to a same-sex, nonbiological coparent).

in having contact with and influence over their children's lives and in fostering a relationship between the child and another adult with whom the parent decides to co-parent.²³⁷ The child's best interests are to grow in a stable, loving home with parent(s) he or she knows, but this cannot always be. When a child's functional co-parents divorce or separate, deciding between co-parents by weighing the child's best interests in staying with one or the other, or visiting with either or both, instead of measuring only the strength of the parents' desires and "claims," makes sense.

Using a best interests standard and doing that kind of balancing does not make sense in the context of ART mix-ups. Mix-up cases are not disputes between two people who acted as co-parents and who have been united in their caring for a child-to-be and/or child. ART mix-up parentage disputes are not between people who have an existing, established relationship or bond with the child. Prospective parents in mix-up cases did not choose to have a child within the context of their relationship with one another, did not share a life, friends and extended family, do not know one another's values, nor have they agreed on shared values to teach the child. In ART mix-up cases the children have no relationship with the parents whose embryos or gametes were mistakenly "donated." The gamete-donor adults and the children in mix-up cases are the total strangers, and the gamete-donors should be declared the legal strangers, if anyone should be. The situation is completely different for children of ART mix-ups than for children in divorce-related custody and visitation cases. In ART mix-ups the child has an existing relationship with the gestational mother and her co-parenting partner only.

Ordinarily, we do not use a best interests standard to decide whether to take a child from a parent with whom the child has a relationship to give the child to a complete

²³⁷ *But see* Troxel, 530 U.S. at 68–69.

stranger who wants to parent the child.²³⁸ We do not require children to develop relationships with strangers, just because that stranger wants to visit with them. And we do not assess whether some stranger can “give” a child more things or opportunities than his parents can. If Bill and Melinda Gates, with all their resources, decide they want to parent anybody’s newborn child, for example, the court does not do a best interests analysis to see if the child should be given to the Gates. Absent any clear and convincing evidence that the parents are unfit and their rights should be terminated, we do not let strangers have children of another parent just because the other person can give them more opportunities for wealth, education, and maybe even success. While this may seem an exaggerated analogy, we are in essence giving the Gates the opportunity to get the child, if the courts utilize a “best interests” standard of review in mix-up cases to give the child to genetic parents who are strangers, particularly mix-up cases involving single mothers like Susan Buchweitz.

Declaring that a stranger to the familial unit is a legal parent and then applying the best interest standard violates a principled, constitutionally-based decision not to interfere in parent-child relationships in the absence of proof of actual harm to the child.²³⁹ The familial unit, including the child, in ART mix-up cases (the gestating mother and the co-

²³⁸ For a state to remove a child from a parent, there must be clear and convincing evidence that the parent is “unfit” and that the child has been abused or neglected. *Santosky v. Kramer*, 455 U.S. 745, 746 (1982); N.Y. SOC. SERV. LAW § 384(b)(3)(g) (1940); Raymond C. O’Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209 (1994).

²³⁹ *Troxel*, 530 U.S. at 66–67.

parent chosen by her who shares in the labor of the child creation and pregnancy) is the relationship that the law should protect, not a potential relationship based on genetics.²⁴⁰

Using a clear and convincing evidence standard before interfering with a parent-child relationship may appear to be a parent-centered approach, but it is also consistent with a child-centered approach. Employing a higher standard before severing an existing parent-child bond preserves a child's relationship with the adult she believes is her parent. This ought to be true for *in utero* bonding relationships as well as *ex utero* bonding relationships. The law has created the high hurdle of clear and convincing evidence, in part, because we collectively have determined that it is inconsistent with children's best interests, that is, with children's needs and health, to forcefully wrench them from a loving home to be given to a stranger, no matter what that stranger can offer the child or what "seemingly legitimate" claims to the child that the stranger may have.²⁴¹

The *in utero* relationship between the child and gestational mother (and perhaps even the child's *in utero* relationship to the mother's coparenting partner) must take precedence over genetics in a child-centered analysis. These first relationships are dependent, interpersonal relationships; the latter genetic relationship in an ART mix-up case has no interpersonal, dependent qualities. As Ellen Waldman and others illustrate, many genetic fathers form no relational bonds with their genetic progeny if they do not have an ongoing relationship with the gestational mother.²⁴² Again, it is the combination

²⁴⁰ See footnote 211 *supra*. A domestic relationship (cohabiting partnership, civil union or marriage) with the gestational mother pre-conception and at conception that does not endure during the pregnancy and birth fails to satisfy the labor and relational components this proposed model requires for parental priority.

²⁴¹ This same rule should be applied in the "switched-at-birth" cases, *see e.g.*, *Mays v. Twigg*, 543 So. 2d 241 (Fl. Dist. Ct. App. 1989) and the adoption revocation cases, *see e.g.*, *In Interest of B.G.C.*, 496 N.W.2d 239 (Iowa 1992) (the Baby Jessica case).

²⁴² Waldman, *supra* note 71, at 1044 (and authorities cited therein).

of labor and interpersonal relationship with the child that creates parenthood under this proposed model.

In summary, genetics-based theories, and often intent-based theories, are parent-centered in a way that may not coincide at all with a child-centered approach for mix-up cases. A child-centered approach is based on the child's physical, emotional and relational needs.²⁴³ Child-centered decisions seek to nurture and support ongoing relationships between the child and the parent, or parents with whom the child has an existing relationship to enhance stability and security.²⁴⁴ Priority must be given to those prospective parents who have provided the most (and consistent) labor for the benefit, physical and emotional health, and development of the child and who have developed pre-existing, even in utero, relationships with the child.

Understanding genetic lineages may be important to children and parents for health reasons. The health information that genetic connections reveal should be made available to children and their legal parents by statute, whether or not the genetic connection arises from gamete donation or mix-up. The fertility clinic must be statutorily

²⁴³ Susan Frelich Appleton discusses how adoption law takes a child-centered approach, while ART regulation, to date, takes a more parent-centered approach. Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393 (2004). She argues, however, that adoption law should take a more parent-centered approach akin to the approach typically recognized for consumers of ARTs. “[O]ne might conclude that even schemes designed to enhance the autonomy of consumers of ARTs accommodate some child-welfare concerns, because parentage laws aim to provide certainty and stability for children by dispelling all doubt about who has the responsibility for their care and support.” *Id.* at 414.

²⁴⁴ Though *Troxel v. Granville*, 530 U.S. 57, is clearly a parent-centered decision, it is the “law of the land” that our Constitution’s Due Process Clause protects a parent-child relationship from forced third-party intervenors in the absence of a showing of unfitness. Applying an appropriate analysis to determine parenthood in ART mistake cases, and then applying *Troxel*’s rationale, should lead to the stability that those children need. *Troxel*’s ruling may fail children in non-mix-up cases by possibly severing powerful familial bonds with grandparents or others who have raised them, but that is because it is a parent-centered approach. The *Troxel* ruling does benefit the children of ART mix-ups when used in conjunction with a labor-based theory of parenthood.

mandated to collect the relevant information before any ART procedure and to convey this information to legal parents of children of ART mix-ups, while maintaining complete confidentiality of the parties. Until the child reaches an age where he or she independently inquires about his or her genetic lineage, no names or addresses, or information about the genetic “relatives” should be available to the gestating couple and child or to anonymous, known, or mistaken gamete or embryo donors. Statutes can require fertility clinics to gather this identifying information, seal it, and deposit it with a court or governmental registry. The sealed records may only be opened upon petition of the child to a court, when the child is of an age to make that request. The court’s sole role in that case would be to determine whether the child is truly making the request, and if the court so determines, the court would be mandated to allow the child access to the record. Adults who believe they were the genetic donors to a particular child would have no statutory, common law or equitable right to open the sealed records.

V. CONCLUSION

As a society we could do as we have been doing so far, that is, leave all parties to ART mix-ups to the whims and vagaries of different judges’ analyses of parenthood and interpretations of statutes never designed to address mix-ups. This disastrous approach resembles an “assumption of the risk” roll of the dice. Prospective parents, by engaging in reproductive technologies, assume the parentage risks of clinic mix-ups and the risks of the ways judges will resolve contested parentage issues. Personally, I would only leave the prospective parents in this posture if I intended to punish them for using reproductive technologies. Leaving hopeful parents-to-be to the whims of various

courts' interpretations of these issues of first impression, whatever analyses they may choose, is a very unjust and painful method of dealing with an already horrific situation. While any state court or legislature may be able to decide to punish prospective parents for using ARTs to remedy their infertility,²⁴⁵ I see no evidence that they are trying to do so.²⁴⁶ If society approves of ART use, we have a duty not to leave potential parents in an "assumption of the risk" stance with respect to the laws of parenthood in mix-up cases. ART mix-ups will not go away. However these dilemmas end up being resolved, people will be left in pain. We probably cannot prevent that pain, absent a total ban on ARTs, which would create a different kind of pain to many, many more people. Since we cannot prevent ART mix-ups from ever occurring again, we can prevent the uncertainty and unpredictability of the law, which at this time compounds the prospective parents' problems.

This Article recommends a labor-based, relational, child-centered approach to establishing parenthood in ART mix-up cases. A labor-based approach seeks to reward potential parents' efforts in creating and caring for a child by prioritizing as legal parents those adults who make the most significant labor contribution to the child's creation and birth. The gestational mother and her chosen co-parenting partner always get first priority under this model, so long as they want to parent the child. Under this proposed approach, the answer to parentage disputes in mix-up cases would be clear and non-debatable from the start. The combination of the labor contribution and the already

²⁴⁵ *But see* *Lifchez v. Hartigan*, 735 F. Supp. 1361 (N.D. Ill. 1990). The United States Supreme Court has not decided whether the liberty to procreate incorporates the liberty to use ARTs to procreate.

²⁴⁶ Certainly in the last decade, jurisdictions and courts that loudly disapprove of commercial surrogacy, or reproductive cloning, or pre-implantation genetic diagnosis, or embryonic stem cell research do not also loudly indicate disapproval of the use of IVF processes for reproductive purposes. And no court or jurisdiction that I have found has sought to punish users of these technologies through criminal or other sanctions.

established relationship of an in utero bond make the gestational mother the most appropriate person to have parentage priority in mix-up cases. By offering the gestational mother parentage priority based on desert, the proposed approach unseats the sex-based biases of a genetic-based approach for defining parenthood in ART mix-up cases. Should the gestational mother decide she does not want to parent the child, this Article suggests a method and priority list for alternative legal parents.

In this recommended approach for resolving ART mix-up disputes, parentage following the priority list and rights-relinquishment rules becomes legal without adoption or court action. The suggested model avoids any third-party intervention by genetic or intending prospective parents, while preserving the child's interests in stability and existing relationships. Third-party interventions inevitably create heart-wrenching custody and visitation disputes. This proposal attempts to avoid that outcome. At the same time, in the interests of the children of ART mix-ups, clinics are mandated both to maintain absolute confidentiality about the names and identities of the parties to the mix-up and to give gestational co-parents access to all genetic information relevant to their child's well-being. When the children of ART mix-ups become mature enough to inquire about their genetic forbearers, and if they so request, the statute should provide them a right of access to that information by merely petitioning a court. The proposed statutory amendments should also mandate that all prospective parents who engage in ARTs be clearly informed about the priority rules relating to parentage determinations in cases of ART mix-ups at the time of the initial commitment to engage in the ART process, and before each new gamete removal, donation, storage or implantation.

In truth, it is difficult enough for two loving adults to parent a child. Adding a forced relationship with another person or couple, with whom the parents are now tied only because a clinic mixed-up their gametes, only makes things more difficult for the parents and the child. The cumulative stress, strain, and instability to the family structure will undermine the child's best interests. Any statute designed to remedy problems caused by ART mix-ups must be child-centered, putting the child's needs for stable, existing relationships before the prospective parents' inconsistent needs.

Fertility clinics and health care providers can use their best skills and procedures to avoid ART embryo or gamete mix-ups. Nonetheless, there will always be errors resulting in the rare mix-ups, even though in each individual case the mix-up may have been avoidable. To err is human. Therefore, if we cannot completely avoid the inevitable human errors of using reproductive technologies to create children, as a society we must work even harder to avoid the compounded pain to the parties caused by uncertain, oppressive, and sex-biased laws. Though ARTs occasionally fail us by falling prey to human error in their design or implementation, the law's design and implementation can be sufficiently well-reasoned, informed by scholarly commentary, and collaboratively developed to avoid aggravating these techno-human calamities. Unlike the inevitable human errors in the use of technology, the errors of drafting sex-biased and unpredictable laws to address problems of ART mix-ups are not inevitable. This last statement should not be misunderstood to imply that lawmakers, lawyers, and legal scholars are superhuman or infallible. If nothing else, this Article illustrates how badly the legal profession and legislatures have erred to date in resolving parentage disputes in cases of ART mix-ups. Legal mistakes, whether court decisions or statute

drafting, are reparable in ways that ART mix-ups are not. Thankfully, scholars continue to work in many disciplines to provide courts and legislators with the knowledge and insights they need to construct a clear, comprehensive, and just statute or policy that resolves parentage disputes in this currently unaddressed area of ART mix-ups. This Article is my humble contribution to this effort and a call to action.