Abstract. Common sense morality and legislations around the world ascribe normative relevance to biological connections between procreators and children. Procreators who meet a modest standard of parental competence are believed to have a moral and legal right to parent the children they brought into the world. I explore various attempts to justify this belief and find most of these attempts lacking. I distinguish between two kinds of biological connections between procreators and children: the genetic connection and the gestational connection. I argue that the second can better help justify a right to parent a particular child.

1. Introduction

Legally, biological parents have a presumptive right to the custody of their children; this is universal practice, and determines an important feature of the institution of parenting – namely that, by default, all children have two custodians. Yet, the normative relevance of the biological connection between a parent and a child is unclear, and so is the justification of this practice. A better understanding of the normative relevance of biological connections between procreators and their offspring would help with assessing the institution of parenting and the status quo in the acquisition of parental rights. Moreover, as I explain below, it will help settle several types of custodial disputes that are likely to become relatively frequent. My paper is a contribution to these endeavours.

Usually, we use the term “biological parent” to mean “genetic parent”. Here I distinguish between two ways in which one can be a biological parent, or procreator: by being the genetic procreator or by being the gestational procreator of the child. The genetic procreators are obviously biological procreators – they contribute biological material that is essential for the future child’s existence and identity. I assume that it is unproblematic to see gestational procreators as another type of biological procreators: genes can only express themselves in an environment, and therefore both genetic material and environmental conditions are necessary for the existence of any phenotype. Gestational procreators contribute the biological environment that co-determines all the features of the future child (Feldman, 1992). Until recently it was easy to ignore this distinction between two ways of being a biological procreator: gestational procreators were always also one of the two genetic procreators of the child, so the distinction did not have much practical relevance. Today, by contrast, a child’s gestational procreator need not be her genetic procreator. It used to

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1 I use the gender-neutral term, because transgender men can and do become gestational procreators.
also be the case that all children had two genetic procreators; today, thanks to the possibility of mitochondrial replacement therapy\(^2\), there are cases in which three different individuals contribute genetic material to the bringing into existence of a child. Therefore, a child can have three genetic procreators and a gestational procreator – altogether up to four different biological procreators. Unsurprisingly, these technological developments generate challenges to the status quo in acquiring the right to custody.

The main thesis of this paper is that when the biological connection between procreator and child plays a role in deciding who has the moral right\(^3\) to be the custodian – or “the parent” – of a new-born, more normative relevance should be attached to the gestational, rather than to the genetic, connection. The next section explains the practical import of my argument, as well as its scope. In the third section I discuss the right to parent in general. Section four presents the most influential accounts of the normative relevance of the genetic connection; I find all but one lacking as justifications for a presumptive right to custody. The fifth section explores several arguments that favour the gestational procreator’s claim to custody, at least one of which I find more convincing than any argument favouring the genetic procreator’s claim. Section six discusses some theoretical implications of my view; the last section explains how my view bears on custody disputes in cases of embryo swaps, adoption without the consent of a genetic parent, as well as on the practice of gestational surrogacy.

2. Background clarifications

Consider the following three types of situation leading to conflicting claims over the custody of a child. They are schematic illustrations of real life cases:

**Case one: Embryo Swap**
Two women seek IVF treatment at the same hospital. Only one of them becomes pregnant as a result of the IVF, and at some stage during the pregnancy it turns out that, due to a mistake, the fetus is the other woman’s genetic offspring. She decides to carry the fetus to term. Both the gestational and the genetic mother want to raise the baby.

**Case two: Adoption without the consent of a genetic procreator**
A baby is put up for adoption by a woman who is both her genetic and gestational mother without consent from the (estranged or misled) genetic father. The baby settles in well

\(^2\) For an explanation of what this is, see: https://nyscf.org/pdfs2/FAQ_on_Mitochondrial_Replacement_Therapy.pdf

\(^3\) From now on I use “right”, unqualified, to refer to moral rights, as most of the present discussion concerns the justification for acquiring the moral right to be a new-born’s custodian. I assume that the existence of a moral right to x ought to be an important basis for a legal right to x, but that the translation may not be always straightforward.
with her adoptive parents. A few months after, the genetic father sues for custody, on the ground that he has never released his right to rear the child. The adoptive couple wishes to keep custody.

Case three: Gestational surrogacy
A woman agrees to serve as a gestational surrogate mother for a couple who provides the gametes. The pregnancy is successful, and at birth the surrogate wants to raise the newborn herself. The couple who provided the gametes, too, wants to raise the new-born.

In all these cases we need a principled way to decide who ought to have the custody of the child. In addition, in the case of surrogacy the very legitimacy of the practice is in question and, as I shall argue, legitimacy will partly turn on what normative relevance we ought to attach to genetics and gestation. In Embryo swap the claims of a genetic procreator are pressed against the claims of a gestational procreator. Conflicts in such cases have been settled differently in different jurisdictions around the world\(^4\) which is indicative of a lack of general agreement concerning the weight of the genetic procreator’s claim relative to the weight of the gestational procreator’s claim (Bayne and Kolers 2003, 224-225). In Adoption without the consent of a genetic procreator the first question is whether, in virtue of his genetic connection to the child, the father had a presumptive right to custody; if so, then putting the baby up for adoption without the consent of the genetic father wronged the latter. The subsequent question concerns the reason in virtue of which the genetic connection with the child gave the father a presumptive right to custody. Even if the genetic father was wronged, it is unclear whether his right to custody endures after adoption. Understanding this second question requires understanding what aspect of the genetic connection grounded his presumptive right to custody. In several situations of this kind, US courts found in favour of the genetic father, and as a result the child – by that time a few years old – was forcefully removed from the adoptive parents. Judges defended their decision by indicating that a right to custody accrues to genetic procreators and can only be lost by voluntary alienation or through child abuse or neglect (Richards 2010, 8-10.) In Gestational surrogacy, arguably the hardest of the three cases, the underlying question is, again, how to weight the genetic procreator’s and the gestational procreator’s claim. In several European countries, legislation recognises the gestational mother as the sole bearer of the right to be the legal mother of the baby (and her husband as the legal father.)\(^5\)

This may mean not only that the gestational mother is legally permitted to be the custodian of the

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\(^4\) In the US the claims of genetic procreators tend to prevail; in Europe, gestational mothers usually obtain custody.

\(^5\) According to the Warnok report: “legislation should provide that when a child is born to a woman following donation of another’s egg the woman giving birth should, for all purposes, be regarded in law as the mother of the child, and that the egg donor should have no rights or obligations in respect of the child.” (1985, 37.)
baby, but also that there is no legal venue for the genetic procreators to become the baby’s custodians even in cases where she would opt for the genetic procreators to become the custodial parents. This would be the case in legislations where legal parents who voluntarily alienate their right to custody – that is, who put their child up for adoption – do not have the right to indicate who should become the child’s custodian. In such places surrogacy contracts are void. There exist jurisdictions where surrogacy contracts are valid, but non-enforceable (in some of the United Stated) and jurisdictions, such as India, Russia, South Africa and some of the United States where surrogacy contracts are both valid and enforceable.

More generally, we need a principled way to settle the following problem: When a custodial dispute arises at, or soon after, birth, between a genetic procreator and a gestational procreator (who may be genetically unrelated to the child), whose, if anybody’s, claim ought to prevail – that is, which, if any, of the two ought to be granted the right to rear the child – all other things being equal? The main thing to be kept equal here is how good at parenting the individuals claiming custody would be. Assume, in cases, that there is no reason to believe that either the genetic or the gestational procreator would make a better parent, whatever the right criteria for parental competence is.

For the rest of this paper I will be referring to the right to parent a child understood as a moral right to be the child’s custodian. The claim that we ought to attach more normative relevance to the gestational than to the genetic connection in order to determine who has the right to parent is limited in two ways. First, and most obviously, neither a genetic nor a gestational connection between parent and child can be either necessary or sufficient for justifying a right to parent. They are not necessary because, I assume, one can rightfully become the custodian of a child without standing in any biological relationship to the child; uncontroversial illustrations are cases when children lack any kin, yet are in need of a custodian and are adopted. The genetic and gestational connections are also not sufficient for a right to parent since nobody can acquire or retain a right to parent if they fall below a certain threshold of adequacy; unfortunately, no kind of biological relationship with the makes one immune to such failure.

Second, this paper is exclusively about the right to parent a child. It makes no contribution to the understanding of the precise rights of parents, that is the rights that parents may exercise in relation to their children. Similarly, I do not make any claims concerning the duty to parent – that is, the moral duty to become a particular child’s custodian – or the duties that various individuals have in relation to children.

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6 Reference.
7 For the distinction between the right to parent and the rights of parents see Brighouse and Swift (2014).
The second qualification of the scope of my argument is more controversial: a right to parent and a duty to parent are usually acquired together, and some think that this situation is in no need of justification. But this is not self-evident. It is possible to have a right to parent a particular child without having a duty to become the parent of that child, and it is possible to owe special duties to a child without having the right to be the child’s parent. Concerning the first possibility, according to one group of views, duties owed to children are, fundamentally, collective duties which then individual parents discharge towards individual children (Vallentyne 2002), for instance because children are vulnerable to adults collectively (Goodin 2005). In this case, if there are enough volunteers for the parenting role it need not be anyone’s duty to become a parent in general or the parent of any individual child. (Or, if there are at least as many children as intending parents, it may be everybody’s duty to become a parent in general, but not any particular child’s parent.) Some of these individuals may be better qualified to rear a particular, and, in virtue of this feature, have a right to claim the custody of that child. Concerning the second possibility, according to the mainstream account the duty to parent a child is borne by procreators in virtue of having brought the child into existence. On this view we collectively acquire a duty to rear children only in cases when their parents fail to discharge their duties. Endorsing the mainstream view is compatible with a belief that procreators, in virtue of having brought the child into existence, acquire extensive duties of provision towards the child but not a right to act as the child’s custodian. That is, they would not possess right to parent the child even though they were duty bound to provide resources to the child (Austin 2007; Archard 2010). Therefore, the rights and the duties that adults have in relation to children might have different justifications and hence it is possible that they are acquired independently from each other.

3. The right to parent

There are three types of account of how individuals acquire the right to parent in general and the right to parent a particular child: parent-centred, child-centred and dual interest accounts. Parent-centred accounts justify a right to parent in general by appeal to the interest of would-be parents without any appeal to children’s interest, and a right to parent a particular child by appeal to the interest of the prospective parent in parenting that particular child. This is the traditional account of a right to parent. Children have long been seen as appropriate objects of ownership, and the most extreme versions of the parent-centred account appeal to the interest of an adult in her or his

8 For instance, in their work on the normative relevance of biological relationship between parents and children, Tim Bayne and Avery Kolers “assume that insofar as parenthood brings both rights and responsibilities it brings them together – that is, one does not get all the rights but none of the responsibilities, or vice versa” (2003, 223.) Given the framing of their argument, in this quote they refer both to the duties of parents and to the duty of becoming a parent.

9 This classification is relevant for the purposes of this paper. I leave to one side discussion of the interest of third parties in ensuring that children are socialised such that they will not violate other individuals’ rights.
property. But, as I discuss below, not all parent-centred accounts of the right to parent assume that children can be owned.

The obvious alternative to parent-centred views are child-centred accounts, according to which children’s interest alone plays a justificatory role. On this account, some people have a right to parent if and only if children in general are better off in the custody of parents than, say, if raised by state-run institutions or left to their own devices. And the individuals who have the right to parent a particular child have that right because they would make the best parent for that child. One example of this type of account was defended by Peter Vallentyne, according to whom the right to parent a particular child “can be legitimately claimed by anyone for whom possession is suitably in the child’s best interest” (2003, 991) – that is by the person who is better able than any other person who is willing to rise the child in question to ensure that the child’s rights will be respected. Child-centred accounts of the right to parent have been resisted because they deny that there is any fundamental right to parent; rather, on these accounts, the right to parent is derivative from the child’s interest. Therefore, some child-centred accounts may deny a right to parent to individuals who would make very good – but not optimal – parents (Brighouse and Swift 2014, 95.) Many believe that this implication is deeply counterintuitive.

For this reason, a third type of account justifying the right to parent has been defended, most influentially by Harry Brighouse and Adam Swift (2006; 2014): the dual interest account, according to which the right is justified by appeal to both the right of the child to be parented and to adult’s interest to play the role of the parent. On the Brighouse-Swift version of a dual interest account the right to parent is, primarily, grounded in the child’s interest in receiving adequate care from an individual with whom the child stands in an authoritative, loving, intimate long-term relationships. Therefore, only individuals who are capable to give adequate care to a child in this kind of relationship have a right to parent in general. Unlike Vallentyne, however, defenders of a dual interest account believe that the right is held not only by those individuals who would make optimal available parents, but by all individuals who would make adequate parents. On Brighouse and Swift’s account the reason is that adults have a fundamental and very weighty interest in an opportunity to parent understood as an opportunity to engage in an authoritative, intimate and loving relationship with the child. For most individuals, they think, parenting is the source of distinctive and important goods which are essential to their full flourishing. These goods accrue to adequate parents in virtue of the unique kind of relationship that exists between parents and children. As Brighouse and Swift elaborate (2006; 2014), to be a parent means to assume great

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10 Others include Archard (1995) and Goodin (2005).
11 As well as because they seem to mandate a very different distribution of the right to parent than the status quo. In fact, child-centred accounts can resist most cases of “child redistribution”, especially after the parent-child relationship has been established.
12 Other versions of a dual interest account have been offered by Matthey Clayton (2006) and Colin Macleod (1997).
responsibilities towards an individual who is much less powerful than you, whom you often have to coerce for her own good, whose mind you will inevitably shape as the relationship unfolds and who loves you in a spontaneous and trustful way unparalleled by other loving relationships. Successfully discharging such responsibilities is constitutive of a flourishing life for most of us. On dual account theories, the right to parent is not merely derivative from the child’s interests; rather, it is *sui-generis* because it is partially grounded in the would-be adequate parents’s fundamental interest in playing the fiduciary role in the parent-child relationships. Brighouse and Swift’s work stops short from explaining how one acquires the right to parent a particular child (Gheaus 2012); but dual-account views might shed light on this question by indicating how the interest of the would-be parent as well as the interest of the child are relevant for establishing the right.

Of these types of account – parent-centred, child-centred and dual interest – only the last two can be successful. I make several normative assumptions, the most important of which is that children are persons who have the moral right to have their fundamental interests satisfied and who are therefore owed duties of justice. Further, I assume – uncontroversially – that paternalism over children is justified by appeal to their lack of full autonomy and that children need parents in order for their lives to go as well as justice entitles them. By “parents” I understand a very small number of individuals who undertake long-term fiduciary responsibilities towards their children. Often, children need parents in order to survive and almost always they need parents in order to have good childhoods and to develop into adults who can have good lives. These general facts about children’s general interest in being parented justify the existence of the family as the default way of rearing children (Vallentyne 2003; Goodin 2005; Clayton 2006; Brighouse and Swift 2014).

In addition, I claim that facts about children’s interests are relevant to determining the right type of account concerning the acquisition of the right to parent a particular child. Parents have a power to exercise, and to exclude others from exercising, a bundle of rights through which they directly and significantly control various aspects of the child’s life. Some of these – such as the right to determine the child’s daily routine (where she lives, eating and resting times, etc.) – are uncontroversial while others, concerning the child’s relationships, disciplining, schooling and values, are more contested. But whatever is the morally justified bundle of parental rights, these rights give parents the power to manage and direct the child’s life to a great extent. Liberals, who believe that persons are free and equal, usually believe that rights to directly control another person’s life must be justified either by appeal to the consent of the person over whom the rights are exercised or by appeal to her interests. Since children lack full autonomy, they cannot give authoritative consent to have their lives controlled by parents (rather than by other types of agents) or by particular individuals acting as parents. Therefore, controlling children’s lives – and, more generally establishing relationships of authority with children – must be justified by appeal to
children’s interests. This argument does not only apply to the institution of parenting as such but also implies that in each particular case an individual’s claim to parent a particular child cannot be legitimate unless it serves the interests of the child in question.

Because I hold that children are persons who are owed duties of justice, and power over them can only be justified if it sufficiently\(^1\) serves their interests, I conclude that parent-centred accounts are not capable of justifying the right to parent a particular child. Therefore, a successful account of how one can acquire the right to parent a particular child must be either of the child-centred or of the dual interest type. For the purposes of this paper I do not commit to either a child-centred or a dual interest account. Nor, as noted above, do I commit to any particular view of the fundamental interests of the child that it is the parents’ (rather than other individuals’) duty to fulfil – with one exception. Like Brighouse and Swift, I assume that one of the most important interests of children is to establish a loving relationship with their custodian, and, because the object of one’s love is not fungible, they have a similarly powerful interest in maintaining such relationships once they are established. There is a good reason to privilege the child’s interest in continuous loving relationships: It is easy to see how agents other than parents could be responsible with fulfilling children’s interests in a variety of goods: schools and educators may be best placed to address children’s interest in education; health care providers might bear ultimate responsibility for children’s health and so on; states could, via various distributive mechanisms, take responsibility for ensuring all children’s nutritional needs are met, etc. But it is parents, as children’s custodians, who ought to share their lives with children because they need to acquire knowledge about the child’s particularities in order to ensure that the child’s fundamental interests are in fact met. Because they should share everyday life with the child, parents are best situated to fulfil the child’s interest in continuous loving relationships\(^2\).

4. The case for the genetic procreator

I turn to discussing the most familiar arguments to the conclusion that procreators have a right to parent their child in virtue of the genetic connection they share with the child. People sometimes speak as if this was self-obvious – as if the mere genetic connection, in itself, could

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\(^1\) Here I leave open the question of the relevant threshold, partly because I do not commit to any particular version of a dual interest or child-centred account, and partly because I do not rely on any view concerning the distribution of duties towards children between parents and the rest of society.

\(^2\) Like Brighouse and Swift (2006; 2015) I privilege parents’ ability to provide children with loving, intimate and lasting relationships as one element of the parental function and a criterion of parental adequacy. My reason is different from theirs. They believe that children have an interest in receiving love and care from the person(s) with whom they stand in an authoritative relationship – that is, from their custodian(s). I make the more modest assumption that children a lasting loving relationship with someone, and that the parent, as custodian, is best placed to provide this.
generate a right to parent\textsuperscript{15}. But, if meant in earnest, this would be a very mysterious reason since it does not indicate anyone’s interest, and certainly is a naturalistic fallacy (Feldman 1922). Moreover, even if the genetic connection alone could justify a right to parent, it would not pick out the two genetic procreators who typically are, under current practice, the child’s custodians. Michael Austin illustrates this: “That Jeff has the same level of genetic connection with his twin brother’s child as his own does not entail that he has parental rights over or parental responsibilities to his twin’s child.” (2007, 20)

Proper arguments for genetic procreators’ right to parent have been offered. Some of them, defended by (right) libertarians, are grounded in self-ownership. A first argument of this kind, advanced by Jan Narveson (1989), assumes ownership in one’s labour. Procreators exert themselves to bring the child into existence and, the argument goes, as a result they have property rights over the child they produce. This argument does not allow to properly distinguish between the claim of the genetic procreator and the claim of the gestational procreator – or, if it does, it seems to favour the gestational procreator. And it is unclear that Narveson’s argument holds. As Barbara Hall (1999) noted, in her own version of an argument grounded in self-ownership, appeal to the procreator’s labour cannot do any work unless the labour in case has been exercise in relation to something that the procreator already rightfully owns. On Hall’s view, genetic procreators have the initial right to rear the child because children come from the parents’ bodily parts: “Parents are entitled to their children for the same reasons that they are entitled to anything that is a part of themselves. Thus, it is ultimately belief in the notion of self-ownership that fuels our presumption in favour of a natural parent’s entitlement to her child.” But Hall’s account, too, may be deficient if, as Hillel Steiner argued, we do not own germline information and gametes such as the sperm and egg are part of the germline (Steiner 2002). Whatever their merits, both Narveson’s and Hall’s arguments presupposes child ownership and hence are of the parent-centred type.

There are more promising arguments pointing to a parental interest, in which the interest in question is not in owning the child; because they do not assume child ownership, these arguments stand a chance of being incorporated into dual interest accounts. One of these has been advanced by Elizabeth Brake (2015). She notes that procreation is, for most individuals, one of the most (if not the most) important creative activity in which they will ever engage. According to Brake, individuals who contemplate parenting have a good reason to procreate with their own gametes, since this makes it more likely that the child they create will have the genetic basis necessary for displaying certain features that the procreator values and wishes to perpetuate. A prospective parent can have reasons – some of which agent-relative – to value certain features that run in her or his

\textsuperscript{15}AND some think that the mere genetic relationship is one of the grounds for some special duties towards a child (McMahan 2002, 373-378).
family and therefore an interest to try and pass them on. Sometimes a desire to have a genetically related child is criticised as narcissistic – part of a quest to create a “mini-me” – because narcissism is likely to detract from parental competence (Overall 2012). But, on Brake’s account, the valued features need not be one’s own – they can be those of a close relative – and therefore this criticism does not apply. This is a parent-centred reason which seems compatible with a dual interest account. But, in itself, it cannot be used to extend a dual interest account into a view on how we come to acquire the right to parent a particular child. This is because the interest identified by Brake can at most indicate a right to procreate, which is enough to create an opportunity to pass on family resemblances. There is no need to supplement this right by a right to parent one’s genetically related child – that is, to control the child’s life.

Others have attempted to derive the right to parent a child from the duties that genetic procreators are typically believed to incur by bringing children into existence. Arguments having this general structure have been independently advanced by Lindsay Porter, Serena Olsaretti, Jake Earl and Melissa Moschella. It is widely believed that procreators incur special responsibilities towards the children they bring into the world, at least in cases when procreation is intentional. On this view, because intentional procreators are causally and morally responsible for the existence of children, and children need the care of others if they are to avoid great misfortune, procreators are under the duty to ensure that children will not come to harm. This family of views would favour the genetic procreator’s claim to custody in the many situations when genetic procreators have intentionally started the process of bringing children into existence, in some cases with the help of a gestational surrogate.

Some defenders of a causal account of parental duties argued that would-be adequate procreators have a powerful interest, and hence a right, to discharge their special duties towards children themselves. According to Porter a procreator can never fully transfer their obligations on to other people such that the procreator becomes free of any responsibility vis-a-vis how their offspring’s life is going. For this reason, she thinks, the procreator who would make an adequate parent has a right to discharge this duty herself: “As the moral agent with the obligation, my right is that I be given the opportunity to do the job that is mine to do. ... because parents have a right to ensure the fulfilment of their obligations, biological parents thereby have a limited right to parent their biological children.” (Porter 2015) Similarly, Earl thinks that, in general, we have a right to try and discharge our special obligations ourselves: “interfering with someone’s reasonable efforts to carry out their special moral obligations constitutes a form of wrongful disrespect.” (Earl, unpublished manuscript). To see how unconvincing these accounts are as accounts of a right to parent one’s genetically related child, consider the following analogy: Assume that, out of no fault of mine, I run you over with my car and break your leg, thereby incurring a duty to mend it. I
happen to be a medical doctor and I can do a reasonably good job. It is true that, together with the
duty, I acquire a right to prevent others from interfering with my mending your leg in case no other,
more qualified person, volunteers to take over. Yet, this right is entirely grounded in your interest
and therefore I cease having it in case a more qualified leg-mender comes along and volunteers to
mend your leg herself. If this other person would do the mending quicker, or in a less painful way
for you, or without leaving a scar, I cannot claim a right to prevent her from doing so by appealing
to how important it is for me to fulfil my duty of fixing what I broke. If so, then the right of a
intentional genetic procreator is derivative and depends on who else, if anyone, is willing to parent
the child instead of the genetic procreator.

Others think that part of the procreators’ duty is to be willing to enter the relationship with
the child themselves and so they draw on the child’s interest in order to explain why procreators
have a right to parent. Moschella argued that one of the procreator’s duty is to love the child and
concludes that “biological\textsuperscript{16} parents cannot fulfil their special obligations to their children without
raising those children themselves, which implies exercising decision-making authority over them
(except in the case of incompetence ... Ensuring that some other adequate caregiver(s) take on that
role is insufficient.“ (Moschella 2016, 38) Moschella assumes that the procreator is in the best
position to meet the child’s emotional need because, should another person take over this role in the
life of the child, this would involve discontinuing the bodily relationship between procreator and
child. Moschella takes this bodily relationship to be generated by the genetic connectedness and,
because our genetic make-up is essential to our identity, the relationship is, in one sense a personal
relationship. But, while the relationship is „bodily“ (thanks to the genetic connection) it does not
necessarily involve physical closeness. This argument is implausible. First, it is not clear why the
discontinuation of a merely bodily relationship of this kind, even with someone who payed a major
causal role in determining our identity, should have a negative emotional impact. Moschella
indicates the potential (maybe likely) worry that the child may feel rejected by her genetic
procreators. Arguably, at least in some cases other people are so much better than the child’s
procreator at fulfilling a child’s emotional needs that, all things considered, the child will be
emotionally better off with them even if the discontinuation of the bodily relationship with the
parent has somewhat offset the emotional interests of the child. Moreover, it is unclear that her
conclusion follows; a genetic procreator can love the child they procreated and fulfil some of her
emotional needs even without having the right to be the child’s custodian.

Olsaretti, too, thinks that intentional procreators have a duty to enter the relationship with
the child themselves, and more specifically, to enter in a parental relationship with the child. Her
reasons do not concern the emotional well-being of the child, but respect towards the child.

\textsuperscript{16} By which she means “genetic”. 
Procreators have knowingly and voluntarily created the child’s need for a relationship and “if someone knowingly and voluntarily causes someone to be needy of a relationship, her refusal to be a party to it can be plausibly viewed as a rejection of the other party as worthy of being in a relationship with.” (Olsaretti, 2017). Olsaretti’s argument can be plausibly read as showing that (genetic) procreators who would make adequate parents have a duty to care for their child in case no individual who would make a better parent is willing to parent that child. It is a convincing way of accounting for the grounds of a duty to (be willing to) parent a child one has procreated and, like in the broken leg example above, it explain a derivative right to prevent others from interfering with one’s ability to discharge this duty. But it does not explain a right to parent that child, assuming another individual who would make no worse a parent is also claiming custody, because in such a case the procreator’s failure to parent the child in case cannot be interpreted as a rejection of, and hence lack of respect for, the child. To the contrary, the procreator’s insistence to get custody in cases when another prospective willing parent would better further the child’s interests may represent a lack of respect for the child.

Another child-centred argument that might be believed to support the genetic procreators’ presumptive right to custody was given by David Velleman (2005). As he noted, many individuals who have been adopted in closed adoptions, or whose procreation involved anonymous gamete donation, often spend a significant amount of time, energy and money in search for their genetic procreators. Velleman thinks that the strong desire of which such efforts are indicative is explained by an important interest in self-knowledge that only close acquaintance with one’s genetic procreator can satisfy. According to this view knowledge of your genetic procreators plays a crucial role in identity formation (in addition to the practical information it brings). Close acquaintance to your immediate kin, argues Velleman, gives you a broader context for creating meaning about your life than you could have in the absence of such knowledge; it is also like having a unique sort of mirror that lets you understand and explore possible versions of yourself. Velleman’s argument is meant to show that it is morally wrong to bring into existence a child via, say, anonymous gamete donation. But it concludes, too ambitiously, that “other things being equal, children should be raised by their biological parents” (362). Some resist the claim that the putative interests in identity formation and self-knowledge identified by Velleman can only be satisfied by acquaintance with one’s genetic procreators (Archard 2005; Haslanger 2009). But, even if the claim was right, it would not seem to support that conclusion that it is in children’s interest to be raised by their genetic procreators17. Rather, it seems to entail a child’s right to come to know well, in a face-to-

17 Although, of course, much depends on what is included in the “other things being equal claim. Velleman's intention seems to be merely to exclude neglectful or abusive genetic procreators from parenting as he seems to accept the legitimacy of the status quo in this respect. If his claim is interpreted strictly it can easily be incorporated into a
face context, the genetic procreator and to have access to family stories. This can surely be achieved by recognising and enforcing a duty on the side of genetic procreators to make themselves available to their offspring as well as by requiring gamete donation to be non-anonymous and adoptions to be open. While fully child-centred, and in this sense a good candidate for a proper account of the right to parent a particular child, Vellemen’s argument cannot entail anything as strong as a right of the genetic procreator to control the life of the child in virtue of the child’s interest in close acquaintance with the genetic procreator.

Finally, there is widespread belief that a genetic connection between parent and child is in the child’s interest because, in virtue of the genetic connection, genetic procreators are more likely then genetically unconnected adults to bond with their children and to display the deep, selfless love that good parents display for their children. This belief is supported by anecdotal evidence and studies that find that children are at significantly higher risk of abuse by their adoptive than by their genetic procreators (McMahan 2002, 376), but the relevance of these studies is not clear. First, there are many confounding factors that could explain why adoptive parents abuse more than non-adoptive parents (Golombok 2015) and they are difficult if not impossible to isolate; second, these studies do not look separately at genetic and gestational procreators which makes it hard to conclude whether it is the genetic or the gestational connection that is responsible for the lower levels of abuse in genetically-related families. Moreover, the genetic connection is clearly neither necessary nor sufficient for parental love, as the existence of bonded and loving adoptive parents and unloving genetic ones shows (Archard 2005). Assuming this belief is correct, all that it indicates is a relatively high likelihood, not the actual existence, of bonding and love. And, as David Archard noted (1992, 102), the mere likelihood of bonding and love have much less weight in establishing the right than actual bonding and loving dispositions. As noted above, I believe that children have a powerful interest in establishing and maintaining loving relationships with the people who rear them. Therefore, if genetic procreators really are more likely than genetically unrelated individuals to bond with and love their child, this seems the best reason to belive that the genetic procreator has the right to parent in situations when all those who claim custody would make equally good parents of that particular child in every other respect. But what if the gestational procreators tend to do even better than the genetic procreator on the same count – that is, with respect to fulfilling the child’s interest in forming and maintaining a loving relationship?

5. The case for the gestational procreators

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child-centred account: if two individuals are equally in the position to parent well a particular child, and one of these individuals is the genetic procreator, it may be in the child’s interest to be parented by this individual.
Above I indicated that some of the arguments meant to explain why genetic procreators have a right to custody would in fact support the gestational procreator’s claim at least as well. These are Narveson’s claims about parental self-exertion (which is unconvincing\(^\text{18}\)) and the popular belief that biological procreators in general are more likely to love their children, empirical support for which comes from cases in which, typically, one of the genetic procreator is also a gestational procreator. But there are also distinctive reasons for supporting a case for the moral right to parent of the gestational procreator.

Two features about gestation have been considered to support the gestational procreator’s right. The first is that gestation is unavoidably burdensome and the second is that gestation is typically the context in which the relationship between parent and child starts.

Gestational procreators carry many of the burdens of procreation: financial costs, health costs (as actual disease or malfunctionings as well as significant risks), discomfort, emotional upheavals, undesirable lifestyle changes and opportunity costs (for instance concerning the gestational procreator’s working life). Some of these costs are unavoidable, while others could be socially mitigated\(^\text{19}\). One of the costs that will always fall on gestational procreators is the experiencing of the “difficult” emotions of pregnancy concerning the future child: worries about the future child’s wellbeing and, when the gestational procreator expects to raise the child, about their own abilities to parent well. Mere appeal to the costs of pregnancy, as some have (Narayan 1999) would be a parent-centred reason. To make it part of a child-centred or dual interest account, one would have to show that it is in the child’s interest that the procreator who bears these costs also has the right to rear. Susan Feldman (1992) advanced a consequentialist argument along these lines, noting that gestational procreators can, during pregnancy, greatly influence the development of the fetus and therefore the future child’s wellbeing. Making sure that gestational procreators have a secure right to the custody of the children they bear is, according to Feldman, the best means to motivate gestational procreators to take proper care of the developing baby. This is indeed a child-centred reason and, possibly, it indicates that it would be unwise to jeopardise gestational procreators’ legal right to custody. But it falls short of establishing that gestational procreators have a moral right to parent – that is, to take control of the child’s life after birth – merely because, during pregnancy, it is in their power to advance or set back the interests of the future child.

Appeal to the second feature of gestation is more promising. Elsewhere (Gheaus 2012) I have argued that, typically, children come into the world being already in an intimate caring relationship, with their gestational procreator. The relationship is partly based on the many emotional responses to the fact of pregnancy: anticipation, planning, hopes, imagination and

\(^{18}\) Barbara Rothman (1989) advanced a similar argument, grounded in the gestational procreator’s labor, which does not presuppose child ownership.

\(^{19}\) I discuss this in more detail in Gheaus 2012.
projection but also anxiety and doubt. (And so, the fact of carrying some of the burdens of pregnancy may be part and parcel of the formation of the relationship.) And partly, the relationship is created through bodily interactions that, at least for the gestational procreators, have meaning and create a history of the relationship with the baby. This intimate caring relationship is to some degree mutual. While we cannot know what is going on in the minds of new-borns, we know that they react positively to the presence of their gestational procreator by measuring physiological reactions such as heartbeat and stress hormone levels. Because both the child and parent have an interest in having and maintaining a caring relationship with each other, if gestation is the context in which such a relationship starts, this provides a good pro tanto reason to think that the gestational procreator has the right to custody: This is a right to continue a relationship that has already started before birth.

The argument then, has the following shape:
P1 Everybody has an important interest in an opportunity to maintain their intimate relationships, interest which is usually protected by negative rights – e.g. to form and keep friendships.
C1 Therefore, by parity of reasoning, a negative right also protects the parent-child relationship for the sake of the child (and possibly the parent).
P2 Gestation involves an intimate relationship.
C2 Hence gestation is a pro tanto reason for establishing the right to parent one’s gestational baby.

If successful, this argument could explain the gestational procreator’s right to rear both on a child-centred and on a dual interest account – and, indeed, I have initially meant it as a way of supplementing Brighouse and Swift’s account of a right to parent in general with an account of the right to parent a particular child.

P2 is contested. Some have wondered whether it is appropriate to describe the relationship between gestational procreators and their babies, at birth, as the kind of relationship which deserves protection (Brighouse and Swift 2014). Others have claimed that my argument works only by assuming that the attachment theory, which has itself attracted much criticism, is true (Porter 2015). It is true that the intimate relationship between a gestational procreator and the baby they carry is, at birth, unlike any intimate relationship between adults or even between a child and an adult (or another child.) The gestational procreator sees the baby for the first time, and may be unable to recognise her. The baby, being pre-verbal, can only show very little about her mental life. On the other hand, gestational procreators do report powerful caring emotions towards and, often, bonding with, the person with whom they have been, for several months, as physically intimate as it is possible to be; babies, in turn, seem, at birth, to prefer their gestational procreator. The very thought of separating new-borns from their gestational procreators by force appears very cruel, and the cruelty charge is best explained, at least in part, by assuming that a significant attachment is already
in place. And miscarriages late in a pregnancy tend to involve mourning the depth of which is not plausibly explained by the loss of a dear project; more likely, the mourning is at least in part explained by the existence of attachment, at the same time physical and emotional, to the baby.

All this is not to say that the relationship between new-borns and their gestational procreators could ever be as developed, and as worthy of protection, as intimate relationships between older individuals. But it is the most developed relationship that a new-born can possibly have, and even such a relatively modest relationship is worthy of protection. This holds even if attachment theory is in many ways wrong.

Another worry with this argument is its lack of universality; not all gestational procreators will be bonded, at birth, to their babies; some will not even know they were pregnant, or will be pregnant against their wishes and, sometimes, against their will. Perhaps gestational procreators who are not bonded at birth lack the right to parent their new-born – although the new-born’s level of attachment may be independent from that of the parent, and that attachment alone, if significant enough, could provide a powerful child-centred reason for the gestational procreator’s right to rear. In any case, gestation is an imperfect proxy for the existence of a mutual intimate relationship and hence, possibly, of a moral right to rear; yet, it seems good enough to justify the gestational procreators’ presumptive legal right to custody.

The previous section concluded that the best case in favour of the genetic procreators’ right to parent is the higher likelihood that they will bond with, and love, the child. But the gestational connection can do even better than the genetic connection on the same count. This is because gestation makes it likely that some bonding already exists at birth, unlike the genetic connection which, at most, makes it more likely that bonding will occur at some stage after birth. Moreover, in some situations, like those when a surrogate mother desires to parent the child she carried, appeal to gestation provides an explanation as well as a reasonably good guarantee that bonding is actually present.

6. Implications of the argument

The argument in the previous section has some general implications which I explore here.

First, as it has been noted, gestational accounts in general deny the parental parity principle which states that “being a mother doesn’t make a person more of a parent than being a father, or vice versa” (Kolers and Bayne 2001, 280). Gestational accounts only explain the parental right of gestational procreators, who are most typically mothers. They have been deemed implausible for claiming that men can only acquire parental rights by association with a woman (Bayne and Kolers

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20 And Caroline Whitbeck noted that the bodily side of this relationship can help to debunk the myth of a mysterious maternal instinct (1984, 191).
This last criticism does not seem fair to gestational accounts, because they leave open the possibility that men can acquire parental rights through adoption without any need to associate with a woman.

I accept the implication that my gestational account does, as such, put fertile women in a privileged position; I do not think this is particularly problematic if it is the result of a general account of parental rights grounded (fully or partially) in the child’s interests. According to this view, rearing children should not be something that we (primarily) do for our own sake, to satisfy our own interests – but something that we ought to do (primarily) for the sake of children. Given biological facts, it is an unfair, hence regrettable, situation that fertile women are better positioned than other individuals to acquire the moral right to custody. It is worth reflecting on whether, all things considered, there is reasons to regret our current dependency on women’s bodies for procreative purposes. Should we develop ectogenesis if we could? Or would the loss of the current way in which we come into the world, through another person’s body, large enough to offset the otherwise many moral advantages that ectogenesis could provide (Smajdor 2012)? To start thinking about this we should consider cases in which no bond is being formed, and least on the side of the gestational procreator, during a pregnancy to which the gestational procreator has consented. Archard has noted that many surrogate mothers do not seem to find it difficult to relinquish their new-borns to the commissioning couple, and speculates that “[t]he knowledge that they, are contracted to give up the child may be decisive in preventing any subsequent bonding.” (Archard 2005, 99). It is not implausible to regret, on behalf of the baby, that a bond has not been formed in such cases; it seems desirable, at least in some respects, to come into the world being already in an intimate relationship with someone.

I also deny that the initial privileging of fertile women that follows from my account needs to be as counter-intuitive as some have claimed it was (Porter 2015). Because I argue that the gestational connection is normative in virtue of being a good proxy for an intimate relationship, my account is compatible with thinking that certain other individuals acquire the right to parent a child through establishing intimate relationships with the child. Which individuals other than the gestational procreators can acquire the right depends on the details of a full theory of the right to parent and the rights of parents. Specifically, such an account would answer a few questions that are relevant here: How many parents should a child have? And what should be the relationship between co-parents? I cannot even gesture towards the answers here, but let me note some facts that can mitigate the worry that my gestational account privileges fertile women too much. First, third parties too can relate to the fetus such that at birth they stand into some kind of intimate relationship with the new-born, albeit one that is even more robust than that of the gestational procreator’s (Gheaus 2012): For instance, pregnant women’s supporting partners can see the fetus and hear its
heartbeat as early as the bearing mother, they can feel the baby, talk to it and be heard by it and can experience the fears, hopes and fantasies triggered by the growing fetus. Second, I assume bonding with a new-born can happen in a relatively short time – it may be a matters of weeks. It is not the case that, on my account, the gestational parent’s privileged relationship with the new-born is inevitably going to last for a long time. Further, it is likely that it is in the children’s interest to have more than one custodian, and my account can easily and plausibly be supplemented to explain why the gestational procreator’s partner(s) can acquire the moral right to parent fairly easily. But, of course, these partner(s) need not be genetic procreator(s).

The last remark brings us to another general implication of my account. As I noted at the outset, by default each child has two parents; but if the biological connection between parents and children that is normatively relevant is gestation, we seem to lack a principled reason for this practice. How many people can have a right to co-parent a child should turn on grounds other than genetic connection. I find this implication of my views a feature rather than a bug. There is a long tradition – at least in the Western culture – of seeing children as property (David Archard and Colin Macleod 2002; Goodin 2005) and the basic structure of the institution of parenthood may be continue to reflect this tradition (Brighouse and Swift 2014). It is a good thing to be critical of it.

7. Conclusions

The overall argument of this paper also has direct implications for the kinds of custody disputes I presented in the beginning of the paper. In the case of embryo swaps, the conclusion is that the gestational procreator should be given custody, since, these being wanted pregnancies, the intimate relationship between gestational procreator and baby is likely to start before birth. In cases of adoption with consent from the gestational, but not from the genetic, parent, it is not clear that the genetic father had a right to parent in the first place, whereas the gestational procreator most likely did. This will turn on answers to several questions: how many parents should children have? On what criteria, other than an already started relationship with the new-born, can one acquire a right to parent a particular child? Are genetic procreators really more likely than genetically unrelated individuals to bond with, and love their children? Even if at birth the genetic father did have, in virtue of their genetic connection, a right to parent her, it is unlikely that this right survived the establishment of an intimate relationship between the child and her adoptive parents. If the right to parent a particular child is justified by appeal to the child’s interest, as I argued it must be, and if children have powerful interests in continuity in care then the courts were wrong to attach normative relevance to the genetic connection. The only normative relevance of the genetic connection, I argued, is increased likelihood of future bonding and love – which, in this situation has not happened (for reasons outside the father’s control.) By contrast, bonding and love did occur
between the child and other individuals who assumed the parental role – that is, the adoptive parents. The courts ought to have ruled in their favour.

The surrogacy cases are more complicated. If genetic procreators really are more likely to fulfil the child’s interest in a loving relationship than genetically unrelated individuals, it means that, other things equal, a genetic procreator has a presumptive right to parent. But when a gestational procreator also claims the right, other things are not all equal. I argued that, at birth, gestational procreators typically had already started to engage in an intimate, caring relationship with their new-born, and a desire to parent the baby on the part of the gestational procreator is likely to indicate actual bonding. A direct implication for gestational surrogacy cases is that the gestational mother ought to have the freedom to decide whether to parent the baby herself (and return any compensation she received for her services). But, if the gestational procreator has a right to parent the baby only in virtue of the bond that she is likely to have with the new-born, than it seems that she cannot alienate this right; the right exists (partially or entirely) in virtue of how the bond will serve the interest of the new-born, and therefore destroying the bond, which is involved in the alienation of the right, will deprive the gestational procreator of the basis for the right. The present account can be interpreted to provide the basis of a radical criticism of surrogacy²¹. This may strike some as implausible, since many people tend to distinguish between benign, fully legitimate forms of surrogacy and morally problematic ones. However, if it is true that the genetic connection between procreators and their children is not normatively relevant, then the very practice of bringing children into existence and then believing that we have a fundamental right to rear them merely because we created them is deeply flawed. The best forms of surrogacy are hostage to this tradition – they cannot have better moral grounding than the practice on which they are parasitical. More generally, it is doubtful that a child-centred account of a right to parent, or even a proper dual interest account, allows parents to transfer their right to parent to another individual of their choice.

References


²¹ And I have done this in Gheaus (2016).


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