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ARE YOU MY PARENT? ARE YOU MY CHILD? THE ROLE OF GENETICS AND RACE IN DEFINING RELATIONSHIPS AFTER REPRODUCTIVE TECHNOLOGICAL MISTAKES¹

*Raizel Liebler**

INTRODUCTION

Imagine that you are a married woman who wants to have a genetically related child with your husband. Your doctor tells you that you are infertile, and therefore you and your husband go to XYZ fertility clinic to receive in vitro treatment. You have your eggs harvested, your husband supplies sperm, and ten embryos are created. Five embryos are implanted in your uterus and five are frozen and kept by the fertility clinic for your later use. You successfully conceive and give birth to twins.

You notice that the children you give birth to are of a different race than you and your husband. After further investigation, you discover that other patients are claiming that their embryos were taken without permission at XYZ.

What would you do if faced with this situation? Would you feel

¹The title is inspired by the children's book, P.D. EASTMAN, ARE YOU MY MOTHER? (1960). ARE YOU MY MOTHER? is about a bird who cannot find his mother. This baby bird was hatched while his mother was away. Because imprinting has not occurred, he goes on a journey, asking everyone he meets, including a dog, a cow, and inanimate objects, "Are you my mother?" In the end, the baby bird is reunited with his mother.

*J.D., DePaul University College of Law, 2001. I thank Dorothy Roberts for her comments, helping me to tie divergent ideas together. I thank Michelle Oberman and Ruta Stropus for their editorial comments. I thank Keidra Chaney for both her editorial acumen and her support. I thank Nanette Zorn for her kind words of encouragement. I dedicate this article to my mother, Roberta Albom Liebler.

that the children, either those that you have given birth to, or those that are genetically related to you are "your" children no matter what? What would you do if someone said that your children are genetically theirs? Would you make a custody sharing arrangement? Would you want your children to have a connection with their other parents? What does parenthood mean?

Traditionally, "parents" are viewed as two people, a man and a woman, whose sexual intercourse resulted in a child. According to traditional definitions and modern-day usage, "mothering" and "parenting" revolve around care and love, but do not specifically relate to genetics or biology. However, "fathering" implies a biological/genetic connection, without implying care and love.² The Supreme Court therefore has constructed two views of parents: those who are genetically related to a child, and those who have a relationship with the child, either a relationship constructed by tradition or a relationship constructed by the "parent."³ A relationship based on tradition is based on both statute and patriarchal views that the father of a child is the husband of the mother.⁴

New reproductive technologies have blurred the line between traditional definitions of genetic parents and parents as caretakers; but as with most new technologies the law has not adequately evolved to take into account these new definitions and their consequences. The lack of clearly defined parents leaves adults with ambiguous roles when the child produced to have has different genetic ties than intended. Racial differences between parents and children further confuses traditional perceptions of parenthood.

Issues similar to the hypothetical situations above have impacted people who have attempted to use new reproductive technologies to have children. This paper will discuss the issues confronting families whose attempts to use new reproductive technologies to have genetic

²One critic defines paternity as "the legal status of men who are deemed to have fathered certain children," fatherhood as "the actual biological or genetic relationship between a man and his 'offspring,'" and social fatherhood as "men's role in parenting, which may occur independently of a biological link . . ." Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 252 n.178 (1995) (citing MICHELLE STANWORTH, ED, REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 98 (1987)(citing Carol Smart, *There is of course the distinction dictated by nature': Law and the Problem of Paternity*)).

³*Lehr v. Robertson*, 463 U.S. 248 (1983).

⁴*Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

children have been thwarted by errors, leading to children being born to the “wrong” parents. I argue that parenting is more than a genetic connection to a child, yet should be a starting point for determining parenthood, considering the emotional consequences for those that consider themselves to be “parents.”⁵

In the Background Section, I will be discussing background information on reproductive technologies, the Supreme Court’s views on the rights of parents and who is considered to be a “parent,” and on the impact of race on new reproductive technologies and the definitions of parent. In the Impact on Families When a Mistake is Made Section, I discuss case studies about “wrong” genetic material, both gametes and embryos, being used to create children, and how this affects all of the people who wish to be considered parents. In the Analysis Section, I discuss policy implications, stating how issues of conflicting parents could be resolved. I conclude by stating how pervasive the problem of children being born to the wrong parents might be.

⁵Several law review articles have discussed the criminal and civil issues, including medical malpractice and negligence. See Anastasia Grammaticaki-Alexiou, *Conflict of Laws, Comparative Law and Civil Law: Artificial Reproduction Technologies and Conflict of Laws: An Initial Approach*, 60 LA. L. REV. 1113 (2000); Matthew Browne, *Note: Preconception Tort Law In An Era Of Assisted Reproduction: Applying A Nexus Test For Duty*, 69 FORDHAM L. REV. 2555 (2001); Judith F. Daar, *Regulating Reproductive Technologies: Panacea Or Paper Tiger?*, 34 HOUS. L. REV. 609 (1997); Kayhan Parsi, *Metaphorical Imagination: The Moral And Legal Status Of Fetuses And Embryos*, 2 DEPAUL J. HEALTH CARE L. 703 (1999); Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between The Science Of Artificial Reproductive Technology And The Laws Which Govern That Technology*, 48 DEPAUL L. REV. 825 (1999). See also Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J. L. AND MED. 455 (1999) (discusses the need to keep the reproductive choices of all equal). Other articles have dealt with the “custody” issues involved with embryos. See Peter E. Malo, *Deciding Custody Of Frozen Embryos: Many Eggs Are Frozen But Who Is Chosen?*, 3 DEPAUL J. HEALTH CARE L. 307 (2000); Helene S. Shapo, *Frozen Pre-Embryos And The Right To Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75 (2002); Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897 (2000); Jennifer M. Stoller, *Comment: Disputing Frozen Embryos: Using International Perspectives To Formulate Uniform U.S. Policy*, 9 TUL. J. INT'L & COMP. L. 459 (2001). Other articles have discussed the determination of motherhood within the context of new reproductive technologies. 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 (1999); Malina Coleman, *Gestation, Intent, And The Seed: Defining Motherhood In The Era Of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996). One article has discussed the interest parents have in having children that share the identifying traits that come from genetic ties, Fred Norton, *Note: Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, And Damages*, 74 N.Y.U. L. REV. 793 (1999).

BACKGROUND

In this section, I will discuss the patients of new reproductive technologies and the ways that the Supreme Court constructs parenting to understand the reason why genetic connections⁶ and race are so important to the determination of parents, both for themselves and for the courts.

Creating Children Through New Reproductive Technologies

In this section, I will first describe the process of using new reproductive technologies and then discuss the types of problems that have occurred due to the use of these technologies.

Use of New Reproductive Technologies

When couples receive help with creating children through new reproductive technologies,⁷ they often use these techniques to have children that are genetically related to both of them, hoping to create a child from the husband's sperm and the wife's egg.⁸ The most popular type of assisted reproductive technology, in-vitro fertilization (IVF), is the process by which eggs are removed from a woman's ovaries and fertilized outside of her body.⁹ Since IVF became available in 1983, an

⁶In this paper, I will be using the term "genetic" parents for those that have children created from their gametes. The reason is that a birth mother, even if her genetic material is not used for the creation of the child, does have a biological connection to the child. However, several of my sources combine the genetic/biological relationship, especially when referring to men.

⁷This paper discusses reproductive technologies that are included in the CDC definition of assisted reproductive technologies and those that are not included. The Centers for Disease Control and Prevention define "assisted reproductive technology" (ART) as "all treatments or procedures that both eggs and sperm are handled." CENTERS FOR DISEASE CONTROL AND PREVENTION, 1999 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3, 437 (2001) at <http://www.cdc.gov/nccdphp/drh/ART99/PDF's/1999ARTerat.pdf> (last visited Apr. 7, 2002). They do not include situations where only sperm are handled or where only fertility drugs are used. *Id.* at 3, 437. Therefore, I will be using the term "new reproductive technologies."

⁸For a discussion of the need to have a genetic connection with one's child, see ROBERTS, *supra* note 2.

⁹In 1999, 73.5 percent of ART procedures used IVF. CENTERS FOR DISEASE CONTROL AND PREVENTION, 1999 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 14, 437 (2001) at <http://www.cdc.gov/nccdphp/drh/ART99/PDF's/1999ARTerat.pdf>. (last visited Apr. 7, 2002).

estimated 170,000 babies have been born through IVF in the United States.¹⁰ In 1999 in the U.S. 86,822 women underwent IVF, resulting in 21,501 deliveries involving 30,285 infants.¹¹ According to one source, "High-tech procedures resolve the male anxiety over ascertaining paternity; by uniting the egg and the sperm outside of the uterus, they '[allow] men, for the first time in history, to be absolutely certain that they are the genetic fathers of their future children.'"¹² However, this purported certainty does not always exist, as shown in the case studies in the Section entitled, *The Impact on Families When a Mistake is Made*.

Sometimes couples cannot have their own genetic materials used to create a child. Therefore, they use sperm, egg, or embryo donation.¹³ These couples often go through an extensive process to select the

¹⁰Ronald Kotulak, *Study Sounds an Alarm on In-Vitro Fertilization*, CHI. TRIB., March 7, 2002, at A1.

¹¹*Id.*

¹²DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 246 (1997) (citing BARBARA STANWORTH, *REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD, AND MEDICINE* (1987) (citing Carol Smart, "There is of Course the Distinction Dictated by Nature": *Law and the Problem of Paternity* 98, 100)).

¹³In several cases, genetic medical conditions and other problems have arisen from the use of donated material. The cases include a sperm donor who passed a rare and potentially fatal genetic disorder, Opitz syndrome, to at least one and possibly as many as forty-three children. Reuters Health, *Sperm Donor's Gene Defect May Affect 43 UK Babies*, at http://dailynews.yahoo.com/h/nm/20010924/hl/sperm_2.html (visited September 24, 2001). In another case, a child born from a sperm donor received a gene from the donor causing her to get polycystic kidney disease. Her parents are suing the sperm bank, though at the time of the donation and her conception, no test existed to test for this gene. LORI B. ANDREWS, *THE CLONE AGE* 83-4 (1999). The donor made over 320 deposits to the sperm bank. Julie Marquis, *Court Limits Anonymity of Sperm Donors*, L.A. TIMES, May 20, 2000, at A1. If the donor carries the gene suspected in the child's condition, there is a 50% chance that any child created from his donor sperm will develop the disease. *Id.* This case also set a new precedent, that an anonymous sperm donor does not have an unlimited right to privacy and can be forced to testify in legal actions alleging that his genetic material resulted in genetic harm to a child. *Johnson v. The Superior Court of Los Angeles County, et al.*, 80 Cal. App. 4th 1050, 1073 (Cal. App. 2000).

In one recent case, a Dutch sperm donor diagnosed with an untreatable brain disorder, late-onset cerebellar ataxia, may have passed the gene for the disease to 18 children. This disease is not fatal, but impacts speech, balance and coordination. These children have a 50% chance of developing the disease; however, no test exists to determine which children will be affected. Emma Young, *Sperm donor revealed to have genetic brain disorder*, NEWS SCIENTIST.COM NEWS SERVICE, February 28, 2002 at <http://www.newscientist.com/news/news.jsp?id=ns99991987>. (last visited March 5, 2002).

donated material.¹⁴ These couples selecting the genetic material of donors are aware that the child-to-be will not be genetically related to one or both members of the couple.

People can "donate" genetic material to others, including gametes (sperm and eggs) and embryos.¹⁵ Usually when a donation is made, the

¹⁴Some fertility clinics have selection books on donors, matching hair, eye color with color.

However, the selection process of a donor by the intended parents can be usurped, as shown in one highly publicized case. Dr. Cecil Jacobson was a renowned fertility expert who was convicted in 1992 for impregnating approximately 70 unsuspecting female patients with his own sperm. *U.S. v. Jacobson*, 785 F. Supp. 563 (E.D. Va. 1992). See also *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 779 (4th Cir. 1995) (citing *United States v. Jacobson*, No. 92-5406, (4th Cir. Sept. 3, 1993), and cert. denied, *Jacobson v. U.S.*, 511 U.S. 1069 (1994)). Parents of children who had sought fertility treatment from Jacobson learned from DNA tests that he is the genetic father of their children. *Doctor Is Found Guilty in Fertility Case*, N.Y. TIMES, Mar. 5, 1992, at A14. At least fifteen children of Jacobson's fertility patients have been confirmed to be the genetic children of Jacobson. *Id.* However, according to prosecutors, Jacobson possibly used his sperm on many more patients, both those that did not carry a pregnancy to term and those that did, but for various reasons decided not to conduct genetic testing. *Id.* Therefore, Dr. Jacobson may have been the sperm donor for more than 70 children for unwitting patients treated at his fertility clinic. Robert F. Howe, *Citing Cruel Lies by Jacobson, Judge Gives Him 5 Years, Fine*, WASH. POST, May 9, 1992, at D1. Jacobson was sentenced to five years in prison without parole and ordered to pay \$116,000 in fines after being convicted of 52 counts of "fraud and perjury for telling patients they were pregnant when they were not and for using his own semen to impregnate women who went to him for what they were told was an anonymous sperm-donor program." *Id.*

Prosecutors had told patients that Jacobson might be the genetic father of their children due to their concern that his children, not knowing that they were related, might marry or have children together. David Parrish & Kim Christensen, *UCI Cases May Spawn Custody Wars*, ORANGE COUNTY REG., July 9, 1995, at A1, available in 1995 WL 5859219. The emotional consequences on the families "treated" by Jacobson were tremendous. One couple that went to Jacobson spent months in counseling to determine the proper way of informing their children. LORI B. ANDREWS, *THE CLONE AGE 77* (1999). They stated that there had been a "mix-up," but that the relationship between the children and their social-legal father was the same. *Id.* However, one of the children started saying "You're not my father." *Id.* Though Jacobson was sentenced for his actions, this does not detract from the difficulty for both the parents and children in dealing with Jacobson's genetic connection.

Also, his patients went to him with the hope of having not only genetic children, but children that they could convince others were the children of the legal social/father, often being told by Jacobson that the sperm donor selected had similar physical characteristics with their husbands. LORI B. ANDREWS, *THE CLONE AGE 79-80* (1999). Six couples sued Jacobson, claiming that they had been promised specialized sperm donors. One couple had been promised a Jewish sperm donor. Other couples had been promised tall, thin donors. Jacobson was none of these promised attributes. *Id.*

¹⁵A donor is "an individual [other than a surrogate] who produces egg or sperm used for assisted conception ... but does not include a woman who gives birth to a resulting child." Unif. Status Child. Asst. Concep. 1(2), 9B U.L.A. 199 (Supp. 2000). Also see, Amy Shelf, *Note*, *A*

owner/possessor¹⁶ of the genetic material makes an express agreement, including informed consent, with a medical provider or the person(s) receiving the material.¹⁷ These agreements state that the donor relinquishes all rights to children produced by their genetic material.¹⁸ One commentator suggests the term "genitor" to be used, instead of "genetic parent" because a social relationship is implied by the term "parent" that does not exist either when a genitor donates gametes.¹⁹

Difficulties to Families Due to the Use of Unintended Genetic Materials

In several instances, doctors or technicians have used the genetic materials of non-donors to create children for others, through either deliberate misuse of genetic materials²⁰ or through errors.²¹ In instances

Need to Know Basis: Record Keeping, Information Access, and the Uniform Status of the Children of Assisted Conception Act, 51 HASTINGS L.J. 1047, 1051 (2000).

¹⁶Hollace S.W. Swanson, *Donor Anonymity In Artificial Insemination: Is It Still Necessary?*, 27 COLUM. J.L. & SOC. PROBS. 151, 152 (1993).

¹⁷Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1, 25–26 (1997) (explaining that donors of eggs and sperm usually agree to donate their gametes with an understanding that they will not have future parental rights to the child).

¹⁸Some fertility clinics allow sperm donors to have contact with their genetic children. See Rainbow Flag Health Services <<http://www.gayspermbank.com/>> (visited on April 20, 2001). Also, some couples have become involved in embryo "adoptions." See Sheryl Gay Stolberg, *Some See New Route to Adoption In Clinics Full of Frozen Embryos*, N.Y. TIMES, February 25, 2001, at A1.

¹⁹Elizabeth Siberry Chestney, *Note: The Right to Know One's Genetic Origin: Can, Should, or Must a State That Extends This Right to Adoptees Extend an Analogous Right to Children Conceived With Donor Gametes?*, 80 TEX. L. REV. 365, 366 n9 (2001).

²⁰A scandal hit University of California – Irvine in 1995, focused around at fertility clinics run principally by UCI doctors Ricardo H. Asch and Jose P. Balmaceda from 1986 to 1995 in Orange and San Diego counties. An excellent chronology of this case, compiled by the Orange County Register is found at Fertility Clinic Scandal Chronology, 1990-Present, <http://www.ocregister.com/clinic/eggchron.htm> <last updated March 25, 1996>

Byron Beam, a University attorney, "acknowledges that 46 eggs and two embryos were transferred without the donors' consent, as well as a dozen births to couples using eggs pirated from their genetic parents." Peter M. Warren, *UCI Is Nearly Finished Settling Fertility Cases*, L.A. TIMES, June 13, 1999, at B1. Melanie Blum, an attorney for several of the fertility clinic's patients, stated "The real numbers are higher. The live births from pirated eggs alone are close to 50 . . . many of those who had eggs stolen never looked into the records." *Id.* Of the estimated 10,000 couples were treated at the clinics, all parties "agree that it may never be known exactly what happened in dozens of cases because clinic records were lost, stolen, are missing or remain in the hands of a federal grand jury that indicted the doctors." *Id.* After the 113 original lawsuits were settled, including "dozens [of couples] who had their eggs stolen" additional lawsuits were filed, claiming that the embryos of as many as 500 couples may have

been sold, without the consent of the genitors. Hector Becerra, *Fertility Clinic Sold Embryo, Woman Claims*, L.A. TIMES, May 13, 2000, at B1.

According to Melanie Blum, at least 15 births had resulted from the misappropriation of eggs, and that "The damage is unbelievable. . . . These children were robbed of their heritage. The parents were robbed of their children." Nick Anderson & Esther Schrader, *50 Couples to Get \$10 Million to End UCI Fertility Clinic Suits*, L.A. TIMES, July 19, 1997, at A1. Three women who might have genetic children that they are not raising talked about their feelings. One woman stated that "'To find out you have a seven-year-old child out there is devastating. . . My life has changed forever. I need to know where my child is.'" Christopher Goodwin, *Women in Fear after 'Stolen Eggs' Scandal*, SUNDAY TIMES, Jan. 14, 1996. Another stated that "'If there is a child that is mine out there I want to see it, even though I know that child won't be in my life. My husband is as devastated as I am, although he's trying to be strong for me. We just feel robbed of the possibility of having our own family.'" *Id.* A third woman, who has not had any children, stated that "'If I do have a child out there, I would be concerned that it has been brought up in a nice environment and that he or she is happy.'" Hector Becerra, *Fertility Clinic Sold Embryo, Woman Claims*, L.A. TIMES, May 13, 2000, at B1. She continued, "'If there were a child. . . I think I would tell the woman, 'I'm sorry this happened to us. I wouldn't do anything to jeopardize what you have with this child. It wasn't your fault, and it wasn't the child's fault.'" *Id.*

One instance of possible incorrect embryo use not only raises issues of parenthood, but also the religious and cultural connections children have with their parents. John and Debbie Challenger believe that embryos from her eggs and his sperm, may have been given to other couple without their permission, resulting in the birth of twins. Sandy Banisky, *Seed of Doubt*, SUN (Baltimore), August 13, 1995, at 1A; Julie Marquis, *Fertility Scandal Victims to Gather*, L.A. TIMES, November 2, 1995, at B5. The issue of religion is an issue here because the Challengers, described as "a devout Christian couple who believe that non-Christians do not go to heaven" are concerned because the birth/legal parents are Jewish. Christopher Goodwin, *Women in Fear After 'Stolen Eggs' Scandal*, SUNDAY TIMES, January 14, 1996. John has said "he would not try to interfere with their religious education", but he is "concerned about . . . their spiritual welfare in the absence of Jesus Christ." Julie Marquis, *Fertility Scandal Victims to Gather*, L.A. TIMES, November 2, 1995, at B5. This would be a great burden on people who consider themselves to be parents of those who, according to their beliefs, will suffer eternal damnation, but can do nothing to prevent this from occurring.

From the UCI scandal, I only found one case with named plaintiffs with an almost definite genetic tie to "someone else's" child. The largest settlement amount during one round of settlements (discussed below) went to Loretta and Basilio Jorge. Marcida Dodson, *21 More Claims Against UCI's Fertility Clinic Settled For \$4.4 Million*, L.A. TIMES, October 1, 1997, at B4. Loretta Jorge's eggs were implanted in another patient, who gave birth to twins, a girl and a boy, who were 8 years old in 1997. *Id.* (This article does not state who is the genetic father of the children and the article implies that through genetic testing Loretta has been confirmed as the genetic mother of the twins.) The Jorges live in the same city as the twins and frequently encounter the other family. *Id.* Seeing the children has caused the Jorges much anguish because "You have biological children out there that you wanted yourself. . . . The whole reason they went to the clinic was to have biological children." *Id.* The connection between genetics and parenthood was mentioned by an attorney for the Jorges: "'They love these kids even though they don't know them. . . (Loretta) always wanted children, and she knows these children are her biological children. How could she not love them?'" Richard Price, *Fertility Scandal Threatens Suit*, USA TODAY, February 22, 1996, at A1.

During the negotiations to settle lawsuits by patients, the cases were divided into several

where unintended genetic materials were used without permission, none of the people involved have signed away their rights to their genetic material or waived their parental rights, as in adoption.²² Often, the unintended use of another's genetic material leads to intense emotional reactions and lawsuits.²³ The discovery of the accidental use

categories, ranked depending on the harm to the clinic's patients. There were either eleven categories, according to Peter M. Warren, *UCI Is Nearly Finished Settling Fertility Cases*, L.A. TIMES, June 13, 1999, at B1, or ten categories, according to Marcida Dodson & Randal C. Archibold & Scott Martelle, *Judge Unseals 41 Settlements in Fertility Scandal*, L.A. TIMES, August 16, 1997, at A18. However, both articles agree on the types of categories used during settlement negotiations. The most severe classification was for couples who did not have children, but whose embryos resulted in someone else having "their" child. Peter M. Warren, *UCI Is Nearly Finished Settling Fertility Cases*, L.A. TIMES, June 13, 1999, at B1; Marcida Dodson & Randal C. Archibold & Scott Martelle, *Judge Unseals 41 Settlements in Fertility Scandal*, L.A. TIMES, August 16, 1997, at A18. The second highest classification went to women whose eggs resulted in another woman or other women and her having children. Marcida Dodson & Randal C. Archibold & Scott Martelle, *Judge Unseals 41 Settlements in Fertility Scandal*, L.A. TIMES, August 16, 1997, at A18. Moving down in severity, there are categories for couples whose embryos were stolen, but there was no evidence of a child from the embryos, and women whose eggs were given to a recipient who received eggs from several women, and gave birth to children with unclear genetic connections. Peter M. Warren, *UCI Is Nearly Finished Settling Fertility Cases*, L.A. TIMES, June 13, 1999, at B1; Marcida Dodson & Randal C. Archibold & Scott Martelle, *Judge Unseals 41 Settlements in Fertility Scandal*, L.A. TIMES, August 16, 1997, at A18. The lowest categories included claims for lost eggs or embryos, and to women whose eggs were given to a recipient who did not become pregnant or miscarried. Peter M. Warren, *UCI Is Nearly Finished Settling Fertility Cases*, L.A. TIMES, June 13, 1999, at B1; Marcida Dodson & Randal C. Archibold & Scott Martelle, *Judge Unseals 41 Settlements in Fertility Scandal*, L.A. TIMES, August 16, 1997, at A18. Therefore, a child being born rather than no child born was a factor, and the genetic parents not having the "lost" child was considered to be important; but the most important factor was the genetic parents not receiving the "misplaced" child or another child from the clinic. The patients were seeking parenthood and losing the possibility of being a parent to a genetic child was valued by this system. However, many people, both those who have used new reproductive technologies and those who have not, have never had genetic children and not been paid for this status from anyone.

²¹See section III below. The misuse of reproductive materials has entered the popular culture. In the series, Ally McBeal, Ms. McBeal discovers that she has a ten-year-old daughter, created from McBeal's harvested eggs. McBeal donated her eggs as part of an infertility study, but by "mistake", the eggs were instead given to a man who died six months ago. McBeal decides to raise the child, after making arrangements with the child's aunt. *Ally McBeal: A Kick in the Head* (FOX television broadcast, February 4, 2002) McBeal confirms that she is the genetic parent of the child via a DNA test. *Ally McBeal: Homecoming* (FOX television broadcast, February 25, 2002).

²²See footnotes 14 and 20 and section III below.

²³See *Harnicher v. University of Utah Medical Center*, 962 P.2d 67, 68 (Utah 1998); *Deborah Perry-Rogers v. Richard Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 1st Dep't 2000); *Perry-Rogers v. Obasaju*, 282 A.D.2d 231 (N.Y. App. Div. 2001). See also Barbara Kantrowitz

of unintended genetic material seems to occur when the child's race appears to be different than the parents or due to the child's blood type not matching the parents.²⁴

In one case, a family sued a fertility clinic for using the wrong sperm donor while using a procedure which was intended to allow the couple to "believe and represent that any child born would be" the children of the husband, leading to the successful birth of healthy triplets, though one child had the "wrong" color hair, and the blood type of two of the children showed that they could not have been genetically related to the intended sperm donor or the intended legal father.²⁵ This case shows how important a genetic connection or at least

& David Kaplan, *Not the Right Father*, NEWSWEEK, March 19, 1990, at 50; Michael Lasalandra, *Woman, ex and hospital settle over sperm mixup*, BOSTON HERALD, August 27, 1998, at 12; Dorinda Elliot & Friso Endt, *Twins - with Two Fathers: A Fertility Clinic's Startling Error*, NEWSWEEK, July 3, 1995, at 38.

Other cases have not resulted in the birth of a child, but still have legal and emotional consequences. See *Woman wins wrong sperm suit*, TORONTO STAR, November 24, 1994, at E3 (Australian woman has abortion after being inseminated with the wrong sperm, wins \$136,000 in negligence suit); *IVF mix-up patient endured 10 days of hell*, DAILY YOMIURI (Tokyo), May 14, 2000, at 2. This Japanese case did not lead to a pregnancy and the patient did not file a suit because the case would not remain confidential. She decided to stop fertility treatment and stated, "This kind of mistake must have happened on other occasions. The secrecy at medical institutions and patient weakness in standing up to the medical authorities prevent such accidents from coming to the surface." *Id.*

In Canada, the London Health Science Centre was sued after implanting a couple's embryos into the wrong woman and settled for an undisclosed amount in May 1999. See Mary-Jane Egan, *Stinginess Invites Mixups, Infertility Expert Contends*, LONDON FREE PRESS (Canada), September 19, 1999, at A3; Mary-Jane Egan, *Lawsuit Against Hospital Settled Out-of-court Deal Reached after Embryos Implanted in Wrong Woman*, LONDON FREE PRESS (Canada), June 14, 1999, at A3.

²⁴"In the United States, a Caucasian couple has given birth to a baby clearly half Asian. And in New York, a couple found out accidentally through a blood mismatch that the baby could not biologically be both of theirs." *Primetime Live: 'The Color of Love'* (ABC television broadcast, February 21, 1996). See also, Edward A. Adams, *Court Rejects Child's Claim in Alleged Sperm Bank Mix-Up*, N.Y. L.J., Sept. 10, 1990, at 2 (child born to couple, but not from husband's sperm as intended. The error was discovered several days after birth due to the child's blood type not matching intended parents).

²⁵*Harnicher v. University of Utah Medical Center*, 962 P.2d 67, 68 (Utah 1998). The couple sued the clinic for negligent infliction of emotional distress. The intended sperm donor matched the plaintiff father's blood type, hair color, stature and eye color, but the sperm donor used did not. Appellant's Brief at 6, *Harnicher v. University of Utah Med. Ctr.*, 962 P.2d 67 (Utah 1998) (No. 960204). The donor used was "fair complected with red hair, while Mr. Harnicher is dark complected with dark hair." *Id.* at 8. The court dismissed the complaint, holding that due to the lack of physical injury, the complaint could not withstand summary judgment. *Harnicher*, 962 P.2d at 70. The court seemed to be astounded that the people who

the appearance of a genetic connection is to some parents. This seems to be especially important to those who choose new reproductive technologies as a way of having children, instead using other means to have children, such as adoption, considering the lengths that they go through to have a child with a genetic connection.

The implantation of the wrong embryo is not as rare as most people think. According to Bert Steward, an embryologist and former inspector for Human Fertilisation [sic] and Embryology Authority (HFEA), the regulatory body of the 118 IVF clinics in the United Kingdom estimated that one in a thousand IVF embryos have been implanted in the wrong woman, leading to at least 25 to 30 children created through IVF in the UK not being raised by their genetic mother.²⁶

became the "parents of three normal, healthy children whom the couple suggest do not look as much like [the intended legal father] as different children might have and whose blood type could not be descended from his" could be claiming an injury. *Id.* at 72. They continue stating that "This result thwarted the couple's intention to believe and represent that the triplets are [his] biological children Exposure to the truth about one's own situation cannot be considered an injury and has never been a tort." *Id.*

²⁶Lois Rogers, *Women Given Wrong Embryos at IVF Clinics*, SUNDAY TIMES (London), November 12, 2000 at 2000 WL 27497193. In the United Kingdom, HFEA, the regulatory body of the 118 IVF clinics in Britain, conducted an audit based on a sample of 1,400 IVF treatments and 700 sperm donor inseminations. Though the audit reported various problems, the HFEA stated that the problems were a small percentage of the total number of IVF treatments. *Id.* HFEA is an appointed committee of 21 learned and lay people. This regulatory system was selected over regulation by politicians or self-regulation by fertility doctors. See Anjana Ahuja, "It's OK not to have Children," TIMES (London), Nov. 6, 2000 (interview with Ruth Deech, head of HFEA), at 2000 WL 28126653.

At least two confirmed case of incorrect embryo implantation exist in Great Britain. In 1993, Deborah Gray was told that she had been implanted with an embryo that contained the genetic material of another woman. She had an abortion, and sued the Royal Victoria Hospital in Belfast for personal injury and damage, and settled out of court. Lois Rogers, *Women given wrong embryos at IVF clinics*, SUNDAY TIMES (London), November 12, 2000. This woman described her experience as "the most appalling and upsetting experience." Adam Lusher, "It was a Terrible Thing that the Doctors did to us, a Terrible Thing", SUNDAY TELEGRAPH (London), Sept. 24, 2000, at 4. Also in 1993, at St Bartholemew's Hospital, Mandy Owen was informed minutes after being implanted that she had received the wrong embryo and had an "immediate womb scrape." She also received GBP 2,000 from the HFEA. *When the Treatment Works, Troubles May Have Just Begun*, SCOTSMAN, Nov. 17, 2000, at 5. An unnamed HFEA inspector estimated that at least 100 women have had problems with IVF problems, including implantation of incorrect embryos. Lois Rogers, *Women given wrong embryos at IVF clinics*, SUNDAY TIMES (London), Nov. 12, 2000.

In the UK, two fertility clinics recently lost several embryos, from as many as 39 patients, though HFEA stated that no babies had been born to the "wrong" mothers. Cherry Norton, *Parents Are Reassured Over Embryo Mix-up*, INDEPENDENT (London), September 26, 2000, at

Case studies of the consequences of unintended genetic materials in instances where the intended parents were attempting to use only their own genetic materials will be discussed in the Section, Impact on Families When a Mistake is Made.

Supreme Court's View of Parents

Rights of Parents According to the Supreme Court

In a series of cases the Supreme Court has decided that a parent's interests in the companionship, care, custody, nurture, and upbringing of children are constitutionally protected.²⁷

In three cases, the Supreme Court stated its viewpoint on the role of parents in the lives of their children. The first case in this series, *Meyer*,²⁸ held that "liberty" protected by the Due Process Clause includes the right of parents to bring up children" and "to control the education of their own."²⁹ Two years later, the Court held that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."³⁰ In *Price*,³¹ the court states "the custody, care and nurture of the child reside first in the parents . . . it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter."³²

In subsequent cases, the court continued to recognize that parents had the fundamental right to make decisions involving the care, custody, and control of their children.³³ In *Parham*,³⁴ the Supreme

2. According to news reports, "dozens of women" called the government helpline "some fearing their babies are not their biological children, others fearing their embryos have been implanted in other women." *Id.* Parents were offered "DNA tests to prove their babies are their own." *Id.*

²⁷See, *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753, (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

²⁸*Meyer v. Nebraska*, 262 U.S. 390 (1923).

²⁹*Meyer*, 262 U.S. at 399, 401.

³⁰*Pierce*, 268 U.S. at 535.

³¹*Prince v. Massachusetts*, 321 U.S. 158 (1944).

³²*Prince*, 321 U.S. at 166.

³³*Stanley*, 405 U.S. at 651 ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum

Court expounded on its views on parental rights.³⁵ The Court focuses on keeping the government out of the lives of families, rather than defining the responsibilities of parents.³⁶ The Court states that the “law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”³⁷ In *Flores*,³⁸ the court states that as long as parents are meeting “minimum requirements of child care,” the government will not question parents’ decisions about their children.³⁹

Though all the cases above dealt with parents confronting either the government or a possible other parent, in *Troxel*,⁴⁰ the Supreme Court addressed the issue of third party visitation of children, specifically that of grandparents.⁴¹ The Court focuses on the right of parents to make decisions for their children.⁴² The Court states that requiring visitation by a non-parent is an “unconstitutional infringement on [the parent’s] fundamental right to make decisions concerning the care, custody, and control of her two daughters,” especially considering that there was no finding that she was an unfit parent.⁴³ Also, the court states that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make

for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements”); *Yoder*, 406 U.S. at 232 (“The . . . primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”); *Quilloin*, 434 U.S. at 255 (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”); *Santosky*, 455 U.S. at 753 (discussing “the fundamental liberty interest of natural parents in the care, custody, and management of their child” and noting the Court’s “historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”); *Glucksberg*, 521 U.S. at 720 (“the ‘liberty’ specially protected by the Due Process Clause includes the right . . . to direct . . . [the] upbringing of one’s children”).

³⁴*Parham v. J. R.*, 442 U.S. 584 (1979).

³⁵*Parham*, 442 U.S. at 584.

³⁶*Id.* at 584-605.

³⁷*Id.* at 602.

³⁸*Reno v. Flores*, 507 U.S. 292 (1993).

³⁹*Id.* at 304.

⁴⁰*Troxel v. Granville*, 530 U.S. 57 (2000).

⁴¹*Id.*

⁴²*Id.* at 60-76.

⁴³*Id.* at 72.

childrearing decisions simply because a judge believes a “better” decision could be made.”⁴⁴

In all of these cases, the Supreme Court did not define who was considered to be a parent, instead assuming that the genetic parents were the parents. However, another series of cases by the court discusses who has the rights and responsibilities of parenthood.

Who Is or Is Not a Parent According to the Supreme Court

The Supreme Court, in two separate cases, has diverged from its traditional stance of biological or genetic parents being “parents” with the corresponding rights and responsibilities, unless they have, in a court action, have been found “unfit” or given up rights to their children.

In *Lehr*,⁴⁵ the Supreme Court held that a genetic father who had never established an actual relationship with his child, including never financially supporting her, did not have a constitutional right to notice of his daughter’s adoption by her stepfather.⁴⁶ The court states “the mere existence of a biological link does not merit [] constitutional protection [as a parent]. The actions of judges neither create nor sever genetic bonds”⁴⁷ and that the

“significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, [courts cannot] compel a State to listen to his opinion of where the child’s best interests lie.”⁴⁸

Therefore a genetic connection is not enough to be a parent; a relationship is required.

However, a genetic connection and a relationship with the child is not always enough to be considered a parent by the Supreme Court. In

⁴⁴ *Troxel*, 530 U.S. at 72-73.

⁴⁵ *Lehr v. Robertson*, 463 U.S. 248 (1983).

⁴⁶ *Id.* at 268.

⁴⁷ *Id.* at 262.

⁴⁸ *Id.*

Michael H.,⁴⁹ the Supreme Court, in a plurality opinion, decided that even though a man was both the genetic father⁵⁰ and had a relationship with his daughter,⁵¹ his due process liberty interest in continuing a connection with the child could not overcome a state statutory presumption that the husband of the child's mother was the "father."⁵² Therefore, the genetic father, not being a "parent," could be denied visitation or any relationship with his daughter.⁵³ The Court states that "California law, like nature itself, makes no provision for dual fatherhood"⁵⁴ and that a "claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."⁵⁵

The opinion, written by Justice Scalia, rests the result on traditional views of legitimacy -- that the children born to a wife are the children of the husband, and the "sanctity . . . accorded to the relationships that develop within the unitary family."⁵⁶ Considering that the "unitary family" consists of a husband, wife, and children, there is no place for any other parents.⁵⁷ This view of parenting and family displaces those who are genetic parents, but not deemed a socially acceptable type of parent. The idea of the "unitary family," free from interference from outsiders, continued in *Troxel*.⁵⁸ However, in instances where incorrect genetic material has been used, there is not a "unitary family" due to the difficulty in determining both the parents and family of the child.

Towards a More Holistic View of Parenting

Other members of the Supreme Court have viewed parenting differently than the majority. Justices Stewart and Stevens agree that neither of the definitions previously expounded by the Court are

⁴⁹*Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁵⁰*Id.* at 114.

⁵¹*Id.* at 121.

⁵²*Id.* at 127, 132.

⁵³*Id.* at 127, 132.

⁵⁴*Michael H.*, 491 U.S. at 119.

⁵⁵*Id.* at 131.

⁵⁶*Id.* at 124-26.

⁵⁷The "unitary family" also does not allow a child to maintain relationships outside of the family. The court states that a child does not have a due process right or liberty interest to maintain a relationship with her genetic father. *Id.* at 130-31. This is despite this child living part of her first three years with her genetic father. *Id.* at 113-15.

⁵⁸*Troxel v. Granville*, 530 U.S. 57 (2000).

sufficient in defining the complexity of parent/child relationships. In his dissent in *Caban*, Justice Stewart had stated that “parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”⁵⁹ Though the majority opinion places the *Troxel* opinion within the traditional views of parenting of the Supreme Court, Justice Stevens views parenting within a larger context.⁶⁰

In his vehement dissent in *Troxel*, Justice Stevens places parental rights within a relationship context. He states that a “parent’s rights with respect to her child have [] never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.”⁶¹ He asserts that the interest of parents have come to be balanced against the state’s interest and “the child’s own complementary interest in preserving relationships that serve her welfare and protection.”⁶²

Justice Stevens suggests that “it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”⁶³ He continues, “At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.”⁶⁴ He is also concerned with parents who are allowed to do whatever they want to their children: “The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.”⁶⁵

⁵⁹*Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (dissent) He continues by stating that “The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures.” *Id.*

⁶⁰*Troxel*, 530 U.S. at 80-91.

⁶¹*Id.* at 88.

⁶²*Id.*

⁶³*Troxel*, 530 U.S. at 88.

⁶⁴*Id.* at 88-89.

⁶⁵*Id.* at 89.

Stevens states that the “almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent’s liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.”⁶⁶

Stevens considers the relationship between parents and children determinative for deciding parental rights, rather than assuming that genetics/biology and the nuclear family are of the utmost importance. The difficulty in constructing a parent-child relationship when mistakes are made through the use of incorrect reproductive materials will be discussed in the next section.

Race and Reproduction

All of the instances discussed in the next section of this paper involve issues of race, where white or possibly white children are born to Blacks or Black children are born to whites. The fact that the reported cases of egg/sperm/embryo switching often involve racialized elements is especially noteworthy in light of the few Blacks that seek medical services for infertility. In the United States, the risk of infertility for Blacks is 1.5 times higher than that of whites.⁶⁷ However, white women seeking treatment for fertility problems are twice as likely to use high-tech treatments as Black women in the United States.⁶⁸ Only 12.8% of black women, compared with 27.2% of white women, in a United States national survey, used specialized infertility services such as fertility drugs, artificial insemination, tubal surgery, or IVF.⁶⁹ Also, potential black parents have great difficulty in finding sperm and egg donors that match their racial/ethnic group.⁷⁰ For example, according to

⁶⁶ *Troxel*, 530 U.S. at 90.

⁶⁷ U.S. Cong., OFFICE OF TECHNOLOGY ASSESSMENT, *INFERTILITY: MEDICAL: SOCIAL CHOICES* ch. 3 p. 51 (U.S. Gov’t Printing Office, May 1988), at <http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk2/1988/8822/882205.PDF> (last visited Apr. 7, 2002).

⁶⁸ See Lynne S. Wilcox & William D. Mosher, *Use of Infertility Services in the United States*, 82 *OBSTETRICS & GYNECOLOGY* 122, 124 (1993) (cited in Dorothy E. Roberts, *The Nature Of Blacks' Skepticism About Genetic Testing*, 27 *SETON HALL L. REV.* 971, 972 n.7 (1997)).

⁶⁹ See Dorothy E. Roberts, *The Nature Of Blacks' Skepticism About Genetic Testing*, 27 *SETON HALL L. REV.* 971, 972 n.7 (1997) (citing Lynne S. Wilcox & William D. Mosher, *Use of Infertility Services in the United States*, 82 *OBSTETRICS & GYNECOLOGY* 122, 124 (1993)).

⁷⁰ Paul Shepard, *The harsh facts of life for black people seeking egg, sperm donors*,

one expert, though 97 percent of white, Asian and Hispanic prospective egg donors complete the donation, only about 25 percent of potential Black women donate.⁷¹

In several instances where incorrect genetic material was used, the discovery of an error in the use of incorrect genetic materials would not have occurred, but for the child appearing to have a different race than the parents. However, in the two frequently discussed instances where genetic material was deliberately misused, there was no stated racial dimension.⁷²

The influence of a racially-based genetic tie,⁷³ or lack thereof, seems to be of underlying importance in the determination of parents, by society, the law, and the parents themselves in the instances discussed in the next section. According to Roberts, the fact that all of the widely discussed cases of new reproductive mistakes involve race are not accidental, that the “stories exhibiting blond-haired blue-eyed babies born to white parents portray the positive potential of the new reproduction. The stories involving the mixed race children reveal its

ASSOCIATED PRESS WIRES, July 3, 1999 (published as Paul Shepard, *Infertility woes*, CHI. SUN TIMES, July 11, 1999, at 29).

⁷¹Paul Shepard, *The Harsh Facts of Life for Black People Seeking Egg, Sperm Donors*, ASSOCIATED PRESS WIRES, July 3, 1999 (published as Paul Shepard, *Infertility Woes*, CHI. SUN TIMES, July 11, 1999, at 29).

⁷²The two large scandals about deliberate misuse of genetic materials are the Jacobson scandal, where a doctor used his own sperm to inseminate his patients and the UCI scandal where eggs and embryos were deliberately given to others without the consent of the genetic parents. See footnotes 14 (about Jacobson case) and 20 (about UCI case).

⁷³Racial issues confuse the application of genetically-based legal principles that determine parenthood. Dorothy Roberts argues that the “law discards the traditional presumptions of paternity and maternity in order to deny a white man's connection to a Black child and a Black woman's connection to a white child.” Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 258 (1995). She states that the presumption of paternity has not applied to the racially mixed children born to a white woman, who have not been judged to be the children of their mother's white husband. *Id.* at 260. She also argues that due to the phenomenon of gestational surrogacy (a woman carries and gives birth to a child with no genetic connection to her.), where a black woman can give birth to a white child, the traditional irrefutable presumption that the woman who gives birth to the child is the mother is changing. *Id.* at 261. Instead, it “becomes imperative to legitimate the genetic tie between the (white) father and the child, rather than the biological, nongenetic tie between the (Black) birth mother and the child.” *Id.* Roberts discusses the Johnson v. Calvert case, 5 Cal 4th 84, 19 Cal Rptr 2d 494 (1993), as an example of where the Black woman who gave birth to a child was not deemed to be the mother, instead viewing the genetic mother as the appropriate parent. *Id.* at 262-63.

potential horror.”⁷⁴ However, I do not mean to imply that the children discussed in the next section are scientifically created monstrosities, rather that the public and their parents treats these children differently because of their racial status.

THE IMPACT ON FAMILIES WHEN A MISTAKE IS MADE

These case studies are included to show the impact on families when the child they expect is not the child they receive. Though these families are expecting a child that will have a genetic connection to them, this desire is not realized, due to the failure of technicians and doctors to use the technologies to create the desired result. In the cases discussed below, couples used new reproductive technologies to have children genetically related to both of them. This genetic connection was important to all of these couples, yet led to reactions that vastly differed, including parents showing disgust at the wrong racial status of their child, parents wanting nothing to do with a child without a genetic connection, parents keeping and loving the child regardless, parents wanting to take away “their” child from someone else, and parents attempting to keep a child away from his genetic parents.

All of the instances discussed in this section involve issues of race, where white or possibly white children are born to blacks or black children are born to whites.⁷⁵ Errors with reproductive technology came to light in the instances I discovered where the race of a child was different than the birth parents. Dorothy Roberts argues that this racial aspect is not accidental – “when we do read news accounts involving black children created by these technologies, they are usually sensational stories intended to evoke revulsion precisely because of the children’s race.”⁷⁶

I discuss two types of case studies where children were created through unintended genetic materials. The first section discusses case studies where the child was created from an unintended gamete, egg or

⁷⁴DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 252 (1997).

⁷⁵I have chosen to use the term “Black” instead of “African-American” because using “African-American” would exclude at least one Black parent discussed in this section.

⁷⁶DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 251 (1997).

sperm, though all the cases in this section involve children created from unintended sperm.⁷⁷ The second section discusses an instance where incorrect embryos were used, led to a child being born into a family without any genetic connection to his birth parents.

When the Intended Mother is Inseminated With the Wrong Sperm

In cases involving an unintended gamete, the couple's child is genetically related to one of them, but not both.⁷⁸ Though the child is related and not a "genetic stranger" to the family it is born to, the effects on the family are often significant because the couple wanted a child related to both of them, not just one of them. The three following examples illustrate the impact of the wrong sperm being used.

Julia Skolnick

In this case, the discovery of the "wrongness" of the genetic material used happened due to the apparent race of the child differing from the race of her expected parents.

The Skolnicks, Julia and Fred, both white, went to a sperm bank, Idant Laboratories, for him to make a sperm deposit before his treatment for cancer.⁷⁹ Julia is described as having "honey-colored eyes and long blonde hair," and her husband, Fred, is described as "tall, dark-haired [and] 'movie-star handsome.'"⁸⁰ Julia subsequently went to the sperm bank and was inseminated with sperm and gave birth to a baby girl in 1987.⁸¹ The child was described in one news report as a being born a "dark-skinned baby girl"⁸² and as a three year old, as having "brown skin, dark eyes and a cloud of dark tight curls."⁸³ She

⁷⁷This is not to imply that all unintended cases with gametes only involve sperm, however all of the well-reported instances with mistaken use of only one parental gamete involve sperm.

⁷⁸Because children are created through the joining of an egg and a sperm, for a child to be genetically related to both intended parents a gamete must be used from each intended parent.

⁷⁹Ronald Sullivan, *Sperm Mix-up Lawsuit is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4.

⁸⁰Robin Schatz, *New Questions in Sperm Case; Dreams Turn to Nightmares*, NEWSDAY (New York), Apr. 22, 1990, at A4.

⁸¹Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES, Mar. 9, 1990, at B1.

⁸²Schatz, *supra* note 80.

⁸³*Id.*

was also described as “dark-skinned with biracial features”⁸⁴ and as having “dark skin.”⁸⁵

Julia stated “it became apparent that she was not my husband’s child.”⁸⁶ However, according to another news report, knowing that Fred was not the genetic father of his daughter was not immediate for the Skolnicks, that “although many people questioned why she didn’t look like either of them, the Skolnicks continued to believe the child was his.”⁸⁷ A DNA test confirmed that Fred was not the child’s father.⁸⁸ Julia describes her insemination as “bec[oming] a tragedy and her life a nightmare.”⁸⁹

Julia describes her daughter as black, but states that “color has nothing to do with her anguish”⁹⁰ and that she “loves her 3-year-old daughter very much.”⁹¹ Her lawyer states that the girl is subjected to “racial teasing and embarrassment”⁹² and that Julia filed suit when the “racial taunting of her child became unbearable for her.”⁹³ According to Julia, her daughter was teased by other children for not resembling her mother, who she is genetically related to.⁹⁴ Also, her lawyer states that she “is determined that what happened to her and her daughter doesn’t happen to any other couple.”⁹⁵

The suit charged the clinic and the sperm bank with negligence and medical malpractice, and “By contending that her daughter is a victim of prejudice, Ms. Skolnick is building a case for monetary damages.”⁹⁶ The question of how to determine damages was raised: “a jury could be faced with the difficult task of deciding the damages involved in raising an interracial child.”⁹⁷

⁸⁴Schatz, *supra* note 80.

⁸⁵Sullivan, *supra* note 79.

⁸⁶Sullivan, *supra* note 81.

⁸⁷Schatz, *supra* note 80.

⁸⁸Sullivan, *supra* note 81. Fred was not involved in the lawsuit because he had died in April 1989. *Id.*

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³Sullivan, *supra* note 81.

⁹⁴Sullivan, *supra* note 79.

⁹⁵Sullivan, *supra* note 81.

⁹⁶*Id.*

⁹⁷Barbara Kantrowitz & David Kaplan, *Not the Right Father*, NEWSWEEK, Mar. 19, 1990, at 50. Julia received a \$400,000 out-of-court settlement, with approximately \$5,000 for

Dorothy Roberts states that though the first harm to Skolnick was using the wrong sperm, the “second harm to the mother was the fertility clinic’s failure to deliver a crucial part of its service—a white child.”⁹⁸ This case was also discussed by Patricia J. Williams, who states that she “ponder[s] this case about the nightmare of giving birth to a black child who is tormented so that her mother gets to claim damages for emotional distress. . . . I wonder if this child can get damages of her own, for being born to a litigation-happy white mother. I think about whether this might not be a nifty way of collecting reparations, this suit for racial deviance as a breach of birthright, a broken warranty of merchantability in the forum of marketed actors.”⁹⁹

Roberts states that this “case not only evidences disdain for the technological creation of Black babies; it also highlights the critical importance of producing a genetically pure white child. The clinic’s racial mix-up negated the value of the mother’s genetic tie.”¹⁰⁰ Roberts suggests that “receiving the wrong *white* child would have been a far less devastating experience.”¹⁰¹

The mother in this case 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. Though this child is the genetic child of the birth mother, Julia seems to believe that she received the “wrong” child – one that is incorrect, not only by not being the child of her husband, but also for not being white. Instead of being satisfied with having a child, which many people who use new reproductive technologies never achieve, she expected the “perfect child.”

The following case illustrates that having children with one’s own race or genetic material is not only an issue for white people.

her daughter. *See* Sullivan, *supra* note 79. This article, as well as the others on this case, have no mention of whether the provider of the sperm was known.

⁹⁸DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 252 (1997).

⁹⁹PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 186-87 (1991).

¹⁰⁰DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 271 (1997).

¹⁰¹DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 271 (1997) (emphasis in original).

Michael and Elizabeth (Betty) Higgins

The Higginses, Michael, an black man, and Betty, a White woman went to Memorial Hospital and Esman Laboratory Physicians in Jacksonville, Florida to have children genetically related to both of them. In 1995, Betty gave birth to twins, who “appear white,”¹⁰² but the children’s race is not known.¹⁰³ Betty’s attorney “said she is unsure if the children are Caucasian or mixed. ‘It appears they are Caucasian, but some think they may be of mixed race. The girl has blue eyes and the boy’s are brown. And they both have curly hair.’”¹⁰⁴ Elsewhere, it has been reported that the twins have “purely Caucasian features.”¹⁰⁵

The twins were born with B-positive blood, although the Higginses both had O-positive blood.¹⁰⁶ Though at first being told that the children might not be related to either one, DNA tests confirmed that while Betty was related to the children, Michael was not.¹⁰⁷ According to the lawsuit filed by the Higginses, the clinic had fertilized Betty’s eggs with the sperm of a man other than Michael.¹⁰⁸

Their attorney argued that “the hospital made a mistake that created a situation in which Michael Higgins is expected to provide for children that aren’t his.”¹⁰⁹ Their attorney states that Michael is not a father at all; “The hospital is really the father, and the hospital should be the one financially responsible for the support of these children.”¹¹⁰ This argument is especially tenuous under the reasoning in *Michael H.* because these were children born during the marriage, and therefore as the husband of Betty, Michael should be responsible for providing their financial support. An argument that the hospital is the father shows that

¹⁰²Deborah Sharp, *Fla. Suit Highlights In Vitro Industry’s Controversies*, U.S.A. TODAY, Nov. 15, 1996, at 3A.

¹⁰³Michael Lasalandra, *Woman, Ex and Hospital Settle Over Sperm Mixup*, BOSTON HERALD, Aug. 27, 1998, at 12.

¹⁰⁴*Id.*

¹⁰⁵Ann Davis, *Legal Beat: High-Tech Births Spawn Legal Riddles*, WALL ST. J., Jan. 26, 1998, at B1.

¹⁰⁶It is scientifically impossible that two people with type O blood could together have genetic children with type B blood.

¹⁰⁷*20/20: A Miracle Gone Wrong* (ABC television broadcast, May 23, 1997); LASALANDRA, *supra* note 103.

¹⁰⁸Lasalandra, *supra* note 103.

¹⁰⁹Mike Stobbe, *Alleged Mix-up Leads to Lawsuit*, FLA. TIMES-UNION (Jacksonville, FL), September 1, 1997, at A5.

¹¹⁰Mike Stobbe, *Couple Blames Mix-up for Woes*, FLA. TIMES-UNION (Jacksonville, FL), November 13, 1996, at A1.

here fatherhood is viewed as only a financial relationship, rather than one based on an emotional or social connection. A more reasonable argument, though possibly more difficult to prove would be to sue for the loss of the intended genetic relationship.¹¹¹ The Higginses subsequently divorced, with Michael not being responsible for child support for the children, due to the lawsuit settlement.¹¹² The provider of the sperm is still unknown.¹¹³

Michael became depressed because the children were not genetically related to him.¹¹⁴ He was described in one account as "unable to bond with the twins"¹¹⁵ According to Betty's attorney Michael "'had a very hard time dealing with the situation. She had a genetic connection to the children and he didn't. . . . They wanted their own biological children."¹¹⁶ 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 in this case, they're Betty's, and they're not mine. They're not my children. And that's what we wanted together."¹¹⁷

One of the most interesting aspects of this case is how much of a role a genetic/race connection plays. Because the children were not the genetic children of Michael, and possibly because they might be white, though Michael was the intended father, he did not consider himself to be the "father." Therefore, he has no connection with the children,¹¹⁸ though they would not exist unless the Higginses would have gone to the fertility clinic.¹¹⁹ Though traditionally Michael would have been

¹¹¹For discussion of the idea of suing for lack of genetic connection, see Fred Norton, *Note: Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, And Damages*, 74 N.Y.U. L. REV. 793 (1999).

¹¹²Lasalandra, *supra* note 103.

¹¹³*Id.*

¹¹⁴Sharp, *supra* note 102.

¹¹⁵*Id.*

¹¹⁶Lasalandra, *supra* note 103.

¹¹⁷20/20: *A Miracle Gone Wrong* (ABC television broadcast, May 23, 1997).

¹¹⁸The news articles on this case state that the Higginses are living separately in different states. They do not mention anything about Michael visiting or having a relationship with the twins. See Lasalandra, *supra* note 103; Vivian Wakefield, *In vitro mix-up settled*, FLA. TIMES-UNION, August 26, 1998, at A1; 20/20: *A Miracle Gone Wrong* (ABC television broadcast, May 23, 1997).

¹¹⁹Compare the case of Jaycee, where the intended parents were financially responsible. John and Luanne Buzzanca contracted with surrogate Pamela Snell to carry an embryo created by the egg and sperm of purportedly anonymous donors. A month before the birth of Jaycee,

responsible for the twins because they were born within marriage,¹²⁰ because he is not genetically related, he is able to avoid parental responsibilities. Here, Michael Higgins, the intended father, manages to avoid responsibility for his intended children due to the results of a lawsuit, while Julia Skolnick retains the responsibility for her daughter, though she has received a financial settlement.

Mistakes in new reproductive technologies also have occurred outside of the United States, even involving countries with regulation of new reproductive technologies.

*Wilma and Willem Stuart*¹²¹

In 1993, Wilma and Willem Stuart, a Dutch couple, went to Utrecht's Academic Hospital in the Netherlands, a fertility clinic, for in-vitro fertilization.¹²² Wilma gave birth to two boys later that year, but after a

the contracted child, John filed for divorce, claiming that there were no children of the marriage. The trial court held that because Luanne did not have a genetic connection to the child, did not give birth to the child, and did not adopt the child, she was not Jaycee's legal mother. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 283 (Ct. App. 1998). Also, because John was not genetically connected to Jaycee, and Luanne was not her legal mother, the trial court held John was not Jaycee's legal father and thus he was not liable for child support. *Id.* at 282. However, the appeals court reversed the decision, stating that the legal parents of Jaycee are those that planned to raise her; but for their plans, the child would not exist. *Id.* at 282-91. The court stated "Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate." *Id.* at 282. The case was remanded to the trial court for John to be ordered to pay child support and for Jaycee's birth certificate to be changed to reflect John and Luanne's legal parentage. *Id.* at 293-94.

This case is far more complicated than even stated within the court record. Jaycee's genetic parents are two halves of different couples, one who donated his sperm, one who used her eggs, together used to create embryos including Jaycee's. The embryos were used to produce born siblings that were conceived at the same time as Jaycee and the other embryos were frozen for later use by the genetic father and his spouse. Jaycee's genetic father and his wife donated Jaycee's embryo, but regret their decision. *48 Hours: "Who is My Mommy?,"* (CBS television broadcast, May 14, 1998).

¹²⁰See *Michael H.*, 491 U.S. 110 (child born in marriage is child of wife and husband, not genetic father).

¹²¹These names, as well as the names of their children, Koen and Teun, are pseudonyms. Pictures of the children at age five can be seen at *Twin Brothers in Womb Only*, SUNDAY TIMES (South Africa), Apr. 4, 1999, available at <http://www.suntimes.co.za/1999/04/04/news/news07.htm> (last visited Apr. 7, 2002). This headline implies that Koen and Teun are not related at all; however, they are genetically half-brothers.

¹²²Marlise Simons, *Uproar Over Twins, and a Dutch Couple's Anguish*, N.Y. TIMES, June 28, 1995, at A3.

few months noticed that one of the twins had darker skin.¹²³ One article reported that “while one boy was as blond as his parents, the other’s skin was darkening and his brown hair was fuzzy.”¹²⁴ After the twins were ten months old, their parents were told, based on a DNA test, that one of the twins’ father was not Willem.¹²⁵ After the DNA test, the Stuarts began to see a psychotherapist to deal with what Willem described as their “bewilderment and pain,” and their questions about the future.¹²⁶

The hospital admitted that Wilma’s eggs were accidentally inseminated with sperm from another man along with that of her husband and alleges that “the mix-up was probably due to a lab technician mistakenly placing sperm from the woman’s husband in a pipette still containing sperm from another man.”¹²⁷ Under Dutch law, the Stuarts are the legal parents of both twins, and the genetic father has no legal rights.¹²⁸

The Stuarts went public with their story to overcome social pressure about their twins¹²⁹ and also to persuade the clinic to contact

¹²³Jennifer Chao, *Mixed Race Twins Stir Debate*, SCOTSMAN, June 18, 1995, at 3.

¹²⁴Dorinda Elliot & Friso Endt, *Twins - With Two Fathers: A Fertility Clinic's Startling Error*, NEWSWEEK, July 3, 1995, at 38. According to Dorothy Roberts, “The reporters’ wording evokes the ominous sense that as the skin of the wrongfully conceived child turned darker and darker and as his hair turned fuzzier and fuzzier, the horror of the mistake increased.” Dorothy E. Roberts, *InterGroup Solidarity: Mapping the Internal/External Syntactic of Oppression: BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855, 860 (1999).

¹²⁵Simons, *supra* note 122.

¹²⁶“How would they tell their son that he was not meant to exist, that he was born because of a technical error? Would they treat the children differently?” and according to the Stuarts’ lawyer, “Koen was born because of a technological error. What, if any, damages or disadvantages will this bring him later in life? How do you answer that?” SIMONS, *supra* note 122.

¹²⁷Elliot et. al., *supra* note 124. The Stuarts agreed to an undisclosed settlement from the hospital, but no one was fired, which angered the Stuarts. Mark Fuller, *Tube Twins From Different Sperm*, TIMES (London), June 20, 1995; ELLIOT ET. AL., *supra* note 124.

Also, at least two other similar mix-ups might have occurred. At the same hospital in 1989, a baby’s blood type did not match the parents. ELLIOT ET. AL., *supra* note 124. According to a patient’s rights organization, only one similar case happened in the past ten years, but in that case the mistake was discovered shortly after implantation, and the woman had an abortion. Mark Fuller, *Tube Twins From Different Sperm*, TIMES (London), June 20, 1995.

¹²⁸Mark Fuller, *Tube Twins From Different Sperm*, TIMES (London), June 20, 1995.

¹²⁹The Stuarts were subjected to comments such as “What? Are those twins? How is that possible?” and “He is called Koen? Such a Dutch name for such an exotic child?” Suggestions were made that Wilma had slept with another man, including being told, “Go on, tell your

the genetic father.¹³⁰ The genetic father is from the Dutch Caribbean island of Aruba, “many of whose mixed-race natives are of both Caucasian and African descent.”¹³¹ The genetic father was described as “of course overwhelmed, but positive” when told about his genetic connection to one of the twins.¹³² The first question he asked was “Do they love the child?”¹³³ The Stuarts want Koen to have a closer relationship with his genetic father than he presently has; however, Koen’s genetic father has met him, bringing along Koen’s other half-brother.¹³⁴

The Stuarts are also concerned about the future of prejudice that their mixed race son, Koen, will face. Willem says that “‘Brown people have a smaller chance to get a decent job in our society. . . . They can’t get a bank loan like white people. Every time the right-wingers and racists in Parliament open their mouths, I am frightened.’”¹³⁵ Wilma asks “[w]hat is going to happen when he comes home from school and says kids have been calling him ‘the black one.’ I’m white. I’ve never suffered racial discrimination and I won’t know how to react properly.”¹³⁶ The Stuarts concern about racial prejudice, while genuine, would not have occurred but for having a mixed-race child. If the sperm of a white man had been used, they would not have to face dealing with Koen’s Black racial heritage. The Rotterdam newspaper *NRC-Handelsblad* “wondered if the ‘commotion’ around the case is ‘the result of a loss of confidence in a technique that was considered infallible’ or ‘because inadvertently a black child has landed with white

secret. Did you have two men at the same time?” They lived in a small town, and Simons states that the issue of mixed race twins might not have been an issue in racially-mixed Amsterdam or Rotterdam. SIMONS, *supra* note 122.

¹³⁰Elliot et. al., *supra* note 124.

¹³¹Jennifer Chao, *Mixed Race Twins Stir Debate*, SCOTSMAN, June 18, 1995, at 3.

¹³²*Id.*

¹³³Elliot et. al., *supra* note 124.

¹³⁴The genetic father had a healthy child produced from his intended IVF, which produced Koen inadvertently. FULLER, *supra* note 128.; *Dateline NBC: Inconceivable* (NBC television broadcast, Oct. 19, 1998).

¹³⁵Elliot et. al., *supra* note 124.

¹³⁶Fuller, *supra* note 128. Wilma also later said “When I learnt the truth . . . my first reaction was to feel as if I had been raped. My biggest fear is that Koen will grow up and think that his existence was the result of a mistake.” and “We love our babies equally, but when you discover that one of your twins had another father, someone you never saw or knew anything about, the shock is unbelievable.” Adam Lusher, *‘It was a Terrible Thing that the Doctors did to Us, a Terrible Thing’*, SUNDAY TELEGRAPH (London), Sept. 24, 2000, at 4.

parents.”¹³⁷ This case is different from the other cases discussed because not only is the genetic father known, but the legal/social parents want him involved in their son’s life.

Misuse of Embryos/Fertilized Eggs

In instances involving unintended embryos, the intended parents, who have supplied their own genetic material, do not receive their genetic child. Instead, by mistake or intentionally, someone else receives their embryo, and often has their child. These cases are especially difficult because not only does one spouse lose a connection to a child, but also because the family loses a connection to a child of the family. However, this situation is also difficult on the “birth” family who were expecting to have a child with a genetic link, rather than a genetic stranger. However genetically separate, families where a child without a genetic connection has been born into the family they consider the child to be a part of their family. This section will discuss the one reported case of people who received/had taken embryos accidentally,¹³⁸ and the consequences, especially when an embryo creates a child. The instance discussed below the Fasano/Rogers case, involves four parents, trying to determine who would be deemed to be the legal parents of one child.

Here, two couples went to a fertility clinic and two children were born; however, who the parents of one of the children were hotly disputed.¹³⁹ The facts in this case challenge ideas of parenthood in general; specifically what it means to be the “mother” of a child. The issue of race in determining parenthood is also raised.

Issues and Facts

The two couples involved in the embryo switch met in a Manhattan fertility clinic, both seeking fertility treatment.¹⁴⁰ According to the Rogers’ attorney, Rudolph Silas, the husbands talked in the fertility

¹³⁷Simons, *supra* note 122.

¹³⁸For discussion of the impact of intentional switching of embryos, see footnote 20.

¹³⁹See *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 1st Dep’t 2000); *Perry-Rogers v. Obasaju*, 723 N.Y. S.2d 28 (N.Y. App. Div. 2001).

¹⁴⁰Jim Yardley, *Sharing Baby Proves Tough for Two Mothers*, N.Y. TIMES, June 30, 1999, at B1.

clinic in December 1997: "Each was determined to have a child. . . . They'd both been trying for years, and they were desperate."¹⁴¹ The first couple involved, Debbie and Robert Rogers, a nurse and a high school teacher from New Jersey, took years to save enough money for IVF.¹⁴² In April 1998, Deborah Perry-Rogers and Robert Rogers began reproductive assistance, including in vitro fertilization and embryo transfers.¹⁴³ However, the Rogers' embryos were implanted in Donna Fasano, along with the Fasano's embryos, without the permission of the Rogerses or the Fasanos.¹⁴⁴

According to the court, both couples agree that on May 28, 1998 they were notified of the implantation mistake and of the need for DNA and amniocentesis tests.¹⁴⁵ Not knowing what happened to their embryos led Deborah Rogers "into a deep depression. She left her nursing job and started undergoing counseling."¹⁴⁶ According to the Fasano's attorney, Ivan Tantleff, the fertility doctor "told them the [Rogers'] embryos were supposed to be put in the garbage. She suggested they terminate her pregnancy. . . . They were outraged."¹⁴⁷

Donna Fasano underwent an amniocentesis and DNA analysis, discovering that one of the children she was pregnant with was not genetically related to her.¹⁴⁸ According to Donna Fasano, after discovering that one of the twins would not be related to her, she consulted an attorney: "I said, if I decided to give the child up that I would only give it up to its genetic parents. And he had told me it would be virtually impossible for them to find [their child]. And that if I didn't want the child, to give him up for adoption. Now how could you not want the child?"¹⁴⁹ These statements show that Donna Fasano felt that the child she was pregnant with was "her" child based on her need to protect the potential child, but also her wish to prevent the genetic parents from discovering the child, instead deciding to keep the

¹⁴¹Dareh Gregorian, *Scrambled-egg Parents Need Wisdom of Solomon*, N.Y. POST, July 6, 1999, at 4.

¹⁴²*Dateline NBC: Lasting Consequences* (NBC television broadcast, February 22, 2000).

¹⁴³*Perry-Rogers*, 715 N.Y.S.2d at 21.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶Gregorian, *supra* note 141.

¹⁴⁷*Id.*

¹⁴⁸*20/20: Losing Joseph* (ABC television broadcast, March 3, 2000).

¹⁴⁹*Perry-Rogers*, 715 N.Y.S.2d at 21.

child. According to the court, 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.”¹⁵⁰

On December 29, 1998, Donna Fasano gave birth to two male infants, of two different races.¹⁵¹ One of the children is black, the genetic child of the Rogerses, initially named Joseph Fasano, now Akeil Rogers.¹⁵² On March 12, 1999, when Akeil was two-and-a-half months old, the Rogerses filed suit against the fertility doctor and the Fasanos to discover if one of the twins was genetically related to them, seeking a declaratory judgment against the Fasanos concerning the “rights, obligations and relationships” of the Rogerses and the Fasanos to Akeil.¹⁵³ According to the court, the parties agree that the Fasanos were “unresponsive” to the Rogerses’ efforts to contact them, though this issue was earlier disputed.¹⁵⁴

However the Rogerses discovered the Fasanos, the dismay of the Fasanos fits within the structure they seemed to have made for themselves – that the child who was not genetically related to them was “their” child. The Fasanos seemed to consider the genetic parents as

¹⁵⁰*Perry-Rogers*, 715 N.Y.S.2d at 22.

¹⁵¹One of the children is white and the Fasanos’ genetic child, Vincent Fasano.

¹⁵²*Perry-Rogers*, 715 N.Y.S.2d at 22.

¹⁵³*Id.*

¹⁵⁴*Id.* According to the lawsuit by the Rogerses against the Fasanos, even though the Fasanos knew the results of an DNA test and an amniocentesis showing that the Fasanos would not be the genetic parents of one of the twins, the Fasanos “‘adopted a hostile stance towards [the Rogerses]’ and denied them and the clinic ‘any information concerning the results’ and have ‘refused to release any information and consider any efforts to contact them as harassment.’” Dareh Gregorian, *Fertility Clinic Is Sued on Egg Mixup*, N.Y. POST, Mar. 27, 1999, at 1. According to one news story, the Rogerses discovered the twins “although the fertility clinic would not give out the information, Deborah and Robert Rogers through an exhaustive search found their son.” *20/20: Losing Joseph* (ABC television broadcast, March 3, 2000). Also, according to this story, the Rogers discovered the name “Fasano” within a pile of Deborah Rogers’ medical records. They then hired a private investigator, who discovered the Fasanos. *Dateline NBC: Lasting Consequences* (NBC television broadcast, February 22, 2000).

The Fasanos “claim they tried to find the biological parents, but their fertility doctor and the lab refused to give them that information.” *20/20: Losing Joseph* (ABC television broadcast, March 3, 2000). In their lawsuit the Fasanos also criticize Nash, the fertility doctor, for revealing their identity to the Rogers. One of the Fasano attorneys, David Cohen, stated that “They’re very upset about the breach of confidentiality’ and that Nash ‘should have asked for the Fasanos’ permission. There were much better ways of handling this.” Dareh Gregorian, *Scrambled Eggs Hatch 2nd Lawsuit*, N.Y. POST, Apr. 7, 1999, at 18.

intruders, people who at one time had a connection to their child, but who were no longer connected, similar to adoptive parents viewing birth parents of adoptive children.

In April 1999, when Akeil was three months old, DNA testing was conducted, confirming that Akeil was the genetic child of the Rogerses.¹⁵⁵

During weeks of negotiating the custody of the child, he remained with the Fasanos.¹⁵⁶ According to David Cohen, an attorney for the Fasanos, "There's just a tremendous amount of unnecessary heartache here. . . . The Fasanos don't see him as someone else's black baby; they see him as their baby. And the Rogerses have missed out on the first three months of his life."¹⁵⁷ The issues between the two arguing sets of parents were that the Fasanos "wanted to maintain contact with the child and they wanted it guaranteed in writing. . . . the Rogers would have to agree to liberal visitation rights and acknowledge that Joseph has an emotional and physical bond to Vincent and the Fasano's and that maintaining that bond is in his best interest."¹⁵⁸

However, Deborah Rogers felt that "I just couldn't understand why you have to negotiate for a child that was ours. He is and will always will be our son and to have negotiate was an insult."¹⁵⁹ According to Deborah, "the Fasanos agreed to relinquish custody of Akeil to the Rogerses only upon the execution of a written agreement, which entitled the Fasanos to future visitation with Akeil. . . . and that she felt compelled to sign the agreement in order to gain custody of her son."¹⁶⁰ Therefore the Rogers and the Fasanos have very different ideas of what their relationship with this child would be.

Signed on April 29, 1999, when Akeil was four months old, the agreement between the Rogerses and the Fasanos "contains a visitation

¹⁵⁵*Perry-Rogers*, 715 N.Y.S.2d at 22.

¹⁵⁶*Id.*

¹⁵⁷Michael Grunwald, *In Vitro, in Error--and Now, in Court White Mother Given Black Couple's Embryos Will Give One 'Twin' Back*, WASHINGTON POST, Mar. 31, 1999, at A1.

¹⁵⁸*Dateline NBC: Lasting Consequences* (NBC television broadcast, February 22, 2000).

¹⁵⁹*Id.*

¹⁶⁰*Perry-Rogers*, 715 N.Y.S.2d at 22. However, earlier reports indicated that the Rogerses were amenable to the possibility of the children continuing a relationship, both couples "agreed through their attorneys that the boys should grow up knowing that they are brothers." Grunwald, *supra* note 157.

schedule providing for visits one full weekend per month, one weekend day each month, one week each summer, and alternating holidays [and] also contained a liquidated damages clause, providing that a violation of the Fasanos' visitation rights under the agreement would entitle them to \$ 200,000."¹⁶¹

According to attorney Ivan Tantleff, Donna Fasano made the decision to give up the child "after a month of heart-wrenching and soul-searching because she believes it is in the interest of the child whom she loves very much"¹⁶² A lawyer for the Fasanos, David Cohen, said the custody exchange was "very emotional, very strained, very difficult. This woman [Mrs. Fasano] had carried the baby to term, and had cared for him for four months."¹⁶³

Donna Fasano was described by attorney, Ivan Tantleff: "The Fasanos have reared, loved and cared for both children as their own. . . She is doing this because she loves both boys and she is a victim here, not the culprit. She doesn't look at them as white and black. She looks at them as her sons. She is torn apart by this."¹⁶⁴ He continues by stating that "Mrs. Fasano was destroyed over this.' . . . 'She holds the babies, she feeds the babies, she cares for them. But at the same time, she doesn't want to deprive her son of being with his biological mother."¹⁶⁵ Donna Fasano herself said that, "We both want what's in the best interest of the child. We're giving him up because we love him."¹⁶⁶ She also said that "[The fertility doctor] may have given me two beautiful babies, but she destroyed their lives."¹⁶⁷ How exactly did the fertility doctor destroy the lives of these children? By causing two children to be born as twins with no genetic ties to each other?

Deborah Rogers was described by her attorney, Rudolph Silas, as "very excited to hear the good news and overwhelmed after so many failed efforts to conceive - delighted, overwhelmed and mostly in

¹⁶¹*Perry-Rogers*, 715 N.Y.S.2d at 22.

¹⁶²Leo Standora, *Egg-swap Mom to Give up Son*, DAILY NEWS (New York), Mar. 30, 1999, at 10.

¹⁶³Samuel Maull, *Baby in NY Fertility Clinic Snafu is Returned to Genetic Parents*, BOSTON GLOBE, May 27, 1999, at A4.

¹⁶⁴Jim Yardley, *After Embryo Mix-Up, Couple Say They Will Give Up Baby*, N.Y. TIMES, Mar. 30, 1999, at B1.

¹⁶⁵*Id.*

¹⁶⁶Maull, *supra* note 163.

¹⁶⁷*Id.*

tears.¹⁶⁸ Silas also stated that ““She had approached this at the end of many years trying to conceive. It certainly raises the possibility of a happy ending for all parties. At least happier than it would have been if there had not been two children.”¹⁶⁹

During the time between Akeil’s birth on December 29, 1998 and May 10, 1999, when he was four-and-a-half months old when custody was turned over, Deborah Rogers stated to the court that the Fasanos only permitted her two brief visits with Akeil.¹⁷⁰ Legally, the Rogerses received custody of Akeil on July 16, 1999 when he was six-and-a-half months old.¹⁷¹

Based on the visitation order, a court ordered oral “visitation orders” over the next months.¹⁷² On January 14, 2000, the court granted the Fasanos visitation with Akeil every other weekend.¹⁷³ The Rogerses challenged the court’s January 14, 2000 visitation order and the Fasanos appealed the order giving the Rogerses custody of the child.¹⁷⁴

New York Supreme Court (Appeals Court)

Under the traditional legal models of parentage, the Fasanos should be viewed as Akeil's parents. Mrs. Fasano gave birth to Akeil, while married to Mr. Fasano.¹⁷⁵ Therefore, Akeil is part of the "unitary family" of the Fasanos. However, the court does not consider this view while determining the rights of the various claiming parents.

In making a ruling concerning the Fasanos’ visitation and custody rights, the appeals court decides not to use either genetics or the “best interests of the child” test to determine who Akeil belongs with, and

¹⁶⁸*Id.*

¹⁶⁹*Id.*

¹⁷⁰*Perry-Rogers*, 715 N.Y.S.2d at 22.

¹⁷¹*Id.*

¹⁷²*Id.* at 23.

¹⁷³*Id.*

¹⁷⁴*Perry-Rogers*, 715 N.Y.S.2d at 23.

¹⁷⁵However, if the Fasanos were not married at the time of Akeil's birth, the result under the traditional model would be different. Assuming that Mrs. Fasano was unmarried at Akeil's birth, then she would be his legal mother, because she gave birth to him and Mr. Rogers would be his legal father, because he is the genetic father. This would leave Mrs. Rogers in the unenviable position of being a genetic parent, but without any rights, similar to the genetic father of a child born to a married woman, not her husband. This differential treatment of genetic parents based on their gender shows both how the genetic connection to a father is viewed as the most important connection, and how valuing the contribution of the gestating mother, detracts from the connection between the genetic mother and the child.

therefore, by default, who his parents are.¹⁷⁶ The court states that “it is simply inappropriate to render any determination solely as a consequence of genetics” in convoluted cases such as this one.¹⁷⁷ The court states in dicta that if the Fasanos would have sought custody, it would have used an intended parent standard to give custody to the Rogerses; the Rogerses “who purposefully arranged for their genetic material to be taken and used in order to attempt to create their own child, whom they intended to rear.”¹⁷⁸

The court states “that in these rather unique circumstances, where the Rogerses’ embryo was implanted in Donna Fasano by mistake, and where the Fasanos knew of the error not long after it occurred, the happenstance of the Fasanos’ nominal parenthood over Akeil should have been treated as a mistake to be corrected at soon as possible, before the development of a parental relationship.”¹⁷⁹ Therefore, the Fasanos cannot be considered to be “parents” of Akeil.¹⁸⁰ The court also responds to the argument that Akeil has bonded with his birth family, stating that

“any bonding on the part of Akeil to his gestational mother and her family was the direct result of the Fasanos’ failure to take timely action upon being informed of the clinic’s admitted error. Defendants cannot be permitted to purposefully act in such a way as to create a bond, and then rely upon it for their assertion of rights to which they would not otherwise be entitled.”¹⁸¹

Therefore, even if the court had considered the Fasanos to be parents under a care model for parenting, they are not parents due to the court’s view that they were involved in wrongdoing. The actions of the Fasanos are thereby equated to kidnappers, whose connections to a kidnapped child would not be considered in determining the “best interests of the child” even if the child had a loving relationship with the kidnappers. The court does not consider that Akeil would not exist,

¹⁷⁶*Perry-Rogers*, 715 N.Y.S.2d 19 at 23-27.

¹⁷⁷*Id.* at 24.

¹⁷⁸*Id.*

¹⁷⁹*Id.* at 25 (emphasis in original).

¹⁸⁰*Id.* at 25.

¹⁸¹*Perry-Rogers*, 715 N.Y.S.2d 19 at 26.

but for Donna Fasano's pregnancy, and her decision not to have an abortion when she was told that she was pregnant with "someone else's child."

Therefore, the court terminated the visitation of the Fasanos with Akeil, officially ending his relationship with the Fasanos on October 26, 2000, when he was a year-and-a-half old.¹⁸²

Court of Appeals (Supreme Court)

On May 8, 2001, New York State's highest court, the Court of Appeals, denied hearing the appeal of the Fasanos from the Supreme Court ruling.¹⁸³ According to Bernard Clair, attorney for the Rogerses, "My clients can now enjoy raising their child without judicial interference."¹⁸⁴ The Fasanos' attorneys said that he believed that "All we ever asked was for a court to decide the best interests of the child."¹⁸⁵

Commentators

Before custody of Akeil was transferred from the Fasanos to the Rogerses, "George Annas, a professor of health law at Boston University, said the custody question would have been quite clear if the Fasanos had decided to fight it out: Every state but California considers

¹⁸² *Perry-Rogers*, 715 N.Y.S.2d 19 at 27.

¹⁸³ Helen Peterson, *S.I. Couple's Embryo-Swap Appeal Loses*, DAILY NEWS (New York), May 9, 2001, at 20.

¹⁸⁴ Christopher D. Ringwald, *Appeal in Embryo Mix-Up Case Declined*, NEWSDAY (New York), May 9, 2001, at A18.

¹⁸⁵ *Id.* The Rogerses and Fasanos lawsuits against the fertility doctors and clinic are ongoing. The New York Court of Appeal has allowed the lawsuits against the fertility clinic and doctors to proceed. Peterson, *supra* note 183. Also, in two separate cases the Appellate Division of Manhattan Supreme Court has not dismissed the families' cases against the fertility doctors on summary judgment, thereby showing that the emotional injuries suffered by these two families were "real" according to the law. *Perry-Rogers*, 723 N.Y. S.2d 28, 29-30 (N.Y. App. Div. 2001); *Fasano v. Nash*, 723 N. Y. S.2d 181 (N.Y. App. Div. 2001). In the Rogerses case, the doctors had claimed that the suit should be dismissed because the only damages sought were for "emotional harm caused by the creation of human life." *Perry-Rogers v. Obasaju*, 723 N.Y. S.2d 28, 29-30 (N.Y. App. Div. 2001). However, the court saw an injury to the Rogerses, stating that they were denied the chance to "experience pregnancy, prenatal bonding, the birth of their son, and time with their son for his first four months." *Perry-Rogers v. Obasaju*, 723 N.Y. S.2d 28, 29-30 (N.Y. App. Div. 2001).

Also, according to *Perry-Rogers v. Obasaju*, the Rogerses are continuing to sue the Fasanos, in addition to the fertility doctors. *Perry-Rogers v. Obasaju*, 723 N.Y. S.2d 28, 29-30 (N.Y. App. Div. 2001).

the birth mother, or 'gestational mother,' not the 'genetic mother,' to be the legal mother."¹⁸⁶ A headline from an article about the switch in custody stated that "Baby in Mixup Returned to Real Mom," as if the mix-up was as simple as parents accidentally confusing their children for each other's.¹⁸⁷

After custody was transferred and visitation was being challenged, Rudolph Silas, an attorney said the Rogerses are concerned that the Fasanos would use the visits "to assert their authority as parents," considering that Mrs. Fasano continues to refer to herself as his mother.¹⁸⁸ Silas also said, "Two mothers? That's not acceptable. It's an invitation to psychological harm. . . . A child can only have one mother."¹⁸⁹ Mrs. Fasano disagreed, stating that "We're both his mother. We both love him," she said. "We want to be a part of his life, forever."¹⁹⁰

According to the Rogerses attorney, Vernerd Clare, "There's no such thing as parents by contract giving up their parental rights. They can do it but it's never enforced in court. It can't be enforced in court. The only recognition of giving up parental rights is through formal adoption."¹⁹¹

Also, according to a New York Post article written after custody had been turned over, but before a legal decision had been made concerning visitation, Donna Fasano "spared herself the pain of a long, emotional custody battle she ultimately would have lost when she turned her switched-before-birth baby over to his genetic parents."¹⁹²

¹⁸⁶Grunwald, *supra* note 157.

¹⁸⁷*Baby Born In Mix-Up Returned To Real Mom*, NEWSDAY (New York, NY), May 27, 1999, at A41. In comparison, see MAULL, *supra* note 163. In an AP wire story published in many newspapers, while stating that one of the children, the "white" one is the genetic child of the Fasanos, also casts the situation in a strange light -- one that would have allowed the Fasanos to give up their genetic child. The article states that "The twin boys, one black and one white, were born Dec. 29, 1998, and the Fasanos fell in love with them But the Fasanos have decided to raise the white child and allow the Rogerses to raise the black child if DNA tests confirm that the Rogerses are his biological parents" The Associated Press State & Local Wire, *Mom implanted with other woman's embryo will give up baby, lawyer says*, March 30, 1999 (published as *Mom Implanted With Wrong Embryo Will Give Up Baby*, CHI. TRIB., March 30, 1999, at A2).

¹⁸⁸Gregorian, *supra* note 141.

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Dateline NBC: Lasting Consequences* (NBC television broadcast, February 22, 2000)

¹⁹²Dareh Gregorian, 'Surrogate' Would Have Lost Custody Bid: Experts, N.Y. POST,

According to lawyer Bernard Clair, who has handled numerous custody fights, "The law is going to come down on the side of the DNA. . . . No matter what the heart says in this case, blood is thicker than a medical mistake."¹⁹³ He also stated that "The courts are not going to support the concept of having two mothers of equal status. It's too confusing for a child. . . . This is a terrible mistake, and I applaud the parents having mightily attempted to work it out, but a child can only have one mother."¹⁹⁴

According to another lawyer, Myrna Felder, "Although all this was accidental, Mrs. Fasano essentially was a surrogate mother."¹⁹⁵ By voluntarily giving up custody, she saved herself a lot of trouble. . . . The longer she would've waited to do so, the more heart-rending it would have been for her and the child."¹⁹⁶ She also stated that the Rogers' parental rights "are absolute."¹⁹⁷

Another lawyer, William Beslow, stated that "There's no biological tie there. In effect, the child has no blood relationship with Mrs. Fasano or the brother," but because Fasano "nourished the child and helped raise this child, allowing her some contact is a fair request."¹⁹⁸

None of these commentators have considered the connections that the Fasanos have made with Akeil or considered whether continuing a relationship with the Fasanos would be to the benefit of Akeil. Though considering the "best interests of the child" is often used in custody cases of children between parents, none of these commentators think to use it here. They treat Donna Fasano as a "mothering" vessel for this baby, and once her however unwitting services are no longer needed,

July 6, 1999, at 4.

¹⁹³Gregorian, *supra* note 192.

¹⁹⁴*Id.*

¹⁹⁵According to the Uniform Status of Children of Assisted Conception Act of 1988 (USCACA), 1 Definitions, 9B U.L.A. 155 (1988 & Supp. 1994), "'Surrogate' means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents. 'Intended parents' means a man and a woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents." Here, the Rogerses and the Fasanos did not enter into an agreement. Therefore, Donna Fasano was not legally a surrogate.

¹⁹⁶GREGORIAN, *supra* note 192.

¹⁹⁷*Id.*

¹⁹⁸*Id.*

neither is she, as a mother or as a parent.¹⁹⁹

Why do most of the commentators assume that Akeil will be "returned" to his genetic parents? Is it because the result seems "right" somehow or morally just, or does it not seem right that a Black child have white parents? Or more insidiously, is it because allowing the Fasanos to keep him would allow for the possibility of Black families raising a white child, if a mistake were made?

ANALYSIS

The law has constructed three conflicting views of parenthood. First, a genetic relationship, with nothing more required to continue being a parent than to not have a connection to family court, such as signing away parental rights, or being found "unfit."²⁰⁰ Second, for less socially acceptable parents, such as fathers of "illegitimate" children, to have a relationship with their child, including an emotional bond and financial support, in order to be considered to be a parent.²⁰¹ This second type of parenting does not include those parents, such as the genetic father in Michael H., who are statutorily denied a place as fathers.²⁰² The third

¹⁹⁹See April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83 (2001) (discusses the impact of racialized views of mothering and motherhood).

²⁰⁰*Troxel v. Granville*, 530 U.S. 57, 68 (2000) ("[T]he Troxels did not allege . . . that Granville was an unfit parent. That . . . is important, for there is a presumption that fit parents act in the best interests of their children.").

²⁰¹*Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (holding that when a biological father had never established a substantial relationship with his child, the failure to give him notice of pending adoption proceedings did not deny the father due process or equal protection); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (Court refused to extend constitutional protection to unwed fathers on the basis of only biological/genetic paternity); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (holding that a non-custodial genetic/biological father with a relationship with the child cannot be presumed unfit as a parent without proper notice and hearing).

²⁰²However, according to Dorothy Roberts, any relationship between this type of parent and child does not determine the relationship. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 353-54 (1995). She states that

"Recent Supreme Court cases involving parental rights of unwed fathers suggest that legal paternity continues to depend more on the father's relationship with his children's mother than on a genetic tie with the children. The Court granted the un-wed biological fathers in *Stanley* [] and *Caban* [] parental rights because they had formed relationships with the children's mothers that resembled the traditional nuclear family, while the fathers in *Quilloin* [], *Lehr* [], and *Michael H.* [], who were denied parental rights, had not."

Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 353-54 (1995) (internal citations deleted).

version is a variant of the first: the "unitary family," consisting of children with their genetic/biological mother and her husband, regardless of whether he is the father.²⁰³ None of these definitions by themselves or together are sufficient to define "parenting" in the instances discussed above.

The genetic relationship versus the emotional/caretaking relationship is often the real conflict in most of these cases. In determining custody and "parenthood" in these cases, the emotional relationship between parent and child is most important, that is, the person(s) who supply the emotional, caretaking, and financial needs of the child should be foremost considered. However, new reproductive technologies create the possibility for genetic parents to be denied the possibility of accepting a caretaking role for the child without their knowledge. In cases similar to the Fasano/Rogers case but where the genetic parents are not known at the birth of the child, the law should recognize the importance of the caretaking relationship without denying genetic parents the opportunity the chance to create such a relationship if they desire it.

New technologies also create new definitions of parenthood, although in some ways these "non-traditional" definitions have always been there (grandparents, adoption, extended families, foster parents),²⁰⁴ but new reproductive technologies introduce new definitions and blurs these lines. I suggest that the statutory requirements that children can have only two parents be changed, so that in situations such as the case studies, children can have many people who care for them and love them, and should be given the legal recognition of that relationship. Though Justice Scalia states in *Michael H.* that "California law, like nature itself, makes no provision for dual fatherhood,"²⁰⁵ there is no reason why the law should not recognize two fathers and mothers, in cases where not nature, but the

²⁰³*Michael H.*, 491 U.S. at 124-26.

²⁰⁴See Alison Harvison Young, *Reconceiving The Family: Challenging The Paradigm Of The Exclusive Family*, 6 AM. U. J. GENDER & LAW 505 (1998); Barbara Bennett Woodhouse, *Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569; Nicole L. Sault, *Many Mothers, Many Fathers: The Meaning of Parenting Around the World*, 36 SANTA CLARA L. REV. 395 (1996); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994).

²⁰⁵*Michael H.*, 491 U.S. at 119.

actions of fertility clinics, have created more than two parents. Recognizing more than two parents is especially important in instances where the "intended" parents are so difficult to judge. A winner-take-all view of parenting will leave many children and parents similarly situated to those in the case studies without connections to their parents and children, however defined.

However, even if the children created by new reproductive technological mistakes are not allowed to have more than two parents, they should also not have less than two parents. The Higgins case is an frightening example where an intended parent has avoided responsibility for children due to the lack of a genetic connection. This should not be allowed to occur, for children with "incorrect" genetic connections would not have existed but for the actions of their intended parents. The intended parents planned on having a child and should therefore be responsible for them, unless they relinquish parental rights to another person or to the state.

To avoid similar situations where determining the parents of a child are complicated due to the use of new reproductive technologies, the reproductive field should be highly regulated to ensure that the doctors and fertility clinics employing these technologies are using them appropriately. Considering that this is not likely to happen, I suggest two possible ways of preventing uncertainty about who the parents are. First, that informed consent contain a provision stating that the clinic does not promise that the intended sperm, egg, or embryo will be used. An informed consent might read: "While the clinic acknowledges that those seeking new reproductive services are often used by those seeking a genetic connection with a child, errors do occur. Allowing your genetic material to be used in these procedures means that you run a risk, however small, that the child you receive will not have the genetic connections that you wish. This might mean that someone else will be raising children from your genetic materials. Also, if you are seeking to have a child that looks like you, an error could prevent this from happening. The child you receive might be of a different race than you, the intended parents." This, of course, will scare away many potential patients, as well it should. People who have children in the traditional fashion, through sexual intercourse, are not promised that their children will be perfectly the way they wanted, and people who have children through new reproductive technologies

should not be expecting that everything will turn out “perfect” just because they have introduced a middleman to the process.

Second, DNA testing should be conducted during amniocentesis so that expectant parents know if the child is genetically theirs before birth, or otherwise be required to have DNA testing done as soon as the child is born, to be included in the procedures of the fertility clinic. Early testing will allow parents whose genetic material was used incorrectly to have the possibility of “reclaiming” their children if the families they are born into decide not to keep them. Therefore, potential parents will not receive a surprise several years later that their children are not “theirs,” or in the Rogers/Fasano case, the Rogerses feeling as if they were cheated out of time with their son. Changes in parenthood status should only be done when children are very young, preventing the emotional agony to both parents and children when such discoveries are made later in the child’s life.

Courts and clients of fertility clinics, should try to remember the words of Justice Stevens in *Lehr* that “intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility.”²⁰⁶ All of these cases involve children who were created because someone, though not necessarily the parents who received the child, wanted to have children. The mere existence of these children is a blessing, not a curse, and they should be loved.

CONCLUSION

As discussed above, when errors are made in the production of children through new reproductive technologies, families and children are impacted greatly. The consequences can include the knowledge that someone else is raising “your” child and go as far as the loss of a child that was born into a family. The emotional impact is intense on all of the people who could be viewed as parents, whether genetic, biological, social or legal. Intense emotional reactions will not be limited to the parents, for when these children discover their origins, likely they will have to confront the question of “Did my parents want me?” in a whole new light.

²⁰⁶*Lehr*, 463 U.S. at 256.

The fact that many of the children born due to mistakes in the use of these technologies are racially distinct from their intended parents, adds an additional element of difficulty to the lives of these children. However, it also helps to show how few cases are actually known. If the vast majority of new reproductive services are used by whites, but mistakes have only been discovered when the child has a different racial appearance than the intended parents,²⁰⁷ then the cases discussed in this paper are but the tip of the iceberg. These cases show that though people use these technologies to ensure the knowledge of the genetic origins of their children, the science, or at least its application is fallible.

If one accepts that there is some error rate for the use of new reproductive technologies, then the instances discussed above are only the discovered ones. Considering that approximately 170,000 babies have been born through IVF in the United States, the chances of other children being raised by unintended parents is high. Even if the error rate is only 0.001%, one in a thousand, then 170 children are being raised by unintended parents, many more than the number of discovered cases.²⁰⁸ Considering that the new reproductive technology industry is unregulated, the number might be higher. Other children and families will be discovered; the consequences will be devastating for them.

²⁰⁷Or because the child has a blood type impossible from the intended genetic parents.

²⁰⁸This figure is based on the estimate by Bert Steward that one in a thousand IVF embryos in the UK have been implanted in the wrong woman. Lois Rogers, *Women Given Wrong Embryos at IVF Clinics*, SUNDAY TIMES (London), Nov. 12, 2000.