Vanderbilt Law Review

Volume 76
Issue 5 *Issue 5 - October 2023*

Article 4

10-2023

Mixed-Up Origins: The Case for a Gestational Presumption in Embryo Mix-ups

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NOTES

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Embryo mix-ups—instances in which fertility clinics mistakenly implant one couple with another couple's embryo—confound courts' determinations of who, between the two couples, are the legal parents. Lax regulation of the fertility industry permitted this relatively new injury to develop, and it has led to morally and legally fraught questions of parenthood and personal autonomy. This Note reviews parentage doctrines, beginning with a discussion of the martial presumption; it also tracks how courts have traditionally responded to parentage questions that fertility medicine has generated, including embryo division in divorce and parentage in surrogacy contracts. It then analyzes potential approaches to resolving parentage disputes in embryo mix-ups and outlines how each approach either comports with or contradicts other parentage doctrines. Finally, this Note proposes that in cases of embryo mix-ups, courts should adopt a presumption that the gestational parents are the legal parents. This solution both avoids legally endorsing nonconsensual surrogacy and incentivizes greater clinic accountability for these grave mistakes.

INTRODUCTION

In 2018, three couples went to the same fertility clinic for in-vitro fertilization ("IVF");[1] one woman became pregnant while the other two did not.[2] While pregnancy via IVF is typically considered a success,[3] this was anything but. Nine months later, the pregnant woman gave birth to two healthy boys.[4] But the boys were not related to the expecting parents—nor to one another.[5] As it turns out, the fertility clinic had mistakenly implanted the woman who carried and delivered the babies with the other two couples' embryos.[6] The clinic ultimately informed the two other couples of the grossly negligent mistake, leading

1. IVF is an outpatient procedure in which a doctor implants a fertilized embryo or embryos into a patient's uterus with the hope that the embryo will implant, and pregnancy will result. *In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 10, 2021), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/JA34-4GJX]. Embryos are human eggs fertilized by human sperm that have yet to be implanted in the uterus. *Id.*

2. Isaac Stanley-Becker, *She Gave Birth to Twins Through IVF. But the Babies Weren't Hers, a Lawsuit Alleges.*, WASH. POST (July 8, 2019, 5:22 AM), https://www.washingtonpost.com/nation/2019/07/08/twins-ivf-birth-lawsuit/ [https://perma.cc/2VC3-D7QJ].

3. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, 2020 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC AND NATIONAL SUMMARY REPORT 5 (2022), https://www.cdc.gov/art/reports/2020/pdf/Report-ART-Fertility-Clinic-National-Summary-H.pdf [https://perma.cc/NEK3-WUAK] (discussing success rates).

4. Stanley-Becker, *supra* note 2.

5. *Id.*

6. *Id.*

to months of litigation.[7] In the end, a New York court ruled for the genetic parents, requiring the gestational parents to give up the children they carried as their own and raised for months to the genetic parents.[8]

In 2022, a different New York couple conceived a fetus through IVF, only to undergo standard genetic testing and discover they shared no genetic relationship to the child.[9] Rather than endure the trauma of litigating their parental rights, the couple opted for an abortion.[10] Given the timeline of genetic testing, the mother underwent the procedure just before the beginning of the third trimester, after which the procedure would have been unavailable in New York.[11]

Assisted reproductive technology ("ART"), which includes IVF, has revolutionized fertility medicine, opening new paths to parenthood.[12] Because of IVF, surrogacy,[13] and gamete donation,[14]

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7. *Id.*

8. *Id.* This Note will use the terms "genetic parents" and "gestational parents" adopted from the definitions of genetic and gestational surrogates respectively. *Infra* note 13. "Genetic parent" may refer to either parent who provided the egg or sperm to create the embryo, "gestational parent" refers only to the parent who gestated and birthed the child, and "gestational parents" refers to the couple made up by the gestational parent and their spouse or partner. As an additional matter, this Note will aim to use gender-inclusive language throughout, as women, transgender men, and nonbinary persons all can become pregnant and give birth. At times, however, the historical development and current structure of the law may necessitate using the binary language of "mothers" and "fathers."

9. Andrea Salcedo, *Couple Sues Fertility Clinic, Saying They Had to Abort Stranger's Baby*, WASH. POST (Apr. 6, 2022, 6:14 AM), https://www.washingtonpost.com/nation/2022/04/06/fertility-lawsuit-wrong-embryo/ [https://perma.cc/3G8Z-2QVW].

10. *Id.*

11. *Id.*

12. Anne-Kristin Kuhnt & Jasmin Passet-Wittig, *Families Formed Through Assisted Reproductive Technology: Causes, Experiences, and Consequences in an International Context*, 14 REPROD. BIOMEDICINE & SOC'Y ONLINE 289, 289 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8907601/pdf/main.pdf [https://perma.cc/2GKR-WT8M] ("Biological and social parenthood no longer have to coincide.").

13. Surrogacy refers to an individual who agrees to carry and give birth to a child for another couple. *Gestational Surrogacy*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/23186-gestational-surrogacy (last updated June 7, 2022) [https://perma.cc/FL2Y-PQHB]. There are two types of surrogacy arrangements: gestational and genetic (which is sometimes referred to as "traditional" surrogacy, but this Note will refer to it as genetic surrogacy). *Id.* A gestational surrogacy agreement involves the surrogate undergoing IVF with an egg other than her own. *Id.* A genetic surrogate is impregnated either through artificial insemination or IVF with the surrogate's own egg. *Id.* Artificial insemination, also referred to as intrauterine insemination, is an outpatient procedure in which a doctor inserts sperm via catheter into the uterus during ovulation in hopes of achieving pregnancy. *Intrauterine Insemination (IUI)*, MAYO CLINIC (Sept. 3, 2021), https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722 [https://perma.cc/4AMG-MTNV].

14. Gamete donation refers to the donation of human eggs and sperm for others to use in ART cycles. *Gamete Donation*, AMA CODE OF MED. ETHICS, https://code-medical-ethics.ama-assn.org/ethics-opinions/gamete-donation (last visited July 9, 2023) [https://perma.cc/A5CL-SMX9].

parenthood no longer depends on a genetic or gestational relationship.[15] With all the wonders that ART has brought to countless families, it has also led to new forms of injury—imposing previously unimagined traumas onto those seeking parenthood through fertility medicine.[16]

Though there are no precise estimates on the frequency of embryo mix-ups,[17] a 2008 survey of fertility clinics found that 21 percent of the clinics had "been aware of inconsistencies between the results of genetic analysis of embryos and later genetic testing."[18] Of these clinics, eleven percent believed "the errors resulted from a mix-up or mislabeling of sample[s]."[19] These statistics do not refer solely to embryo mix-ups, but also include instances of implanting a gestational parent with embryos of the unintended sex or with a genetic predisposition to certain heritable conditions.[20] And though embryo mix-ups are relatively rare, they are important because of the immeasurable pain they cause and as a catalyst for legal questions about parenthood. Further, as fertility treatments have only increased in recent years, lax industry regulation has likely also increased the number of embryo mix-ups, heightening the stakes.[21]

Notably, embryo mix-ups create the possibility for legally-endorsed nonconsensual surrogacy.[22] This Note uses the term "nonconsensual surrogacy" to refer to a court ordering a gestational parent in an embryo mix-up to relinquish the child to the genetic parents.[23] Thus, the gestational parent becomes an unwilling surrogate for the genetic parents.[24] The threat of nonconsensual surrogacy takes

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15. *See* Kuhnt & Passet-Wittig, *supra* note 12, at 289.

16. *See generally* Kerry Breen, *Could an IVF 'Mix-up' Happen to You? Experts Explain What to Look for*, TODAY (Nov. 11, 2021, 10:37 AM), https://www.today.com/health/womens-health/ivf-mix-happen-experts-explain-look-rcna5236 [https://perma.cc/58TF-KEQ4] (describing how embryo mix-ups occur).

17. This Note defines "embryo mix-ups" as instances where a fertility clinic mistakenly implants a potential parent with the genetic embryo of another set of potential parents.

18. Susannah Baruch, David Kaufman & Kathy L. Hudson, *Genetic Testing of Embryos: Practices and Perspectives of US In Vitro Fertilization Clinics*, 89 FERTILITY & STERILITY 1053, 1055 (2008).

19. *Id.*

20. *Id.*

21. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 3, at 19 ("The number of embryo transfer cycles in 2020 (165,041) was about 1.3 times higher than in 2011 (129,360).").

22. *See A Landmark Case Involving an Unintended Surrogacy*, WARSHAW BURSTEIN (July 17, 2019), https://www.wbny.com/eric-wrubel-legal-basis-for-genetic-parents-declared-legal-parents [https://perma.cc/9327-EJRT] [hereinafter *A Landmark Case*] (describing the case from the Introduction as involving "uninten[tional]" (i.e., the gestational parent never consented) surrogacy).

23. *See id.*

24. *See id.* A consensual surrogacy agreement, however, refers to a woman agreeing to become pregnant via ART and relinquish the child to the intended parents. *See* CLEVELAND CLINIC, *supra* note 13. Thus, the important difference is that the consensual surrogate agrees to become

on greater urgency in the wake of *Dobbs v. Jackson Women's Health Organization*,[25] which overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, allowing individual states to ban abortions altogether.[26] In states with these bans, gestational parents who discover that they have no genetic ties to the fetuses they are already carrying have no option but to carry the fetuses to term, with full knowledge that they might not retain parental rights after birth. Accordingly, in a post-*Dobbs* world, legally endorsed nonconsensual surrogacies are a real threat.[27]

Embryo mix-ups thus implicate several legal questions: what role procreation imparts on parental status (i.e., genetics or gestation), how to balance interests in reproductive autonomy (i.e., autonomy over genetic material or physical gestation), and how to best regulate the fertility industry.[28] Adjudicating parental rights has served as a vehicle through which courts have grappled with these legal quandaries, and in this sense, embryo mix-ups are no different.[29] On the individual level, courts declare the child's legal parents, determining whether genetic, gestational, or marital connections yield the strongest legal claim.[30] On a macro level, courts' determinations recognize certain family formations over others, influencing the treatments that fertility clinics offer and patients seek.[31] Embryo mix-ups, unlike error-free ART treatments, further require courts to consider how their decisions will influence future clinical practice and accountability.[32]

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pregnant with the intention of relinquishing the child. *See* Alice M. Noble-Allgire, *Switched at the Fertility Clinic: Determining Maternal Rights When a Child Is Born from Stolen or Misdelivered Genetic Material*, 64 MO. L. REV. 517, 520 (1999) (differentiating a gestational parent carrying the genetic parents' genetic child and a surrogate on the basis of consent).

25. 142 S. Ct. 2228 (2022).

26. Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

27. *Infra* Part III.

28. Sarah Zhang, *IVF Mix-Ups Have Broken the Definition of Parenthood*, ATLANTIC, https://www.theatlantic.com/science/archive/2019/07/ivf-embryo-mix-up-parenthood/593725/ (last updated July 11, 2019, 2:23 PM) [https://perma.cc/H92D-LV3U] ("[M]istakes by IVF clinics have also created scenarios . . . which do not merely add nuance to traditional definitions of parenthood, but utterly confound them.").

29. *See id.* (noting the legal quandaries embryo mix-ups raise).

30. *See, e.g.*, Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003) (resolving embryo mix-up in favor of genetic father and gestational mother).

31. *See* Johnson v. Calvert, 851 P.2d 776, 777 (Cal. 1993) (recognizing intended parents' claims over child carried by surrogate), superseded in part by CAL. FAM. CODE § 7601, which recognizes that more than two individuals may be a child's "natural parent."

32. *See* Melody A. Rasouli, Christopher P. Moutos & John Y. Phelps, *Liability for Embryo Mix-ups in Fertility Practices in the USA*, 38 J. ASSISTED REPROD. & GENETICS 1101, 1101–07 (2021) (discussing the general cost of litigation over embryo mix-ups for fertility clinics compared to the minimal costs associated with proper storage and maintenance).

Both courts and patients need certainty in the outcome of embryo mix-ups, and clinics need greater incentives to improve policies. Part II of this Note discusses (1) the background of relevant parentage laws—including the rights of genetic, nonmarital fathers, (2) the current regulatory and legislative scheme governing the fertility industry, (3) the historical development of redefining legal parenthood when ART is involved, and finally, (4) an account of the few published embryo mix-up cases. Part III explores the various presumptions and theoretical frameworks that legal theorists and courts propose to resolve embryo mix-ups.

Finally, Part IV offers a presumption in favor of the gestational parents to avoid legally endorsing nonconsensual surrogacy and to incentivize better social outcomes. In the lax regulatory landscape in which clinics operate,[33] patient suits for malpractice are one of the strongest threats to ensure greater clinical care.[34] As will be explored, a gestational presumption not only prevents gestational parents from becoming nonconsensual surrogates, but it also incentivizes patients to discover embryo mix-ups and hold clinics accountable.[35] The threat of such costly litigation provides a significant monetary incentive for clinics to self-impose more stringent standards of care. While nothing will undo the trauma that embryo mix-up patients endure, our legal system can protect gestational parents' autonomy and push clinics to do better—two outcomes that today's legal landscape desperately requires.

I. FROM MARITAL PRESUMPTIONS TO EMBRYO MIX-UPS

A. The Marital Presumption: Genetics Just Aren't Enough

Although no child was born via IVF until 1978,[36] parental right determinations that weigh genetic versus relational connections are not new to courts. In fact, these considerations were highly relevant to deciding legal fatherhood, which often involved the marital presumption.[37] The marital presumption is the legal presumption that the mother's husband is the legal father of any children born into the marriage.[38] Courts have used the marital presumption to deny genetic,

33. *See infra* Section II.B.

34. *See* Rasouli et al., *supra* note 32.

35. *See infra* Part IV.

36. Whitny Braun, *The History of Assisted Reproductive Technology in Under 1000 Words...*, HUFFPOST, https://www.huffpost.com/entry/what-do-christmas-trees-a_b_8851496 (last updated Mar. 14, 2017) [https://perma.cc/74T8-7772].

37. *E.g.*, Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

38. *Id.* at 113, 130.

nonmarital fathers' parental rights in certain cases.[39] While marital presumption cases differ significantly from embryo mix-ups—as marital presumption cases do not involve ART—they nonetheless demonstrate how courts balance a genetic connection against a relational one in determining parental rights.[40] Historically, the marital presumption rendered genetics alone insufficient to establish genetic, nonmarital fathers' parental rights.[41]

The Supreme Court first encountered the marital presumption in *Stanley v. Illinois*, which considered the constitutionality of an Illinois law that declared nonmarital children wards of the state upon the mother's death, regardless of the genetic father's desire to keep his children.[42] Stanley, who had helped raise his genetic children for years alongside their mother, challenged the law as unconstitutional under the Fourteenth Amendment Due Process Clause.[43] The Court agreed, holding that a genetic, nonmarital father has a "private interest" in the children he raised as his own for years.[44] Thus, the Court recognized that genetic, nonmarital fathers who have established a relationship with their children have constitutionally protected parental rights.[45]

While *Stanley* seemed to favor upholding genetic fathers' parental rights, in *Lehr v. Robertson*, the Court permitted a genetic mother to allow for the adoption of her child without the genetic father's consent, citing his failure to register as a putative father before the birth.[46] *Lehr*'s holding demonstrates that a genetic father's role in establishing a parent-child relationship *before* the child is born bears on the strength of his claim of parental rights.[47] Indeed, the Court noted that "the mere existence of a biological link" does not automatically impute parental rights to genetic, nonmarital fathers, and genetic fathers bear the burden of demonstrating relational attachment to support their claims.[48]

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39. *E.g.*, *id.* at 124.

40. *E.g.*, *id.*

41. *E.g.*, *id.*

42. 405 U.S. 645, 646 (1972).

43. *Id.* at 646–47.

44. *Id.* at 651.

45. *Id.*

46. 463 U.S. 248, 264 (1983). Putative father registries are state registries for genetic, nonmarital fathers to claim their nonmarital children as their own, thereby asserting and protecting their parental rights. Dale Joseph Gilsinger, Annotation, *Requirements and Effects of Putative Father Registries*, 28 A.L.R.6th 349 (2007).

47. *See* 463 U.S. at 264.

48. *Id.* at 261–62; *see also* Caban v. Mohammed, 441 U.S. 380, 392 (1979) ("In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding" his parental rights.).

In Michael H. v. Gerald D., the Supreme Court affirmed its stance that a genetic connection without substantial relationship is insufficient for constitutionally protected parental rights.[49] Even though the genetic, nonmarital father lived with and parented his genetic daughter for the first several months of her life, the Court denied the his claim of parental rights.[50] The Court reasserted that the marital presumption existed to keep marital family units intact, holding that a state may prioritize an interest in marital stability over a genetic father's interest in his parental rights.[51] The Court also quickly dismissed the child's claims (via her guardian *ad litem*) to a right to maintain a relationship with both her genetic father and her legal father (her mother's husband).[52] Deeming her claims too weak for merit under either the Due Process or Equal Protection Clauses, the Court noted that there is no right to have more than two parents.[53] Through *Lehr* and *Michael H.*, the Supreme Court set high standards for nonmarital fathers claiming parental rights, prioritizing relational over genetic ties.[54]

Though these Supreme Court cases dealing with the marital presumption took place forty or more years ago, all states continue to apply the marital presumption, albeit to varying degrees.[55] Furthermore, the marital presumption also plays a significant role in resolving parentage via ART. The Uniform Parentage Act ("UPA")—the Uniform Law Commission's proposed uniform parentage legislation[56]—applies the marital presumption to the spouse of a gestational parent who undergoes fertility treatment regardless of a known lack of genetic relationship.[57] The old common law parentage presumption has thus evolved to vindicate new forms of family creation that eschew a genetic connection.[58] Given the presumption's enduring presence and modern

49. 491 U.S. 110, 121–24 (1989).

50. *Id.* at 114, 129.

51. *Id.* at 129.

52. *Id.* at 130–32.

53. *Id.*

54. *Id.* at 129; Lehr v. Robertson, 463 U.S. 248, 264 (1983).

55. Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 252 (2019).

56. The Uniform Law Commission is a nonprofit made up of "practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws." *About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview (last visited June 18, 2023) [https://perma.cc/9UNA-2GBK].

57. UNIF. PARENTAGE ACT § 705(a) (UNIF. L. COMM'N. 2017).

58. *Compare id.* (applying the marital presumption without regard to genetic relationships), *with Michael H.*, 491 U.S. at 124 (listing a husband's inability to procreate as one of the few ways of rebutting the marital presumption under common law).

updates, marital presumption precedents offer valuable insight into how courts have historically balanced genetic versus relational claims of parentage, definitively coming down on the side of the relational claim.[59]

The marital presumption's enduring presence has several implications. On one level, it reflects the historical approach of the judicial system to parenthood: a mother's parental status was unquestioned given her presumed role in childbirth, whereas a father's status was defined by relationships—not genetics.[60] On another level, it shows that despite the availability of DNA testing, the Supreme Court continued to rely on a relational rather than genetic model to evaluate fathers' parental rights.[61]

B. Legislative Response: Recommendations, not Requirements

ART regulation has largely been left to the states.[62] While there is no uniform ART regulation, there is federal monitoring of the industry and proposed legislative schemes for states aimed at creating a comprehensive, national approach.[63]

In 1992, Congress passed the Fertility Clinic Success Rate and Certification Act ("FCSRCA"), the *only* federal legislation addressing ART.[64] FCSRCA requires the Centers for Disease Control and Prevention ("CDC") to "develop a model program for the certification of embryo laboratories, to be carried out *voluntarily* by interested States."[65] The regulations provide suggested best practices, clinic accreditation programs, and define successful ART cycles.[66] The CDC defines success by the number of live births resulting from ART, which includes procedures beyond IVF, such as surrogacy and artificial

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59. *See Michael H.*, 491 U.S. at 121–24.

60. *See, e.g.*, *id.* at 110 ("[B]lood tests showed a 98.07% probability that [the nonmarital appellant] was [the child's] father.").

61. *See, e.g.*, *id.*

62. *See* Feinberg, *supra* note 55, at 248–53.

63. *See* 42 U.S.C. § 263a-1 (directing the CDC Secretary to annually report on fertility clinic success rates); UNIF. PARENTAGE ACT (UNIF. L. COMM'N. 2017) (model legislation posed for states to adopt to have uniform parentage laws throughout the country).

64. 42 U.S.C. § 263a-1. Senators Tammy Duckworth, Patty Murray, and Representative Susan Wild did recently introduce the Right to Build Families Act of 2022, which would prevent states from instituting laws restricting the use of ART. *See* S. 5276, 117th Cong. §§ 2–3 (2022).

65. Implementation of the Fertility Clinic Success Rate and Certification Act of 1992–A Model Program for the Certification of Embryo Laboratories, 64 Fed. Reg. 39374 (July 21, 1999) (emphasis added).

66. *Policy Documents*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/nass/policy.html#clinic (last updated Mar. 14, 2023) [https://perma.cc/F4VV-H9VE].

insemination.[67] Notably, CDC guidelines are completely voluntary and do not impose any legal requirements on states that do not participate.[68] In fact, failure of a clinic to participate will only result in the CDC identifying the clinic as a non-reporter in the annual Assisted Reproductive Technology Clinic Success Rates Report.[69] Thus, non-compliant clinics may still operate and serve patients.[70] Without any federally mandated licensing or accreditation,[71] the only national scheme concerning ART is a voluntary success-monitoring program with no power to meaningfully regulate the industry.[72]

Like ART regulation, there is no federal approach to parentage laws, but several states have adopted portions of the UPA, creating a legislative patchwork.[73] The UPA is most notable in its comprehensive definitions of parenthood when ART is involved; for example, the UPA excludes gamete donors from being considered legal parents.[74] This definition carries significant implications because it precludes gamete donors, who will be genetically related to future children, from claiming parental rights.[75] The UPA further excludes both genetic and gestational surrogates from claiming parental rights.[76]

Overall, the legislative response to ART is bare-bones, varies state to state, and has failed to address embryo mix-ups.[77] Given this

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67. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 3, at 5. Notably, this definition ostensibly includes embryo mix-ups as "successes," as they are ART cycles which result in live births. *See id.*

68. Reporting of Pregnancy Success Rates from Assisted Reproductive Technology (ART) Programs, 80 Fed. Reg. 51811 (Aug. 26, 2015).

69. *Id.* at 51814:

> An ART program is considered to be non-compliant with the federal reporting requirements of the FCSRCA if the program was in operation at any time during the reporting year and performed any ART cycles and (a) fails to submit ART cycle data to HHS/CDC by the reporting deadline, or (b) the program's Medical Director fails to verify the clinic success rates table by the reporting deadline.

70. *See id.*

71. Naomi Cahn & Sonia M. Suter, *The Art of Regulating ART*, 96 CHI.-KENT L. REV. 29, 40–41 (2021).

72. *See* 42 U.S.C. § 263a-1.

73. *See* COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 3:3 (2022–2023 ed. 2022) (noting the several states that have adopted some iteration of the UPA or substantially similar laws).

74. UNIF. PARENTAGE ACT §§ 102(9), 702 (UNIF. L. COMM'N. 2017).

75. *See id.*

76. UNIF. PARENTAGE ACT § 103(c) (UNIF. L. COMM'N. 2017).

77. *See* Michael Ollove, *States Not Eager to Regulate Fertility Industry*, STATELINE (Mar. 18, 2015, 12:00 AM), https://stateline.org/2015/3/18/states-not-eager-to-regulate-fertility-industry/ [https://perma.cc/TQ3F-Y6EY] ("Compared to many other industrialized nations, neither the U.S. nor state governments do much to oversee the multibillion-dollar [fertility] industry.").

legislative failure, courts have become the venue where novel ART-related parenthood questions are resolved.[78]

C. ART-istic Approaches: Judicial Response to Assisted Reproductive Technology

In the process of opening previously unavailable avenues to parenthood, ART also upended how courts resolve parental-rights disputes.[79] ART has fundamentally changed both legal and social conceptions of parenthood.[80] While parenthood has never relied *solely* on genetics—as adoption has been an avenue to legal parenthood throughout much of American history[81]—ART has divorced parenthood from sexual procreation.[82] Through ART, especially IVF and surrogacy, neither a genetic nor a gestational relationship is necessary to achieve legal parenthood.[83] The manner in which courts have reacted to successful ART outcomes highlights various considerations also relevant to embryo mix-ups.

Courts have consistently grappled with the implications of ART in divorce proceedings adjudicating the property division of jointly owned frozen embryos.[84] Frozen embryos are particularly unique because while they are treated as a special form of property,[85] courts cannot avoid the implications of potential parenthood.[86] In the divorce proceedings of *Reber v. Reiss*, for example, the Pennsylvania Superior

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78. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (rejecting enforceability of surrogacy contracts as an issue of public policy); Johnson v. Calvert, 851 P.2d 776, 782–83 (Cal. 1993) (upholding surrogacy contract as enforceable); Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21–23, 27 (App. Div. 2000) (finding for genetic parents in embryo mix-up); Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 790 (Ct. App. 2003) (finding for gestational mother and genetic father in embryo mix-up).

79. *See, e.g.*, *In re Baby M*, 537 A.2d at 1234 ("the Court is asked to determine the validity of a contract that *purports* to provide a new way of bringing children into a family [via artificial insemination].") (emphasis added).

80. *See* Kuhnt & Passet-Wittig, *supra* note 12, at 289 ("[T]he use of [ART] across borders can make the process of family formation much more complex, raising a number of ethical and legal questions about the nature of parenthood.").

81. *History of Adoption Practices in the United States*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/adoption/intro/history/ (last visited July 11, 2023) [https://perma.cc/Z2JC-XFVY] (noting that the legal history of adoption goes back to the 1850s).

82. Kuhnt & Passet-Wittig, *supra* note 12, at 289.

83. *See* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N. 2017) (identifying the contracting couple in surrogacy cases as the intended parents regardless of genetic relationship); *see also infra* notes 100–105 and accompanying text (explaining the intent-based approach to adjudicate parentage in surrogacy cases).

84. *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1139–40 (Pa. Super. Ct. 2012).

85. Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R.5th 253 § 2(b) (2001).

86. *See, e.g.*, *Reber*, 42 A.3d at 1139–40.

Court awarded frozen embryos to the wife over the husband's strong protests because it was her only opportunity to achieve genetic parenthood. Indeed, the wife's past chemotherapy rendered her unable to have genetic children without medical intervention.[87] The court rested much of its analysis on the unique experience of not only pregnancy, but also genetic parenthood.[88] In balancing the wife's desire for genetic parenthood against the husband's desire to avoid unwanted genetic donation, the court found the former more compelling.

Furthermore, cases that award embryos to the spouse who lobbied against their use *also* emphasize the weight genetic parenthood carries.[89] In *Davis v. Davis*, the wife wanted to enforce the original agreement that would have resulted in donating their embryos to another couple, but the Supreme Court of Tennessee refused to enforce the contract, holding that the husband's interest in avoiding unwanted genetic parenthood was greater than the wife's interest in avoiding a "futile" egg retrieval.[90] Like the *Reber* court, the *Davis* court relied on the uniqueness of genetic parenthood—acknowledging the potential for great injury if genetic parenthood is unwillingly thrust upon a father.[91] Though they reached opposite outcomes, *Reber* and *Davis* present similar reasoning in considering the weight of genetic parenthood.[92] The same reasoning could ultimately be used to support genetic parents' claims in embryo mix-ups.[93]

Surrogacy cases, more so than embryo disputes, have explicitly weighed implications of genetic and gestational parenthood.[94] *In the Matter of Baby M*—perhaps one of the most famous surrogacy cases in the United States—recognized a genetic surrogate's parental rights over the child she had originally agreed to surrender to the contracting couple.[95] The New Jersey Supreme Court held that surrogacy contracts

87. *Id.*

88. *Id.*; *see also* Szafranski v. Dunston, 34 N.E.3d 1132, 1162 (Ill. App. Ct. 2015) ("We concur in the circuit court's ruling that Karla's interest in using the pre-embryos is paramount given her inability to have a biological child by any other means.").

89. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

90. *Id.* Like much of the jurisprudence surrounding reproductive law, it is unclear after *Dobbs* how courts will weigh an individual's interest in reproductive autonomy and avoiding unwanted genetic parenthood. *Id.* at 601 ("That a right to procreational autonomy is inherent in our most basic concepts of liberty is also indicated by the reproductive freedom cases." (citing Roe v. Wade, 410 U.S. 113 (1973))).

91. *Id.* at 604 ("[H]e would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.").

92. *See Reber*, 42 A.3d at 1140; *Davis*, 842 S.W.2d at 604.

93. *See Reber*, 42 A.3d at 1140; *Davis*, 842 S.W.2d at 604.

94. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1234–35 (N.J. 1988).

95. *Id.* In this surrogacy contract, the genetic surrogate had been artificially inseminated with the intended father's sperm. *Id.* at 1235. For a comparison between genetic and gestational surrogacy, see *supra* note 13.

were invalid as a matter of public policy, labeling surrogacy a form of baby selling.[96] Though it relied largely on public policy considerations, the court also emphasized the relationship the surrogate formed in gestating and birthing the child.[97] That is not to say the court ignored genetics, as it also found Baby M's genetic parents to be her legal parents.[98] Furthermore, while the court expressed some troublingly patronizing views on women's ability to decide whether to be a surrogate, it recognized pregnancy and childbirth as unique emotional and physical experiences.[99]

A mere five years later, the Supreme Court of California resolved a case involving a gestational surrogate who wished to assert parental rights over the child she carried.[100] Noting that either a genetic or gestational relationship with a child is sufficient under California law to prove legal motherhood, [101] the court resolved that "when the [genetic and gestational relationships] do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[102] California's solution to surrogacy cases has since been dubbed the *intent-based approach*.[103] Like the marital presumption, the intent-based approach measures parenthood by a relational rather than purely genetic metric.[104] It

96. *In re Baby M*, 537 A.2d at 1246. Surrogacy contracts vary from state to state, though they typically include a provision that the intended parents are considered parents immediately upon the child's birth. *See, e.g.*, UNIF. PARENTAGE ACT § 804(a)(4) (UNIF. L. COMM'N. 2017).

97. *In re Baby M*, 537 A.2d at 1263 (The genetic surrogate "as the [both natural and legal] mother (indeed, as a mother who nurtured her child for its first four months—*unquestionably a relevant consideration*), is entitled to have her own interest in visitation considered." (emphasis added)).

98. *Id.* at 1234.

99. *Id.* at 1248 (The surrogate "never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment."); *see also What Are Some Common Complications of Pregnancy?*, NAT'L INST. OF CHILD HEALTH & HUM. DEV., https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/complications# (last updated Apr. 20, 2021) [https://perma.cc/86LH-FTKC] (some common complications include high blood pressure, gestational diabetes, infections, and depression and anxiety, among several other possibilities).

100. Johnson v. Calvert, 851 P.2d 776, 777–78 (Cal. 1993).

101. *Id.* at 782.

102. *Id.*

103. *See generally* JOSLIN ET AL., *supra* note 73, § 4:8 ("[T]he intent-based rule for determining legal parentage should apply to all persons who consent to the procreation of child through a medical procedure with the intention of parenting the resulting child, regardless of that person's genetic connections to the resulting child.").

104. *Compare* Lehr v. Robertson, 463 U.S. 248, 264 (1983) (refusing parental rights to genetic, nonmarital father who failed to register as putative father before child's birth), *with Johnson*, 851 P.2d at 782 (recognizing parents based on acts taken to procure surrogate and bring about child).

rewards the parents who took the necessary steps to bring the child into the world, that is, those who intended to be parents all along.[105]

Notably, the intent-based approach differs from the traditional standard for determining custody: the best interests of the child.[106] The best-interests standard, true to its name, weighs various factors to determine custody to promote the child's best interests.[107] Surrogacy cases do not lend themselves to applying the best-interests standard,[108] not in the least because courts use the best-interests standard to determine custody and not parental rights.[109] Unlike divorce custody proceedings, surrogacy requires parents to have concrete expectations for a court adjudicating parental rights before going through with the arrangement.[110] Surrogacy would be untenable without set expectations, otherwise intended parents would not feel confident in their ability to legally claim their child.[111] The intent-based approach, however, provides consistent outcomes for intended parents and consenting surrogates alike.[112]

ART precedents throughout the nation reveal various concerns courts consider in determining parental rights.[113] These considerations are still relevant to adjudicating embryo mix-ups, but courts must also recognize key differences between other forms of ART and embryo mix-ups.

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105. *See Johnson*, 851 P.2d at 782.

106. *Compare id.* (the intended parents are the legal parents), *with* Gibson v. Greene, 58 N.Y.S.3d 551, 552 (App. Div. 2017) (describing the best-interests test as a multifactor test weighing considerations like "stability," "home environments," "past performance of each parent," and "each parent's relative fitness" to determine custody).

107. *Gibson,* 58 N.Y.S.3d at 552.

108. *Johnson*, 851 P.2d at 782 n.10:

> [T]he best interests standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as the natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child. Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her.

109. Kelly Mroz, *What Is the Difference Between Child Custody & Parental Rights?*, LAW FOR FAMS., https://www.lawforfamilies.com/12722863-what-is-the-difference-between-child-custody-parental-rights.html (last visited July 12, 2023) [https://perma.cc/E8XY-ZWNS] ("Just being a parent does not assure [an individual] of custody time . . . . The term 'parental rights' refers to both [the] rights and responsibilities as a parent.").

110. *See Johnson*, 851 P.2d at 783 (discussing expectations in parents created by "[t]he mental concept of the child").

111. *Id.*

112. *Id.* at 782.

113. *See In re* Baby M, 537 A.2d 1227, 1263 (N.J. 1988) (concern about separating a child from the woman who was both the genetic and gestational mother); *Johnson*, 851 P.2d at 782 n.10 (concern about splitting parentage between a previously unconnected surrogate and a genetic father).

D. Mixing and Matching: Adjudicating Parenthood in Embryo Mix-Ups

Given the rarity and deeply sensitive nature of embryo mix-ups, opinions adjudicating parenthood in such cases often go unpublished. Despite this, there are a few examples from recent decades in which courts have explicitly grappled with embryo mix-ups.

In an early embryo mix-up case in New York, a white couple, the Fasanos, was implanted with two embryos, one belonging to them and one belonging to a Black couple, the Rogers.[114] Upon officially discovering the mistake at birth, the Fasanos agreed to relinquish the Rogers's genetic child on condition of visitation rights.[115] While determining visitation rights, the court noted in dicta that if it were to apply the intent-based approach to determine parental rights, it would find for the Rogers because they *intended* to be the parents of the child resulting from the mis-implanted embryo.[116] In short, the court imagined applying the intent-based approach as though it were a regular surrogacy case, not an unimaginable mistake.[117] In its brief discussion, the court fails to note the stark difference between surrogacy and embryo mix-ups, nor does it seem to consider Ms. Fasano's lack of intent to be a surrogate.[118]

As explored in Part I, the firm that successfully represented the two sets of genetic parents relied on *Perry-Rogers*' use of the intent-based approach.[119] Although the actual opinion is unpublished, given the genetic parents' lawyer's explanation of the court's reasoning, the court evidently adopted the dicta *Perry-Rogers* laid out for applying the intent-based approach to embryo mix-up cases.[120] Ironically, given the court's use of the intent-based approach, the firm representing the genetic parents described the case as one of "unintended surrogacy."[121] This outcome was all the more puzzling because, at the time, New York considered even consensual surrogacy to be against public policy.[122]

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114. Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21–23 (App. Div. 2000).

115. *Id.* at 22.

116. *Id.* at 24.

117. *Id.* Notably, however, the court recognized that gestational mothers could have parental rights despite a lack of genetic connection to a child, and "it is simply inappropriate to render any determination solely as a consequence of genetics." *Id.*

118. *Id.*

119. Zhang, *supra* note 28; *see also A Landmark Case*, *supra* note 22 (discussing the influence of the same-sex couple case on the firm's arguments in the Part I mix-up case).

120. Zhang, *supra* note 28 ("[The genetic parents' lawyer] says the [genetic parents'] case rested in part on *Perry-Rogers v. Fasano*.").

121. *A Landmark Case*, *supra* note 22.

122. *Id.*

Conversely, when faced with an embryo mix-up case, the California Court of Appeals specifically rejected the invitation to apply the intent-based approach.[123] In *Robert B. v. Susan B.*, Robert and Denise contracted with an anonymous donor for eggs, which they fertilized with Robert's sperm with the intent to implant in Denise.[124] The fertility clinic, however, simultaneously implanted another woman—Susan—with some of the fertilized embryos belonging to Robert and Denise.[125] As Susan intended to use a donated embryo, neither Denise nor Susan intended to be a genetic mother.[126] The court affirmed the lower court's dismissal with prejudice against Denise, as she had no genetic or gestational claim, as well as the finding that Robert (the genetic father) and Susan (the gestational mother) were the legal parents.[127] The court affirmed Susan's legal motherhood, citing to "the valid claims of gestational mothers."[128]

Though Denise encouraged the court to rely on surrogacy cases recognizing the intent-based approach, the court refrained from applying the test.[129] In a footnote explaining why the intent-based approach would be inappropriate, the court laid out that

> [E]ven if [it] were to invoke the concept of intended mother here, which party would qualify? Both—and neither. Susan intended to be the mother of the child created from an embryo implanted in her uterus that day at the clinic—but not *that* embryo, not one belonging to someone else. . . . Denise intended to be the mother of the child created from this very embryo—but not at that time, and she did not intend for another woman to bear the child.[130]

Unlike the New York courts, the California court—the birthplace of the intent-based approach—saw too great a distinction between surrogacy cases and embryo mix-ups to fairly apply the test.[131]

In yet another embryo mix-up case in California, *Prato-Morrison v. Doe*, the California Court of Appeals considered the alleged genetic parents' request for genetic testing of thirteen year-old twin girls they believed to be their genetic children.[132] The Morrisons claimed the clinic stole the couple's embryos and illegally sold them to the gestational

123. Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 790.
128. *Id.*
129. *Id.* at 789.
130. *Id.* at 789 n.7.
131. *Id.*
132. Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 511 (Ct. App. 2002).

parents and potentially other couples.[133] The California Court of Appeals rejected the couple's claims based on the twins' age, and that the children's "relationship with their presumed parents is considerably more palpable than the possibility of a new relationship with a previously unknown biological parent."[134] Once a child of disputed parentage reaches a certain age, the interest in not psychologically damaging the child outweighs either set of parents' interest in asserting parental rights.[135]

Embryo mix-ups, like other ART cases in the past, pose difficult questions for courts to resolve, pushing the current legal framework to its limits.

II. GENETICS, INTENT, OR GESTATION: WHICH MATTERS MOST?

Though this Note dedicates much of its analysis to determining parental rights, it is important to contextualize these cases within the other questions attendant to embryo mix-ups, particularly reproductive autonomy and ART regulation. Determining parental rights is the vehicle through which to address these broader questions.[136] While courts must resolve the immediate question before them in embryo mix-up cases (who are the legal parents), they must also recognize the incentives accompanying those decisions.[137] Thus, this analysis will focus on resolving the question of parental rights in embryo mix-ups, and through that resolution it will address the broader outcomes beyond any single case.

Though legal theorists diverge on how courts should approach embryo mix-ups, most agree that the traditional best-interests-of-the-child test is insufficient.[138] The best-interests standard gives judges too

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133. *Id.*

134. *Id.* at 516 (citing Dawn D. v. Superior Court, 952 P.2d 1139 (Cal. 1998)).

135. *See* Mays v. Twigg, 543 So. 2d 241, 243 (Fla. Dist. Ct. App. 1989). In a famous switched-at-birth case, the Florida District Court of Appeal dismissed a complaint by the alleged genetic parents claiming custody of the child from whom they were separated at birth after the child they had been raising as their own died as result of congenital heart disease, and lab tests revealed they were not genetically related. *Id.* at 242. In dismissing the complaint, the court noted that

> Children are not property, but individuals whose needs and physical and mental well-being find protection in the law. The cases dealing with custody contests between a natural parent and a third party are replete with declarations that the privilege of custody of the natural parent must yield if such custody will be detrimental to the welfare of the child.

Id. at 243.

136. *See supra* Part I.

137. *See supra* notes 28–32 and accompanying text.

138. *See, e.g.*, Josh Deutsch, Note, *Finders-Keepers: A Bright-Line Rule Awarding Custody to Gestational Mothers in Cases of Fertility Clinic Error*, 12 CARDOZO J.L. & GENDER 367, 376 (2005).

little guidance in deciding between two sets of parents with valid claims who are both fit and desperately want the child.[139] The three main theoretical frameworks to resolve parentage claims in embryo mix-ups are a blanket presumption in favor of the genetic parents,[140] an intent-based approach as developed in surrogacy cases,[141] or a blanket presumption in favor of gestational parents.[142]

A. Maybe Genetics Are Enough: Presuming the Genetic Parents

One bright-line approach to determining parentage in embryo mix-up cases is to presume in favor of the genetic parents.[143] The genetic presumption is appealing because our society traditionally presumed genetics to be the basis for the legal bond between families before ART made new family constructions possible.[144]

The genetic presumption has strong cultural resonance across society. This is evident in the earliest surrogacy cases, many of which support finding in favor of the genetic parents. For example, cases like *Baby M*—while turning largely on public policy—emphasized the importance of a genetic relationship in determining parentage.[145] Further, even cases that upheld surrogacy contracts pointed to the fact that a gestational surrogate had no claim to be the child's genetic parent.[146] The resonance of the genetic presumption goes beyond just the courtroom. Adopted children seeking out their birth parents demonstrates the importance of a genetic connection,[147] as does the ongoing debate on the rights of children conceived through donated eggs

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But see Noble-Allgire, *supra* note 24, at 590 (describing a modified best-interests approach to determine custody).

139. Deutsch, *supra* note 138, at 376.

140. *See* Belsito v. Clark, 644 N.E.2d 760, 766 (Ohio C.P. 1994) (arguing that "[f]or the best interest of the child and society, there are strong arguments to recognize the genetic parent as the natural parent").

141. *See, e.g.*, Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21–23 (App. Div. 2000) (applying the intent-based approach as though identical to surrogacy).

142. *See, e.g.*, Deutsch, *supra* note 138, at 387 (calling for a blanket presumption in favor of the gestational mother).

143. *See generally Belsito*, 644 N.E.2d at 766 (favoring genetic presumption in surrogacy cases).

144. Kuhnt & Passet-Wittig, *supra* note 12.

145. *In re* Baby M, 537 A.2d 1227, 1263 (N.J. 1988).

146. *See* P.M. v. T.B., 907 N.W.2d 522, 535 (Iowa 2018) ("[A] gestational surrogacy in which the birth mother lacks a genetic connection to the child raises fewer concerns than . . . traditional surrogacy . . . .").

147. Graham Shelby, *When Adopted Children Want to Meet Their Birth Parents*, N.Y. TIMES (Aug. 7, 2018), https://www.nytimes.com/2018/08/07/well/when-adopted-children-want-to-meet-their-birth-parents.html [https://perma.cc/56DH-SHJB] (noting that it is becoming more common for adopted children to seek out birth parents, facilitated by "online genetic services like Ancestry.com and 23andMe").

and sperm to identify the genetic donors.[148] Nevertheless, only two states, Indiana and Ohio, presume in favor of the genetic mother in surrogacy cases, with all other states applying the intent-based approach, a gestational presumption, or having no clear rule.[149]

Though declining to conclude on how to best resolve embryo mix-ups and other ART mistakes, Raizel Liebler explores the implications of unintentional mixed-race families.[150] As she points out, parents often discover these mistakes upon giving birth to children of a different race,[151] as was the case in the New York case in Part I.[152] Though not explicitly endorsing a genetic presumption, Liebler explores various instances of white parents in particular expressing disturbing views about the fact that their child is of a different race.[153] The deeply problematic cases Liebler points to involve mistakes in artificial insemination rather than embryo mix-ups—meaning that the mother is still related to the child.[154] This distinction is important because if it were an embryo mix-up where neither parent were related to the child, they may have an easier time relinquishing the child to the genetic parents.[155] Liebler's analysis does provide an additional argument in favor of a genetic presumption, but historically our legal system has been uncomfortable with making custody decisions based on racial matching.[156]

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148. *See generally* Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMPAR. L. 619, 659 (2012) (discussing balancing donor-conceived children's right to know their biological parents with the donors' rights to remain private).

149. JOSLIN ET AL., *supra* note 73, §§ 4.8–10.

150. Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships After Reproductive Technological Mistakes*, 5 DEPAUL J. HEALTH CARE L. 15, 16–17 (2002).

151. *Id.* at 32.

152. Stanley-Becker, *supra* note 2.

153. Liebler, *supra* note 150, at 36:

> The mother in this case [where the clinic artificially inseminated her with the wrong sperm] seems to be more concerned about having a child who is black than not having the child of her husband. Having a child that is not white seems to be overwhelming for this mother, who considers this situation to be tragic.

154. *Id.* at 34–39 (describing two instances of fathers unable to bond with children of a different race due to clinic error in not using their sperm to artificially inseminate their wives).

155. *See id.* at 38:

> Michael became depressed because the children were not genetically related to him. . . . Michael stated that he would have preferred Betty to not be genetically related to the twins, "[b]ecause if they weren't ours, they would go to their true parents, biological parents. But . . . they're Betty's, and they're not mine."

156. 42 U.S.C. § 5115a(a)(1)(B) (repealed 1996) (prohibiting adoption agencies receiving federal funding from "discriminat[ing] in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved").

Disputes over embryo ownership in divorce proceedings provide further support for a genetic presumption given the courts' careful consideration of the implications of genetic parenthood.[157] In these cases, courts recognize a unique interest in both achieving genetic parenthood and avoiding having genetic children against one's will.[158] Disputes over embryo ownership, however, are not perfect analogues to embryo mix-ups because the genetic parents' interests are aligned in mix-ups, rather than competing.[159] Furthermore, embryo disputes do not involve resolving the parentage of an already existing child.[160] This limits the relevance of disputes over embryo ownership, and their emphasis on genetic parenthood, to instances of embryo mix-ups.

Marital presumption cases—unlike embryo disputes—seem to have no problem denying genetic fathers parental rights.[161] Like embryo mix-ups, marital presumption cases involve children who already exist.[162] Thus, courts not only consider the parents' interest in their parental rights, but also must consider the child's interests.[163] Marital presumption cases accept imposing the injury of genetic parenthood without legal parenthood in favor of preserving a stable home environment for the child.[164] Though not identical to embryo mix-ups, these cases accept an injury akin to nonconsensual gamete—specifically sperm—donation.[165]

In addition to the difficulty in squaring a genetic presumption with the marital presumption, legal theorists have noted that a genetic presumption discounts the gestational parent's contributions.[166] While

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157. *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1139–40 (Pa. Super. Ct. 2012); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

158. *See Reber*, 42 A.3d at 1139–40; *Davis*, 842 S.W.2d at 604.

159. *Compare Reber*, 42 A.3d at 1139–40 (weighing wife and husband's competing interests in achieving genetic parenthood and avoiding unwanted parenthood respectively), *with* Stanley-Becker, *supra* note 2 (genetic parents both want genetic parenthood and want to avoid having genetic children without legal parenthood).

160. *See generally* Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998) (noting that frozen embryos do not constitute "persons").

161. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (denying genetic, nonmarital father parental rights), *with Davis*, 842 S.W.2d at 604 (awarding embryos to husband to avoid unwanted genetic parenthood, especially without legal parenthood).

162. *See, e.g.*, *Michael H.*, 491 U.S. at 131.

163. *See, e.g.*, *id.* (considering family stability for child); *see also* Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 511 (Ct. App. 2002) (rejecting alleged genetic parents' claims in favor of stability for children).

164. *See, e.g.*, *Michael H.*, 491 U.S. at 131.

165. *See id.*

166. Leslie Bender, *"To Err Is Human" ART Mix-Ups: A Labor-Based, Relational Proposal*, 9 J. GENDER RACE & JUST. 443, 487 (2006):

> 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. [But] women also make a pregnancy contribution to the birth of a child. An analysis that credits all of

it is true that both genetic parents contribute equally to the child, only the gestational parent undergoes nine months of pregnancy and childbirth.[167] A genetic presumption glosses over the necessary roles of gestation and birth, creating dangerous legal and practical consequences.[168] From a legal perspective, disregarding the burden of pregnancy contradicts the logic of the marital presumption, which elevates relational over genetic ties.[169] Practically, a genetic presumption endorses a form of legally nonconsensual surrogacy, as the gestational parent never intended or consented to be a surrogate.[170]

A genetic presumption erodes reproductive autonomy to a level reminiscent of *The Handmaid's Tale*—a dystopian novel exploring a theocratic American government that forces women to serve as surrogates for politically powerful infertile couples.[171] If one of the fourteen states that have banned abortion post-*Dobbs* adopted a genetic presumption in embryo mix-up cases, a gestational parent who discovered an embryo mix-up before giving birth would have no choice but to serve as a nonconsensual surrogate, assuming the genetic parents asserted their parental rights.[172] Further, if any of the thirty-six states with some degree of legal abortion were to adopt a genetic presumption, a gestational parent who discovers an embryo mix-up after the child's birth is in the same position: she has now undergone pregnancy and childbirth with all intention of keeping the child, only to have it taken away.[173] In the wake of *Dobbs*, women have seen the Supreme Court strip them of their right to full reproductive autonomy. A genetic presumption takes that a step further, willfully disregarding the realities of pregnancy and putting gestational parents in the position of nonconsensual surrogates, as though it were a mere clerical error on a birth certificate.[174]

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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.

167. *Id.*

168. *Id.*

169. *See supra* Section II.A and accompanying text (describing development and continued prevalence of marital presumption).

170. *See* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 789 n.7 (Ct. App. 2003) (noting inapplicability of intent-based approach to embryo mix-ups because no parent intended the mix-up).

171. MARGARET ATWOOD, THE HANDMAID'S TALE (1985).

172. *See Tracking the States Where Abortion Is Banned*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (last updated Aug. 23, 2023, 11:30 AM) [https://perma.cc/MJN7-E2DJ] (noting that fifteen states have outright banned abortion).

173. Stanley-Becker, *supra* note 2.

174. *See Robert B.*, 135 Cal. Rptr. 2d at 789 n.7 (noting that Susan never intended to be a surrogate).

Overall, while a genetic presumption appeals to historical understandings of family and parenthood, the framework discounts the gestational parent's experience in a way that is far too dangerous given the current state of laws governing reproductive autonomy.[175]

B. Intent to What? The Inapplicability of the Intent-Based Approach to Embryo Mix-Ups

Rather than tailor a presumption to embryo mix-ups specifically, some have argued for—and New York courts evidently endorsed—applying the intent-based approach to embryo mix-ups.[176] The appeal of applying the intent-based approach lies in the similarities between surrogacy cases and embryo mix-ups. Like surrogacy cases, embryo mix-ups also involve two mothers—one genetic and one gestational—and courts have developed the intent-based approach to resolve their competing claims.[177] Surface-level similarities, however, give way to greater problems with the intent-based approach: namely, that it cannot be applied consistently where gestational parents intended to use donor gametes, and that it ignores the gestational parent's intent altogether.

Changing one fact in *Robert B. v. Susan B.* illustrates one of the greatest weaknesses of relying on the intent-based approach for embryo mix-ups.[178] Assume that Susan was married, but she and her spouse intended to use donor sperm. The court would have unquestionably reached the same decision in finding that Susan was the legal mother of the child.[179] The marital presumption, however, would have likely precluded the court from finding Robert to be the child's other legal parent, as Susan's spouse would already hold that title.[180] If Susan and her spouse provided a safe and healthy environment for the child, in all likelihood, a court would have denied Robert's claim, especially when considering Supreme Court precedents regarding the marital presumption.[181]

The outcome would be unclear if the court had instead applied the intent-based approach. While Robert and Denise intended to use the embryo that was mistakenly implanted in Susan—creating the

175. *See* N.Y. TIMES, *supra* note 172 (displaying the prevalence of abortion bans).

176. *See* Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21–23 (App. Div. 2000).

177. *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (balancing interests of genetic mother and gestational surrogate).

178. *See* 135 Cal. Rptr. 2d at 786.

179. *See id.*; *see also Johnson*, 851 P.2d at 778 (noting that either a genetic or gestational relationship is sufficient to find legal motherhood in California).

180. CAL. FAM. CODE § 7613(a)(1) (West 2023).

181. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).

initial investment in bringing about the child—Susan and her hypothetical spouse intended to use donated material.[182] Where the gestational parent intended to use donated embryos or gametes, the intent-based approach cannot resolve the question of parentage; if the court considers the gestational and genetic parents' intent equally, it does not weigh in favor of one parent or the other.[183] While the New York court considered the genetic parents' creation of the embryos to be the catalyst intent that solidified the genetic parents' parental rights, that is just one example of intent to parent that a court might consider in an embryo mix-up.[184] The implantation of the embryo in the gestational parent, the pregnancy itself, or the preparation the gestational parents undertook while expecting the child could all be evidence of intent to parent from the outset of pregnancy.[185]

The obstacle that donor gametes and embryos pose to applying the intent-based approach is greater than a one-off example like *Robert B.* Indeed, the CDC reported that the total number of ART cycles performed using fresh or frozen donor eggs or embryos increased from 18,530 in 2011 to 24,040 in 2020.[186] A significant and growing number of couples and single women turn to egg or embryo donation to build a family.[187] This is especially true for queer couples who may not be able to have a genetic or gestational relationship to their children without relying in some part on ART.[188] Thus, even accepting the argument that the intent-based approach can be applied equally where both sets of parents intended to have genetic children, the application cannot be extended to cases where the gestational parents intended to use donor

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

183. *Compare id.* (Susan never intended to have a genetic child), *with* Stanley-Becker, *supra* note 2 (gestational mother originally intended to have genetic child).

184. *See* Francesca Rebecca Acocella, Note, *Love Is Love: Why Intentional Parenting Should Be the Standard for Two-Mother Families Created Through Egg-Sharing*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 479, 495 (2016) (describing intent to parent as not only creating the embryo but also pregnancy and childbirth).

185. *See id.*

186. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 3, at 20. While the overall use of fresh donor eggs or embryos decreased, the use of frozen donor eggs or embryos greatly increased. *Id.* Since the number of those using donor eggs are increasing, the potential for embryo mix-up cases to involve mothers who never intended to be genetic mothers is significant. *See id.*; *see also Robert B.*, 135 Cal. Rptr. 2d at 789 n.7.

187. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 3, at 20.

188. *See* Acocella, *supra* note 184, at 485 (describing egg-sharing, a process by which a female same-sex couple uses IVF to implant an embryo with an egg from one woman into the other woman's uterus, thereby involving both partners to some extent in bringing about the child). *But see* Clara Moskowitz, *An L.G.B.T.Q. Pregnancy, from D.I.Y. to I.V.F.*, N.Y. TIMES (Apr. 15, 2020), https://www.nytimes.com/2020/04/15/parenting/fertility/lgbtq-pregnancy-ivf.html [https://perma.cc/QD5L-MY2V] (noting that only five to ten percent of fertility-clinic patients self-identify within the LGBTQ+ community despite "presumably [being] some of fertility clinics' bread-and-butter clientele").

gametes or embryos.[189] Considering the increased use of donor gametes and embryos, the intent-based approach cannot be applied uniformly—thereby creating uncertainty for litigants and judges alike in an area of law that is already too susceptible to confusion.[190]

Despite the surface-level conceptual parallels between surrogacy and embryo mix-ups, applying the intent-based approach to embryo mix-ups ignores the gestational parent's intent against being a surrogate.[191] In the case of mix-ups, the gestational parent *never consented or intended* to be a surrogate.[192] Of course, some once-consenting surrogates ultimately regret their decision and attempt to keep the baby.[193] That, however, differs entirely from embryo mix-ups.[194] The former situation involves someone who knowingly agreed to take on a deeply personal and intimate task and later regretted that decision.[195] The latter, however, involves individuals who always intended to become parents, who took on the burden of pregnancy for the payoff of parenthood, only for a court to intervene and deny them that opportunity due to a clinic's mistake.[196] The simplest way to identify the key difference between a surrogate and a gestational parent in an embryo mix-up is consent.[197] The intent-based approach is appropriate as applied to surrogacy cases because courts can award parenthood based on the original intent of all parties *before* the surrogate ever became pregnant.[198] But as *Robert B.* explains, none of the parents involved in embryo mix-ups intended for the mix-up, and it is illogical to pretend so and recognize rights on that fiction.[199]

As the New York courts applied the intent-based approach to embryo mix-ups, they failed in two respects by: (1) not recognizing the

189. *See Robert B.*, 135 Cal. Rptr. 2d at 789 n.7.

190. *See* Bender, *supra* note 166, at 468 ("While an intent standard . . . may perform adequately in assigning parentage in cases [with certain different conditions], it fails miserably as a device for assigning parentage in cases of mix-ups.").

191. *See Robert B.*, 135 Cal. Rptr. 2d at 789 n.7.

192. *See* Noble-Allgire, *supra* note 24, at 520 ("An analysis of the surrogacy cases is helpful, but not dispositive . . . . [because] [a]lthough both types of cases require a choice between a genetic mother and a gestational mother, they are distinguishable on the basis of consent.").

193. *See* Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) ("Under Anna's interpretation of the Act, [that the gestational surrogate should be presumed a parent], a woman who agreed to gestate a fetus . . . would, *contrary to her expectations*, be held to be the child's natural mother." (emphasis added)).

194. *Compare id.* (a woman who previously agreed to serve as a surrogate attempting to revoke the contract), *with* Stanley-Becker, *supra* note 2 (a woman who never agreed to serve as a surrogate attempting to keep the children she carried and intended to raise as her own).

195. *See Johnson*, 851 P.2d at 782–83.

196. *See* Stanley-Becker, *supra* note 2.

197. *See* Noble-Allgire, *supra* note 24, at 520.

198. *See id.*

199. *See* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 789 n.7 (Ct. App. 2003).

stark differences between the two situations; and (2) only considering the genetic parents' intent.[200] Completely ignoring the gestational parent's intent contradicts the intent-based approach's underlying logic and undermines reproductive autonomy in a time where such control is already consistently threatened.[201]

C. Labor Pains: Presuming the Gestational Parents

The third approach that the legal system may take is a presumption in favor of the gestational parents.[202] Before ART enabled new paths to parenthood, there was no question that the person who gave birth to the child was the child's genetic, gestational, and legal parent.[203] Donated gametes, IVF, and surrogacy have unsettled that assumption.[204]

In her article exploring embryo mix-ups, Professor Leslie Bender proposes taking a "labor-based approach" to ART mix-ups, concluding that courts should weigh the gestational parent's emotional and physical labor more heavily than the genetic parents' contribution.[205] She notes that this approach, unlike the genetic presumption, acknowledges the additional labor that the gestational parent must endure in bringing forth the child.[206] Her reasoning reflects the Supreme Court's requirement that genetic, nonmarital fathers establish a relationship with the child to claim parental rights.[207] In surrogacy cases, Arizona, North Dakota, and Idaho all have statutes or court precedents that presume the gestational surrogate to be a legal parent in certain situations.[208]

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200. *See* Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 24 (App. Div. 2000).

201. *See id.* (failing to mention that Ms. Fasano never intended to be a surrogate); *see also* N.Y. TIMES, *supra* note 172.

202. *See, e.g.*, Deutsch, *supra* note 138, at 387.

203. *See* Noble-Allgire, *supra* note 24, at 520 ("Until recently, there was no question that the woman who gave birth to a child was the child's mother.").

204. *See id.* ("Because [ART] goes beyond the natural means of procreation, it has strained the limits of traditional parentage laws built upon the laws of nature.").

205. Bender, *supra* note 166, at 491:

> Once this [gestational] 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.

206. *Id.* at 488–89.

207. *See* Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).

208. *See* JOSLIN ET AL., *supra* note 73, § 4:9.

It is undeniable that the experience of gestating and birthing a baby is a greatly emotional and, at times, a traumatizing experience.[209] As surrogates who do not regret going through the process describe, separating the child from the gestational parent can compound the severity of the surrogacy experience.[210] Gestational parents, on the other hand, do not have the benefit of having consented to this ordeal in advance.[211] Gestational presumption supporters note it would avoid forcing women to be nonconsenting surrogates and the resulting emotional trauma.[212] With fourteen states banning abortion, gestational parents in those states would have no option to avoid nonconsensual surrogacy if a court applied anything other than a gestational presumption.[213]

While the high cost of IVF may mean that those who undergo the procedure are relatively wealthier and therefore more likely to be able to afford traveling to another state with more flexible abortion laws, this is not necessarily a fair assumption.[214] Sixteen states currently mandate some insurers offer or provide coverage for IVF, enabling greater accessibility to those who otherwise may not be able to afford the out-of-pocket price of the procedure. [215] Of the states that

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209. *See* Cheryl Tatano Beck, Sue Watson & Robert K. Gable, *Traumatic Childbirth and Its Aftermath: Is There Anything Positive?*, 27 J. PERINATAL EDUC. 175, 175, 180 (2018) ("Up to 45% of new mothers have reported experiencing a traumatic birth. . . . Birth trauma can be perceived as a psychologically seismic occurrence of a magnitude that can severely shake the foundations of mothers' assumptive worlds.").

210. *Secret Diary of a Surrogate Mother*, GUARDIAN (Apr. 27, 2013, 4:00 AM), https://www.theguardian.com/lifeandstyle/2013/apr/27/secret-diary-of-a-surrogate-mother [https://perma.cc/9WAG-Q6Z5] (surrogate describing feeling "a great well of grief" after the birth, and, after giving the babies to her brother and sister-in-law (the intended parents), that "[t]here was a great hole where the babies should have been," but that she ultimately does not regret serving as a surrogate).

211. Noble-Allgire, *supra* note 24, at 520.

212. Deutsch, *supra* note 138, at 377.

213. N.Y. TIMES, *supra* note 172; *see also Prenatal Genetic Diagnostic Tests*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/womens-health/faqs/prenatal-genetic-diagnostic-tests (last updated Dec. 2022) [https://perma.cc/9BNV-G5KS] (noting that prenatal genetic diagnostic tests identify genetic disorders in a fetus and that some parents choose to terminate such pregnancies).

214. *Compare* Marissa Conrad, *How Much Does IVF Cost?*, FORBES, https://www.forbes.com/health/family/how-much-does-ivf-cost/#how_much_does_ivf_cost_section (last updated Mar. 7, 2023, 11:47 AM) [https://perma.cc/TA28-LEF7] (finding the average cycle of IVF costs from $12,000 to $14,000), *with* Allison McCann, *What It Costs to Get an Abortion Now*, N.Y. TIMES (Sept. 28, 2022), https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html [https://perma.cc/V7K7-B2HX] (calculating the cost of travelling for an abortion based on original state and destination, type of abortion sought, and additional expenses to cost anywhere from $1,000 to well over $4,000).

215. ARK. CODE ANN. § 23-85-137(a) (2011); COLO. REV. STAT. § 10-16-104(23) (2023); CONN. GEN. STAT. §§ 38a-509, 38a-536 (2018); DEL. CODE ANN. tit. 18, § 3342(i)(2) (2018); HAW. REV. STAT. § 432:1-604 (2013); 215 ILL. COMP. STAT. 5/356m (2022); MD. CODE. ANN., Ins. § 15-810 (West 2021); MASS. GEN. LAWS ch. 175, § 47H (2010); MONT. CODE ANN. § 33-31-102(3)(h)(v) (2021); N.H.

mandate an offer or coverage for IVF, Texas, West Virginia, and Arkansas all have abortion bans in place.[216] It is therefore conceivable that there is some population in these states that may be able to afford IVF but cannot afford out-of-state travel for an abortion in the case of an embryo mix-up. Regardless of the gestational parents' financial ability to travel across states for abortion care, the law should not impose such a burden onto couples for a clinic's mistake.

Additionally, a presumption in favor of the gestational parents is more consistent with how courts have conceptualized parenthood via the marital presumption.[217] Indeed, the Court clearly established that while genetic fathers have parental rights where they have established a substantial relationship with the child,[218] genetics alone do not impart such rights in the absence of a substantial relationship.[219] The marital presumption itself is a presumption to gestational parents' partners,[220] and the law continues to embrace acknowledging family ties as built through relational rather than genetic bonds.[221] While marital presumption cases and embryo mix-ups are distinct—prioritizing established familial relationships—is highly applicable to embryo mix-ups.[222]

Of course, the gestational approach is not without shortcomings. In embryo mix-ups, genetic parents intended to raise the child that was mistakenly implanted in the gestational parent, and it was not through any fault of their own that the mistake occurred.[223] Further, there are indeed benefits to maintaining genetic family units, if only from a purely medical standpoint, as genetic parents can inform their children of family medical history.[224] Yet both adoption and the increased reliance on gamete donation undermine serious concerns of permitting

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REV. STAT. ANN. § 417-G:2 (2020); N.J. STAT. ANN. § 17B:27-46.1x(a) (West 2017); N.Y. INS. LAW § 3221(k)(6)(C)(vi) (McKinney 2023); OHIO REV. CODE ANN. § 1751.01(h) (LexisNexis 2009); 27 R.I. GEN. LAWS § 27-18-30(a) (2017); TEX. INS. CODE ANN. art. 1366.003 (West 2005); W. VA. CODE § 33-25A-2 (2010).

216. N.Y. TIMES, *supra* note 172.

217. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (holding that a genetic relationship is insufficient to overcome already established relationships between a marital father and the child).

218. *See* Stanley v. Illinois, 405 U.S. 645, 646 (1972).

219. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983).

220. *See, e.g.*, *Michael H.*, 491 U.S. at 121.

221. *See, e.g.*, *id.*; Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003) (affirming Susan's legal motherhood by citing to "the valid claims of gestational mothers").

222. *See Michael H.*, 491 U.S. at 124–30.

223. *See infra* Section III.B.

224. *See* Belsito v. Clark, 644 N.E.2d 760, 766 (Ohio C.P. 1994); *see also* Clark, *supra* note 148, at 650 (describing the importance of access to donor information for accurate medical history).

nongenetic family formation.[225] Further, studies show that donor-conceived children are just as well-adjusted throughout childhood development as children born into genetic families.[226] Our nation's understanding of family has never fully relied on genetic connections, and a preference for genetic connections alone is insufficient to support a genetic presumption.[227]

Perhaps most unfairly, a gestational presumption may create instances where the genetic parents no longer have an opportunity to conceive genetic children. For example, cancer patients collect their genetic material before undergoing treatments that ultimately prevent them from producing eggs or sperm; should that patient's last embryo be mixed up, a gestational approach would rob them of the opportunity to be a genetic parent.[228] Courts have factored in similar circumstances when deciding on property division of embryos in divorce proceedings.[229] Though parenthood can be achieved without genetics—such as through adoption or ART with donated gametes—it seems unfair to deny an individual the chance at genetic parenthood.[230]

Despite its imperfections, however, a gestational presumption is more consistent with contemporary legal understandings of parentage and adequately recognizes a gestational parent's role in pregnancy.[231]

III. A GESTATIONAL PRESUMPTION TO PROMOTE BETTER OUTCOMES

The harm embryo mix-ups cause is beyond measure, but the law still has an opportunity to minimize and prevent future harms.[232] No matter the outcome, one set of parents feels they have been unjustly

225. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 81; Kuhnt & Passet-Wittig, *supra* note 12.

226. Susan Imrie & Susan Golombok, *Impact of New Family Forms on Parenting and Child Development*, 2 ANN. REV. DEVELOPMENTAL PSYCH. 295, 302–04 (2020). The authors note that families who did not tell their children about their donor conception had slightly worse outcomes, marking the only significant difference in adjustment of donor-conceived children. *See id.* at 302–03.

227. *See Michael H.*, 491 U.S. at 129 (presuming in favor of non-genetic father).

228. *Fertility Preservation: Understand Your Options Before Cancer Treatment*, MAYO CLINIC (Dec. 6, 2022), https://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/fertility-preservation/art-20047512 [https://perma.cc/L38R-AVWL]; *see also* Reber v. Reiss, 42 A.3d 1131, 1137–38 (Pa. Super. Ct. 2012) (awarding embryos to wife in divorce proceedings as she had undergone chemotherapy for breast cancer and could no longer have genetic children).

229. *See, e.g.*, *Reber*, 42 A.3d at 1137–38.

230. *See, e.g.*, *id.*

231. *See Michael H.*, 491 U.S. at 124–30; Bender, *supra* note 166, at 506.

232. *See* Hayley Smith, *'Nightmare' IVF Mix-Up Leaves L.A. Couple Giving Birth to Other Family's Baby*, L.A. TIMES (Nov. 8, 2021, 3:13 PM), https://www.latimes.com/california/story/2021-11-08/couple-gives-birth-to-wrong-baby-in-nightmare-ivf-mix-up [https://perma.cc/C5XB-WKBD] (Of her experience with an embryo mix-up, a gestational mother said, "It was torture that shook me to my core and forever changed who I am.").

denied parenthood, and all parties involved must reconcile the attendant emotional—and at times physical—trauma.[233] Recognizing the sensitive moral and legal considerations at play, this Note nonetheless argues that the gestational presumption is the superior framework for two key reasons: (1) it avoids legally endorsing nonconsensual surrogacy;[234] and (2) it incentivizes gestational parents to discover potential embryo mix-ups and hold clinics accountable without fear of losing their child.[235]

Since *Baby M*, courts have served as the forum to clarify parental status in the novel family structures that ART enables.[236] These decisions implicate questions of reproductive autonomy and an unregulated ART industry.[237] Embryo mix-ups amplify these questions even more than typical ART cases.[238] In resolving parentage in embryo mix-up cases, courts have the opportunity to set expectations that will have profound effects beyond the parties in the case.[239] They can vindicate gestational parents' reproductive rights, avoid legally endorsing nonconsensual surrogacy, and create an environment where all injured parties feel empowered to hold clinics accountable, which will in turn encourage greater care.[240] Simply put, these cases are the result of clinic error. But given the current dearth of regulation over the fertility industry, it is up to the courts to create an environment where fertility clinics cannot afford to make such dire mistakes.[241]

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233. *See Court Orders Genetic Test to Identify Biological Parents in Embryo Mix-Up*, TIMES ISR. (Oct. 19, 2022, 8:05 PM), https://www.timesofisrael.com/court-orders-genetic-test-to-identify-biological-parents-in-embryo-mix-up/ [https://perma.cc/52FK-3G6H] (An alleged genetic mother in an embryo mix-up told interviewers, "My heart goes out to [the gestational mother]. I really identify with her. I wish I could hug her now and cry with her because we are both victims of this terrible mistake that happened.").

234. *See supra* notes 209–222 and accompanying text (describing how a gestational presumption avoids nonconsensual surrogacy in post-*Dobbs* America).

235. *See* TIMES ISR., *supra* note 233 (gestational mother refuses genetic testing to confirm embryo mix-up to avoid having to give up the baby).

236. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

237. *See id.* at 782 n.10 (noting the effect of not recognizing the intent-based approach on family structures formed by surrogacy).

238. *See* Zhang, *supra* note 28.

239. *See Johnson*, 851 P.2d at 782 n.10.

240. *See* Sections IV.A, B.

241. *See* Rasouli et al., *supra* note 32, at 1101–07 (discussing the general cost of litigation over embryo mix-ups for fertility clinics compared to the minimal costs associated with proper storage and maintenance); *see also* Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 516 (Ct. App. 2002); Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003).

A. Avoiding Nonconsensual Surrogacy: Presuming the Gestational Parents

As a basic matter, a gestational presumption avoids legally endorsing nonconsensual surrogacy by affording the gestational parent a choice in the matter. On balance, nonconsensual gamete donation is a lesser injury than nonconsensual surrogacy.[242] The gestational parent invests greater time and risk into carrying and birthing the child than any other parent.[243] While there are instances where the genetic parents may have spent more money in collecting and cryogenically preserving their genetic material,[244] the costs at issue here are greater than mere monetary investment; both parents who intended to get pregnant will have undergone the incredibly invasive procedures associated with IVF, but only the gestational parent will have undergone pregnancy.[245]

As tort law has recognized, calculating pain and suffering is a fact-specific inquiry best left to the jury to determine on a case-by-case basis.[246] As such, this Note tends to rely on concrete measurements—such as the fact that pregnancy and childbirth present significant physical risks for the gestational parent.[247] Among Global North countries, the United States had the highest maternal mortality rate of 23.8 deaths per 100,000 live births in 2020.[248] In cases of embryo mix-

242. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (permitting denial of genetic father's parental rights), *with In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988) (deeming even consensual surrogacy too great of an injury to permit as a matter of public policy).

243. *See generally* NAT'L INST. OF CHILD HEALTH & HUM. DEV., *supra* note 99 (discussing complications of pregnancy).

244. Forbes estimates that embryo cryopreservation may cost between $1,000 and $2,000, with an additional storage cost of $350 to $600 annually, adding to the other fees associated with hormone treatments, egg retrieval, and implantation. Conrad, *supra* note 214.

245. *See* Bender, *supra* note 166, at 487.

246. *E.g.*, Rozar v. R.J. Reynolds Tobacco Co., 292 So. 3d 1202, 1207 (Fla. Dist. Ct. App. 2020) ("Damages for pain and suffering are difficult to calculate, have no set standard of measurement, and for this reason are uniquely reserved to a jury for their decision." (quoting Pogue v. Garib, 254 So. 3d 503, 507 (Fla. Dist. Ct. App. 2018))).

247. Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, NAT'L CTR. FOR HEALTH STATS. (Feb. 2022), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf [https://perma.cc/H9SQ-BLW6].

248. *Id.*; *see also* Nina Martin & Renee Montagne, *U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NPR (May 12, 2017, 10:28 AM), https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world [https://perma.cc/NK62-HJAQ]. For reference, the United Kingdom had a maternal mortality rate of 9.2 deaths per 100,000 live births, Canada with 7.3 per 100,000, and Finland with the lowest at 3.8 per 100,000 in 2017. *Id.*

ups, minimizing injury turns not on monetary or emotional investment, but rather on the very real health risks that accompany childbirth.[249]

While avoiding nonconsensual gamete donation is an interest courts have recognized in embryo disputes, that interest loses its weight once the child exists.[250] Though an irreparable harm, the loss of autonomy associated with nonconsensual gamete donation is less than that associated with nonconsensual surrogacy. The law must take greater lengths to avoid the latter—even if it means permitting the former.[251] Concerns over nonconsensual surrogacy take on new depths in the wake of *Dobbs*, as several state legislatures have banned or severely restricted abortion access.[252] Prenatal genetic testing that could reveal an embryo mix-up is typically available between the tenth and twenty-second week of pregnancy.[253] Given the delayed timeline for genetic testing, gestational parents may be forced into nonconsensual surrogacy in states that either outlaw abortion or limit its application to early in the pregnancy.[254] Considering the second case set out in Part I, the gestational mother decided to have an abortion mere days before her third trimester, after which she could not legally receive an abortion in New York.[255]

From a judicial perspective, the gestational presumption provides courts with more certainty when confronting embryo mix-ups than the genetic presumption or intent-based approach, as it requires no additional testing or decision as to whose parental intent controls.

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249. *See* NAT'L INST. OF CHILD HEALTH & HUM. DEV., *supra* note 99 (discussing complications of pregnancy).

250. *Compare* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (finding husband's interest in avoiding genetic parenthood without legal parenthood as controlling), *with* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (finding greater interest in family stability than genetic father maintaining relationship with his genetic daughter).

251. *See* Bender, *supra* note 166, at 478.

252. N.Y. TIMES, *supra* note 172.

253. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 213. The two main tests used to diagnose genetic disorders—in which a gestational mother would be most likely to discover she is not genetically related to the fetus she is carrying—are amniocentesis, which typically occurs between fifteen and twenty weeks of pregnancy, and chorionic villus sampling, which occurs between ten and thirteen weeks of pregnancy. *Id.* Women, however, may be more inclined to choose amniocentesis, as "[t]he chance of miscarriage with [chorionic villus sampling] is slightly higher than the chance of miscarriage with amniocentesis." *Id.*

254. *See id.*; *see also* N.Y. TIMES, *supra* note 172.

255. Salcedo, *supra* note 9. Though Washington D.C., Alaska, New Jersey, New Mexico, Oregon, Vermont, and Colorado do not have a gestational limit on the books, very few clinics offer abortions in the third trimester, not to mention the barrier of travelling to one of these states or D.C. if not already there. *See* N.Y. TIMES, *supra* note 172; *see also* Sarah McCammon, *Abortion in the Third Trimester: A Rare Decision Now in the Political Spotlight*, NPR (Apr. 30, 2019, 5:03 AM), https://www.npr.org/2019/04/30/718546468/opponents-fight-efforts-to-protect-late-term-abortion-rights [https://perma.cc/PLM7-JH6W] (mentioning that Boulder, Colorado is home to "one of the few clinics in the country that offers third-trimester abortions").

Not only does the gestational presumption provide much greater certainty, but it is also more consistent with court precedents regarding the discovery of these mistakes once the child is beyond infancy.[256] These cases can go years without the gestational parents discovering the mistake—either because they did not intend to use their own genetic material in the first place, or because they are the same race as their child and did not consider a lack of genetic relationship upon birth.[257] As is seen in *Mays v. Twigg*, courts are reluctant to reassign parental rights once a parent-child relationship exists.[258] Thus, given that genetic parents have a limited window in which they can assert any legal claim over the child, a gestational presumption at infancy is further consistent with contemporary family law precedents.[259]

Nevertheless, the greatest drawback of a gestational presumption arises from instances where the embryo mix-up involves the last chance for individuals to be genetic parents.[260] The harm suffered in nonconsensual gamete donation likely exceeds the harm suffered in embryo disputes, as the genetic parents in embryo disputes had the benefit of previously agreeing to donate the embryos upon divorce.[261] Embryo dispute precedents thus could counsel to find for the genetic parents in such situations; but as explained above, embryo disputes are fundamentally different from parentage disputes where the child is already conceived or born.[262] Additionally, not all courts agree that the frozen embryos being the only or best chance to achieve genetic parenthood is sufficient to overcome previous agreements to donate the embryos.[263] While courts could employ an exception to the gestational presumption in these cases—as will be explored below—the

256. *See* Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 516 (Ct. App. 2002) (denying alleged genetic parents' request to genetically test fourteen-year-old twins).

257. *See* Liebler, *supra* note 150, at 24 (describing how embryo mix-ups are often discovered upon the child being a different race).

258. *See* Mays v. Twigg, 543 So. 2d 241, 243 (Fla. Dist. Ct. App. 1989) (denying genetic parents' claim over ten-year-old child in switched-at-birth case).

259. *See id. See generally* UNIF. PARENTAGE ACT § 608(b) (UNIF. L. COMM'N. 2017) (laying out that a presumption of parentage cannot be overcome after the child is two years old, unless the court determines the presumed parent "is not a genetic parent, never resided with the child, *and* never held out the child as" their own (emphasis added)).

260. *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1137–38 (Pa. Super. Ct. 2012).

261. *See, e.g.*, Terrell v. Torres, 456 P.3d 13, 14 (Ariz. 2020); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

262. *See supra* notes 157–165 and accompanying text.

263. *See, e.g.*, *Terrell*, 456 P.3d. at 14 (enforcing contract which agreed to donate frozen embryos upon marriage dissolution despite only avenue through which wife could have genetic children); *Kass*, 696 N.E.2d at 180 ("Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced" even if this results in denying one spouse the possibility of genetic parenthood).

gestational presumption must be absolute for considerations beyond the parents' individual claims.[264]

In one sense, the gestational presumption cuts against the traditional conception of family as a legal mechanism for recognizing genetic bonds.[265] ART, however, disrupted that notion long before courts began to grapple with embryo mix-ups.[266] While there are certainly strong arguments in favor of a genetic presumption,[267] there are more compelling reasons and legal precedents cutting in favor of a gestational presumption, tracing back to the marital presumption.[268] Most importantly, the questions of reproductive autonomy that embryo mix-ups implicate further tip the scales in favor of a gestational presumption.[269]

Courts must recognize one set of parents' rights, either vindicating or rejecting the gestational parent's reproductive autonomy in the process. Though a gestational presumption may cause genetic parents to suffer immense harm, the law should not craft any exceptions to the presumption. An exception would both create legal uncertainty concerning parentage and permit nonconsensual surrogacy—the latter of which cannot be legally acceptable.[270] A blanket gestational presumption is the only way to avoid the harm of nonconsensual surrogacy.

B. Conceiving Better Incentives

In addition to avoiding legally endorsing nonconsensual surrogacy, a gestational presumption creates incentives for parents and clinics that generate socially beneficial outcomes.[271] A gestational presumption both allows parents to hold clinics accountable and encourages parents to take advantage of the full range of neonatal treatments that promote fetal health.[272]

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264. *See infra* Subsection IV.B.1.

265. *See* Belsito v. Clark, 644 N.E.2d 760, 766 (Ohio C.P. 1994) (finding for genetic parents in surrogacy case).

266. *See* Zhang, *supra* note 28.

267. *See* Liebler, *supra* note 150, at 36 (noting the dangerous outcomes where ART mistakes lead to white families having children of color and expressing problematic and racist views about their children).

268. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).

269. *See supra* Part III.

270. *See supra* notes 192–201 and accompanying text (describing uncertainty in adjudicating parenthood in embryo mix-ups if anything other than gestational presumption is adopted).

271. *See infra* Subsections IV.D.1, 2.

272. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 213.

1. Incentivizing Clinic Accountability

Parents discover embryo mix-ups when the fetus is in utero through genetic testing,[273] when the parents give birth to a child of a different race than their own,[274] or years into the child's life through discovery of widespread clinic error or at-home genetic testing.[275] In the absence of a gestational presumption, parents more concerned with avoiding litigation and relinquishing their child would likely forego any claims they held against the clinic.[276] Such an outcome is highly problematic for several reasons. Primarily, disincentivizing gestational parents from bringing claims against the clinic obfuscates how often these mix-ups occur and fails to hold clinics accountable for their actions.[277] Given that regulation of the fertility industry is already extremely lacking, courts should not create legal precedents that lead patients to forego suing clinics out of fear of losing parental rights over their child.[278] Without private litigation, it is difficult to see how the current regulatory scheme can successfully prevent clinics from using the subpar practices that lead to embryo mix-ups.[279]

Though this Note focuses on resolving competing parental claims, resolving parental rights does not hold the clinic accountable or speak to either set of parents' rights to sue the clinic. Legal parenthood

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273. *See* Salcedo, *supra* note 9 (parents discovered alleged embryo mix-up while the fetus was in utero through genetic testing).

274. *See* Stanley-Becker, *supra* note 2 (Asian couple discovered embryo mix-up upon giving birth to two white boys); *see also* Liebler, *supra* note 150.

275. *See* Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 516 (Ct. App. 2002) (genetic parents discovered alleged embryo mix-up upon learning about widespread malpractice at the clinic they used); *see also* Lindsay Lee Wallace, *Netflix's* Our Father *Tells the True Story of a Fertility Doctor Who Used His Own Sperm on Patients*, TIME (May 12, 2022, 5:54 PM), https://time.com/6176310/our-father-true-story-netflix/ [https://perma.cc/L35S-J987] (detailing how Jacoba Ballard took an at-home DNA test and eventually discovered she has ninety-three half-siblings as a result of a fertility doctor artificially inseminating patients with his own sperm without their consent).

276. *See* Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 22 (App. Div. 2000) ("The Fasanos took no action regarding the clinic's apparent error until the Rogerses, upon discovering that Ms. Fasano had given birth to a child who could be theirs, located and commenced an action against them."); *see also* Ryan Au, *Israeli Woman Given Legal Custody of Baby Born Following Embryo Mix-Up*, PET (Oct. 31, 2022), https://www.progress.org.uk/israeli-woman-given-legal-custody-of-baby-born-following-embryo-mix-up/ [https://perma.cc/5W39-2KJC] (After giving birth and being declared the child's legal guardian, the gestational mother of an Israel embryo mix-up told reporters, "I wanted a baby for many years and went through gruelling treatments until the long-awaited moment arrived. I ask that they allow me to raise her and leave me alone.").

277. *See, e.g.*, Stanley-Becker, *supra* note 2 (gestational couple discovered clinic mistake upon birth of child and informing clinic); Salcedo, *supra* note 9 (gestational couple discovered clinic mistake upon genetic testing and informing clinic).

278. *See* Ollove, *supra* note 77; Rasouli et al., *supra* note 32.

279. *See* Cahn & Suter, *supra* note 71, at 40 (describing CDC guidelines in place and how failure to comply with guidelines does not preclude clinic from operating); Rasouli et al., *supra* note 32.

necessarily does not—and cannot—function as a remedy for the injury embryo mix-ups cause.[280] Rather, monetary damages must be the answer to the clinic's malpractice for several reasons. As an initial matter, children are not compensation for an injury that a clinic causes; deciding parental rights does not affect the clinic in any substantial way. Those who the court determines are not the legal parents of the child feel the greatest pain from the decision, but the decision is not intended to punish either set of parents—that pain is a tragic reality that cannot be avoided.[281] Rather, to make clinics bear the responsibility for their mistake, they must pay both sets of parents, as in an embryo mix-up both sets of parents have several claims.[282] Given the lack of national regulatory or legislative schemes to impose minimum standards of care upon fertility clinics, private causes of action against them are currently the best way to ensure clinics self-regulate to higher standards.[283] After all, better practices come at a fraction of the cost of litigating embryo mix-ups.[284]

Thus, the gestational presumption only speaks to which set of parents should be presumed to be the legal parents of the child; it does not speak to the clinic's liability to either set of parents.[285] Even if the gestational parents enjoy a presumption of parentage and keep the child, that does nothing to remedy the injuries the clinic brought upon them.[286] As seen in documented embryo mix-up cases, even the legal parents of the child have consistently sued clinics for various tortious

280. *See* Smith, *supra* note 232 (describing the legal process both sets of parents undertook to "switch" babies back to genetic parents as well as the lawsuits against the fertility clinics responsible for the embryo mix-up).

281. *See id.* (describing the intense pain both sets of genetic parents felt even though they both ended up with custody of their genetic child).

282. The gestational parents in the New York case involving the two boys who went to two different sets genetic parents sued the fertility clinic for "negligent infliction of emotional distress, . . . intentional infliction of emotional distress, . . . reckless and wanton misconduct, . . . breach of implied covenant of good faith and fair dealing, . . . breach of fiduciary duty, . . . misrepresentation, . . . breach of duty to disclose, . . . breach of duty to obtain informed consent, . . . bailment, . . . battery, . . . and . . . deceit and fraudulent concealment." A.P. v. CHA Health Sys., Inc., No. 19-CV-03826-WFK-CLP, 2023 WL 2537839, at *2 (E.D.N.Y Feb. 13, 2023). Though there is no guarantee that the plaintiffs will succeed on all such claims, it nonetheless demonstrates the type of claims victims of embryo mix-ups can likely pursue.

283. *See* Rasouli et al., *supra* note 32 (discussing the general cost of litigation over embryo mix-ups for fertility clinics compared with the minimal costs associated with proper storage and maintenance).

284. *See id.*

285. *See* Mroz, *supra* note 109 (defining parental rights as the legal parents' rights and obligations towards their child).

286. *See A.P.*, 2023 WL 2537839 at *2.

actions.[287] Without public officials ensuring compliance, private action is perhaps the most effective avenue to push fertility clinics to self-impose better practices, for fear of facing the crushing cost of litigation.[288]

Anything but a complete gestational presumption discourages gestational parents from coming forward when these mix-ups occur; this, in turn, prevents the genetic parents from ever discovering the misuse of their embryos.[289] Genetic parents ought to know if their embryos have been misused, not only to hold clinics accountable, but also to plan for their future fertility treatments—especially if the clinic misused the last of their preserved embryos.[290] Depending on the parents' ages and potential future medical treatments, there may be limited time to recover equally viable embryos, should they choose to do so.[291]

The security a gestational presumption affords the gestational parents allows them to come forward when they discover such mistakes and hold the clinics accountable, thereby also alerting the genetic parents of their injury.

2. Promoting Medical Autonomy

In addition to holding clinics accountable for their errors, a gestational presumption creates socially beneficial outcomes, such as medical and reproductive autonomy.[292] When the fetus is in utero, genetic testing is the only way to discover the mix-up.[293] In the absence of a gestational presumption, parents who conceived through IVF would be discouraged from undergoing genetic testing, as was the case in a recent embryo mix-up in Israel.[294] A court had to go so far as requiring genetic testing of the fetus, as the gestational mother refused to confirm the genetic identity of the child.[295] Some believed that the gestational

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287. *See, e.g.*, Smith, *supra* note 232 (embryo mix-up case in which both couples became pregnant with the other's embryo and ultimately adopted one another's babies then both sued fertility clinic even though both families ended up with their genetic child).

288. *See* Rasouli et al., *supra* note 32.

289. *See supra* note 277 and accompanying text (describing how clinic only discovers mistake if gestational parents inform them, which then allows the clinic to inform the genetic parents).

290. *See* Smith, *supra* note 232; *see also* Reber v. Reiss, 42 A.3d 1131, 1139–40 (Pa. Super. Ct. 2012).

291. *See* MAYO CLINIC, *supra* note 228.

292. *See* TIMES ISR., *supra* note 233 (gestational mother unwilling to undergo genetic testing when unclear whether she could keep child).

293. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 213.

294. TIMES ISR., *supra* note 233.

295. *Id.* (additional testing was necessary to determine if the fetus was related to the alleged genetic mother).

mother did so specifically because she knew that, legally, it would be more difficult for a court to order her to relinquish custody after the birth of the child if she were able to take the child home for even a short amount of time.[296] Though the choice of prenatal genetic testing should lie entirely with the gestational parents, courts should not craft precedent that discourages it; rather, the law should create an environment where parents are free to choose whether to undergo such testing.[297]

Allowing gestational parents to access genetic testing is beneficial because it permits them to hold clinics accountable as soon as possible, and it informs them of any genetic conditions that they can treat or manage before birth.[298] While such medical decisions, including genetic testing, are completely up to the gestational parents, legal outcomes should not discourage parents from taking full advantage of the medical treatments they wish to receive during pregnancy.[299]

Genetic testing and the gestational presumption ensure a gestational parent will have the fullest extent of reproductive autonomy possible after a clinic has already denied full autonomy with the mistake.[300] The gestational parents could choose to have an abortion (if available), keep the child as their own, or relinquish the child to the genetic parents. Gestational parents do not otherwise have this decisionmaking power under an intent-based approach or genetic presumption regime.[301] A gestational presumption is not designed to preclude genetic parents from ever raising their genetic children, but rather to give the gestational parent full reproductive autonomy.[302] If a gestational parent wants to avoid the trauma and expense of litigation, but would otherwise want to keep the child, a gestational presumption avoids pushing these parents towards unwanted abortions.[303] Two sets of couples typically desperately want the children that result from

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296. *Id.*

297. *See generally* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 213 ("It is your choice whether to have prenatal genetic testing. Your personal beliefs and values are important factors in the decision about prenatal testing.").

298. *See id.* (explaining the options parents have upon discovering a child has a genetic disorder, including preparing for the level of care the child will need).

299. *See id.*

300. *See* TIMES ISR., *supra* note 233.

301. *See supra* notes 192–201 and accompanying text (describing how both a genetic presumption and the intent-based approach permit for nonconsensual surrogacy).

302. *See supra* notes 293–299 and accompanying text.

303. *See* Salcedo, *supra* note 9 (example of couple who choose to terminate a pregnancy to avoid "the emotional toll of a potential custody battle" with the genetic parents).

embryo mix-ups,[304] and courts should not have outcomes that incentivize termination of a wanted pregnancy.[305]

The gestational presumption creates an environment where all patients undergoing fertility treatments do not feel a need to avoid genetic testing for fear of discovering an embryo mix-up and losing their child. For those who do suffer from an embryo mix-up, they will be able to make a fully informed decision regarding their pregnancy and parenthood plans.

CONCLUSION

Ms. Fasano never got visitation rights of the child she carried and birthed in 1998,[306] and the unnamed New York couple lost custody of the two boys they desperately wanted in 2019.[307] While embryo mix-ups constitute a significant minority of live births resulting from ART cycles, they represent the worst possible outcome resulting from lax regulation and human error.[308] Regulations and practices must be set in place to prevent these mistakes.[309] Yet, until such regulatory changes occur, the continued risk of embryo mix-ups looms for both parents seeking fertility treatments and judges deciding these issues.[310] The threat of litigation is currently the strongest force for better industry practices.[311]

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304. *See, e.g.*, Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003) (case in which both the gestational parent and the genetic parents sought custody of the child).

305. While this Note does not mean to suggest that abortion in and of itself is a bad outcome, but rather that it is an undesirable outcome for all involved when the parents actually want the child, the legal system has made it so that abortion—while still unwanted—is ultimately preferable to nonconsensual surrogacy. *See* Salcedo, *supra* note 9 (providing example of couple choosing abortion over nonconsensual surrogacy).

306. Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21, 27 (App. Div. 2000).

307. Stanley-Becker, *supra* note 2.

308. *See* Baruch et al., *supra* note 18, at 1055 (listing sample or embryo mix-up as one possible source of error in preimplantation genetic diagnosis and reporting that 11% of surveyed clinics believed these inconsistencies resulted from mix-up); *cf.* Ollove, *supra* note 77 (discussing other issues resulting from the lack of regulation).

309. *See* Rasouli et al., *supra* note 32, at 1104 ("[S]afeguards include changes in processes to decrease labeling errors, investing in malpractice for non-physician staff, and understanding the role of policy limits when offered a settlement."); Ollove, *supra* note 77 (discussing consequences of current lack of regulation).

310. *See generally* Ollove, *supra* note 77 (discussing the current lack of regulation).

311. *Compare* Reporting of Pregnancy Success Rates from Assistive Reproductive Technology (ART) Programs, 80 Fed. Reg. 51811, 51814 (Aug. 26, 2015) (noncompliance with CDC recommendations for fertility clinics merely results in being identified as a non-reporter), *with* Rasouli et al., *supra* note 32, at 1103–04 (discussing the general cost of litigation over embryo mix-ups for fertility clinics compared to the minimal costs associated with proper storage and maintenance).

ART has challenged the limits of traditional jurisprudence in family law, particularly in the legal understanding of who does, and who should, have parentage over any specific child.[312] Even as our courts have adapted to these new technologies and legal realities, judicial responses to embryo mix-ups—and the unique challenges they create—reveal just how much current family law jurisprudence needs to adapt to properly address the new realities of ART.[313]

While several approaches have attempted to address how to respond to embryo mix-ups over the past two decades, this Note outlines why the fairest presumption is in favor of the gestational parents. In light of the recent *Dobbs* decision, this framework is necessary to combat the risk of legally endorsed nonconsensual surrogacy.[314] It falls in line with established parentage precedents and incentivizes clinic accountability while maintaining gestational parents' medical and reproductive autonomy.[315]

Embryo mix-ups are likely to continue to proliferate given the continual rise of family formation through ART in the United States.[316] The law cannot fully rectify the harm embryo mix-ups cause. Regardless of the parental rights outcome, two sets of parents will have to endure the trauma of discovering their fertility clinic's mistake and the inevitable litigation that ensues.[317] Until the legislative-regulatory scheme creates safeguards to prevent these mix-ups, the gestational presumption promotes the best outcomes to prevent nonconsensual surrogacy and create greater clinic care.

*Betsy Anne Sugar**

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312. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (upholding surrogacy contract to determine parentage of a child and not applying adoption or other family law statutes).

313. *See* Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21 (App. Div. 2000) (ruling that genetic parents were legal parents and denying visitation rights to the gestational mother); Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003) (court ruled that child's parents were the genetic father and the gestational mother, dismissing the claim of the genetic mother); Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 511 (Ct. App. 2002) (dismissing claim of couple seeking blood tests and visitation with children of another fertility clinic couple when the clinic was investigated for misuse of genetic materials).

314. *See supra* notes 192–201 and accompanying text (describing how both a genetic presumption and the intent-based approach permit for nonconsensual surrogacy).

315. *Supra* Part IV.

316. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 3, at 20.

317. *See, e.g.*, Stanley-Becker, *supra* note 2; Salcedo, *supra* note 9; Smith, *supra* note 232.

* J.D. Candidate, 2024, Vanderbilt Law School; B.A. 2021 Davidson College. Special thanks to Professor Jenny Cheng for introducing me to the topic of embryo mix-ups in Family Law, assisting me in early research, and reading and editing my final drafts. I would also like to thank *Vanderbilt Law Review*'s editors, particularly Christian Dunn, Ari Goldfine, Stefan Pruessmann, Hala Bazzaz, and Isaak Elkind. Thank you to my Notes Editor, Sam Hunt, and Notes Development Editor, Kristen Sarna, as they provided me with great support and guidance through the entire research and writing process. Finally, I would like to thank my parents and Soren Emerson for all their support.