FINDERS-KEEPERS: A BRIGHT-LINE RULE AWARDING CUSTODY TO GESTATIONAL MOTHERS IN CASES OF FERTILITY CLINIC ERROR

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INTRODUCTION

Susan Buchweitz, a forty-seven year-old single female, wanted to have a child.[1] Susan pursued alternative reproductive methods, specifically, pregnancy by in vitro fertilization.[2] Susan's age combined with the absence of a male partner influenced her to use donated eggs and sperm for her fertilization procedure.[3] A California fertility clinic implanted an embryo in her uterus and she successfully gave birth to a baby boy nine months later.[4] Despite her dreams of motherhood coming true, there was no happy ending to Susan's story. Susan's legal difficulties were just beginning.

Ten months after giving birth, Susan was notified that the fertility doctor had made a mistake during her procedure.[5] When performing Susan's in vitro fertilization, the fertility doctor failed to honor Susan's request for donated eggs and sperm, and mistakenly used an embryo provided by a couple who was trying to produce its own biological children.[6] After this egregious error was brought to her attention, Susan commenced a malpractice action against the fertility clinic and settled for one million dollars.[7] Susan's case was a slam dunk—"the fertility doctors should have taken greater care to ensure that they did not implant an embryo in a woman whose status as the child's parent would foreseeably be contested."[8]

After the malpractice litigation, Susan was then confronted with a custody action.[9] The couple that involuntarily provided the embryo for Susan's

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1 Sherry F. Colb, *Custody Dispute after Fertility Clinic Mistake, at* http://www.cnn.com/2004/LAW/09/24/colb.dna/index.html#colb (Sept. 24, 2004).

2 Mary Anne Ostrom, *Wrong Embryo Leads to Suit against Doctor, Custody Fight over Boy, at* http://www.jewishworldreview.com/0804/wrong_embryo_suit.asp (Aug. 4, 2004).

3 *Id.* (Susan said "Mr. Right just never came along.").

4 Colb, *supra* note 1.

5 Ostrom, *supra* note 2.

6 Colb, *supra* note 1.

7 *Id.*

8 *Id.*

9 *Id.*

implantation brought suit to gain custody of Susan's three year-old son.[10] The wife of that couple underwent a fertilization procedure the same day as Susan and gave birth to a baby girl.[11] Susan's son is the biological brother of the couple's daughter, and they are hoping to raise the children together as siblings.[12] A final decision is still pending, but thus far, a California family court has awarded Susan temporary custody and has granted the biological father twice-weekly visitation rights to the three year-old boy.[13] The custody battle has had a devastating impact on Susan's life—she worries everyday that her son will be taken away from her, she mortgaged her house to pay her legal bills, and she lost her job because she could no longer put in long hours.[14]

Susan's custody litigation requires the court to determine parental rights when childbirth is assisted by reproductive technology. However, identifying the legal mother is difficult where the mother's biological functions are severed between the egg provider and the fetus carrier. Susan's case is further complicated by the fertility doctor's mistake and the absence of an intentional surrogacy arrangement.

Section I of this note describes modern reproductive techniques and the consequent division of parental roles. Section II illustrates how courts have struggled to adapt common law child custody rules to contemporary reproductive technologies. Section III distinguishes voluntary surrogacy arrangements from fertility clinic error. Section IV concludes that in the special circumstance of fertility clinic error, a bright-line rule awarding custody to gestational mothers is best.[15] Section V examines whether such a bright-line rule recognizing legal maternity in gestational mothers would pass constitutional muster.

I. ASSISTED REPRODUCTION

Infertile people lack the ability to procreate through natural sexual intercourse.[16] In the past, adoption was the only alternative to infertility.[17] Today, infertile people can turn to reproductive technology to become parents.[18] Fertility clinics employ two methods of assisted reproduction: artificial insemination and in vitro fertilization.[19] As set forth in further detail below, both of these fertilization procedures fracture parenthood along functional lines.[20]

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[10] *Id.*

[11] Ostrom, *supra* note 2.

[12] *Id.*

[13] Colb, *supra* note 1.

[14] Ostrom, *supra* note 2.

[15] The term "gestational mother" refers to the woman who carries the child to term in her uterus.

[16] Michelle Pierce-Gealy, *"Are You My Mother?": Ohio's Crazy Baby-Making Produces a New Definition of "Mother"*, 28 AKRON L. REV. 535, 542 (1995).

[17] Colette Archer, *Scrambled Eggs: Defining Parenthood and Inheritance Rights of Children Born of Reproductive Technology*, 3 LOY. J. PUB. INT. L. 152 (2002).

[18] *Id.*

[19] *Id.* at 152-53.

[20] Pierce-Gealy, *supra* note 16, at 542-43.

Artificial insemination entails the introduction of the male's sperm into the female's body, and fertilization takes place in the womb.[21] If the husband is infertile, the wife can be artificially inseminated with the sperm of a donor.[22] Artificial insemination severs fatherhood in this situation, as the husband is the child's intended father and the sperm donor is the child's genetic father.[23] On the other hand, if the wife is infertile, a surrogate can be artificially inseminated with the husband's sperm.[24] In this situation, the wife is the child's intended mother, but she shares no biological ties with the child.[25] The surrogate performs both biological functions by providing the egg and carrying the fetus.[26]

In vitro fertilization involves the fertilization of the male's sperm and the female's egg in a laboratory dish, and the resulting embryo is implanted inside the woman's uterus.[27] If the wife is unable to produce eggs, she can use donated eggs to achieve pregnancy.[28] The husband's sperm fertilizes a donor's egg, and the embryo is implanted in the wife's uterus. In this situation, biological motherhood is divided; the wife is the child's gestational mother and the egg donor is the child's genetic mother.[29] In yet another scenario, a surrogate may be used if the wife can produce eggs but cannot carry the fetus.[30] The husband's sperm fertilizes the wife's eggs, and the embryo is implanted in the surrogate's uterus. This procedure also severs the biological mother's reproductive functions; the surrogate is the gestational mother and the wife is the genetic mother.[31]

In vitro fertilization has the potential to create very complicated child-birthing arrangements. For instance, in 1997, a California trial court held that a child born from an in vitro fertilization procedure has no legal parents.[32] There, an egg from an anonymous donor was fertilized with sperm from an anonymous donor, and the embryo was implanted in a surrogate who carried the fetus for the intended parents.[33] Children born from "donor surrogacy arrangements" can have as many as six different parents: " '(1) a sperm donor; (2) an egg donor; (3) the

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21 *Id.* at 543.

22 *Id.* While unmarried people, like Susan Buchweitz, can and do participate in assisted reproduction, examples here are based on married couples for the sake of simplicity.

23 *Id.*

24 Pierce-Gealy, *supra* note 16, at 544; *see also* Archer, *supra* note 17, at 152 (defining a "surrogate" as a woman who "contracts to carry a child to term on behalf of an infertile couple, and then assigns all of her parental rights over to them").

25 Pierce-Gealy, *supra* note 16, at 544.

26 *Id.*

27 Archer, *supra* note 17, at 153.

28 Pierce-Gealy, *supra* note 16, at 546.

29 *Id.*

30 *Id.*

31 *Id.*

32 *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (1998). The California Court of Appeals reversed the trial court's judgment and recognized the child's intended parents as the legal guardians.

33 *Id.*

intended mother; (4) the intended father; (5) the surrogate mother; (6) the surrogate mother's husband.' "[34]

II. THE JUDICIAL RESPONSE TO ASSISTED REPRODUCTION

Before the development of modern reproductive technology, the common law assigned parental rights to the child's biological parents.[35] This common law tradition provided the basis for fundamental rights that protect the parenting interests of those who share a biological connection with the child.[36] In *Meyer v. Nebraska*, the Supreme Court held that the liberty protected by the Due Process Clause[37] included the right of parents to "establish a home and bring up children."[38] Mothers naturally acquired a parental liberty interest because the event of birth signaled their obvious biological relationship with the child.[39] A biological father's parental liberty interest, however, was recognized only if he married the child's mother or participated in the child-rearing process.[40]

The United States Supreme Court has not decided whether constitutional parenting rights extend from parents of children produced through sexual intercourse to parents of children born from assisted reproduction.[41] An Ohio probate court stated that only the genetic parents in an assisted reproductive relationship have fundamental rights in parenting.[42] The Supreme Court of California stated that when female procreative roles are divided by assisted reproduction, neither women is entitled to a liberty interest in parenting because (1) the recent development of assisted child-birth forecloses the possibility of any deeply rooted tradition, and (2) fundamental parenting rights are limited by a zero-sum game—the liberty interests of the gestational mother can only be enforced at the expense of the genetic mother and vice-versa.[43]

In *Michael H. v. Gerald D.*, Justice Scalia and Chief Justice Rehnquist appeared to agree with the Supreme Court of California's interpretation of the 14th Amendment.[44] They refused to recognize that a biological father had a liberty interest in raising a child he conceived through an extramarital affair because there is no specific tradition in American history that protects the parenting rights of

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[34] Archer, *supra* note 17, at 157-58 (citing Ardis L. Campbell, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567 (2000)).

[35] 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, 521 (1999).

[36] John Lawrence Hill, *What Does It Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 365 (1991).

[37] U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

[38] Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923).

[39] Lehr v. Robertson, 463 U.S. 248, 260 (1983).

[40] *Id.*

[41] Noble-Allgire, *supra* note 35, at 571.

[42] Belsito v. Clark, 67 Ohio Misc. 2d 54, 63-64, 644 N.E.2d 760, 766 (Ct. Com. Pl. 1994).

[43] Johnson v. Calvert, 851 P.2d 776, 787, 5 Cal. 4th 84, 100-01, 19 Cal. Rptr. 2d 494, 505 (Sup. Ct. 1993); *see also In re* Baby M, 537 A.2d 1227, 1253-54, 109 N.J. 396, 447-50 (Sup. Ct. 1988).

[44] Michael H. v. Gerald D., 491 U.S. 110 (1989).

adulterous fathers.[45] Furthermore, according to Justices Scalia and Rehnquist, substantive due process rights should be based on the most "specific tradition" available:

> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.[46]

Since reproductive technology is a modern phenomenon, it is likely that Justice Scalia and Chief Justice Rehnquist would have denied a parental liberty interest to parents of children produced from assisted reproduction due to the absence of a supporting tradition in American history.[47] None of the other justices on the Supreme Court endorsed the specific tradition mode of historical analysis; for instance, Justice Brennan asserted that the adulterous father possessed a parental liberty interest because he was biologically related to the child and he financially supported the child since birth.[48] Therefore, it is probable that a majority of the Court at that time would have recognized the fundamental parenting rights of biological procreators in assisted child-births based on a broader American tradition of protecting biological parenthood.[49]

Assuming that biological procreators in assisted child-births are entitled to fundamental parenting rights, it is unclear *who* holds such rights where one woman provides the eggs and another woman carries the fetus.[50] When in vitro fertilization divides the female's reproductive roles, state courts have implemented different laws to reconcile the competing parental interests of genetic and gestational mothers.

In *Johnson v. Calvert*, a surrogate mother refused to transfer parental rights to the genetic parents after delivering the baby.[51] Applying an "intent test," the Supreme Court of California determined that the female genetic provider was the

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45 *Id.*

46 *Id.* at 127.

47 *See id.*

48 *Id.* at 143.

49 *See id.* at 132, 136-37.

50 Noble-Allgire, *supra* note 35, at 574.

51 *Johnson*, 851 P.2d at 777.

legal mother because the genetic mother intended to procreate the child, and intended to bring about the birth of a child that she intended to raise as her own.[52] In her dissenting opinion, Justice Kennard advocated a "best interests of the child" standard to determine the legal mother where reproductive roles are divided between two women.[53] Yet such a standard begs the question: Is the child better off being raised by the genetic mother or the gestational mother? In a majority of cases, the best interest of the child standard leads the analysis back to square one.[54]

The New York courts adopted California's intent test for cases of assisted reproduction where gestation and genetics do not coincide in the same woman.[55] In *McDonald v. McDonald*, an embryo consisting of the husband's sperm and a donor's egg was implanted into the wife's uterus.[56] During the subsequent divorce proceeding, the husband argued for custody of the couple's twin girls on the ground that he was their only legal parent because he was genetically related to the girls and the mother was not.[57] The Appellate Division rejected the husband's argument and held that the wife was the legal mother of the children because she intended to procreate and raise them.[58] Factual differences between *Johnson* and *McDonald* caused the intent test to reach opposite outcomes. Whereas the California court declared the female genetic provider to be the legal mother, the New York court recognized legal maternity in the gestational mother.[59]

Unlike New York and California, Ohio instituted a strict genetic standard.[60] Accordingly, when the female's reproductive functions are divided between genetics and gestation, the genetic provider is the legal parent unless she waives her parental rights.[61] Ohio's genetic standard has been criticized as a form of gender discrimination[62] because it represents a masculine view of reproduction where sperm contribution establishes biological paternity, and it ignores the fact that egg supply is only the beginning of the maternal reproductive process.[63] Commentators have condemned the genetic standard as "dehumaniz[ing] all women" by presenting "a distorted view of women's wombs as incubators for

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[52] *Id.* at 783.

[53] *Id.* at 799.

[54] Barring the minority of cases where one mother has a substance abuse problem or a criminal record, both genetic and gestational mothers will be able to present evidence to the court that they are fit parents. The inability of the "best interests of the child" standard to determine custody in cases where both parents present sufficient evidence that they are suitable guardians has led many courts to use arbitrary tiebreakers. *See Ex parte* Devine, 398 So.2d 686 (Sup. Ct. Ala. 1981); *see also* Murray v. Murray, 622 P.2d 1288 (Wash. Ct. App. 1981).

[55] McDonald v. McDonald, 608 N.Y.S.2d 477, 479-80, 196 A.D.2d 7, 11 (2d Dept 1994).

[56] *Id.* at 478, 196 A.D.2d at 9.

[57] *Id.* at 478-79, 196 A.D.2d at 9.

[58] *Id.* at 479-80, 196 A.D.2d at 11.

[59] *Johnson*, 851 P.2d at 787; *McDonald*, 608 N.Y.S.2d 477.

[60] *Belsito*, 67 Ohio Misc.2d at 58.

[61] *Id.* at 65-66.

[62] Pierce-Gealy, *supra* note 16, at 556.

[63] Colb, *supra* note 1.

sale."[64] Moreover, it is discriminatory to ignore the "special contributions" of gestational mothers simply because what they do is "uniquely female."[65] Ohio's genetic standard has been rebuked for reinforcing ancient, patriarchal notions of child-birth:

> This denigration can be traced as far back as Augustine, who viewed women as the "passive receptacle[s] of the male seed." Even Artistotle emphasized the male genetic contribution to reproduction over the female, finding the male seed "more divine than the base matter contributed" by women. Noted antisurrogacy feminist Gena Corea feels that the new reproductive techniques are "transforming the experience of motherhood and placing it under the control of men. Woman's claim to maternity is being loosened; man's claim to paternity strengthened."[66]

III. FERTILITY CLINIC ERROR

Both *McDonald* and *Johnson* adjudicated maternal rights in a voluntary surrogacy arrangement.[67] The New York and California courts, however, did not limit the scope of their decisions to voluntary surrogacy arrangements. Instead, *McDonald* and *Johnson* promulgated an overbroad intent test to determine the legal mother in *all* cases of assisted reproduction where genetics and gestation do not coincide in the same woman.[68] Consequently, despite distinctly different factual circumstances from that of a voluntary surrogacy agreement, the intent test applies even to a case where the fertility clinic implants an embryo into the uterus of a woman who *did not intend* to get *that* embryo.[69]

The New York courts recently adjudicated a case that is analogous to Susan Buchweitz's custody litigation. In *Perry-Rogers v. Fasano*, a white couple and a black couple were simultaneously undergoing in vitro fertilization procedures at the same clinic.[70] The fertility doctor mistakenly implanted embryos containing the black couple's genetic material into the white mother's uterus along with the white couple's embryos.[71] Nine months later, the white mother gave birth to two baby boys—one white and one black.[72] The white mother shared an undivided

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64 Pierce-Gealy, *supra* note 16, at 556.

65 Colb, *supra* note 1.

66 Pierce-Gealy, *supra* note 16, at 545 n.80 (citations omitted); *see also* Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescriptions: Religious Imagery of Woman as "Fetal Container" in the Law*, 10 J.L. & RELIGION 73, 78 n.27 (1993-94); Barbara Bennett Woodhouse, *"Who Owns the Child?" Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1043 (1992); GENA COREA, THE MOTHER MACHINE 289 (1985).

67 *Johnson*, 851 P.2d 776; *McDonald*, 608 N.Y.S.2d 477. "Voluntary surrogacy arrangement" refers to a situation where the intended mother contracts with a surrogate, compensating the surrogate for relinquishing her parental rights.

68 *Johnson*, 851 P.2d at 783; *McDonald*, 608 N.Y.S.2d at 479-80.

69 *See, e.g.*, Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (App Div. 1st Dept. 2000).

70 *Id.* at 21.

71 *Id.* at 22.

72 *Id.*

biological connection with the white child. The black child, however, had a white gestational mother and a black genetic mother.

The Appellate Division did not need to apply the intent test because the white mother relinquished custody of the black child to the black mother, and the white mother's visitation rights were the only issue before the court.[73] Yet the court parenthetically noted that if custody were actually litigated, under the intent test, the black genetic mother would be considered the legal mother.[74] The court asserted that the intent test favored the genetic parents because "[i]t was they who purposely arranged for their genetic material to be taken and used in order to attempt to create their own child, whom they intended to rear."[75]

The Appellate Division's analysis in *Perry-Rogers* is severely flawed. As previously stated, the New York courts adopted the "intent test" that California created in *Johnson*, which relied heavily on a law review article written by Professor Hill.[76] Specifically citing Professor Hill, the Supreme Court of California essentially embraced the proposition that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents* . . . . [T]he intended parents are the *first cause*, or the primary movers, of the procreative relationship."[77] Therefore, the *Perry-Rogers* court implicitly decided that the black/genetic mother's unconsented egg donation was a "but for" cause of the child's birth, presumably because the white/gestational mother could have been replaced by a surrogate.[78]

However, Professor Hill explicitly stated in his article that "[t]he active role of [the] parent as the creator of the child is lacking in the contribution of genetic donors . . . . The sperm or egg donor plays the passive role of providing the seed from which the child will develop. This contribution, in itself, cannot be a basis for a claim to parental rights."[79] The *Perry-Rogers* court failed to acknowledge that in cases of fertility clinic error,[80] gestational mothers have an equally compelling argument for legal maternal status under the intent test.

> One could argue that the gestational mother is the "but for" cause of the child's birth because she had the intent to have a child and was carrying out this intent by having an embryo implanted in her. Although the genetic mother's eggs played a necessary role in producing the embryo, they were not the "but for" cause of the pregnancy because the gestational mother

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[73] *Id.*

[74] *Perry-Rogers*, 715 N.Y.S.2d at 24.

[75] *Id.*

[76] Hill, *supra* note 36.

[77] *Johnson*, 851 P.2d at 782 (citing Hill, *supra* note 36, at 415) (italics in original and emphasis added).

[78] *Perry-Rogers*, 715 N.Y.S.2d at 24.

[79] Hill, *supra* note 36, at 391.

[80] "Fertility clinic error cases" refer to cases where the clinic mistakenly implants an embryo in the wrong woman.

> could have used someone else's genetic material [e.g. a different egg donor].[81]

The scope of the intent test should be narrowed to only apply to voluntary surrogacy arrangements because it is unsuitable for cases involving fertility clinic error.[82] First, the intent to raise children of assisted reproduction does not distinguish the competing maternal claims. In all voluntary surrogacy arrangements, there is an "intended mother" who engages the services of an egg donor or a gestational host. In cases of fertility clinic error, however, both women intend to raise the child; thus, the courts cannot justifiably identify a single intended mother to whom maternal rights should be solely awarded. The absence of an intended mother is demonstrated by the fact that the genetic parents did not consent to the use of their embryos and the gestational mother did not volunteer to be a surrogate.[83] Susan Buchweitz's custody dispute arose in 2003 after she was informed by the fertility clinic that the wrong embryo, consisting of the sperm and eggs of a couple who was trying to have its own biological children, was mistakenly implanted into her.[84] Refusing to apply the intent test to determine legal maternity, a California appellate court remarked:

> [E]ven if we were to invoke the concept of the intended mother here, which party would qualify? Both—and neither. [The birth mother] intended to be the mother created from an embryo implanted in her uterus that day at the clinic—but not *that* embryo, not one belonging to someone else. Indeed, her intent was to obtain an embryo created entirely from the egg and sperm of anonymous donors. [The genetic father's wife] intended to be the mother of the child created from this very embryo—but not at that time, and she did not intend for another woman to bear the child.[85]

Second, in cases of fertility clinic error, neither woman is the "first cause" of the child's birth within the reproductive relationship.[86] In voluntary surrogacy arrangements, the intended parents act first by soliciting a surrogate or an egg donor to produce their biological children.[87] However, in cases of fertility clinic error, the genetic and gestational mothers simultaneously manifest their intent to create the child. In *Perry-Rogers*, the doctor's mistake was made possible by a circumstance where both women underwent in vitro fertilization at the same time.[88] The two biological mothers were total strangers until the clinic notified them of its negligent conduct. Before the notification, neither woman had the capacity to influence or cause the other to take any steps toward the child's assisted procreative

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[81] Noble-Allgire, *supra* note 35, at 560.

[82] *See id.* at 569.

[83] Colb, *supra* note 1.

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

[85] *Id.* at 789 n.7 (rejecting the claim of the genetic father's wife for standing to dispute custody due to her lack of a biological connection to the child).

[86] *See Johnson*, 851 P.2d 776.

[87] *See id.* at 776; *see also McDonald*, 608 N.Y.S.2d 477.

[88] *See Perry-Rogers*, 715 N.Y.S.2d 19.

birth. Thus, "first cause" analysis is not amenable to cases of fertility clinic error because neither the genetic nor the gestational mother qualify as the first cause of the child's birth.

If the white/gestational mother had not relinquished custody, another potential issue would have been whether the genetic mother or the gestational mother was the "first cause" of childbirth in a case of fertility clinic error.[89] An issue in the landmark case *Pierson v. Post* was whether the first hunter to chase or the first hunter to kill acquired the ownership rights in a wild fox.[90] The Supreme Court of New York held that according to the rule of capture, the first hunter to mortally wound the fox established ownership rights to the animal.[91] The court's holding was motivated by an overriding policy objective to kill the most foxes and increase the state's food supply.[92] Today, *Pierson v. Post* stands for the proposition that policy considerations control judicial determinations of "who is first."[93] Following such logic, the relevant policies favor awarding custody to the gestational mother in cases of fertility clinic error, and do not justify the conclusion in *Perry-Rogers* that the genetic mother was the "first cause" of the child's birth.

IV. BRIGHT-LINE RULE FOR THE GESTATIONAL MOTHER

Susan Buchweitz's custody battle is an example of the negative effects of legal uncertainty: (1) she suffers daily anxiety over her precarious parental status, and (2) the uncertain outcome of her case dramatically increases litigation costs, forcing Susan to mortgage her home.[94] The intent test, as demonstrated in Section III, is not an effective means of determining legal motherhood in cases where the clinic implants an embryo in the wrong woman. Similarly, the alternative standard based on the best interests of the child fails to provide the court with substantial guidance in decision-making where both mothers present evidence that they are fit parents.[95]

On the other hand, whereas Ohio's per se genetic standard provides stability in the determination of parental rights,[96] it does not protect the sanctity of the mother-child relationship in cases where the fertility clinic mistakenly implants an embryo in the wrong woman. If the fertility clinic notifies the gestational mother that a mistake has been made shortly after the completion of the implantation procedure, she is more likely to abort the fetus than to become an involuntary

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89 *Id.*

90 Pierson v. Post, 3 Cai. 175 (Aug. Term 1805).

91 *Id.*

92 *Id.*; *see also* Anna Caspersen, *Comment, The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 365 (1996).

93 Brant Lee, *Great Property Cases: Teaching the Amistad*, 46 ST. LOUIS L.J. 775, 782 (2002).

94 Ostrom, *supra* note 2.

95 *Johnson*, 851 P.2d at 783.

96 *See Belsito*, 67 Ohio Misc. 2d at 58.

surrogate for the genetic parents.[97] If the fertility clinic delays notifying the gestational mother of the error until after child birth, as in Susan Buchweitz's case, the transfer of custody to the genetic parent is harmful to both the child and the birth mother because they have already grown attached to each other. Therefore, it is problematic to apply the genetic standard to fertility clinic error cases because either the birth mother is alienated from the fetus or the child's dependency on his or her caretaker is severed.

A bright-line rule immediately awarding custody to the gestational mother avoids such problems. In the special circumstance where a fertility clinic implants an embryo in the wrong woman's uterus, the courts should adopt an irrebuttable presumption giving legal maternity to the gestational mother [hereinafter "gestational bright-line rule"]. One limited exception to the rule should be established in cases where the genetic mother proves by clear and convincing evidence that the birth mother committed a felony or abused drugs or alcohol during the pregnancy. This narrow exception is intended to protect children from being raised by an unfit birth mother. As to cases of fertility clinic error, the gestational bright-line rule is a more suitable approach than any of the alternatives currently employed by the courts.

Furthermore, affirmative justifications support the gestational bright-line rule. Professor Hill cited five arguments favoring parental status of the gestational mother, but only two in favor of the genetic mother.[98] In defense of the genetic donor's priority, Professor Hill noted a "genetic-identity" claim, suggesting that "an important aspect of parenthood is the experience of creating another in one's own likeness. Part of what makes parenthood meaningful is the parent's ability to see the child grow and develop *and see oneself in the process of this growth.*"[99] Yet Hill rejected a "property-oriented argument based on a person's right to any products of his or her body" on the ground that "children are not property."[100] Property rights can be asserted in one's sperm or eggs but not in another person; thus, the genetic parents' property rights are extinguished after childbirth.[101]

Professor Hill concluded that the arguments recognizing legal maternity in the gestational mother were "much more compelling" than those of the genetic mother.[102] First, scientific evidence supports the existence of a maternal bond between the gestational host and the fetus.[103]

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[97] This note should not be interpreted to advocate a pro-life or anti-abortionist position. Nevertheless, it is still desirable for child custody law to avoid unnecessary abortions and place children with parents who want them.

[98] Hill, *supra* note 36, at 389-413.

[99] *Id.* at 389.

[100] *Id.* at 389, 391.

[101] *Id.* at 391.

[102] *Id.* at 394.

[103] Hill, *supra* note 36, at 397.

Second, the best interests of the child can be served by awarding custody to the gestational mother.[104] It is well-documented that if children do not establish a secure relationship with one parent figure early in childhood, they are more likely to suffer a distorted sense of self-identity as well as an inability to form meaningful relationships later on in life.[105] In the context of voluntary surrogacy arrangements, Professor Hill found that the best interests of the child argument does not enhance the genetic or gestational mother's claim to the child because the child could form a secure relationship with a biologically unrelated guardian.[106] In Susan Buchweitz's case, she was not notified of the fertility clinic error until ten months after the birth of the baby, and current custody proceedings may separate Susan and her three year-old son.[107] Awarding custody to the genetic parents would destroy the secure relationship that she has already established with her son, and would place the child at risk for future emotional and psychological harm. Thus, in the special circumstance of fertility clinic error, the best interests of the child standard favors gestational mothers more than genetic mothers.

Third, studies show that gestational mothers suffer severe separation anxiety that frequently induces depression when they are forced to relinquish their children.[108]

Fourth, the gestational mother deserves legal parenthood because of her acute physical involvement in bearing the child.[109]

> The reality and extent of the physical involvement of the gestational host in the procreative process is obviously paramount. The birth mother risks sickness and inconvenience during pregnancy. She faces the certain prospect of painful labor. She even risks the small but qualitatively infinite possibility of death. Throughout all of this discomfort and uncertainty, it is her body which remains the cradle for the growing fetus. By comparison, the physical involvement of the sperm donor is de minimis. While the egg donor physically risks more than the sperm donor, her level of physical involvement pales in comparison with that of the gestational host.[110]

In the context of voluntary surrogacy arrangements, Professor Hill stated that the "physical involvement" argument did not advance the gestational mother's claim to the child.[111] He reasoned that the physical involvement argument is akin to the gestational mother asserting a property right in the child, and she transferred that property right to the intended parents via contract.[112] Yet there is no surrogacy contract in cases where the fertility clinic mistakenly implants an embryo in the

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104 *Id.* at 389.
105 *Id.* at 402-03.
106 *Id.* at 403.
107 Colb, *supra* note 1.
108 Hill, *supra* note 36, at 405.
109 *Id.* at 408.
110 *Id.*
111 *Id.*
112 *Id.*

wrong woman's womb. Thus, the gestational mother could not possibly have transferred any quasi-property rights in the child to any other person. In cases of fertility clinic error, the physical involvement argument strongly favors recognizing the gestational host as the legal mother.

The fifth argument defending the gestational mother's claim to the child was discussed above in Section II and it condemns the genetic standard for commodifying women's wombs.[113]

The gestational bright-line rule is justified by the lack of an alternative legal framework that is appropriate for cases of fertility clinic error, and the fact that the gestational mother has a stronger claim for legal maternity than the genetic mother. Further support for the gestational bright-line rule derives from the custodial element of the birth mother's reproductive function. Before the commencement of parental rights litigation, the gestational mother will invariably have custody of the fetus or the newborn child depending on when the complaint is filed. Since the gestational mother already has custody of the child, the law should not rear its ugly head and disturb a favorable situation. The judiciary should not intervene when the most optimal outcome is achieved by letting nature run its course. In addition to producing better results, the gestational bright-line rule improves judicial economy by requiring courts to dismiss the genetic parents' custody petition. The one exception to the gestational bright-line rule, i.e., pleading and proving that the birth mother committed a felony or abused alcohol or drugs during the pregnancy, is the only way the genetic mother can survive a motion to dismiss and get an evidentiary hearing.

V. CONSTITUTIONAL CHALLENGE

Although the gestational bright-line rule represents the best approach for fertility clinic error cases, states may be reluctant to implement the rule because it is subject to two constitutional challenges under the 14th Amendment. First, assuming that the parental liberty interest extends from parents of children born from sexual reproduction to parents of children born from assisted reproduction, genetic parents may argue that the gestational bright-line rule violates their procedural and substantive due process rights. Second, the genetic father may argue that the gestational bright-line rule denies him equal protection because he is physically unable to gestate a fetus. Nevertheless, the gestational bright-line rule would survive both of these constitutional challenges.

The dismissal of the custody petition of genetic parents, as necessitated under most circumstances by the gestational bright-line rule, precludes the defense of their parental liberty interest at an evidentiary hearing. In other words, genetic providers may argue that their fundamental parenting rights cannot be terminated until they have had their day in court. In his dissenting opinion in *Michael H.*, Justice Brennan asserted that procedural due process does not require a particular

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[113] Hill, *supra* note 36, at 409-10. *See supra* Section II and accompanying notes 35-67.

substantive outcome, but it does require an evidentiary hearing where a litigant has a fair chance at prevailing on his or her constitutional claim.[114] Justice Brennan added that procedural due process is violated where a conclusive presumption terminates a constitutionally protected interest.[115] According to Justice Brennan's rationale, the gestational bright-line rule would deprive the genetic parents of procedural due process because it conclusively terminates the genetic parents' fundamental right to parent their biologically related child.[116]

The Supreme Court, however, has consistently denied procedural due process protection to biological parents in parental rights termination proceedings pursuant to a three-factor balancing formula.[117] This three-factor balancing formula considers the following criteria: (1) the private interests affected by the proceedings; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure.[118] The Supreme Court applied the balancing test in *Lehr v. Robertson*, and held that the Due Process Clause did not require a New York trial court to give the biological father notification that his child was being adopted by the husband of his child's mother.[119] Similarly, in *Quilloin v. Walcott*, the Supreme Court also upheld the constitutionality of a Georgia statute that authorized the adoption of a child born out of wedlock despite the natural father's objection.[120] The Supreme Court denied procedural due process protection to the biological father in *Quilloin* based on the following balancing analysis:

> We have little doubt that the Due Process Clause would be offended "[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption . . . w[as] in the "best interests of the child."[121]

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114 *Michael H.*, 491 U.S. at 147 (Brennan, J., dissenting).

115 *Id.* at 151.

116 *See id.*

117 *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1977); *see also Lehr*, 463 U.S. at 256.

118 Santosky v. Kramer, 455 U.S. 745, 754-57 (1982); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

119 *Lehr*, 463 U.S. at 256, 263, 265.

120 *Quilloin*, 434 U.S. at 255.

121 *Id.* (citations omitted).

In *Quilloin*, the Georgia adoption statute satisfied the "private interests" factor because permitting adoption by the child's mother's husband established legal recognition of their family unit; thus, the statute benefited every relevant private interest except that of the natural father.[122] Furthermore, the Supreme Court found that Georgia's adoption statute sufficiently safeguarded against the risk of error because it required a judicial determination that the adoption preserved the "best interests of the child."[123] In *Stanley v. Illinois*, however, the Supreme Court invalidated a statute that made children of unwed parents wards of the state upon the death of the mother.[124] "The Court held that the Due Process Clause was violated by the automatic destruction of the custodial relationship without giving the father any opportunity to present evidence regarding his fitness as a parent."[125] The biological father in *Stanley* was entitled to procedural due process protection because: (1) removing the children from the father's custody negatively affected the interests of the children and the father who wanted to live together as a family; (2) the statute conclusively presumed that all unwed fathers were unfit parents, creating a high risk of error in cases where the unwed father cared for his children; and (3) the government had a de minimis interest in removing children from their parents' custody.[126]

Justice White's dissenting opinion in *Lehr* criticized the three-factor balancing formula and argued for stronger procedural protections of the parental liberty interest in parental rights termination proceedings.[127]

> The majority posits that the intangible fibers that connect parent and child . . . are sufficiently vital to merit constitutional protection *in appropriate cases.* It then purports to analyze the particular facts of this case to determine whether appellant has a constitutionally protected liberty interest. We have expressly rejected that approach. In *Board of Regents* v. *Roth*, we stated that although "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations . . . to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake . . . to see if the interest is within the Fourteenth Amendment's protection . . ." The "nature of the interest" at stake here is the interest that a natural parent has in his or her child, one that has long been recognized and accorded constitutional protection. We have frequently stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection.[128]

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122 *Id.*

123 *Id.*

124 Stanley v. Illinois, 405 U.S. 645, 649 (1972).

125 *Lehr*, 463 U.S. at 259 (citing *Stanley*, 405 U.S. at 654-55).

126 *Stanley*, 405 U.S. at 657-58.

127 *Lehr*, 463 U.S. at 269-70.

128 *Id.* (citations omitted).

Justice White's and Justice Brennan's dissenting opinions represent a more expansive scope of due process protection, while the majority's balancing test restricts procedural due process protection of fundamental parenting rights.[129]

In his plurality opinion in *Michael H.*, Justice Scalia provided a third approach to procedural due process protection of biological parents in parental rights termination proceedings. In *Michael H.*, a biological father claimed that California's irrebuttable presumption of paternity in favor of the mother's husband deprived him of procedural due process because it terminated his parental liberty interest without an evidentiary hearing.[130] Justice Scalia rejected the father's claim by holding that irrebuttable presumptions were analyzed under an equal protection framework and that they were not subject to procedural due process challenges.[131]

> This Court has struck down as illegitimate certain "irrebuttable presumptions." Those holdings did not, however, rest upon procedural due process. A conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate. But the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not. In this respect there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father. Both rules deny someone in Michael's situation a hearing on whether, in the particular circumstances of his case, California's policies would best be served by giving him parental rights. Thus, as many commentators have observed, our "irrebuttable presumption" cases must ultimately be analyzed as calling into question not the adequacy of procedures but—like our cases involving classifications framed in other terms—the adequacy of the "fit" between the classification and the policy that the classification serves. We therefore reject Michael's procedural due process challenge . . . [132]

Accordingly, under the same rationale, Justice Scalia would reject the procedural due process challenge of the genetic parents.[133]

The challenge to the gestational bright-line rule would not survive even if the Court applied the three-factor balancing formula. The gestational bright-line rule would satisfy the "private interests" prong because the gestational mother avoids separation anxiety and the child is afforded an opportunity to develop a secure

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[129] *Id.*; *see also Michael H.*, 491 U.S. at 147-51; *Santosky*, 455 U.S. at 754-57.

[130] *Michael H.*, 491 U.S. at 113.

[131] *Id.* at 120-21.

[132] *Id.* (citations omitted).

[133] *See id.* Although Justice Scalia's plurality opinion was only joined by one other justice, his procedural due process analysis might have precedential value because it appears that five justices agreed with it, including Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy and Justice Stevens.

relationship with the only mother he or she has known since birth. The genetic parents' interests are the only ones that are adversely affected by the gestational bright-line rule, but their interests are trumped by the best interests of the child.[134]

The gestational bright-line rule would also not be invalidated under the "risk of error" prong. The rule is analogous to the Georgia statute in *Quilloin* that permitted adoption by the mother's husband over the natural father's objection, and it is distinguishable from the statute in *Stanley* that automatically removed custody from unwed fathers upon the mother's death.[135] Supreme Court decisions have shown that the absence of an evidentiary hearing, while fatal to statutes that remove custody from the natural parents and make children wards of the state, does not invalidate statutes that award custody to at least one of the biological parents.[136]

Finally, there is a sufficient countervailing government interest supporting the use of the gestational bright-line rule. The irrebuttable presumption in favor of the birth mother serves the government interest of non-involvement. In cases of fertility clinic error, the child is better off with the birth mother and government intrusion is unnecessary and undesirable.

For all the reasons above, the genetic parents' procedural due process challenge will fail, but the genetic parents may still have grounds to challenge the gestational bright-line rule based on their substantive due process right to raise their biological child. For such a claim to succeed, the Court must first recognize that a parent's liberty interest in child-rearing extends from parents of children produced through sexual intercourse to parents of children produced through assisted reproduction. Assuming genetic parents possess a liberty interest in raising their biological child, the next question involves the standard of judicial review. Supreme Court decisions, however, have been unclear as to the level of scrutiny to apply to alleged infringements of the liberty interests of parents.

States that adopt the gestational bright-line rule would favor judicial review based on rational basis scrutiny. In 1923, the seminal Supreme Court case *Meyer v. Nebraska* established a liberty interest in raising one's biological children.[137] In *Meyer*, the Supreme Court used language suggesting that rational basis scrutiny would be the applicable standard of review.[138] "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is *arbitrary or without reasonable relation to some purpose* within the competency of the State to effect."[139] Two years later, the Supreme Court invalidated an Oregon statute for interfering with the parent's liberty interest in child-rearing, and the Court stated "rights guaranteed by the Constitution may not be abridged by legislation which has no *reasonable relation*

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134 *See Quilloin*, 434 U.S. at 255.

135 *Id.*; *see also Stanley*, 405 U.S. at 655.

136 *See Quilloin*, 434 U.S. at 255; *see also Stanley*, 405 U.S. at 657-58; *Lehr*, 463 U.S. at 265.

137 *Meyer*, 262 U.S. at 400.

138 *Id.*

139 *Id.* (emphasis added).

to some purpose within the competency of the State."[140] Under rational basis scrutiny, the state will be able to discharge its burden of proof by providing any reasonable state purpose for the gestational bright-line rule, such as assuring a biological nexus between mother and son. The court will accept any reasonable state purpose, whether it is the actual purpose or not.[141] Accordingly, the gestational bright-line rule would survive rational basis review.

On the other hand, the genetic parents would favor strict scrutiny as the applicable standard of review of the state's infringement upon their parental liberty interest. First, the genetic parents may argue that strict scrutiny is the applicable standard of review for *all* substantive due process rights. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by [compelling] state interests and is closely tailored to effectuate only those interests."[142] However, because different liberty interests receive varying levels of protection, it is not difficult for proponents of the gestational bright-line rule to refute this argument. For example, the Supreme Court held in *Planned Parenthood v. Casey* that a woman's liberty interest in abortion was not protected by strict scrutiny; instead, a state may constitutionally impose limited restrictions on a woman's right to abortion as long as the restriction accomplishes a *legitimate* state purpose.[143] Thus, rational basis review is applied to unsubstantial restrictions on a woman's liberty interest in abortion, and the case shows that some liberty interests are not protected by strict scrutiny.

Additionally, another possible argument for the application of strict scrutiny to the gestational bright-line rule is found in prior parental liberty interest cases, in which there were some references to the appropriate standard of judicial review. For example, in his concurring opinion in *Troxel v. Granville*, Justice Thomas wrote:

> I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce v. Society of Sisters* holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality . . . recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply *strict scrutiny* to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.[144]

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[140] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (emphasis added).

[141] Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487-88 (1955).

[142] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[143] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

[144] Troxel v. Granville, 530 U.S. 57, 65 (2000) (emphasis added and citations omitted).

Even under strict scrutiny, however, the Supreme Court may likely decide that the gestational bright-line rule is constitutionally valid. Section IV discussed the myriad of reasons that favor awarding custody to the gestational mother in cases of fertility clinic error. Some of these reasons included: protecting the sanctity of the mother-child relationship, establishing a secure relationship with a parent figure early in childhood, avoiding future psychological disorders that affect the child's sense of self-identity and ability to form new relationships, as well as preventing the birth mother from sustaining heightened separation anxiety and depression that results from relinquishing the child.[145] If the Court views all of these factors in aggregate, the compelling state interest of a gestational bright-line rule is particularly persuasive.

In addition to enforcing a compelling governmental objective, the gestational bright-line rule is narrowly tailored. A classification is narrowly tailored when there is a close fit between the state interest and the classification used to enforce that interest.[146] In cases where the fertility clinic implants an embryo in the wrong woman, application of the gestational bright-line rule achieves the governmental objectives discussed above.[147] Thus, the gestational bright-line rule is narrowly tailored to the special circumstance of fertility clinic error.

Under this analysis, the gestational bright-line rule survives even strict scrutiny review. In *Gratz v. Bollinger*, the Supreme Court upheld the constitutionality of the affirmative action program at the University of Michigan Law School by holding that achieving a critical mass of racial diversity qualified as a compelling state interest.[148] *Gratz* shows that strict scrutiny is not automatically fatal to state policies; like the affirmative action program in *Gratz*, the gestational bright-line rule can survive strict scrutiny. Governmental objectives underlying the gestational bright-line rule should satisfy strict scrutiny because they are equally as important as racial diversity.[149] A state's compelling interests in protecting child development as well as the birth mother's mental health are narrowly tailored to the special circumstance of fertility clinic error; therefore, the state's objectives trump the genetic parents' substantive due process rights in parenting their biologically related child.

In addition to the due process challenge, a genetic father may have grounds for an equal protection challenge as the gestational bright-line rule deprives him of equal protection because he is physically unable to gestate a fetus. However, this constitutional challenge would fail for two reasons. First, claims of gender-based discrimination are subject to intermediate scrutiny, a lower standard of judicial

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145 *See supra* Section IV.

146 *Troxel*, 530 U.S. at 333.

147 *See supra* Section IV.

148 Gratz v. Bollinger, 539 U.S. 306, 327-28 (2003).

149 *See id.*

review than that under strict scrutiny.[150] As opposed to proving under strict scrutiny that the gestational bright-line rule is narrowly tailored to a compelling state interest, the state is only required to prove under intermediate scrutiny that the gestational bright-line rule is substantially related to an important government objective.[151] Therefore, if the gestational bright-line rule survives strict scrutiny in a substantive due process challenge, it is exceedingly likely to survive intermediate scrutiny in an equal protection challenge.

Second, the Supreme Court has repeatedly upheld state laws that have resulted in disparate impact between the sexes because of real differences.[152] In gender-based equal protection jurisprudence, the Supreme Court has struggled to draw the line between real physiological differences and socially-constructed differences that reinforce gender stereotypes.[153] Gender classifications based on real differences are consistent with the Equal Protection Clause, but gender classifications based on socially-constructed differences are not.[154] In *U.S. v. Virginia*, the Supreme Court struck down a Virginia policy that categorically excluded women from the state military academy on the ground that it was based on negative gender stereotypes that women were incompetent and inferior.[155] The Supreme Court found that there was no credible evidence to suggest that women were physically incapable of enduring the military academy's rigorous training process.[156]

Yet, in *Michael M. v. Sonoma County*, the Supreme Court upheld a statutory rape law that criminalized sexual intercourse between an adult male and a minor female, but did not criminalize sexual intercourse between an adult female and a minor male.[157] The Supreme Court rejected the equal protection challenge because the statutory rape law was based on real differences between the sexes.[158] The Supreme Court found that the purpose of statutory rape was to prevent illegitimate pregnancy, and that this was an important state interest.[159] "[T]he risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes."[160]

The gestational bright-line rule would be upheld in the face of an equal protection challenge because its adverse effect on the genetic father is based on real differences between the sexes. The rule does not deny custody to the genetic father

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150 Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that gender-related classifications must serve important governmental objectives and must be substantially related to achievement of those objectives).

151 Zablocki v. Redhail, 434 U.S. 374, 388 (1978); *Craig*, 429 U.S. at 197.

152 Michael M. v. Sonoma County Super. Ct., 450 U.S. 464, 471-73 (1981).

153 *See id.; see also* U.S. v. Virginia, 518 U.S. 515 (1996).

154 *See Michael M.*, 450 U.S. at 471-73; *see also Virginia*, 518 U.S. at 533-34 (1996).

155 *Virginia*, 518 U.S. at 533-34.

156 *Id.* at 540-41.

157 *See Michael M.*, 450 U.S. at 475-76.

158 *Id.* at 471-73.

159 *Id.*

160 *See id.* at 473.

on the basis of socially constructed stereotypes, such as "women are better parents than men." Rather, it denies custody to the genetic father in cases of fertility clinic error because it achieves compelling state interests.[161] The fact that the father is adversely impacted by this rule is obviously based on real differences between the sexes—he cannot gestate a fetus. The gestational bright line rule is analogous to the statutory rape law upheld in *Michael M.* and distinguishable from the Virginia's policy of gender segregation in *Virginia.*[162] Thus, the gestational bright-line rule passes constitutional muster.

CONCLUSION

States should adopt the "gestational bright-line rule," which refers to an irrebuttable presumption of legal maternity for the birth mother where a fertility clinic mistakenly implants the wrong embryo in her uterus. With respect to cases of fertility clinic error, the gestational bright-line rule is superior to its alternatives, i.e., the intent test, the best interests of the child standard, and the genetic standard. Moreover, important policy considerations support the gestational bright-line rule, such as helping the child form a secure relationship with a parent figure early in childhood and preventing the birth mother from suffering heightened anxiety disorder if she is forced to relinquish custody. The gestational bright-line rule passes constitutional muster and leads to an optimal outcome in cases like those of Susan Buchweitz, who would be awarded full custody of her son.

The advantages of the gestational bright-line rule are fully realized when it is compared to the California state law that currently governs the Buchweitz case. Section 7650 of the Uniform Parentage Act provides statutory standing to "any interested person . . . to determine the existence or nonexistence of a mother and child relationship."[163] California appellate courts have held that women who are biologically unrelated to the child do not have standing as an "interested person" under section 7650.[164] Yet, Susan Buchweitz, the birth mother, and Susan's adversary, the genetic mother, both qualify for standing to contest maternity under section 7650 because they both share a biological relationship with the child.[165]

Section 7610(a) of the Uniform Parentage Act provides that a maternal relationship can be established "[b]etween a child and the natural mother . . . by proof of her having given birth to the child."[166] The statutory language of subsection (a) appears to favor gestational mothers because it expressly states that the event of childbirth identifies the "natural mother" and it does not have an

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[161] *See supra* Sections IV and V.

[162] *See Michael M.*, 450 U.S. at 464; *see also Virginia*, 518 U.S. 515.

[163] CAL. FAM. CODE § 7650 (Deering 2005).

[164] *Id.*; *see also Robert B.*, 135 Cal. Rptr. 2d at 788; West v. Super. Ct., 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997).

[165] CAL. FAM. CODE § 7650 (Deering 2005); *see also Robert B.*, 135 Cal. Rptr. 2d at 788.

[166] CAL. FAM. CODE § 7610 (Deering 2005).

equivalent provision for egg donors.[167] However, the California Supreme Court decided that by using the phrase "natural mother," the legislature contemplated that a child will have only one natural mother.[168] The California Supreme Court specifically designed the "intent test"[169] to identify the "natural mother" under the Uniform Parentage Act when two women offer evidence of a biological connection to the child.[170]

Since Susan Buchweitz's custody case involves fertility clinic error, the intent test is an unsuitable method for analyzing the parental claims.[171] The appellate courts will struggle to identify a single "intended mother" because Susan did not volunteer to be a surrogate and the genetic mother did not consent to egg donation;[172] in other words, both mothers intended to have the child and to raise the child. The inability of the intent test to effectively resolve cases of fertility clinic error introduces an unacceptable element of uncertainty into Susan's custody litigation.

Furthermore, California statutes and case law are unclear as applied to the facts of Susan's case; consequently, attorneys on both sides are encouraged to litigate extensively at their clients' expense. As discussed in the introduction, Susan's legal bills escalated to such an unreasonable level that she was forced to mortgage her home in order to make the payments.[173] The gestational bright-line rule would add certainty to Susan's custody dispute, and would therefore, dramatically reduce litigation costs. The attorney representing the genetic mother would advise his client to drop the custody lawsuit because it will lose under the gestational bright-line rule.

Unfortunately for Susan, she might lose custody of her son to the genetic parents if a California appellate court decides that the genetic mother was in fact the intended mother. Conversely, Susan may retain custody of her child if an appellate court determines that she was the intended mother. Even if Susan maintains custody of her son, the trial court's order to award the genetic father visitation rights will most likely be affirmed. The California legislature has declared a compelling state interest in "establishing paternity for all children" because "knowing one's father is important to a child's development."[174] California statutes direct the court to "grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interests of the child."[175] The statutory presumptions favoring paternity and visitation by natural

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167 *Id.*

168 *Id.*; *see also Johnson*, 851 P.2d at 795.

169 *See supra* Section II.

170 *Johnson*, 851 P.2d at 795.

171 *See supra* Section III.

172 *Johnson*, 851 P.2d at 782.

173 Ostrom, *supra* note 2.

174 CAL. FAM. CODE § 7570(a) (Deering 2005); *see also Robert B.*, 135 Cal. Rptr. 2d at 790.

175 CAL. FAM. CODE § 3100(a) (Deering 2005).

parents suggest that it is unlikely any appellate court hearing will reverse the trial court's order for twice-weekly visits by the genetic father in Susan's case.[176]

Uncertainty pervades Susan's custody litigation because it is difficult for a court to apply the intent test to a case of fertility clinic error. Therefore, Susan will be fortunate if she retains custody of her son on appeal, and the inconvenience posed by the genetic father's visitation would constitute a minor sacrifice on her part. Susan's case illustrates the need for statutes that clearly determine custody of children born from reproductive technology because the absence of such legislation only benefits family law litigators at the parents' expense.

[176] *See* CAL. FAM. CODE § 7570 (Deering 2005); *see also* CAL. FAM. CODE § 3100 (Deering 2005).