

How Do We Acquire Parental Rights?

1. Introduction

A number of U.S. court cases have heard men, hitherto strangers to their biological child, contest the mother's right to put it up for adoption. Disputes over surrogacy agreements have raised the question of who is the real mother of a child borne by one woman for another. When difficult medical decisions must be made for a child, the default position is that its parents should be the proxy decision-makers. Custody disputes center on which of a couple has the stronger right to parent their children. In all these cases, the judgments made about parenthood are not merely legal or biological, but also moral claims.

In this paper I develop a theory of the acquisition of parental rights that can help us make these judgments. According to this *investment theory*, parental rights are generated by the performance of parental work. Thus, those who successfully parent a child have the right to continue to do so, and to exclude others from so doing. The account derives from a more general principle of desert that applies outside the domain of parenthood. It also has some interesting implications for the attribution of moral parenthood. In particular, it implies that genetic relationships per se are irrelevant to parental rights and that it is possible to have more than two moral parents.

2. What is Moral Parenthood?

This paper is concerned with moral parenthood, which is constituted, at least in part, by the moral rights and responsibilities of parents. This is distinct from natural parenthood, forms of which include genetic, gestational, and rearing parents, and from social or legal parenthood, forms of which include adoptive, surrogate, and foster parents.¹

A complete account of moral parenthood would identify the parents and give the content and weight of their rights and responsibilities. Here

¹There are relationships between them. In particular, conclusions about legal parenthood should be responsive to conclusions about moral parenthood (see sections 10 and 13).

I am concerned primarily with the scope of parental rights, that is, who holds them, and against whom. Thus, I assume that there are some parental rights, but I remain agnostic about their exact content. At a minimum, they include the right to act as a proxy decision-maker for the child in its best interests and the right to exclusively perform parental duties.² Though they must have some weight, these rights are defeasible, that is, they can be outweighed by other moral considerations. Again, I do not commit to how much weight they have.

3. Methodology

A theory of moral parenthood, like any account of a contested normative concept, should help us decide difficult or borderline cases. We should not, therefore, use our intuitions about those cases to decide whether a particular theory is correct. However, there are central cases of parenthood that are uncontested. For example, if two people in a committed relationship conceive and nurture a child, they are moral parents to that child. It would be a fault with a theory of moral parenthood if it failed to give the right result for such paradigmatic cases. This is therefore a condition of adequacy for any theory.

A theory of moral parenthood can be supported by moral principles and intuitions from outside as well as inside the domain of parenthood. Such evidence may provide a broader base of support for the theory than one that relies solely on intuitions about parenthood. A theory whose principles are supported by a wide range of reflectively endorsed moral principles and intuitions is more plausible, all else being equal, than one whose principles are supported by a narrow range. A wider base of support indicates that the theory fits with a greater number of considered

²Phillip Montague claims that the interests of children, and therefore the obligations of parents, are primary in the parent-child relationship. Consequently, he finds a tension between the idea that rights are oriented towards their possessors and the idea that parental rights derive from the interests of children. Phillip Montague, "The Myth of Parental Rights," *Social Theory and Practice* 26 (2000): 47-68, p. 57. He resolves this tension by denying the existence of parental rights. Though I do not have space here for a complete discussion of his argument, Montague does not seem to have considered a justification for rights like the one I give, nor the claims against others entailed by a parental right to exclusive parenting. Such obligations imply that the content of parental rights includes more than just liberties to fulfill obligations, but they need not be in tension with the interests of children. For an account of parental rights that grounds their content in the welfare of the child, see Samantha Brennan and Robert Noggle, "The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice," *Social Theory and Practice* 23 (1997): 1-26. For a defense of the claim that there are parental rights that are justified by the interests of the parents (not just their children), see Harry Brighouse and Adam Swift, "Parents' Rights and the Value of the Family," *Ethics* 117 (2006): 80-108.

moral intuitions. Likewise, a theory whose principles are derived from moral principles outside the domain of parenthood is better supported because it gives our moral theory greater explanatory unity. Further, this reduces the number of ad hoc moral principles, where an ad hoc principle is one generated solely to account for intuitions about a particular subject matter that are inconsistent with more general moral principles.

The principle upon which I base my account of the acquisition of parental rights has a wide base of support from outside the domain of parenthood, as well as fitting many common intuitions about parenthood. The account requires no ad hoc principles. I take these facts as substantial evidence in its favor.

4. The Investment Principle

The investment theory of parental rights is based on the following principle:

The investment principle: Ceteris paribus, the extent of an agent's stake in an object is proportional to the amount of appropriate work he or she has put into that object.

Object is a placeholder for anything over which people can acquire rights. A person's *stake* is some set of rights over the object. The nature of these rights will be determined by the nature of the object. The *appropriate work* for producing any object of type O is (morally permissible) work that leads to a good O. This work may vary across environments and there may be more than one way to produce a good O. Finally, all this applies *ceteris paribus*, since there could be other moral principles whose rulings conflict with those of the investment principle and may outweigh them.

The investment principle is a straightforward way to understand the principle of justice that says that reward should be proportional to work. I assume that the principle is intuitive, even if people dispute how to weigh it against other moral principles. (In particular, it may be a matter of dispute how different bases for desert—such as work performed and need—are to be balanced with regard to the distribution to people of rights over objects. In section 7 I consider whether other moral principles may affect the acquisition of parental rights.) It also fits with plausible judgments about particular cases. For example, suppose that B and C are employed to work on the same task, and they are equally efficient workers. B works on the task twice as long as C. Then, all else being equal,

she should be paid twice as much.³

It may be disputed whether work generates a stake in its object, rather than just generating a claim to some compensation.⁴ In cases of paid labor, for example, we may not think that workers acquire rights over their products. However, it is important to keep separate the implications of the investment principle from implications of other moral principles that may simultaneously apply. Two considerations, in particular, may confound our intuitions that work put into an object confers rights over it. The first is when another person already has (exclusive) rights of that type over the object. The second is when some morally binding prior agreement exists about the distribution of reward for work. Both of these apply in the normal case of industrial labor. Outside of such cases the investment principle applies without interference, and so produces clear intuitions: it's my song if I wrote it, our bivouac if we built it, our amateur dramatics society if we founded it, and so forth. If you and I build something out of unowned (but ownable) materials, for example, I cannot acquire exclusive rights over it simply by paying you for your work—you must agree to such an arrangement. The two confounding considerations do not apply in the central cases of parenthood, either: no one yet has exclusive parental rights over the child, nor are there prior agreements on whose work will count as parental. Where they do apply, for example, in cases of adoption or paid childcare, the investment principle does not give such a straightforward verdict.⁵

5. Calculating Work

A key question for assessing the size of a contributor's stake is how to measure the amount of morally deserving work (henceforth, just "work").

³For those who do not take desert as a basic moral ground, the investment principle may also be given a consequentialist justification: if people know that they will receive a stake in the products of their labor, and that that stake will be proportional to their labor, this provides an excellent incentive for them to work to produce good things.

⁴Indeed, we may have a deeper worry than this. Consider Robert Nozick's concern about Locke's labor-mixing theory of the acquisition of property rights. Nozick wonders: "why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't?" Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 174-75. My argument here relies on our intuitions about a range of cases, not on a solution to the deep theoretical concerns to which Nozick gestures. It is worth noting, however, that the investment principle applied to parenthood is in better shape than similar principles applied to property. First, there are good reasons for thinking that some small group of people ought to have parental rights (for the sake of the child, if nothing else). Second, rights over children are rights over objects that are created, not rights over objects that existed prior to human activity.

⁵See, *inter alia*, section 8.

Two main factors appear relevant: the effort expended and the value created.⁶

Clearly, where no effort has been expended, no work has been done. It is possible, however, that where effort is expended without success, there has been work. Two cases may be distinguished. In the first there is some expected value that, for reasons outside the agent's control, did not materialize. Here it seems that the effort still deserves reward. Indeed, were the actual value greater than the expected value, again for reasons outside the agent's control, it does not seem that what she deserves for the work done is any greater. A second case of effort without success occurs when the effort is misdirected. If the agent could reasonably have expected that the effort she expended would not generate value, then she does not deserve reward for its expenditure.

We have established that effort directed at expected value is work. It is not yet clear, however, exactly what role expected value plays. Perhaps, for example, work is some function of effort expended and expected value created such that the greater the expected value the greater the amount of work. In some cases this seems plausible; in others only the amount of effort seems relevant. For example, if I have trained myself to work efficiently, I deserve a proportionate reward; but this is not the case when I am a faster worker than you just because my parents fed me better as a child. Similarly, if two tailors both have a choice between machine-sewing and hand-sewing and one chooses the former, she may deserve a greater reward for her greater productivity; however, if one cannot afford a machine, but must sew by hand, it would be unfair if he is penalized. Again, considerations of luck versus personal responsibility make the difference: only if I am responsible for the difference in expected value does this affect what I deserve, that is, the amount of work I do.⁷ To make sense of all these intuitions, I suggest therefore that work is

⁶I am ignoring here a separate issue, which is how to distinguish work from nonwork. My inclination is to include all activity as potential work, and assign it a nonzero value when it is expected to produce something of value. Others delineate work as unpleasant activity. (For discussion of this, and the value-added alternative, see Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown Law Journal* 77 (1988): 287-366, pp. 300-310.) However, it seems implausible to me that we do not work if we enjoy it. Indeed, work—conceived as such—seems to be one of the main satisfactions that life offers. However, space precludes detailed consideration of this point here.

⁷I tread a potentially unstable line here, since I am ruling out certain forms of luck (e.g., resultant and constitutive luck) as relevant to desert, but still allow certain others to be relevant (e.g., the circumstantial luck whereby I find myself in a situation in which there is work available). This is a general problem for theories that take voluntary action as a basis for desert; it will be a problem for any theory of parental rights that grounds them in the actions of the parents. One solution, if we want to rule out all forms of luck, is to equalize people's opportunities to acquire parental rights (see section 7). This is an issue for a theory of social justice to answer.

best assessed as the amount of appropriately directed effort, where appropriateness is defined as the ratio of the effectiveness of the means taken to the most effective means the agent could have taken.⁸

This piece of conceptual analysis is too brief to be conclusive. Since this is not a paper about the concept of work, however, it will have to suffice. In my claims about work later in the paper I rely not merely on the analysis here, but on the consistency of the claims with our intuitions about what counts as work in the cases considered. The agreement of the two—for example in my claim that the act of coitus leading to conception normally involves very little work—is taken as sufficient evidence that the claim about that case is correct.

6. Applying the Investment Principle to Parenthood

Applied to children, the investment principle tells us who has the parental rights. In short, it tells us that the primary caregivers, those who have invested substantial parenting work into a child, are also the rights-holders. The investment principle thus helps make theoretical sense of the intuition that, in general, those who parent a child are the child's parents. Biological parents who raise their child (our paradigmatic case) therefore have the right to do so; but adoptive parents, through their nurturance, are just as much moral parents of their children.

There are also reasons for thinking that good consequences follow from applying the investment principle to parenthood. The processes of bonding and attachment and the attendant needs for stability during development mean that the welfare of the child will often be best served by allowing the person or people who have done the parenting work so far to continue to do so.⁹ Thus the welfare of the child and the rulings of the investment principle will frequently coincide.¹⁰

It is important to note here a possible misinterpretation of the princi-

⁸“Could have taken” includes what the agent should have done in the past that affects her effectiveness now. It excludes means that were objectively available to the agent but which she (without fault) did not know about. Thus the effort that counts is whatever effort people may properly be held responsible for. This result will hold even if one's theory of personal responsibility makes different claims from those I have made about the relevance of moral luck. Were such a theory correct, it would be necessary to see whether the investment principle came to verdicts about who possesses parental rights that were different from those based on my assumptions about responsibility.

⁹Cf. David Archard, *Children: Rights and Childhood*, 2nd ed. (New York: Routledge, 2004), pp. 150-51.

¹⁰This has two pleasing implications. First, custody disputes that require balancing the interests of the child against the rights of a competent parent should be relatively uncommon. Second, rule consequentialists looking for a principle to determine the acquisition of parental rights have reason to adopt the investment principle.

ple. The investment principle may seem reminiscent of Lockean principles of property acquisition, and so it might seem as though I assimilate parental rights to property rights. This would be a mistake. The investment principle is a principle of desert that applies quite generally to any object over which people may have rights and into which they can invest work, but the nature of the rights depends on the nature of the object. So, for example, the rights I can acquire over songs I write may be very different from my rights over the herbs I grow, and both very different from my rights over the kittens I breed, or the club I helped to found.¹¹ The investment principle applies to objects that can be owned, and is one way of acquiring rights over them. It also applies to objects we cannot own, but nevertheless is a way in which we may acquire those (nonownership) rights appropriate to them.¹²

7. Other Moral Principles

The *ceteris paribus* clause allows that other moral principles could be relevant to the acquisition of parental rights. Consequently, before we can conclude that the investment principle tells us who has parental rights over a child, it must be shown that other principles do not apply. In this section I consider the possible relevance of welfare considerations and rights transfers. I do not think there are principles of justice other than the investment principle that can ground parental rights. It might be suggested that considerations of justice support some kind of “right to parent,” but this would not be a parental right. To think otherwise is to confuse a right to parent some unspecified child with rights over a particular child.

¹¹The tendency of legal regimes to assimilate different rights to property rights should not obscure the differences in the moral rights that may underlie those legal rights.

¹²Indeed, Locke himself denies that parents have property rights in their children, claiming instead that, “The power, then, that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood.” See John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988 [1689]), II 58. Parental rights for Locke are therefore conditional on the fulfillment of parental duties. Further, Locke assumes that the natural parents have a claim right of “first try” in rearing their children. In *The Lockean Theory of Rights*, A. John Simmons suggests that this right may be best defended by “variants of Locke’s property arguments that establish not property in the child, but rather only a special right to a large say in what is done with the thing to which one has contributed (the child).” He goes on: “Since the natural parents (or, at least, mothers) are always (barring exotic technology) the first to perform significant acts of commitment and concern for the child (such as carrying it to term, laboring to give it birth, protecting it after birth, etc.), natural parents have first claim on rearing their child.” A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), p. 183.

The parents of a child make a huge difference to its quality of life. It might therefore seem that the expected welfare of the child should be a factor in determining its parents. However, the link between a child's welfare and who gets to parent it is not straightforward. On any plausible account of what children are owed by their caregivers, they have a claim only to a certain threshold of care.¹³ It is likely that many different people would be able to supply this. But this means that many people could discharge parental responsibilities. Given this, how might the future welfare of a child decide between them? Moreover, why should we think, in general, that the welfare of a creature can confer rights over that creature to another party, rather than just ground claims by the creature itself?

Instead of thinking of welfare considerations as conferring parental rights, it is better to think of them as potentially outweighing those rights. There are two familiar cases in which this may occur. First, where a child is being neglected, considerations of welfare may justify taking it from its current caregivers and placing it in the custody of alternates who are expected to care for it better.¹⁴ These alternate caregivers would then be able to acquire parental rights by putting in parenting work. Second, when parental claims are contested, for example, in custody disputes, the welfare of the child should have weight. Thus welfare considerations might favor giving primary custody to someone with a weaker parental claim.¹⁵ In both these cases, the transfer of legal parenthood is justified on the basis of the child's welfare and this transfer facilitates the acquisition of the accompanying moral rights.

An alternative way in which it is sometimes possible to acquire rights over an object is when another agent transfers the rights. Whether such transfers are possible depends on the nature of the object; for example, legally we may transfer property rights but not the right to vote. I do not think that moral rights over children can be transferred in this way. Were this possible, one parent could transfer his or her rights to a stranger and that person would thereby become an equal parent with the remaining original parent (or parents). This is highly counterintuitive. There are ways in which agreements or contracts may affect parental rights, how-

¹³Or to be given a certain amount of resources: the point applies whatever the proper currency of the child's claims.

¹⁴This also gives us a clue about the *content* of parental rights. Assuming that their content is constrained by the welfare of the child, the right to raise should range over a conjunction: "P has the right to (raise C as a flourishing child and exclude others from raising C)." There are not two separate conjoined rights: "P has the right to raise C" and "P has the right to exclude others from raising C." This means that in the case in which P fails to raise C, P does not have the right to exclude others from raising C; thus others may step in. This may lead, over time, to these others becoming the primary parents, or it may end up with the earlier parents mending their ways.

¹⁵I say more about legal disputes over custody in section 13.

ever. In particular, it may be possible to agree not to press one's parental stake. This occurs in cases of adoption, where the present parent or parents allow other people to invest parenting work in the child and agree not to exercise their parental rights.

8. The Work of Parenting

In section 4 I claimed that the appropriate work for acquiring rights over an object was work that produced a good object of that type. The primary goal of parenting is the flourishing of the child, in both the short- and long-term. Good parents have to help their child from day to day, from one stage of childhood into the next, and they must also act with regard to the adult their child will become.¹⁶ Further, what a child needs during its development varies over time. Thus, parental work will be whatever work is appropriate to assisting the child's development at its particular life-stage.

Exactly what divides parental and nonparental work will be contentious. For example, people may argue about whether monetary contributions count (e.g., sent by a parent working away from home). Assuming they do, we need to establish how this contribution to the child's welfare compares to the work done by caregivers who are present. Perhaps more contentiously, does preconception work count? If it does, then biological fathers, sperm and egg donors, and the physicians performing IVF will all be doing parental work and will start with some stake in the child. But what then of the nagging parents of adult children who want grandchildren, or someone who sabotages a condom?

I do not resolve these difficult issues here. For the most part, we can get by with our pretheoretical understanding of what counts as parenting. However, there will be cases, like monetary contributions or the work of IVF, that are disputed or novel. In such cases, absent a persuasive account of parental work that excludes them, we should err on the side of caution and allow any work that positively contributes to the child's development to count. Without a principled reason to exclude some work and not other work, we risk ruling out forms of parenting simply because of prejudices caused by our contingent parenting traditions.

It might be objected that there is at least one principled way to distinguish parental from nonparental contributions to a child's welfare: parents are those people who are in a particular form of caring, intimate relationship with a child, and parental work is therefore the work done

¹⁶Some children may not be expected to reach adulthood. However, this does not negate the forward-looking character of parenthood, it merely—sadly—truncates it.

within this relationship.¹⁷ Such a view could rule out providing money or assisting in the process of conception on the grounds that they are not done from within the right sort of relationship. A view like this has some intuitive appeal: a great deal of what a child needs is nurturance within an intimate relationship with a caregiver or caregivers, and so the view captures many cases of parental work. However, it has two problems. First, there seem to be very plausible examples of parental work that are not captured by the idea of work done from within an intimate relationship. Consider a mother who is forced by economic hardship to work in a different country and send remittances home to support her family. It seems arbitrary (and, indeed, unfair) to say that she is not parenting whereas a woman wealthy enough to stay at home would be. Of course, it could be claimed that such cases do constitute work within an intimate relationship, since working away from one's family may involve a great deal of sacrifice on its behalf, but then the distinction between the types of work becomes unclear. Unless we can determine whether an action constitutes work within an intimate parent-child relationship without relying on our prior intuitions about whether the action counts as parental work, this account will serve no function. Second, other than its fit with many intuitions about particular actions that parents perform, there does not seem to be a theoretical justification for thinking that work done from within an intimate relationship is more deserving than other work that assists a child's development.

One further case deserves more detailed consideration here, since it might seem to generate counterintuitive implications from the investment theory. This is the case of hired childcare. Clearly a lot of childcare—the work of babysitters or nannies, for example—is parental work, since it is work performed to substitute for absent parents. But for whom does it generate parental rights?¹⁸ If it generated rights in the caregiver, there could be cases in which the nannies of working parents acquired a greater parental stake than the original parents.¹⁹ On the other hand, if hiring childcare counted as doing the work oneself, then there could be parents to a child who were permanently absent from their child's life. Both options seem morally troubling.

The solution, I think, is to consider the relationship between parental work and parental responsibilities. A large part of the work of parenting

¹⁷My thanks to an anonymous reviewer for *Social Theory and Practice* for suggesting this view.

¹⁸I ignore here the possibility that it just doesn't count as morally deserving work for anyone, because none of the parties involved seem to be doing anything wrong. For example, we think that people are allowed to go out without their children and are being good parents by hiring a babysitter. Neither does paid childcare seem morally questionable.

¹⁹My thanks to Wayne Sumner for pressing me on this point.

is the fulfillment of one's responsibilities.²⁰ But there are at least two types of parental responsibility. The first type simply involves ensuring that certain things are done for one's child; for example, ensuring that the child is fed, clothed, comforted, and the like. These responsibilities can be fulfilled by proxy parents, like babysitters. The other type, however, necessarily involves actions by the parent herself. For example, children deserve an intimate relationship with their parent or parents, which suggests that parents have the duty to make a good faith attempt to form a loving bond with their child. Such a duty cannot be satisfied by employing someone else to bond: the intimate relationship is intrinsic to parenthood. Now, if this understanding of parental responsibilities is correct, we can reconcile our intuitions on paid childcare. For some responsibilities it is possible for a parent to employ someone to carry them out on her behalf. In such cases, the parent, not her employee, will be deserving of the stake generated by the parental work, since it is she who is fulfilling the relevant responsibilities. However, there are limits on what can be contracted out. Parents who use substitute parents too much are liable to fail to carry out duties that only they can perform (developing an intimate relationship takes a serious investment of time, for example). This will therefore undermine, rather than promote, their parental claims.

In the light of this discussion, we can also see what the investment theory can tell us about surrogacy disputes. Surrogate motherhood occurs when a woman carries a fetus to term on the understanding that at birth custody will be given to another person or persons. Surrogacy cases are ripe for disagreements about parental rights, since they involve different people playing roles during pregnancy that would normally be played by just one person. For example, where the agreements unravel, who should be considered the "real" mother of the child—the egg donor, the gestational mother, or the woman on whose behalf the fetus is gestated?²¹

According to the investment theory, the people with the strongest claim to parent are those who have put in the most parental work. This would normally be the gestational mother (even if we count the preconception work of the contracting parents).²² However, in the case of contracted surrogacy, it looks as if the gestational mother is working on behalf of the contracting parents. The analysis just given therefore implies

²⁰I leave open the possibility that there is parental work over and above the fulfillment of parental responsibilities.

²¹See Gregory E. Pence, *Classic Cases in Medical Ethics: Accounts of the Cases that Have Shaped Medical Ethics, with Philosophical, Legal, and Historical Backgrounds* (New York: McGraw-Hill, 1995), pp. 142-53, for details of the Baby M case, which famously pitted the biological and gestational mother of a child against the contracting parents—the child's biological father and his wife.

²²See section 9.

that her work does not generate parental rights for herself, but, if anyone, for them. Consequently, it is they, not she, who have the strongest claim to parent the child in the event of conflict. Of course, this will be true only if the surrogate mother really is working on behalf of the commissioning parents, and this requires that the surrogacy contract must be valid. If it is not, then the surrogate's work presumably makes her the child's moral parent. The question of the validity of such contracts is not answered by the investment theory.²³

9. Implications of the Investment Principle

The investment principle has some immediate implications for our understanding of who the moral parents of a child are and why. Around the time of conception, a number of individuals may have a stake in the fetus, especially in cases of assisted reproduction. However, over the course of pregnancy and childbirth, the work of the gestational mother will normally substantially outweigh this other work. Thus, at birth, the gestational mother will generally have a massive majority stake in the child. Amongst other things, this implies that she has the power to decide which other people will be permitted to invest parental work, and therefore who else will become a moral parent.

If other people, such as the child's biological father, are not substantially involved during a woman's pregnancy, then their parental rights can be acquired only by sharing caregiving after birth. However, fathers (and others) need not be so excluded. Through their relationship with the mother during pregnancy, they may be able to provide support that constitutes a parental contribution.²⁴ Further, the gestational mother may have given her partner reason to think that he or she would get to be a

²³A wide range of arguments have been developed to show that surrogacy contracts are invalid. For example, there has been a great deal of discussion over whether commercial surrogacy constitutes an illegitimate commodification of children or women's labor. See Elizabeth S. Anderson, "Is Women's Labor a Commodity?" *Philosophy and Public Affairs* 19 (1990): 71-92; Richard J. Arneson, "Commodification and Commercial Surrogacy," *Philosophy and Public Affairs* 21 (1992): 132-64.

²⁴Cf. Barbara Katz Rothman's *Recreating Motherhood*, in which she argues that parenting is a social relationship based on nurturing. Because men cannot gestate fetuses, they are excluded from much of the nurturing of pregnancy. However, this does not involve a permanent exclusion from parenthood: "Like mothering, fathering should not be thought of as a genetic connection, but a social relationship ... The social relationship of parenting, of nurturing and of caring, needs a social base, not a genetic one. Through their pregnancies, women begin to establish that base. Through their relationships with women, and then with children, men too can establish that base. Pregnancy is one of the ways that we begin a social relationship with a child, but obviously not the only one." Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W.W. Norton, 1989), pp. 225-26.

parent, and this may give the partner a legitimate claim to be allowed to parent.

The investment principle also nicely ties together the discharge of parental responsibilities and the acquisition of parental rights. In the case, for example, where a man has impregnated a woman and is thereby considered to have acquired parental responsibilities,²⁵ one way in which he can discharge those responsibilities is through parenting (since whatever their exact content, parental responsibilities include ensuring parental work is done). He will thereby acquire parental rights. Hence, normally, men will not end up fulfilling parental responsibilities without rights; nor will they have parental rights if they substantially fail to fulfill their responsibilities.

Two interesting implications of the investment principle merit further consideration here. First, it implies that more than two people can parent a child. I address this implication in the next section. Second, in most cases the amount of work done in supplying the genetic material needed for a child is minimal.²⁶ The investment principle therefore implies that genetic relationships do not confer parental rights (or do so to an extent easily outweighed by most other caregiving actions). In cases like gamete donation, where the standard accompaniments of culpability and coitus are not present, I believe that this fits with most people's intuitions. In more traditional cases, it may seem strange. I provide an extended argument against the relevance of genetic ties in section 11.

10. Multiple Moral Parents

Only two people provide a child's genes. However, many people may contribute to the raising of a child and so may acquire parental stakes. Indeed, a child may have any number of moral parents. This should be a matter of celebration, not of concern. In societies where the biological parents do the majority of the parenting work, this will normally mean that their parental stake greatly outweighs that of other caregivers. If, instead, members of the extended family play a substantial role in raising children, these other family members may acquire parental rights. And where childrearing is communal, all the participating members of the

²⁵I consider how and why this is the case in Joseph Millum, "How Do We Acquire Parental Responsibilities?" *Social Theory and Practice* 34 (2008): 71-93.

²⁶The contribution made to the child by its genes will be substantial. However, as I argued in section 5, work is best understood as appropriately directed effort, and even if sex may be aimed directly at conception, it does not normally involve much effort. Exceptions to this rule, such as couples who spend a long time trying to conceive, do not imply that the genetic relationship itself has significance, independent of the importance they attach to it.

community will be parents. Thus the investment theory of parenthood avoids the trap of arbitrarily preferring any particular parental set-up: if a way of raising children leads them healthily through their development, then this counts as a legitimate mode of parenting.

This conclusion may challenge some strong intuitions. But unless we take a very strict geneticist line, it is hard to see principled reasons for thinking that only two people can have parental rights over a child. After all, even for those people who think biological links are important, adoption still provides an alternative source of parental rights. Unless we beg the question, nothing in the process of adoption seems to require that a genetic parent relinquish his or her rights before another adult can adopt.²⁷ It is more likely that allowing more than two parents would be objected to on the grounds of the child's welfare. Here, two considerations are in order. First, I am aware of no evidence, for obvious reasons, that indicates that having more than two parents harms a child.²⁸ Second, even if having multiple parents were harmful, this would be a reason to restrict the number of *legal* parents that were permitted; it would not have direct implications for the moral rights of parents.

11. Intuitions About Genetic Parenthood

Many people think genetic parenthood is important. This is illustrated by the extensive efforts of many infertile couples to have a biological child, rather than adopt, and by adopted children who search for their biological parents. It is therefore plausible that many people believe genetic parenthood is a source of moral parenthood. However, the investment theory gives no weight to genetic relationships per se. This might therefore ap-

²⁷Perhaps it could be claimed that it is part of the concept of "parent" that there are at most two (and, perhaps, that these two play the roles of "mother" and "father"). But in this case we can ask whether this conceptual claim is supposed to be normative, or just a claim about the meaning of words. If the former, then some normative justification needs to be given and we are back where we started. If the latter, then we may respond that we are not concerned with just analyzing the meaning of the word "parent," but with the rights and responsibilities that accompany the primary caregivers of children. The precise meaning we give to parent, *in its moral sense*, may then be amended in line with our normative conclusions about these caregivers.

²⁸A recent case before the Court of Appeal for Ontario concerned a lesbian couple, one of whom was biological mother to a child whose biological father was also closely involved in his child's life. The child considered himself to have two mothers and a father. The nonbiological mother of the couple asked for and was granted equal legal parenthood with the two biological parents (*A.A. v. B.B.*, 2007 ONCA 2). Were this precedent to be followed, it might then be possible to gather evidence about the effects of having more than two parents. In this case the judge was convinced that the best interests of the child lay in having three parents.

pear to be evidence against the theory.²⁹

To see that it is not, we must examine more closely the role of intuitions in moral theorizing. Sometimes our intuitions give us reason to think that there is some justificatory principle to be discovered, and sometimes they do not. It is often reasonable, for example, for me to pay attention to a feeling that some proposed action is wrong, simply because this feeling is a clue that there may be a moral reason that applies to the situation that I have not yet noticed. However, in cases in which we can causally explain our moral intuitions, and the facts cited in the explanation do not justify the intuitions, we no longer need expect that the intuitions are alerting us to some principle. This, in turn, means that if we cannot find an alternative justification for the intuitions and we have such a causal story, we have reason to think that the intuitions are not justified. This is the normative analog of a genetic argument.³⁰ Unjustified moral intuitions should be substantially discounted during the process of reflective equilibrium. This follows from considerations of explanatory unity: to amend moral principles that are more thoroughly integrated with our moral theory to take account of such isolated intuitions would be ad hoc.

Evolutionary biology provides plausible explanations of the origins of people's moral intuitions about the importance of biological relationships. Natural selection operates (ultimately) at the level of genes, not individuals. Since relatives share genes by descent, the genetic fitness of an individual is affected by the reproductive success of its relatives as well as itself. Kin selection theory therefore predicts that people will favor relatives over nonrelatives and that, consequently, we can expect adaptations with the function of distinguishing, and preferentially helping, genetic relatives (in proportion to the degree of relatedness). Humans possess various adaptations that appear to have this function; for example, the propensity to jealousy, or mother-child bonding.³¹ Further, the evolved preferences predicted by evolutionary theory are mirrored to a significant extent by moral principles in the great majority of human so-

²⁹Cf. Tim Bayne and Avery Kolers, who write: "it seems that including the gestational and genetic parents is a litmus test of any account of the right sort of causal linkage [for parenthood]." Tim Bayne and Avery Kolers, "Toward a Pluralist Account of Parenthood," *Bioethics* 17 (2003): 221-42, p. 239.

³⁰By a *genetic argument*, I mean an argument that purports to undermine the credibility of a belief by showing that the causal origins of that belief are unrelated to any justification for the belief.

³¹See David M. Buss, *The Dangerous Passion: Why Jealousy is as Necessary as Love and Sex* (New York: Free Press, 2000), pp. 3 f., for evidence that jealousy is an adaptation. I assume that the evolutionary significance of mother-child bonding is too obvious to require argument.

cieties.³² This provides evidence that such moral principles, including the intuitions with which I am here concerned, are caused (in large part) by the evolved preferences.³³

If the empirical contentions of the previous paragraph are roughly accurate, then the causal explanation of why people think genetic relationships are important is not related to reasons that justify their importance. Consequently, we do not have reason to think that these intuitions are clues to some principle that justifies them. Hence, in the absence of further justificatory reasons, we should discount them. Further, it looks unlikely that there are such reasons: it is hard to see what justificatory connection there might be between stretches of DNA and moral standing. I therefore do not give the intuitions weight.³⁴

Of course, it will often be the case that the moral and the biological parents will coincide (as with the paradigm case of parenthood). Further, procreation may lead to parental responsibilities, the fulfillment of which may confer parental rights. I deny only that the biological link itself is the source of those rights.³⁵

My argument here is unlikely to do anything to dispel the desires of those people who want biological rather than adopted children. Conse-

³²For example, see Nancy W. Thornhill, "An Evolutionary Analysis of Rules Regulating Human Inbreeding and Marriage," *Behavioral and Brain Sciences* 14 (1991): 247-93, for an analysis of some ways in which the rules governing sex and marriage in human societies reflect the evolved interests of their members (particularly the more powerful members).

³³The evidence is twofold. First, it is significant that moral principles reflect genetic relationships (of course, there are exceptions, but there is still a substantial correlation). Second, emotional reactions are excellent predictors of moral judgments, and so it is plausible that where humans have strong emotional preferences, these will be reflected in their moral judgments. See Jonathan Haidt, "The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment," *Psychological Review* 108 (2001): 814-34; Jonathan Haidt and Matthew A. Hersh, "Sexual Morality: The Cultures and Emotions of Conservatives and Liberals," *Journal of Applied Social Psychology* 31 (2001): 191-221, on sexual morality in particular.

³⁴This argument is too brief to establish my claim conclusively. It should, however, be enough to show how a plausible argument against these moral intuitions can be developed. For a similar use of a genetic argument to undermine moral intuitions about the priority of family relationships, see Peter Singer, *The Expanding Circle: Ethics and Sociobiology* (New York: Farrar, Straus & Giroux, 1981), p. 71.

³⁵This argument places the burden of proof with those who think that genetic links have moral significance. They face the difficult task of explaining how the provenance of one's DNA can confer rights and responsibilities. I do not here consider ways in which they may do so. Explanations of some attempts to justify taking genetic ties seriously along with comprehensive criticisms can be found in John L. Hill, "What Does it Mean to be a 'Parent'? The Claims of Biology as a Basis for Parental Rights," *New York University Law Review* 66 (1991): 353-420, pp. 388-94; and Avery Kolers and Tim Bayne, "'Are You My Mommy?': On the Genetic Basis of Parenthood," *Journal of Applied Philosophy* 18 (2001): 273-85.

quently, it might be objected that these widespread preferences deserve to be given some weight. I have no reason to quarrel with this assertion. If our general moral theory assigns (considered) preferences moral weight, then the satisfaction of such preferences, including desires for biological children, will make a moral difference. In turn, this may give us reason to provide opportunities for people to satisfy their preferences. So, for example, we might think that infertile couples should be given the option of fertility treatment, not just told that they must adopt. But the genetic argument I just gave implies that these (considered) preferences count no more than other (considered) preferences; in particular, they do not entail rights over their objects.³⁶

12. Other Theories of Parenthood

There are currently four main alternative theories that purport to show how parental rights are acquired: genetic, gestational, intentional, and causal.³⁷ I have argued that genetic accounts are incorrect. I now consider how the other accounts fit with the investment theory and argue that, insofar as they deviate from it, they are mistaken.

Gestational accounts of parenthood claim that moral parenthood, and therefore parental rights, arises in the first instance through gestation. The investment theory supports this claim. Indeed, one of the more plausible justifications for gestationalism is that women perform considerable labor during pregnancy.³⁸ An account that claimed that only gestation is sufficient for moral parenthood would fail to meet the criterion of adequacy by not fitting the paradigmatic case. The investment theory incorporates gestation within a broader account, which shows how actions after birth (e.g., of potential fathers or adoptive parents) can confer pa-

³⁶Recall the distinction between a right to parent and parental rights (section 7).

³⁷Following the taxonomy given by Bayne and Kolers, "Toward a Pluralist Account of Parenthood," pp. 221-22.

³⁸See, e.g., Uma Narayan, "Family Ties: Rethinking Parental Claims in the Light of Surrogacy and Custody," in Uma Narayan and Julia J. Bartkowiak (eds.), *Having and Raising Children: Unconventional Families, Hard Choices, and the Social Good* (University Park: Pennsylvania State University Press, 1999), pp. 65-86, at p. 81. Bayne and Kolers object to this "Sweat Equity" justification on the grounds that it seems to ground the rights of parenthood without thereby grounding the responsibilities. They are concerned that genetic fathers would thereby lack parental responsibilities and perhaps even that gestation gives only rights but not responsibilities ("Toward a Pluralist Account of Parenthood," pp. 231-32). Since I do not think that parental rights and responsibilities must be acquired in the same way, I do not find this implication troubling. (In section 9 I noted that fulfilling parental responsibilities will normally lead to the acquisition of parental rights. I consider the grounds of parental responsibilities elsewhere: see Millum, "How Do We Acquire Parental Responsibilities?")

rental rights in a similar manner.

According to intentional accounts of parenthood, the parents of a child are those people who formed and carried out the intention to have a child. Thus, in cases of surrogacy, for example, the couple who want the child and commission others to help create it thereby acquire the rights over the child when it is born.³⁹

Such accounts have (at least) two serious problems. First, they privilege a particular set of intentions or intentional actions. In the surrogacy case, for example, the surrogate mother may also either have or acquire the intention to mother the child. It is not clear why her intentions fail to generate parental rights. The intentionalist may offer two replies to this. One is to note that there is a good reason to think that the surrogate does not get parental rights, which is that she agreed to carry the child for the couple. But then it is agreement that is doing the moral work, not intention. The other is to claim that it is the *first* people to form and act on the intention to procreate who get the parental rights. But privileging first intentions just looks arbitrary, given all the subsequent actions that may be necessary for the creation of a child. (Consider Bob and Candi, two strangers who have casual and unprotected sex. Bob does it because he is trying to procreate, Candi for the pleasure of the act. When she later decides against abortion, we do not think her delay in intending to have a child gives Bob some greater claim to be its parent.)

The second problem is that these theories do not account for unintentional parenthood. The fact that a couple did not intend to conceive is not normally considered to absolve them of responsibility for the child (when they could have known that it was a possibility); neither is it thought to deprive them of rights over it.

These considerations indicate that intentional accounts provide flawed and incomplete accounts of moral parenthood.⁴⁰ Nonetheless, it will often be the case that in carrying out the intention to have a child people will do parental work, and much of the morally deserving work of parenting will be intentionally directed at the creation and development of a child. The investment theory therefore shows why the work done by intending parents may give them a claim.

Finally, Tim Bayne and Avery Kolers develop a causal account of

³⁹See, e.g., Hill, "What Does it Mean to be a 'Parent'?"; Marjorie M. Shultz, "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality," *Wisconsin Law Review* (1990): 297-398; Andrea E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies," *The Yale Law Journal* 96 (1986): 187-208.

⁴⁰I should note, in defense of such accounts, that they are generally proposed as recommendations for the ascription of *legal* parenthood in a *particular range* of cases, such as assisted reproduction (Shultz, "Reproductive Technology," p. 324). Thus I criticize such accounts here only insofar as they are taken as general theories of moral parenthood.

parenthood in an attempt to incorporate what they see as the plausible elements of genetic, gestational, and intentional accounts.⁴¹ They argue that various people may be causally implicated in the creation of a child—for example, by providing genetic material, or by gestating her. According to them, each person who is appropriately causally related to a child is a moral parent of that child, and so has parental rights. However, as Bayne and Kolers admit, they do not have an account of which causal relations are appropriate.⁴² But many people may be causally implicated in the existence of a child; not all are its parents. On the other hand, the investment theory does explain which causal factors count, why they count, and to what extent. It should therefore be preferred.

13. Applying the Investment Theory: Absent Fathers

In Western societies, many people may have some parental stake in a child. However, generally we will call parents only those who have a substantial stake—these will be the primary caregivers.⁴³ Since the law should be at least somewhat responsive to the moral situation, legal parenthood should generally be assigned to some subset of the moral parents. This indicates two important uses for an account of parental rights like the investment theory. First, it can be used to criticize the law, for example, on the grounds that it fails to assign legal parenthood where it is morally due. Second, it may prove useful to the application of the law as it stands, if interpretive decisions must be made in the light of the moral factors relevant to a case. In this section I briefly apply the investment theory of parental rights to a moral problem concerning the assignment of custody. By doing so, I intend to show the applicability and therefore utility of the investment theory.

Custody disputes are complex. Which people have parental rights over a disputed child and the strengths of their respective claims are importantly relevant, but so are other factors. As I suggested in section 7, considerations of the welfare of the child may outweigh parental claims. Further, pragmatic issues will and should affect legal decisions. For example, the ability of disputing parents to agree on parenting schedules may determine which custody options are viable. Consequently, the investment theory does not, in general, provide a glib solution to custody disputes. Nevertheless, there are cases in which a theory of parental rights can provide quite straightforward answers. My theory is particu-

⁴¹Bayne and Kolers, “Toward a Pluralist Account of Parenthood,” pp. 238-41.

⁴²Ibid., pp. 239-40.

⁴³Cf. Jeffrey Blustein, *Parents and Children: The Ethics of the Family* (Oxford: Oxford University Press, 1982), p. 140.

larly helpful where one (or more) party has performed much more parental work than the other(s).

Consider the case of absent fathers. These are biological fathers who have played no role in the life of their offspring. In the U.S., if a child has no legal father, its mother may put it up for adoption without anyone else's consent. In a number of lawsuits, genetic fathers who have previously been absent from their child's life have tried to block such adoptions.⁴⁴ They thereby assert parental rights. Should this be allowed? More generally, do absent genetic fathers have the moral right to take up parenting their biological children?

As with the surrogacy case considered earlier, the investment theory allows us to give a perspicuous analysis of the moral factors that may be relevant to these cases. Its basic verdict is simple: biological fathers who have invested no parental work into their offspring do not have any parental rights over them. Consequently, their mothers (or other moral parents) may exclude these men from parenting, including from adoption decisions.⁴⁵

This verdict is most intuitive in cases in which the biological father has not done parental work that he could have done; for example, the mother may have informed him of her pregnancy and tried to involve him in the child's life. In cases in which the father has simply not been given a chance to parent, however, it may seem unfair not to allow him to do so. This will be correct in those cases in which the child's mother (or other parents) have wrongly prevented him from putting in parental work. As I noted in section 9, depending on the prior relationship between the biological parents, the mother may have a duty to give the father an opportunity to parent. Moreover, men may acquire parental rights

⁴⁴See Mary L. Shanley, "Fathers' Rights, Mothers' Wrongs? Reflections on Unwed Fathers' Rights and Sex Equality," in Narayan and Bartkowiak (eds.), *Having and Raising Children*, pp. 39-63, at p. 40.

⁴⁵I assume here that the content of parental rights includes having the right to decide whether one's child will be given up for adoption and at least some discretion as to how that will be done. Hence the mother in these cases is permitted to prevent the biological father from adopting the child. To properly support this claim, we would need a more thorough examination of the content of parental rights, for example, by assessing the interests they protect. It may be quickly supported by noting two points. First, parents may care greatly about the welfare of their children, even when they are giving them up (indeed, in some circumstances this may be why they give them up). This is a clue that there is an important interest at stake here. Second, it is likely that the content of parental rights includes the right to allow another person to put in parental work, as well as to exclude her from doing so. For example, we expect that a single parent who finds a new partner may include her in parenting, and that this partner may then over time acquire her own parental rights. This same right to allow another person to parent one's child could be used to allow a future adoptive parent to do so, before relinquishing one's own parental claim.

through their caregiving actions during pregnancy, which would then give them some claim to continue parenting later. However, when these conditions do not obtain, the existence of a genetic link does not give the father any claim. Remaining intuitions to the contrary, I suspect, indicate either residual intuitions about the moral significance of biology, or views about what the biological father deserves in virtue of his genetic contribution to the child, which then depend on a false account of morally deserving work.

14. Conclusion

The investment theory integrates the acquisition of parental rights into moral theory more broadly. This justifies its use to clarify or replace alternative theories. However, the theory remains incomplete in two respects. First, there are debates internal to the investment theory, for example, over exactly what counts as parental work. Second, it needs inclusion in a complete account of parenthood, which gives the content and weight of parental rights and responsibilities. Despite these gaps, the investment theory as it stands can help us ascertain the moral parents of a child in many cases. It can thereby help resolve certain problems in normative ethics.⁴⁶

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⁴⁶For very helpful comments on and discussion regarding earlier drafts of this paper, I would like to thank David Archard, David Benatar, Elizabeth Brake, Samantha Brennan, Danielle Bromwich, Tom Hurka, and Wayne Sumner. The views expressed in this paper are my own and do not represent the views or policies of the Department of Health and Human Services or the National Institutes of Health.