

## The Best Available Parent and Duties of Justice

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In a recent paper published in *Ethics*, Anca Gheaus argued for the best available parent view, which holds that the right to parent should track “the child’s, as well as third parties’, but not the potential parents’, interests.”<sup>1</sup> In this short note, I argue that the best available parent view, in its present formulation, struggles to accommodate for our weighty duty not to perpetuate historical injustices. I offer an alternative view that reconciles this tension. Let us begin with Gheaus’s view.

The status quo is, as Gheaus puts it, that we should “allocate child custody to procreators [because they] hold the moral right to parent their offspring, unless they renounce it or lose it for child abuse and neglect.”<sup>2</sup> The status quo constitutes not only the moral and philosophical leanings of many, but also the legal order in which we were raised. For although some of us might have had better parents than others in some respects, the state took no interest in allocating children to the best available parent.

Gheaus thinks that the status quo fails to properly justify parental authority over children. We might reconstruct Gheaus’s argument for the best available parent view as follows:

1. Rights to control the life of another must be justified in two ways: consent or legitimate interests.
2. Children have not yet developed into fully autonomous agents and therefore cannot give consent.
3. By (2), parental rights must be justified by appeal to the child’s legitimate interests.

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<sup>1</sup> Gheaus, “The Best Available Parent.” Following Gheaus, when I refer to “rights” in this essay, I am referring to moral rights unless otherwise specified.

<sup>2</sup> Gheaus, “The Best Available Parent,” 434.

4. Since “childrearing can have negative externalities ... there is a presumption in favour of child-rearing that advances children’s interests as much as possible, while respecting third-parties’ rights.”<sup>3</sup>

5. By (4), “there is a presumption in favour of the view that the right to parent is held by the person who would make the best available parent for a child and who is willing to rear her.”<sup>4</sup>

Gheaus points out that the “best” in the best available parent view should be understood comparatively. That is, if we are given a choice between parents  $P_1$  ...,  $P_n$ , and we know that  $P_{101}$  is the best, we ought to specify the right to parent to  $P_{101}$ , since that would make things go best. On the comparative construal of “best,” even if  $P_{101}$  is only 1 percent better than  $P_{100}$ , we would be making a moral mistake if we specified the right to  $P_{100}$ . For our purposes, it will be useful to formulate a version of Gheaus’s principle of parental control rights that makes explicit this comparative construal of bestness:

Gheaus’s Comparative Principle (GCP): “The right to parent is held by the person who, among those willing to parent, is going to advance the child’s legitimate interests best.”<sup>5</sup>

But there is something strange about trying to apply GCP, at least in certain contexts. As Gheaus herself acknowledges: “In non-ideal circumstances many people are unjustly poor and suffer from social exclusion,” which gives rise to the worry that “the best available parent view compounds injustice by denying them a right to parent.”<sup>6</sup> I think this is a worry that we should take seriously.

When we are thinking about parental rights, we should not ignore such circumstances. We should

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<sup>3</sup> Gheaus, “The Best Available Parent,” 435.

<sup>4</sup> Gheaus, “The Best Available Parent,” 435.

<sup>5</sup> Gheaus, “The Best Available Parent,” 434.

<sup>6</sup> Gheaus, “The Best Available Parent,” 459.

recognize that all children enter the world with a particular history, bound by a particular set of institutions, social practices, and familial relations. And we ought to take this into account when theorizing about how to specify parental rights. Reflecting on how the best available parent view applies in such circumstances, Gheaus writes:

Another person's claim to parent a newborn cannot easily over-ride the claim of the loving and adequate gestational mother to exercise global authority over the child. *But the view allows for this possibility.* Suppose another adult wishes to parent the child, an adult who is not yet in a loving relationship with the newborn but whose abilities to exercise beneficial authority over the child significantly surpass those of the gestational mother. In this case the best available parent view may mandate the exclusion of the gestational parent from exercising parental authority over the child, but not from continuing an intimate relationship with her.<sup>7</sup>

I want to focus on Gheaus's claim that the best available parent view allows for the possibility that we might specify parental rights in such a way that a gestational mother could lose their parental rights on the grounds that there exists another person who would be a better parent than the gestational mother. This seems mistaken to me.

To see why, consider the case of the residential school system in Canada. Between 1831 and 1996, more than 130 residential schools operated within Canada.<sup>8</sup> The stated purpose of the residential school system was to assimilate Indigenous youth into Canadian society. To assimilate, teachers prohibited students from speaking their own language, wearing traditional clothes, and

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<sup>7</sup> Gheaus, "The Best Available Parent," 458, emphasis added.

<sup>8</sup> Miller, "Residential Schools in Canada."

practicing Indigenous spiritual traditions.<sup>9</sup> An estimated 3,200 Indigenous children died from overcrowding in the schools and many students suffered physical and sexual abuse.<sup>10</sup>

Despite their recent decline in the 1990s, the effects of the residential school system are still unravelling. While I was writing this article, an unmarked mass grave of 215 Indigenous children was discovered in British Columbia.<sup>11</sup> Seven hundred fifty-one unmarked mass graves have been discovered near a former residential school in Saskatchewan.<sup>12</sup> And 182 unmarked graves have been discovered in British Columbia.<sup>13</sup> It is perhaps an understatement to note that recent empirical research supports the claim that survivors of the residential school system face vast health inequalities in Canadian society.<sup>14</sup> The historical trauma and lasting effects of colonization that survivors of the residential school system deal with may have led to a situation where survivors may lack “personal parenting resources” through no fault of their own.<sup>15</sup>

Given this backdrop of genocide and colonization, it seems strange that “the best available parent view may mandate the exclusion of the gestational parent from exercising parental authority over the child, but not from continuing an intimate relationship with her.”<sup>16</sup> For any act of specifying the right to parent an Indigenous child to the *best* available parent would seem to come at the expense of compounding this historical injustice, and would likewise serve to reimpose a form of

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<sup>9</sup> Miller, “Residential Schools in Canada.”

<sup>10</sup> Miller, “Residential Schools in Canada.”

<sup>11</sup> Watson and Dickson, “Remains of 215 Children Found Buried at Former B.C. Residential School, First Nation Says.”

<sup>12</sup> Eneas, “Sask. First Nation Announces Discovery of 751 Unmarked Graves Near Former Residential School.”

<sup>13</sup> Migdal, “182 Unmarked Graves Discovered Near Residential School in B.C.’s Interior, First Nation Says.”

<sup>14</sup> Wilk, Maltby, and Cooke, “Residential Schools and the Effects on Indigenous Health and Well-Being in Canada.”

<sup>15</sup> Gheaus defines “personal parenting resources” as dispositions that are efficient for the task of child-rearing, e.g., emotional stability and a tendency to nurture. See Gheaus, “The Best Available Parent,” 450. I should note that I most certainly do not want to assume that Indigenous individuals would not be the “best parents” for their children in the actual world. My thought here is that, due to discrimination, interference by the Canadian state, etc., it is a live possibility that some Indigenous individuals have adequate personal parenting resources as opposed to optimistic personal parenting resources. But this claim is a conditional claim about a possible world, which says: even if such-and-such conditions were to hold in Indigenous communities, it would be wrong to specify the content of moral paternal rights in the way that GCP does. An anonymous referee aptly notes that similar considerations might arise due to individuals affected by structural injustices, which might hinder their personal parenting resources.

<sup>16</sup> Gheaus, “The Best Available Parent,” 458.

assimilation that initially drove the residential school project. Now, Gheaus does acknowledge that her view might advocate for a sort of “leveling up” of would-be parents who are victims of injustice; so, in some circumstances, the right does not hold since it is silenced by our weightier obligations to reparations. And yet recall that Gheaus does allow for the possibility that the best available parent view might exclude the gestational mother from exercising parental authority over their child (while allowing them to maintain an intimate relationship with the child).<sup>17</sup>

But why should this be a live possibility simply because there exists another would-be parent who would be a better parent than the gestational mother? In the case of would-be parents who are survivors of the residential school system, admitting of this possibility seems to reinstitute a form of colonial interference with Indigenous peoples.<sup>18</sup> That is, it assumes that we can weigh the value of

*X*: having a child raised by the best available parent

against

*Y*: our duty not to perpetuate historical injustices.

Yet talk of *X* outweighing *Y* in our normative theorizing, in this case, seems to yield the wrong verdict. Part of taking our duty not to perpetuate historical injustices toward Indigenous persons seriously seems to require that we step back from a view that treats all specifications of parental rights as normatively equal. That is, we seem to be led to modify GCP to give us the following:

Gheaus’s Comparative Principle\* (GCP\*): “The right to parent is held by the person who, among those willing to parent, is going to advance the child’s legitimate interests best” on

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<sup>17</sup> Gheaus, “The Best Available Parent,” 458.

<sup>18</sup> Although note that the interference would not only arise by the recognition of a legal or political right to parent consistent with GCP. My worry here is that conceptualizing the specification of parental rights according to GCP makes this a live possibility.

the condition that specifying parental rights in such a way does not severely conflict with other very weighty duties of justice (esp. duties not to perpetuate historical injustices).<sup>19</sup>

The issue with GCP was that it assigned lexical priority to *X* over *Y*. But taking our duty not to perpetuate historical injustices toward Indigenous persons seriously requires that we place strong side constraints on what can be done to improve children's lives; that is, we ought to assign lexical priority to *Y* over *X*, which gives us GCP\*.<sup>20</sup>

But perhaps there is a reply for Gheaus in the vicinity. Part of what Gheaus has been assuming is that we should treat all specifications of parental rights as normatively equal. That is, when we are thinking about specifying parental rights, we ought to think of the entire set of would-be parents as falling under the scope of GCP. Perhaps this is governed by some feasibility constraints—for example, that all the willing parents *can* actually exercise their parental rights—and this would require that the would-be parents and the child are both inhabitants of the same territory (e.g., Canada). Yet proceeding in this general manner yields an incorrect conclusion, for it seems wrong to specify the parental rights of Indigenous children to non-Indigenous persons who exist outside of the Indigenous community simply because they would be the “best” available parent. However, if GCP is democratically decided upon *within* a given Indigenous community, then it does seem *prima facie* tenable.<sup>21</sup> This is because there is salient a difference between

*A*: specifying parental rights *between* a community

and

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<sup>19</sup> Gheaus, “The Best Available Parent,” 434. Note that I specify duties of justice, e.g., the duty not to perpetuate historical injustices, as being “very weighty.” One could specify such duties with an infinite weight, yet this would likely run into cases where some evaluative fact(s) outweigh a very weighty fact about side constraints. Thus, I admit that they may be defeasible in some exceptional circumstances.

<sup>20</sup> Cf. Rawls, *A Theory of Justice*, 42, n23.

<sup>21</sup> I would like to thank an anonymous referee for suggesting this point.

*B*: specifying parental rights *within* a community.

Whereas *A* seems to issue the wrong verdict, *B* might not. This is because *A* assumes that we can specify parental rights in such a way that they *can* severely conflict with our duty not to perpetuate historical injustices toward Indigenous persons. Yet *B*, if it were democratically decided upon by a particular Indigenous community, might avoid the worry that the entire set of would-be parents in Canada is included within the scope of GCP.

But this construal of GCP might just end up being another way of restating GCP\*. For the thought behind GCP\* was that we ought to take *Y* to be lexically prior to *X*, and then build that into GCP. Similarly, if we take *B* to be lexically prior to *A*, that gives us a democratic deliberative constraint, which would satisfy GCP\* in most cases. While I think this is right, it is not clear that Gheaus would accept such a concession to her much more demanding GCP. This is because Gheaus seems to want GCP to serve as a universal monistic principle that tells us something about the justification of parental rights *as such*, rather than the justification of parental rights indexed to a particular community.<sup>22</sup> Perhaps such an account can work in some cases, but I hope to have shown that things are much more complicated when we consider applying GCP to Indigenous persons in Canada.

Before wrapping up, I should briefly note what does *not* follow from adopting GCP\*. A critic might wonder whether GCP\* permits interference with parental rights in cases of child abuse.<sup>23</sup> Fortunately, it does because GCP\* only rules out interfering with (or specifying) parental rights to bring about optimistic results. GCP\* thus hinges on the following *asymmetry intuition*: we seem to be

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<sup>22</sup> As an anonymous referee notes, Gheaus could have left room in her view for the moderated view I offer here. But Gheaus seems unwilling to promote other considerations of justice at the expense of letting children be parented by suboptimal parents. This is why Gheaus rejects the dual-interest view defended by Brighouse and Swift. See, e.g., Brighouse and Swift, *Family Values*.

<sup>23</sup> I am grateful to an anonymous referee for suggesting that I say more on this crucial point.

permitted to prevent some bad state of affairs from happening (e.g., preventing a murderer from killing an innocent) at the cost of compounding a historical justice, but we do not seem to be permitted to bring about some good state of affairs (e.g., optimifically specifying parental rights) at the cost of compounding historical injustice.<sup>24</sup> That the asymmetry seems to hold shows that my argument in this paper applies to Gheaus's view in particular and not to other moral principles. In other words, I have only demonstrated that one particular optimific moral principle (i.e., GCP) ought to be revised, not that there is a general issue with all optimific moral principles in general.

Leaving that qualifying point aside, I want to make fully explicit what I take to be the root issue of this dialectic: the meaning of "best." It matters greatly what we think "bestness" means, for recall the trouble with GCP was that it specifies "bestness" comparatively, which, together with the duty to bring about optimific results, gives rise to the view that even if  $P_{101}$  is only 1 percent better than  $P_{100}$ , we would be making a moral mistake if we specified the right to  $P_{100}$ . To see why this is such an odd result, consider two cases.<sup>25</sup>

*Optimific Parent:* Due to the history of colonial oppression, child  $X$  would have vastly better outcomes if raised by  $P_{1,000,000}$  as opposed to  $P_1$ .

*Marginally Better Parent:* Due to the history of colonial oppression, child  $X$  would have marginally better outcomes if raised by  $P_{1,000}$  as opposed to  $P_{999}$ .

In the Optimific Parent case, one might reasonably think that it is preferable for the child to be adopted by  $P_{1,000,000}$ , even if doing so exacerbates historical injustice. In contrast, in the Marginally

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<sup>24</sup> You might also find the asymmetry intuition intuitive, but if you do not, then I suspect that you might disagree with me over a deeper question: Is the right prior to the good or is the good prior to the right? Throughout the paper, I have taken the familiar Rawlsian view that the right is prior to the good, e.g., in saying that we ought to assign lexical priority to  $Y$  over  $X$ , which gives us GCP\*. But of course, some consequentialists might find this background intuition entirely unconvincing; unfortunately, I cannot address this deeper disagreement in this short note.

<sup>25</sup> Thanks to an anonymous associate editor for asking me to expand on this point about GCP and for asking me to consider the differences between the following two cases.

Better Parent case, the fact that  $P_{1,000}$  having parental rights over  $X$  would make things go best for  $X$ , comparatively speaking, does not seem to be a reason to specify parental rights in this way; such a reason seems outweighed by our very weighty duty not to perpetuate historical injustices. But this is precisely the problem with GCP: it issues the same verdict in both cases. Yet insofar as there is a salient difference between the two cases, we seem to be led to modify GCP to GCP\*.

In closing, I would like to suggest that our very weighty duty not to perpetuate historical injustices should encourage us to seek different avenues for improving the lives of children. No doubt, GCP\* should not be taken to exhaust our normative vocabulary, for there are other weighty duties of justice (i.e., reparations), and these duties might turn out to entail an even more radical view than the best available parent view. Thus, what I have argued for in this paper should be understood as a conciliatory attempt to modify Gheaus's original proposal, to think through its implications within a particular context.<sup>26</sup> For those attracted to Gheaus's view, I hope that GCP\* ultimately allows us to recognize that, alongside our moral ideals, we also have political ideals to create a better world for our children, rather than merely better children for our world.<sup>27</sup>

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<sup>26</sup> In a way, the motivation behind GCP\* grows out of a more expansive reading of the fourth premise of Gheaus's argument for the best available parent view. When Gheaus says that "childrearing can have negative externalities" ("The Best Available Parent," 435), I think we ought to take "negative externalities" to capture not only rights violations, but also unfulfilled duties of justice. Thanks to an anonymous associate editor for helping me develop this point.

<sup>27</sup> I would like to thank an anonymous associate editor and two anonymous referees at the *Journal of Ethics and Social Philosophy* for their extremely thorough and helpful comments on this paper. For helpful feedback and discussion on earlier drafts, I would also like to thank Chris Howard, Connor Kianpour, Khaleel Rajwani, Matthew Palynchuck, Em Walsh, and Daniel Weinstock. Finally, I would like to acknowledge support from the Social Sciences and Humanities Research Council of Canada.

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