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Can Gestation Ground Parental Rights?[*]

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Abstract: In law and common-sense morality, it is generally assumed that adults who meet a minimum threshold of parental competency have a presumptive right to parent their biological children. But what is the basis of this right? According to one prominent account, the right to parent one's biological child is best understood as being grounded in an intimate relationship that develops between babies and their birth parents during the process of gestation. This paper identifies three major problems facing this view—the explanatory, adjudicatory, and theoretical problems—and explains how an alternative autonomy-based account is capable of avoiding them.

Keywords: gestation; parental rights; biological parenthood; surrogacy; procreative ethics; Anca Gheaus

1. Introduction

In law and common-sense morality, it is generally assumed that adults who meet a minimum threshold of parental competency have a presumptive right to parent their biological children. But what is the basis of this right? Providing an answer to this question is necessary not only to establish the legitimacy of biological parental rights, but also to adjudicate practical controversies in which there are multiple conflicting claims over who is entitled to parent a newborn child, including (but not necessarily limited to) gestational surrogacy disputes. In this paper, I critically examine one answer that has recently become prominent in the philosophical literature, namely, Anca Gheaus's argument that the right to parent one's biological child is grounded in an intimate relationship that develops between babies and their birth parents during the process of gestation.[1] I begin in Part 2 by outlining the two dominant accounts of the right to parent and showing how

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[1] Anca Gheaus. "The Right to Parent One's Biological Baby," *Journal of Political Philosophy*, 20(4) (2012), pp. 432-455, and "Biological Parenthood: Gestational, Not Genetic," *Australasian Journal of Philosophy*, 96(2) (2018), pp. 225-240.

neither has the resources to explain why adults who have a right to parent in general also have a special right to parent their biological children. I then turn in Parts 3 and 4 to outline and critique Gheaus's gestational account of this right, arguing that it faces three serious problems that ultimately discredit it as a tenable account: one relating to its *explanatory* function, or its ability to explain why adults who have a right to parent in general also have a special right to parent their biological children; one relating to its *adjudicatory* function, or its ability to resolve cases in which there are multiple conflicting claims over who gets to parent a newborn child; and one relating to its *theoretical* basis in the interest theory of rights. Finally, in Part 5, I show how an alternative autonomy-based approach toward the acquisition of parental rights is capable of avoiding these problems. According to the General Autonomy Principle, the right to parent one's biological child is not rooted in any specific feature of the biological relationship, but rather in a more general right to non-interference in one's justice-respecting projects. This right often protects the rights of gestators to parent the children they have gestated, but not necessarily, and not for reasons that make any essential reference to biological connectedness. If sound, this alternative account has important theoretical and practical implications, suggesting among other things that the dominant approach toward surrogacy dispute resolution is currently misguided.

2. Parental Rights and the Baby Redistribution Problem(s)

The common assumption that adults have a presumptive right to parent their biological children depends on the truth of two premises:

(1) adults are generally entitled to stand in authoritative relationships with respect to children; and

(2) adults have a special entitlement to enter into those relationships with children to whom they are biologically—either genetically or gestationally—related.

I will demonstrate in this section that while contemporary accounts of parental rights are able to substantiate premise (1), they are ill-equipped to substantiate premise (2). This will highlight the need for a supplementary justification of the right to parent one's biological child, which Gheaus's gestational account promises to provide.

The contemporary literature on the morality of parenthood offers two main accounts of the justification of parental rights: *child-centered* accounts, which justify parental rights solely with reference to the interests of children[2]; and *dual-interest* accounts, which justify parental rights with reference to the interests of children as well as adults.[3] Child-centered accounts begin with the observation that children, as not yet fully-formed persons, tend to be poor guardians of their own interests. Left to their own devices, they usually make decisions emotionally and impulsively, and they will often forgo their long-term interests in favor of more immediate desires. In order to develop into healthy adults, then, children require the help of paternalistic caretakers who can make decisions on their behalf and ensure that their long-term interests are being served. Because adults normally require a certain degree of authority over children in order to perform this role effectively, serving as a child's caretaker is also thought to ground a number of limited and conditional rights over that child. Samantha Brennan and Robert Noggle describe this view in the following way:

[2] For child-centered approaches toward the justification of parental rights, see David Archard. *The Family: A Liberal Defense* (Basingstoke: Palgrave MacMillan, 2010), esp. chapter 2; Jeffrey Blustein. *Parents and Children: The Ethics of the Family* (New York: Oxford University Press, 1982); Samantha Brennan and Robert Noggle. "The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice," *Social Theory and Practice*, 23(1) (1997), pp. 1-26; Robert Noggle. "Special Agents: Children's Autonomy and Parental Authority" in David Archard and Colin Macleod (eds.) *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2002); Sarah Hannan and Richard Vernon. "Parental Rights: A Role-Based Approach," *Theory and Research in Education,* 6(2) (2008), pp. 173-189; and Peter Vallentyne. "The Rights and Duties of Childrearing," *William and Mary Bill of Rights Journal,* 11(3) (2003), pp. 991-1009.

[3] For dual-interest approaches toward the justification of parental rights, see Harry Brighouse and Adam Swift. "Parents' Rights and the Value of the Family," *Ethics,* 117(1) (2006), pp. 80-108, as well as *Family Values: The Ethics of Parent-Child Relationships* (Princeton: Princeton University Press, 2014), esp. chapter 4; Matthew Clayton. *Justice and Legitimacy in Upbringing* (Oxford: Oxford University Press, 2006), chapter 2; Colin Macleod. "Parental Responsibilities in an Unjust World" in David Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children* (Oxford: Oxford University Press, 2010), and "Parental Competency and the Right to Parent" in Sarah Hannan, Samantha Brennan, and Richard Vernon (eds.) *Permissible Progeny? The Morality of Procreation and Parenting* (New York: Oxford University Press, 2015); and Ferdinand Schoeman. "Rights of Children, Rights of Parents, and the Moral Basis of the Family," *Ethics*, 91(1) (1980), pp.6-19.

> Children are immature in a number of ways. Their limited cognitive powers and experience make them prone to mistakes in judging their own interests and how to further them. The healthy mental, physical, and emotional development of children seems to require that someone have the responsibility to nurture and protect the child, and the authority to exercise her own judgment in doing so on a day-to-day basis. Given that someone must do these things, and that children are often too immature to do so, it seems natural to assign parents the right to do so.[4]

One of the attractive features of child-centered accounts is that they fit with common understandings about the conditionality of parental rights. If parental rights are justified indirectly, as it were, as necessary conditions of fulfilling antecedent parental duties, then this explains why parents forfeit their rights when those duties go unfulfilled, e.g. through neglect or abuse. However, while child-centered accounts are well equipped to explain the conditionality of parental rights, their sole focus on children's interests also makes them vulnerable to a well-known objection, which I will refer to here as the *baby redistribution problem*. As Harry Brighouse and Adam Swift put it,

> [I]f all that matters is ensuring that children's interests are met as well as possible, then children should be distributed to those people judged most likely to raise them best. If parents' interests play no justificatory role [in an account of parental rights], what would there be to impugn a well-intentioned and efficient government agency that distributed the children, who under a laissez-faire system would be reasonably well-raised, to adults who would be better parents, thus leaving some adequately good parents childless?[5]

The baby redistribution problem suggests that while child-centered accounts provide a coherent justification of the rights *of* parents, or the rights of caretakers to exercise discretion over how they

[4] Brennan and Noggle, "Children's Rights, Parents' Rights, and Family Justice," 4.
[5] Brighouse and Swift, "Parents' Rights and the Value of the Family," 86.

discharge their parental duties, they do not provide a justification of the right *to* parent, or the right of adults to enter into authoritative relationships with children in the first place. And because they do not appeal at all to adults' interests in grounding the right to parent, child-centered accounts are consistent with redistributing children to adults who are best able to serve their interests, including redistributing babies away from their procreators to more competent adoptive parents.

Of course, proponents are likely to respond here that child-centered accounts *do* in fact have the resources to solve the baby redistribution problem. For instance, if the babies are old enough to have formed emotional attachments to their biological parents, then redistributing them to more competent adoptive parents is likely to harm them by imposing separation costs and undermining their interest in continuity of care.[6] Even if the proposal was to redistribute babies at or shortly after birth, there may nevertheless be child-centered reasons against doing so. For example, philosophers like David Velleman and Bernard Prusak have argued that children have an interest in being parented by their biological progenitors that is derived from their interest in having access to their ancestral history or the unique brand of parental love that is made possible in the 'given' relationship between procreator and progeny.[7] If these arguments are correct, they seem to supply us with reasons against baby redistribution.

Notice, however, that even if these arguments *are* correct—though there are good reasons to be suspicious of them[8]—they do not account for the more fundamental intuition that the baby redistribution problem seeks to pump, which is that redistributing babies away from their custodial parents is unfair *to the parents*, in addition to being potentially unfair to the children. While children have an important interest in having a paternalistic caretaker, adults also have an important interest

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[6] Anne L. Alstott discusses the developmental importance of continuity of care in *No Exit*: *What Parents Owe Their Children and What Society Owes Parents* (Oxford: Oxford University Press, 2004), esp. chapters 1 and 2.

[7] J. David Velleman. "Family History," *Philosophical Papers*, 34(3) (2005), pp. 357-378, and Bernard Prusak. *Parental Obligations and Bioethics*: *The Duties of a Creator* (New York: Routledge, 2013), esp. chapter 1.

[8] For a persuasive account of these reasons, see Sally Haslanger's critique of Velleman in "Family, Ancestry and Self: What is the Moral Significance of Biological Ties?" in *Resisting Reality: Social Construction and Social Critique* (Oxford: Oxford University Press, 2012), chapter 5.

in the type of paternalistic caretaking that is performed in the context of parent-child relationships.[9] Brighouse and Swift identify four features of this type of relationship that combine to make it both welfare-generating and non-substitutable, and hence distinctively valuable for adults.[10] First, unlike relationships between adults, the relationship between parents and children is structurally unequal, with children being especially vulnerable to and dependent on the guidance of their parents. Second, the relationship between parents and children is also unlike relationships between adults in that it is always characterized by a type of legitimate paternalism, wherein parents are required to govern children in ways that will promote their immediate and long-term interests. Third, parent-child relationships are also unique in the sense that children, unlike participants in other types of relationships, are not capable of exiting the relationship without significant cost to themselves. Finally, and most importantly, parent-child relationships are also distinct in the unique brand of intimacy they make possible, wherein the "love that one receives from one's children…especially in the early years, is spontaneous and unconditional and, in particular, outside the rational control of the child."[11] According to Brighouse and Swift, adults have a strong self-regarding interest in being able to occupy a relationship characterized by these features:

> The [parental] role enables [parents] to exercise and develop capacities the development and exercise of which are, for many (though not, certainly, for all), crucial to their living fully flourishing lives. Through exercising these capacities in the specific context of the intimately loving parent-child relationship, a parent comes to learn more about herself, she comes to develop as a person, and she derives satisfaction that otherwise would be unavailable.[12]

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[9] While I focus here on Brighouse and Swift's intimacy-based account of this interest, it is important to note that it is not the only account available in the literature. On the contrary, Colin Macleod and Matthew Clayton have put forth alternative accounts based on, respectively, our interest in creative self-extension and pursuing our own conception of the good. See Macleod, "Parental Competency and the Right to Parent," 229-236, and Clayton, *Justice and Legitimacy in Upbringing*, 54-57.

[10] See Brighouse and Swift, "Parents' Rights and the Value of the Family," 91-96, and *Family Values*, 87-93.

[11] Brighouse and Swift, "Parents' Rights and the Value of the Family," 93.

[12] Ibid., 95.

Once we account for the distinctive interest that many adults have in parenting, we can start to see why baby redistribution might be an injustice to parents as well as to children. So long as adults meet a minimal threshold of parental adequacy, their strong interest in having intimate relationships with children weighs in favor of an entitlement to maintain those relationships uninterrupted, even if there are other adults available who might do a better job of serving the child's interests. Importantly, this entitlement is *fundamental* in the sense that it is grounded directly in the parent's, rather than the child's, interests.

The dual-interest account presented by Brighouse and Swift explains why adults have a fundamental right to parent *in general*, and why it would therefore be unjust for the state to redistribute children from what it deems less suitable to what it deems more suitable parents. However, it does not on its own explain how adults acquire rights to parent *particular* children, and may still be vulnerable to other forms of baby redistribution. Gheaus makes this point by imagining a scenario of 'baby scarcity' in which the number of adults who wish to be parents exceeds the number of children who are available to be parented.[13] In this type of scenario, how should we determine who gets to parent which child? The standard response is to claim that so long as they meet the minimal threshold of parental adequacy, adults are entitled to parent their biological children. Notice, however, that Brighouse and Swift's account does not in fact support such a right. Because their account of the value of parenting does not depend on any biological connection between parent and child, adults who do not have biological children have the same moral interest in parenting as adults who do have biological children, and hence the same fundamental right to parent.[14] Thus, Gheaus imagines two possibilities for redistributing the babies, both of which are consistent with Brighouse and Swift's account:

[13] Gheaus, "The Right to Parent One's Biological Baby," 438-440.
[14] As Brighouse and Swift put it, "Everything we have argued would apply in a world in which children were produced by storks." See Brighouse and Swift, 2014, 104.

First, the babies may be redistributed on the basis of parental competence without actually violating anybody's right to parent. If there are more prospective parents than there are children available to be parented, then the situation is simply one in which it is impossible to satisfy everybody's right to parent; and if all adults have an equal right to parent in general, then moral considerations other than the right to parent must be used to determine who gets to parent which child. Gheaus suggests that parental competence may be one such consideration, given that children have a morally relevant interest in having better rather than less good parents.

However, if redistributing babies on the basis of parental competence seems unfair—perhaps because the personality dispositions associated with excellent parenting are in part a matter of brute luck—a second possibility for redistribution is to set up a baby-allocating lottery in which each adult who would make at least an adequate parent is afforded an equal chance of being allocated a baby. In this case, it is possible that babies would in fact be transferred from less good to better parents, though the basis for reallocation would not be grounded in considerations of parental competence, but rather in considerations of fairness.

Both the competence-based and fairness-based redistribution schemes are consistent with Brighouse and Swift's account of parental rights, yet both leave open the possibility that some adults would be denied the opportunity to parent their biological children. According to Gheaus, this highlights an important limitation of their account: while it has the resources to explain why adults have a right to maintain existing parental relationships with the children in their care, it cannot explain why adults are entitled to enter into those relationships with their biological children in the first place.

In the following section, I will outline and critique Gheaus's own strategy for addressing this limitation, though before doing so, it is worth sidelining a potential objection. One might argue that the specter of baby redistribution is only problematic if there are positive reasons in favor of redistributing babies—otherwise, the mere desire of adults to parent their biological children might provide a sufficient reason against redistribution. This type of argument might seem attractive in

the context of laws and social norms that give adults a strong presumptive claim to parent their biological children, though there are at least two problems with it upon reflection. First, even if there were no positive reasons in favor of redistributing babies, it is still problematic that an account of parental rights permits it in theory, for it suggests that one of the most widely accepted and deeply valued parenthood-related rights is rooted only in convention, and has no philosophical basis. However, a second and arguably more significant problem for this type of argument is that there *may* in fact be good reasons for redistributing babies under certain circumstances. For example, Gheaus suggests that in societies with entrenched histories of racism or sexism, redistributing babies randomly at birth might have the effect of improving equality of opportunity by mitigating the influence of race or gender on one's life prospects.[15] Moreover, if we take the opportunity to parent as itself a distribuendum of justice—as philosophers like Brighouse and Swift do—then redistributing babies randomly between all adequate prospective parents might also be a fairer way of allocating parenting opportunities, particularly for those who might be at a disadvantage pursuing parenthood under a laissez-faire system (including same-sex couples and single or infertile individuals). This is not to say that pursuing either of these ends justifies baby redistribution, but only that such a conclusion is tenable in the absence of a fundamental right to parent one's biological baby.

3. Anca Gheaus's Gestational Account

If the arguments in the previous section are correct, then neither the child-centered nor the dual-interest account of parental rights necessarily supports a fundamental right to parent one's biological baby. A child-centered account might be able to explain why it would be unfair to children to redistribute babies away from their biological parents, though this does not establish a *right* to parent one's biological child—at most, it simply establishes an *obligation* to do so, and only if

[15] Gheaus, "The Right to Parent One's Biological Baby," 445-446.

we accept that children have a morally relevant interest in being parented by their biological progenitors. A dual-interest account can explain why it would be unfair to parents to disrupt *already existing* parent-child relationships, though to the extent that their interest in those relationships is conceived independently of any biological connection to the child, it cannot on its own explain how adults acquire rights to parent their biological children in the first place. This, it seems, leaves us with one of two options: we can either (1) bite the bullet and accept that there is no fundamental right to parent one's biological baby; or (2) explain how such a right can be incorporated into the dual-interest framework.

Given the general acceptance of the right in question, option (1) is not very attractive. Even if it were in a child's best interest to be handed over to a set of excellent adoptive parents upon its birth, forcibly redistributing babies away from their adequate biological parents still seems like an injustice to those parents, and this is a difficult intuition for many people to abandon.[16] Moreover, pursuing option (1) would also require a radical revision in our understanding of the right to procreate, insofar as the value of that right is largely conditional on the ability to parent the children created as a result of its exercise. However, option (2) is not without its difficulties either, for attempts to ground a rights-claim in the fact of biological connectedness have sometimes run the risk of collapsing into the kind of proprietarian account that many philosophers now consider outdated. To take one commonly discussed example, some have argued in accordance with a Lockean theory of acquisition that insofar as individuals acquire rights over the fruits of their self-owned labor, so too may procreators acquire rights over the fruits of their procreative labor.[17] This type of argument

[16] It is worth noting, however, that not all philosophers have shied away from this option. Peter Vallentyne is happy to concede on child-centered grounds that the right to parent a newborn baby may be "legitimately claimed by anyone for whom possession is suitably in the child's best interests." See Vallentyne, "The Rights and Duties of Childrearing," 991.
[17] According to the Lockean theory of acquisition, "every man has a *property* in his own *person*: this no body has a right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*." While Locke did not endorse the idea that procreators own their children, many theorists have suggested that this is an unavoidable implication of his theory of property acquisition. For Locke's theory of acquisition, see John Locke. *Second Treatise of Government.* (Ed.) C.B. Macpherson (Indianapolis: Hackett, 1980), chapter

might be able to explain why individuals have a right to parent their biological children, though it does so at a cost, for many take it to imply that children, like Locke's acorns and apples, are simply things to be owned.

Recognizing this difficulty, Gheaus has sought to provide an alternative account of the right to parent one's biological baby that does not appeal to a proprietarian claim over one's offspring, but rather to the significance of the relationship that is established between procreators and their progeny during the process of gestation. This gestational account has emerged as the most promising account of the right to parent one's biological baby in the existing literature, so it is worth exploring in some detail.

Gheaus's account begins with the observation that pregnancies always impose a variety of burdens (or 'costs') on pregnant women and their supporting partners. For instance, throughout the duration of their pregnancies, women endure numerous *physical* burdens, from the aches, pains, nausea, and fatigue that are experienced during gestation, to the intense pain and physical trauma that often accompanies childbirth. These burdens are not only intrinsically costly in terms of being physically unpleasant, but they are also instrumentally costly in terms of curtailing women's autonomy, making them increasingly reliant on others for the performance of everyday tasks. Moreover, women also endure a number of *social* and *behavioral* costs as a result of carrying out a pregnancy. They face limitations on the food they can eat, the amount of alcohol they can consume, and the physical activities they can safely engage in, and they must cope with the patronizing and sometimes intrusive behavior of friends, family, co-workers, and strangers. Finally, pregnant women also endure a wide range of *psychological* and *emotional* costs prior to giving birth. They

5. For discussion of its implications in the case of procreation, see David Archard. *Children: Rights and Childhood* (New York: Routledge, 2004), 141-145; Robert Nozick. *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 287-289; Susan Moller Okin. *Justice, Gender, and the Family* (New York: Basic Books, 1989), 74-88; and Hillel Steiner. *An Essay on Rights* (Oxford: Blackwell, 1994), 237-248.

must deal with the constant fear of miscarriage or of something else going wrong with the pregnancy, and they must sometimes confront the daunting decision of whether to continue a pregnancy in the face of significant health risks.[18]

One might think that the mere incursion of these costs is sufficient to ground a desert-based claim to parent the resultant child. Joseph Millum, for example, has recently defended an investment theory of parental rights, according to which "parental rights are generated by the performance of parental work."[19] On the basis of this type of theory, one might reason that because pregnant women and their supporting partners incur significant labor-related costs as a result of bringing a child into existence, they are more deserving than other available adults to act as that child's parents. However, Gheaus does not believe that this type of argument can perform its intended function, for while the incursion of costs may entitle procreators to parent *a* baby, it does not necessarily entitle them to parent their biological baby in particular. Indeed, appealing to costs alone would not preclude a different type of redistributive scheme in which newborn babies were shuffled randomly between all eligible procreative couples.

However, while a strictly desert-based argument ultimately fails, Gheaus believes that the costs of pregnancy are significant for a second reason, namely, because their incursion "facilitates the creation of an intimate relationship between the bearing parents and the future baby."[20] As she explains,

> Because children come into existence through gestation, pregnant women and their supporting partners have to invest a significant amount of resources into having birth children. This is often a conscious, intentional process, akin to other projects in which people engage: it contains much antici-

[18] Gheaus, 2012, 446-449. For a further discussion of the costs of pregnancy on which Gheaus's account explicitly draws, see also Amy Mullin. *Reconceiving Pregnancy and Childcare: Ethics, Experience, and Reproductive Labor* (Cambridge: Cambridge University Press, 2005).
[19] Joseph Millum. *The Moral Foundations of Parenthood* (Oxford: Oxford University Press, 2016), 24.
[20] Gheaus, "The Right to Parent One's Biological Baby," 449.

> pation and planning, thinking and hoping, imagination and projection. Through their bodily connection with the baby and their various psychological investments, expecting parents normally build a relationship with their future baby, which is something highly emotional and already quite developed at birth.[21]

According to Gheaus, the relationship that develops between procreators and their progeny during gestation provides the 'missing step' in the justification for a fundamental right to parent one's biological baby. While existing dual-interest theories explain why it is impermissible to disrupt already existing parent-child relationships, they do not on their own explain why adults are entitled to enter into those relationships with their biological children in the first place. Yet if the process that brings children into existence also results in the development of an intimate relationship between the baby and its birth parents, then birth parents do not need a special justification for initiating a relationship with their baby, as such a relationship has already been initiated by the time the baby is born. As Gheaus concludes:

> If, at the moment of birth, adequate parents have already paid significant costs for becoming parents, and in the process have developed an intimate incipient relationship with the baby, they are more entitled than other prospective parents to parent the baby they have borne. The difference between adequate bearing parents and other adequate prospective parents can provide the necessary justification for translating the fundamental right to parent in general into a right that birth parents have to parent their birth baby.[22]

[21] Ibid., 449.
[22] Ibid., 451.

Gheaus's account has a number of attractive features. First, it seems to provide a coherent justification for the right to parent one's biological baby without collapsing into a form of proprietarianism. Procreators are not entitled to parent their biological babies because they have general ownership rights over their offspring, but rather because they tend to develop morally significant relationships with their babies during the process of gestation. Moreover, this justification fits neatly into the dual-interest framework, as it appeals to the same kinds of considerations that dual-interest theorists appeal to in order to justify the right to parent in general. The reason why it would be unjust to redistribute babies away from their adequate biological parents is the same reason that Brighouse and Swift provide as to why it would be unjust to redistribute children away from their adequate custodial parents: it disrupts an already existing relationship that the parents (and perhaps also the children) have a morally relevant interest in continuing. Finally, Gheaus's account might also be considered advantageous insofar as it provides a philosophical justification for existing legal norms. In parental custody disputes involving gestational surrogacy and donated gametes, courts and legislators in Europe and North America have often assigned legal motherhood to the woman who has gestated the embryo, rather than the woman who donated the ovum or commissioned the surrogacy arrangement.[23] Gheaus's account has the resources to explain why these judgments may be correct.

However, while Gheaus's account presents a number of advantages over existing accounts of the right to parent one's biological baby, it also runs into at least three serious problems as well: one relating to its *explanatory* function, or its ability to explain why adults who have a right to parent in general also have a special right to parent their biological child; one relating to its *adjudicatory* function, or its ability to resolve cases in which there are multiple conflicting claims over

[23] In the United States, precedent for assigning legal motherhood to the gestational mother was set in the famous 'Baby M' case, *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988). In the United Kingdom, giving legal priority to gestational mothers is legislated through s. 33(1) of the *Human Fertilization and Embryology Act* (2008), which states that "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of a child."

who gets to parent a newborn child; and one relating to its *theoretical* basis in the interest theory of rights. I will review each of these problems in turn before outlining a tentative strategy for addressing them.

4. Three Problems

4.1 The Explanatory Problem

The first set of difficulties facing Gheaus's account stems from its reliance on the realization of certain qualitative features in a pregnancy, particularly the development of an intimate maternal-fetal bond. This is problematic for at least two reasons. First, it seems to carry the odd implication that in cases where such a bond is *not* established, gestating women do not have fundamental rights to parent their biological children. Imagine, for example, a woman who suffers from antenatal depression throughout her pregnancy, a condition that can be characterized by (among other things) feelings of physical and emotional detachment from one's fetus.[24] This woman may not have developed an intimate bond with her fetus, though given that she has incurred all of the typical costs associated with carrying out a pregnancy (in addition to the ancillary cost of coping with her depression), it would still seem unjust to deny her the opportunity to parent her biological baby. Indeed, the only difference between this woman's pregnancy and a non-depressed woman's pregnancy is a particular attitude felt toward the fetus, and one that is itself the product of an unchosen psychological affliction.

Gheaus's response to this difficulty is more or less to bite the bullet: she concedes that such a woman would not have a fundamental right to parent her biological child, though denies that this is a significant problem for her account, as "the existence of an intimate relationship between

[24] See, for example, "Depression During and After Pregnancy," *Centre for Disease Control and Prevention (CDC)*, accessed July 29, 2019, https://www.cdc.gov/reproductivehealth/features/maternal-depression/index.html

birth parents and newborns is the rule rather than the exception."[25] However, even if we bite the bullet about atypical pregnancies, there is still a second and more serious problem with the reliance of Gheaus's account on maternal-fetal bonding, which is that it is controversial that such a bond *ever* materializes, at least not in the rights-grounding sense that Gheaus describes. As Lindsey Porter has recently argued, empirical research from nursing and psychology suggests that the apparent relationship that Gheaus describes between pregnant women and their fetuses is really better characterized as a one-directional attitude.[26] While it is common for pregnant women to self-report feelings of attachment to their fetuses, these feelings have been explained by psychologists as responses to social or cultural cues, rather than as evidence of a two-way maternal-fetal bond: there is in fact no physiological evidence to suggest that fetuses share in the affective attitudes of their gestators, nor is there any evidence to suggest that maternal feelings of attachment have any effect on developing fetuses. Thus, "[g]iven that the woman's feelings aren't affecting the fetus, and the fetus's feelings aren't affecting the woman," Porter concludes that "it is implausible to suppose that the right way to characterize MFA [maternal-fetal attachment] (or 'bonding') is as a relationship. It's not a relationship; it's an attitude."[27]

If Porter is right that maternal-fetal bonding is better characterized as an attitude rather than a relationship, then Gheaus's account is in serious trouble. The key selling point of Gheaus's account is that it purports to offer a distinctively relationship-based account of the right to parent one's biological baby, one that explains why redistributing babies away from their adequate biological parents is just as wrong—and wrong for the same reasons—as redistributing children away from their adequate custodial parents. However, if the crucial maternal-fetal bond that drives Gheaus's account is really just a one-directional attitude, then the case of gestation is not really analogous to existing parent-child relationships in which *both* parent and child are interpersonally

[25] Gheaus, "The Right to Parent One's Biological Baby," 452.
[26] Lindsey Porter. "Gestation and Parental Rights: Why is Good Enough Good Enough?" *Feminist Philosophical Quarterly*, 1(1) (2015), pp. 1-27, esp. 17-23.
[27] Ibid., 22.

engaged. Rather, it is more analogous to a case in which a person simply *feels* attached to something that is not capable of reciprocation.

There are two possible ways that Gheaus could respond to this difficulty, though neither is particularly helpful for her account. First, she might claim that a one-way feeling of attachment is in fact sufficient to ground a right to parent one's biological baby. This would defuse the worry that mothers do not develop relationships with their fetuses *per se*, though if merely feeling attached to something is sufficient to ground a right to that thing, then this strategy also invites a slippery slope toward some rather dubious rights-claims.[28] Alternatively, Gheaus might concede that a one-way feeling of attachment is insufficient to ground a right to parent one's biological baby, but insist that there are still good child-centered reasons against separating babies from their gestational mothers (to the extent that such reasons are available).[29] This would provide a solution to the baby redistribution problem, but only on child-centered terms—it would not explain why redistributing babies away from their biological parents is an injustice to the parents, and so would not constitute an argument for a fundamental right to parent one's biological baby.

4.2 The Adjudicatory Problem

The explanatory problem poses a challenge specifically for an account that seeks to ground parental rights in a two-directional maternal-fetal relationship. One might object, however, that this is not the only way to ground parental rights in gestation. For example, Millum's investment theory

[28] For example, I may have a strong attachment to the oak tree under which I proposed to my wife, though the bare fact that I have such an attitude is not in itself sufficient to confer rights to or over that tree, particularly if there are competing interests in the tree that must be balanced against my own (e.g. those of the community or other individuals). I discuss this issue further below in section 4.3.
[29] Gheaus in fact hints at this strategy in Gheaus, "The Right to Parent One's Biological Baby," 452, n. 46, though it is potentially undermined by the empirical literature on maternal-infant bonding. Numerous studies suggest that the bond that develops between infants and their adoptive mothers is normally just as strong as the bond that develops between infants and their biological mothers, provided the infants are adopted shortly after birth. For two such studies, see Leslie M. Singer, David M. Brodzinsky, Douglas Ramsay, Mary Steir, and Everett Waters. "Mother-Infant Attachment in Adoptive Families," *Child Development*, 56(6) (1985), pp. 1543-1551; and J.E. Koepke, S. Anglin, J. Austin, and J. Delesalle. "Becoming Parents: Feelings of Adoptive Mothers," *Pediatric Nursing*, 17(4) (1991), pp. 333-336.

seems to provide a way of grounding parental rights in gestation that does not involve assuming that a special relationship exists between pregnant women and their gestating fetuses—rather, it only requires that we accept (a) that an agent's stake in an entity is proportional to the amount of appropriate work she has put into that entity, and (b) that pregnant women perform the highest proportion of appropriate work in bringing a child into existence.[30] However, there is a second set of problems that faces *any* account of parental rights that assigns special normative significance to gestation, one that emerges from what might be described as a dilemma regarding their inclusivity. Even if gestation has the significance that Gheaus ascribes to it, one glaring problem with appealing to gestation as a basis for the right to parent one's biological baby is that it seems to exclude men from the constituency of persons who are eligible for that right. If the labor and bonding that occurs during gestation is what grounds parental rights, then it seems like only women can have fundamental rights to parent their biological children (as long as only women are capable of gestation). This, in turn, suggests an important limitation of Gheaus's account: while it might have the resources to explain why it would be unjust to redistribute babies away from their adequate biological mothers, it seems ill-equipped to explain why it would be unjust to redistribute babies away from their adequate biological fathers.

One could of course bite the bullet on this issue and simply accept the implication that men do not have fundamental rights to parent their biological children. This is the route taken by Barbara Katz Rothman, for example, who insists that "If men want to have children, they will either have to develop the technology that enables them to become pregnant…or have children through their relationships with women."[31] However, while biting the bullet is a viable option, it is not one that many people are inclined to take. Not only does it seem intuitively unfair that only women should

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[30] This type of account is of course vulnerable to a separate set of objections to which a relationship-based gestational account may be immune, including objections directed at the 'investment principle' expressed in (a).

[31] Barbara Katz Rothman. *Reconceiving Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W.W. Norton, 1989), 257.

have fundamental rights to parent their biological children, but it also violates what some parental rights theorists call the Parity Principle, which holds that "any fact by virtue of which a woman laid claim to be a parent could also be a fact in virtue of which a man with equal merit could claim to be a parent, and vice versa."[32] If we believe that an account of parental rights ought to respect the Parity Principle—perhaps in virtue of the equal interest that men and women have in parenting children, combined with the fact that we are not responsible for being biologically male or female—then it seems like we have a *prima facie* reason to reject an account that grounds parental rights in gestation.

Gheaus acknowledges this worry, though rather than rejecting the Parity Principle, she attempts to accommodate it by showing how men (and non-gestational partners in general) can also share in the labor and bonding that generates parental rights. As she writes,

> Like in the case of paying the costs of pregnancy, pregnant women's supporting partners are capable of being direct participants in the process of creating a relationship with the baby during pregnancy. With the help of medical technology, they can see the fetus and hear its heartbeat as early as the bearing mother; during the last stages of pregnancy they can feel the baby, talk to it and be heard by it. Just like the mother, they can experience the fears, hopes, and fantasies triggered by the growing fetus.[33]

On this view, even though men are not capable of gestating babies themselves, they are still capable of participating in many of the relationship-building activities that women typically engage in over the course of their pregnancies, which may be sufficient to generate a relationship-based right to

[32] David Archard and David Benatar. "Introduction" in David Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children* (Oxford: Oxford University Press, 2010), 26. The term 'Parity Principle' was originally coined by Tim Bayne and Avery Kolers in "'Are you My Mommy?' On the Genetic Basis of Parenthood," *Journal of Applied Philosophy*, 18(3) (2001), pp. 273-285, 280.
[33] Gheaus, "The Right to Parent One's Biological Baby," 450.

parent the resultant child. This type of approach might allow Gheaus to account for the rights of biological fathers, though it ends up introducing a new set of problems, for if male partners can acquire parental rights in virtue of participating in the various relationship-building activities that occur during a pregnancy, then it seems as though a laundry list of other persons can as well.[34] For example, in addition to their male partners, many pregnant women also receive support from their siblings, parents, relatives, and friends, each of whom participate in the various relationship-building activities that occur during a pregnancy, and sometimes to an even greater extent than the baby's biological father. If we want to argue that men can acquire parental rights in virtue of their proximity to their gestating partner, then we risk opening the door to a host of other potential rights-claimants as well.

Gheaus might simply concede that, along with male partners, siblings, parents, relatives, and friends can also acquire rights to parent children with whom they have sufficiently bonded during gestation (even if they do not always assert those rights). However, this is not an attractive option. Not only does it seem intuitively implausible that so many people should have legitimate claims to parent a particular child[35], but acknowledging any parental rights-claims on the basis of mere proximity to the gestator also prevents Gheaus's account from serving a crucial *adjudicatory* function in cases where there are multiple conflicting claims over who gets to parent a particular child. To understand why, consider an important type of case in which such a conflict may arise:

> *Gestational Surrogate*: Alice and Bill desperately want to have a biological child, though Alice suffers from a form of infertility that makes her unable to safely gestate an embryo. Eager to fulfill their procreative aspirations, Alice and Bill create an embryo using *in-vitro* fertilization and arrange for a gestational surrogate, Claire, to bring the embryo to term.

[34] Porter also makes this point in "Gestation and Parental Rights," 14-17.

[35] It is also practically infeasible to the extent that the right to parent a particular child entitles the right-holder to a certain degree of exclusivity with respect to that child.

> However, after nine months of pregnancy, Claire cannot bear the thought of relinquishing the child, and now wants to keep the baby against her prior agreement with Alice and Bill. Who is entitled to parent the baby?

Initially, it might seem like Gheaus's account has the resources to settle this type of dispute—indeed, if parental rights are grounded in gestation, then Gheaus's account seems to provide a straightforward explanation for why the surrogate, rather than the gamete providers, should be entitled to act as the child's parent. Notice, however, that if Gheaus wants to maintain her initial response to the worry about parental parity, then this resolution to the surrogacy dispute does not necessarily follow. In the same way as male partners can participate in the various relationship-building activities that occur during a pregnancy, so too can commissioning parents in surrogacy contracts: they can accompany the surrogate to doctor's appointments, they can view ultrasound scans of the developing fetus, they can feel its kicks and rumblings inside the surrogate's abdomen, they can talk to and be heard by it, and they can share in the various fears, hopes, and fantasies triggered by the growing fetus. If male partners can acquire parental rights in virtue of their participation in these relationship-building activities, then it is difficult to see how Gheaus's account can consistently exclude commissioning parents.

The inclusivity dilemma facing Gheaus's account can now be stated as follows: either parental rights are acquired via gestation, in which case men do not have rights to parent their biological children; or men can acquire parental rights through their proximity to the gestator, in which case so can a host of other potential rights-claimants that a gestational account is wont to exclude. Both horns of this dilemma are unattractive—the first because it is intuitively under-inclusive and the second because it is intuitively over-inclusive—though in its present formulation, Gheaus's account cannot avoid choosing between them.

4.3 The Theoretical Problem

Confronted with the inclusivity dilemma, Gheaus might choose to reject the Parity Principle and concede that only women have fundamental rights to parent their biological children. This, it seems, is the lesser of two evils: while rejecting the Parity Principle yields the surprising conclusion that men do not have fundamental rights to parent their biological children, maintaining it yields the even more problematic conclusion that those rights can be claimed by anyone who has sufficiently bonded with a baby over the course of a pregnancy. Not only is this conclusion impracticable in its own right, but it also precludes Gheaus's account from serving a crucial adjudicatory role in precisely the kinds of cases we need it to perform that role, i.e. cases in which non-gestational bonders also assert the right to parent a newborn child.

However, while rejecting the Parity Principle preserves the adjudicatory function of Gheaus's account, it also exposes a new set of problems, for the reasoning that is used to justify the assignment of parental rights to the gestator in cases like *Gestational Surrogate* appears to be based on an important oversight in its application of the interest theory of rights. At the most general level, Gheaus's account relies on the interest theory supposition that having a strong interest in a thing is sometimes sufficient to generate a right to that thing.[36] This supposition is often true: there are many cases in which we acquire rights to certain things or states of being in virtue of the contribution those things or states of being make to various aspects of our well-being. However, a common limitation or exception to this principle involves cases in which another person already has a legitimate claim to the thing in question. To take a somewhat trivial example, imagine that I hire you to look after my prize-winning flower garden while I am recovering from an illness. In the following months, you become surprisingly invested in it: you enjoy the ritual of watering and fertilizing it, you take pleasure in watching it grow, and caring for it has uncovered an innate set of

[36] In Joseph Raz's widely-cited version, "X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." See Joseph Raz. *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 166.

skills you were previously unaware you had, including patience, attention to detail, and a keen sense of aesthetic design. While you may have a strong interest in tending to the garden upon my recovery, it does not follow that you thereby have a right to do so, even if you stand to benefit from it more than I do. Your strong interest in the garden provides me with a reason to let you care for it, though it is not in itself sufficient to hold me under a duty to do so, particularly if discharging that duty requires abdicating my own role in caring for it.

Now, there are obviously many ways in which a flower garden is unlike a fetus, and I will be careful to account for these differences in further detail below. However, at a very general level, it seems like the same kinds of considerations that undermine your claim to care for the garden against my wishes can also be invoked to undermine the gestational surrogate's claim to keep the baby against the wishes of the commissioning couple. Presumably, the reason why your interest in the garden does not justify a right to care for it is because I already have a pre-existing claim to it: assuming that my gardening project was justly initiated and continues to be justice-respecting (e.g. it is carried out on a plot of land to which I have legitimate access, using seeds that have been legitimately acquired, without taking up space that is otherwise needed for food production, etc.), it is one that I have a right to continue without undue interference from other people. By parity of reasoning, if the commissioning couple can be thought to have developed a morally relevant interest in the embryo they have created, then the reason why the gestational surrogate's interest in the baby does not justify a right to keep it is because the commissioning parents already stand in a special rights position with respect to it themselves. It was created out of gametes to which they had legitimate access for the purpose of serving *their* parenting project, so they should have a presumptive right to continue that project without undue interference from others.[37]

[37] Note that I do *not* assume that what drives the parental rights claim in this instance is the fact that the resultant child shares Alice and Bill's genetic material. The same reasoning would apply if the embryo was composed out of others' genetic material to which they had legitimate access, e.g. that of a close pair of friends.

Of course, intuitions vary about gestational surrogacy disputes, making them non-decisive test cases for the defensibility of this type of reasoning. So consider another important test case, one that shares relevant features of a gestational surrogacy dispute, but where our intuitions might be more settled:

> *Gamete Thief*: Dana breaks into the freezer of a gamete storage facility and steals an embryo that Ernest and Fran had frozen for a future procreative project. She then has it implanted in her uterus and gestates it for the following nine months. When Ernest and Fran discover what Dana has done, they confront her at the hospital on the day the baby is born and plead that she hand it over to them to parent. Who is entitled to parent the baby?

According to Gheaus's gestational account, Dana is in the strongest rights position with the respect to the baby in virtue of the fact that she has gestated it for nine months and participated in the various relationship-building activities that give rise to parental rights. This, however, seems entirely backwards. Rather than acting in a way that makes her eligible for the acquisition of parental rights, Dana appears to have engaged in an egregious form of wrongdoing: she has gestated an embryo that was not hers to gestate. Notice, however, that we can only account for this intuition if we accept the claim that Ernest and Fran already stand in a special rights position with respect to the embryo they have created—otherwise, there is no principled basis on which to challenge Dana's parental rights-claim to the baby it grows into.

With a few negligible differences[38], the case of *Gamete Thief* is structurally similar to the case of *Gestational Surrogate,* such that the reasoning we use to resolve one case ought to be applied *ceteris paribus* to the other. If we think that Claire has a gestationally-based right to parent

[38] For example, while Dana intentionally steals an embryo from the outset, Claire initially engages in a legitimate agreement and only 'steals' the fetus once she changes her mind about relinquishing it to Alice and Bill. Moreover, whereas Dana only steals the embryo, Claire steals the embryo *and* breaks a promise, giving Alice and Bill an additional moral complaint against her. However, neither of these differences detracts

the baby in *Gestational Surrogate*, then we are forced to extend the same reasoning to Dana in *Gamete Thief*. If, however, we think that Dana's parental rights-claim is illegitimate in virtue of her relationship to the embryo, then we ought to think the same of Claire, who differs from Dana only in terms of the point in the gestational process at which she decided to 'steal' the embryo. I think we have good theoretical reasons to endorse the latter view, and thereby reject the principle that parental rights are always acquired via gestation. This does not imply that gestation is irrelevant to the acquisition of parental rights, though it does suggest that it cannot be the whole story, and that we may have to look elsewhere for a principle that better systematizes our judgments about these different cases.

I will propose one such principle in the following section, though before doing so, it is worth considering two potential objections that might be raised against the reasoning I have deployed in this subsection. When confronted with the case of *Gamete Thief*, a proponent of gestationalism might respond in the following way: "it is true that by gestating Ernest and Fran's embryo without their consent, Dana has violated their pre-existing claim to it and has thereby engaged in a form of wrongdoing. It does not necessarily follow, however, that Ernest and Fran are now entitled to parent the resultant child. While Dana owes Ernest and Fran compensation for stealing their embryo, she may still be in the strongest rights position with respect to the child in virtue of the relationship that has been established during the process of gestation."[39] This objection suggests that there is an explanatory gap between the premise that Ernest and Fran have a pre-existing claim to their embryo and the conclusion that they are entitled to parent the child it grows into. Even if we accept that they have such a claim, it is possible that other moral considerations come into play during the process of gestation that diminish its significance and ultimately weigh in favor of assigning parental rights to the child's gestator.

from the relevant fact that, in both cases, a person is claiming parental rights over an embryo that was created out of others' genetic material for the purpose of serving *their* parenting interest.

[39] I am grateful to Anca Gheaus and RJ Leland for independently pressing me on this potential objection.

Is this objection sound? I believe that whatever force it has stems from an unstated but implicit assumption that Dana, in virtue of having gestated the child, is better qualified to act as that child's parent. So, to fix ideas for a moment, let us assume that there is in fact no discernible difference in parenting competency between the two conflicting parties, such that the scenario is one in which we need a tiebreaker principle to determine who is entitled to parent the child. When the facts of the case are fixed in this way, it seems clear that the balance of reasons weighs in favor of assigning parental rights to Ernest and Fran. Dana may have formed parental intentions with respect to the baby she gestated, and in so doing, developed a strong interest in parenting it upon birth. However, because this interest was formed illegitimately in relation to an embryo to which she lacked legitimate access, it is not one that should carry any moral weight in the assignment of parental rights. And once we discount Dana's interest from our moral assessment, the case becomes easy to resolve: while we have a weighty reason to assign parental rights to Ernest and Fran in light of the legitimate parental intentions they have formed with respect to their embryo, we have no weighty reason to assign parental rights to Dana.

Of course, a proponent of gestationalism might object to this reasoning on the grounds that it relies on a philosopher's abstraction—namely, the stipulation that there is no relevant difference in parenting competency between the gestator and the commissioning couple. Even though Dana's parental interest has been formed illegitimately, and does not itself merit any moral consideration, it might be argued that she still possesses gestation-based attributes that provide child-centered reasons against a transfer of custody. For instance, suppose that Porter is wrong and babies really do develop something akin to a relationship with their gestational host over the course of a pregnancy. If this is the case, then transferring a baby away from its gestational host will always involve harmful separation costs for the baby. Thus, even if we discount the gestator's interest in parenting

the baby, she will always be in a privileged rights position with respect to the baby simply in virtue of how babies come into the world.[40]

Is this further objection sound? Setting aside the fact that it could only support a child-centered, rather than fundamental, right to parent one's gestated child, I believe that it fails for at least two reasons. First, the reasoning that underlies it appears to reduce to absurdity when applied in structurally analogous cases. Consider, for example, one such case:

> *Baby Snatcher*: George longs to become a father, though he is unable to find a reproductive partner and his adoption applications have consistently been rejected on account of his being a single man. Frustrated with the biases in the adoption system, and desperate to fulfill his parental aspirations, George snatches a baby from a hospital nursery who had just been born to a pair of loving parents. When the authorities apprehend George a year later and seek to reunite the baby with its original parents, George protests on the grounds that it would impose unreasonable separation costs on the child, who now enjoys an intimate and caring relationship with George.

If the costs of separation are sufficient to preclude a transfer of custody in the case of *Gamete Thief*, then surely they are sufficient to preclude a transfer of custody in the case of *Baby Snatcher,* where the relationship in question is more fully developed and not subject to the controversy surrounding maternal-fetal bonding. This, however, is a troubling implication, for it suggests that one can legitimately acquire the right to parent a child via clearly illegitimate means, so long as the child in question develops an interest in the relationship being maintained.

However, a second and more important reason why the objection fails is because the separation costs to the baby cannot plausibly be appealed to in order to preclude a transfer of custody.

[40] Gheaus defends a similar child-centered position in "Biological Parenthood," especially at pp. 236-237.

In fact, the claim that they *can* be must rely on one of two untenable premises: either (1) a deeply implausible conception of the harm associated with being separated from one's gestational host; or (2) a deeply implausible weighting of competing interests. In order for it to be the case that the separation costs to the baby preclude a transfer of custody, the harms must be so severe as to outweigh any parental interest on the part of the original intended parents, or the parental interest must be so weak or insignificant as to be overridden by even non-serious harms. Neither of these claims are defensible. While there may be immediate and short-term harms associated with separating a baby from its gestational host, it is implausible to suppose that these harms are so severe as to render the original intended parents inadequate[41]—they are at best a consideration that acts as a tiebreaker between the gestational host and the intended parents, giving the former an edge over the latter from the perspective of the child. However, if the harms of separation are not so severe as to factor into the adequacy of the intended parents, then the objection relies on a seriously implausible weighting of interests, one that expresses a similar lack of sensitivity toward the interests of parents as the purely child-centered accounts canvassed in Part 1: it assumes that the avoidance of short-term, non-serious harms to the baby justifies forever denying Ernest and Fran the opportunity to parent the child they deliberately set out to create.[42] The implausibility of this view is compounded when we consider that *Dana* is responsible for the fact that the child now faces these

[41] This would seem to imply, counter-intuitively, that non-biologically-related adoptive parents are inadequate, at least in cases where the gestator would otherwise meet the minimum threshold of parental competency.

[42] An anonymous reviewer wondered if it matters whether Ernest and Fran have multiple embryos stored, such that they would not be forever denied the opportunity to parent *a* biological child if parental rights were assigned to Dana on child-centered grounds, even if they are forever denied the opportunity to parent *this* biological child. It is clear that they would have a much stronger complaint if the stolen embryo represented their only chance to pursue biological parenthood, though it does not follow that they would lack a legitimate complaint if they could 'try again' with a different embryo. Whether or not this is the case will depend on a number of additional factors, including the extent to which we think the embryos are interchangeable, and whether we think that the costs of separation to the child would outweigh the costs of undertaking another procreative project to Ernest and Fran. Furthermore, and perhaps more importantly, if Ernest and Fran's parental rights claim can be diminished on the grounds that they can 'try again' with a different embryo, then presumably Dana's parental rights claim would also be diminished to the extent she can 'try again' using an embryo to which she has legitimate access. In this sense, appealing to the ability to 'try again' as a tie-breaker principle would not necessarily weigh in favor of assigning parental rights to Dana.

harms. Had she not stolen the embryo and allowed Fran to gestate it, the resultant child would not be in a position where he faces the costs of separation.

If these arguments are correct, then we ought to reject the principle that parental rights are always acquired via gestation. While a gestational host may develop a strong attachment to a baby over the course of a pregnancy—and hence a strong interest in parenting the child upon birth—this interest does not necessarily carry any moral weight in cases where other parties already have a legitimate interest in parenting the child themselves. This suggests that there is a more fundamental principle underlying the right to parent one's biological child, one that is lexically prior to gestation and that works to determine whether gestation has normative significance in individual cases.

5. A Tentative Solution: The General Autonomy Principle

What, then, could this principle be? Following a broadly liberal approach to the acquisition of parental rights, I believe that a promising candidate can be found in what I will call the General Autonomy Principle (GAP), or the notion that individuals have a strong presumptive right to non-interference in their justice-respecting projects. That individuals have such a right is a familiar component of liberal theories of justice, particularly those that prioritize individuals' ability to formulate, revise, and pursue their own conceptions of the good, though its relevance for the acquisition of parental rights has yet to be fully explored.[43] A full exploration is of course beyond the scope of this paper, though I hope to demonstrate its promise in explaining why adults who meet a

[43] One important exception is found in the work of Norvin Richards, who sees the right to parent one's biological child as being rooted in a more general right to continue with whatever we have underway, so long as it does not cause harm to others. The account proposed here draws inspiration from Richards' work, though parts company with his account in a number of important ways, particularly in terms of the criteria it takes to be relevant for determining whether a project is in fact harmless (or, in my preferred terminology, justice-respecting). Nevertheless, it sits squarely in the same family of liberal views, and may be read as a friendly complement to his account. For statements of Richards' account, see *The Ethics of Parenthood* (Oxford: Oxford University Press, 2010), esp. chapters 1-3, and, more recently, "How We Acquire Parental Rights," in Leslie Francis (ed.) *The Oxford Handbook of Reproductive Ethics* (Oxford: Oxford University Press, 2016).

minimum threshold of parental competency normally have a presumptive right to parent their biological children. This explanation depends on a number of contestable assumptions about justice in childrearing, and so is presented somewhat tentatively, though if sound it has the considerable advantage of being rooted in a widely accepted moral principle *and* avoiding the three major problems facing Gheaus's gestational account.

To understand the appeal of a general autonomy-based account, let us return for a moment to the case of *Gamete Thief*, which was originally presented to show that gestation is neither necessary nor sufficient for the acquisition of parental rights. In this case, Ernest and Fran are wronged by the theft of their embryo, and in a way that is not reducible to a violation of their property rights—they are also wronged in a more fundamental sense by having an important project of theirs interrupted. By deliberately creating and storing their embryo with the intention of parenting the child it eventually grows into, Ernest and Fran have embarked on a central life project, one they are permitted to begin, and entitled to continue, without interference by other people or institutions. They are permitted to begin their project because they are not (by stipulation)[44] under a duty *not* to begin it: by creating an embryo out of reproductive gametes to which they have legitimate access, they are not infringing on the justice-based entitlements of any other person. They are entitled to continue their project because (a) its continuation does not (by stipulation)[45] infringe on the justice-based entitlements of other people, and (b) the legitimate parental intentions they have formed with respect to their embryo serve to *create* duties of non-interference in others. They normatively transform the embryo from a group of cells over which they have property rights to a central component

[44] There are imaginable cases in which Ernest and Fran *would* be under a duty not to begin their project, including cases in which their child would be born into less-than-minimally decent conditions, or cases in which the introduction of new members into the community would impose unreasonable costs on existing third parties. I explore the former type of case in "Children's Rights and the Non-Identity Problem," *Canadian Journal of Philosophy*, 49(5) (2019), pp. 580-605.

[45] If we think that the opportunity to parent is itself a distribuendum of justice, we open up the possibility that the continuation of a parental project with respect to one's biological child *may* in fact infringe on the justice-based entitlements of other people, particularly those who are at an unchosen disadvantage in satisfying their own parenting interests (e.g. single, infertile, or homosexual individuals). I consider this possibility in further detail below.

of their conception of the good, one whose pursuit others—i.e. Dana—are duty-bound to respect. This principle simultaneously explains why Dana's parental rights claim is invalid: while she may see herself as having embarked on her own project by gestating and giving birth to Ernest and Fran's embryo, it is not a project that meets the criterion of being justice-respecting if we accept the plausible claim that individuals have initial rights to control the use of their reproductive gametes.[46]

A similar line of reasoning can be invoked to support the right to parent one's biological child in more familiar cases. In paradigm cases of procreation, two consenting adults deliberately combine their genetic material to create a child who they plan to jointly parent. From the moment a pregnancy is confirmed, they engage in a series of actions and decisions that reflect their commitment to that project and solidify its place within their broader conception of the good: they purchase baby clothes and accessories; they prepare a nursery in their home; they inform their friends and family of the impending arrival; and they rearrange their personal and professional lives to accommodate their upcoming parental responsibilities. We do not need to assume that a relationship exists between a baby and its birth parents to ascribe significance to these intentions, nor do we need to assume that there is anything special about biological connectedness *per se*. The process of legitimate intention-formation has moral significance independently of these factors, and serves to set a child's procreative parents apart from other prospective parents: *they*, and not others, have engaged in a process of legitimate intention-formation with respect to the child they have created, so *they*, and not others, should have a presumptive right to carry out those intentions by parenting the child upon birth. One important feature of this account is that biological connectedness is only derivatively significant for the acquisition of parental rights in paradigm cases of

[46] While some philosophers derive this right from a more general right to bodily self-ownership (see, for example, Barbara Hall, "The Origins of Parental Rights," *Public Affairs Quarterly*, 13(1) (1999), pp. 73-82), it may also be derived from other rights that are less controversial. For example, insofar as the right to procreative autonomy includes both a right to procreate and a right *not* to procreate, the right to control the use of one's reproductive gametes can be plausibly derived from the right to procreative autonomy.

procreation. Insofar as individuals have a presumptive right to control their reproductive gametes, they always stand in a privileged position to form legitimate parental intentions with respect to children who derive from those gametes, though it is ultimately their intentions, rather than the fact of biological connectedness, that drives the rights-claim.

If the preceding remarks are sound, a general autonomy account presents three main advantages over Gheaus's gestational account, corresponding to its three major problems. First, it has a clear explanatory mechanism: whereas the gestational account must rely on controversial claims about maternal-fetal bonding, the general autonomy account relies on a widely accepted principle concerning non-interference in one's justice-respecting projects. This principle may of course be disputed, though not without enormous cost. If we were to reject the principle that all individuals have rights to non-interference in their justice-respecting projects, then we would be opening the door to the legitimate usurpation of our life projects by anyone who happens to develop an interest in them, whose ability to continue those projects would in turn be vulnerable to the legitimate usurpation of others, and so on *ad infinitum*. This would create a moral environment in which it was virtually impossible to formulate and pursue one's own conception of the good, and would thus run counter to the fundamental commitment to individual autonomy that undergirds liberal theories of justice.

Second, the general autonomy account also escapes the inclusivity dilemma, as it is able to account for the rights of non-gestational partners without opening the door to a host of other potential rights-claimants as well. This is not only attractive insofar as it restricts legitimate parental rights-claims to a more plausible constituency of persons, but also because it allows for the adjudication of cases in which there are multiple conflicting claims over who gets to parent a newborn child. In the case of *Gestational Surrogate*, for example, the general autonomy account clearly and unambiguously assigns parental rights to the commissioning parents (Alice and Bill), whereas Gheaus's account is ambiguous between assigning parental rights to the gestator (Claire) and the commissioning parents, assuming the commissioning parents have also participated in the various

relationship-building activities that give rise to parental rights on that account.[47] In this sense, the general autonomy account has the twin advantage of solving the baby redistribution problem *and* resolving cases in which there are multiple conflicting claims over who gets to parent a particular baby.

Finally, the general autonomy account can also explain our intuitions about important test cases where the gestational account goes astray. In the case of *Gamete Thief*, for example, the general autonomy account offers a clear explanation for why Ernest and Fran, rather than Dana, should be entitled to parent the child they deliberately set out to create. It also fares better in cases of gestation that do not involve a relational component. For example, the GAP is able to explain why the woman who suffered from antenatal depression over the course of her pregnancy should nevertheless be entitled to parent her child, and it may also provide us with guidance in possible future cases of ectogenesis, where a relationship-based gestational account is presumably silent.

Despite these advantages, however, a general autonomy-based account also comes with three important caveats, the exploration of which may provide the basis for further inquiry. First, because it is based on a more general right to non-interference in one's justice-respecting projects, the GAP will not support the parental rights-claims of persons who have not formed parental intentions with respect to their progeny, including estranged biological parents. There have been numerous legal cases in which men, previously unknown to their biological children, have later

[47] An anonymous reviewer wondered why someone who favoured Claire's claim could not also appeal to the GAP in order to protect her right to parent the resultant child, insofar as this can be understood as the continuation of a project *she* has initiated. The reason, of course, is because Claire's project is not justice-respecting. By deliberately creating an embryo with gametes to which they had legitimate access, and proceeding to form parental intentions with respect to that embryo, Alice and Bill have embarked upon a justice-respecting project, one they were entitled to begin, and are entitled to continue, without undue interference from others. Claire does not violate their rights by gestating the embryo—she is of course contracted to do so by Alice and Bill—though she clearly interferes in their project by refusing to relinquish the child to Alice and Bill upon birth. Claire may see herself as having embarked on her own project of gestating and parenting a child, but the GAP would not designate this project as justice-respecting, given that its initiation infringes on the justice-respecting project of Alice and Bill. Thus, if one accepts the basic principle underlying an autonomy-based account, one could not come to the conclusion that it supports Claire's parental rights claim.

claimed rights to parent those children on the basis of a genetic relationship.[48] The GAP does not support such a rights-claim, as the assumption of a parental role with respect to those children cannot plausibly be interpreted as the continuation of a pre-existing project. In cases where a man was aware of his partner's pregnancy, but did not form parental intentions with respect to the child, he can be understood to have forfeited his initial opportunity to do so; similarly, in cases where a man was unaware of his partner's pregnancy, he could not have formed any parental intentions to begin with, and thus does not stand in any special rights position with respect to the resultant child. Of course, in cases where this information has been deliberately withheld, it is an open question whether a man has been wronged by being denied an initial opportunity to form rights-grounding parental intentions with respect to his progeny. The GAP does not by itself supply an argument for such a wrong, though if such an argument was successful, the GAP would have the resources to designate the partner's parental project as non-justice-respecting, and thereby close a moral loophole wherein women can deliberately withhold information about their pregnancies and exclude their male partners from being in a position to acquire parental rights. Norvin Richards has recently supplied such an argument, claiming that a man may be wronged by having information about a pregnancy withheld from him if he had a legitimate expectation—rooted either in an explicit promise or the relationship's history—to believe that he would be included in the decision-making process following a conception.[49] If this is correct, then adhering to the justice-respecting condition of the GAP may require his partner to offer him the opportunity to be included in her parental project. Of course, if this is incorrect, or if the case is one in which the man has no legitimate expectation to be included in the decision-making process following a conception, then the GAP may well permit the legitimate exclusion of biological fathers in certain cases. One might object that this violates the Parity Principle—which I suggested earlier we have some reason to endorse on the

[48] For a widely discussed US case, see *In the Interests of B.G.C.,* Supreme Court of Iowa, No. 207/91-476, 92-49, September 23, 1992.
[49] Richards, "How We Acquire Parental Rights," 273-279.

grounds that (a) men and women have an equal interest in parenting, and (b) we are not responsible for the fact of being biologically male or female—though it is not clear that it actually does. After all, the fact by which the woman is laying claim to being a parent in this case—her right to continue a justice-respecting project—is also a fact by which a man with equal merit could also lay claim to be a parent in many other cases. However, because pregnancies only occur in women's bodies (at least for now), it is sometimes the case that men will be in a weaker position to lay this claim.[50, 51]

A second and related set of challenges involves cases in which one party forms parental intentions earlier than another, and then seeks to exclude them from a parenting project. Imagine, for example, that a couple has conceived and is unsure of whether to proceed with the pregnancy. The man continues in his uncertainty, while the woman begins to envision a future in which she raises the child independently. Having now formed parental intentions with respect to the embryo she is carrying, does the women have a right to non-interference against the man in what she now conceives of as *her* parenting project? This, it seems, will again come down to whether or not the initiation of this project can be considered justice-respecting. The nature of the relationship might again play an important role in our thinking about this question. For example, if the man and woman

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[50] Some will undoubtedly find this to be an objectionable implication, but I think this reaction should be resisted for at least two reasons. First, if Richards' account is correct, then men may be able to guard themselves against this type of legitimate exclusion by only having sex with women who agree to include them in the decision-making process following a conception. Second, when viewed in the context of a complete account of parental rights and responsibilities, the prospect of legitimate exclusion might be quite plausible. For example, those who find the prospect of legitimate exclusion *prima facie* objectionable due to the burden placed on men may be more sympathetic if, in excluding her male partner from acquiring parental rights, a woman can also be understood to have waived any legitimate claim for future assistance from the excluded man.

[51] Another reason why men are in a weaker position to lay this claim is because they do not have the right to control whether a child will in fact be brought to term. Imagine that a woman has become pregnant with her partner, but is unsure of whether she wants to bring the baby to term. Her partner may form genuine parental intentions with respect to the embryo she is carrying, though this 'project' cannot be considered justice-respecting insofar as it is conditional on the woman waiving her right not to procreate. There is a more general principle underlying this reasoning, which is that we cannot have a legitimate claim to non-interference in projects that require the potential interferer to waive their basic rights. For example, it is part of my conception of the good to grow old with my wife, and this imposes a duty on others not to interfere in our relationship in myriad ways. However, it does not impose a duty on my wife to stay in a marriage with me against her will, as she retains the right to free association and to set the terms of her own relationships.

are in a long-term relationship, the man may have grounds for a legitimate expectation to be included in the decision-making process following a conception, in which case the initiation of the woman's project would appear morally tainted. If, however, the conception is the result of a one-night stand, there may be no grounds for such an expectation, in which case it might not be unreasonable to think that the woman could legitimately form exclusionary parental intentions. In either case, custodial conflicts between biological progenitors represent an important set of challenges for an autonomy-based account to address.

A third caveat is that in addition to claims about legitimate gamete access or expectations to be included in the decision-making process following a conception, the 'justice-respecting' condition of the GAP will also include claims about justice in childrearing more generally. This means that in order for the GAP to *unconditionally* support a right to parent one's biological child, we would have to make the following assumptions about the requirements of justice in childrearing:

(1) *Children may be permissibly raised by parents in families*: justice in childrearing does not require (though it may permit) the non-parental care of children.

(2) *Children may be permissibly raised by suboptimal competent parents*: justice in childrearing does not require that children be allocated to the best available parents.

(3) *The opportunity to parent is not a distribuendum of justice:* justice in childrearing does not require an equitable distribution of parenting opportunities, which may otherwise be disrupted by automatically assigning parental rights to a child's biological parents.

Assumptions (1) and (2) are supported by the reasoning that underlies dual-interest accounts of parental rights: the protection of children's interests justifies assigning a small number of adults decision-making authority over a child, and, assuming those adults meet a minimum threshold of

parental competency, their strong interest in exercising that authority justifies a right to do so without interference, even if there other adults available who would do a better job.[52] Notice, however, that the reasoning that gives plausibility to (1) and (2) also seems to render (3) indefensible. Indeed, if parenting contributes to human flourishing in the way that Brighouse and Swift (and others) suggest, then we ought to lament the situation of persons like George from *Baby Snatcher*, who are unable to satisfy their parenting interests due solely to brute bad luck. George's situation, while in certain ways exaggerated, is structurally non-unique: single-sex couples and single or infertile individuals face similar unchosen barriers to the satisfaction of their parenting interests, particularly when there are no children readily available for adoption. Thus, the GAP is most plausibly understood as supporting a right to parent one's biological child only under certain distributive conditions, namely, those of *baby surplus*, in which the number of children available to be parented exceeds the number of parenting units[53] who wish to be parents. In conditions of *baby scarcity*, in which the number of children available to be parented is less than the number of parenting units who wish to be parents, it is not unreasonable to think that the parental rights-claims of procreators might be tempered by the interests of disadvantaged prospective parents. If the opportunity to parent is itself a distribuendum of justice, then such persons may have a legitimate justice-based complaint in a scenario where heterosexual fertile couples were able to parent multiple children while *their* parenting interests went unsatisfied. In this type of scenario, achieving a more just distribution

[52] This is not to suggest that either of these assumptions is uncontroversial. Gheaus herself has notably rejected (1) on the grounds that children have a right against being exposed to potentially harmful monopolies of care, while Vallentyne has rejected (2) on the grounds that children have a right to be allocated to the best available custodian upon birth. For Gheaus's rejection of (1), see "Arguments for the Nonparental Care of Children," *Social Theory and Practice*, 37(3) (2011), pp. 483-509, and "Children's Vulnerability and Legitimate Authority over Children," *Journal of Applied Philosophy*, 35(S1) (2017), pp. 60-75. For Vallentyne's rejection of (2), see Vallentyne, "The Rights and Duties of Childrearing."

[53] A parenting unit may be an individual or a small group of adults (e.g. a couple). A couple's parenting interests may be satisfied by jointly parenting one child between them; thus, in a surplus scenario, the number of children available to be parented need not exceed the number of individual adults who wish to be parents, as some of those adults will form collective parenting units.

of parenting opportunities might require taking a number of measures currently viewed as supererogatory, including making gametes available for use in other people's procreative projects or opening up the nuclear family to more multi-parenting arrangements.[54]

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[54] For a recent discussion of the latter, see Anca Gheaus. "More Co-Parents, Fewer Children: Multiparenting and Sustainable Population," *Essays in Philosophy*, 20(1) (2019), pp. 1-21.

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