

**GENETIC TIES:
ARE THEY MORALLY BINDING?**

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ABSTRACT

What determines parenthood? The advent of IVF and the rapid growth of reproductive technologies have challenged the significance historically associated with biological relationships. It is now possible for a child to have many different people in the role of genetic, gestational, nurturing or legal parent and for the formation of many novel types of families. While frequently some or all of these roles are combined, it is now possible for someone to be a ‘parent’ in one sense, without necessarily taking on the obligations and rights associated with parenthood in a moral sense. Despite the expanded options for constructing families and the proliferation of novel arrangements for raising children, the essential feature of what it means to be a ‘real parent’ and to have a child of ‘one’s own’ is often grounded in the transmission of genes.

This thesis examines the claim that genes define ‘moral’ parenthood. It investigates whether or not genetic relatedness is morally weighty in determining which individuals incur obligations for and rights over children. My thesis adopts a novel approach to address this question. It combines the analysis of both people’s views as captured through a qualitative study and those found in philosophical literature relating to the moral significance of genetic parenthood. I design and conduct a study to capture more directly the meanings that people attach to passing on their genes, which acts as a starting point for identifying and evaluating possible arguments about the moral relevance of genetic parenthood. I then analyse the principles imbedded in the participants’ views in light of the current philosophical literature. I eliminate several of the possible claims as either irrelevant to, or unsuccessful in defining moral parenthood, and I investigate further the remaining plausible claims. Among these is the claim that parenthood is based on causal responsibility. I analyse causal definitions of parenthood and show that standard explanations of moral, rather than causal responsibility, provide a more plausible and coherent account. I apply the standard conditions for moral responsibility to examples of genetic parenthood and propose a

novel account to determine when genetic parenthood generates the parental obligations associated with moral parenthood.

My account, which I refer to as '*Candidate Parenthood*', entails that causing a child to exist is a morally significant outcome and any individual, whether genetically related or not, can be held to account for causing a child to exist if this is a foreseeable consequence of their free actions. I argue that under some conditions causing a child to exist for whom others will take on parental obligation is a justified account of generating parental obligations, that is, that parental obligations and their correlative entitlements are sometimes transferable.

I conclude that genetic relatedness is significant in determining a child's moral parents only to the extent that genetic parenthood is an example of an action that standardly gives rise to moral responsibility. On my account genetic parenthood is neither necessary nor sufficient, but often relevant in determining moral parenthood.

DECLARATION

This is to certify that

- (i) this thesis comprises only my original work towards the PhD;
- (ii) due acknowledgement has been made in the text to all other material used.

Signed

G.Fuscaldo

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TABLE OF CONTENTS

ABSTRACT	I
DECLARATION.....	III
ACKNOWLEDGMENTS.....	IV
TABLE OF CONTENTS	V
INTRODUCTION.....	7
THESIS OVERVIEW	15
CHAPTER 1. WHAT DEFINES PARENTHOOD?	23
INTRODUCTION.....	23
1. WHAT IS THE ROLE OF GENES IN PARENTHOOD? LEGAL OPINION	26
2. WHAT DOES GENETIC PARENTHOOD MEAN? WHY THIS QUESTION IS IMPORTANT.	31
3. WHAT DOES GENETIC PARENTHOOD MEAN? COMMON ASSUMPTIONS	38
SUMMARY	48
CHAPTER 2. WHAT DOES GENETIC PARENTHOOD MEAN? AN EMPIRICAL STUDY	51
INTRODUCTION.....	51
1. AN ANALYSIS OF DECISIONS ABOUT FROZEN EMBRYOS.....	52
2. PRESENTATION OF DATA.....	68
2.1 OVERVIEW OF PARTICIPANTS EXPERIENCES	70
2.2 RESPONSES TO SPECIFIC OPTIONS.....	71
3 MAJOR THEMES.....	91
SUMMARY	105
CHAPTER 3. ‘MY CHILD’: SPECIAL OBLIGATIONS FOR GENETIC OFFSPRING?..	109
INTRODUCTION.....	109
1. THE ‘PHYSICAL RESEMBLANCE’ ACCOUNT	110
2. THE ‘EMOTIONAL ATTACHMENT’ ACCOUNT	116
3. THE ‘MY CHILD’ ACCOUNT.....	126
3.1 ‘MY CHILD’ - WHAT DOES IT MEAN?.....	128
3.2 ‘MY CHILD’ = MY OWN FLESH AND BLOOD	129
3.3 ‘MY CHILD’ = DERIVED FROM MY BLUEPRINT	130
3.4 THE COMBINATION ARGUMENT	134
SUMMARY	136
CHAPTER 4. CAUSAL ACCOUNTS OF PARENTHOOD	139
INTRODUCTION.....	139
1. MORAL RESPONSIBILITY.....	142
2. TWO CAUSAL ACCOUNTS OF MORAL PARENTHOOD.....	143
3. WHY IS ‘THE CAUSER’ RESPONSIBLE?.....	146
4. DOES CAUSING A CHILD GENERATE HARM?	155
5. WHO IS THE CAUSE OF A CHILD’S EXISTENCE?	159
5.1 THE SUFFICIENT AND PROXIMATE CAUSE	160
5.2 ‘INITIAL CAUSERS’	164
5.3 THE ‘BUT-FOR’ CAUSE.....	167
5.4 WHO IS <i>THE</i> CAUSE? CONCLUSION	172
6. CAUSES AND CONSEQUENCES.....	173
7. CONDITIONS FOR MORAL RESPONSIBILITY	181

7.1 CONDITION 1: FREEDOM.....	182
7.2 CONDITION 2: FORESEEABILITY	188
SUMMARY	197
CHAPTER 5. “CANDIDATE PARENTHOOD”: A TWO STEP ACCOUNT OF MORAL PARENTHOOD.....	201
INTRODUCTION	201
1. RECONSIDERING CAUSAL PARENTHOOD: ‘ <i>CANDIDATE PARENTHOOD</i> ’ A MORE PLAUSIBLE EXPLANATION	203
2. CANDIDATE PARENTHOOD- THE TOO MANY PARENTS OBJECTIONS:.....	205
2.1 TOO MANY PARENTS IS NOT A PROBLEM	205
2.2 ‘DILUTED’ MORAL RESPONSIBILITY	207
2.3 EQUAL ACCOUNTABILITY BUT DIFFERENT ACCOUNTS	212
2.4 TRANSFERABILITY	217
3. ‘CANDIDATE PARENTHOOD’ AND THE PROBLEM OF NO PARENTS	225
SUMMARY	227
CHAPTER 6. DOES GENETIC PARENTHOOD GENERATE ENTITLEMENTS?	231
INTRODUCTION	231
1. WHAT IS A PARENTAL ENTITLEMENT?.....	233
2. THE PROPRIETARIAN ARGUMENT	235
3. THE EXTENSION CLAIM	243
4. THE PRIORITY THESIS	248
5. PARENTAL ENTITLEMENTS AND FROZEN EMBRYOS	262
SUMMARY	264
CHAPTER 7. ‘CANDIDATE PARENTHOOD’ PUT TO THE TEST.....	267
INTRODUCTION	267
1. THE FROZEN EMBRYO STUDY	271
2. TEST CASES	276
2.1 THE ‘TSUNAMI BABY’	277
2.2 PATRICK	288
2.3 MAGILL VS MAGILL.....	293
2.4 THE IVF EMBRYO MIX UP	299
SUMMARY	305
CHAPTER 8. CONCLUSIONS.....	309
LIST OF REFERENCES	315
APPENDIX I: PUBLISHED PAPERS	335

INTRODUCTION

Who is a parent?

Once upon a time when reproduction was done ‘the old fashioned way’ a woman who gave birth to a child was this child’s mother and her husband was presumed to be the child’s father¹. In the normal course of events biology defined parenthood and ‘blood ties’ determined which individuals would raise which children. But things are not so simple now.

In 1999 an Italian business man and his Portuguese wife commissioned a clinic in Denmark to arrange a gestational surrogate to produce their third child. The 33-year-old American woman selected for the surrogacy underwent an embryo transfer procedure in Athens. The embryos were formed from the sperm and egg of an anonymous American man and British woman. The surrogate became pregnant with twin girls. On learning that the children were female and not, as hoped for, male, the businessman reneged on his contractual agreement with the gestational mother and rejected suggestions that he was responsible for the girls².

In September of 1999 a child access dispute was brought before the Family Court of Australia. The case, (Re: Patrick³), involved a lesbian couple, a gay sperm donor and their two year old son, Patrick. The sperm donor sought regular fortnightly visits and overnight visits with the boy while the biological mother and her partner (the co-parent), sought to remain Patrick’s exclusive parents. The women applied for restricted twice-yearly contact between the sperm donor and the child. The child’s mother told the court that the man had agreed, before the insemination took place,

¹ Unless there existed evidence to the contrary.

² O’Reilly, D. (2000, May 14). Unwanted twins stir a protest over IVF surrogacy. *The Sunday Age*, p2

³ Family Court of Australia Media Release [Online accessed 04/06/03] ULR:

<http://www.familycourt.gov.au/media/html/patrick.html>

that his role would be as a donor and not as an active parent and that an ongoing, traditional father son relationship was not in the boy's best interests⁴.

An embryo mix up in Britain in 2000 resulted in a white couple giving birth to two black twins. Genetic tests established that the wrong sperm was used to inseminate the ova of the white woman who gave birth to the twins. Both of the couples sought custody of the children.

In 2001 it was reported that several children with two genetic mothers had been born⁵. A new procedure involving the transfer of mitochondria (the cell's power packs) from the egg of one woman to that of another for the purpose of enhancing fertility has resulted in the birth of more than ten children who carry the genetic material of three people⁶.

Current technology raises the possibility for children to be born from the eggs of aborted fetuses⁷, for the use of artificial gametes⁸, for embryos to be merged to create a chimaera⁹, for a child to be cloned from one adult¹⁰ and for men to gestate a fetus¹¹.

Who are the parents of these children? What features determine parenthood and how should we evaluate competing claims and disclaimers about parental rights and duties?

⁴ Family Court of Australia, J. (2002). *Re Patrick: (An Application Concerning Contact)* [2002] FamCA 193, from http://www.familycourt.gov.au/judge/2002/html/patrick_text.html

⁵ Heighfield, R., & Heinrichs, P. (2001, 6 May). World's first genetically altered babies: One child two mothers. *The Sunday Age*, p. 1

⁶ See Barritt, J. A., Brenner, C. A., Malter, H. E., & Cohen, J. (2001). Mitochondria in human offspring derived from ooplasmic transplantation. *Human Reproduction*, 16, 513-516

⁷ Dillner, L. (1994). British public will rule on fertility advances *British Medical Journal*, 308, 153-158

⁸ Newson, A. J., & Smajdor, A. C. (2005). Artificial gametes: new paths to parenthood? *Journal of Medical Ethics*, 31, 184-186

⁹ Hutchinson, M. (2003). Mixed-sex human embryo created On *BBC News*. UK: BBC

¹⁰ Abbot, P. (2001). Trepidation greets plan for cloning humans. *Nature*, 410 (6826), 293

¹¹ Hutchinson, M. (2003b). Womb transplant baby 'within three years'. On *BBC News World Edition*. UK, Wood, C., & Westmore, A. (1983). *Test-tube Conception*. Melbourne: Hill of Content.

While once a child's parentage may have been obvious, the above examples illustrate how technological advances have confused our ideas about who is a parent and what makes a family. As Marilyn Strathern points out, through much of history and across many diverse societies the biological facts of life, having sex, transmitting genes and giving birth have been taken as the basis for family ties and kinship¹². Aligning parental status with 'biological facts' has a long history and near universality¹³, but today the biological facts of parenthood are no longer tangible, nor are they the only relevant facts.

While many people have welcomed advances in reproductive technologies, many others have responded to the possibilities they raise with concern and fear. Surrogacy arrangements have been condemned as commodifying women and children. Donation of egg and sperm and the separation of social and genetic parenthood have been likened to a new 'stolen generation'¹⁴. Reports of chimaera's and clones have provoked talk of mad scientists and 'Brave New World' baby factories¹⁵. The Danish surrogacy left some commentators speculating that a whole generation of children could be born without parents and lacking a sense of identity.

These examples also illustrate how notions of parenthood have implications beyond our personal preferences and that the question '*who is a parent?*' is important because parenthood is more than a label.

¹² Strathern, M. (1992). *Reproducing the Future: Essays on Anthropology, Kinship and the New Reproductive Technologies*. New York: Routledge. p5

¹³ According to some commentators at least, see for example Brenda Almond. Almond, B. (1994). Parenthood-social construct or fact of nature? In D. Morgan & G. Douglas (Eds.), *Constituting Families: A study in governance*. (pp. 98-108). Stuttgart: Franz Steiner. However this is a controversial notion and will be discussed further in chapter 1.

¹⁴ 'Stolen Generation' is the term commonly used to mean the Australian Aboriginal children who were removed from their families by Australian government agencies and church missions between early and mid 1900's. See Human Rights and Equal Opportunity Commission. (1997). *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*: Sterling Press. <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>

¹⁵ Hutchinson, M. (2003a). Have the scientists gone too far? . On *BBC News*. <http://news.bbc.co.uk/1/hi/health/3040126.stm>

What is a parent?

Despite the growing confusion and debate over *how parenthood is determined*, the question of *what parenthood entails* proves much less complex. It is relatively uncontroversial to state that parenthood is associated with obligations or duties. We expect parents to feed, cloth, educate and to promote the physical and psychological welfare of their children. Parenthood is also associated with authority or power, for example to be able to make decisions about a child or to make claims on contact with a child. While there exist different views on precisely what are the duties and rights of a parent and while it proves difficult to define what makes a 'good' parent or when a parent is 'good enough'¹⁶, there is widespread agreement that parenthood is a status involving duties and authority. In many countries this status is enshrined in law. Australian law, for example, imposes the following duties and powers¹⁷ on parents in relation to their children:

- the power to name the child
- the power to make decisions on behalf of the child (for example medical, travel permission)
- the power to decide where the child will live and how he or she will be educated, what religion, if any the child will be brought up in
- the power to discipline
- the responsibility to ensure that the child receives medical treatment when required
- the responsibility to support the child adequately¹⁸

¹⁶ As argued in O'Neill, O. (2000). The 'good enough' parent in the age of the new reproductive technologies. In H. Haker & D. Beylveled (Eds.), *The Ethics of Genetics in Human Procreation* (pp. 33-48). Vermont: Ashgate. A notion popularized in Bettelheim, B. (1987). *A good enough parent : a book on child-rearing*. New York: Knopf : Distributed by Random House.

¹⁷ The term 'powers' is used synonymously with 'authority' and responsibility in relation to defining the entitlement or legal requirements of parents in regard to children. In later chapters the notion of parental rights is explored more fully.

¹⁸ Discussed more fully in Gamble, H. E. C. (1986). *Law for parents and children* (2nd ed. ed.). Sydney: Law Book Co.

On whom are these duties and powers conferred? While the law clarifies what duties are owed to children and what authority can be claimed in relation to them, it is less clear on the subject of which individuals owe these duties or hold such rights. Of course, children share with all other human beings a number of universal rights. These are negative rights or claims on all of us to allow others to act freely. For example the Universal Declaration of Human Rights¹⁹ proclaims the rights and freedoms to which all people are entitled and includes the right not to be abused, tortured or enslaved. Parents share the same obligations as everyone else to respect these ‘universal’ rights. However, as O’Neill points out, parents are required to do more than just respect their children’s universal rights. In addition to the rights ascribed to all humans, children have some special rights that are claimable against ‘specifiable others’²⁰. For example the right to medical care, education and food are not negative rights to be left free to pursue these things, but claims or positive rights that are made usually against parents and sometimes the state, to provide them.

Given that a parent, in the moral sense, is someone with special duties and entitlements with regard to *particular* children, which individuals acquire these rights and duties and how are they acquired?

What determines parenthood- the candidates

The advent of IVF and the rapid growth of reproductive technologies largely reflect the importance in our society of biological parenthood and genetic kinship. However, the same technology has challenged the significance historically associated with biological relationships. Gamete and embryo donation and surrogacy arrangements now make it possible for a child to have many different people in the role of genetic, gestational, nurturing or legal parent and for the formation of many novel types of families. While frequently some or all of these roles are combined, it is now possible for someone to be a ‘parent’ in one sense, without necessarily taking on the

¹⁹ General Assembly of the United Nations. (1948). *Universal Declaration of Human Rights*, from <http://www.un.org/Overview/rights.html>

²⁰ O’Neill, O. (1979). Begetting, Bearing, and Rearing. In O. O’Neill (Ed.), *Having Children* (pp. 25- 38). New York: Oxford University Press The possibility that in fact these rights are not claimable against ‘specifiable others’ but rather claimable against the state is a view put forward by Eekelaar, J. (1994). Parenthood, Social Engineering and Rights. In Derek Morgan & G. Douglas (Eds.), *Constituting Families : A Study in Governance* (pp. 80-97). Stuttgart: Franz Steiner, Verlag, but is not considered in depth in this thesis.

obligations and rights associated with parenthood in a moral sense. In other words a genetic, gestational or legal parent need not be a child's 'moral parent'.

As Ruth Macklin points out, the separation of biological and social roles now makes it impossible to 'discover' who is the '*real parent*' as might have been the case in a traditional paternity or maternity dispute²¹. Macklin illustrates two different types of decisions that arise from custody disputes involving gamete donation or surrogacy. One type of decision stems from a conceptual question, or a question of definitions, '*Should a woman whose contribution is solely gestational be termed a mother of the baby?*' While the other question, '*Which role should entitle a woman to a greater claim on the baby in the case of a dispute?*' is a moral question, which is not a matter of definitions and cannot be reached by discovery, but is a matter for decision²².

Similarly, the conflict that arose in the Danish surrogacy case above cannot be resolved by discovering the biological facts of the girls' birth. A blood test might uncover the identity of the twins genetic kin, but this fact is not helpful in the face of competing claims between the gestational and "commissioning" parents and does not determine who has responsibility for (or entitlements over) the girls. In order to decide this question we need to determine which are the morally relevant factors and which have the greater moral weight with respect to duties for and claims over children. On this question the literature reveals no shortage of candidates. While surrogacy disputes have highlighted three obvious possibilities (genetics, gestation and rearing roles) other contenders on which to base parenthood include intention²³, legal precedence²⁴, causation,²⁵ custom,²⁶ contractual arrangements²⁷ and the best interests of children²⁸.

²¹Macklin Ruth (1995). Artificial means of reproduction and our understanding of the family. In Joseph H. Howell & William F. Sale (Eds.), *Life choices : A Hastings Center Introduction to Bioethics* (pp. 287-313). Washington, D.C: Georgetown University Press

²² Macklin Ruth Artificial means of reproduction and our understanding of the family. In p294

²³Hill, J. L. (1991). What Does It Mean To Be a Parent? The Claims of Biology as the Basis for Parental Rights. *New York Law Review*, 66, 353-420

²⁴ See for example the judgement in *Re: Patrick. Re Patrick : (An Application Concerning Contact)* [2002] FamCA 193 (5 April 2002)

http://www.austlii.edu.au/au/cases/cth/family_ct/2002/193.html

Genetics as the basis of parenthood: Is blood really thicker than water?

Plausible arguments have advanced each of the above, alone or in combination, as a morally relevant and weighty feature in determining competing parental claims or disclaimers. However, despite the expanded options for constructing families and the proliferation of novel arrangements for raising children, the old adage that ‘blood is thicker than water’, continues to underlie our notions of what makes a family. It is ‘blood ties’ or more literally, *genetic ties* that currently underpin our legal and social definitions of parentage. As Maggie Kirkman points out, genes have become important receptacles of meaning in Western culture²⁹. The essential feature of what it means to be a ‘real parent’ and to have a child of one’s own’ are often grounded in the transmission of genes. While many of the candidates listed above can and have been used to assign parenthood, it is against the primacy of genetic parenthood that all other parental declarations are assessed, and it is this tenet that is the subject of my investigation.

This thesis examines the claim that genes define ‘moral’ parenthood. How important is genetic relatedness, are genetic ties a morally weighty factor in determining which individuals incur obligations for and rights over children? I use the term ‘*moral parenthood*’ henceforth, to distinguish between individuals who incur duties and rights over children and other senses of parenthood, namely genetic, gestational, contractual and legal parenthood. While it is true that parenthood is often a combination of some or all of these aspects of parenting, this is obviously no longer necessarily true. Given

²⁵ For example Nelson, J. L. (1991). Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. *Public Affairs Quarterly*, 5(1), 49-61

²⁶ See for example Strathern, M. (1995). Displacing knowledge: Technology and the consequence for kinship. In F. Ginsberg & R. Rapp (Eds.), *Conceiving the New World Order: The Global Politics of Reproduction* (pp. 346-364). Berkeley: University of California Press

²⁷ Robertson, J. A. (1994). *Children of choice : freedom and the new reproductive technologies*. Princeton: Princeton University Press.

²⁸ Daniels KR, Blyth E, Hall D, & Hanson KM. (2000). The best interests of the child in assisted human reproduction: the interplay between the state, professionals, and parents. *Politics Life Sciences*, 19(1), 33-44

²⁹ Kirkman, M. (2004). Genetic connection and relationships in narratives of donor-assisted conception *Australasian Journal of Emerging Technologies and Society*, 2(1).
<http://www.swin.edu.au/sbs/ajets/journal/issue2/KirkmanGenetic.pdf>

that a parent in some senses is not necessarily a moral parent, and that there exist competing claims as to what determines moral parenthood, my aim is to elucidate how moral parenthood comes about and what, if any, is the role of genes in this determination. More specifically I ask, *does the genetic relationship between progenitors³⁰ and their offspring generate obligations for and entitlements over these children?*

While I focus on the question of the role of genes in defining moral parenthood, I do not exclude the possibility that other factors, for example gestation, intention, contract or social norms might together or alone also be sufficient grounds for moral parenthood. To clarify, the question ‘*what makes a moral parent?*’, is limited in this thesis to an exploration of the question “*does genetic parenthood generate moral parenthood?*”. I do not explore directly the role of other (non-genetic) contenders and I do not attempt to adjudicate between all competing parental claims and disclaimers. However, my analysis of the role of genes in determining moral parenthood necessarily has broader implications. My conclusions are applicable to and encompass some of the claims and disclaimers of both genetically related and non-genetically related individuals for moral parenthood. Further, while it is clear that many individuals both genetically related and not genetically related voluntarily take on the job of moral parent, my interest is to clarify whether, as is often assumed, genetic relatedness automatically generates, or non-voluntarily gives rise to moral parenthood. In other words, I accept as given that genetic relatedness is not necessary for moral parenthood³¹, but explore whether it is *sufficient*.³² I acknowledge that there is more to parenthood than principles and rules. My aim is not to undermine the powerful loving bonds that form between parents and their children, but merely to question the age-old mantra, that blood ties are the basis of these bonds.

³⁰ Throughout this thesis the word progenitor is used in its literal sense to refer to an individual that provides genetic material which results in the existence of a child. A progenitor is a genetic parent that may or may not also be a gestational and social parent. The term begetter is used distinguish between passing on genetic material (for example by providing gametes) and other concepts of parenthood. The term begetting excludes everything except the provision of gametes.

³¹ I present some argument for this claim in this chapter 1 where I consider the claim that genetic parenthood is necessary because genetic parents best promote their children’s welfare.

³² The distinction between necessary, sufficient and both necessary and sufficient (or strong) geneticism is one made and explored by Avery Kolers and Tim Bayne, Kolers, A., & Bayne, T. (2001). "Are You My Mommy" On the Genetic Basis of Parenthood. *Journal of Applied Philosophy*, 18(3), 273-285

Thesis Overview

Does genetic parenthood generate moral parenthood? My thesis adopts a novel approach to address this question. It combines the analysis of both empirical claims and the philosophical literature relating to the moral significance of the genetic parenthood. I design and conduct a study, the Frozen Embryo study to collect ‘real-world’ claims about the significance of genetic relatedness. I then analyse these claims in light of the current philosophical literature to determine whether there is a sound theoretical basis for these beliefs. I apply standard accounts of moral responsibility to examples of genetic parenthood and propose a novel account to determine when genetic parenthood generates the obligations associated with moral parenthood.

My approach in addressing the question I have raised could be described as “Coherentism”. This is a term used by Beauchamp and Childress, based on the ideas of John Rawls. It describes a model of justification in ethical theory that is neither deductive, which involves ‘top- down’ application of rules, nor inductive, involving the bottom-up derivation of rules and principles³³. It is a model of ethical justification that works in both directions, with the goal of constructing a general theory that is consistent with our considered judgments; those moral convictions in which we have the highest confidence, or our ‘fixed points’ as Rawls describes them. Beauchamp and Childress explain that Coherentism is somewhat analogous to hypothesis testing in science, which involves testing, modifying and rejecting through experiment or experimental thinking.

Rawls describes the process of constructing, pruning, adjusting and revising ethical theories consistent with our considered and trustworthy paradigmatic judgments as one of engaging in and aiming for ‘*reflective equilibrium*’. As explained by Norman Daniels,

³³ Beauchamp, T. L., & Childress, J. F. (1994). *Principles of Biomedical Ethics* (4th ed. ed.). New York: Oxford University Press. p 20 In a later edition of their book they refer instead to ‘coherence theory’, see Beauchamp, T. L. (2001). *Principles of biomedical ethics* Beauchamp, James F. Childress (5th ed. ed.). New York, N.Y.: Oxford University Press. p397

*‘So-called reflective equilibrium occurs when we evaluate the strengths and weaknesses of all plausible judgments, principles, and relevant back-ground theories. That is, we incorporate as wide a variety of kinds of legitimate moral beliefs as possible, including hard test cases in experience.’*³⁴

In the following chapters I engage in a process of ‘reflective equilibrium’. I draw from case studies, public and legal opinion and the philosophical literature and I design an empirical study to collect real life experiences and reflections. I consider the strength and weaknesses of this wide pool of beliefs and theories about genetic parenthood in the light of our long standing, credible and ‘considered judgments’ about moral responsibility.

My aim is to test different claims about the significance of genetic parenthood and to determine whether genetic parenthood entails moral parenthood. I evaluate different accounts of moral parenthood against the three general criteria that determine the adequacy of any moral theory³⁵, 1) coherence and consistency with considered moral judgments, 2) consistency with our experiences and 3) workability³⁶ in real-life situations. I reason that an adequate account of moral parenthood must identify some individual or a ‘workable’ number of individuals as having the obligations and entitlements associated with moral parenthood, but I do not assume that a child must have two and only two parents. (I reject without argument the possibility that moral parenthood is associated with the ‘state’, rather than any individual, on the grounds that this is totally incompatible with our every day judgments). Further, an adequate account of moral parenthood must also explain how parental duties and rights are generated. I analyse and ultimately reject several competing theories about the role of genes in determining parenthood, on the basis of these criteria. I develop a novel explanation of how moral parenthood is determined that meets these general conditions and coheres with our considered norms.

³⁴ Daniels, N. (1979). Wide reflective equilibrium and theory acceptance in ethics. *Journal of Philosophy*, 76, 256-282 p257, reprinted in Daniels, N. (1996). *Justice and Justification: Reflective Equilibrium in Theory and Practice*. New York: Cambridge University Press.

³⁵ While many more tests of the adequacy of a theory can be described, see for example *Beauchamp and Childress Principles of biomedical ethics*. p45-47, where eight such ‘tests’ are outlined, the three terms I use above summarise and abbreviate the most common criteria.

³⁶ Understood as explanatory power, justificatory power and practicability.

My analysis is largely neutral between competing normative theories and I attempt to provide a coherent account that converges across different theories at least at the level of principles, obligations and rights. I accept a version of principle-based common-morality ethics as described by Beauchamp and Childress and maintain that it is possible to arrive at an account of moral parenthood that can accommodate diverse classical theoretical standpoints³⁷. I do however take a non-consequentialist approach to moral responsibility and accept that this is not assigned on the basis of maximizing utility.

I begin in chapter 1 with an overview of the relevant Australian law as evidence of my claim that genes currently underpin our understanding of parenthood. I illustrate the prevailing view that genetic parents have *prima facie* obligations and claims and that parental status for non-genetic contenders involves overriding the former. I present three different perspectives, which reveal that the role of genes is both confused and contested and illustrates the need to address this conflict.

In this chapter I draw on a number of legal anomalies to demonstrate that while genetic definitions of parenthood may have proven legally expedient in the past, they now fail to clarify for a number of families and children the question of who is a parent. Secondly, I present a case study reflecting public opinion on how families should be constructed and what makes a parent. This case study reveals the existence of diverse views about families and the role of genetic relatedness, many of which conflict with our current social and legal norms. Thirdly, I consider the nature/nurture debate and the anthropological discussion regarding families and address common misconceptions in debates about parenthood. I conclude by showing that there exists a wide range of legal, personal and scientific views about the role of genetic relationships in assigning parenthood and that many of these conflict with and contest our traditional notions. I argue that neither the current law nor an analysis of the scientific facts of parenthood can help to resolve the difficult questions raised by the

³⁷Beauchamp, & Childress. *Principles of Biomedical Ethics*. Chapter 1.

Patrick case or the Danish surrogacy. I reason that these questions are morally weighty and not simply a matter of personal preference. I suggest that sorting out questions about the role of genes in puzzles about parenthood, rests largely on an analysis of whether and to what extent genetic ties give rise to moral ties and whether genetic parenthood is sufficient for moral parenthood.

Having argued in Chapter 1 that both legal views and popular views about the role of genes rest largely on unexamined assumptions and norms, in Chapter 2, I present an empirical study designed to investigate more directly the weight that people *do* attach to genetic relatedness. I reason that one way to clarify the importance of genetic relatedness is to investigate and analyse the *reasons* that people give for valuing such connections. Of course a survey of opinion on the weightiness of genetic ties does not in itself amount to a conclusive argument about their moral weight. Collecting people's reasons for holding a belief or view serves in my thesis as a starting point for developing concepts and distinctions and elucidating the principles embedded in such views. While there are many contexts in which to explore the meaning of genetic relatedness, notably experiences of adoption or gestational surrogacy, my empirical study (the 'Frozen Embryo study') is unique in that it focuses on the experience of begetting, (transmitting genetic material), dissociated from the experience of gestation, birth or relinquishing a child. This study investigates the reasons that people give for the decisions they make about human embryos that become surplus following fertility treatment. I reason that these embryos embody almost exclusively the *genetic* relationship between progenitors and progeny³⁸. The choices that individuals make about their excess embryos are therefore in some sense a measure of the weight they accord to begetting.

The 'Frozen Embryo' study is therefore analogous to a philosopher's 'thought experiment' in that it attempts to elucidate the essential features of an issue by removing all the potentially confounding considerations. What distinguishes my approach with traditional approaches to moral problems based on thought

³⁸ Of course it is possible that some people might see an embryo as the embodiment of their 'flesh and blood' or the loving union between two people. These possibilities are discussed further in chapter 2.

experiments, is that I appeal to *real* and not only speculative or imagined claims about the significance of genetic relatedness. The advantage of considering arguments and concerns that exist in the ‘real world’ is not only that this might expand the ‘pool of beliefs’ to consider, but that this improves the chances of finding a theoretical position with consistent practical application.

The analysis and interpretation of the Frozen Embryo study concludes by drawing out a list of ‘real-world’ claims about the significance to genetic parenthood. These are summarised as follows 1) genetic ties give rise to physical resemblance and strong emotional ties, 2) genetic ties give rise to strong emotional ties and moral obligations, 3) a child with ‘my genes’ is *my child* to whom I have special obligations, 4) begetting gives rise to moral parenthood because begetting causes a child to exist, 5) begetting generates transferable obligations, 6) genetic parents are best, 7) genetic parenthood is analogous to property ownership and 8) begetting gives rise to authority or parental entitlements.

In the chapters 3 to 6 these eight claims are analysed in the light of current philosophical literature to determine whether they reveal a sound theoretical basis for moral parenthood. In summary, the aim of the analysis that follows is to determine whether these claims, supplemented and supported by arguments found in the current literature, clarify the role of genes in sorting out questions about parenthood and ultimately whether genetic parenthood generates moral parenthood.

The analysis of the ‘claims’ elucidated by the Frozen Embryo study begins in chapter 3 where the first three of these claims are further specified and analysed. I begin by considering the notion that genetic relatedness generates physical resemblance and emotional attachments. I then consider the possibility that stronger emotional attachments are formed between genetically related people and whether this is morally significant. Finally I attempt to clarify the notion of ‘my child’. I consider several possible explanations for the belief that a genetically related child is unique and more properly the child of its genetic parents than other children. I consider how ‘my

genetic child' might generate moral parenthood. In the end I reject each of these three claims as providing the basis of an argument explaining why and how genetic parenthood generates the parental obligations associated with moral parenthood.

In chapter 4, I begin an analysis of the belief, elucidated through the Frozen Embryo study, that genetic parenthood gives rise to parental obligations because causing a child to exist generates such obligations. I discuss several problems with causal accounts of parental responsibility and suggest that the current theories defending such accounts are incoherent and unworkable. I illustrate how strictly causal explanations of parenthood result in the problem of too many parents. Conversely my analysis of 'intentional' parenthood, a competing account of what defines parenthood, reveals the opposite problem, that a child could have no parents. I suggest that the problems with these accounts stem from confusion over causes, consequences and when causing generates moral accountability. I propose that moral parenthood is about moral responsibility and not causal responsibility. I describe a standard account of how moral responsibility is generated and based on this I develop a novel and more plausible explanation of how parental obligations are generated. I clarify the conditions under which agents can be held to account for the consequences of their actions and reason that even though genetic parents do causally contribute to the existence of their offspring, they are morally accountable only when the two conditions generally held to apply for moral responsibility, freedom and foreseeability, are met. I specify each of these conditions for the purpose of my thesis and conclude that genetic parents are morally accountable for causing a child to exist where this was a foreseeable outcome of a free action.

In chapter 5, I consider the implications of this conclusion and 'flesh-out' my account, which I refer to as 'Candidate Parenthood'. On my reasoning moral parenthood is determined via a two-step test. Firstly, a test for accountability; this involves determining who can be held to account for causing a child to exist. Secondly, a test for moral responsibility; given that an agent is accountable, what account do they give? I argue that, under some conditions, the transfer of parental obligations to

others is an example of an account that justifiably releases an 'accountable' parent from moral parenthood. I consider the 'workability' of my account and the possibility that it identifies 'too many parents' and 'no parents'.

The question of parental entitlements or 'rights' is explored in Chapter 6. In this chapter I take up the suggestion that begetting generates parental entitlements. I consider three influential accounts of parental rights; 1. Proprietarian arguments, that parental entitlements are analogous to property rights, 2. the Extension Claim, that parental entitlements are an extension of other well founded rights and 3. the Priority Thesis, that parental entitlements are grounded on and constrained by their prior parental obligations. I argue that the latter is the most plausible explanation of how parental entitlements are generated. On my reasoning moral parents are entitled to fulfil the obligations they have incurred and this is the basis and scope of parental rights. The transfer of parental obligations to others entails that parental rights are waived.

In chapter 7 I test my account. I return to the findings of the Frozen Embryo study and consider whether 'Candidate Parenthood' can explain the feelings and beliefs about genetic relatedness captured in this study. I further consider whether my account is compatible with and coheres with our ordinary judgements, by testing it against a number of hypothetical and real cases involving competing parental claims and disclaimers. I illustrate some of the limitations of 'Candidate Parenthood'; that it rests on nuanced interpretations of what is free and foreseeable, and it is more complex than applying genetic definitions of parenthood. Despite its limitations, I show the explanatory power of my account and its advantages in providing a way of sorting through competing parental claims and disclaimers. I suggest that given the complex number of ways in which people can become parents any account of moral parenthood is bound to be complex. 'Candidate Parenthood' locates the complexity by defining moral parenthood and provides some direction for future analysis, refinement and specification.

In summary my thesis argues that genetic ties are not as morally weighty as is often assumed and that while begetters are ‘candidate parents’, genetic parenthood is neither necessary nor sufficient for moral parenthood. On my account causing a child to exist is a morally significant outcome and any individual, whether genetically related or not can be held to account for causing a child to exist if this is a foreseeable consequence of their free actions. What account they give determines whether or not they are required to meet the needs of these children. “Accountable parents” who do not propose to take on parental obligations must provide an adequate explanation of their part in causing a child to exist. I argue that in some instances genetic parents are not moral parents because under some conditions transferring parental obligations is a justifiable account of causing a child to exist and releases an ‘accountable parent’ from moral parenthood.

I conclude that genetic relatedness is significant in determining who are a child’s moral parents only to the extent that genetic parenthood is an example of an action that standardly give rise to moral responsibility. On my account genetic parenthood is neither necessary nor sufficient, but often relevant in determining moral parenthood.

CHAPTER 1. WHAT DEFINES PARENTHOOD?

Introduction

What makes a parent?

I begin this chapter with an overview of the relevant Australian law to illustrate my assertion that genes currently underpin our understanding of parenthood. In support of my choice of genes as the starting point for a discussion of what makes a parent, I illustrate the prevailing view that genetic parents have *prima facie* obligations and claims and that parental status for non-genetic contenders involves overriding the former.

I follow on to defend the rationale behind the question I have posed, namely, what is the role of genes in determining parenthood? To many people, the role of genes in parenthood will seem obvious. The desire for genetic offspring is often claimed to be a fundamental human need and a crucial self-defining experience. For some this is easily explained as the need to fulfill a strong biological urge. For others, genetic ties are important because they create shared family histories, a sense of continuity or a type of immortality. Many people find pleasure in the experience of shared family resemblance or traits and mannerisms. It is often claimed that genetically related parents and children form special attachments or that genetic ties give rise to special and immutable obligations and duties.

However, it is also often claimed that in modern individualistic societies we have over-emphasized the importance of genetic relatedness. Anthropologists remind us that there exist cultural groups where genetic ties are not the sole or even the most important determinant of who has responsibility for children - where fosterage and surrogacy are not uncommon or where children are seen as communal

responsibility¹². Even in our own culture, it is argued, the many successful experiences of couples who adopt or form blended families following divorce show that genetic ties are not the only determinant of parenthood³.

It could be said that how people feel about genetic ties or what the weight that they attach to such relationships is simply a personal matter and not the subject of moral enquiry. I present evidence from three different perspectives to show that the role of genes is in fact not obvious, but both confused and contested. I illustrate the need to address this conflict and argue that the weight we attach to genetic ties is not simply a matter of personal taste, but has important moral implications. I show that popular views about the role of genes are often based on unexamined assumptions and historical norms.

I begin in section 1 by drawing on a number of legal anomalies to demonstrate that while genetic definitions of parenthood may have proven legally expedient in the past, they now fail to clarify for a number of families and children the question of who is a parent. In section 2 I present a case study reflecting public opinion on how families should be constructed and what makes a parent. This case reveals the existence of diverse views about families and the role of genetic relatedness, many of which conflict with our current social and legal norms. While some people attach great weight to genetic ties others claim that genes are just one among many ways of tying families together and that genetic parenthood does not entail parental rights and obligations. I argue that questions about the significance of genetic relationships cannot simply be dismissed as questions about personal taste. I demonstrate that the question ‘what is the role of genes in determining parenthood?’ is important because how we answer this question has morally weighty implications.

¹ Sault, N. (2000). Many mothers, many fathers: the meaning of parenting around the world. *Santa Clara University Law Review*, 36, 2. <http://www.scu.edu/ethics/publications/other/lawreview/manymothers.html> URL:

² Stone, L. (2000). *Kinship & gender: an introduction*. Boulder Co: Westview Press

³ Bartholet, E. (1993). *Family bonds: adoption and the politics of parenting* Boston :: Houghton Mifflin.

Finally in section 3, I illustrate that popular views about the role of genes in parenthood are often based on unexamined assumptions or historical norms. I consider the nature/nurture debate and the anthropological discussion regarding families and address a common misconception in debates about parenthood. I argue that questions about the role of genes in defining families cannot be resolved by science. Even if we *could* ‘discover’ whether parenthood is aligned with natural facts or culturally constructed, neither ‘discovery’ would reveal anything about the way in which parenthood *should* be defined or whether any moral significance is attached to genetic relationships. Further, I argue that attempts to determine ‘who is the best person for the job’ of raising a child are not always relevant. Even if this could be satisfactorily determined, it is not the case that only the ‘best person for the job’ can be a parent. We often accept that being a parent entails doing a *good* or *good enough* job. Nor does this line of argument address the question posed. The question I focus on is not *who is best placed to raise a child*, but whether genetic relatedness gives rise to the duty to raise a child.

This chapter concludes that there exists a wide range of legal, personal and scientific views about the role of genetic relationships in assigning parenthood and that many of these conflict with and contest our traditional notions. I argue that neither the current law nor an analysis of the scientific facts of parenthood can help to resolve the difficult questions raised by the Patrick case or the Danish surrogacy. I reason that these questions are moral weighty and not simply a matter of personal preference. Sorting out questions about the role of genes in puzzles about parenthood, I suggest, rests largely on an analysis of whether and to what extent genetic ties give rise to moral ties.

1. What is the role of genes in parenthood? Legal Opinion

As it stands today the law in Australia is founded on the historical assumption that a child will be raised by its progenitors (its genetic mother and father). The law accommodates variations on this scenario by either *extinguishing*⁴ or *deeming*⁵ mechanisms, which allow substitute parents to replace a child's genetic parents⁶.

Australian law provides that if a man has sexual intercourse with a woman, and a child is born as a result, he is the father of the child⁷. Where a married woman or a woman in a de-facto relationship gives birth to a child, the law provides that she is the child's mother and her husband or de facto partner is presumed to be the child's father. This presumption can be overridden by evidence to the contrary, for example where DNA evidence indicates misattributed paternity⁸. In other words according to the law a genetic relationship determines parental status.

⁴ For example adoption extinguishes the legal parentage of a child's biological parents Adoption Act Victoria, (1984). http://www.austlii.edu.au/au/legis/vic/consol_act/aa1984107/ s 53

⁵ Statutory presumption or deeming provisions re-allocate legal parenthood. For example the Family Law Act and Child Support Assessment Act presume that where a married woman becomes pregnant as a result of artificial insemination, her husband and not the sperm donor is the father of the child born see Child Support (Assessment) Act (Cth), (1989).
[http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/FD1F462AEFF61D47CA256F71004CAA8E/\\$file/ChildSuppAss89.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/FD1F462AEFF61D47CA256F71004CAA8E/$file/ChildSuppAss89.pdf), s5(b), Family Law Act (Cth), (1975).
[http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/7804B5160EBF9185CA25702100021B02/\\$file/FamilyLaw1975_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/7804B5160EBF9185CA25702100021B02/$file/FamilyLaw1975_WD02.pdf) s 60H (1) and Status of Children Act (Vic), (1974).
[http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/0/425c3444ca413716ca256f1c000add62/\\$FILE/74-8602a022.pdf](http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/0/425c3444ca413716ca256f1c000add62/$FILE/74-8602a022.pdf) s 10C.

⁶ See Seymour, J., & Magri, S. (2004). A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review: The Victorian Law Reform Commission.
[http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/\\$file/ART_Surrogacy_and_Legal_Parentage.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/$file/ART_Surrogacy_and_Legal_Parentage.pdf), for a review.

⁷ This is the case even if his intention was only to assist the women to become pregnant and not to take on any fathering. See for example the judgment in the case of a lesbian woman known as BM and sperm provider identified as ND. Family court judge Justice Kay found that despite an initial agreement between BM and ND, because the child was conceived through sexual intercourse and not artificial means ND is the child's legal father and not excluded from financial responsibility. ND & BM [2003] FamCA 469 (23 May 2003) (Family Court of Australia 2003). <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/family%5fct/2003/469.html?query=nd+and+bm>

⁸ It is also possible to disprove maternity, although this rarely occurs outside of the context of assisted reproduction. There have been occasional reports of misattributed maternity for example due to a hospital mix-up see for example the famous case of Kimberley May discussed in Morrison, F W, & Tweel, R R. (2005). *Balancing Parent's Rights V. The Best Interest Of Children: Custody Determinations Between Biological Parents and Others* from http://www.phil-mor.com/articles/parents_rights_2.htm.

Obviously however, non-genetically related individuals can acquire parental status. When a child is adopted the legal relationship between the biological parents and their children is 'extinguished'. The adoptive parents acquire all of the legal rights and responsibilities that would otherwise have fallen to the biological parents. Similarly in the context of assisted reproduction using donated gametes or embryos, individuals with no biological relationship can become a child's legal parents because the law *extinguishes*⁹ the relationship between gamete and embryo donors and their progeny and confers parental rights and duties on the recipients. The law provides that where a married or de-facto couple seek to become parents through an artificial conception procedure and where both the man and woman agree to the procedure, then the resultant child will be legally recognised as their child, '*even though it is not biologically related to them*'¹⁰.

In summary deeming and extinguishing provisions reflect and maintain a 'two parent co-habitation' model. These mechanisms transfer the rights and responsibilities of parenthood from one or both of a child's progenitors (genetic parents) to one or more 'social' parents. Parental status for individuals with no genetic relationship to a child is legally deemed,¹¹ artificially created, allocated or conferred¹² and has been described in terms of extinguishing¹³, transferring¹⁴, forfeiting¹⁵, ignoring¹⁶, expunging¹⁷,

⁹ Literally the term used by the Victorian Law Reform Commission, see Victorian Law Reform Commission. (2003). Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper: Victorian Law Reform Commission.
[http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/\\$file/Consultation_Paper.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/$file/Consultation_Paper.pdf), p76 and Seymour, & Magri. A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review

¹⁰ Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper p76

¹¹ Status of Children Act (Vic),

¹² Note that people concerned with the care and welfare of children can apply to the Family Law Court for a parenting order. These orders can include various aspects of parental responsibility for example where the child will live and go to school. The court then decides on a parenting order with the best interests of a child as its paramount consideration. See Seymour, & Magri. A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review

¹³ Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper p76 and Seymour, & Magri. A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review

¹⁴ Bayne, T. (2003). Gamete Donation and Parental Responsibility. *Journal of Applied Philosophy*, 20(1), 77-87, Benatar, D. (1999). The unbearable lightness of bringing into being. *Journal of Applied Philosophy*, 16(2), 173-180

¹⁵ Kolers, & Bayne. "Are You My Mommy" On the Genetic Basis of Parenthood. ,

¹⁶ New Zealand Law Commission. (2004). New Issues in Legal Parenthood.
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_91_232_PP54.pdf

fictionalizing¹⁸, disowning¹⁹ or denying^{20,21} the rights and responsibilities of genetic parents. The underlying premise is that while non-genetic parents might take on, or be given parental duties, making a genetic contribution to a child *automatically generates* these rights and duties.

Genetic definitions don't work

Although intuitively appealing, two problems arise from the legal premise that genes define parenthood. The first problem is that this premise does not succeed in defining parenthood in all cases. The second problem is that this definition is not always agreed upon. To take each of these in turn; firstly, changes to family structures and new reproductive technologies increasingly provide examples that are not easily accommodated in the current legal framework²². For example, the assumption of genetic primacy creates anomalies with regard to gamete and embryo donation and leaves in doubt the parentage of children born following non-coital insemination to same sex partners.

Consider the following case study:

“Lisa, a single woman self-inseminates using sperm provided by her friend Julian. She has a baby, Charles. Julian dies without leaving a will. Charles is not entitled to an interest in Julian’s property as Julian has no rights and incurs no liabilities to Charles. If Julian had intercourse with Lisa, instead

¹⁷ New Zealand Law Commission. New Issues in Legal Parenthood

¹⁸ For example sociologists describe situations where friends assume the role of family members as ‘fictive kinship’. See Rapp, R. (1982). Family and Class in Contemporary America: Notes Toward an Understanding of Ideology.

In B. Thorne & M. Yalom (Eds.), *Rethinking the Family: Some Feminist Questions* (pp. 25-39). New York: Longman

¹⁹ Nelson, J. L. (2000). Reproductive Ethics and the Family *New Zealand Bioethics Journal*, 1(1), 4-10

²⁰ Almond. Parenthood- social construct or fact of nature?

²¹ see also Helen Gamble Gamble, H. (1990). Fathers and the New Reproductive Technologies: Recognition of the Donor as Parent. *Australian Journal of Family Law*, 131, 140-142 who argues that current legislation ‘confuses the truth about paternity’ p 142. Also claims that anonymous gamete donation denies or ignores ‘the truth’ about parentage, see for example Frith, L. (2001). Gamete donation and anonymity: The ethical and legal debate. *Hum. Reprod.*, 16(5), 818-824. <http://humrep.oxfordjournals.org/cgi/content/abstract/16/5/818>, Turner, A. J., & Coyle, A. (2000). What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy. *Human Reproduction*, 15(9), 2041-2051. <http://humrep.oxfordjournals.org/cgi/content/abstract/15/9/2041>

²² Both the New Zealand and Victorian Law Reform Commission are currently grappling with these anomalies and have undertaken major reviews of law related to reproductive technologies and the status of parents and children. See New Zealand Law Commission. New Issues in Legal Parenthood, Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper

of donating sperm so Lisa could self-inseminate, Charles would be his child, and entitled to an interest in his estate.’²³

The law recognises that a sperm provider is a father in the normal course of events, or deems that husbands are fathers. In the case where a man donates sperm for the purpose of non-coital insemination the law extinguishes parental duties and thus leaves open the question of who is the father of a child born to a single woman or lesbian couple. As illustrated in the case study above, there is currently no legal provision to determine who is Charles’ father. Further, in the case of same sex couples, the law does not currently recognise the role of non-biological parents. If, in the case above, Lisa had conceived and given birth to Charles with the involvement of a female partner, Cathy, the law does not acknowledge Cathy’s parental standing even if she had performed the role of a parent in caring for Charles. Nor can Charles claim any child support or inheritance against Cathy.

Genetic definitions are not agreed upon

Secondly, in addition to the problem of ‘exceptions to the rule’ recent legal cases have challenged the rule itself. Legal opinion is now conflicting over whether genes define parenthood and whether progenitor’s genetic contributions generate parental obligations and authority over their progeny.

In *Re: Patrick*²⁴ introduced earlier, disagreement between the birth mother, her partner and the sperm donor resulted in the donor seeking regular contact with the child through the Family Court of Australia. In his judgment the Honourable Justice Guest decided that it was in Patrick’s best interest to continue to have contact with his biological father. However, Justice Guest acknowledged that the law made no

²³ Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper case 19 p80

²⁴ *Re Patrick : (An Application Concerning Contact) [2002] FamCA 193 (5 April 2002)* See also McConville, J., & Mills, E. (2003). *RE Patrick and the Rights and Responsibilities of Sperm Donor Fathers in Australian Family Law*, *QUT Law & Justice Journal* (Vol. 3). <http://www.law.qut.edu.au/about/ljj/editions/v3n2/pdf/Mills&McConville.pdf> and Kelly, F. (2002). Redefining Parenthood: Gay and Lesbian Families in the Family Court- the case of *Re Patrick*. *Australian Journal of Family Law* 16(3), 204-226 for discussion.

provision for the role of sperm donors outside of the traditional heterosexual model²⁵. He concluded that a sperm donor is not the *parent*²⁶ of a child conceived as the result of self-insemination. Justice Guest reasoned that if the sperm donor in *Re:Patrick* is a parent, then any sperm donor could find themselves with parental responsibilities.

*“...in the absence of express provisions in federal law, the Family Law Act can and should be read in light of such state and territory presumptions, thereby leaving the sperm donor, known or unknown, outside the meaning of 'parent'. Where this leaves individuals such as the father is a matter for the legislature. Given the father's active involvement in Patrick's conception and his ongoing efforts to build a relationship with his son, it is a strange result that he is not Patrick's 'parent'. Equally strange, however, would be the case of an unknown donor who deposits his semen at a sperm bank only to find that he has parental responsibilities under the Family Law Act for any child conceived of his genetic material.”*²⁷

In *The Matter of Mark*, the Honourable Justice Brown also considered the meaning of ‘parent’ within Australian federal law but reached a different conclusion²⁸. The issue in this matter was who should have responsibility for the care, welfare and development of Mark. He was born in 1992 in the United States as a result of a surrogacy arrangement between Mr X and Mr Y, a gay couple and Ms S, who conceived from an anonymous egg donation and the sperm of Mr X. Justice Brown disagreed with the decision of Justice Guest in *Re Patrick*. She reasoned that Mr X was Mark’s parent in reality and in the ordinary sense of the word, despite the unusual manner of Mark’s birth. Brown argued that the intention of the law is not to restrict the meaning of parent but to enlarge it and that, where not otherwise defined, ‘parent’ can be given its ordinary meaning. Justice Brown noted that on Justice Guest’s

²⁵ As discussed earlier, in the case of a heterosexual couple, where a man consents to his wife’s insemination with donor sperm, he is deemed to be the father of the child that results from this procedure.

²⁶ In this case the sperm donor is not a *legal parent* and does not incur financial responsibilities.

²⁷ *Re Patrick : (An Application Concerning Contact)* [2002] FamCA 193 (5 April 2002) p120

²⁸ Unreported decision of Justice Sally Brown, Family Court of Australia 28 August 2003. See Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper p 82. Also Shiel, F. (2003, December 13). Gay couple 'parents', court finds. *The Age* and Middletons Lawyers. (2004). *Re Mark: An Application Relating To Parental Responsibilities*. Retrieved 31/08/2005, from http://www.middletons.com.au/_site/inprint/PDF/Lamily%20Law%20April%202004.pdf

reasoning in *Re: Patrick*, a single woman who conceived a child through ART using her own oocyte would not be this child's parent ²⁹.

While frequently when faced with difficult interpretations of fact and diverse opinion we might appeal to legal reasoning to clarify the issues, this discussion has shown that on the subject of whether genes determine parenthood, legal opinion is itself conflicting and provides little direction. Nor is legal opinion the only relevant opinion. In the following section I discuss the public debate over a challenge to legal notions of what makes a family and entitlements to parenthood. The following analysis reveals that there is wide diversity on the meaning and weight that individuals attach to a person's genetic relationship with a child and that questions about what makes a parent are not simply legal puzzles or personal matters, but questions of moral significance.

2. What Does Genetic Parenthood Mean? Why this question is important.

The role of genes in parenthood: Public Opinion

In mid 2000 a legal challenge was brought against laws governing fertility treatment in Victoria. The case focused on whether single women and lesbian couples should be allowed access to assisted reproductive technologies (ART) and gave rise to heated community debate over what kinds of families are best for raising children and the significance of genetic paternity³⁰. On the one hand it was argued that the 'natural' (biological) family is the ideal, that children raised by other than their biological

²⁹ Justice Brown suggested that it was open to her to find that Mr X was a parent for the purposes of the Act.

However, she refrained from making a positive finding on the issue. Instead, she granted a parenting order on the basis of Mr X's role as a person concerned with Mark's care, welfare and development. Justice Brown found that Mr Y was not a parent of the child, but rather also a person concerned with Mark's care, welfare and development. The reluctance of Justice Brown to find that Mr X was a 'parent' of Mark under the Family Law Act appears to have been influenced by the impact that such a finding would have on sperm donors and people involved in artificial conception procedures, and the responsibilities or entitlements that could be imposed on them as a result, see previous note.

³⁰ For discussion of this case see Fuscaldo, G. (2002). Fatherless Families: How Important is Genetic Relatedness? . *Monash Bioethics Review*, 18-29, Skene, L. (2001). Voices in the ART Access Debate. *Monash Bioethics Review*, 20, 9-23

parents are disadvantaged and they have a right to know their genetic parents. By contrast, supporters of legal change argued that what matters is that a child is raised in a stable and loving environment. They maintained that the traditional biological family is only one of many possible choices for raising children and that whether or not progenitors take on parental roles is negotiable and a matter of personal preference³¹.

Analysis of this debate serves to introduce three common and conflicting notions about families and parenthood; 1) that family ties are determined by universal scientific facts, 2) that parental roles are not based natural facts but cultural norms or individual preferences and 3) that parenthood is determined by children's best interests. I will show that although commonly held, none of these claims are helpful in understanding the moral weight attached to genetic relatedness.

Background

The case involved IVF specialist, Dr John McBain who argued that the Victorian law³² prohibiting single women and lesbian couples from access to fertility treatment contravened the Commonwealth Sexual Discrimination act³³ and was therefore inoperative. McBain claimed that he was therefore at liberty to treat Ms Meldrum a single women, seeking donor insemination. In July 2000, the Australian Federal Court's Justice Sundberg ruled that the marriage/de facto marriage requirement of Victoria's Infertility Treatment Act is inoperative, making it unlawful to deny single

³¹ Fuscaldo. Fatherless Families: How Important is Genetic Relatedness? .

³² Dr John McBain and Ms Lisa Meldrum instituted proceedings against the State of Victoria, the Minister for Health of the State of Victoria, and the Infertility Treatment Authority. Section 8 of 'The Infertility Treatment Act relates to the requirement for treatment procedures and persons who may undergo treatment procedures. It states, in summary, that a woman who undergoes a treatment procedure (defined as artificial insemination or a fertilisation procedure) must be married or living with a man in a genuine de facto relationship and that a doctor must be satisfied that she is unlikely to become pregnant other than by a treatment procedure. See Infertility Treatment Act (1995).
[http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/0/446d8739f2d7ac94ca256edf000cdd78/\\$FILE/95-63a020.pdf](http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/0/446d8739f2d7ac94ca256edf000cdd78/$FILE/95-63a020.pdf)

³³ The Sex Discrimination Act states that it is unlawful for a person who provides services to discriminate on the grounds of marital status by refusing to provide or make those services available. See section 22, Sex Discrimination Act (1984). <http://scaleplus.law.gov.au/html/pasteact/0/171/top.htm>

and lesbian women access to IVF and donor insemination services on the basis of marital status³⁴.

In a response to the ruling, the Prime Minister John Howard expressed his concern and opposition, and introduced a bill to amend the Sex Discrimination Act allowing the states to restrict access to fertility treatments to married women or women in heterosexual defacto relationships³⁵. The bill was rejected by the Senate's Legal and Constitutional Legislation Committee on the grounds that it contravenes an international treaty on discrimination against women³⁶ and is contrary to the spirit and letter of the Sex Discrimination Act 1984^{37,38}

The Debate

The question of whether single and lesbian women should have access to fertility treatments proved highly controversial. The Federal Court's decision was met with heated debate and opinion polls revealed the community to be sharply divided over this issue. 47% of Australians polled were opposed to banning single women from assisted reproductive technologies, while 42% supported the restriction. On the

³⁴ *McBain v State of Victoria* (includes summary dated 28 July 2000) [2000] FCA 1009 (28 July 2000) (Federal court of Australia 2000). <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2000/1009.html?query=mcbain>. For analysis of the McBain case see Skene. *Voices in the ART Access Debate*.

³⁵ Bills Digest No. 24 2000-01 Sex Discrimination Amendment Bill (No. 1) (2000). <http://64.233.179.104/search?q=cache:6faAvVQNaX8J:www.aph.gov.au/library/pubs/bd/2000-01/01bd024.htm+sex+discrimination+amendment+bill+no+1+2000&hl=en>

³⁶ Australia is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

³⁷ For the committees conclusions see The Senate Legal and Constitutional Legislation Committee. (2001). *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000*. http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1999-02/sexdisreport/report/contents.htm chapter 5.

³⁸ What followed was a highly controversial decision by the Federal Attorney-General, Daryl Williams to invoke a seldom used power to grant the Australian Catholic Bishops Conference special leave to be a party to a High Court challenge to the Federal Court ruling³⁸. The appeal sort to quash the Sundberg decision on the grounds that it was wrong but the High Court rejected the Catholic Church's claim to an interest in the case and dismissed the appeal against the Sundberg decision, *Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attor* [2002] HCA 16 (18 April 2002) (High Court of Australia 2002). http://www.austlii.edu.au/au/cases/cth/high_ct/2002/16.html

question of lesbian access the poll trend was reversed with 47% supporting a ban and 44% opposed to one³⁹.

The Prime Minister, John Howard, opposed the Sundberg decision and expressed the view that children have “... *the fundamental right... to have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father*”⁴⁰.

The then Catholic Archbishop of Melbourne, Dr George Pell added to the controversy warning of a “*whole new generation of stolen children*” and claimed that the decision to allow single women and lesbians ART treatment “...*opens the door to a massive social experiment on children,*”⁴¹.

Comments by Rev Dr Norman Ford, director of the Caroline Chisholm Centre for Health Ethics, gave further voice to the sentiment of opposing views, “*A child has a natural right to be conceived, born and reared by both mother and father. It would be a natural injustice for a child to be legally deprived of the possibility of being reared by his or her natural father.*”⁴²

Many of the views in the community, expressed through letters to the daily papers and their editorials, echoed those of Howard, Pell and Ford. It was argued that allowing single women and lesbians access to IVF treatment jeopardizes traditional family structures, that children should be raised by their biological parents and that they are entitled to know their (genetic) parents⁴³.

By contrast, those in favour of lifting the restrictions in Victoria argued that; what is important is that a child is raised in a stable and loving environment, that the nuclear

³⁹Hudson, P., & Rollins, A. (2000, 15 August). Nation split on IVF for singles, lesbians *The Age*, p. 1

⁴⁰Gordon, M., & Farrant, D. (2000, 2 August). Howard sparks IVF storm. *The Age*, p. 1

⁴¹ Farrant, D., Darby, A., Hudson, P., & Hannan, E. (2000, 29 July). IVF victory sparks bliss and anger. *The Age*, p. 1

⁴²Ford, N. (2000, 1 August). Letter. *The Australian*, p. 12

⁴³ For examples see Sex Discrimination and the single woman, Editorial. (2002, April 19). *The Age*, p. 12, Bone, P. (2000, August 17). The loneliness of a fatherless child. *The Age*, p. 16

(biological) family is only one of many models of a family and, that many children have been and are successfully reared by single parents and people other than their biological parents.⁴⁴ A spokeswoman for the Prospective Lesbian Parent group, 'Trudy'⁴⁵, argued that a fatherless family '*is just another way. It is no worse or better – it's just different.*'⁴⁶

The idea that there are many family forms that meet the needs of children is not new and is supported by social anthropology. Studies of diverse cultures have revealed numerous examples of social groups where blood ties are not necessarily the sole determinant of who is a parent and who is responsible for the welfare of children⁴⁷. Changing social arrangements and declining fertility in the West have also seen a proliferation of non-traditional families with step-parenting and 'blended family' arrangements following divorce and remarriage now a common phenomenon. In fact it has been suggested based on the current rate of decline in traditional families that they could become extinct in the next hundred years⁴⁸. However, while the fact of a decline in traditional families is accepted, views like 'Trudy's, that biological families are just one among other equally viable options for rearing children, were met with moral condemnation. According to Dr David Oderberg ⁴⁹, "*...every child, when brought into the world, has a human right to a mother and a father. It is nothing less than child abuse intentionally to create another human being with the express purpose of denying it a father.*"⁵⁰. As echoed by Bill Muchlenberg, the national secretary of the Australian Family Association "*A child can certainly be raised in other types of relationships. It's like being born with one arm. It can be overcome admirably but it's not ideal. It's not the kind of thing we'd wish on a child.*"⁵¹

⁴⁴ For example see Roberts, K. (2001, November 16). For a happy family all you need is love *The Age*, p. 12

⁴⁵ Who withheld her full name.

⁴⁶ Crawford, A. (2000, 7 August). The Australian nuclear family could be extinct by the end of the century. True. *The Age*, p. 1

⁴⁷ For examples see Sault. Many mothers, many fathers: the meaning of parenting around the world. also Donner, W. W. (1999). Sharing and compassion: fosterage in a Polynesian society. *Journal of Comparative Family Studies*, 30, 703-722 and Stone. Kinship & gender: an introduction .

⁴⁸ Bernard Salt, director of KPMG Consulting, as cited by Anne CrawfordCrawford. The Australian nuclear family could be extinct by the end of the century. True.

⁴⁹ Reader in philosophy at the University of Reading

⁵⁰ Oderberg, D. S. (2000, 3 August). Any child has a right to a father. *The Australian*, p. 11

⁵¹ Crawford. The Australian nuclear family could be extinct by the end of the century. True.

Muehlenberg argues that the biological family consisting of a mother, father and their (genetic)⁵² offspring is the appropriate and necessary structure for raising children. According to Muehlenberg, parenthood is based on the facts of nature and the biological family is historically and socially the universal norm⁵³.

Muehlenberg's comments reflect a view commonly expressed in debates about families and children, that the biological family is natural and the ideal family form and that kinship and parenthood are biologically determined.

The difference between Trudy and Muehlenberg's views illustrates the question of interest, how important is biological relatedness? Does the passing on of genes (begetting) *define* who is a mother or father - or are family arrangements simply a matter of personal choice? Is a gamete provider's⁵⁴ genetic relationship with a child sufficient to justify any authority over the child and does it confer on progenitors some responsibility for their offspring, more so than for other children?

For many people these questions are easily answered intuitively. A child's genetic parents are often referred to as 'real parents' and parental roles are assumed to stem from this relationship. However, as highlighted by the debate over single and lesbian

⁵² Although the Prime Minister, Muehlenberg, Oderberg and other critics of fatherless and alternative families do not specifically refer to genetically related families, I take it to be uncontroversial to assume that when they refer to 'mother', 'father' or 'parent', this is their intention. It is possible that by 'a right to a father' what is intended is a right to a male 'rearer' and not necessarily a genetically related one. But for the purposes of my discussion, I am interested in the debate over lesbian and single women's access to IVF to the extent that it provides an example of the diversity of views on who is or can be a parent and illustrates two competing views 1) that parenthood is biologically determined and that providing sperm entails parental duties and rights and 2) that the role of a sperm provider is a matter of preference or for negotiation, that contributing genes does not automatically entail duties or rights. The Australian Family Association's opposition to gestational surrogacy, and its view of adoption as a response to unfortunate circumstances, further support my claim that it is the preservation of the *genetic* family that is of concern as and not that a child should have *any* male and female rearer. See Muehlenberg, B. (2000b). *Surrogacy and the Interests of Children* from The Australian Family Association <http://www.family.org.au/>

⁵³ See Muehlenberg, B. (2000a). *The Historicity and Universality of the Natural Family* from The Australian Family Association <http://www.family.org.au/index.html>

⁵⁴ I use the term 'sperm provider' to differentiate men who provide sperm from 'sperm donors', the term used by IVF clinics to refer to men who donate sperm under a formal agreement which removes them from their parental duties.

women's access to ART's, genetic kinship is not a universally held view of what makes a parent and what defines families.

On the basis of Trudy's comments it could be inferred that biological connections are not very important at all, that anyone can be a parent, and that families are what you make them. Her views suggest that decisions about the role of sperm providers in rearing children are simply a matter of personal preference or for negotiation and imply that contributing genes does not automatically incur duties or rights. A sperm donor does not necessarily have the responsibilities or claims of a traditional father and fathers are optional but not necessary to ensure the welfare of children.

From Muchlenberg's views we can infer that genetic parenthood is very important, that biological relatedness is not just one of many possible candidates for defining responsibilities and rights but a fact of nature and not open to interpretation.

It is tempting to dismiss this debate as simply a difference of opinion: some people attach great weight to genetic ties and some do not. However, the two competing views, 1) that biological ties generate parental claims and duties and 2) that progenitors can choose whether or not to take on parental roles, have important implications for social policy and reproductive technologies. How are conflicting claims and disclaimers between gamete providers, surrogates, commissioning parents and social parents to be evaluated without an understanding of how parental roles are determined?

As discussed in the preceding section, our current social and legal policies regarding parenting rest largely on the assumption that biological ties are overriding and that families deviating from the traditional model are an aberration. However, rapid technological advances and new ways of forming families challenge this assumption.

Nor is the view that ‘obligations towards genetic kin are elective’, any less of an assumption. The notion that defining parenthood genetically is neither good nor bad, or simply not a moral issue but just a matter of personal choice needs to be argued. Accepting this view in the name of tolerance and pluralism may have adverse effects. The fact that biological relatedness is deeply important to many individuals in our society, as evidenced by the great lengths to which some people go to create such families, may mean that something important is lost if we allow the deliberate separation of genetic and social parenting.

If genetic relatedness is not morally relevant and parental obligations are simply a matter of choice, on what basis do we condemn parents who choose to abandon their genetic offspring?⁵⁵ If genetic heritage has only sentimental value, how do we justify prohibitions on anonymous gamete donation⁵⁶ or the posthumous use of gametes?

What I have argued in this discussion is that the question of what weight attaches to genetic relatedness is not merely an academic or legal puzzle but has important and morally weighty significance. Moreover this question cannot simply be dismissed as a matter of individual taste but requires a coherent and comprehensive analysis if we are to arrive at consistent and morally justifiable policies regarding who is a moral parent.

3. What Does Genetic Parenthood Mean? Common Assumptions

Anthropological Opinion and The Nature/ Nurture Debate

The above discussion has also highlighted three questions that often underpin debate about parenthood and families: 1) are parental roles biologically determined, or 2) is the weight attached to genetic kinship solely a matter of custom or individual preference, and, 3) which possible parents best promote children’s welfare?

⁵⁵ A problem discussed by James Nelson, Nelson. Reproductive Ethics and the Family

⁵⁶ Sweden, the UK, New Zealand and Victoria have enacted legislation requiring gamete donors to provide identifying information which can be accessed by children born as a result of donor procedures on turning 18 years of age. banning anonymous gamete donation, however this practice is widespread in the US and many other countries both formally and informally.

Arguments about the influence of genes compared with the impact of our environment in shaping human nature are not restricted to discussions about what makes a family. These arguments, often referred to collectively as the nature/nurture debate, also dog investigations about the nature of intelligence, gender and more recently other complex human behaviors⁵⁷. In this section I show not only that these questions are very difficult to answer, but that even if we could find them, the answers to these questions do not sort out competing claims such as those illustrated by the Patrick case or the Danish surrogacy.

Is the significance of begetting based on natural facts?

The development of IVF and the enormous and rapid growth in reproductive technologies largely reflect the importance in many societies of raising genetically related children. Despite the relatively low success rates and many risk factors associated with ART's, it is clear from the demand for these services that many individuals will go to great lengths to achieve biological parenthood.

It is often said that the need to procreate is a biological urge or instinct and hence that the desire for 'our own' genetic offspring is programmed into our genes through the course of evolution⁵⁸. The genetic basis of kinship is thus justified as in line with the scientific facts of life. Support for the genetically based kinship is also claimed on the basis of its near universality and its historical prominence⁵⁹. As Brenda Almond argues⁶⁰, while there have been societies ignorant of physiological paternity and while different social arrangements are possible, this does not explain away that for most

⁵⁷ Ceci, S. J., & Williams, W. M. (Eds.). (1999). *The Nature-Nurture Debate : The Essential Readings (Essential Readings in Developmental Psychology)*. Malden, Mass.: Blackwell. Ceci, S. J., & Williams, W. M. (Eds.). (1999). *The nature-nurture debate: The essential readings (essential readings in developmental psychology)*. Malden, Mass.: Blackwell.

⁵⁸ For example see Potts, M., & Short, R. (1999). *Ever since Adam and Eve : the evolution of human sexuality* Cambridge University Press., and Silver, L., & Silver, S. (1998). Confused heritage and the absurdity of genetic ownership. *Harvard Journal of Law and Technology*, 11, 593–618.

⁵⁹ Muehlenberg. *The Historicity and Universality of the Natural Family*, Muehlenberg, B. (2001). *The case for the two-parent family*, from The Australian Family Association <http://www.family.org.au/index.html>

⁶⁰ Almond. Parenthood- social construct or fact of nature?

people and throughout much of history, the blood tie has been seen as something immutable and non-negotiable.

Is the significance of genetic parenthood a cultural construct?

While many of us might intuitively describe the desire to procreate as a biological urge is this truly an innate and universal desire? It is equally often claimed that our current emphasis on genetic kinship and blood ties is cultural constructed⁶¹. Many anthropologists argue that humans have no innate or instinctive behaviours, save perhaps in infancy and that the desire for offspring is not a basic drive but an acquired motive that is socially reinforced⁶². Much evidence and argument is proffered in support of the claim that the biological nuclear family is not universal, and that its historical prominence can be attributed to social and political influences⁶³. The fact that childlessness is becoming increasingly popular in many developed countries is held to support to this claim. Indeed, it is the lament of many feminist writers that patriarchal society promotes pronatalism and the view that mothering is a necessary part of womanhood⁶⁴. These writers maintain that patriarchy constructs incentives for childbearing with promises of prestige and approval while the threat of insecurity and ridicule accompanies childlessness. Further it is argued that the importance of biological ties, that is, the construction of motherhood as gestating and giving birth to a genetically related child, is a patriarchal definition. Robin Rowland⁶⁵ and Barbara Katz Rothman⁶⁶ among others, suggest that for women mothering has always been experienced in terms of relationships to children. Conversely they claim that for men the concept of fathering has been primarily concerned with ownership of children or rights over children carrying their genes.

⁶¹ For example, Rothman, K. (1994). Beyond mothers and fathers: ideology in a patriarchal society In E. N. Glenn, G. Chang & L. R. Forcey (Eds.), *Mothering : ideology, experience, and agency* (pp. 139-157). New York :: Routledge. Almond. Parenthood- social construct or fact of nature?.

⁶² see also Franklin, S. (1997). *Embodied progress : a cultural account of assisted conception* London ; New York :: Routledge.

⁶³ For example Smart, C. (1987). 'There is of course a distinction dictated by nature'. Law and the problem of paternity. In M. Stanworth (Ed.), *Reproductive technologies : gender, motherhood, and medicine* (pp. 98-117). Cambridge: Polity Press. See Franklin. *Embodied progress : a cultural account of assisted conception* Chapter 1 for a historical review of the natural/cultural debate.

⁶⁴ For example see Rowland, R. (1992). *Living laboratories : women and reproductive technologies* Sydney :: Sun Books.. Chapter 7

⁶⁵ Rowland. *Living laboratories : women and reproductive technologies* .

⁶⁶ Rothman, B. K. (1996). Daddy plants a seed: personhood under patriarchy. *Hastings Law Journal*, 47, 1241-1248

According to Rowland, these differences explain the reluctance of men to consider adoption in the face of infertility while her studies suggest that for many women it is chiefly their husbands reluctance to raise a child that is not “their own” that prevents them from seeking to adopt⁶⁷.

It is also claimed the genetic determination of kinship represents an ethnocentric assumption and that the significance accorded to genetic parenthood as a determinant of social relationships has varied across time and from one culture to another⁶⁸. Many anthropological studies are cited in evidence of the fact that maternity, paternity, kinship and child care responsibilities are not uniquely biologically determined. These studies show that cultural groups do and have existed which do not hold a genetic theory of reproduction. Anthropologists studying the nature of kinship remind us that in many cultures genetic ties are less relevant to family dynamics. In some Polynesian and Micronesian societies for example, high rates of adoption and fosterage reflect the practice of sharing the responsibility for raising children among extended families and friends. Children are seen as a communal responsibility and cared for not exclusively by their biological parents. Genetic mothers and fathers do not give preferential treatment to their biological offspring as every child is seen as a child belonging to the community⁶⁹. Among the Mbuti of Zaire, the hunting camp is considered to be a family, and the kin terms for father and mother are extended to all adults in the camp that are the parents generation. Each child will call several women ‘mother’ and several men ‘father’. The behaviors and expectations associated with these kin labels are also extended⁷⁰. In the mountain region of Nepal the Nyinba tribe practice polyandry. In this tribe paternity is designated, not necessarily known. Women announce which husband is the ‘father’ of a given child, a process that ensures an equal distribution of children to husbands⁷¹.

⁶⁷ Rowland. *Living laboratories : women and reproductive technologies* p 266

⁶⁸ Franklin. *Embodied progress : a cultural account of assisted conception* , ibid

⁶⁹ Donner. Sharing and compassion: fosterage in a Polynesian society.

⁷⁰ Sault. Many mothers, many fathers: the meaning of parenting around the world. [Online accessed 23/07/00]

URL: <http://www.scu.edu/SCU/Centers/Ethics/publications/other/lawreview/manymothers.shtml>.

⁷¹ Stone. Kinship & gender: an introduction Chapter 6.

It is not necessary to multiply examples to make the point that genetic relatedness is not the only determinant of parenthood or family. Even within our own culture it is evident from the many successful experiences of couples who adopt and from the blended families resulting from divorce and remarriage, that satisfaction of the desire to parent is possible in the absence of genetic relatedness⁷².

Further it is argued that the biological family has emerged as a privatizing and cost saving measure to protect societies from the economic burdens of child support and to service the need for a legally expedient system to protect property and privilege⁷³. More recently it has been claimed that the nuclear family is not a natural phenomenon but an invention of the 1950's⁷⁴.

The futility of natural vs cultural construct debate

But what is lost in the apparently intractable nature/nurture debate is that neither the claim that the parenthood is a natural fact, nor that it is a cultural construct is informative in terms of revealing anything about how parenthood *should* be determined. Even if it were true that the desire for genetic offspring is instinctual it is clearly an instinct that we can resist or choose to suppress. Furthermore, proof that the parental roles stem from natural facts would not provide a reason for valuing or protecting biological kinship. In other words, simply being natural or of evolutionary value does not entail that genetic relatedness is morally weighty. Consider the recent claim that rape is a biological response to men's evolutionary need to reproduce⁷⁵. The possible instinctiveness, naturalness or evolutionary value of rape does not provide a moral justification for such violence, indeed were it in fact an instinctual

⁷² For examples see Sault. Many mothers, many fathers: the meaning of parenting around the world. <http://www.scu.edu/SCU/Centers/Ethics/publications/other/lawreview/manymothers.shtml>. See also Donner. Sharing and compassion: fosterage in a Polynesian society. and Stone. Kinship & gender: an introduction

⁷³ Smart. "There is of course a distinction dictated by nature". Law and the problem of paternity. In , also Arnup, K., & Boyd, S. (1995). Familial disputes? Sperm donors, lesbian mothers and legal parenthood. In D. Herman & C. Stychin (Eds.), *Legal inversions : lesbians, gay men, and the politics of law* (pp. 77-101). Philadelphia :: Temple University Press.

⁷⁴ For example Smart. "There is of course a distinction dictated by nature". Law and the problem of paternity. In . Weston, K. (1991). *Families we choose : lesbians, gays, kinship*. New York Columbia University Press., Chapter 8.

⁷⁵ Thornhill, R., & Palmer, C. T. (2000). *A natural history of rape : biological bases of sexual coercion* Cambridge, Mass. ; London :: MIT Press.

behavior, it provides a good example of one we *should* suppress. *Choosing* to attach little or no weight to genetic paternity or maternity may be counter- intuitive, anti-evolutionary or historically novel but is it wrong?

On the other hand, neither does the claim that, genetic definitions of family are culturally constructed, entail that such definitions are therefore of no moral weight or simply a subject outside the realm of moral judgement. The fact that different people attach different meaning to genetic kinship in different cultures shows only that genetic definitions of parenthood are not universal; it does not show that therefore this construction cannot be evaluated. Not all cultural constructs are morally insignificant, as illustrated by debates over the corporal punishment, capital punishment and female infibulation practiced in cultures outside our own. The issue is not whether a practice or belief is based on natural facts or cultural beliefs but whether or not reasons can be given to justify them.

What I have tried to show in the above analysis is that the question of what value or weight should be ascribed to genetic relatedness cannot be answered simply by discovering whether or not the biological family is a natural fact or a cultural construct.

Genetic Parents: the best people for the job?

The third question illustrated by the debate over access to ART's revolves around the notion that children's welfare determines parental privileges and duties. One of the most frequently raised concerns about single women and lesbian couples raising children in the absence of their (genetic) fathers⁷⁶ and probably the most controversial

⁷⁶ Following the introduction of the Sex Discrimination Amendment bill in the lower house, the provisions of the bill were referred to the Senate Legal and Constitutional Legislation Committee for inquiry. This committee invited submissions related to the proposed amendments and received 172 submissions both supporting and opposing the Bill. A wide cross section of community opinions on this issue is captured in the submissions received by the Senate Legal and Constitutional Legislation Committee. Senate Legal and Constitutional Legislation Committee. (2001). Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000 http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1999-02/sexdisreport/report/contents.htm Senate Legal and Constitutional Legislation Committee. Submissions to Inquiry into The Sex Discrimination Amendment Bill (no.1) 2000. legcon.sen@aph.gov.au <<mailto:legcon.sen@aph.gov.au>> Copies of submissions can be obtained from the Committee Secretariat.

reason given by the Government for introducing the amendment bill, is the claim about the welfare of children raised in non-traditional families. The Government argued that it is in a child's best interests to be raised by both its mother and father.

Much argument and evidence was proffered in support of the Government's claim, based on grounds similar to those expressed by the Prime Minister. Research was presented in support of the view that children raised by two parents⁷⁷ of different sex achieve better outcomes than do those raised in single parent families. It was argued that this conclusion is supported in relation to a wide range of criteria including emotional and psychological well being, educational outcomes, involvement with drugs, work patterns, delinquent or criminal behaviour, sense of identity, appropriate gender development⁷⁸ and risk of child abuse⁷⁹. These claims are not restricted to debates about 'fatherless' families but also surface in comparisons between the welfare of adopted children⁸⁰, children raised by 'step-parents'⁸¹ children born following

⁷⁷ Again I take this to mean genetic parents (see note 52 above)

⁷⁸ Senate Legal and Constitutional Legislation Committee. Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000, see note 35. Submission 60, The Australian Family Association cites as evidence two reviews by Muehlenberg. *The case for the two-parent family*, and 'Muehlenberg. *The Historicity and Universality of the Natural Family*, available through the association, <http://www.family.org.au/afafamil.htm>. Submission 69, Women's Action Alliance cites Wade F. Horn, 'You've Come a Long Way Daddy', The Heritage Foundation, USA July 1997. Elaine Karmack and William Galston, 'Putting Children First: A Progressive Family Policy for The 1990's', 1990, The Progressive Policy Institute. And Beyond Rhetoric: A New Agenda for Children. USA National Commission on Children, 1991

⁷⁹ Submission 102, Festival of Light cites P. Cameron and K. Cameron, 'Homosexual parents' Adolescence, vol. 31. 1996. 757-776 as evidence that children raised by homosexuals or lesbian parents are more likely to be sexually molested during childhood.

⁸⁰ A recent poll of American people found that more than a third of respondents believed that adopted children are more likely than their non-adopted peers to have social, education, psychological and medical problems. See Harris Interactive Market Research. (2002). National Adoption Attitudes Survey, sponsored by the Dave Thomas Foundation for Adoption, in cooperation with the Evan B. Donaldson Adoption Institute http://www.adoptioninstitute.org/survey/Adoption_Exec_Summ.pdf. A significant number of empirical studies in the adoption literature support these claims, see for example Sharma AR, McGue MK, & Benson PL. (1995). The emotional and behavioral adjustment of United States adopted adolescents: part I. *Child Youth Services Review* 18, 83-100 Fisher, A. P. (2003). Still "not quite as good as having your own"? Toward a sociology of adoption. *Annual review of Sociology*, 29, 335-361, Sullivan PF, Wells JE, & Bushnell JA. (1995). Adoption as a risk factor for mental disorders. *Acta Psychiatrica Scandinavica*, 92, 119-124, Wierzbicki M. (1993). Psychological adjustment of adoptees: a meta-analysis. *Journal of Clinical Child Psychology* 22, 447-454

⁸¹ A large literature contrasts the outcomes for children living in different family structures. Many of these studies show that, compared to children living with two genetic parents, children living with a single mother or with a mother and stepfather are more likely to experience a number of adverse or socially undesirable outcomes such as poorer academic achievement, criminal behavior, poverty, drug and alcohol abuse and marital instability. For example, Amato, P. R., & Keith, B. (1991). Parental Divorce And The Well-Being Of Children - A Metaanalysis. *Psychological Bulletin*, 110(1), 26-46, Kitson, G. C., & Holmes, W. M. (1992). *Portrait of divorce: Adjustment to marital breakdown*. Guilford Press. Amato and Keith. For reviews see Cherlin, A. J., & Furstenberg, E. E. (1994). Stepfamilies in the United States: A reconsideration. In J. Blake & J. Hagen (Eds.), *Annual review of sociology* (pp. 359-381). Palo Alto, CA: Annual Reviews, Hetherington, E. M., Bridges, M., & Insabella, G. M. (1998). What

gamete donation⁸² and children raised in traditional biological families. Evidence is repeatedly presented in support of the claim that the biological family best promotes children's wellbeing⁸³.

Obviously however, genetic relatedness is not sufficient to protect children's welfare and being raised in a traditional family does not guarantee a child's welfare. Clearly children need, food, shelter, a safe environment and much more than just a genetically related family to ensure that they grow up happy and healthy. Secondly, it is also untrue that genetic relationships are *necessary* to ensure children's welfare; consider the many successful examples of adoption and fosterage, the number of children successfully raised outside of the biological families, or by only one biological parent.

In essence the claim underlying concerns about non-genetic parents is that, on the balance of probabilities, children raised by their (genetic) mother and father achieve *better* outcomes⁸⁴. However, this claim is also the most difficult to substantiate. Like those who favoured the Government's position, those with contrary views put forward extensive evidence in support of the claim that it is the quality of nurturing provided, rather than the structure of the family, that is important for children's welfare⁸⁵. It was argued that any detriment suffered by children growing up in one parent families, or fatherless families, compared with those growing up in two parent families, reflects the lower socio-economic status of the former rather than the

Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment. *American Psychologist*, 53(2), 167-184

⁸² A few studies have suggested that the lack of a genetic link between parents and children born as a result of donor insemination or gamete donation may have adverse outcomes, reviewed by Brewaeys, A., Ponjaert, I., VanHall, E. V., & Golombok, S. (1997). Donor insemination: Child development and family functioning in lesbian mother families. *Human Reproduction*, 12(6), 1349-1359. Brewaeys, A. (2001). Review: parent-child relationships and child development in donor insemination families. *Human Reproduction Update*, 7(1), 38-46. , Golombok, S., Cook, R., Bish, A., & Murray, C. (1995). Families Created By The New Reproductive Technologies - Quality Of Parenting And Social And Emotional Development Of The Children. *Child Development*, 66(2), 285-298. Golombok, S. (2005). Unusual families. *Reproductive Medicine Online*, 10, 9-12, Golombok, S., Jadv, V., Lycett, E., Murray, C., & MacCallum, F. (2005). Families created by gamete donation: follow-up at age 2. *Human Reproduction*, 20(1), 286-293.

⁸³ See for example Daly, M., & Wilson, M. (1998). *The Truth About Cinderella* London: Weidenfeld & Nicolson Publishers.

⁸⁴ And that, therefore, in the best interests of children, the State should not assist single and lesbian women to become parents.

⁸⁵ Evidence for these claims is cited in submission 27, Ms Kristen Walker, submission 42A, the New South Wales Gay and Lesbian Rights Lobby and submission 49, the Australian Institute of Family Studies.

absence of a father. Secondly, the cited studies of single mothers are based on divorced families and not children born to women who are single by choice. The latter are often distinguishable because they tend to be older, better educated, financially secure and less likely to raise children affected by poverty and lack of social support. Fears about the absence of male role models or inappropriate gender identity have also been countered with evidence that, parents have little impact on gender development and that children raised by lesbians are no more likely to identify themselves as lesbian than children from heterosexual families. Further evidence is provided to refute the claim that children raised by lesbians suffer social ostracization, bullying at school or increased psychological or emotional hardships compared with their peers⁸⁶.

What can be deduced from all this evidence is that there are a large number of variables which could affect children's welfare including parental socio-economic status, availability and extent of social support and the emotional and psychological well being of the rearing parents. It is outside the scope of this discussion to give a detailed evaluation of all the data for against the claims that children do better in biological families and given the complex number and combinations of possible variables, it is doubtful that such claims can ever be satisfactorily tested empirically. Clearly it is not guaranteed, nor even reasonably probable that the claimed benefits for children raised by two heterosexual parents and harms to children raised by one or two same sex parents will ensue. Suffice it to say that there is room to doubt the claim that biological families should be preferred or are morally valuable because they best serve children's interests⁸⁷.

⁸⁶ Very extensive evidence for these claims is cited in submission 27, Ms Kristen Walker, submission 42A, the New South Wales Gay and Lesbian Rights Lobby and submission 49, the Australian Institute of Family Studies.

Recent studies support the claims in these submissions, and have found no adverse affects on the emotional and behavioural development of children raised in both heterosexual and lesbian donor insemination families Reviewed by Baetens, P., & Brewaeys, A. (2001). Lesbian couples requesting donor insemination: an update of the knowledge with regard to lesbian mother families. *Human Reproduction Update*, 7, 512–519 Also reviewed by Brewaeys. Review: parent-child relationships and child development in donor insemination families.

⁸⁷ See also reviews by Brewaeys. Review: parent-child relationships and child development in donor insemination families. , Cherlin, A. J. (1999). Going to extremes: Family structures, children's well-being, and social science. *Demography*, 36(4), 421-428, Cherlin, & Furstenberg. Stepfamilies in the United States: A reconsideration.

Nor in fact, is it necessary to prove this claim for the purposes of this present discussion. As shown above, one reason for assigning weightiness to genetic parenthood is the claim that genetic parents best promote children's welfare. However, this claim conflates a number of issues. The question 'who is a moral parent' cannot be answered by identifying which adults can 'do the best job'. Showing that genetic parents are best placed to raise their offspring would not show that therefore they are obliged to raise their children. Firstly this is because we do not have an obligation to provide children with parents that 'do the best job'. Clearly, in the face of competing parental claims and disclaimers we have an obligation to protect children's interests, but this is not to say that we must at all times *maximise* their welfare. As Ten argues, '*the issue is whether the quality of life that a single woman will give to her child is sufficiently good and not whether it is ideal.*'⁸⁸

Secondly, even without any obligation to do so, there are counterintuitive implications of selecting parents according to who can maximize a child's welfare⁸⁹. If parenthood were determined by matching children with the best person for the job, then non-genetically related individuals could in many instances mount an overriding claim for parenthood. It is precisely this type of argument that was used to justify the removal of aboriginal children from their birth families. This practice, carried out in some Australia states from the early to mid 1900's was aimed at assimilating indigenous children into the white population, and justified on the basis that these children would be better cared for by white foster parents or in institutions.⁹⁰

What I have tried to show in this analysis is that biological relatedness is not sufficient or necessary to benefit children. Nor is it clear that children's welfare will be diminished in the absence of genetic parents or maximised under their care. Further, evidence that genetic parent's do a better job would not help to answer the question posed. Even supposing that this evidence was unequivocal, it does not follow that

⁸⁸ Ten, C. L. (2000). A child's right to a father. *Monash Bioethics Review*, 19(4), 36

⁸⁹ A point also made by Bigelow, J., Campbell, J., Dodds, S. M., Pargetter, R., Prior, E. W., & Young, R. (1988). Parental Autonomy. *Journal of Applied Philosophy*, 5(5), 183-196

⁹⁰ See Human Rights and Equal Opportunity Commission. Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families

therefore genetic parents must raise their offspring and that non-genetic parents are second best. I have argued that we are not obligated to find the best parent for the job because we are not obligated to maximize children's welfare. Further, it is problematic to claim that parenthood should be allocated to individuals who can 'do the best job'.

Showing that genetic parents are best placed to raise their offspring does not show that therefore they are obliged to do so. The question of interest is not 'who is the best person to raise a child', but, who incurs these obligations, who is entitled to parent and do genes play a role in the story? While it is clear that many people can and do voluntarily take on the job of moral parent, my interest is to clarify whether, as is often assumed, genetic relatedness gives rise automatically or non-voluntarily to moral parenthood. To conclude, the remaining chapters focus on whether genetic relatedness is sufficient grounds for moral parenthood but do not exclude the possibility that other factors may also be sufficient.

Summary

I began this chapter by presenting a summary of the current Australian legislation, which illustrated the view that genetic parents have *prima facie* parental obligations and entitlements. I presented several legal opinions relating to parental claims and showed the role of genes in parenthood is both confused and contested. I concluded that while genetic definitions of parenthood have legal weight these are increasingly challenged by changes to family structure and advances in reproductive technologies. My case study of public opinion about access to IVF illustrated two opposing views about the importance of biological relatedness, 1) that biological parents have non-voluntary duties and rights and 2) that biological parents can choose whether or not to take on parental roles. I argued that these two views cannot be dismissed as merely a difference of opinion because both views are underpinned by moral claims and have weighty moral implications. I concluded that we cannot assume that the role of genes in parenthood is either a matter of preference or a scientific fact. I discussed three assumptions about genetic parenthood and biological families highlighted by the public debate over single women's access to IVF, that the biological family is a

cultural construct, that it is a natural fact and that genetic parents are best. I referred to the anthropological discussion on this issue to illustrate that neither scientific facts or cultural norms can clarify the role of genes in determining parenthood because this is a moral question and not a scientific or anthropological question. Further I argued that determining parenthood is not a matter of identifying parents on the basis of maximizing children's welfare, and even if this were so the evidence does not support the claim that genetic parents are best. I argued that our obligations to children are not obligations to maximize their welfare but to adequately protect their interests and entail parenting that is good enough.

I conclude this chapter by reiterating that the role of genes in determining moral parenthood cannot be resolved by recourse to legal, public and anthropological opinion or scientific data because it is a moral question. In the following chapter I begin an investigation of the moral significance of genetic parenthood by reporting on an empirical study which I undertook to explore the meanings that people attach to genetic parenthood.

CHAPTER 2. WHAT DOES GENETIC PARENTHOOD MEAN? AN EMPIRICAL STUDY

Introduction

What makes a parent? In the previous chapter, I began to address this question by accepting, as given, that a moral parent is an individual with duties for and authority over children. I went on to ask how these duties and rights are conferred and on whom. While many competing candidates have been put forward as defining what it is to be a moral parent, I made a case for beginning the investigation by clarifying the role of genes in assigning parenthood. I illustrated through a discussion of legal and public debate that genes are often assumed to be the locus of parental authority. However, the meaning attached to genetic parenthood is increasingly confused and conflicting. I showed that unraveling this confusion is not simply a matter of discovering the scientific facts about families or gathering data about which individuals make the best parents. I argued that significance of genetic relatedness is often assumed and linked to beliefs about the origin of families.

In this chapter, I present an empirical study that elucidates more directly what meanings people attach to genetic relatedness. My study, referred to as the ‘Frozen Embryo’ study¹ explores the weight that people attach to genetic relatedness in the context of IVF. I report on and analyse the decisions and intentions of 42 people who have completed IVF treatment and find themselves with surplus cryopreserved embryos. Victorian couples in this position have three choices: to dispose of their embryos, to donate them to another infertile couple or to donate them to research.

As described in the next section, the ‘Frozen Embryo’ study is based on the rationale that decisions about human embryos are a measure of the importance that people attach to purely ‘begetting’ (passing on their genes), when separated from the meanings attached to gestating and raising genetic offspring. It thus constitutes a real-

¹ Reported in part in Fuscaldo G, & Gillam L. (2005). Decisions about frozen embryos, *under review*

life version of the classic philosophical thought-experiment, where all the confounding features are removed, in order to focus on the essence of the issue at hand².

1. An Analysis of Decisions About Frozen Embryos

1.1 Study Rationale: Why an empirical study of people's views?

Before beginning to describe this study and its findings, it is necessary to clarify how an investigation of people's views can shed light on the moral weightiness of genes. Obviously asking people what they feel about an issue does not in itself provide any moral argument about the issue. As illustrated earlier, evidence that many individuals feel strongly that lesbian couples should not have access to IVF because children need fathers does not in itself constitute any moral argument about the importance of fathers. However, if one were interested in the claim that children need both a mother and a father then such evidence would be a starting point for gathering claims about why having parents of both genders might be important. Each of these claims could then be examined for its coherence. Similarly, an empirical investigation into the weight that people attach to begetting provides a starting point for sorting out arguments about the moral weightiness of begetting. What the study provides is a list of reasons for thinking that genetic parenthood *might be* important or unimportant. People's views are best understood as claims, each of which could be analysed to determine if there is a sound theoretical basis for such views.

It is of course possible that some of the reasons that people give for feeling the way they do about genetic ties could be eliminated from the list of things to consider, because they fall outside of the realm of *moral* reasons. It is also possible that some of the reasons that people give will reveal principles which form the basis of morally

² Used by philosophers to solve a problem using the power of imagination, see Brown, J. R. (2002). Thought Experiments. In Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2002 Edition ed.). <http://plato.stanford.edu/archives/sum2002/entries/thought-experiment>. A thought experiment could be used to 'imagine' the moral significance of begetting, but as I explain, the experiences of people who need to make decisions about their surplus embryos is an example of considering the significance of genetic parenthood in the absence of confounding factors. Because it is a real life version of a thought experiment it could yield greater insight into the question of interest.

weighty arguments for assigning a particular value to genetic ties. A third possibility is that the individuals interviewed in my study (or indeed those of any sample) will not have considered these issues in depth and that there may exist some reasons for assigning a weight to genetic relatedness that are not uncovered by asking people what they think. It could be argued that questions about the weightiness of genetic relatedness are moral questions and therefore questions better asked of moral philosophers and not the general public.

While it is true that a survey of people's views might not reveal *all* of the possible morally weighty arguments about begetting, this is also true of surveys of philosophical arguments on parenthood. A review of the philosophical literature may fail to reveal, or reflect on, arguments and concerns that exist in the 'real world', and is susceptible to the criticism that real life issues or practical applications are not adequately considered. The chances of finding a theoretical position with consistent practical application (the aim of this thesis) are obviously increased if this position takes account of claims made in 'the real world' and not only those contrived in the imaginations of moral philosophers. The latter however, are also considered in this thesis. It is unlikely that one can ever guarantee that every possible argument, claim or concern relevant to an issue has been considered. However, a fair account of at least the most significant and popular of these can be given by investigating both real world claims and the positions put forward in the current philosophical literature.

While the Frozen Embryo study is only a starting point, for exploring the moral weightiness of genetic ties, it provides a unique and valuable insight by identifying 'real world' claims about the moral weightiness of genetic parenthood. In the following chapters the principles and values embedded in peoples views about begetting, as revealed through my study, are analysed in light of the current philosophical literature, in the search for a sound theoretical basis for moral parenthood³.

³ A further challenge to this study's rationale, that is, the argument that how people feel about their embryos is a private matter and not a matter for analysis, was dismissed in chapter 1.

1.2 Study Rationale: Why the views of people with surplus embryos?

The previous chapter highlighted that for many people, genetic kinship is very important, but that the importance of genetic relatedness is often assumed or based on unsupported notions. Very little empirical evidence is available to examine the meaning and significance that individuals attach to passing on their genes⁴ and what reasons they have for doing so. This may be due, in part, to the fact that it is very difficult to separate the meanings attached to parenthood with those attached to transmitting our genes.

There are of course many situations in which to examine the significance of genetic relationships. There exists a wealth of research on the topic of adoption and the meanings and experiences associated with non-biological parenthood.⁵ Similarly, the experiences of children and adults growing up in 'blended' families following separation or divorce is a growing field of inquiry⁶. The advent of ARTs has further stimulated research into the effects of separating genetic, gestational and social parenthood. In particular studies have been undertaken to examine the reasons that couples seek IVF⁷, the effects of gamete donation on children and adults⁸, and the

4 Some examples include, Kirkman. Genetic connection and relationships in narratives of donor-assisted conception <http://www.swin.edu.au/sbs/ajets/journal/issue2/KirkmanGenetic.pdf> Thornton, J. G., McNamara, H. M., & Montague, A. A. (1994). Would you rather be a 'birth' or a 'genetic' mother? If so, how much? *Journal of Medical Ethics*, 20, 87-92, Hallebone, E. L. (1991). Non-genetic mothers and their 'own' children: Infertility and IVF donor birth. *Australian Journal of Social Issues*, 25(2), 123-136 Ceballo, R., Lansford, J. E., Abbey, A., & Stewart, A. J. (2004). Gaining a child: Comparing the experiences of biological parents, adoptive parents, and stepparents. *Family Relations*, 53(1), 38-48

5 See for example Howe, D. (1998). *Patterns of adoption : nature, nurture, and psychosocial development*. London ; Malden, MA :: Blackwell., Audrey, M., & McDonald, M. (2001). *The many-sided triangle : adoption in Australia*. Carlton, Vic. :: Melbourne University Press., Barth, R. P. (1994). Adoption Research - Building-Blocks For The Next Decade. *Child Welfare*, 73(5), 625-638, Haslanger, S., & Witt, C. (Eds.). (2005). *Adoption matters : philosophical and feminist essays*. Ithaca, N.Y. :: Cornell University Press, Wegar, K. (2000). Adoption, family ideology, and social stigma: Bias in community attitudes, adoption research, and practice. *Family Relations*, 49(4), 363-370, Zamostny, K. P., O'Brien, K. M., Baden, A. L., & Wiley, M. O. L. (2003). The practice of adoption - History, trends, and social context. *The Counseling Psychologist*, 31(6), 651-678

6 Amato, P. R. (1993). Children Adjustment To Divorce - Theories, Hypotheses, And Empirical Support. *Journal of Marriage and the Family*, 55(1), 23-38, Cherlin. Going to extremes: Family structures, children's well-being, and social science. , Wallerstein, J. S. (1991). The Long-Term Effects Of Divorce On Children - A Review. *Ethnology*, 30(3), 349-360.

7 See for example Pasch, L. A., Dunkel-Schetter, C., & Christensen, A. (2002). Differences between husbands' and wives' approach to infertility affect marital communication and adjustment. *Fertility and Sterility*, 77(6), 1241-1247. Schmidt, L., Munster, K., & Helm, P. (1995). Infertility and the seeking of infertility treatment in a representative

implications of commercial and altruistic surrogacy⁹. The experience of gay and lesbian couples raising children to which only one or neither partner is genetically related are also increasingly well documented and provide a source of data on how genetic and non-genetic parents understand and negotiate their roles¹⁰.

While interesting and informative the studies above do not address the question of the significance of genetic relatedness in isolation. Although the importance of such relationship could be inferred from each of the above examples, views about the importance of genetic kin in the context of adoption, are often complicated by the issue of relinquishment and factors surrounding secrecy and openness¹¹. Similarly, studies that investigate the experience of women acting as gestational surrogates suggest that some women's views about their role are not solely a matter of whether or not the child they gestate shares any of their genetic material¹². Complications are also illustrated in studies of the experiences of gay and lesbian parents where arrangements involve the genetic contribution of only one partner and this need not be the partner who gestates the baby or gives birth. Again, while these studies shed some light on the weightiness of genes in parenthood they are complicated by other factors such as the weight that is attached to gestating and giving birth to a child.

population. *British Journal of Obstetrics and Gynaecology* 102(12), 978-984. , van Balen, F., Verdurmen, J., & Ketting, E. (1997). Choices and motivations of infertile couples. *Patient Education and Counselling*, 31(1), 19-27.

⁸Golombok, Cook, Bish, & Murray. Families Created By The New Reproductive Technologies - Quality Of Parenting And Social And Emotional Development Of The Children. , Robertson, J. A. (1995). Ethical and legal issues in human embryo donation. *Fertility Sterility*, 64, 885-894, Robinson, J. N., Forman, R. G., Clark, A. M., Egan, D. M., Chapman, M. G., & Barlow, D. H. (1991). Attitudes Of Donors And Recipients To Gamete Donation. *Human Reproduction*, 6(2), 307-309.

⁹ Arneson, R. J. (1992). Commodification And Commercial Surrogacy. *Philosophy & Public Affairs* 21(2), 132-164, Roberts, D. E. (1995). The Genetic Tie. *University of Chicago Law Review* 62(1), 209-273.; Schenker, J. G. (1997). Assisted reproduction practice in Europe: Legal and ethical aspects. *Human reproduction Update* 3(2), 173-184.

¹⁰Golombok, S. (1998). New families, old values: considerations regarding the welfare of the child. *Human Reproduction*, 13(9), 2342-2347, Golombok. Unusual families. , Patterson, C. J. (2000). Family relationships of lesbians and gay men. *Journal of Marriage and the Family*, 62(4), 1052-1069. , Tasker, F. (2005). Lesbian mothers, gay fathers, and their children: A review. *Journal of Developmental and Behavioural Pediatrics* 26(3), 224-240.

¹¹ Kirkman. Genetic connection and relationships in narratives of donor-assisted conception , Zamostny, O'Brien, Baden, & Wiley. The practice of adoption - History, trends, and social context.

¹² Levine, H. B. (2003). Gestational surrogacy: Nature and culture in kinship. *Ethnology*, 42(3), 173-185. , Ragone. (2000). Of likeness and difference: how race is being transfigured by gestational surrogacy. In H. Ragone & F. W. Twine (Eds.), *Ideologies and technologies of motherhood : race, class, sexuality, nationalism* (pp. 56-75). New York :: Routledge, Ragone, H. (1996). Chasing the blood tie: Surrogate mothers, adoptive mothers and fathers. *American Ethnologist* 23(2), 352-365.

The Frozen Embryo study gives a unique insight into the different meanings attached to genes in a context that addresses begetting in isolation from any compounding relationships such as those between begetting, gestating and/or rearing a child. The relationship that exists between progenitors and embryos that have been created and stored *in vitro* is almost exclusively a genetic relationship. The feelings or attitudes that people have about their embryos may therefore be interpreted as a reflection of the significance of begetting, disentangled from the weight attached to genetic parenthood in the usual sense (which involves transmitting genes to a child that one also gestates, gives birth to and nurtures).

Earlier work suggests that many couples with surplus embryos do in fact make decisions about their fate based in part on the significance that they attach to genetic relatedness¹³. Evidence suggests that given a choice between having their excess embryos destroyed or donating them to another infertile couple many choose the former because they feel strongly that if a child results from their embryo, they are necessarily this child's (moral) parents¹⁴. Conversely, some couples hold that (moral) parenthood is based on social and not genetic relationships and happily donate their embryos to others¹⁵. The aims of the Frozen Embryo study were to further clarify how people think about their excess embryos and what reasons they give for deciding between the available options. I reason that people making these decisions are necessarily required to reflect on the possibility of other people raising a child born from their embryo donation. This possibility represents the separation of genetic,

13 McMahon, C. A., Gibson, F., Cohen, J., Leslie, G., Tennant, C., & Saunders, D. (2000). Mothers conceiving through in vitro fertilization: siblings, setbacks and embryo dilemmas after five years. *Reproductive Technologies*, 10, 131-135 de Lacey, S. (2005). Parent identity and 'virtual' children: why patients discard rather than donate unused embryos. *Human Reproduction*, 20(6), 1661-1669.

<http://humrep.oxfordjournals.org/cgi/content/abstract/20/6/1661> , Fuscaldo G, & Gillam L. Decisions about frozen embryos , Kovacs, K. T., Breheny, S., & Dear, M. J. (2003). Embryo donation at an Australian university in-vitro fertilisation clinic: issues and outcomes. *Medical Journal of Australia*, 178, 127-129

14 See Fuscaldo and Gillam 2005, McMahon, 2000 and Delacey. It should be remembered that moral parenthood is a term I introduced for the purpose of this thesis to draw out the distinction between being a genetic parent only (begetter) and as distinct from being the person who acquires duties for and authority over a child. This term is not one used by any study participants but it does describe their views about what moral ties might attach to begetting.

15 McMahon, Gibson, Cohen, Leslie, Tennant, & Saunders. Mothers conceiving through in vitro fertilization: siblings, setbacks and embryo dilemmas after five years. , Oke, K., Hammerberg, K., & Blood, J. (1998). *Frozen Embryos- what decisions to make?* . Paper presented at the 17th Annual Scientific Meeting of the Fertility Society of Australia, Hobart, Australia

gestational and social parenthood and elucidates the weight and meaning attached to genetic parenthood as detached from other parental roles.

For Victorian couples with excess embryos, questions about genetic relationships are more than merely theoretical. These couples face a real and inevitable decision about an *existing* being and one that shares their genetic kinship. Their decision is, unlike the case of adoption, a decision about whether or not to allow the existence of a genetically related child to be raised by others, and not about whether to raise a genetically unrelated child or to relinquish an existing genetically related child. Further, while gamete donors must also consider the meaning attached to genetic parenthood, gamete donation is undertaken voluntarily and often unsolicited. It is safe to assume that individuals that choose to donate their gametes (at least anonymously) do not intend to raise their genetic offspring, and that therefore they share some views about the significance of genes in determining parental roles. In other words, gamete donation necessarily implies *particular beliefs* about the role of genes in parenthood, whereas decisions about surplus embryos necessitate *reflection on* the significance of genetic parenthood.

It should be noted, however, that as with studies of adoption or experiences of women who act as gestational surrogates, decisions about surplus embryos are also not exclusively about parenthood. While the Frozen Embryo study is unique in that the only experience of parenting reflected in decisions about surplus embryos are experiences related to genetic parenthood, it also captures views about embryos unrelated to parenting, for example views that reflect beliefs about preserving human life in general. As evidenced by the current debate on the permissibility of destroying embryos for research purposes, decisions about the fate of embryos are also tied up with beliefs about their moral status or arguments about the value of all life¹⁶. It is doubtful that any study could capture people's experience of begetting exclusive of other experiences because, as argued by Michael Bayles there is no experience

¹⁶ For example sanctity of life arguments

involved in begetting (aside from the act of providing gametes itself)¹⁷. This said, the Frozen Embryo study comes as close as possible to capturing exclusively the real life experiences of begetting, and more accurately reflects these, than studies which conflate the experience of begetting with those of begetters who also gestate, and, or, or raise their genetic offspring.

1.3 Study Background

The Frozen Embryo study examines the decisions made by people who complete IVF treatment and find themselves with cryopreserved embryos that they no longer require. Victorian couples in this position have three choices, to dispose of their embryos, to donate them to another infertile couple or to donate them to research.

A routine consequence of many IVF procedures is that more embryos than patients can use for their own treatment are produced, these are cryopreserved for future use. Cryopreservation of surplus embryos is now an integral part of IVF procedures and the number of embryos in storage around the world is steadily increasing¹⁸. However, when couples with frozen embryos complete or discontinue IVF treatment, they face the decision of what do with their surplus embryos.

In Australia, legislation and guidelines determine the length of time that embryos can remain in storage. Storage limits vary between states: in Victoria, legislation which came into effect on January 1st, 1998¹⁹ provides that human embryos can remain cryopreserved for a maximum of five years (with some possibility for extension). Couples with surplus embryos approaching the legal storage limit must then decide between three options: to donate their embryos to another infertile couple, to have their embryos disposed of and, as of January 2003, couples can also choose to donate

¹⁷ Bayles, M. D. (1979). Limits to a Right to Procreate. In O. W. R. O'Neill (Ed.), *Having Children: Philosophical and Legal Reflections on Parenthood* (pp. 13-24). New York: Oxford University Press

¹⁸ Eydoux, P., Thepot, F., Fellmann, F., Francannet, C., Simon-Bouy, B., Jouannet, P., et al. (2004). How can the genetic risks of embryo donation be minimized?: Proposed guidelines of the French Federation of CECOS (Centre d'Etude et de Conservation des Oeufs et du Sperme). *Human Reproduction*, 19(8), 1685-1688.
<http://humrep.oxfordjournals.org/cgi/content/abstract/19/8/1685>

¹⁹ Infertility Treatment Act (Infertility Treatment Act, 1995)

their spare embryos to research. This new option follows the enactment of federal legislation permitting embryo research under some conditions²⁰. Surveys conducted prior to this legislative change reveal that more than 80% of Victoria couples dispose of excess embryos rather than donate them to another couple²¹. Whether the recent option of donating surplus embryos to research will affect the decisions of Victorian couples remains to be seen, however surveys outside of Victoria suggest that substantial numbers of couples would consider this option²².

Several studies have reported on the fate of surplus supernumerary embryos²³ and on couples' attitudes or intentions regarding the option of disposal²⁴, donation to others²⁵, or donation to research²⁶. While some data exists on couples' attitudes to all three options, this describes the hypothetical intentions of people who did not have embryos in storage and who had not yet commenced in-vitro fertilization (IVF)²⁷. Evidence suggests that people's intentions regarding spare embryos change after IVF

²⁰Research Involving Human Embryos Act, (2002). <http://www.scaleplus.law.gov.au>

²¹ Kovacs, Breheny, & Dear. Embryo donation at an Australian university in-vitro fertilisation clinic: issues and outcomes. , Oke, Hammerberg, & Blood. *Frozen Embryos- what decisions to make?* , Tinney, L., Hammarberg, K., Breheny, S., & Leeton, J. (2002). *Deciding the fate of excess frozen embryos*. Paper presented at the 21st Annual Scientific Meeting of the Fertility Society of Australia, Gold Coast, Australia

²² Burton PJ, & Sanders K. (2004). Patient attitudes to donation of embryos for research in Western Australia. *Med J Aust*, 180, 559-561, McMahon, C. A., Gibson, F. L., Leslie, G. I., Saunders, D. M., Porter, K. A., & Tennant, C. C. (2003). Embryo donation for medical research: attitudes and concerns of potential donors. *Human Reproduction*, 18(4), 871-877. <http://humrep.oxfordjournals.org/cgi/content/abstract/18/4/871>

²³ Hounshell, C. V., & Chetkowski, M. D. (1996). Donation of frozen embryos after in vitro fertilization is uncommon. *Fertility and Sterility*, 66, 837-838, Kovacs, Breheny, & Dear. Embryo donation at an Australian university in-vitro fertilisation clinic: issues and outcomes. , Lornage, J., Chorier, H., Boulieu, D., Mathieu, C., & Czyba, J. C. (1995). Six year follow-up of cryopreserved human embryos. *Human Reproduction*, 10(10), 2610-2616. <http://humrep.oxfordjournals.org/cgi/content/abstract/10/10/2610> , Sehnert, B., & Chetkowski, R. J. (1998). Secondary donation of frozen embryos is more common after pregnancy initiation with donated eggs than after in vitro fertilization-embryo transfer and gamete intrafallopian transfer. . *Fertility Sterility*, 69, 350-352

²⁴ Kloch, S. C., Sheinin, S., & Kazer, R. (2001). Couple's attitudes regarding disposition after in vitro fertilization (IVF) *Fertility and Sterility*, 76, S25, Svanberg, A., Boivin, J., & Bergh, T. (2001). Factors influencing the decision to use or discard cryopreserved embryos. . *Acta Obstet Gynecol. Scand*, 80(849-855)

²⁵ de Lacey. Parent identity and 'virtual' children: why patients discard rather than donate unused embryos. , Newton, C. R., McDermid, A., Tekpetey, F., & Tummon, I. S. (2003). Embryo donation: attitudes toward donation procedures and factors predicting willingness to donate. *Human Reproduction*, 18(4), 878-884. <http://humrep.oxfordjournals.org/cgi/content/abstract/18/4/878> , Soderstrom-Anttila, V. (2001). Pregnancy and child outcome after oocyte donation. *Human Reproduction Update*, 7(1), 28-32.

²⁶ Burton PJ, & Sanders K. Patient attitudes to donation of embryos for research in Western Australia. , McMahon, Gibson, Leslie, Saunders, Porter, & Tennant. Embryo donation for medical research: attitudes and concerns of potential donors.

²⁷ Laruelle, C., & Englert, Y. (1995). Psychological study of in vitro fertilization-embryo transfer participants' attitudes toward the destiny of their supernumerary embryos.[comment]. *Fertility & Sterility*, 63(5), 1047-1050

treatment²⁸, following the birth of children²⁹, and are predicted by the success or otherwise of ‘parental projects’³⁰. A few studies have examined how couples who have completed fertility treatment make final decisions about their surplus embryos and how they decide between all three options³¹. While these previous studies relating to surplus embryos provide useful and interesting insights all but one³² employ quantitative methodology and forced answer questionnaires (with room for written comments).

The advantages of qualitative research methods to gain insight into complex behaviours and attitudes to health related areas have been discussed previously³³. The ‘Frozen Embryo’ study is only the second in depth qualitative investigations of couples’ attitudes to all of the three commonly available options for supernumerary embryos³⁴. It explores more directly the views and attitudes of couples on their available options and elicits from them factors that influence their decision-making and responses to hypothetical models to clarify their reasoning.

1.4 Methodology

1.4.1 Aims and Approach

The aim of the Frozen Embryo study, in relation to this thesis, is to elucidate the reasons behind the decisions that people make in relation to their surplus

²⁸ Hounshell, & Chetkowski. Donation of frozen embryos after in vitro fertilization is uncommon. , Lornage, Chorier, Boulieu, Mathieu, & Czyba. Six year follow-up of cryopreserved human embryos.

²⁹ Cooper, S. (1996). The destiny of supernumerary embryos. *Fertil Steril*, 65 205 (letter), McMahon, Gibson, Cohen, Leslie, Tennant, & Saunders. Mothers conceiving through in vitro fertilization: siblings, setbacks and embryo dilemmas after five years.

³⁰ Lornage, Chorier, Boulieu, Mathieu, & Czyba. Six year follow-up of cryopreserved human embryos. , Newton, McDermid, Tekpetey, & Tummon. Embryo donation: attitudes toward donation procedures and factors predicting willingness to donate.

³¹ Hammarberg, K., & Oke, E. (2000, 25-28 June). *The impact of changing legislation on couples with frozen embryos in excess of five years*. . Paper presented at the 16th Annual Meeting of the European Society for Human Reproduction and Embryology, Bologna, Italy; McMahon, Gibson, Cohen, Leslie, Tennant, & Saunders. Mothers conceiving through in vitro fertilization: siblings, setbacks and embryo dilemmas after five years , Oke, Hammerberg, & Blood. Frozen Embryos- what decisions to make?

³² McMahon, Gibson, Cohen, Leslie, Tennant, & Saunders. Mothers conceiving through in vitro fertilization: siblings, setbacks and embryo dilemmas after five years.

³³ Berg, B. J. (1994). A researcher’s guide to investigating the psychological sequelae of infertility: methodological considerations. *Journal of Psychosomatic Obstetrics and Gynecology*, 5 147-156, Rice, P., & Ezzy, D. (1999). *Qualitative Research Methods: a Health Focus* Sydney, Australia: Oxford University Press.

³⁴ The first study of this kind was that of McMahon, Gibson, Cohen, Leslie, Tennant, & Saunders. Mothers conceiving through in vitro fertilization: siblings, setbacks and embryo dilemmas after five years.

cryopreserved embryos, where these capture views about the importance of begetting. I investigate what factors influence their decisions and elicit participant's responses to hypothetical scenarios to stimulate reflection on and discussion of the factors that influence their choices. A second aim, unrelated to this thesis, was to explore factors that might make the decision-making process easier. Previous studies reveal that for many people decisions about what to do with their surplus embryos are difficult and emotionally stressful³⁵. Participants were asked what factors might help them to make decisions and to respond to hypothetical procedural changes that might affect or facilitate their decisions. The results of the latter enquiry are reported in part here, where they are relevant. Only findings relevant to the question of interest, that is, *'what meaning or significance do people who are making decisions about surplus embryos attach to the fact of their genetic relationship with these embryos?'* are reported and discussed here.

1.4.2 Methods and Participants

The study, formally entitled 'Decisions About Surplus Embryos', was approved by the University of Melbourne Human Research Ethics Committee, the Epworth Hospital Research Ethics Committee, and the Monash Private Surgical Hospital Research Ethics Committee.

The study involved both semi-structured individual interviews and focus group discussions. All of the interviews were conducted by myself and the focus group discussions were jointly facilitated by myself and my supervisor, Dr Lynn Gillam. The participants were individuals who had completed IVF treatment and who had surplus embryos in storage approaching the legal storage limit of five years. Participants were recruited from Victoria through advertisements placed in newsletters, information brochures and flyers displayed in Melbourne IVF clinics, or posted to members of IVF support groups and patients of Melbourne clinics. Both couples and individuals were invited to participate. Couples or individuals who did not have (or had never

³⁵ McMahon, Gibson, Cohen, Leslie, Tennant, & Saunders. Mothers conceiving through in vitro fertilization: siblings, setbacks and embryo dilemmas after five years, Oke, Hammerberg, & Blood. Frozen Embryos- what decisions to make?

had) surplus embryos in storage were excluded from the study. No other exclusion criteria were applied.

Volunteers were offered the option of participating in small focus group discussions of no more than eight people, or face-to-face interviews as a couple or individually. Telephone interviews were also made available to participants residing outside the metropolitan area, or if requested. The rationale behind the use of in depth interviews was that they would allow the opportunity to find out not only what participants decided about their surplus embryos but how and why they made these decisions. Further, focus groups are known to be particularly suitable for examining sensitive issues³⁶. Previous reports reveal that many couples find making decisions about their surplus embryos very difficult and emotionally stressful. It was hoped that in a focus group interviews participants might feel more relaxed about talking about these difficult decisions with others who share similar experiences. In addition, focus groups are useful in eliciting responses to different perspectives or points of view and therefore allow the researcher to obtain a more detailed account of the reasoning behind particular views. However, it was anticipated that some participants might find it too stressful to discuss this sensitive issue in a group setting³⁷ and might feel confronted by the possibility of disagreement with or challenge to their position. For this reason, participants were offered the option of individual and telephone interviews. Interviews were conducted between April and September of 2004.

Table 1, below, summarises the number of participants recruited to individual interviews and focus group interviews. No distinction is made between individual interviews conducted face-to-face and telephone interview. Although it is possible that different individuals would have had more or less to say over the telephone or in person, it is doubtful that the content of their responses is significantly affected by the method of interview.

³⁶ Rice, & Ezzy. *Qualitative Research Methods: a Health Focus*

³⁷ In part due to the concerns raised by one of the Ethics committees reviewing this project.

A total of forty-two individuals, 11 males and 31 females, participated in the study and were interviewed individually, as couples or in focus groups (Table 1). Female participants ranged in age from 28- 44 years and males from 30- 49 years of age. All participants except one had genetically related children or were pregnant at the time of interview. Five interviewees were from outside the Melbourne metropolitan area.

Table 1: Interview type

Interview	3 Focus Groups	7 Couple Interview	13 Individual Interview	Totals
Males	2	7	2	11
Females	13	7	11	31
Total Individuals	15	14	13	42

Participants were asked what decisions they had made or what their intentions were regarding their surplus embryos. Participants were encouraged to reflect on and discuss at length the reasons behind their decisions and their experiences of the process. Further questions were asked to elucidate the factors that influence decision-making. The interview questions focused on two different aspects; ascertaining how and why participants chose, or intended to choose between the available options, and eliciting responses to researcher-generated hypothetical situations for the disposition of surplus embryos (Box 1). The aim of prompting discussion based on hypothetical scenarios was to encourage further reflection and to capture more accurately the reasons behind participants' decisions. To clarify, asking participants to respond to different procedural possibilities for the disposition of their surplus embryos

elucidated the extent to which their reasons for choosing one option over another were based on views about the option per se, or views about how that option was organised.

Each individual interview was of approximately one hour's duration and focus groups were between one and a half and two and a half hours in length. With the participants' permission the interviews were audio-recorded and transcribed by a professional transcription service. The audio tape transcripts were then read, corrected and coded by myself.

The data approached saturation on key themes by the completion of forty interviews.³⁸ The data was thematically analysed, drawing from grounded theory, as described by Rice and Ezzy. This argues that theory can be built through observation and insights from the social world.³⁹ Briefly, the methods of thematic analysis involve coding and organizing 'chunks' of data and identifying and developing themes. Participants' responses were compared and grouped according to similarities and differences. After the initial categories or *codes* were developed, the next stage involved interpreting meanings and common themes in relation to the question of interest. As described by Joy Higgins, 'interpretation' involves constructing knowledge 'by search for meaning, beliefs, and values, and through looking for wholes and relationships with other wholes'⁴⁰. In other words, coding the data involved breaking it down and re-conceptualising it, whereas interpreting the data involved 'putting the data back together in new ways'⁴¹ by making connections between codes to identify themes.

Themes represent my interpretation of the participants' responses and the possible claims about the significance of genetic parenthood that these illustrate. I do not intend to imply that the list of claims I generate is a literal representation of what the

³⁸ As suggested by Rice, P., & Ezzy, D. (1999). *Qualitative Research Methods: a Health Focus*. Sydney, Australia: Oxford University Press. p 46

³⁹ Rice, & Ezzy. *Qualitative Research Methods: a Health Focus*

⁴⁰ Higgins, J. (2001). Charting standpoints in qualitative research. In H. Byrne-Armstrong, J. Higgs & D. Horsfall (Eds.), *Critical Moments in Qualitative Research*. Oxford: Butterworth Heinemann p49

⁴¹ Rice, & Ezzy. *Qualitative Research Methods: a Health Focus*

participants believe. More simply, I suggest that particular responses imply particular claims or beliefs about genetic parenthood. I acknowledge that my interpretation of the data is influenced by my own experiences and beliefs, in particular by my past work experience as a clinical embryologist in an IVF clinic. I accept that interpretation of narrative is a subjective tool and that different interpretations are possible. This is particularly true when people are being asked to discuss a matter that is difficult to articulate and where their responses may reflect inchoate notions. However, I also accept as argued by Rice and Ezzy, that *'while there are no final grounds for accepting interpretations as accurate, this does not mean that all interpretations are equal'*⁴². They suggest that one way to ensure interpretative rigour is to demonstrate how the interpretation was achieved, by including substantial parts of direct quotes and providing the reader with a clearer sense of evidence on which the analysis is based. To this end, extensive parts of the transcripts are presented in this chapter together with detailed discussion of how I interpret the data. Among the themes developed in this way, those that elucidate possible 'claims' about the weightiness of begetting are picked out for further analyses in the following chapters.

Participants' privacy has been protected by removing names and other identifying information from the discussion of the results.

⁴² Rice, & Ezzy. *Qualitative Research Methods: a Health Focus* p37

Box 1: Interview Theme List

1. Participant's decision or Intention
 - a) What decisions have you made or what are your Intentions regarding your surplus embryos?
 - b) How do you feel about the decision-making process, how sure are you of this decision?
2. Participants attitudes to choices and factors influencing their decisions
 - a) Describe your reasons for choosing your preferred option
 - b) Describe how you feel about each option in turn (donations to research, disposal, donation to another couple)
3. Participants responses to hypothetical scenarios

Would your preferences change if any of the following possibilities were available?

 - a) directed research- having information about or choosing the research project for which you would provide embryos (reported in part only)
 - b) self disposal of embryos
 - c) directed donation- having information about or some element of choice about the recipients of your donated embryos
 - d) negotiated levels of ongoing contact with any child born from your donated embryos
 - e) anonymity following the donation of surplus embryos
4. What factors, if any, would facilitate decision-making? (reported in part only)

1.5 Results

As summarised in Table 2, many of the participants remained unsure regarding what they would do with their excess embryos. Only one couple and two individuals had finalised the disposition of their excess embryos. One couple had donated their two surplus embryos to another infertile couple and two participants had discarded their surplus embryos at the time of interviewing. Of the remaining interviewees, 11 described feeling unsure as to a final decision. Two women from this group suggested that although they did not want any more children they were contemplating a further IVF cycle rather than choosing between the available options. Almost one third of both male and female participants in this study indicated that their preference was to donate their excess embryos to another couple. It should be noted that legislative changes permitting embryo research in Victoria only came into effect on June 19th, 2003. At the time of interviewing only one of Melbourne's two IVF clinics had been granted a license to carry out research on supernumerary embryos. The option of donating to research may therefore not have been actually available to all interviewees, and participants in this study may not have time to fully consider this option. Interestingly, however a majority of interviewees indicated a preference for this option.

Table 2 Decisions/Intentions

	<i>Disposal</i>	Research[#]	Donate to couple	<i>Unsure</i>
Males	0	7	3	1
Females	6*	8	9	10
Totals Interviewees	6	15	12**	11 ^{##}

* Two individuals had chosen to dispose of their surplus embryos at the time of interview

** One couple had donated two surplus embryos to another couple at the time of interviewing

The option of donating to research, although legally permitted at the time of interview was not offered by all Melbourne clinics and therefore not available in practice to all study participants.

^{##} Some responses fall into more than one category eg intention to dispose of but unsure

1.5.1 Labelling of Data

This section describes the way in which participants responses are labeled. Each interview is numbered for ease of reference and a letter uniquely identifies each quote. Note however, that particular quotes can be matched to particular individuals only in the case of individual interviews. Some interviews involve couples, some groups of people, and some one individual. Because of the lively nature of the focus group discussions, the interview transcripts do not reliably differentiate between different respondents. Thus, the quotes reproduced in the results do not always represent *an individual* but rather represent *an interview*. For the purpose of this study however, the pooling of responses is justified because what is of interest is the substance of the quote and not to which individual it belongs. Further, the Frozen Embryo study does not claim to be quantitatively representative of the views of all persons with surplus frozen embryos. The aim of the study was to collect as many different views about the meanings attached to genetic relatedness (as illustrated by decisions about surplus embryos) as possible. While it is interesting to observe if particular points of view are repeated or if they are commonly held, how many times a point of view is repeated is not relevant to the present study.

To clarify ‘*Interview 5 quote a*’ uniquely identifies a quote from interview 5, as does ‘*Interview 5 quote b*’ but these quotes are not necessarily from the same individual. The letters A and A1 denote responses from a couple interviewed together. Phrases and words in square brackets [for example], have been added by the researcher for the sake of clarity.

2. Presentation of Data

This section describes how participants’ responses are organized and presented.

In the first instance, in Section 2.1 an overview of the participant’s experiences of making decisions about their spare embryos is presented. In section 2.2, participant’s views about each of the available options for their surplus embryos are presented. These are sorted into two groups. Section 2.2.1 highlights participants’ views about donating surplus embryos to research and discarding surplus embryos. These

responses are presented together because they fall into the general category of responses indicating that no future genetically related child would exist.

Section 2.2.2 highlights participants' views about donating their embryos to another couple.

Within these three sections similar quotes are collected under a code heading. Codes merely summarise the main idea expressed by a group of similar quotes. The significance of these ideas in relation to the question of the role of genes in moral parenthood is discussed in the following chapters. All comments relevant to this question have been coded and only material that did not relate to this question has been excluded. The aim of coding was to include *all* relevant views not just similar views, as is made obvious by the fact that concepts represented by some codes contradict, or are at odds with concepts represented by other codes.

In section 3 the major themes that emerge from the interpretation of all of the coded responses are presented and specified.

The organisation of the data is presented below for clarity.

2.1 Overview of Participants Experience

2.2 Response to Specific Options

2.2.1 Donating to Research/Discarding Surplus Embryos

2.2.2 Donation of Surplus Embryos to Another Couple

3. Major Themes

2.1 Overview of Participants Experiences

CODE 1: HARD DECISIONS

Many of the participants described coming to the end of the legal storage time and having to make final decisions about embryos excess to their needs as very difficult and emotionally stressful. Three interviewees described feelings of conflict stemming from their religious convictions. Many described wanting to help others but feeling uneasy about the possibility of a future child, or a sibling to existing children, 'being out there'.

For some, decisions about their surplus embryos became more difficult after successful IVF treatment or the birth of a child.

it's a difficult decision... It makes me cry... ...It's actually really hard because while you are going through the IVF and everything, the embryos are just embryos. Once you have a child, the embryo is that, like the end product is that. So it's a really emotional thing. (Interview 8 quote a)

Oh, it's incredibly difficult, incredibly difficult..... I think it's probably more difficult once you've had a successful pregnancy from one of those embryos and you get a beautiful little boy or little girl out of it and think, 'Goodness me, how can I abandon those embryos?' because they are other little [Johnnies] waiting to happen. That's the difficulty in it...It's all emotional.....Oh, they are my little children. (Interview 6 quote a)

Only four of the participants said that they had no difficulty making decisions about the fate of their surplus embryos. They described feeling confident about what they would decide, believing that only one option was right for them and feeling no conflict over choosing between options. Conversely, the majority of participants in this study reported that these decisions are very difficult and the source of emotional and moral distress and having great trouble deciding between options. The following sections describe in more depth the nature of these reflections.

2.2 Responses to specific options

2.2.1 Donating to Research/Discarding Surplus Embryos

CODE 2: EMBRYOS ARE POTENTIAL CHILDREN

Among the reasons given for their decisions or intentions regarding the fate of their surplus embryos, some responses reflect the view that it would be wrong to destroy embryos because they are potential life or potential children that should not be destroyed or used for research purposes.

A1: Yeah, I think it's just a potential life and to me it's closer to a potential life than other things I suppose. Like, sperm itself ...

A: Yeah, absolutely. To destroy just sperm or just eggs would be no problem whatsoever. (Interview 1 quote a)

Yeah, to me it was just barely life. Once the sperm and the egg were together there was a life starting off and just to abruptly stop it without it happening naturally, you know, it just wasn't an option for me, no. (Interview 14 quote a)

...there's no prospect whatsoever of me donating them to research or destroying them, no prospect at all really. I will either use them or give them to childless couples and if they don't become little people, well at least we've tried. (Interview 6 quote b)

CODE 3: EMBRYO RESEARCH IS 'CALLOUS'

Some participants indicated they would have great difficulty imagining their embryos being used for research purposes.

No, I couldn't do that [donate to research], I couldn't bear the thought of them being poked or cut up... (Focus 2 quote a)

...it's so callous and it's even worse than destroying them in some ways. I know that as a medical person there is value in research but I'm not putting my embryos in for it. (Interview 6 quote c)

One couple likened embryos research to images from 1950's horror films

A1: Not a big fan. I've seen too many of those 1950s horror movies.

A: Mad scientists. I have such a cynical view of the medical and research side of things because I work in [field] and because I work with some very adolescent, uncaring men who are in charge. I can't get beyond that at the moment. But I just think, sure, if it's an egg, then fine, go for it. If it's an embryo, I just think it should be given a chance. I just think it's got more potential than to go to research at this stage.

A1: Well, yeah. I think it's a wonderful gift that could be made to somebody in terms of an embryo and a new person. Then, I guess there is important medical research to be undertaken but I don't know that that's particularly attractive and I don't know why it is. ...Maybe it is those '50s films, I don't know. (Interview 15 quote a)

CODE 4 WHAT ARE THE EMBRYOS GOING TO BE USED FOR?

Many respondents suggested that they would be more likely to donate surplus embryos to research if they had information about and could direct their embryos to particular projects. Several participants suggested areas of research that they would like to support. These included research on childhood illnesses, Multiple Sclerosis, Cystic Fibrosis, Diabetes and cancer. Several interviewees suggested stem cell research as an area to which they would be willing to donate their surplus embryos. Overwhelmingly respondents indicated that they would like their embryos to be used for research with direct medical benefit.

I think it was research for med students or something so that mattered to me in terms of me and I guess it would. If it was cosmetics, I'd say no, forget it. If it was something like research for curing or

containing things like MS or something, I'd be more disposed towards it. Yeah, depending on what it was. (Interview 19 quote a)

Yeah, the type of research. You'd have to tell me precisely what type of research and I would then, I can imagine that it might alter my decision slightly. Certainly, for example, if my child had a terminal disease and the only thing that was going to help him was something created from stem cells of his brothers and sisters, I would sacrifice the embryos. It would have to be a fairly direct link like that. I probably wouldn't be so excited about sacrificing them for the sake of research into Staphylococci or something like that. (Interview 6 quote d)

The comments below capture the sentiment of many responses on the question of donating to research. They suggest that people with spare embryos would be more likely to donate these to research if they had some assurance about the research aims, methods, and applications and that a lack of knowledge or understanding could be a factor in decision-making about surplus embryos.

I don't know if that would change my mind about it but I think I would need to go – I wanted to guarantee him that if my embryos are going to be used for research, that I know exactly what's going to happen and you know what it's for and all that. (Interview Focus 2 quote b)

See you don't get a great deal of information so I don't actually understand the process of what happens when they go to research and what bits go where or what they do. So if I knew more about that, I might be more inclined to do that rather than [dispose of them] (Interview 19 quote b)

CODE 5: EMBRYOS SHOULDN'T JUST 'GO DOWN THE DRAIN'

In considering the option of having their surplus embryos disposed of several participants indicated that they did not know how this was done and asked for details about the disposal process. One woman suggested that she would feel better about disposing of her embryos if she could bury them and plant a commemorative tree.

I wanted to maybe ...put them somewhere and maybe plant something over them – I'd feel better about that rather than them going down a drain. I don't understand how they discard, but, I guess it's just, it seems like a harsh thing (Interview 19 quote c)

A number of other participants responded positively to the possibility of taking control of, or personalising the disposal of their excess embryos.

CODE 6: EMBRYOS ARE 'JUST CELLS'

Other participants did not view their embryos as special entities or 'children' but more like 'abstract genetic material'.

I can't equate an embryo, as I know it in the very early stages, to a baby. I know I sort of have this notion that once the embryo becomes a life and a baby, I can't sort of try and make myself feel the embryo is a life as such. To me it's sort of abstract genetic material that is the precursor. I've tried to even think of it in those terms. I just can't create the feelings inside of me. (Interview 5 quote a)

CODE 7: DESTROYING EMBRYOS IS A 'WASTE '

Many other responses describe discarding embryos as 'a waste' and that donating to research presents an option which makes good use of embryos that would otherwise be destroyed.

I think it's a bit of a waste to discard them basically because they just take them out of storage and let them deteriorate. So I think in the process of deteriorating, do some research.(Interview 13 quote a)

Well, I think if people are only going to destroy embryos, I can't see why research isn't a good way of using them ... It makes sense to at least have some use out of them. Being Catholic, I'm Catholic but I'm not like a fully practicing one, you know, like saying that you are destroying life, which I suppose

I see that it is in a way but if it's going to happen regardless, it might as well do some good and help some people. (Interview 11 quote a)

CODE 8: EMBRYO RESEARCH IS 'GIVING BACK'

Also describing the disposal of embryos as 'a waste', one couple suggested that they would have donated to research had this been available to them. A few individuals described their decision to donate spare embryos as one stemming from a reciprocal obligation to 'give back' what they themselves had been given.

As I said, I feel an obligation that we're the recipient of a product of other people's research, that other people have gone before us, taken the risks with IVF, made the hard decisions to donate their material to IVF research and I feel that we've got it a bit easy in that we can just sort of rock up and obtain the benefits of IVF for ourselves. I feel that if I was in the position to have stuff to donate, that it would be my obligation in terms of returning the favour if you will..... I feel that IVF would never have happened in the first place without the, if you like, the early pioneers. (Interview 5 quote b)

2.2.2 Donation of Surplus Embryos to Another Couple

CODE 9: 'GIVING SOMEONE ELSE A CHANCE'

Some participants preferred donating their embryos to other infertile couples because they believed this was the best way to help.

I'd rather give someone a chance of having a baby than giving some to research. I think I'd rather give, I mean, we're very lucky. We've got three little children and we are very lucky and I want to give someone else that chance instead of going to research (Interview 12 quote a)

CODE 10: EMBRYOS EMBODY FERTILITY

One participant described thinking about her surplus embryos in terms of thinking about the end of her period of fertility.

So I'm sort of struggling with the fact that, on the one hand, I don't want anymore children really and I know that would be unfair on him to have anymore children. Part of me has a hard time letting go of the fact that this is it for me, you know? That's a bit difficult to say, OK, I guess that whole child birthing experience is over. So that's the other side of it also, by sending back the forms I'm sort of saying I'm now closing that door on my life. I guess because I'm younger than most people on IVF I sort of feel like, 'It's over already?' (Focus 1 quote a)

CODE 11: EMBRYOS ARE 'MY BABIES'

Many respondents indicated that their decisions regarding their surplus embryos reflect the idea that their cryopreserved embryos are 'their babies' and that feelings of guilt or regret would be associated with their destruction or donation.

.... Look, I know some people say, 'It's just a few cells in the freezer', but for us they are already our babies. If you refer to them as that, then it's hard to think that, you know, I feel bad enough, when they thaw three out and they say, 'Two survived.' I always give a thought to the one that didn't and I sort of feel bad about that. Even when it doesn't succeed, you get a bit of guilt that two more didn't make it. So you do, you feel a bit accountable. (Interview 2 quote a)

A number of participants explained that the way they viewed their surplus embryos had changed since having children. Some women described feeling maternally towards the embryos or thinking about them in relation to their existing children.

Initially, probably had I made that decision within the first six months I probably would have [disposed of surplus embryos] but as time has proceeded, and [name] has grown and become the love of our lives, ...we kind of keep thinking those embryos are part of the whole [name] thing. [name] is my three year old and that's where the embryos are from and that's what we're having trouble with. And that, with me in particular, I think of them as [name] and I don't know why I do that, I just do. It was all that, you know, they were from the same batch and that is what my biggest problem is. (Interview 16 quote a)

I suppose the whole experience of the IVF has made me feel that it's a baby because I've seen the embryos under the microscope, they actually present them to you on transfer day...So, to me, it's every bit as much a baby as what the other children are that have been the outcome of this project. Whereas, I guess if I hadn't seen all of that then maybe I wouldn't have felt that way because, you know, it's a dot and it's not visible to the naked eye and all those sorts of things. Whereas, I've actually, you know, I can look at the children and think, if that was the luck of the draw, you were selected as the embryos on that day and not this other one. (Interview 4 quote a)

That's why we'd like to use as many as we can [rather than dispose of] More so since we've had the kids, definitely. Before we had the kids I just thought, 'Yeah, that's no problem. I can do that.' But now, seeing what these little embryos have become, yep, I'd have huge difficulty. (Interview 1 quote b)

It's not even a dilemma for me. It's just completely out of the question for me. I just couldn't do it. I might have been able to do it if I'd never been successful in creating a baby. It's just that I've seen what they become and I just couldn't. (Interview 6 quote e)

CODE 12: EMBRYOS WILL BECOME 'MY CHILD'/'OUR CHILD'

Some of the reasons given to explain participants' choices for their surplus embryos include the belief that a child that results from a donation would still be 'my child'.

I don't think I could [donate to others]. I think it would bother me all my life, just thinking, 'I wonder what my child is doing?' because it is our child. (Interview 1 quote c)

I don't know, I think the hard thing for me to give up is it's another part of me that I haven't got any control over. So it's got my genes and I can't have anything to do with it but I know it's out there. (Interview 3 quote a)

Well, you do think of them as your own. So then you've got a child minder for the entire life of the person. (Interview 14 quote b)

I just don't think I could cope knowing that, I suppose, out there, there is another biological child...I would feel that they were still mine. I see what I felt with my two kids and I think that I'm lucky, ...I would dearly love to be able to offer that to another couple. But I just don't think I could cope knowing that, really, one of my kids and I suppose I think of the embryos still as embryos but with a potential for them to become a child, you know, to become a fully grown adult who is a contributing member of society, knowing that one of mine is out there. (Interview 9 quote a)

In thinking about the options available to them for their excess embryos a few participants reflected on the possibility of donating gametes. Several indicated that donating oocytes or spermatozoa would be different to donating an embryo because an embryo is a united part of a couple.

...she [friend] just jokingly said why don't you give them [excess embryos] to your sister and I went, "No way"...even if it was my dearly beloved sister who was desperate for children, ...I'd still feel like it was my child. ...So, I would find it difficult. However, I told my sister who can't have children that she could have my eggs. (Focus 3 quote a)

By donating an egg, I'm donating a part of me but it goes now through the IVF process, it would be mixed with her husband's sperm ...But there is a big difference between that and actually putting in one of [our embryos], I look at it as giving one of my children away... an embryo belongs to me and my husband and I, and it is our child. That is the difference for me. Like I said, emotionally it would be much easier for me to donate an egg to a close friend whereas it would be much more emotional for me to actually give away my child which is the way that I look at my embryos.(Interview 8 quote b)

...for me – it's actually easier, the thought of donating eggs would be much easier than donating an embryo... Because it's joined with his genetics. (Focus 3 quote b)

'Its our grandchild'

Others described that the thought of donating their surplus embryos was connected to their parent's feelings that any child that resulted from this donation would be their grandchild.

...both our parents have expressed very clearly they are diametrically opposed to the idea ...My parents' problem is, 'I don't want my extra grandchildren running around out there. I feel familial pressure because they know, my family knows that we've got five leftover. My bloody father rings me every couple of months and asks me when I'm going to pick up the next one. (Focus 2 quote c)

...the two people that had the greatest impact afterwards when we'd made the decision to donate was my father and my stepmother ...She burst into tears again. "That might be my grandchild." (Focus 3 quote c)

...but I would feel funny on her behalf if there was a potential granddaughter that she wouldn't have access to that. (Interview 19 quote d)

Embryos are siblings

Several participants spoke of their embryos and the possibility of success following donation to others, in terms of having a sibling to their existing children.

...if something was to happen to me, I'm dead, I'm not going to know...but it's ultimately then got to be passed onto my kids too because they are a byproduct of that [embryo donation]. They ultimately have a full brother or sister out there that they may or may not actually know about. (Interview 9 quote b)

...it's not fair to 'Johny' that he would have a sibling somewhere lurking around and I think he has a right to know that. (Interview 19 quote e)

I just don't think I could stand the thought, to me it's like a brother or sister of my children walking around somewhere in the world and that's really difficult (Focus 2 quote d)

CODE 13: EMBRYOS ARE NOT PROPERTY

While many participants spoke of a possible future child resulting from their embryo donation as 'my child', a few individuals pointed out that their relationship to their embryos and their sense of responsibility was not synonymous with ownership of property.

The embryos feel like they belong to us more than just an ownership, it feels like something that belongs to us very personally...It's more than property. It's almost like something that we've created...It's part of us even if it might not be easy to identify it as a child. It did feel biologically part of us. We feel a sort of sense of responsibility to manage them wisely rather than flippantly. (Interview 5 quote c)

CODE 14: CONCERN ABOUT FUTURE FEELINGS TOWARDS 'MY CHILDREN'

Many participants reflected on the possibility of donating and expressed concern or discomfort about how they might feel about this in the future.

I would love to be of assistance to someone like that. I couldn't bring myself to do it for the two purposes, that they could find me and come to me over how many years and say you're my mother. I don't know how I'd feel about that at that time and having that cloud hanging over my head for the next however many years, there may be a child - my child out in the world somewhere and I wouldn't feel comfortable with that, I don't think. (Interview 17 quote a)

...in our hearts we would dearly love to be able to donate our two embryos to a couple that have been unable to have a baby but we don't think that we could, I suppose psychologically cope with having, an

18 year old come knocking on our door in a number of years and say, 'Hi, you are my biological parents.' (Interview 9 quote c)

CODE 15: 'MY GENETIC CHILD, BUT OTHERS COULD RAISE IT'

Although common, not all participants thought of their surplus embryos as children or believed that a child resulting from their embryo donation would necessarily be 'their child'. Some participants indicated that they had or would consider embryo donation and emphasised the importance of raising a child as a factor in determining parenthood.

I mean, their basis is they are a hunk of cells but it's not a child ...I don't actually see it as being a child. I think what we're donating is an embryo, a genetic embryo with our genetic makeup and I don't see that I'm giving up blood or anything like that...I would know the genetic makeup of it, of whoever it is, the genetic makeup is part of (my husband) and I. That would be about the only tie. So if they were to arrive when they were 18, and that would mean my oldest would be 24, then genetically they have a brother or sister. So that's all it is, really, because they would have been brought up in a different way and that influence on their life... I don't know, genetically they are ours but we haven't raised them. (Interview 13 quote b)

CODE 16: STRONG EMOTIONAL TIES

Many participants spoke of the strong emotional tie that they believe would exist between them and any children born as a result of their donation.

I was just so tormented by that - the thing was I kept thinking if I give them away and I see this child walking down the street, I'm going to follow it home. I cannot separate myself. That is - and I wouldn't be able to. I could not separate the emotional and the physical. That would still be my child, irrespective of what paper I signe., (Focus 2 quote d)

If I was to give the embryos for donation -this was what was going through my head. I thought I would end up seeing that child somewhere and I won't be able to disassociate... (Focus 3 quote d)

CODE 17: THEY LOOK LIKE US

A few individuals commented on the importance of the physical resemblance that they believed they would share with children born from their donated embryos.

... And should they turn up further down the track [children born from embryo donation]... you'd have a heart attack when you opened the front door and see yourself standing there. (Focus 3 quote e)

I don't know how I could deal with that, in that they [donated embryos] would take, just assuming that everything would go fine, we would have two children, particularly as they are our embryos. Our children look very much like us. Both my sons are identical to their father, so I don't know that I could do that. (Interview 16 quote b)

A few respondents suggested that they would feel stronger emotional ties or a sense of responsibility towards children that came from their donation because of a close physical resemblance.

I'm the chief care-giver of this child and his future is in my hands basically and I have full responsibility for him. The other child [from donated embryo] - I'd be the mother only in the biological sense but there would still be a tie. ...Particularly if you saw the child and the child looks like you and looks like your husband and acts like you and your husband, has personality traits from you. I don't think you could help but have that feeling of connection. (Interview 6 quote f)

...if you see someone that looks like your other child or has the same mannerisms as you ...that will tug the old strings... say someone knocked at the door and they looked like [our son] and they said, 'I'm 18 and I've had a hard time and really need some help', and they looked like him, you'd be more warm to him more than a stranger who came and said that, or someone else's kid. (Interview 15 quote b)

CODE 18: WE'RE RESPONSIBLE FOR THEM

In discussions about their options, many participants reflected on how they might feel about future children coming into being following the donation of their surplus embryos to other infertile couples. Several indicated that they would feel a sense of responsibility for such children and some indicated that this is because they caused the embryos to exist or chose to donate them.

...see we actually created [them], we went into a process that we knew full well could create several embryos. So how can we not ...feel responsible for them. (Interview 4 quote b)

Once a child comes into existence you have certain responsibilities, donating those embryos is abrogating those responsibilities.... By disposing of those embryos you are discharging your responsibility. (Interview 20 quote a)

...you'd feel a sense of responsibility for that [future child]...because you know we created the embryo. We made the decision. (Focus 1 quote b)

...my concern would be that I would feel, 'It's my child out there.' I wasn't in the circumstance where I was an unmarried mother and I had to give it up, you know? ...You're not in a circumstance where you are forced to give up your child. I think there is a difference... you'd feel emotionally and you'd feel legally bound. If it ends up in a council estate on the other side of the city and it's doing drugs and all the rest of it and I find out, well, too right you would feel responsible. (Interview 5 quote d)

CODE 19: 'BEING GENETICALLY RELATED GIVES YOU NO CHOICE'

One participant suggested that this sense of responsibility for any future children resulting from embryo donation is unavoidable and due to a genetic connection.

I think when you're genetically related to somebody, you don't have a choice with some of the things you do for them. When you're not genetically related to somebody or related by marriage, or not connected with them, what you do to them means you've chosen it (Focus 3 quote f)

CODE 20: NOT MY RESPONSIBILITY

One participant rejected the notion that she would have motherly obligations to a child that results from her donated embryo, but indicated that she might retain an interest in this child welfare.

...my feeling at the moment is the other ..., [person] who we donated to is the parent of the child...and at this stage, I feel quite removed from the parental responsibility. It's more out of our interest for the welfare of that child's growing up. (Interview 19 quote f)

CODE 21: DONATING EMBRYOS IS NOT FINAL

Two participants spoke of discarding their embryos in terms of closure, explaining that if the embryos continued to exist that they would continue to be linked or have emotional ties to them.

I think about this quite often. It's like when is this fraught with emotion going to end? If you donate them, regardless of the type of person, you are always going to wonder about the child. If you donate them to research, you sort of fear that in ten years time they are going to turn around and say, 'Ten years ago, [clinic] were doing this and this to the embryos and that to the embryos', and all the other things. When is this emotional roller coaster going to stop? I think probably discarding them maybe even my way of getting off the roller coaster. (Interview 8 quote c)

I think I would find it easier to dispose [of excess embryos] because once it's done, it's done. There is no going back, it's final. Whereas, donating to a couple, it's not final. There may not be an end to it. It's an ongoing thing because that child would continue to grow and become a somebody, I suppose. (Interview 9 quote d)

CODE 22: OTHERS CAN DO A GOOD JOB

Participants were asked how they felt about the possibility of other people raising ‘their embryo’. Several people responded that they felt quite sure that couples who were on IVF waiting lists would do ‘as good a job’ of parenting.

I was speaking to the girl... and I remember her saying that, ... ‘Oh I wouldn’t like my child to be brought up by somebody else. What happens if they are drug addicts?’, or this or that. I thought that’s peculiar. These women, you see them in the clinic,... they are people who have struggled and gotten money together to create a family. I think that’s just a cop out to think that maybe they are not good enough people. (Interview 2 quote b)

Absolutely, I’m sure that other people could make the child as every bit as happy as I could, if not happier. I don’t see any problem with that. (Interview 6 quote g)

CODE 23: DIRECTED DONATION: ‘IF I COULD CHOOSE THE PARENTS...’

Participants were also asked for their opinion on the possibility of directing their donation to particular individuals and how they felt about the possibility of selecting the recipients. While some responses indicated that this would be a welcome option, others were troubled by how to guarantee a good outcome.

...if I knew that whoever I was donating to was going to bring them up in a Christian home, encourage as much as I would to be Christians too, then I think that I would be more likely [to donate] but because I can’t make enough guarantees, I would find it phenomenally difficult. If we could choose the parents then we might do it ... (Interview 1 quote d)

Well, I guess knowing they were the Brady Bunch characters and they smiled every day, that would make everybody feel good but it’s not the reality... In an ideal world I guess you’d want them to be financially stable enough and emotionally stable, of good character, you know, that kind of thing, no drugs, ...to give a kid a fighting chance. (Interview 15 quote c)

I just want to know they weren't going to do anything terrible. There are terrible people out there who get to adopt children and you just don't know how that happens. (Interview 16 quote c)

Interestingly, a number of participants felt that they might be more likely to donate if they knew the recipients or something about them and their family life. Some participants suggested that the following information about recipients might prove helpful to potential embryos donors: knowledge of family background, occupation, religion, sexual orientation, health status and previous criminal record. In general comments reflect the desire that children born from embryo donations are raised 'in a stable and loving home' by people who have the means to support them. Some participants suggested that they could more easily donate to a sister or good friend. Others however, felt that a closer relationship with the recipients might make it difficult or confusing both for the child and the adults involved. A few people felt uncomfortable about the possibility of choosing the recipients of their embryos and described this as unfairly discriminatory.

CODE 24: FUTURE CHILD- "WHAT IF THEY'VE HAD A TERRIBLE LIFE?"

Another common concern regarding embryo donation revolved around the future welfare of children born from such donations. Some individuals expressed disquiet about how the child might be raised and by whom and indicated that some family arrangements were less than ideal.

I guess my biggest fear would be if a child was born in this way and then came to me in twenty years to get that information and had had a -terrible life. Yep. I would feel really bad... (Focus 1 quote c)

...and should they turn up further down the track, how you handle it. If they've had a horrible life and they've been kicked onto the street, 'I've got nowhere to live', then you've got another dilemma. (Focus 1 quote d)

I certainly would think twice about donating if I thought it was a same sex couple or a single mum because having been a single mother, I know it's not the ideal situation for a child. Once again, getting back to it, it's not about the couple, it's all about the baby. (Interview 2 quote b)

CODE 25: OUR CHILD OR NO CHILD

Participants were asked whether they had considered or how they felt about the possibility of receiving a donated embryo themselves. Most of the respondents indicated a preference for raising a genetically related child. Some stated that they had or would have considered receiving a donor embryo, if their preferred option had not been successful.

I think we could have done that...I mean, it might have been you know initially or not the same as your own child, but I think we would have got past that pretty quickly. Once you have the child in our lives... (Interview 19 quote g)

A1: I mean, you may as well adopt really.

A: But then, not really, because I've always wanted to know what it's like to be pregnant. So it's a big deal to a woman, maybe not so much to a man. (Interview 3 quote b)

We sort of thought of it as a form of adoption as well and we just felt uncomfortable. We thought that we might not fully believe that the child would be ours or we would feel the child really was ours or belonged to us, even though we'd sort of birthed the child and raised it. We felt a bit uncomfortable that the child, as the child grew older, might sort of move slightly away from us towards the genetic parents, the biological parents. We strongly had this idea that, even if we could never have children we'd rather not go down that line because we had this real idea that our children were ours sort of in total, that they were of us and raised by us. (Interview 5 quote e)

If things were different I don't think I ever would have. That's probably why I wondered whether other people were interested in a donor embryo. I suppose, maybe more than most people, I'd value the biological link. I wanted it to be our child and I would have even struggled if I couldn't use my egg and I had to get donor sperm. (Interview 6 quote b)

My genetic child or no children. Unfortunately, it was pretty much I'd have my child or I wasn't going to have any. (Interview 8 quote d)

Even as much as I know that I wanted children, I still think that I wanted my own children. I didn't want somebody else's. (Focus 2 quote c)

CODE 26: ONGOING CONTACT-A CONTINUING RELATIONSHIP

Participants were asked to respond to the possibility of maintaining ongoing contact with children that resulted from their donation. More specifically, they were asked for their views on embryos donation programs that allow donors and recipients to negotiate the level of ongoing contact between themselves and the resulting children (for example like the Snowflakes embryo adoption program⁴³). A few participants responded that the possibility of making contact with these children would influence their decisions about the destiny of their surplus embryos and that this option would make it easier for them to go ahead with donation to others.

It actually does make me feel quite interested in it because I'm wondering if we can play a role in their lives in some way but not as parents. I always feel for the adoptive parents because I'd hate them to think that we were kind of moving in on their territory... we might be interested in that. If we could somehow be in some kind of role, have something to do with them. (Interview 16 quote d)

For me it was the way it currently was - I would have no contact with the child- at least [in the hypothetical] I could still be considered an auntie...or I'm part of that child's family, the child is

⁴³ *Snowflakes Embryo Adoption Program*. Retrieved 2nd September, 2005, from <http://www.nightlight.org/snowflakeslanding.asp>

still a part of me, and I'm still a part of them, and I can sort of overlook and be a part of their life and feel as if I am still contributing, even if it's in the background and you don't have any say over their day-to-day living...That for me would have probably changed the way that I would have thought about it. (Focus 3 quote g)

One interviewee revealed that she was seeking some closure with regard to her surplus embryos and that donating in an open embryo adoption program would only extend her involvement and emotional tie with her embryos.

It's not for me. If I was going to do that I might as well have the baby myself. You know, if I'm donating to childless couples, I just want it to end there. I don't need the emotional pull of having a continuing relationship with a child whose future I can't have any control over. (Interview 6 quote i)

CODE 27: 'CHILD'S IDENTITY'

Conversely, some participants felt that the hypothetical model of guaranteed donor anonymity would make them decide *not* to donate their embryos. The majority of interviewees were opposed to this model on the grounds that it is unfair to children to deny them information about their genetic identity.

...I could never imagine what it must be like for a child to grow up, and obviously not know the specifics at a very young age but by the time they get to 18, some of these kids must go through horrendous identity crises where they don't know not only who their parents are but anything about themselves at all. So they have no ties to anything anywhere. For as much as adoptive parents or recipient parents obviously give them an identity and all that, at some point they'd say, 'Why have I got a Greek- Roman nose and black hair and dark skin? Where do I come from, what's my background?' I just think it would cause an identity crisis to me if I had know where I was from or what I was from. (Interview 8 quote e)

A few however commented that children have no such right and that providing information about genetic parents confuses notions of what gives us identity.

I feel the people that raised the baby, who nurtured them and cared for them, should be thought of as the parents. That they came from other genetic material is part of who they are but, no, I don't think they should have access to information about who those people might be... I think that could be confusing for a person's identity and I think personal identity comes from where they grow up and how they grow up or how they're brought up. (Interview 5 quote f)

CODE 28: EMBRYO DONATION IS A GOOD THING TO DO

Interestingly all participants stated that donation of surplus embryos to others was a good and altruistic thing to do and no in principle objection to the practice was raised by any of the respondents.

Oh, I totally think it's fine for other people. I sort of feel like the longing that you can have to have a child and how much people can want to have children and how much it would hurt if you couldn't have children and if that was an option that another couple wanted to pursue and wanted to get children and it worked for them and it worked for the people who donated the embryo or the sperm or the egg, then that's fine. No objection at all but if it was my embryo, no I wouldn't [donate my embryos] - but no objections to somebody else doing it. (Interview 5 quote g)

CODE 29: EMBRYO DONATION BRAVE AND UNSELFISH

Some participants described donating embryos to others as brave and unselfish and the wish that they could help others.

...you read in the IVF newsletter you know about all these stories and you think gee I wish I could be that better person. I wish I could sometimes rise above my situation and consider what somebody else is going through, not just what I'm going through ...I can't destroy them and I can't give them away. What on earth do I do? (Focus 2 quote e)

Maybe if I give them to somebody else, they might survive but there was this selfish thing in me that said if I can't have them, how can I give them to somebody else? I can't. They're my children and if I can't have them, I can't give them to anybody else, either. I know that really sounds selfish but that's exactly what I felt. (Focus 2 quote f)

I think it's really brave of people to donate their eggs or embryos. Because I would have a great difficulty, my child, you know after having one of these children, one of these is out there...(Focus 2 quote g)

CODE 30: EMBRYO DONATION- ITS HARD TO DO THE RIGHT THING

A few participants revealed considerable moral distress and feeling conflicted at being unable to donate to others and believing this to be the right thing to do.

I think I'd feel, if that was the case, if I had donated and it didn't work, relief but then I would feel, I suppose myself, that I had done the right thing, I've donated them. Thank God it didn't work. Not in a nasty way but then you don't have that whole thing that they are going to...come back but you've done your part to help somebody else. (Focus 1 quote e)

When we actually found out that a woman had got pregnant, look it was really mixed ...I'm happy that someone was able to get pregnant but I'm also happy that the pregnancy hadn't gone on and we haven't had to worry about what's going to happen further down the track. That's very selfish on my behalf. In some ways it's a relief for me, but I felt wrong saying that. (Interview 14 quote c)

3 Major Themes

Participant's attitudes to the available options regarding surplus embryos and their responses to hypothetical options in this study provide valuable insights into the influences behind couple's decision-making regarding their surplus embryos. More importantly for the purpose of this thesis the Frozen Embryo study provides empirical data on the meanings that people attach to genetic relatedness and the

significance of the genetic relationship between progenitors and their offspring. In the following section participants' responses are grouped according to common themes and further specified. Themes represent my interpretation of the participants' responses and the possible claims about the significance of genetic parenthood, these illustrate.

Themes that illustrate the question of interest are highlighted for further analysis. Recall that not all of the coded responses illustrate views about the significance of genetic ties. As discussed below some of the decisions people make about their surplus embryos reflect ideas about the moral status of embryos or duties to help others. For the sake of completeness, all themes are specified below, but only those that shed light on the significance of genetic relatedness are discussed further in this thesis.

In other words in this section the themes illustrated by particular codes or groups of codes are further specified. These are then sorted out into those themes that are of relevance to the thesis question and those which are not. Only themes relevant to an analysis of the significance of genetic relatedness will be considered further.

Within this group, the themes illustrated by the participants' responses reveal a number of possible claims regarding the role of genetic parenthood in defining moral parenthood. Note that my aim in this section is to examine all the claims for their relevance to the thesis question. The fact that I determine that a particular claim *is* relevant to the thesis question, does not constitute any endorsement of the soundness or grounds for such a claim. In this section I merely identify which claims are candidates for explaining what, if any, is the role that genes play in determining moral parenthood. The analyses of each of these claims begins in the following chapter, where each of the 'candidate claims' are analysed in the light of current philosophical literature to determine if there are strong theoretical arguments in their support.

Decisions about embryos are moral decisions

This study reveals that most of the participants view the decisions they have to make about their surplus embryos as difficult and morally weighty decisions (code 1). Despite the fact that these decisions are now a routine part of many IVF procedures, none of the participants in my study described them as routine, or trivial, or equivalent to decisions about how to select between treatment options. Many of the participants' responses illustrate reflection on what can and cannot be done to embryos, and how they should be treated (codes 3, 4, 5). It may be that only persons who find these decisions weighty volunteer for studies investigating their significance. However, surveys of attitudes around the world indicate that the fate of surplus embryos is for most people a very weighty matter.⁴⁴ Further, the ongoing public debate over stem cell research and technologies that involve the death of embryos support my interpretation. Obviously it may be true that some people do not share the view that the disposition of embryos is a moral issue, but the fact that my study has captured the views of people who do, justifies an investigation of why this might be so. As discussed in Chapter 1, an issue can have moral weight even if some people do not believe this to be so, or describe it as such. Conversely, having strong feelings or feeling morally conflicted about an issue does not entail that one has good reasons for feeling this way.

Given that some people believe decisions about embryos to be morally weighty, my aim is to explore what weight they attach to their embryos and, of more relevance to this thesis, what is the significance of their genetic relationship to their own embryos?

⁴⁴ Bangsbo, S., Pinborg, A., Yding Andersen, C., & Nyboe Andersen, A. (2004). Patients' attitudes towards donation of surplus cryopreserved embryos for treatment or research. *Human Reproduction*, 19(10), 2415-2419. <http://humrep.oxfordjournals.org/cgi/content/abstract/19/10/2415>, de Lacey. Parent identity and 'virtual' children: why patients discard rather than donate unused embryos. , Robertson. Ethical and legal issues in human embryo donation. , Soderstrom-Anttila, V., Foudila, T., Ripatti, U.-R., & Sieberg, R. (2001). Embryo donation: outcome and attitudes among embryo donors and recipients. *Human Reproduction*, 16(6), 1120-1128. <http://humrep.oxfordjournals.org/cgi/content/abstract/16/6/1120>

Embryos are special; – life should be preserved

For many of the participants decisions about the fate of their surplus embryos centered on the notion that embryos are special, and on questions about what would be best for the embryo or how the embryos should be treated (codes 1-5).

Some participants believed that they had an obligation to give the embryos a ‘chance at life’ by either donating them to others or attempting another cycle. The fact that some couples indicated that they would ‘take a chance ‘ at another treatment cycle even though they did not want any more children, indicates that the obligation to preserve the life of the embryo is felt very strongly. Responses that fall into this group indicate that for some people, decisions about embryos are weighty because life should be preserved and (all) embryos are special living entities or potential children (codes 2,3 and 7). This is a claim about the importance of all embryos and not specifically about preserving genetically related embryos. This notion, although a powerful intuition for many people, is not strictly relevant to the thesis question because here the participants’ decisions about their embryos are not based on their genetic relationship to *their* embryos, but on their beliefs about how *all embryos* should be treated. This claim, in summary, *‘that my genetic embryo should not be destroyed (or used for research) because human life should be protected’* will not be considered further in this thesis.

Embryos are special- helping others

Some participants described their surplus embryos as abstract genetic material or a bunch of cells (code 6). However, even individuals who did not ascribe moral status to embryos felt that the decisions they were required to make about their disposition were weighty. Responses to different options for research and the disposal of embryos indicate that even participants who accept that embryos can be destroyed have strong views about how they should be disposed of or what research might be permissible (codes 3, 4, 5).

For many individuals the significance of decisions about spare embryos revolved around the fact that these could be used to help others (code 9) either through the benefits of research or because a long waiting list of other infertile couples is seeking, donated embryos.

All of the participants stated that the donation of surplus embryos to others was a good and altruistic thing to do (code 28) and many described this as brave and unselfish (code 29).

From these findings, my study confirms that part of the decision-making relating to surplus embryos is concerned with how these embryos could be used (for example, for research or by other persons) (code 7, 8, 9) and concerns about wasting a valuable resource.

Reflections about the possible usefulness of embryos are again not specifically about genetically related embryos, but more generally about the utility of *all* spare embryos. This notion is not strictly relevant to the thesis question because here the participant's decisions about their embryos are not based on their genetic relationship to their embryos but on their beliefs about how all embryos should be treated. This claim, in summary, *'that my genetic embryo should not be destroyed (or used for research) because embryos should not be wasted'* will not be considered further in this thesis.

Decisions about embryos belong to begetters

All of the participants' responses reveal that they feel that they have some authority over the fate of their embryos. That is, the embryos progenitors believe that decisions about the fate of their embryos fall to them, and that they are entitled to information about how their embryos are handled or what becomes of them.

It is interesting to note that none of the participants suggested that others are entitled to or should be allowed to make final decisions about what happens to their embryos (although some respondents did grant that on the question of disposal or research that scientist, or researchers themselves could determine the specific fate of embryos after the initial decision to donate to research or to dispose of spare embryos had been made by the genetic parents). Of course, as discussed earlier, it is possible that only people that feel that decisions about embryos are theirs to make have participated in the Frozen Embryo study. It is also true that the study is biased in that it includes only people who have or are about to make decisions about their embryos, It thus excludes people who refuse to make such decisions, or who feel that others can decide for them. This limitation notwithstanding, it is clear that the participants in this study believe they have the authority to make decisions about their surplus embryos, but not about the fate of the surplus embryos of others. The nature of this authority and whether genes play a role in conferring such claims is directly relevant to my research question and will be explored further in the following chapters.

Embryos are special- fertility is special

The Frozen Embryo study reveals that while many individuals view human embryos as special entities, there exist a complex variety of beliefs about what makes them special. One participant spoke of embryos as representative of her fertility and described that disposing of her embryos would for her equate with sterility (code 10). This comment is probably not unlike the experiences of some women who do not wish to have (anymore) children and their attitudes to the option of irreversible fertility control. Anecdotal accounts suggest that many women who could do so, choose not to undergo tubal ligation or other types of irreversible fertility control, because they are 'not ready' to become infertile.

Does this response shed light on genetic relationships? Many of the feelings or views that participants have about their embryos are interesting and understandable. Recall however, that my aim is not to explain why participants feel the way they do, but to

investigate whether the way that they feel reveals a claim about the importance or otherwise of genetic relatedness.

If we accept that genetically related embryos embody a begetter's fertility, can this account give insight into how moral parenthood is grounded? Clearly, the duties associated with moral parenthood cannot be grounded in the fact that the transmission of genes embodies fertility, because an obligation to respect or protect fertility would require only an obligation to beget and not necessarily an obligation to gestate or raise a child. Similarly, parental claims cannot be explained with reference to the fact that my genetically related embryo embodies my fertility. A right to promote or protect my fertility might justify a right or claim over my embryo (or my gametes or my reproductive health) but does not entail that I have rights or claims over any child that results from this embryo.

For these reasons, I suggest that the claim illustrated in the idea that embryos embody fertility is not specifically a claim about a genetic relatedness. An embryo may indeed symbolise fertility for some individuals, but this does not amount to a claim based on genetic relatedness. For example, a woman might equally claim that her breasts are a symbol of her fertility. She might further refuse to have a mastectomy or feel a deep sense of loss connected with the removal of her breast and relate this to the loss of her fertility. Similarly, the loss of a genetically related embryo might entail the loss of something that symbolises one's fertility and one might feel comforted by its continued existence, but these feelings appear to be unconnected to any feelings or beliefs about future children or parenthood. In other words, the symbolic value of an embryo may have little to do with the value of potential future children, genetically related or not. The claim that embryos are special because they embody fertility is therefore not relevant to the question of interest and will not be considered further in this thesis.

Embryos are special – physical resemblance is special

Feelings about embryos were also explained with reference to the belief that children born following embryo donation would look very much like their progenitors. Significantly, a number of participants felt that close physical resemblance engenders stronger emotional feelings towards genetically related children and that this possibility would make it too difficult to cope with donation of spare embryos to others (Code 17). A few of the participants speculated on how they would feel if a grown up child resulting from their donation ‘turned up on the doorstep’ in need. One individual suggested that he would feel more warmly towards such a child than towards a stranger in similar need, if a close resemblance existed between the child and his existing son (Interview 15b). Others suggested that they would feel more strongly connected to such potential children *because* they would share a close physical likeness to spouses, partners, or existing offspring (Interview 16b, Interview 6f).

Notice that these responses illustrate three different claims about notions of physical likeness between progenitors and their offspring. Firstly, they reflect two empirical claims, 1) that persons with genetic relationships more closely physically resemble each other more than do persons who are not genetically related, and 2) that people form closer emotional attachment towards people whom they physically resemble. They also suggest that 3) people feel a greater responsibility towards people whom they physically resemble.

Clearly these claims are relevant to questions about the role of genes in moral parenthood. The claims illustrated here will be considered further in the following chapter.

Embryos are special- they engender strong emotions

Other examples of how participants feel about their embryos were captured by responses describing strong emotional ties or feelings of attachment towards embryos, or the possible future child that might result from their donation (Code 16, 14, 21). Several participants speculated that these emotional ties would be too strong to ignore

or that they would be so powerful as to draw genetic parents to their offspring, even where they had never met (Code 16). Others expressed strong emotions and described feelings of guilt or conflict in having to choose between equally unacceptable options regarding the fate of their spare embryos (Code 1).

In reflecting on the option of discarding their embryos, several participants explained that this was the only option that would release them from the emotional bond they felt towards their embryos, or the future children that might result (Code 21, 24). Others who had donated their spare embryos described a sense of both guilt and relief on finding out that this donation had not resulted in a successful ongoing pregnancies or live birth (code 30).

These responses indicate that some people believe that their emotional tie to their embryos, and the children they might become, will continue for the life of the embryo or child, and that as long as the embryo continues to exist they will feel an emotional bond to it. They also suggest that emotional ties to genetic kin are very strong, involuntary and immutable.

What is the relevance of how begetters feel in determining the role of genes, are emotional attachments morally weighty? One obvious possibility is that emotional attachments are important because they generally justify special duties and obligations. In other words perhaps the obligations and duties associated with moral parenthood are generated in the same way that special obligations are generally thought to arise between friends, spouses or other people with special relationships. This kind of reasoning suggests the claim that begetters have special obligations towards their offspring because they feel a strong emotional attachment towards them and that having strong feelings for someone generates special obligations towards them. This claim will be considered further in the following chapters.

My Embryo = my child, my family's child

As illustrated in codes 11 and 12, in talking about their embryos or the children that might result from their donation, many participants spoke of 'my baby' and 'my child'. Several people stressed the fact that if they donated embryos and these successfully gave rise to a pregnancy and birth that the resultant child would *still be* 'my child' despite the fact that others would gestate, give birth to and nurture this child. Others indicated that any genetic offspring would also be a grandchild and a sibling, and that this relationship remains a fact despite the circumstances of the child's birth, or any contractual arrangements stating otherwise. These responses imply that genetic connections are important not just between progenitors and their offspring but that significance is attached to them in relation to the extended family (code 12). A few people suggested that concern for their parents or for their existing children in the face of knowledge that their grandchild or sibling 'was out there somewhere' weighed heavily in their decision- making about their surplus embryos. Others described their embryos as a unique combination of theirs and their spouses genetic makeup and therefore uniquely '*our child*'.

How should we understand the notion of *my child* in relation to parental claims and obligations? In the next chapter I further explore the notion that *my genetic child* is *my child* and, with reference to the current philosophical literature, examine the possible significance of this claim.

Genetic parenthood and responsibility

One reason for attaching weight to the fact that a genetically related child is 'my child' in the sense referred to above is, according to a few participants, grounded in the fact that they have some choice in whether or not this child exists. As illustrated by quotes 4b, and 5d (Code 18) some participants believed that choosing to donate an embryo could amount to causing a child to exist. They further suggest that causing a child to exist makes them responsible for any child that results from their donation (Code 18,). Notice that some of the responses indicate that embryo donors would not just *feel* morally responsible for any children born from their donation (Interview 4b, 5d), but

would *be* responsible (Code 18, Interview 20 quote a, Code 19). This claim is reflected in the fact that some participants believed that they have duties for future children from their donated embryos, such as those to promote their welfare. Take for example the views expressed in interview 20 quote a (Code 18). This quote suggests genetic parents who do not raise their offspring are somehow failing in their duties and that discarding embryos is one way of discharging ones duties towards genetic children, the other is having and raising such children.

Similarly the quotes illustrated in Code 23 show that some people would be more likely to donate their embryos to another couple if they could have some choice about the recipients. They suggest that information or knowledge about the ability of the recipients to perform parenting roles or their ability to provide a supporting home environment, in particular, would positively impact on their willingness to donate surplus embryos. Concerns about the future welfare of their genetic offspring (Code 27) illustrate, in part, that for some people begetting is associated with ongoing duties (of some kind) and that even if others raise non-genetically related children, that begetters incur ongoing responsibilities that manifest regardless of how a child is raised and by whom.

It could be the case that this concern for a child's future welfare is no different to the concern that many people feel, not just begetters. But, the fact that some participants state that they would be more likely to donate if they had assurances about the future welfare of their genetic offspring suggests that they believe that it is their duty to obtain this assurance. In other words, begetting entails that I am responsible for what happens to the child that results and assurances about this child's future life are required by me (even if not exclusively) because the duty to protect this child future welfare is mine.

Overall the responses in Codes 21, 22, 26, 27 suggest that at least some begetters believe that if an embryo exists because of them, then they have ongoing duties, and

that the future welfare of such children is their concern, even if others volunteer to take on the role of raising a non-genetically related child.

To recap, the claim illustrated in this section is that genetic parents can choose or cause a child to exist and they incur responsibilities for this child. This claim is clearly relevant to questions about whether genetic parents are moral parents and is in fact the most direct statement made by the study participants of a link between genetic relatedness and moral parenthood. It is examined further in the following chapter with reference to the work of several philosophers, Nelson, Bayne and Kolers and Callaghan.

Parental obligations can be passed on

Interestingly, while many participants indicated that they had not or would not donate their embryos to another infertile couple, and many stated that they could not emotionally or morally take up this option, none of the study participants described any in principle objection to embryo donation per se. All of the respondents described the donation of spare embryos to others as a good thing to do (Code 28). Some individuals went further to suggest that the donation of embryos is the right thing to do and a brave and unselfish act (Codes 29, 30). The inability to take up this option presented for many individuals a serious moral dilemma and one that produced feelings of conflict and guilt.

These views reveal that some people believe it is at least theoretically possible for other people to successfully raise genetically unrelated children (Code 22). In other words, they suggest the belief that even if genetic parenthood gives rise to moral parenthood, a view highlighted above, moral parenthood and all it entails is in some circumstances at least, transferable to other non-genetically related individuals.

Discussion around the theme of directed donation, where potential embryo donors gave their views on the hypothetical option of choosing or having information about

potential recipients further support this interpretation (Code 23). Some participants indicated that they might be more predisposed to donating their embryos to particular recipients and suggested the type of information or knowledge about potential recipients that might both positively or negatively influence their decisions.

The fact that some participants indicated that they could not donate embryos because they believed they had duties to ensure the future welfare of children resulting from the donation shows that *they* could not transfer these duties to others. That the same individuals had no objection to others donating embryos reveals that this option is not rejected because of the ‘wrongness’ of separating genetic and social parenting in general, but based on the personal impact of *them* doing so.

This conclusion is further supported by the reflections of some participants on whether other people could adequately raise their donated embryo (Code 22). Responses related to this possibility suggest that at least some participants are comfortable with donating embryos and the accompanying duties.

Genetic parents are best

Interestingly, while none of the participants objected in principle to the possibility of embryo donation to others, a few believed that non-genetic parents are not an ideal replacement and some suggested this would not be an ideal situation for children. As illustrated in Code 24, some of these concerns relate to the future child’s welfare, how it will be raised and the attitudes or disposition of the recipients. Other responses reflect concern about the impact of denying a child access to its genetic heritage. Responses to the hypothetical option of donating embryos anonymously suggest that for some people genetic heritage is important and should not be denied to children (Code 27). Others place less importance on genetic information and describe moral parenthood as socially determined (Code 27). In contemplating the possibility of remaining anonymous these individuals suggest that it might make it easier for them

to donate their embryos, if indeed anonymity could ever be guaranteed (an unlikely event given the current Victorian legislation).

What is revealed by some of the responses, namely those voicing concern about ‘others’ raising ‘my’ embryos (Code 24) and those objecting to anonymous donation in general (Code 27), is a concern that if parenthood is transferred to others that something may be lost in the transfer. The reflections of some individuals in the study suggest the belief that genetic parents should raise their genetic offspring and that the welfare of children is best promoted when they do so. In other words, these responses suggest that while others can adequately raise non-genetically related offspring, this is not ideal because genetic parents are best placed to raise their genetic offspring. This claim, (discussed in chapter 1), will be further analysed in the following chapters in light of similar concerns raised about the separation of genetic and social parenthood by philosophers David Benatar, James Nelson and David Callahan.

Embryos as property

It is interesting to reflect on the language that some individuals used in discussing their decision-making about spare embryos. Several people used terms such as ‘my child’ and ‘my babies’ (Codes 11, 12). While the language used about embryos and children resembles language used about property and ownership, only one individual directly articulated the possibility that embryos are property or that parental claims are analogous to property rights (Code 13). The individual in question rejected this possibility and explained that she felt that her embryos belonged to her more than property belongs to someone because the embryos were a part of her. Despite the obvious disanalogies between children and property, that possibility that we ‘own’ ourselves and therefore that we own the products of our bodies is obviously relevant to questions about the claims and obligations related to moral parenthood. In the following chapter, I investigate the possibility that moral parenthood is grounded in notions of property and on claims about our ownership of embryos, gametes, or our genetic blueprint.

Entitlements/rights

The results of the Frozen Embryo study indicate that many people believe that even if they were to donate their spare embryos, they have some ongoing connection with or role to play in the lives of children born from their donation. In reflecting on the hypothetical possibility of open embryo adoption programs or arrangements allowing negotiated levels of ongoing contact with donor children, some individuals reveal that they would welcome the chance to remain connected. For some, this possibility would positively influence their decision and they describe being less likely to donate to others where ongoing contact was not an option. The view that genetic parents should be able to remain connected to their genetic offspring is sometimes based on the needs of the children (Codes 24, 27) and sometimes relates to the wishes of the genetic parent (Code 11, 16, 23).

What is clear is that at least some participants believe that a genetic tie gives them some future entitlement, to access or connect with or play a role in the lives of their offspring. This view illustrates the claim that genetic parenthood generates entitlements, authority over or rights regarding genetic offspring. It further raises the question of whether genetic parents retain any claim over or rights over their genetic offspring following embryo donation.

I consider the possibility that the transfer of moral parenthood entails the transfer of all rights and claims in the following chapters where I discuss the possibility that genes do give rise to parental claims and when, if ever these are abrogated.

Summary

The Frozen Embryo study reveals that the decisions that people make about their surplus embryos are for many people difficult moral decisions and reflect views about the moral status of embryos, the desire to help other infertile couples and views about parenthood. Importantly, for the purpose of this study, these views are, as predicted, largely tied up with the significance of genetic parenthood and the meaning attached

to begetting. My study reports on the reasons that people give for their decisions about their spare embryos and from these uncovers a number of different views about the significance of genetic relatedness. These views suggest the following as relevant to the thesis question because they are possible claims about the nature of genetic parenthood and its relation to moral parenthood:

Physical resemblance = moral obligations: That stronger emotional bonds are formed between people who physically resemble each other and strong emotional bonds give rise to moral obligations. Genetic parents thus incur obligations for their offspring because they share a physical resemblance.

Genetic ties = emotional ties: That begetters are moral parents because enduring emotional bonds are formed between progenitors and their offspring.

My Genes = my child: The claim that a child that is part of me or comes from my body or share my genes is my child and therefore that I have prior claim to or obligations towards this child.

Begetting generates obligations: Begetting gives rise to moral parenthood because begetting causes a child to exist, and people are morally accountable for children that they cause to exist.

Parental obligations are transferable: The obligations associated with begetting are not immutable, others can take on moral parenthood even if genetic parents incur moral parenthood.

Genetic parents are best: Genetic parents are moral parents because this has the best outcome for children, adults and society.

Genes = property: The duties and rights associated with moral parenthood are grounded in the fact that we are the owners of our genetic material and therefore the owners of our embryos.

Begetting generates entitlements: Begetting gives rise to decisional authority over embryos and entitles genetic parents to ongoing contact or information about their genetic offspring.

Each of these claims provides a starting point for examining the role of genes in determining moral parenthood. In the following chapters, each of these eight claims is further analysed in light of the current philosophical literature to determine if there are coherent arguments in their support. Reference to the current philosophical literature will in turn reveal new varieties of claims and theories, some of which will support the views above and others that will diverge from them. In the following chapters both claims drawn out from the Frozen Embryo study and those revealed in the literature will be considered.

The ‘claims’ illustrated by the Frozen Embryo study are discussed as follows:

Chapter 3	Physical resemblance = moral obligations Genetic ties = Emotional ties My Genes = My child
Chapter 4	Begetting generates obligations
Chapter 5	Parental obligations are transferable Genetic parents are best
Chapter 6	Genes = property Begetting generates entitlements.

The question on which the following chapters focus is *are there sound arguments to support the beliefs and intuitions about the significance of begetting captured in the Frozen Embryo study and reflected in the current philosophical literature?*

CHAPTER 3. ‘MY CHILD’: SPECIAL OBLIGATIONS FOR GENETIC OFFSPRING?

Introduction

In the previous chapter, I presented the key findings of an empirical study that elucidates how people feel about genetic parenthood in the context of IVF and decisions about surplus human embryos. I reasoned that the decisions that people make about their embryos necessarily reflect, to some extent, the weight that they attach to begetting, uncomplicated by the facts usually associated with genetic parenthood (which standardly involve gestating, giving birth to and raising a genetically related child). The findings of the Frozen Embryo study provide a starting point for sorting out claims about the moral weightiness of begetting.

The Frozen Embryo study, in summary, reveals eight themes that capture reasons given by participants to explain the meaning they attach to genetic parenthood. As explained in the previous chapter, these themes represent potentially viable candidates for explaining whether begetting is morally weighty, and if genetic parenthood defines moral parenthood. In the following chapters each of the eight themes is treated as a claim and analysed, in light of the current literature, to determine whether there is a sound theoretical basis for that claim. In this chapter, the first three of these themes are discussed and analysed: 1) that genetic ties generate physical resemblance and moral obligations, 2) that genetic ties give rise to emotional ties, and 3) that a child with ‘my genes’ is *my child* to whom I have special obligations.

I begin in section 1 by considering the notion that stronger emotional bonds are formed between people who *physically resemble* each other and strong emotional bonds give rise to moral obligations (the ‘physical resemblance’ account). In section 2 I explore the possibility that emotional attachments are morally weighty in determining moral parenthood because they form the basis of special obligations (the ‘emotional attachment’ account). Finally, in section 3 I examine the idea that my genetic child is

special and the possibility that adults incur obligations for children that share their physical or genetic constitution (the ‘my child’ account).

The analysis in this chapter concludes that none of the three ‘intuitive’ accounts of parenthood considered can coherently explain how parental obligations are generated or why genetic parenthood entails moral parenthood. What these accounts have in common is: a) an attempt to specify what makes a genetically related child special and different to any other child and b) an underlying assumption that this difference is morally relevant and generates parental obligations. My analysis shows that while some features of genetic relatedness might sometimes make a genetic child special, neither physical resemblance, emotional attachment or sharing genes are the basis of parental obligations, because none of these features can show why this specialness is morally relevant in a way that would make it the basis for moral parenthood.

1. The ‘Physical Resemblance’ Account

In reflecting on the possibility of a future child resulting from their donation of an embryo to another infertile couple, several of the participants in the Frozen Embryo study described how they would feel about seeing a child that ‘looked like me’ or ‘looked like my partner or my existing children’. Many of these individuals indicated that they believed that the emotional connection that they would feel towards such future children would be very strong and because of this they could not donate an embryo knowing that others would raise ‘their’ child. Some thought that they would be drawn to children that looked like themselves and unable to detach themselves. A few people suggested that the strength of obligations they felt towards children would be greater towards those children that share a physical resemblance to themselves or their existing siblings.

In the previous chapter I suggested that these responses illustrate three different claims: 1) that people with genetic relationships more closely physically resemble each other than do people who are not genetically related, 2) that people form stronger emotional attachment towards people whom they physically resemble and 3) that

people have a greater responsibility towards those they are emotionally attached to. In this section I examine these claims and whether physical resemblance is morally weighty in determining moral parenthood.

It might appear that physical resemblance is too trivial a feature to determine moral parenthood and that the physical resemblance account is destined to fail before it begins. However, I suggest that it is important to explore the weight attached to physical resemblance, even if for no other reason, because it is highly sought after¹ and frequently referred to as distinguishing genetic relationships. Further, physical resemblance was a recurring theme in the responses of the participants of the Frozen Embryos study.

For the sake of clarity I present the claims elucidated above as a formal argument as follows:

P1: genetically related people more closely physically resemble each other than people who are not genetically related

P2: people form closer emotional attachments with people whom they physically resemble than with others

P3: strong emotional attachments produce special or greater moral obligations

C: Therefore genetic parents have special or greater moral obligations towards their genetic offspring than to non-genetically related children.

In relation to the question of interest were this argument sound, it would show that genetic parents incur parental obligations for their offspring and that these obligations are special or greater than their obligations towards other children. It would also

¹ For example similarity of 'racial' and other physical features is prioritised when matching gamete and embryo donors with recipients. See Fuscaldo, G. (2003). Gamete donation and 'race'. In D. Cooper (Ed.), *Nature encyclopedia of the human genome*. London; New York: Nature Pub. Group.

explain our intuition that other genetic relationships are special and that genetic kin have special obligations to each other.

The problems with this argument are almost self-evident. It is clearly counterintuitive to suggest that we have special obligations to people whom we physically resemble. Were this the case, then any parent could divest themselves of obligations for children who did not look like them, and complete strangers who happened to share physical resemblance would incur special obligations for each other. If physical resemblance generates special obligations then I would have an obligation to save a random stranger that looks like me, or perhaps even my pet dog, in preference to my daughter if she did not bear as close a physical resemblance to me.

For the sake of completeness I also point out that while both premise 1 and 2 appear to be self evident facts, the veracity of both of these empirical claims is contested. A substantial body of data and argument has been presented in support of the contention in premise 2, that emotional ties are linked to physical resemblance. Some studies suggest kin recognition confers evolutionary advantage and that children who do not physically resemble the adults charged with their care are more at risk². Similarly arguments against 'inter-racial' adoption include 'evidence' that parents and children who do not share physical racial characteristic such as skin colour, find it more difficult to establish emotional bonds³. It is also claimed that the degree of attraction between (heterosexual) men and women is a factor of the degree to which they are alike in certain physical characteristics⁴. Predictably there is ongoing debate

² Daly, & Wilson. *The Truth About Cinderella*

Also arguments by Daly, M., & Wilson, M. (1984). A Sociobiological Analysis of Human Infanticide In G. Hausfater & S. B. Hardy (Eds.), *Infanticide : comparative and evolutionary perspectives* (pp. 487-502). New York :: Aldine Pub. Co. Daly and Wilson argue that babies gain from displaying fathers phenotypic traits and that 'adulterine' will suffer a cost ranging from neglect to extreme abuse. See also Bressan, P. (2002). Why babies look like their daddies: paternity uncertainty and the evolution of self-deception in evaluating family resemblance. . *Acta Ethologica*, 4, 113-118

³ see Rothman, B. K. (2005). *Weaving a family : untangling race and adoption*. Boston: Beacon Press. Chapter 10 also Cross Jr, W. E. (1991). *Shades of Black: Diversity in African-American Identity* Philadelphia: Temple University Press.

⁴ Alvare, L. (2005). Narcissism guides mate selection: Humans mate assortatively, as revealed by facial resemblance, following an algorithm of "self seeking like". *Evolutionary Psychology*, 2, 177-194 Jaffe, K. (2002). On sex, mate selection and evolution: an exploration. Comments on Theoretical Biology. *Comments on Theoretical Biology*, 7, 91-107

over the soundness of these data and an equal body of counter-claims exists denying that physical resemblance generates closer emotional attachments⁵.

Interestingly it is not only premise 2 that is open to debate. While it may appear to be simply a fact of life that children resemble their parents, premise 1 is also contested. Contrary to widespread belief, evidence suggests that children look no more like their parents than their resemblance to any other randomly selected adult⁶. In one fascinating study Paula Bressan and Maria Martello show that the extent to which we believe that people resemble each other is predicted by our beliefs about their relationships⁷. Bressan and Martello report on three studies where 100 men and 100 women were asked to estimate the facial resemblance of 40 photographically portrayed child-adult pairs. Each photograph of an adult-child pair was labeled with either truthful or deceitful information. Ten photos of a related adult-child pair were truthfully labeled as related and ten photos of a related pair were deceitfully labeled as unrelated. Similarly, ten photos of an unrelated pair were deceitfully labeled as related and 10 photos of an unrelated pair were truthfully labeled as unrelated. Bressan and Martello found that on average, two genetically related individuals labeled as unrelated were judged to be as resemblant as two genetically unrelated individuals. Likewise two genetically unrelated individuals labeled as related, were judged to be as resemblant as two genetically related individuals.

According to their evidence, people are twice as likely to perceive that an adult and child physically resemble each other if they are told that the pair is genetically related,

⁵ See for example Bressan. Why babies look like their daddies: paternity uncertainty and the evolution of self-deception in evaluating family resemblance. . This paper denies any evolutionary advantage in physical resemblance- and argues that 'it is advantageous for babies to abstain from showing paternal marks. It is advantageous for parents to produce offspring lacking distinctive signature cues' because this in turn decreases paternity uncertainty. It is advantageous for all parties to decrease paternity uncertainty because any link between harming babies and paternal disinvestment decreases the fitness of both mothers and fathers.

⁶ Accuracy in distinguishing related adult-child pairs from unrelated adults –child pairs has been shown to be only slightly higher than chance. This result was consistent for children aged from 6 months to 18years. Nesse R M, Silverman A, & Bortz A. (1990). Sex differences in ability to recognize family resemblance. *Ethology and Sociobiology*, 11, 11-21. When asked to rate the resemblance between a child and three possible mothers or fathers, one of whom was the actual parent, children were judged no more similar to their parents than to random adults, and Christenfeld NJS, & Hill EA. (1995). Whose baby are you? *Nature*, 378, 669.

⁷ Bressan, P., & Martello, M. F. D. (2002). Talis pater, talis filius: perceived resemblance and the belief in genetic relatedness. *Psychological Science*, 13, 213-218.

than if they are told the pair are unrelated. Apparently the belief that genetically related individuals more closely resemble each other is often something that we simply infer or are programmed to seek. Various hypotheses have been put forward to explain this behaviour including explanations about the evolutionary advantage of exaggerating a perceived child-parent resemblance⁸.

Geneticists remind us that it is impossible to attribute physical resemblance to genetic resemblance⁹. As Mark Cohen argues in debunking the myth that ‘race’ is a biological category:

“Of the 50,000 to 100,000 pairs of genes needed to make a human being, perhaps 35,000 to 75,000 are the same in all people, and 15,000 to 25,000 may take different forms in different people, thus accounting for human variation. But only a tiny number of these genes affect what many people might consider to be racial traits. For example, geneticists believe that skin color is based on no more than 4 to 10 pairs of genes. The genes of black and white Americans probably are 99.9 per cent alike.

*In addition, studies of the human family tree based on detailed genetic analysis suggest that traits such as skin color are not even good indicators of who is related to whom, because the traits occur independently in several branches of the human family. When we consider the pairs of genes that may differ among humans, we see that, beyond the genes determining skin color, black people from Africa, Australia, and the south of India are not particularly closely related to each other genetically”.*¹⁰

⁸ For example as alleged above because shared physical resemblance could increase paternal investment in children. Interestingly the converse is also claimed, that a truly efficient evolutionary strategy would combine a poor sensitivity to actual relatedness with a strong effect of presumed relatedness, ie that paternal uncertainty selects against father-child resemblance. If father-child resemblance were less ambiguous then children who unambiguously do not resemble father risk maltreatment and possibly death, ie evolutionary pressure would have led to us looking alike but evolution covers up for extra-pair copulation. French, R. M., Brédart, S., Huart, J., & Labiouse, C. (2000). *The resemblance of one-year-old infants to their fathers: refuting Christenfeld & Hill (1995)*. Paper presented at the Proceedings of the 22nd Annual Conference of the Cognitive Science Society

⁹ Paabo, S. (2001). The human genome and our view of ourselves. *Science*, 5507, 1219-1220. Note that this is also true of claims about genetic relatedness and psychological resemblance. In a forthcoming paper David Velleman discusses the importance of genetic relatedness in producing psychological resemblance between family members. I contend however, that the same arguments that I used to dismiss the claim that genetic relatives physically resemble each other (in summary that physical features are complex and not solely genetically determined) also hold for psychological resemblance. Velleman, J. D. (forthcoming). Family History. *Journal of Philosophical Papers*. <http://www-personal.umich.edu/~velleman/Work/ORIGINS.pdf>

¹⁰ Cohen, M. N. (1998). *Culture, not race, explains human diversity*, from <http://chronicle.com/mate.lib.unimelb.edu.au/che-data/articles.dir/art-44.dir/issue-32.dir/32b00401.htm> Cohen,

More simply, very few genes determine visible physical traits and therefore people who share physical traits may not be closely genetically related. Conversely, closely genetically related people may not share physical traits. Physical resemblance is in part genetically determined, partly a matter of perception, affected by environmental factors, and can be acquired¹¹.

I conclude this section by reiterating that it is highly problematic to suggest that people have greater obligations to those with whom they share physical resemblance. Further, the empirical claims set out in premise 1 and premise 2 are widely debated and opposing evidence further undermines the physical resemblance argument. But, perhaps a variation of this argument can succeed if we set aside claims about physical resemblance and begin with premise three. It could be argued that the reasons that parents feel emotionally attached to their genetic children is largely irrelevant and that the simple fact that someone loves a child or is emotional attached to her gives rise to special obligations towards her. I consider this possibility in the following section.

M. N. (1998). Culture, not race, explains human diversity, *Chronical of Higher Education*, April 17, 1998 from <http://chronicle.com.mate.lib.unimelb.edu.au/che-data/articles.dir/art-44.dir/issue32.dir/32b00401.htm> See also Hannaford, I. (1996). *Race : the history of an idea in the West* Washington, D.C. : Baltimore, Md. : Woodrow Wilson Center Press. Hannaford, I. (1996). *Race: the history of an idea in the West*. Washington, D.C.: Baltimore, Md.: Woodrow Wilson Center Press.

¹¹ See for example Zajonc R B, Adelman, P. K., Murphy, S. T., & Niedenthal, P. M. (1987). Convergence in the physical appearance of spouses. *Motivation and Emotion*, 11(1), 335-346 A fascinating study that addressed the question of whether people who live with each other for a long period of time grow physically similar in their facial features. The results showed that there is indeed an increase in apparent similarity after 25 years of cohabitation. The authors suggest that a promising explanation of this phenomenon is one based on a theory of 'emotional efference'. This theory proposes that that habitual use of facial musculature may permanently affect the physical features of the face. The implication of this theory holds further that two people who live with each other for a longer period of time, by virtue of repeated empathic mimicry, would grow physically similar in their facial features. Kin resemblance, therefore, may not be simply a matter of common genes but also a matter of prolonged social contact.

2. The 'Emotional Attachment' account

Many of the participants of the Frozen Embryo study¹² described feeling a strong emotional attachment to their embryos. One of the key findings of our study was that many individuals indicated that they would prefer to have their surplus embryos destroyed rather than donate them to another infertile couple because they felt emotionally connected to their embryos; and they believed that these feelings would continue to exist even if others raised their genetic child. Could a sound account of the moral significance of genetic ties be based on the idea of emotional attachment?

The finding that genetic parents feel emotionally bonded to their offspring is not surprising and clearly predictable. Biologists remind us that there are sound evolutionary reasons for valuing genetic connections, that producing genetic offspring and concern for the welfare of our genetic kin ensures the survival of our own genetic material in the ongoing gene pool. As the demand for reproductive technologies demonstrates, the need to have and care for genetically related children is indeed a powerful desire. It is sometimes argued that people's feelings about their embryos or their genetic kin are instinctual and that the strong feeling of attachment that the study's participants describe for their embryos, or future offspring, simply reflect the natural facts of genetic relatedness. However, as discussed in Chapter 1, to what extent these feelings are in fact natural and instinctual, as opposed to culturally reinforced, remains a topic of debate. Moreover, as argued in that Chapter, recourse to evolutionary arguments or 'evidence' of what is natural does not in fact progress the question under investigation. It may be true that the process of natural selection explains why certain feelings towards our genetic kin exist, but how are such feelings related to moral parenthood? Is it the existence of strong feelings of attachment that determines whether or not a person is a moral parent?

¹² And in previous studies investigating peoples attitudes towards their surplus embryos see for example de Lacey. Parent identity and 'virtual' children: why patients discard rather than donate unused embryos. , McMahon, Gibson, Leslie, Saunders, Porter, & Tennant. Embryo donation for medical research: attitudes and concerns of potential donors. , Oke, Hammerberg, & Blood. *Frozen Embryos- what decisions to make?* , Tinney, Hammarberg, Breheny, & Leeton. *Deciding the fate of excess frozen embryos*

It might appear at first glance that the answer to this question is self-evident. Feelings of emotional attachment are morally weighty because emotional connections are necessary for human flourishing. Obviously children might survive, but do not flourish without the love of their parents, nor do most parents fare well without their children. However, the fact that strong feelings exist towards genetic offspring is not in itself a reason to assign moral parenthood to begetters. For this to be justified, some additional argument is required to show how strong emotional attachments to children are related to parental obligations.

In the previous chapter I suggested that one obvious possibility is that moral parenthood is just a variation of the special obligations that we have (or can justify) towards our friends, spouse, family or other people we feel strongly emotionally attached to. It is generally accepted that even though we have obligations towards all people, including complete strangers, we can justify special or overriding obligations towards our friends and loved ones. Similarly, the obligations associated with moral parenthood could therefore belong to genetic parents because of the strong feelings of attachment they feel towards their offspring. Thus, to the extent that genetic parenthood gives rise to strong emotional attachment (irrespective of whether or not this occurs naturally or instinctually or as a result of any physical resemblance), it could also be the basis of the special or greater moral obligations that parents have towards their children. Expressed more formally this reasoning suggests the following argument:

P1: strong emotional attachments produce special or greater moral obligations

P2: genetic parents feel strongly emotionally attached to their genetic offspring

C: Therefore genetic parents have special or greater moral obligations towards their genetic offspring than to other children

If we assume that moral parenthood is at least a subset (even if not wholly) the special or greater moral obligations referred to above then the success of this argument

would show that the duties associated with moral parenthood fall to genetic parents. On the face of it, this argument appears to summarise our intuitive reasons for prioritising our genetic offspring over other children. However, I will show that argument is open to challenge on several fronts and that it does not do the job that is generally associated with genetic definitions of parenthood.

To begin with, premise 2, this appears to be true, at least sometimes, as revealed by the participants of the Frozen Embryo study. Note that the success of the argument does not require that only genetic parents feel emotionally attached to their offspring, nor that they have greater attachments than any one else to the same child. Of interest is whether genetic parenthood is sufficient to generate parental obligations, irrespective of whether or not this is also true of non-genetic parenthood or of whose obligations are overriding. Further, the argument does not require that premise 2 is always true. Even if *all* begetters do not share these feelings of emotional attached to offspring, the fact that *some* do have these feelings could entail, according to the argument, that when they do have such feelings they also have special obligations to their offspring. Given that premise 2 is true does the argument succeed?

Consider now premise 1; this appears to describe the very nature of our social roles with regard to the duties and obligations we have towards people with whom we are intimate for example, our friends and the people we love. However, it proves quite difficult to explain why the way that we feel about others has special moral relevance. Consider the following example borrowed from Dianne Jeske and Richard Fumerton;

“...consider a situation in which your child is in grave danger but the only way you can aid your child is at the expense of other children. Suppose, for example, you took your child canoeing. After taking the wrong fork in the river, your canoe overturns in the rapids. As it turns out, another canoe with two children has been caught in the same rapids and has

*suffered the same fate. You judge (correctly) that you can either save your child or save the two strangers but you cannot do both....What should you do?*¹³

Jeske and Fumerton suggest that in response to this question a great many of us would conclude that it is morally permissible to put our own child's life first, or that we are in fact morally obliged to do so.

Jeske and Fumerton use this example in an investigation of one of the often-debated problems associated with consequentialist theories of morality. Such accounts have difficulty accommodating our intuition that we have greater obligations and should give preferential treatment to our loved ones and people with whom we share special relationships. The problem with consequentialist theories that hold a non-relativistic view of value is how to explain the moral relevance of the fact that it is *my* child. If my child's life has intrinsic value and the other two children's lives represent twice as much intrinsic value then how can I be permitted to save my child's life at the expense of the other two? Attempts to resolve this problem include calculations about how much value is preserved in my saving one or other of the lives. For example, it is postulated that one of the long-term consequences of denying that people have special obligations towards their loved ones is an overall reduction in value or happiness. The consequence of failing to save my child might be that ... *I become hardened to the needs of my other intimates and even incapable of forming intimate relationships that allow me to promote value*¹⁴. But, as with all consequentialist arguments, there often exist or can be imagined situations where the consequences are different. For example, my failure to save the other two children could result in both of their parents equally becoming hardened against forming other intimate relationships and thereby resulting in an overall reduction in the value that such relationships produce.

These are old and classic arguments, and there are of course many different strategies for accommodating special obligations within consequentialist frameworks including

¹³ Jeske, D., & Fumerton, R. (1997). Relatives and relativism. *Philosophical Studies*, 87, 143-157 p146

¹⁴ Jeske, & Fumerton. Relatives and relativism. p149

appeals to different versions of consequentialism. My aim here is not to resolve a problem as old as consequentialist theories themselves, but more simply, to point out that the claim stated in premise 1 above, although intuitively appealing, is not unproblematic for at least for some versions and theories of morality. Some schools of thought simply reject the notion that we have special duties to persons with whom we have special relationships. The views espoused by some philosophers¹⁵ entail that, all other things being equal, (for example that we are equally able to do so and that the consequences are equivalent) there is no *prima facie* obligation to save my child ahead of any other child in danger. Notice however, that if we cannot justify any special duties for intimates and loved ones then we cannot claim that we have special obligations to anyone we feel attached to irrespective of whether they are genetically related to us or not. In other words denying premise 1 denies much more than just the claims of genetic parents.

While non-consequentialist theories are better able to accommodate our intuitions regarding our special relationship and special duties the fact is that this remains a difficult problem in the philosophical literature. It is not my aim here to present a valid justification for any or all of our special obligations. More simply I wish to investigate the possibility that if such obligations exist and if they can be coherently justified, the same justification could also account for an intuition that genetic parents are moral parents.

However, even given that any special obligations can be justified there is still a problem with the argument. There is something peculiar about claiming that genetic parents have special obligations towards their offspring because they feel emotionally attached to them. After all, if this were true then any genetic parent could divest themselves of parental duties at times when they felt ‘unattached’ to their children. Indeed if emotional attachments ground moral parenthood then it is quite possible that no adult will feel attached to some children and therefore that some children could have *no parents*, (as was the case in the Danish surrogacy case). Similarly, if

¹⁵ Discussed in Jeske, & Fumerton. *Relatives and relativism*.

emotional attachments generate obligations then I would have obligations to anyone I feel attached to. Thus it would follow that if I felt attached to a handsome stranger, say, a movie star, or my chiropractor, I would then have special obligations for them greater than those I have regarding other strangers.

I suggest that the problem with the argument is that premise 1 is false because emotional attachments do not *generate* special obligations. While I might have special or overriding obligations towards my spouse or friends, and I also feel emotionally attached to them, I suggest that my obligations do not arise *because* of my feelings. My obligations to my spouse or friends could be explained by the existence of a promise, implied or otherwise, because there exists an understanding of reciprocity between us, because our feelings for each other are mutual or simply because we voluntarily undertake to care for each other. In other words the nature of the interpersonal relationships that I have with my spouse and my friends is what generates my special obligations towards them and not simply the fact that I have strong feelings for them. While it is notoriously difficult to explain the special obligations that arise from special relationships, that these require the existence of a relationship or shared understandings about social roles, is not in question. The difficulty with understanding moral parenthood as an example of the special obligations that exist between people who care for each other is that genetic relatedness is not like these relationships, and arguably, is not a relationship at all. The relationship between a parent and child is not like the relationships that exist between individuals who voluntarily come together and make commitments to each other. In the words of James Nelson, the obligations of parents towards children are not '*elective affinities*'¹⁶ or like the attachments we have because of relationships we voluntarily enter into.

The following bizarre example illustrates that feelings, relationships and obligations can arise independently of each other. In his book, *The Seven Faces of Eve*, geneticist Professor Bryan Sykes recounts the story of the discovery of the 'Iceman', a 5,000 year old frozen body recovered from the Italian Alps in 1991. His DNA analysis of the

¹⁶ Nelson. *Reproductive Ethics and the Family* p 4. This term is from Goethe, J. W. v. (1971). *Elective affinities*. Harmondsworth : Penguin.

Iceman identified a living relative, Marie Moseley, an Irish management consultant from Dorset. Sykes describes that when she learnt of the genetic relationship,

“Marie began to feel something for the Iceman. She had seen pictures of him being shunted around from glacier to freezer to post-mortem room, poked and prodded, opened up, bits cut off. To her, he was no longer the anonymous curiosity whose picture had appeared in the papers and on television. She had started to think of him as a real person and as a relative.”¹⁷

I suggest that even if, as evidenced in this example, strong feelings are generated by genetic relatedness, (with or without our knowledge of this relationship) these feelings alone, in the absence of any other morally weighty facts do not generate special obligations. It is clearly incoherent to claim that Marie has an interpersonal relationship with the Iceman or that the fact that she ‘feels something for him’ because they share similar DNA, entails that she incurs obligations towards him (or his remains). My point is that ‘feelings’ can exist independently of meaningful interpersonal relationships and do not in themselves generate obligations.

Re-stating the argument:

P1: strong emotional attachments produce special or greater moral obligations

P2: genetic parents feel strongly emotionally attached to their genetic offspring

C: Therefore genetic parents have special or greater moral obligations towards their genetic offspring than to other children

I conclude that this argument is not sound because P1 is false and moral obligations are generated independently of feelings of emotional attachment.

¹⁷ Sykes, B. (2002). *The Seven Daughters of Eve: The Science That Reveals Our Genetic Ancestry*. New York: Norton p8

Further, even if some version of this argument did succeed, the claim that emotional attachments are morally weighty in determining moral parenthood is unworkable because it fails to distinguish between competing parental claims and disclaimers and creates the problem of too many children and too many parents.

A further example will clarify this problem.

Consider again Fumerton and Jeske's example above of the children canoeing. Imagine now that the children in danger are, in canoe A, my genetic child, in canoe B my next door neighbour's child and in canoe C a genetically unrelated child that has been gestated and raised by me. It is quite possible that I could feel emotionally attached to all three children. Is there something to distinguish my obligations to the child in A from my obligations to the other children, or indeed to any other persons I feel emotionally attached to? In other words if emotional attachments generate special obligations then these obligations appear to be not very special at all and appear to exist towards a large number of people, not especially to my genetic offspring.

To further add to this example, imagine that a bystander say Carol, is also standing on the river-bank feeling very emotionally attached to the child in canoe A. Can we distinguish between any duties generated by Carol's feelings for the child in A and those generated by my feelings for the child in A? The problem with assigning moral parenthood on the basis of emotional attachments is that even if special obligations are linked to emotional attachments, frequently a number of different people, both genetically related and unrelated, feel emotionally attached to the same child. It is often precisely because of competing emotional ties that disputes arise over who is a child's moral parent.

Perhaps what is actually being claimed by people who feel emotionally attached to their genetic offspring is that theirs is an example of a different kind of emotion or a stronger emotion than exists between other people who feel emotionally attachments

to each other. Perhaps genetic attachments are unique and this is what uniquely identifies genetic parents as moral parents. A wealth of empirical data has been published asserting that not only is emotional bonding facilitated amongst genetic kin, but that the strength of these bonds is a factor of the degree of genetic relationship¹⁸ If we believe that an essential feature of meaningful human relationship lies in our ability to form strong emotional attachments and that one measure of the success of intimate relationships is how strong these bonds are, it could be argued that we should prioritize relationships that maximise such attachments. Thus if stronger attachments are formed between genetically related parents and their offspring than are formed between non-genetically related people, then genetic parents should be given priority in the face of competing parental claims or disclaimers.

Again however this argument has several problems. Firstly the claim that genetic relatedness generates stronger attachments remains highly controversial. On the one hand it is claimed that shared ancestry elicits altruism¹⁹ that genetic parents have stronger commitments to their offspring than do other 'parents' and that children

18 A large literature examines the differential parental investment for stepchildren and genetic children. Reviewed in Anderson, K. G., Kaplan, H., Lam, D., & Lancaster, J. B. (1999). Paternal care by genetic fathers and stepfathers II: Reports by Xhosa high school students. *Evolution and Human Behavior*, 20, 433-451. Much of this literature contrasts outcomes for children living in different family structures. These studies generally show that, compared to children living with two genetic parents, children living with a single mother or with a mother and stepfather are more likely to experience a number of adverse or socially undesirable outcomes, such as poorer academic achievements, criminal behaviour, poverty, drug and alcohol abuse and marital instability. See for example Biblarz, T. J., & Raftery, A. E. (1999). Family structure, educational attainment, and socioeconomic success: Rethinking the "pathology of patriarchy." *American Journal of Sociology*, 105, 321-365, Dawson, D. A. (1991). Family structure and children's health and well-being: Data from the 1988 National Health Interview Survey on Child Health. *Journal of Marriage and the Family Relations*, 53, 573-584, Harris, K. M., & Marmer, J. K. (1996). Poverty, paternal involvement, and adolescent well-being. *Journal of Family Issues* 17, 614-640. In addition a number of studies have analysed direct measures of parental investment in or involvement with children, and found similar disparities. Among children of current unions, parents tend to invest more in genetic offspring than in step offspring; similarly, parents invest more in genetic children of current unions than in genetic children of previous unions. See for example Anderson, K. G., Kaplan, H., Lam, D., & Lancaster, J. B. (1999). Paternal care by genetic fathers and stepfathers II: Reports by Xhosa high school students. *Evolution and Human Behavior* 20, 433-451, Case, A., Lin, I.-F., & McLanahan, S. (1999). Household resource allocation in stepfamilies: Darwin reflects on the plight of Cinderella. *American Economic Review Papers and Proceedings*, 89, 234-238, Zvoch, K. (1999). Family type and investment in education: A comparison of genetic and stepparent families. *Evolution and Human Behavior* 20, 453-464. Evolutionary perspectives on parental care emphasize two reasons for parental investment in offspring. First, parents invest in genetic offspring because doing so increases their own genetic fitness see for example Daly, & Wilson. *The Truth About Cinderella* Second, parental investment influences that person's relationship with the offspring's other parent. For example, Flinn, M. V. (1988). Step- and genetic parent/offspring relationships in a Caribbean village. *Ethology and Sociobiology*, 9, 335-369, Kalmijn, M. (1999). Father involvement in childrearing and the perceived stability of marriage. *Journal of Marriage and the Family*, 61, 409-421. Daly and Wilson claim that a child is one hundred times more likely to be abused or killed by a step-parent than by a genetic parent. (Daly, M., & Wilson, M. (1994). Some differential attributes of lethal assaults on small children by stepfathers versus genetic fathers. *Ethology and Sociobiology*, 15, 207-217, Daly, & Wilson. *The Truth About Cinderella*

19 Oates, K., & Wilson, M. (2002). Nominal kinship cues facilitate altruism. *Proceedings of the Royal Society of London Series B-Biological Sciences*, 269, 105-109

raised by non-genetically people are 'at risk'²⁰ However these conclusions are vigorously debated and an equal body of data has been presented purporting to show that there is no significant difference between the commitment of biological and non biological parents towards their children as evidenced by outcomes for children raised by non-biological parents²¹.

Secondly even if it were possible to determine which combination of parent and child maximises emotional attachments, as I have argued in chapter 1, the question of interest is not 'which arrangements are best', but, who incurs obligations towards children? I contend that whether or not genetic relationships generate stronger emotional bonds than do other relationships makes no difference to the success of the argument above. If the argument fails because special obligations are not *generated* by emotional attachments then the strength of emotional attachment that different people feel towards the same child is irrelevant in determining who incurs parental obligations towards this child.

20 Wilson and Daly claim that the mistreatment of stepchildren, has a firm basis in the genetic investment that binds parents to biological offspring. See also Daly, & Wilson. *A Sociobiological Analysis of Human Infanticide*. In They claim that babies gain from displaying fathers phenotypic traits and that an 'adulterine' will suffer a cost ranging from neglect to extreme abuse. See also Bressan. *Why babies look like their daddies: paternity uncertainty and the evolution of self-deception in evaluating family resemblance.* .

21 Reviewed by Tomison, A. M. (1996). *Child Maltreatment and Family Structure: Discussion Paper Number 1*. In National Child Protection Clearinghouse Australian Institute of Family Studies (Ed.). <http://www.aifs.gov.au/nch/discussion1.html>. For example Gelles, R. J., & Harrop, J. W. (1991). The risk of abusive violence among children with nongenetic caretakers. *Family Relations*, 40, 78-83. Giles-Sims and Finkelhor suggest that the disproportionate number of children abused in stepfamilies may occur because adults generally predisposed to violence may be more likely to experience a marital breakup, and subsequently participate in a stepfamily Giles-Sims, J., & Finkelhor, D. (1984). Child abuse in stepfamilies. *Family Relations*, 33, 407-413. In support of Giles-Sims and Finkelhor, Wallis also suggested that non-offending family members may be more likely to report maltreaters where no biological relationship exists Wallis, Y. (1992). *The Victorian Community's Attitudes to Child Sexual Abuse*, Community Services Victoria, Melbourne. , time involvement with biological fathers and stepfathers provides opportunities to interact with stepchildren Hofferth, S. L., & Anderson, K. G. (2001). Biological and stepfather investment in children. Research Report No. 01-471, Population Studies Center, University of Michigan , visitation frequency, and physical proximity between fathers and children (e.g., Arditti, J. A., & Keith, T. Z. (1993). Visitation frequency, child support payment, and the father-child relationship postdivorce *Journal of Marriage and the Family*, 55, 699-712, Cooksey, E. C., & Craig, P. H. (1998). Parenting from a distance: The effects of paternal characteristics on contact between nonresidential fathers and their children. *Demography* 35, 187-200. See Anderson, K. G., Kaplan, H., & Lancaster, J. B. (2001). Men's Financial Expenditures on Genetic Children and Stepchildren from Current and Former Relationships. Research Report No. 01-484. Population Studies Center. University of Michigan. September 2001. <http://www.psc.isr.umich.edu/pubs/abs.html?ID=1305> for review.

In my arguments above I do not mean to imply that how people feel about children is unimportant or that emotional bonding between parents and children irrelevant. Obviously it is important that parents feel attached to children and that someone can be identified as having obligation to raise and care for children. Also obvious is that people's feelings towards their embryos can create moral conflict and anxiety, and there is a need to respect and be sensitive to these feelings. However, the fact that strong feelings exist about begetting is not in itself a reason to assign moral parenthood to begetters. It is entirely possible to respect and encourage emotional attachments between parents and children and even to accept that for some people these are more easily facilitated between genetic kin, while also accepting that obligations arise or are generated independently of emotional attachments.

In conclusion in this section I have argued that the existence of or strength of emotional attachment people feel towards their children is not a sound basis for determining who incurs parental duties. While it is clear that genetic connections evoke strong emotions in many people and even though we can sympathise with individuals who are frustrated in their attempts to satisfy their desires regarding their genetic offspring, these desires and emotions are neither necessary nor a sufficient basis for moral parenthood.

In the following section I explore another idea generated by the Frozen Embryo study. The idea summarised in theme 3 that genetic relatedness distinguishes 'my child' from any other child and determines parenthood.

3. The 'my child' account

As we see from the Frozen Embryo study, for many people embryos derived from their gametes represent *their child* and the reasons for not donating to other couples can be summarised as the desire not to be a parent or not to have a child of theirs "*out there somewhere*". Thus genetic ties are taken to define parenthood despite the fact that if donated these embryos would be raised by another family, and would entail no

financial or legal obligations²². But in what sense does “having my genes” constitute that the child that develops from a donated embryo is ‘my child’, or my parents grand-child or my child’s sibling?²³ Are there arguments to support the strongly held intuition that my genetic offspring is ‘my child’ and that therefore that I have special obligations and entitlements regarding this child?

Notice that the question above has two different foci. Firstly, I am interested to clarify whether there is, as claimed, some feature of genetic relatedness that serves to distinguish my genetic offspring from any other child. While it may appear at first glance that my genetic child is obviously special and different to any other child, the following discussion will show that in fact it proves quite difficult to define precisely what this difference is. Secondly, even if we could confidently define the feature that distinguishes genetically related children, is this feature one which grounds moral parenthood? In other words simply showing that child A is different from child B because child A shares my genes does not entail that I am therefore child A’s moral parent and have duties and obligations for child A because of a genetic relationship. Some additional account would have to be given to explain how this difference matters morally.

I begin in section 3.1 by attempting to clarify what constitutes ‘my child’ and introduce three different ways of thinking about this notion. These include (in 3.2) the possibility that what distinguishes my relationship to my child with my relationship with any other person is that ‘my child’ is material constituted²⁴ from ‘my flesh and blood’ or, (in 3.3) that ‘my child’ is one that is derived from my genetic blueprint and (in 3.4) that ‘my child’ is one defined by a combination of these features. I conclude

²² Save the requirement in Victoria and some other jurisdictions (WA, SA, UK, Sweden, NZ) that identifying information be made available to children born from donated gametes and embryos on turning 18 years of age.

²³ I do not directly consider the claim that my genetic child is special because she is special to her grandparents or her siblings. I show however that the notion of ‘my own child’ is incoherent and is equally so as a claim about a special connection for all genetic kin.

²⁴ A term I have borrowed from Kolers and Bayne who also explore the basis of parental duties and address the possibility that parenthood is grounded on the material constitution and genetic derivation Kolers, & Bayne. “Are You My Mommy” On the Genetic Basis of Parenthood.

each section by considering whether any of these features could be the source of special obligations of progenitors towards their offspring.

3.1 ‘my child’– what does it mean?

In a skillful and entertaining analysis Kenneth Alpern reflects on the notion of ‘one’s own child’ and why we attach significance to this relationship. He suggests that ‘*under the impression of being scientific*’ we have come to regard that the fundamental essence of having ‘our own child’ is in having a child that carries our genes. Alpern investigates this notion and raises a number of questions about how we might explicate gene relations. He poses the following hypothetical:

*“Suppose that, walking down the street, you were to discover that a baby in a stroller happened by chance to have exactly the same genetic makeup as you. Would this child be yours or you its parent? Would the discovery of this identity of genes necessarily or naturally engender in you deep affection for the child and concern for its well being?”*²⁵

Obviously many of us might be curious about the child in the pram, (lets call her Lucy). We may even feel emotional about Lucy, because she looks like us. But, as Alpern points out, the child in this scenario does not seem to capture what we mean when we refer to ‘my child’. I could protest that the difference here is that Lucy is more precisely my clone and not my child. But, even if the scenario is modified so that Lucy’s genotype is a replica of the genotype of my husband’s and my genetic daughter, something about Lucy appears to lack the essence of what makes a child mine. As Alpern suggests, merely happening to have the same genes is not enough to constitute having a child of one’s own, just as identical twins are not each other’s child. What is missing? It may be that the genetic makeup of Lucy is only accidentally identical to my genetic makeup, and that her genes did not come from my body. So, Lucy’s genes were not derived from me in the way that genetic children are derived from their genetic parents’ DNA “blueprint”.

²⁵ Alpern, K., D. (1992). Genetic puzzles and stork stories: on the meaning and significance of having children. In K. Alpern, D. (Ed.), *The ethics of reproductive technology* (pp. 145-169). New York: Oxford University Press p. 160

3.2 'my child' = my own flesh and blood

To take each of these possibilities in turn, Alpern suggests that one reason that Lucy does not intuitively appear to us to be the same as a child of our own is that she has not come from our bodies. In other words according to the "*my child = my own flesh and blood*" argument, what is important or makes my child really '*mine*' is that she is made from materials produced by my body. But, exactly how much of my flesh and blood is my genetic child? As molecular biologist Lee Silver explains:

*"In the fertilized egg that eventually develops into a child, a mother deposits just a single copy of DNA for each of the 23 human chromosomes. A second set of 23 DNA molecules is deposited in this same egg by the genetic father. The information present in each of these 46 DNA molecules is copied over time into 100 million, million (100,000,000,000,000) new sets of DNA molecules that are placed into each new cell formed during fetal and child development. Each of these new DNA molecules is built from raw materials that are recovered from the food that the mother, and then the child consumes..."*²⁶

Most of the DNA molecules that actually come from a child's mother or the father, if not all, disappear long before the child is born. At most only a tiny fraction of original DNA molecules from the parents survive in a few scattered cells among the millions of cells present in the child's body.

The flesh and blood argument is problematic for those arguing that genes have priority. As Kolers and Bayne point out, this argument appears to give a greater claim to gestational parents than to genetic parenthood²⁷. If being materially constituted from a person makes one that person's child, then a newborn baby would be the child

²⁶ Silver, & Silver. Confused heritage and the absurdity of genetic ownership. p 600

²⁷ Kolers, & Bayne. "Are You My Mommy" On the Genetic Basis of Parenthood.

of the women who gestated it, from whom it is primarily composed²⁸. In the absence of gestation, genetic parents do not contribute significantly to the material composition of a child. In fact Silver states that any physical link between progenitors and their offspring is more imagined than real, and that *no* material connection exists between parents and their offspring²⁹, a point I expand below. Moreover, if being comprised of my flesh and blood is what makes someone my child, then how should we understand our relationship with people to whom we donate blood, bone marrow or organs? Superficially at least, it appears that such donations are examples of people who are constituted substantially more from ‘my flesh and blood’ than my children are. Obviously however, we do not conceive of blood or organ donation as examples of material constitution determinative of parental duties or entitlements.

Aside from the problem of ‘how much material contribution counts’, a more pressing problem with flesh and blood arguments is that they do not explain why such contributions entail duties or entitlements. Recall that the question of interest is not ‘how is child A different to child B?’ but, ‘why do I have rights and duties with regard to child A, more so and different to those that I have regarding any other child?’ Even if it were the case that child A is composed of more of my flesh and blood than say Lucy, this fact would not explain why I would be child A’s moral parent and not Lucy’s³⁰.

3.3 ‘my child’ = derived from my blueprint

To return to Alpern’s hypothetical, perhaps the reason that I do not intuitively think of Lucy as ‘my child’ is because her genes are only accidentally similar to mine.

²⁸ Silver, & Silver. Confused heritage and the absurdity of genetic ownership. Note, I am not suggesting that gestation cannot define parenthood, I am simply pointing out that this argument does not support genes as the basis of parenthood

²⁹ Silvers actual statement is that there is no physical connection between any father and his son. Here Silver is referring to the fact that a genetic mother, who also gestates, might share more material constitution with her children than would a father because gestating a child involves sharing of material substance. However if we consider only what is shared by begetters and their children then Silver’s statement is true of genetic mothers as well as genetic fathers and all of their progeny male and female.

³⁰ Some writers have suggested an analogy between the rights we have regarding our property and the entitlements we have as parents. One possibility is that I have authority and duties with regard to child A because I own my genetic material. I consider the possibility that parenthood is analogous with property rights in Chapter 6.

Perhaps what is special about “my own child” is that her genes are derived from mine, they are a copy from my genetic blueprint. This is a more promising explanation of the ‘flesh and blood’ account above because it does not hinge on the significance of the minute material contribution of parents to children. Perhaps also the ‘blueprint’ account could distinguish between genetic and gestational contribution on the basis that my genetic offspring is *more* ‘my child’ than a child I gestate, because genetic contributions *more importantly* determine this child’s characteristics³¹. At first glance this notion may appear more appealing because we tend to think that our genes determine what is unique about us and not the materials from which we are constituted. Consider the analogy of a blueprint or mold. We might agree that what makes an object itself is the mold from which it originates and not the materials put into the mold. For example, all red plastic bowls made from the same mold are the same, what makes a red molded bowl different is the shape of the mold from which it is poured. Similarly it is sometimes claimed that genetic contributions more importantly contribute to what it is that makes an individual herself. Therefore it could be argued that my child is determined by the genetic ‘mold’ she is derived from. However, as geneticists and biologists repeatedly explain, we are the product of both environment and genetics. Despite a growing tendency to stress the role of genes in traits and behaviour it is not possible to distinguish between or evaluate the separate contributions of genes and environment to our individual makeup³². While genetic inheritance is often described as a blueprint or mold it is actually more analogous to a frame or skeleton. Like building frames genes do not define a particular outcome, but form the basis around which a number of different possible outcomes can emerge. It is not coherent to describe a child’s genetic make-up as more importantly defining her than environmental factors and their interactions with her genes. Obviously a genetic

³¹ A point made by Kolers and Bayne Kolers, & Bayne. "Are You My Mommy" On the Genetic Basis of Parenthood.

³² Despite the growing emphasis on the role of genes in determining complex behaviours and traits the vast majority of human hereditary differences involve the interplay of many genes with each other and the environment. A recent study highlights this fact. In their study of identical twins Fraga et al show that while they are genetically indistinguishable during the early years of life, older identical twins exhibit “remarkable differences” in their gene expression Fraga, M. F., Ballestar, E., Paz, M. F., Ropero, S., Setien, F., Ballestar, M. L., et al. (2005). Epigenetic differences arise during the lifetime of monozygotic twins. *Proceedings of the National Academy of Sciences*, 102(30), 10604-10609. Their study shows that external and internal environmental factors have an impact on gene expression and explains why even people with identical genotypes are phenotypically different.

‘frame’ is necessary, but it does not determine a child’s make-up, only a number of possible outcomes.

Another obvious problem with claiming that ‘my child’ is one modeled on my genetic blueprint is that identical twins have the same blueprint. If genetic derivation determines ‘my child’ then the children of my identical twin would also be my children because they are derived from the same genes.

Silver tries to clarify the confusion over the way we think about genetic relationships³³. He explains that genes are simply ‘material packets of information’ and that biological relationships among people such as father and son, sister and brother, grandmother and grandchild are based entirely on shared genes. He points out that because genes are simply packets of information, there is no limitation on the type of medium within which they can be stored. Genes stored in computer memory are no less valid than genes stored in DNA. Silver illuminates this notion through the following thought experiment.

“Let us say there is a genetic engineering company on Mars. Just like many companies can now do on Earth, this company can create new DNA molecules with a DNA synthesizer. But the technology of this company is so advanced that its synthesizers can create whole human chromosomes that can be placed into human eggs (whose own DNA was previously removed), which can then be placed in the wombs of surrogate women, where they develop into babies born nine months later.

Now you and your spouse go to a company on earth which determines all the genetic information (known as ‘the sequence’) present in your chromosomes. Half of your genetic information and half of your spouse’s genetic information is next transmitted by radio waves to Mars, where the Martian biotech company converts it back into DNA which is used to form an embryo that develops into a baby boy. The child on Mars will be just as much your

³³ Silver, L. M. (2001). Confused meanings of life, genes and parents. *Studies in History and Philosophy of Biological and Biomedical Sciences*, 32(4), 647-661. Silver, L. M. (2001).

*son as any son that you have on earth. There is no scientific test that could distinguish between the two as your legitimate biological sons.”*³⁴

What Silver’s hypothetical highlights is that ‘a tangible connection between parent and child is more imagined than real’ and that genetic relationships are really only links between people who share information.

What I have argued in the discussion above is that parental status for begetters, cannot be grounded in the fact that a child is materially constituted from its genetic parent. This is because firstly a child simply does not share any of its begetter’s flesh and blood. Secondly, if providing the material that makes up a child is the basis of parental rights and duties then the person that gestates a child (and not the begetter) would have greater claim to parenthood. In any case as yet no argument has been put forward to show why contributing to a child’s material constitution would give rise to any parental claims or duties. I then considered the possibility that genetic derivation distinguishes ‘my child’ from any other child. But, genes cannot distinguish between ‘my child’ and the children of my identical twin, nor is there any reason to hold that genes are more importantly determine ‘my child’ than does her environment. Even setting aside these problems, the more important question remains, why should genetic blueprinting give rise to parental obligations? Genetic derivation does provide a traceable line of descent for most people, however as yet no explanation has been proposed to accompany the claim that this feature might determine moral parenthood, or that genes have priority over gestation.

³⁴ Silver. Confused meanings of life, genes and parents. p654

3.4 The combination argument

Another possibility for sorting out what we mean by ‘my child’ and what makes ‘my child’ different and special is that this child is a unique combination of several factors.

An account of parenthood recently put forward by Avery Kolers, is in effect an example of what I refer to as ‘the combination argument’³⁵. Kolers proposes that what distinguishes a parent is a combination of genetic information, the physical derivation of this information and the parent’s intentions³⁶. His account rests on a reconstructed view of ‘*physical geneticism*’, a genetic definition of parenthood that attaches significance to the fact that children are physically derived from their parents.

Kolers acknowledges the distinction I described in the section above between genes as information (the genetic blueprint argument) and genes as physical objects (the flesh and blood argument). He argues, as opposed to Silver, that the physical origin of the DNA from which a child is constituted *does matter*, and that ‘*physical geneticism ... takes seriously the essentially embodied character of reproduction.*’

*“Although the original DNA molecules are all but gone, every molecule composing a newborn baby- DNA included- is made of stuff that the gestating mother consumed. Physical processes, including the replication of genetic information, occur in some place or other, and the environment in which they take place affects their character. These processes then ramify through multiplication, as well as continued interaction with the environment.”*³⁷

Kolers is interested to explain the apparent incompatibility between the view that cloning is a form of reproduction freedom³⁸ and that cloning violates the rights of a

³⁵ Kolers, A. (2003). Cloning and Genetic Parenthood. *Cambridge Quarterly of Healthcare Ethics*, 12(4), 401-410

³⁶ Note that Kolers also adds that an element of social convention determines parental roles Kolers. Cloning and Genetic Parenthood.

³⁷ Kolers. Cloning and Genetic Parenthood. p408

³⁸ for example as argued by John Robertson who reasons that a person can have an interest in passing on his or her genes Robertson, J. (2000). Cloning as a reproductive right. In G. McGee (Ed.), *The human cloning debate* (2nd ed., pp. 42-57). Berkeley California: Berkeley Hills Books

person who seeks not to reproduce³⁹. To clarify, he offers the example of a woman, Tarzana who clones herself and creates a new person Jane. According to geneticism, Jane is Tarzana's later born twin sister. Further, by cloning herself Tarzana has given her parents another daughter, despite their wishes regarding having more children.

Kolers agrees that if informational understandings characterise genes and a parent is a 'node' in the transmission of information, then Tarzana's parents are Jane's parents. By cloning herself without their consent Tarzana violates her parent's right not to have more children. However he points out that the physical environment in which genetic information is stored and replicated affects their character, and that environments partly determine which genes are expressed and how. On Kolers reasoning, because Jane is derived from gametes stored in a physical environment affected by Tarzana's agency, Tarzana makes a unique and significant contribution to Jane and is arguably her mother. Conversely had the cells from which Jane was cloned been taken from Tarzana before she had been able to exercise any real agency regarding her life, then both physical and informational definitions of genetic parenthood would agree that Tarzana is Jane's older twin sister.

In summary Kolers' account attaches significance to the physical derivation of a child's DNA and combines elements of intention and convention. Kolers' account addresses the problem illustrated by Silver's Martian example; that no test could distinguish between the child 'made' on Mars and one physically derived from its parents. He argues that it is a mistake to downplay the unique contribution made by the gamete providers.

According to Kolers, 'physical geneticism' the way he describes it successfully and non-arbitrarily settles the problem of 'who is a parent?' But how unique is the contribution of gamete providers and how successful is the combination argument in determining parenthood?

³⁹ Note he does not defend cloning but uses it as an example to consider the implication of genetic accounts of parenthood Kolers. Cloning and Genetic Parenthood.

Kolers' argument is essentially a claim that the intentional genetic and physical derivation of a child from its genetic parents entails that they are the child's moral parents. Recall however, from sections 3.2 and 3.3 above, that I have already argued that neither material nor genetic derivation can provide any principled explanation for moral parenthood. Thus Kolers' argument cannot succeed as a combination argument. However, if some 'intentional' account of moral parenthood is available then Kolers' account could also explain 'who is a parent' on the basis of intention alone.

Intuitively there is some appeal to the notion that my intention to become a parent is significant. Consider again Alpern's example of Lucy, the cloned baby I come across in the pram. Perhaps it is the fact that I did not intend for Lucy to exist that explains why she is not 'my child' despite sharing my genes. I consider intentional account of parenthood in some detail in the following chapter.

For now I conclude that any combination argument would have to show not just how each feature alone contributes to defining parenthood but why each feature should be combined. As argued above, even if Kolers account or any combination argument can succeed in uniquely identifying parenthood, a further argument is required to show why any particular identifying feature or group of features entails a particular relationship. In other words, the question again, is not what distinguishes one potential parent from another, but how are the obligations and claims associated with moral parenthood generated and does begetting play a role?

Summary

The claims addressed in this chapter have in common the intuition that genetic offspring are special and more properly 'my child' than other children. My analysis has explored whether firstly there is any distinguishing feature about genetic children and

secondly if this is a feature that could explain the claim that genetic parents have special obligations for their offspring.

I began by addressing the claim that genetic children more closely physically resemble their parents than do others, and that stronger emotional bonds and moral obligations result from these shared features. I reasoned that it is counterintuitive to argue that emotional bonds produce moral obligations and showed that there is substantial evidence disputing the claims that children more closely resemble their genetic parents and that stronger emotional bonds are formed between genetically related parents and children. I suggested that it is not emotional attachments that generate moral obligations between people, but rather the nature of their interpersonal relationship and mutual understandings.

I then explored the notion of ‘my child’ and the possibility that physical derivation or genetic derivation distinguished ‘my genetic child’ from any other child. I argued against the claim that shared ‘flesh and blood’ distinguishes genetic relationships and explained that even were this a distinguishing feature it fails to explain the origin of moral obligations. My analysis also showed that while genetic offspring are generally distinguishable by their particular genetic blueprint again this feature cannot alone explain the basis of parental obligations. In other words even if the fact that a child shares genetic information or is physically derived from its genetic parents uniquely distinguishes ‘my child’ this fact alone cannot explain or support the claim that genetic parents have special obligations or that they have priority in the face of competing parental claims or disclaimers.

Finally I considered the possibility that genetic offspring are distinguishable by a combination of features and considered an example of a ‘combination account’ as put forward by Kolers. I explained that for any combination argument to succeed it is necessary to show why each feature is included and why particular features are combined. I concluded that Kolers’ account, which combines physical derivation, genetic derivation and parental intentions is not successful because neither physical

nor genetic derivation alone is successful and therefore that the combination argument combining these features is not successful. I leave consideration of the role of parental intentions to the following chapter.

The analysis in this chapter has shown that even though we might try to discover who is a parent by aligning our ideas about parenting and families with tangible biological facts, genetic kinship is not so tangible. It is very difficult to make sense of the notion of 'my child' or 'our child'. In this chapter I have dismissed as incoherent the claim that genetic relatedness distinguishes 'my child' or 'my family' from any other child, as a child for whom I have special obligations.

This chapter concludes that there is no sound theoretical basis for the claims elucidated by the Frozen Embryo study that physical resemblance, emotional attachments and shared physical or genetic derivation generate parental obligations.

In the next chapter I consider another possibility that could explain the source of parental obligations. I consider the notion, illustrated by the findings of the Frozen Embryo study, that parenthood is a causal relationship.

CHAPTER 4. CAUSAL ACCOUNTS OF PARENTHOOD

Is there a sound theoretical basis to support the view that begetting generates parental obligations because begetters cause children to exist?

Introduction

As shown by the Frozen Embryo study, for many individuals decisions about the fate of surplus embryos are tied to notions of responsibility for the future children they could become. Several participants indicated that they could not or would not donate their surplus embryos because they believed that if their genetic offspring came into being, then it would be their job to care for and raise this child. While many of the same participants accepted that others (embryo recipients) could do a good job of parenting, their discussions on this issue reflect the view that begetting generates moral parenthood because causing a child to exist generates moral parenthood. More formally, their responses suggest the following argument:

P1: Causing a child to exist generates moral parenthood (moral responsibility for that child)

P2: Begetting causes a child to exist

C: Begetters are moral parents

In this chapter, I begin an analysis of this argument in light of relevant philosophical literature. Is there a sound theoretical basis for the claim that causing a child to exist generates moral responsibility for such children?

Before embarking on this analysis in section 1, I clarify the many different possible uses of the term ‘moral responsibility’ and which of these meanings is relevant to my question about whether genetic parenthood entails moral parenthood.

In section 2, I summarise two causal accounts of parenthood, that of James Nelson and Daniel Callahan, to introduce the general features of such accounts of parenthood and how they identify moral parents. In the following sections I discuss some of the problems and questions associated with causal accounts of parenthood in general. In section 3, I discuss an assumption that underlies all accounts of responsibility, the intuition that the person that causes a harm has a special obligation to compensate for, or correct it. While this is a strong intuition, I describe why it proves quite difficult to explain, and why nevertheless I ultimately accept it as given.

In section 4, I go on to discuss the analogy between causing a child to exist and causing harm. I argue that causing a child to exist may generate obligations even if no harm is caused.

In section 5, I consider the question of who is the cause of a child’s existence. I show that strictly causal accounts of parenthood are implausible because they generate too many parents. I describe three accounts of parenthood which are based on causal explanations, each of which can be seen as a different attempt to ‘narrow down’ the number of parents generated by causal definitions. The three accounts I present have in common the fact that they attempt to distinguish between ‘all of the causers’ and ‘the cause’ of a child’s birth. Where they differ is that each of the three accounts identifies different people as *‘the cause’* of a child’s existence. Section 5.1 discusses Nelson’s view that *the* cause of a child’s existence is the sufficient and proximate cause. In 5.2, I present Robert Munsen’s view that where a number of agents contribute to causing a child to exist, the initial and not the intervening agents are the cause of a child’s existence. In section 5.3, I discuss John Hill’s account that intentional parents are moral parents because they are the ‘but-for’ cause of a child’s existence. I conclude the first part of this chapter by pointing that all three accounts

present incoherent and implausible explanations of moral parenthood. I show that all three accounts are problematic because they attempt to draw an ontological distinction between the different causers. In other words they do not succeed in addressing the problem of ‘too many parents’ because each of their attempts to distinguish between or eliminate some of the causes of a child existence is ultimately incoherent. I suggest that the problem with all three accounts is that they are based on an incomplete understanding of causation, and that they confuse causal responsibility with moral responsibility.

In the second part of the chapter, I explain the nature of this confusion. I begin in section 6 by clarifying the notions of cause and consequence, and I show that attempts to identify *‘the’* cause are misguided. I argue that moral responsibility and not causal responsibility is the basis of parental obligations. I then go on to consider when ‘causing’ generates moral responsibility. In section 7, I discuss well accepted and standard accounts of moral responsibility and I outline the two conditions that apply before causing an outcome entails that an agent is morally responsible for that outcome; these are 1) freedom and 2) foreseeability. I point out that standard accounts of moral responsibility entail that an agent is morally accountable for both the intentional and unintentional consequences of her free actions where these consequences were foreseeable.

The analysis in this chapter concludes that causal accounts of parenthood as presented in the current literature do not provide a sound theoretical basis for the claim that begetting generates parental obligations.

1. Moral Responsibility

The term morally responsible¹ has several different meanings and is often confused with causal responsibility. Obviously only moral agents are responsible in a moral sense and only actions with morally significant consequences need moral justification. For example, an earthquake may be responsible for a Tsunami but in this sense, responsibility entails only causality because an earthquake is not a moral entity. However, an individual can also be responsible in only a causal sense. For example, if I clap my hands I am responsible for making a noise, but I am not required to give a moral account of the consequences of this action because making a sound is not generally a morally significant action. If however, I make a sound during an examination, the exam supervisor might hold me responsible for making a noise and blame me for disturbing the other students. Here moral responsibility is used in the sense that a moral agent is required to give a moral account of her past actions.

Moral responsibility also refers to moral accountability for future actions. For example, we could say that the exam supervisor is responsible for looking after students in their exams. In this sense responsibility means that the exam supervisor has an obligation or has the the job of, say, ensuring that students are not disturbed by unnecessary noise during their exam. If she allows some students to clap their hands at will, then we could say that she is responsible for allowing a disturbance and for failing to carry out her responsibilities.

Note that saying that an agent is moral responsible does not necessarily entail that they are blameworthy. It could be the fact that the action for which they can be held to account for is one for which the proper response is praise rather than blame. Alternatively, it may be the case that an agent avoids blame because she provides a valid justification for her action. To clarify, imagine for example that Sofia intentionally kills Giovanni. To say that Sofia is morally responsible for Giovanni's

¹ In part paraphrased and based on an explanation of moral responsibility as it appears in Duff, R. (1998). Responsibility. In *Encyclopedia of Philosophy* (pp. 290-294). New York: Routledge and Zimmerman, M. (1992). Responsibility. In L. Becker & C. Becker (Eds.), *Encyclopedia of Ethics* (pp. 1089-1095). New York: Garland Publishing

death is only to say that Sofia is answerable or can be held to account for her actions. One account Sofia might give is that she killed Giovanni in self-defense. Depending on her account, we might accept that while she is morally accountable she is not blameworthy. Another possibility is that Giovanni was 96 years old and in chronic pain. Sofia might explain that she killed Giovanni because his life was no longer tolerable or meaningful and because Giovanni begged her repeatedly to do help him to die. At least some of us might accept this account as a justification of Sofia's action and further we might even judge her action as brave or praiseworthy.

Henceforth, I use the term moral accountability rather than moral responsibility to avoid any confusion over accountability and blameworthiness. To say that an agent is morally accountable for an event is to say that she can be held to account or for this event or is answerable, it is not to say that she has done something wrong.

2. Two Causal Accounts of Moral Parenthood

The Claim: genetic parents are morally responsible for their offspring because they cause them to exist

Is the fact of a causal connection between begetters and their genetic offspring significant in terms of assigning moral parenthood? At least one philosopher, James Nelson, argues that it is precisely because genetic parents cause their children to exist that they incur special duties and obligations with regard to their offspring. Nelson argues against the practice of sperm donation and gestational surrogacy on the grounds that they are inconsistent with the duties that parents owe to children. He reasons that raising children is not open to individual preferences and those reproductive technologies that allow the separation of genetic and social parenting invite a 'consumer –choice' approach to families. In his view, the moral significance of being a parent is based on a *causal* rather than a *contractual* model². Nelson's claim is that the importance given to genetic relatedness is not a matter for choice, that genetic

² Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. , Nelson. Reproductive Ethics and the Family

ties give rise to special obligations and that a child's genetic parents have a prima facie obligation to remain in a child's life in an ongoing way³.

In support of his view Nelson appeals to our commonsense view that causing harm generates a special obligation to aid the victim of that harm.

*“If you’ve run over your neighbor with your motorcycle, smashed her Ming vases with your expansive gesticulations, or trapped his children in the old refrigerator left invitingly in your front yard, there doesn’t seem much question about who has particular obligation to make matters as right as possible, to compensate for damage and to remove the existing risk. And while all this may be complicated by considerations of negligence on your part or your neighbors, it seems clear that in general, your causal relation to these harms leaves you in no position to ‘refuse’ that obligation.”*⁴

In summary Nelson's argues⁵ that because children are born in a helpless and needy condition and because genetic parents have caused such children to exist, they have an obligation to care for them. On his view, the only acceptable reason for a genetic parent to divest themselves of parental duties is in the event that they are seriously unable to do so⁶.

Similarly, Daniel Callahan argues that biological relationships are not a matter of voluntary undertaking. He claims that once formed, genetic ties cannot be repealed⁷.

‘Once a father, always a father. Because the relationship is biological rather than contractual, the natural bond cannot be abrogated ...’⁸ ...Fatherhood, because it is a

³ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. , Nelson. Reproductive Ethics and the Family

⁴ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. p 51

⁵and acknowledges the prior work of Sidgwick in making this argument. See Sidgwick, H. (1890). *The Methods of Ethics*. London:New York: Macmillan.. Chapter IV.

⁶ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. , Nelson. Reproductive Ethics and the Family

⁷ Callahan, D. (1992). Bioethics and Fatherhood. *Utah Law Review*, 735(3), 735-746

⁸Callahan. Bioethics and Fatherhood. p.738

*biological condition, cannot be abrogated by personal desire or legal decisions. Nor can the moral obligations be abrogated either....'*⁹

According to Callahan it is morally irrelevant that a sperm donor may not intend or desire to act as a father, that the woman whose ovum his sperm fertilizes does not want him to act as a father or that society is prepared to excuse him from such obligations; he is still, morally speaking, the father.

Nelson and Callahan's arguments can be summarised as two distinct claims

that genetic parents have moral responsibilities with respect to their offspring because they cause them to exist¹⁰, and that

genetic parenthood incurs *immutable* obligations (genetic ties are not elective and we cannot simply choose to acknowledge them or sever them at will).

In this section, I focus only on the first of these claims. I return to the second claim in chapter 5 of this thesis.

According to causal accounts, we could say that the genetic parents in the Danish Surrogacy case have failed in their parental duties because they have severed the connection between themselves and the children they caused to exist. Similarly, in the case of *Re: Patrick*, Nelson and Callahan's positions suggest that that the 'sperm provider'¹¹ has irrevocable lifelong duties towards his son and that he breached these duties by allowing others to raise the boy.

⁹ Callahan. *Bioethics and Fatherhood*. p.739

¹⁰ Note that Callahan does not actually *state* that parenthood is a causal relationship but his position is in fact based on a causal explanation. He states that "Human beings bear a moral responsibility for those voluntary acts that have an impact on the lives of others; they are morally accountable for such acts....given the obvious importance of procreation in bringing human life into existence, fathers have a significant moral responsibility for the children they voluntarily procreate." Callahan. *Bioethics and Fatherhood*. p737

¹¹ Although he has also been called the sperm donor I hesitate to use this term because the very claim Patrick's genetic father was making was that he was not in fact just a sperm donor but that his genetic relationship with Patrick entailed that he was also Patrick's 'moral father'.

Note that Nelson's and Callahan's causal account of moral parenthood do not entail that only genetic parents incur parental duties or have parental rights. They accept that others, including adoptive parents, step parents, teachers, guardians or nannies might take on some or all of parents' duties. However, according to a causal account, while others may voluntarily take on parental roles, genetic parenthood is sufficient to generate obligations because begetting amounts to causing a child to exist and we are morally accountable for things that we cause.

There are however some difficulties with this causal account of parenthood. In the following sections I discuss three problems with the proposition that causing a child to exist generates moral parenthood. These are in section 3, the problem of answering the question 'why is the 'causer' responsible for redressing the harm she causes? In section 4, I show a problem with the analogy that causing a child to exist causes a harm and, in section 5, I describe the problem of how to identify the 'causer'?

3. Why is 'the causer' responsible?

As Shelly Kagan points out, while it appeals to our commonsense morality, the notion that the person who causes harm has a special obligation to correct or compensate for it, proves difficult to justify¹². Kagan uses an example to illustrate that what is missing is an 'internal linkage' between the causer and the victim. His example involves Agnes, an agent, and Victor, a victim in danger of drowning because Agnes has pushed him into a swimming pool. Kagan suggests that we believe that Agnes has a special obligation to help Victor get out of the pool more so than any random stranger, because Agnes has caused Victor to be in danger of drowning. Further he suggests that Stanley, a random passerby, may also have some obligation to help Victor. He goes on however, to consider the possibility that Victor manages to pull himself out of the pool but contracts pneumonia. Now Agnes is still under an obligation to help Victor and this might include, say, the obligation to help defray the cost of Victor's medical bills. But, Kagan reasons that, if we agree that Stanley does not have the same obligation as Agnes to help with Victor's medical bills, then it is the case that Agnes

¹² Kagan, S. (1998). Causation and responsibility. *American Philosophical Quarterly*, 25, 293-302

has special obligations towards Victor, different to and greater than the obligations of any random strangers towards each other¹³.

Kagan considers a number of possible defenses for this widely held intuition. He dismisses possible consequentialist arguments that making 'causers' of harm liable acts as a deterrent upon possible future wrong-doers and thereby promotes the overall good. According to Kagan an account of why wrong-doers have stronger obligations to aid victims than others must rest on the relationship between the two and not on the effects of such wrong-doing on others¹⁴. Kagan further considers the possibility that the wrong-doer deserves to be punished and the most fitting punishment is that she be made to aid her victim. However, as Kagan points out deserving punishment might explain why the wrong-doer should be made to pay for the financial costs associated with the harm she has caused, but does not explain why she would have any greater reason than any of us to aid the victim¹⁵. Kagan suggests that what is missing from a 'desert account' is an explanation of our intuition that the wrong-doer has a stronger obligation to help or a stronger reason to do so than any of us. In appeals to corrective justice, as long as the imbalance between 'what the causer gains' and 'what the victim loses' is redressed or corrected, it does not seem to matter that the wrong-doer's payment or loss goes to his victim or that the victim is compensated by his wrong-doer¹⁶.

In summary Kagan considers a number of possible arguments to defend our intuitions about the obligations of causers and concludes by speculating that an adequate justification 'may take some doing and that it remains to be seen whether it can be provided at all'.¹⁷

¹³ Kagan. Causation and responsibility.

¹⁴ Kagan. Causation and responsibility.

¹⁵ Kagan. Causation and responsibility.

¹⁶ Kagan. Causation and responsibility.

¹⁷ Kagan. Causation and responsibility.

Jeffrey Blustein also addresses the problem of causal responsibility and moral accountability and more directly explores causal accounts of moral parenthood. Blustein asks what is the source of biological parent's¹⁸ duties to their children and considers an explanation put forward by Henry Sidgwick¹⁹.

*"No doubt children are naturally objects of compassion, on account of their helplessness, to others besides their parents. But, on the latter they have a claim of a different kind, springing from the universally recognized duty of not causing pain or any harm to other human beings, directly or indirectly, except in the way of deserved punishment; for the parent, being the cause of the child's existing in a helpless condition, would be indirectly the cause of the suffering and death that would result to it if neglected."*²⁰

Blustein observes that it is not clear why causal agency is the source of parental obligations. He argues that there is a gap in Sidgwick's argument between the premise that parents cause children to exist in a helpless and needy condition and the conclusion that they are morally blameworthy for harming their child through neglect²¹. Blustein concedes that children are born with needs and interest, but he argues that that knowing what these needs are, and who was involved in bringing them about, does not make it clear whose duty it is to meet these needs²². He suggests that the fact that parents caused a needy being to exist does not in itself entail that they have any more of a duty to prevent harm and suffering coming to that child than anyone else. Blustein proposes that the 'missing premise' might be that biological parents are somehow in a better position than most other people to care for their child and to prevent harm from occurring to children they bring into existence. But, Blustein denies that this explanation is one that shows that causation by itself is the

¹⁸ Neither Sidgwick nor Blustein differentiate between biological parents, gestational parents or genetic parents. What exactly is the cause of a child's existence will be considered later in this chapter. Blustein, J. (1977). On the Duties of Parents and Children. *Southern Journal of Philosophy*, 15(Winter), 427-441, Sidgwick. *The Methods of Ethics*. Suffice it to say at present that Blustein's arguments are applicable to genetic parenthood even if though they may not exclude other candidates for moral parenthood, a problem considered later in this chapter.

¹⁹ Sidgwick. *The Methods of Ethics*.

²⁰ Sidgwick. *The Methods of Ethics*. p 249

²¹ Blustein. On the Duties of Parents and Children.

²² Blustein. On the Duties of Parents and Children. A point also made by Onora O'Neill as referred to in Chapter 1 O'Neill. Begetting, Bearing, and Rearing. In

source of parental duties. He suggests that the reason that biological parents might be in a better position to care for or harm their offspring is because our social institutions are arranged in such a way that biological parents have almost exclusive responsibility for their children²³.

According to Blustein it is not because biological parents cause a child to exist, but because they do so in societies where biological parents are delegated child rearing duties that they incur such duties. In other words biological parents may be in the best position to meet the needs of their children, but this is only so, according to Blunstien, because in our society matters are arranged such that biological parents are in this 'best position'. He suggests that, as it is the case in some other cultures, we can imagine arrangements in our society such that a non-biologically related individual (or perhaps 'the state') is given the job of raising children. Blustein argues that in these societies it *would not* be the case biological parents have responsibility for their children, even if they cause children to exist, because they would not in fact be in the best position to carry out these responsibilities²⁴.

In summary Blustein, like Kagan questions the notion that we are accountable for some outcome simply because we are causally responsible for it. He suggests that biological parents do not incur parental duties because of their causal connection with the existence of their offspring, but rather because of social convention. In his view, it would only be wrong for biological parents not to take up moral parenthood if they produce children in social settings where the arrangement is that biological parents are delegated this role.

Nelson responds to Blustien's views and argues that parental duties are not merely assigned. He suggests that the fact that someone other than the person causing a harm might be best placed to address this harm, does not clear the 'causer' of responsibility.

²³ Blustein. On the Duties of Parents and Children.

²⁴ Blustein. On the Duties of Parents and Children.

‘if you’ve placed someone in peril of serious harm, you have at least a prima facie obligation to help that person out of danger. If someone else were better situated to free the children trapped in your old refrigerator, it seems sensible to say that they would have a responsibility to do so, but that their proximity does not absolve you of liability. You are still morally involved in virtue of your causal connection to the case’²⁵

Nelson’s argument here is not unlike the argument made in chapter 1 that moral parenthood cannot be determined simply by determining who is the best person to take on that role. The fact that others are well placed to care for a child does not entail that they are therefore obliged to do so. Nelson puts a similar argument, that if parental obligations are based on causal accounts then these obligations exist independently of whether others (‘non-causers’ of children’s existence) are better placed to fulfill them²⁶.

John Bigelow and his colleagues also consider the connection between parental obligations and the fact that progenitors cause their offspring to exist²⁷. Bigelow gives an example, the case of swapped babies, to argue that special moral significance is attached to the fact that parents are causally responsible for the existence of their children. This example involves a nurse switching two babies in hospital. Baby A dies shortly after birth. The nurse takes baby A and puts her in the cot of Baby B and vice versa, because she believes that baby A’s parents are less likely to harm baby B than are her biological parents. Bigelow asks us to imagine that both sets of parents are about to leave the hospital but that neither A’s parents nor B’s parents want to take the surviving baby B home, and move to leave her behind with the nurse²⁸. He reasons that the nurse is justified in protesting that it is wrong of the parents to leave the baby for her to care for. Further, it would be equally wrong for the nurse to force baby B into the car of A’s parents on the grounds that they are less likely to harm her than her own biological parents (parents B).

²⁵ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. p51

²⁶ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective.

²⁷ Bigelow, Campbell, Dodds, Pargetter, Prior, & Young. Parental Autonomy.

²⁸ An example with parallels to the Danish surrogacy case where none of the ‘potential parents’ wanted to raise the twin girls.

Bigelow suggests that our intuition that B's parents should raise baby B is not based on 'paternalistic'²⁹ arguments about who is well placed or best placed to raise baby B. He points out that our intuition that baby B's parents should raise her remains strong irrespective of which parents are favoured by 'paternalistic' arguments. Bigelow dismisses proprietorial explanations for this intuition³⁰ and proposes that our intuition is explained by our obligations to respect parent's autonomy. He argues that paternalistic arguments might sometimes justify placing children with their biological parents and sometimes justify their placement with others in the interests of children's their safety. However, our 'paternalistic' obligation to children must be weighed against our obligations to respect autonomy³¹. Bigelow reasons that in exercising their autonomy people need to be free to pursue long-term projects, and that, in our culture at least, autonomy overrules strict paternalistic obligations. According to Bigelow:

*“Genuine respect for someone's autonomy includes not only permitting them to reap the benefits of their own actions, but also requiring them, other things being equal, to cope with the inconveniences which result from their actions. If people spill their groceries in the car park, then they should clean them up. If they keep pets (like cheetahs) which become hazards, then they must deal with the problem. If they bring a child into the world and it needs to be cared for, they should care for it.”*³²

In summary this account attaches moral parenthood to biological parents because they cause children to exist and because respect for autonomy requires that we allow people to have or experience the consequences of their actions. In the case of parenthood, the consequence of bringing a child into being might in one instance be a benefit and in another (say for example for the parents of Baby B who do not want to raise their child), an inconvenience or burden. The reason that this benefit or burden

²⁹ Bigelow et al, use the term paternalistic here to refer to arguments about what is in the babies best interests. In this case they suggest that arguments that Baby B would be better off in the care of A's parents than she would in be in the care of her biological parents (parents B) are an example of paternalistic arguments. Bigelow, Campbell, Dodds, Pargetter, Prior, & Young. Parental Autonomy.

³⁰ I return to property arguments in reference to parental claims in chapter 6 of this thesis.

³¹ Bigelow, Campbell, Dodds, Pargetter, Prior, & Young. Parental Autonomy.

³² Bigelow, Campbell, Dodds, Pargetter, Prior, & Young. Parental Autonomy. p189

belongs to or should be acted on by the ‘causer’ is on Bigelow’s account because these consequences are the result of the ‘causers’ autonomous action.

Leaving aside for the moment the possibility that the birth of a child is not the result of an autonomous action (say for example it was the result of rape or deceit) if we apply Bigelow’s account to the ‘Kagan problem’ can it explain the questions raised by Kagan about why ‘causers’ have obligations to attend to what they cause?³³ At first glance Bigelow’s approach does seem to satisfy our intuition that biological parents have overriding standing where competing claims exist over who should raise a child. As he suggests, it is easy to see that a child is a long-term project or a commitment and that preventing a parent from raising their child fails to respect her autonomous desires and actions.

In short Bigelow’s argument is that being autonomous requires in part that individuals are accountable for the outcomes of their autonomous actions and required to act on that which they are accountable for. In other words, Bigelow’s account appears to reflect a Kantian notion of autonomy as not just a capacity to deliberate in certain ways, but as the ability to ‘know what morality requires of us’. Thus on his account where the existence of a child is the consequence of an autonomous action, her existence creates an obligation for the actors. However, Bigelow’s account appears to ‘beg’ Kagan’s question. It appears to present the following:

1. Causing a child to exist produces burdens and benefits;
2. Autonomy requires that an agent take on the burdens and benefits that they cause;
3. Autonomous agents incur obligations and rights for the children that they cause to exist;
4. Respect for autonomy requires that the causal agent incur the obligations that they cause to exist.

³³ Note that Bigelow et al. do not in fact address Kagan’s question but present an account to explain the ‘baby swap’ case. I apply Bigelow’s account to illustrate that while it is a common intuition, the claim that causers are responsible for the harms they cause, rests on a prior assumption that any causing generates responsibility.

Even given, as Bigelow suggests, that causing a child to exist is an example of point 1, above, and that we agree with point 4, that we should respect an individual's autonomy, his account does not explain why 2 and 3, 'causing' generates obligations for a child or in fact for any other outcome that one causes. Bigelow's account, like most of our currently available accounts of moral responsibility, does not address, and appears to assume the link between causing and responsibility and then presents a plausible and coherent account of why (given that any causing ever generates responsibility) causing a child to exist generates responsibilities.

To return to the original question 'is there a sound theoretical basis for the claim that causing a child to exist generates moral responsibility for such children? In the above analysis I considered the possibility that genetic parents are moral parents because the person that causes a harm or need is the one who is obliged to ameliorate, compensate for, or deal with it. My analysis reveals at least one problem with this premise, that is, the difficulty of explaining why causing a consequence of moral significance entails that the 'causer' has duties (and possibly rights) in relation to what they cause, different to and greater than those of any other person not causally connected to the outcome. I have considered briefly two different types of responses to this question. Firstly that of Blustein, that in fact parents do not have any special obligations to the children they 'cause' and that our strong intuition that this is the case is based on the fact that in our society parental duties are customarily distributed to biological parents. Secondly I applied an account based on Bigelow's explanation of parental autonomy. Applying Bigelow's account to the Kagan problem suggests an explanation based on respect for autonomy and the claim that this requires that we allow people to 'have' both the positive and negative consequences of their autonomous action.

I have outlined some of the problems with both of these accounts and while not an exhaustive analysis, it is presented to illustrate, after Kagan, that although an intuitively appealing and strongly held intuition, a satisfactory justification of the claim that causers are responsible for what they cause may not yet be available. Difficulty in

explaining how duties or claims relate to causal responsibility also arise in discussions of desert, justice crime and punishment. Similar debates surface around attempts to justify notions of private property and why individuals have special claims on that which they create or produce.

The problem of explaining why causing incurs responsibilities is an old and complex problem. While I have not presented a satisfactory and coherent justification of why causing a harm entails that I have special obligations to the ‘victim’ of my harm, I am unaware of any serious opposition to this premise (apart from that of Blustein which is limited to a discussion of parental obligation). Hundreds of volumes have been written on moral responsibility and while thousands of pages are dedicated to elucidating the conditions under which causal responsibility attracts moral responsibility, the possibility that it never does so under any conditions, is simply not considered. It is this premise that forms the basis of our justice system and our assessment of desert, reward, punishment, and entitlements. Further the basis of capitalist ideologies revolves around the premise that the person that causes or creates something is the person with special claims regarding this thing.

While the fact that this premise remains largely unchallenged does not entail that it is therefore sound, for the purpose of my thesis I suggest that it is relatively uncontroversial to accept it as a given, and as an example of a Rawlsian ‘fixed point’³⁴. In our current legal, social and moral framework, questions about whether or not genetic parenthood is an example of a cause that typically generates moral responsibility are important, and can sensibly be addressed, while acknowledging that the job of explaining why *any* example of causing would ever generate moral responsibility, is ongoing.

At this point the question currently under consideration can be restated as follows; given that causing something can ever generate moral responsibility, is genetic

³⁴ As referred to in the introduction. Rawls, J. (1971). *A theory of justice* Cambridge, Mass. :: Belknap Press of Harvard University Press.

parenthood an example of causing that generates moral responsibility for the existence of a child? To return to Nelson's claim, he suggests that genetic parenthood does generate moral parenthood because genetic parenthood causes a child to exist in a needy and helpless condition and that failing to care for this child amounts to causing a harm. He suggests that a biological parent that fails to care for her offspring fails to take on her responsibilities and is morally negligent even if others can take on this job. Having accepted that causing an outcome can entail moral responsibility for that outcome, in the next section I discuss a further problem with causal accounts of moral parenthood, that is, that causing a child to exist does not always entail causing a harm and causing an obligation.

4. Does causing a child generate harm?

Nelson's claim that genetic parents incur obligations for the children they cause to exist rests in part on the analogy between causing a child to exist and causing a harm. However, Onora O'Neill argues that these two events are not in fact always analogous. She suggests that there is a difference between accident victims, such as say the children trapped in Nelson's old fridge, and the accidental or unintended birth of a child³⁵. O'Neill describes that one way of acquiring parental obligations is to voluntarily undertake them and to make decisions and act on these. Thus the voluntarily decision to procreate is an example of causing a child to exist for which O'Neill grants that parental obligations are acquired. However, O'Neill argues that the parental obligations of unintended begetters are disanalogous with the liabilities imputed to persons that unintentionally cause harm by foreseeable risky actions. As she explains, a motor accident is a foreseeable risk of driving and when a driver causes harm to another person they are obliged to compensate their victim. According to O'Neill, however, unintending parents may point out that however neglectful or rejecting they are, they do not worsen their children's lives³⁶.

³⁵ O'Neill. Begetting, Bearing, and Rearing.

³⁶ O'Neill. Begetting, Bearing, and Rearing.

“But for the unintentional conception, the children would have had no life at all. The only case in which it might be plausible to say that unintending parents harm their children would be if they make the children’s lives worse than non-existence.”³⁷

Nelson considers O’Neill’s objection and argues against the claim that causing a child to exist does not necessarily causing a harm. He uses the following example;

“Consider a corporation- “Concepticon”-which produces a drug that can be used by infertile men to enable them to beget children. It turns out that the drug has the side effect of afflicting the resulting children with a grave disease- not in utero or immediately upon birth, but some years thereafter-unless they are provided with the antidote. What would our reaction be if Concepticon deliberately chose not to keep the antidote on the market, on the grounds that, as the children wouldn’t have existed without the drug, they are no worse off for its action, and hence the producing corporation has no liability?”³⁸

Nelson claims that this example shows that it is possible to harm someone without making them worse off than they otherwise would have been, and thus that it is coherent to speak of unintentionally causing a child to exist as causing a harm. Notice however that in Nelson’s example the child born as a result of the fertility drug is the same child as the one that would be better off if the antidote were made available by Concepticon. Whereas in the case of an unintended pregnancy it cannot be said that the unintending parents acquire an obligation because they have caused a harm. Causing a child to exist cannot in itself be said to be causing a harm if this child would not exist without that action occurring. In Nelson’s example the reason that Concepticon is obligated to make the antidote available is because by not doing so they are in fact making an existing child’s life worse off. Nelson’s comparison is between existence without the antidote and existence with the antidote, whereas O’Neill’s comparison is between existence (with negligent parents) and non-existence.

³⁷ O’Neill. Begetting, Bearing, and Rearing. p29. An argument made famous by Derek Parfit in Parfitt, D. (1984). *Reasons and Persons*. Oxford: Clarendon Press.

³⁸ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. p 51

This problem, of particular relevance to legal allegations of ‘wrongful life’³⁹ is also known as ‘the paradox of existence’ and is frequently debated with reference to the work of Derek Parfit. Parfit illustrates the problem with an example; the case of a woman learning that if she conceives now her child will be born with a mild deformity, such as a withered arm, but if she waits a month she will conceive a perfectly normal child.⁴⁰ If the woman refuses to wait and gives birth to a child with a withered arm she has not harmed the child because had she waited and conceived later, then a different child would exist. In Parfit’s example it is not possible for the child with the withered arm to exist except for existing with a withered arm. Parfit suggests that, as most people contend, it is wrong for the woman not to wait to conceive a normal child, but the ‘wrongness’ is not because in causing this child to exist she has caused a harm to this child⁴¹.

To return to Nelson’s claim, based on Parfit’s reasoning then, a parent cannot be said to incur obligations because they cause a child to exist in a ‘helpless and needy state.’ That fact that a child is brought into existence and that left without care this child would suffer harm, is not equivalent to causing a harm to exist, when there is no other way that this child could exist. However, unlike Parfit’s example, it is frequently the case that the same child’s life can be made worse off due to the actions or inaction of its parents. In other words it is possible to cause a child to exist and then by failing to care for this child or taking inadequate care of this child to cause a harm to exist. The following example illustrates this point.

³⁹ For example legal cases of wrongful life as by John Robertson. *Children of choice: freedom and the new reproductive technologies*. where it is alleged that a child has been harmed by the actions of its parents in bringing him/her into existence. Robertson maintains that the only case where wrongful life could exist is where a child’s life was such that they could reasonably claim that their life was worse than non-existence. He suggests that very few conditions would fit this strict requirement and that in most cases alleging parental abuse, say through prenatal or postnatal conduct or because a child was born with a serious congenital condition, it is still probable that the child prefers to live with this ‘harm’ than not to live. Robertson. *Children of choice: freedom and the new reproductive technologies*. p 247

⁴⁰ In Parfit, D. (1976). On Doing the Best for Our Children. In M. D. Bayles (Ed.), *Ethics and Population* (pp. 100-115). Cambridge, Schenkman.

⁴¹ Parfit, On Doing the Best for Our Children

Imagine a child being born in a needy and helpless condition and a situation where this is the only way this child could come to exist. Say for example that a baby, call him Jo, is born to a woman, Mary, who is homeless and destitute and pregnant because she was raped. Jo could not have come to exist in any other way and therefore causing Jo to exist does not amount to causing a harm, thus neither Mary nor the rapist have caused a harm because they caused Jo to be born. The wrongness of the rapist's actions are based on the harm he does to Mary. Clearly the baby might grow up saddened or disturbed by the violent circumstances of his birth, but given that he believes that his life is better than no life then causing his existence cannot be said to be analogous to causing a harm.

In an alternative scenario, imagine that after Jo is born the rapist finds Jo and places him on a rubbish dump. While causing Jo to be born does not cause a harm to exist, by placing Jo on the dump the rapist is now responsible for harming Jo. It is simply not that case that there is no other existence available to Jo other than existence on the rubbish dump in a helpless and needy state. Thus, it is also the case that the rapist has harmed Jo by causing him to exist in this way, when it was possible to cause Jo to exist in another state, say by placing Jo in the hands of someone who could care for him. Once again the case of Mary, the rapist and Jo is one that compares one type of existence with another and not existence with non-existence. What this example shows is that unlike Nelson's claim, causing a child to exist does not in itself cause a harm, but that a parent could make a child worse off and thereby cause a harm by causing a child to exist in one state when he could have existed in another better state.

My aim in this discussion has been to show that causing a child to exist in a particular state is sometimes analogous to causing a harm to exist, where another state was possible. More importantly however, causing a child to exist may generate obligations even if 1) no harm is caused or 2) no child is harmed. The existence of a child can coherently be described as a consequence of someone's action and one for which they can in some cases, be held morally accountable irrespective of whether or not this consequence is a harm.

It is not necessary to define the existence of a child as a harm to show that it is a consequence of moral significance. Clearly, even if no-one is harmed by the existence of a child it is also true that her existence creates needs that she cannot meet herself. In other words causing a child to exist creates the need for parent. The fact that a child's existence creates needs, raises the question of whose obligation it is to meet these needs, even if the existence of these needs does not in itself amount to a harm.

Having argued that causing a child to exist is a morally significant consequence and one that generates obligations, two things now remain to be shown for the purpose of my analysis of a causal account of moral parenthood. Firstly who is the cause of a child's existence, or more specifically, does begetting amount to causing a child to exist? Secondly, is begetting an example of the type 'causing' for which one can be held to give a moral account?

5. Who is the cause of a child's existence?

How do we determine what or who among the countless contributing factors is *the* cause of a child's existence? In the case of the Danish surrogacy for example, the birth of the twins was the result of an IVF procedure. Was the cause of the twins' existence the action of the man and woman who provided the gametes, the embryologist who inseminated the egg, the clinician who performed the embryo transfer, the nurses that assisted the clinician, the woman who gestated the babies or the commissioning parents? I contend that strictly causal accounts of parenthood are implausible because they generate too many parents. A workable causal account of parenthood needs somehow to identify a few individuals as moral parents. If everyone who causes a child to exist is a moral parent then the very concept of parenthood as a 'special role' with unique rights and duties must be rejected.

In what follows, I present three accounts that can be seen as different attempts to 'narrow down' the number of parents, by suggesting three different ways of

determining ‘*the* cause’ of a child’s existence. James Nelson argues that gamete providers, as the ‘sufficient and proximate cause’ are *the cause*. Ronald Munson proposes that gamete providers are not *the cause* where other agents intervene, that the ‘initial causer’ is the cause; and John Hill contends that ‘necessary causers’ or the ‘but-for’ cause is the cause of a child’s existence.

5.1 The sufficient and proximate cause

Nelson considers this problem that many people cause a child to exist and suggests that just as no one person is fully responsible for the existence of any other, all the actors in the causal train have *some* responsibility for the existence of a child. On his account, moral responsibility for the birth of a child includes gamete donors and third parties involved in IVF who are merely helping parents to do what they cannot do unaided.

However, Nelson argues that making available one’s gametes, even in the absence of any intention to take on parenting, is an act highly proximate to conception and in combination with the actions of the other parent, is jointly sufficient to cause a child to exist. It is for this reason, he claims, that the gamete providers make a special contribution and count as ‘the’ cause and hence the moral parents.

“To be a parent is to be much more than a ‘but-for’ cause of a child’s existence; the making available of one’s gametes is an act highly proximate to conception, and, in concert with the other parent’s actions, is jointly sufficient for it. Our practice is generally to take proximity and sufficiency pretty seriously; a pair of coordinated actions which were proximate to and jointly sufficient for some event, and were not the result of forcing or fraudulent action on the part of others would be hard not to see as the cause of the event in question.”⁴² (original emphasis)

⁴²Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. p 54

Thus in answer to the question ‘who is the cause of child’s existence?’ Nelson appears to suggest that while many actions contribute, providing gametes is an action both sufficient for and closest to this outcome, and hence that gamete providers are the cause. To these two conditions, Nelson also adds irreplaceability and the absence of coercion.

“Whether the instrument used for introducing sperm into the appropriate environment is a plastic syringe or the more traditional vessel, the father is irreplaceably involved in the production of the child, in a way that other causal agents (apart from the mother) are not.”⁴³

He reasons that in the absence of coerced conception or fraud, gamete providers are morally responsible for children that result even unintentionally or accidentally from their gametes.

“...barring rape or other kinds of coercive intercourse, if you’ve been involved in making a baby, you’re responsible for it, whether you consent to such responsibility or not.”⁴⁴

Nelson is concerned to account for our intuition that biological parents cannot simply be excused responsibility for children that result from accidental and unintended pregnancies simply because they do not accept or consent to assuming such responsibilities. Nelson contends that in the absence of force or fraud we are morally accountable for all of the consequences of our actions, both intentional and unintentional. While this account has initial plausibility, some gaps remain. I present two bizarre case reports below that highlight problems with Nelson’s causal account. I suggest that the following two cases show that contributing genetic material to a child is not in itself sufficient to generate parental obligations.

⁴³ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. . p 59.

⁴⁴Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. p 51.

Case 1 is a published case report based on an incident that occurred in the 1860's during the American civil war. According to Dr T G Capers of Vicksburg⁴⁵, on the 12th May 1863 during a battle of the American civil war a young soldier friend of his was hit in the scrotum by a bullet that carried away his left testicle. The same bullet apparently penetrated the left side of the abdomen of a young woman nursing the injured nearby. To her surprise, 278 days later, the woman gave birth to a healthy baby boy. The infant was shortly after operated on to remove a malformed bullet. Dr Capers concluded that this was the same bullet that carried away the testicle of his young friend and, with some spermatozoa on it, penetrated the ovary of the young woman.⁴⁶

Case 2 again describes another accidental and involuntary pregnancy. The case reported in 1988 involves young woman admitted to hospital with a stab wound to her abdomen after a knife fight involving her, a former lover and her new boyfriend. Forty weeks after being discharged from hospital the woman was readmitted with acute abdominal pain and delivered a full term male via caesarean section. Of particular relevance to this case is the fact that the woman was unable to give birth naturally because she had no vagina, which also makes the question of how she became pregnant puzzling. It was eventually revealed that the woman was aware of the fact that she had no vagina. On the night she was admitted to hospital, just before she was stabbed in the abdomen, she had engaged in fellatio with her new boyfriend. Her former lover discovered her in this act, which is when the knife fight ensued. All three were injured but who stabbed who remains unclear. The woman became pregnant despite the absence of a vagina because semen migrated across the

⁴⁵Capers, L. G. (1874). Notes from the Diary of a Field and Hospital Surgeon, C.S.A. *The American Medical Weekly*, 1(19), 233-234 as cited by Napoleon, D. (1959). *New York State Journal of Medicine*, 492-493. and Hicks, D. (1989). Oral Conception. Impregnation via the Proximal Gastrointestinal Tract in a Patient with an Aplastic Distal Vagina. *British Journal of Obstetrics and Gynaecology*, 96, 501-502

⁴⁶ After the publication of this story in the American Medical Weekly the following appeared as an Editor's Note in The American Medical Weekly, 21st November 1874. "Dr. L.G. Capers, of Vicksburg, Miss., disclaims responsibility for the truth of that remarkable case of impregnation by a minnie ball, as reported in No. 19 of this Journal. He tells the story as it was told to him. He does not say it is untrue, but is disposed to appositely remember the truth of the old adage, that "accidents may happen in the best regulated families." While I accept that the veracity of this case report is in doubt, as I'm sure does the reader, I continue to use this case to illustrate my argument. In some ways it makes no difference whether or not the case represents a true event because the point made applies to all examples of accidental pregnancies, as will become obvious later in this chapter.

abdominal space following the puncture of her stomach wall with a knife, shortly after she engaged in oral intercourse.⁴⁷

It seems implausible to suggest that the genetic link between the gamete providers and the children born in either case entails that the gamete providers are responsible for the care of their offspring. In the civil war story (Case 1) above, our intuition is, I believe, that even though the soldier and the nurse are part of the causal train of events that led to the child's existence, his birth was an unforeseeable accident. I suggest that the gamete providers above are not accountable for the boy because we are not accountable for *everything* that we are causally connected to.

Similarly in Case 2 even though DNA paternity tests would reveal the identity of the genetic father, I suggest that our intuition is that he is not morally accountable for the pregnancy and birth. It was not foreseeable by anyone that a pregnancy could result from an act of fellatio or from a knife attack. The genetic father is certainly causally connected to the existence of the child and we might agree that if he was involved in stabbing anyone he did something wrong. However, the 'wrongness' of his act is not related to the fact that he caused a child to exist and I suggest that most of us would not blame him or hold him morally accountable for the child's existence. Our intuitions about the genetic mothers in both cases might be complicated by the fact that they gestated their pregnancies to term, however it is not clear that any other option was available to them. In Case 2 it is interesting to note that the woman was not aware that she was pregnant and was admitted to hospital for acute intermittent abdominal pain. Putting aside questions about the parental responsibilities of a woman who gestates a baby, I contend that Case 1 and Case 2 challenge the notion that providing gametes generates moral parenthood because this causes a child to exist.

⁴⁷ Verkuyl, D. A. (1988). Oral conception. Impregnation via the proximal gastrointestinal tract in a patient with an aplastic distal vagina. Case report. *British Journal of Obstetrics and Gynaecology*, 95, 933-934

If my intuitions above are correct, simply sharing a genetic connection does not in itself entail that gamete providers are obligated to their genetic offspring. I suggest that the above cases illustrate examples where the birth of a child is a consequence that the genetic parents could not have foreseen and over which they had no control. In light of Nelson's account, the provision of gametes was, in both cases, sufficient for, 'highly proximate to', and irreplaceably connected to the existence of a child. Further, in neither case were the gamete providers forced or deceived into making their contribution. Therefore, in contrast to Nelson's claims, I suggest that case 1 and case 2 illustrate the possibility that causing a child *does not* generate moral parenthood. For a causal account of parental obligations to succeed, it would have to explain why some causers are not moral parents. As I have shown, Nelson's attempt to distinguish 'the sufficient and proximate causers as 'the cause' is not successful. In the following section I present another account which provides a different way of identifying 'the cause' of a child's existence and represents a different attempt to explain why some causers are not moral parents.

5.2 'Initial causers'

Robert Munson puts forward a slightly different account of who causes a child to exist. On his view, in the case of artificial insemination (AID) a sperm donor is not a moral father because it is not he that causes the conception. Munson reasons that the person who transfers the sperm (the clinician or scientist), who is acting as an agent of the patient, is the person who causes the conception to occur.

*"... the sperm donor does nothing to impregnate the recipient of the sperm. He is not responsible for her becoming pregnant, even though it is his sperm that makes her pregnant. He is the biological father... but he is not the causal father, for ...he is not the causal agent."*⁴⁸

⁴⁸Munson, R. (1988). Artificial Insemination and Donor Responsibility. In R. Munson (Ed.), *Intervention and Reflection* (pp. 444-449). Belmont, CA: Wadsworth p 448. (Original emphasis).

Munson reasons that because the sperm donor is not the causal agent he can make no claim on the child nor can the child's representatives make any claim on him⁴⁹. Further he argues that the scientists and doctors involved in the artificial insemination are acting merely as agents, extensions of their patients' wills and not as independent persons- and that it is the patients' intentions and actions that cause a child to exist. While he acknowledges that the sperm donor and the physician who performs the insemination are both part of the 'causal complex' that produces an AI child, they are not 'causal agents' so do not acquire parental obligations. As illustrated in the following example Munson seems to argue (although does not make clear or explicit) that the person that initiates the causal chain is 'the' cause and therefore morally responsible.

*"If a terrorist has filled a hospital ward with methane gas and by unsuspectingly turning on the light I cause the gas to explode, I am causally responsible for the explosion. That is, I performed the action that completed the causal chain. However, moral responsibility lies with the terrorist who filled the room with explosive gas."*⁵⁰

Munson use of the terms causal agent, causal responsibility and moral responsibility is somewhat confusing, but I suggest that what he intends is that the role of the sperm donor is analogous with that of the unsuspecting passer-by above, and that both are causally responsible but neither are morally responsible. According to Munson's example it appears that the reason that neither the passerby nor the sperm donor are morally responsible is because neither are the 'initiating cause'. In his view in the case of AID the individuals seeking to become parents initiate the causal chain and a sperm donor is merely one of the agents that subsequently intervenes.

However, while Munson is correct in concluding that the passer-by above is not blameworthy, I suggest that the reason that we hold this to be correct is not a reason that could be used to claim that sperm donors are not morally accountable for

⁴⁹ Munson. Artificial Insemination and Donor Responsibility. p 449

⁵⁰ Munson. Artificial Insemination and Donor Responsibility. p 448

children that they cause to exist. In other words the reason that the passerby is blameless it is not because he was not the 'initial causer'. The reason that the passer-by is not blameworthy, despite causing the explosion, is that he had no knowledge or choice about the fact that this could be the consequence of turning on the light⁵¹. In Munson's example the role of the passer-by is disanalogous with the role of a sperm donor or the medical staff who assist in AID because the latter voluntarily undertake actions for which they can foresee the consequences. A closer analogy would be to compare the sperm donor with a passer-by who voluntarily turned on the light even after being told that there was a good chance an explosion might follow.

Of course a further complication is that the birth of a child is not (usually) analogous with causing an explosion, a point discussed in the preceding section.

While Munson's position nicely accommodates our intuitions regarding the role of sperm donors, his account is based on the idea that 'initial causers' are 'the' cause and that subsequent intervening agents are released of any responsibility for the consequences of their actions. But, Munson does not explain why intervening agents do not incur any responsibility for their part in causing an event. As Nelson asks in relation to sperm donation and AID, why does separating the supply of gametes and the delivery of gametes now entail that responsibility is neither doubled, halved nor shared but 'simply leaks away'?⁵² In other words a more plausible causal account of who is responsible for children must address the fact that many individuals causally contribute to the existence of a child, and explain why different contributions generate different responsibilities.

Munson's account illustrates a more promising move in that it implies a distinction between causal responsibility and moral responsibility. However, as it stands

⁵¹ It is relatively uncontroversial to assert that moral responsibility requires free choice, a point discussed further below.

⁵² Nelson. *Parental Obligations and the Ethics of Surrogacy: A Causal Perspective*. p 58. Note that while Nelson raises this question, his own account, that (only) begetters are the sufficient and proximate cause, also suffers from and does not address this problem.

Munson's account does not explain why some 'causers' are responsible and some are not, nor why only 'initial' causers are responsible. Munson's account, like Nelson's does not succeed in narrowing down the 'causers' of a child's existence and the problem remains that many people contribute to a child's existence. It is unworkable to conclude that they all incur parental obligations, but attempts to eliminate some of the causers require a coherent explanation and not merely an arbitrary stipulation.

5.3 The 'but-for' cause

John Lawrence Hill also puts forward an account which aims to pick out *'the'* cause and to distinguish between all of individuals who contribute to the birth of a child. Hill's account is like Munson's account and argues that it is the 'intended parents' who are the 'first cause' of a procreative relationship and in addition Hill adds that intentional parents are the 'but for' cause. Having discussed the problems with identifying the 'initial cause' as 'the' cause in the previous section, in this section I focus on the possibility that the 'but-for' cause coherently identifies moral parents.

Hill argues that what is essential in determining competing claims over children is not the biological tie between a parent or a child but the 'preconception intention' to have a child⁵³. Hill does not directly address the question of parental obligations but limits himself to a discussion of competing claims. The possibility that parental claims could be determined independently of parental obligations will be discussed further in a later chapter. It is incoherent however, to suggest that intention defines parental claims but that intentional parents have no obligations regarding their intended children, or that intention only generates claims and not obligations. Clearly, as discussed earlier at least one way of acquiring parental obligations is by voluntarily agreeing to take them on. The question of interest here is not 'do intentional parents ever acquire obligations?', but, where different people are competing for the right to raise a child, do the obligations and claims generated by intentional parents uniquely identify the moral

⁵³ Hill. What Does It Mean To Be a Parent? The Claims of Biology as the Basis for Parental Rights.

parents? For the purposes of my inquiry, I assume for the time being that both claims and obligations come together⁵⁴.

Hill puts forward three arguments in support of his claim that, in the face of competing claims intending parents have moral priority. The first focuses on the *prima –facie* importance of the intended parents, the second is an argument claiming that it is unfair to permit surrogates to break their promise to relinquish a child. Thirdly Hill suggests that in cases where such promises are broken, policies which do not immediately clarify who is a parent will render all parties concerned ‘victims of uncertainty’. Hill gives rights based and consequentialist reasons for why gamete providers who do not intend to take on a parental role should keep their preconception promises⁵⁵. In this section, I focus only on the first argument, since this is the argument that directly addresses the issue of parenthood. In this first argument, Hill claims that intentional parents are moral parents because they are the first and ‘but for’ cause of a child’s existence. I leave the subsequent two weaker claims aside because arguments about promise breaking and contract breaking are not relevant to identifying moral parents. Such arguments cannot distinguish between any of the possible candidates for parenthood in terms of which has a greater *prima- facie moral* rather than contractual claim. It is obviously not necessary to engage in arguments about whether genes, intention or gestation have priority if promises and contracts determine parenthood, a possibility considered earlier in chapter 1.

Hill proposes that intentional parents have a prior claim over children whose existence they ‘engineer’ because they were the ‘but-for’ cause of the existence of such children. Hill refers to the infamous Baby M case to illustrate his arguments. In this case, an infertile couple Mr and Mrs Stern commissioned Mary Beth Whitehead, to gestate a child and to relinquish this child to them. The Sterns intended to raise this child from its birth. The child, baby M, was the result of artificial insemination of Ms Whitehead’s with the sperm of Mr Stern.

⁵⁴ In Chapter 6, I explore the possibility that this is not the case.

⁵⁵ Hill. What Does It Mean To Be a Parent? The Claims of Biology as the Basis for Parental Rights.

Hill argues that baby M would not exist 'but for' the actions of Mr and Mrs Stern and that therefore they have priority in the case of competing claims over baby M. Hill acknowledges that other people were involved in the existence of baby M and that Ms Whitehead is also causally connected to the baby. However he argues that

*"... while all the players in the procreative arrangement are necessary in bringing a child into the world, the child would not have been born but for the efforts of the intended parents"*⁵⁶

[original emphasis]

Hill maintains that although it might seem peculiar to determine parental status on the basis of mental states and not tangible biological facts, there is a legal precedent for the relevance of mental states in other areas of law including contract torts and criminal law.

Notice that Hill's account does not commit us to holding any particular type of parent as the trump parent. Rather, Hill's position provides that the persons who intended that a child exist are the people that have priority irrespective of whether or not they have any biological relationship with the child. Of relevance to my inquiry is Hill's claim that intentional parents have priority because of their particular causal connection with the child they intentionally cause to exist. If sound, this argument would also show that genetic parents who are intentional parents also have priority in the face of competing claims.

According to Hill's account the sperm provider in the case of re: Patrick, would not have claims over and duties towards Patrick if his preconception intention was to act merely as a gamete provider and not as a social father⁵⁷. Hill's account implies that

⁵⁶ Hill. What Does It Mean To Be a Parent? The Claims of Biology as the Basis for Parental Rights. p 414.

⁵⁷ It was precisely this question that was the subject of debate in Re: Patrick. Patrick's biological mother maintained that there was never any intention that Patrick's genetic father would have a social role in Patrick's life. Patrick's genetic father stated that while he understood that Patrick's mother and her partner would be Patrick's primary carers, it was never his intention to relinquish all claims and duties regarding Patrick's upbringing.

Patrick would not have existed but-for the actions of the intentional mothers and thus, that they are ‘the’ cause and the moral parents.

However, Hills ‘but-for’ argument ignores the fact that while intentional parents may be necessary for the existence of a child, biological parents also stand in a ‘but-for’ relationship with this child⁵⁸. Hill suggests that

“... while some gestational host and genetic progenitors are necessary to achieve the intention of the intended parents to have a child, no particular biological progenitors are necessary. Where one prospective biological contributor is not available, the couple can always seek the services of others.”⁵⁹ (original emphasis)

The problem with this argument is that, the fact that a biological progenitor is replaceable does not deny the fact that she is causally connected to the existence of a child when she is not replaced⁶⁰. Ms Whitehead was no less necessary than Mr and Mrs Stern for the existence of baby M, even if it is true that Mr and Mrs Stern could have used another gestational host to conceive a different baby.

Similarly in the case of Patrick, even if though the birth mother and her partner initiated and were irreplaceable for the existence of Patrick, the sperm provider was equally irreplaceable. Had the sperm provider in fact been replaced, then another child and not Patrick would have come to exist, and this new sperm provider would equally be irreplaceable for the existence of that child. Thus, the first problem with Hill’s account is that it does not give a coherent account of why ‘intenders’ should be distinguished as ‘the’ cause.

⁵⁸ As argued by Kolers, & Bayne. "Are You My Mommy" On the Genetic Basis of Parenthood.

⁵⁹ Hill. What Does It Mean To Be a Parent? The Claims of Biology as the Basis for Parental Rights. p415

⁶⁰ As argued by Mackie, J. L. (1975). Causes and Conditions In E. Sosa (Ed.), *Causation and Conditionals*. London ; New York: Oxford University Press

A second problem with Hills account is that intentions do not reliably pick out moral parents in all cases. There are two obvious types of examples that illustrate this point, these are cases where intentions change and those where no-one intended the existence of a child. Given that we are to be bound by our intentions regarding children, *which* of our intentions are binding? Consider again the case of the Danish surrogacy. What Hills position would be on this case remain unclear. Although he states that intentional parents have priority in light of competing claims as in the baby M case, in the Danish surrogacy it is the intentional parents who later change their minds. Hill goes to some lengths to argue that once entered into it would be unfair to allow gestational surrogates to break their contractual arrangement and their promise to relinquish a child to intentional parents. He does not however discuss the possibility that intentional parents could be the ones to change their minds.

Further, in the case of unintended pregnancies it is counter intuitive to claim that intention defines parenthood and therefore that genetic parents can choose whether or not to have a role in their children's lives. If parental obligations are determined according to intent then why do we pursue and label "recalcitrant" men who never intended to be fathers and who refuse to pay child support? What would be wrong with a woman, who became pregnant accidentally, abandoning her children simply because she never intended to become pregnant?

Hill suggests a fall-back position; where a child comes into existence in the absence of any preconception intentions, then that child's genetic or gestational parents should constitute its legal parents. His aim is to address concerns that biological progenitors will be denied an unplanned but ultimately wanted child. Hill rejects this concern, stating that where no intentional parents exist, the claims of biological parents would take precedence. The problem with this account is that firstly Hill does not consider the possibility that no-one will claim parenthood, say as in the Danish surrogacy. In contrast to strictly causal accounts, if parental status is defined by preconception intent there is the possibility that a child would have no parents. Further, as discussed

above if biological parents are also necessary, why is biological parenthood a fall-back position and not a candidate equal to intentional parenthood?

To summarise, Hills position entails that biological parents have claims over their offspring, presumably because they cause them to exist (although Hill does not explicitly clarify this point) but that where intentional parents exist, then they have overriding claims, because they are now *the but-for cause* of a child's existence. Hills intentional account is on the one hand intuitively appealing because it acknowledges the possibility of non-biological parents and allows that moral parenthood can voluntarily be taken on. However, his account is not coherent as an account of moral parenthood for at least two reasons 1) it does not explain why 'intenders' should be distinguished as 'the' cause and 2) picking out intentional parents does not reliably identify moral parents in all cases.

5.4 Who is *the* Cause? Conclusion

To recap, I began by suggesting that that strictly causal accounts of parenthood are implausible because they generate too many parents. I then presented three 'narrowing' accounts that ground moral parenthood on causal relationships and attempt to distinguish between all the individuals involved and 'the cause' of a child's existence. Nelson's suggests that gamete providers are *the* cause of a child's existence because they are the proximate and sufficient cause. Munson suggests that the initial causer is *the* cause and Hill argues that intentional parents are both the initial and 'but-for' cause and therefore *the* cause and the moral parents.

All three versions fail to give a coherent causal account of parenthood because each fails to clarify what distinguishes one causal agent from another. The basic problem with these accounts is that each is working on an incomplete and unarticulated understanding of causation and each confuses causal responsibility with moral responsibility.

In the following section I begin by clarifying the notions of cause and consequence, and I show that attempts to identify *'the'* cause of an event are misguided. I argue that moral parenthood cannot be defined simply by defining who is the cause of a child's existence, and I show that parenthood is better understood as about *moral responsibility* and not causal responsibility. I discuss well accepted and standard accounts of moral responsibility and I outline the two conditions that apply before causing an outcome entails that an agent is morally responsible for that outcome; these are 1) freedom and 2) foreseeability. I point out that standard accounts of moral responsibility entail that an agent is morally accountable for both the intentional and unintentional consequences of her free actions where these consequences were reasonable foreseeable.

6. Causes and Consequences

In this section, I consider a standard account of causation and clarify which consequences are the outcome of which actions. I discuss different attempts to limit the consequences for which one can be held to account by limiting the consequences that need to be included in the realm of things for which one needs to account. My aim in this section is to discuss the notion that some consequences can be excluded because some actions are not *'the cause'* of them, because they are too remote to be linked to a cause, or because several persons caused them.

To begin with, which outcomes qualify as consequences of which actions? Perhaps in reflecting on case 1, the civil war story, we might be tempted to argue that the existence of a child was not a consequence linked to the nurse or soldier, but that the individual who fired the gun caused the stray bullet and the accidental conception. Some might argue that in case 1 the fact that a child was caused to exist is simply too remote a consequence or too vaguely connected to the events of that case to define his existence as a consequence of any particular action. Perhaps the consequences of the events leading up to case 1 should be limited to consequences prior to the accidental conception, say to discharging a weapon or causing an injury to a soldier? We could argue that the soldier and nurse in case 1 are not the cause of the boys

existence because many events, other than the provision of gametes were required for his existence (including the firing of a gun and that a stray bullet followed a particular trajectory). How should we define who or what is the cause of an event and which events count as the consequence of an action?

John Mackie illustrates how a simple statement, that A caused P, can be understood in different ways. It can be understood to mean that without A, P would not have resulted, that is, that A is a necessary cause of P. It could mean that A is sufficient to cause P, that is, no other events were required in conjunction with A for P to come about. Further this statement might be intended to convey that A is ‘*a cause*’ of P but only one among many factors which were necessary for P to occur.⁶¹ Mackie suggests that the most satisfactory account of what we mean when we use causal language is captured in the third understanding of this statement. He reasons that A causes P and P is a consequence of an event A, as long as A contributes to P, even if A is not the total cause of P. Mackie refers to conditions of type A above as ‘*in*us conditions’, that is conditions necessary but not always sufficient to bring about P.

Michael Zimmerman explains that the reason that we often focus exclusively on only one of the causes of a consequence and that we may incorrectly claim it to be ‘the cause’ is because we conflate two notions: the weight or judgement assigned to a cause and the determination of the causes⁶². For example in case 2 involving the knife fight, imagine that the young woman decided to press charges against one of the young men and claimed damages for the knife wound she sustained and the associated medical expenses. A court of law might then be required to assign liability for medical expenses to a particular person and this might require a determination of who was to blame. But, the fact that a court of law decides that someone is to blame for a knife wound does not entail that they are therefore the *only cause* of a knife wound. More simply, it entails only that of all the factors that contributed to the knife wound, blame

⁶¹ Mackie. *Causes and Conditions*

⁶² Zimmerman, M. (1998). *An Essay On Moral Responsibility*. Totowa, NJ: Rowman and Littlefield.

or legal liability is attached to one (or some) of these⁶³. However, if we remove for the time being, questions about how all of the actions which caused the knife wound could be judged, it is easy to see that many actions together caused that injury, including the actions of the young woman herself. To summarise, the statement that A caused P entails only that P is causally connected to A and A is necessary, but not (always) sufficient, to cause P.

Mackie further explains why we tend to cite only one cause as ‘the cause’ and overlook other inus conditions. To borrow from Mackie, in relation to the existence of the child in case 2, the knife wound is an inus condition. In this particular case, this injury was necessary but not sufficient to cause the child’s conception, even though, considered on its own the knife wound did not guarantee that the woman would conceive a child and even though knife wounds are not a necessary to cause all conceptions in general.

Mackie explains that one reason that we might claim that an inus condition is ‘the cause’ and not just ‘a cause’ is because of the limits of the field of our enquiry. For example, consider again the nurse in case 1 (the civil war story), let’s call her Betty. Imagine that on the day of Betty’s shooting one of her colleagues, John was also on duty. Now consider the question “why did Betty get shot?”. If a historian were asking this question, she might be interested in why shots were fired on the day and at the location that Betty was on duty. However, a charge nurse might be more concerned with the safety of his nurses and might be interested in why Betty was shot and not her colleague John. The answer to the historians question might be that a renegade group of soldiers broke ranks and began to fire at the hospital grounds. The answer to the charge nurses question might be that Betty was attending to a wounded soldier

⁶³ This conclusion is not however one universally accepted amongst legal theorists. According to Hart and Honore there is no distinction between causing P and being liable for P. Hart, H. L. A., & Honore, T. (1985). *Causation in the law* (2nd ed.). Oxford: New York: Clarendon Press; :Oxford University Press.. But as Gillam argues it is not surprising that this distinction is not made by legal theorists because the law is in fact looking for causes to attach liability to and therefore not concerned with other actions that may be causes but not actions that attract legal blame, see Gillam, L. (1999). *Using fetal tissue and Nazi data*: Monash University PhD Dissertation. I suggest that this is an example of looking for a cause in a particular causal field and as discussed above does not entail that a cause inside one causal field is not also a cause inside another field, even though it is not acknowledged as such because of the limits of the field of our enquiry.

while John had a tea break. The answer to the two questions are obviously different even though the fact that a rebellion took place and that Betty did not take her tea break when John did, were both necessary for Betty to get shot.

Using Mackies account we can see we might fail to notice some inus conditions as causes because of the limits of the field of our enquiry. Similarly, in both case 1 and 2, it might seem counter intuitive to say that the genetic parents caused their offspring to exist. However, when we consider this statement in light of Zimmerman and Mackies clarification, it is clear that contributing gametes is an inus condition or ‘a cause’ of a child’s existence. It is also clear that contributing gametes is not sufficient to cause a child to exist, nor does it guarantee that a child will result. The existence of a genetically related child is however, a consequence of the contribution of gametes from the genetic parents in both cases 1 and 2.

But perhaps in thinking about who is the cause of a child’s existence what we are really interested in is whose contribution is the most important or noteworthy. To return to case 1, we might accept that gametes from the soldier and nurse were necessary for the existence of their genetic child but that this is not the most important factor contributing to the child existence. It could be said for example that environmental or social factors more importantly account for a child’s existence. For example, unintended pregnancies are frequently a consequence of war. We could claim, for argument’s sake, that it is this social context that more importantly accounts for the existence of the child in case 1 than does the contribution of his genetic parents. But, as discussed in chapter 2, it is not always possible to measure the different causal contributions for any consequence. While we can acknowledge the different contributions of genetic, gestational and social parents this is not to say that we can measure such contributions or rank the extent to which they caused a child’s existence. The most noteworthy or important cause, is simply the cause that relates to our question of interest. As explained in the case of nurse Betty, if a charge nurse is asking why Betty was shot and not her colleague John then the answer that John was on a tea break suggests that this was the most important cause of Betty’s shooting.

However, the fact that John was on a tea break is only the most important cause of Betty's shooting in the context of the question asked by the charge nurse. Many other things were obviously equally necessary and therefore equally important for Betty's shooting to occur. In other words, where two events, A and B are both necessary for consequence P, it makes no sense to claim that A is *more the cause* of P than B is, it is more likely that we are simply more interested in either A or B.

Perhaps the reason that we might at first glance, think that a particular causal contribution is less important than another is because it is more easily replaceable. For example, as discussed above this is the kind of argument used by Hill to claim that intentional parents have priority over gestational mothers because the latter are replaceable. However, as argued earlier to say that for consequence P, that cause A is replaceable, is not to say that A is any less important than cause B, when it is not in fact replaced. Recall as discussed for the Patrick case, if Patrick's genetic father had been replaced by another different sperm donor then 'a child' would have resulted, but not Patrick. In questions about moral parenthood we are interested in who are the particular parents of particular children. The incorrect claim that some causes of an outcome are less important in causing that outcome might again result from confusing 'cause' with legal notions where different causal contributions can attract different 'liabilities', as discussed earlier.

In summary any consequence that can be shown to be causally linked to an event can be said to be caused by that event, but nothing more is entailed by the statement that A caused P or P is a consequence of A. Lynn Gillam discusses our understanding of causal language in common parlance⁶⁴. She points out that it may seem like an empty conclusion to say that 'a cause' is only that, and no more a cause than any other contributing factor. She suggests however that on reflection this account is not so counter intuitive, but captures our everyday meaning of causes and consequence. Gillam explains that it would make no sense to distinguish between foreseeable and unforeseeable or intended and unintended consequences if the consequences of A

⁶⁴ Gillam. Using fetal tissue and Nazi data

were only those things that were guaranteed by A or inevitably followed from A. To this we can add that where A and B in combination cause consequence P, A might have different moral or legal weight to B, but both are equally causes of P.

I conclude this clarification of causes and consequence by pointing out that both actions and omissions can be the cause of a consequence. It is sometimes thought that actively bringing about an event is different to bringing about the same event by failing to act, say as in the often cited example of killing someone and not preventing the death of that person. However, as Mackie points out, both actions and omission can be ‘a cause’ of an event according to his definition of an inus condition⁶⁵.

The above clarifications of ‘what is a cause’ and ‘what is a consequence’ can now be applied to causal accounts of parenthood. Accordingly, any and every action (and omission) that contributes to the existence of a child is a cause of this child’s existence. This includes the actions of gamete providers, midwives, gestating mothers, grandparents and even acts of war.

To return to Munson’s position, it should now be clear that his claim that a sperm donor is not the ‘causal agent’ of a child’s existence does not stand up to analysis. A sperm donor is no less the cause of a child’s existence than is the genetic mother or the gestating mother. But, how then do we account for our intuitions that sperm donors are not morally accountable for the children they help to bring about? Leaving aside the question of the sperm donors intentions for now, ⁶⁶ it could be argued that while he is one of the necessary causes, that many other agents subsequently intervene and contribute to a child’s existence and that they are therefore accountable. Another possible defence of the sperm donor is that often sperm is donated and stored for long periods of time. Can people be held to account for the consequences of their actions even if these consequences occur many months or years later?

⁶⁵ Mackie. *Causes and Conditions* p16

⁶⁶ The question of whether a sperm donor’s intentions make him less accountable was introduced earlier and will be considered further below. I put aside for now questions about the different moral weight that might be attached to different causal contributions.

Again I will draw on standard accounts of causal responsibility to tackle this question. More specifically, I address the question of whether we can exclude consequences that are only remotely attached to us because they are removed from us in time, or because the actions of other persons removes them from us.

The first thing to notice about this question is that it represents yet another attempt to distinguish between ‘a cause’ and ‘the cause’. If we accept Mackies account of causing and his description of ‘inus conditions’ it is clear that A can be said to be a cause of P even if P occurs many year later and even if events B,C and D intervene in the causing of P. An example may help to illustrate this point: it is now clear that smoking is causally connected to lung cancer⁶⁷. Obviously lung cancer is not exclusively caused by smoking and many other things may intervene to determine whether or not a person who smokes does in fact develop lung cancer. For example, some people might argue that a persons genetic predisposition, whether or not she frequents smoky bars, whether she meditates or her husbands smoking all contribute to whether or not she will develop lung cancer. It is also true that lung cancer may develop many years after a person stops smoking and that many smokers developed lung cancer before it was known that smoking causes lung cancer. This example shows that a causal link between smoking and lung cancer exists irrespective of how much time elapses before lung cancer develops or how many other factors or persons intervene or contribute to causing lung cancer.

To reiterate, provided that a causal link can be traced between A and P, P is a consequence of A irrespective of when P eventuates. When this is the case then A can be said to cause P even when many other factors or persons intervene subsequent to A. Applying this understanding to examples of parenthood, it is true that a sperm donors actions might be quite distant in time from the existence of a child and that many other persons intervene to cause this child to exist. For example a child can result from a sperm donation only if a technician prepares the sperm donation for insemination, if a woman consents to insemination with this sample, if a clinician or

⁶⁷ This is an example I borrow from Hart Hart, & Honore. *Causation in the law*, p71

nurse correctly locates the catheter used to inject the sperm, etcetera. We might feel differently about the importance of each of the contributions that result in the existence of a child. But, it is not the case that because there are many different contributions or because some of them are subsequent to the contribution of the sperm donor, that therefore a child that results from his donation is not a consequence of his sperm donation.

The question of whether or not different moral weight attaches to different contributions (or different contributors) or whether sharing a causal connection entails sharing moral responsibility will be dealt with in the following chapter. For now I conclude only that every event that is necessary for the existence of a child can be said to be 'a cause' of this child's existence. Thus, sperm donors, technicians, genetic gestational and nurturing parents can all be said to cause a child to exist as can IVF scientists and clinicians, midwives, grandparents and in cases 1 and 2, gun shots and knife wounds. I conclude that attempts to distinguish between the type of causal connection between adults and children are incoherent and that identifying the 'causers' of a child's existence does not identify a child's moral parents.

In the following section, I argue that moral responsibility and *not* causal responsibility is the basis of parental obligations. I consider the intuition that the soldier and the nurse in case 1 are not morally accountable for their genetic child. I explain this intuition by referring to standard accounts of moral responsibility which show that we are not morally accountable for everything that we cause.

I conclude this chapter with an analysis of when, and under which conditions, causing a child to exist entails moral responsibility for that child. These considerations have important bearing on the question of whether genetic parents are moral parents. Given that, as I have shown, genetic parents are *a cause* of the existence of their genetic offspring and that at least some example of causing entail moral responsibility, does making a genetic contribution to a child ever or always entail that a genetic parent is morally responsible for her child?

I begin by referring to standard accounts of moral responsibility to explain the types of causing for which one can be held morally accountable.

7. Conditions for moral responsibility

In the discussion above I showed that underlying a strictly causal account of moral parenthood is the claim that we are morally responsible for all of the consequences of our actions. I illustrated the problems with this account using two case studies that suggest that genetic parents are not always, morally accountable for causing a child to exist.

In what follows I will argue that genetic parents are in fact always a cause of their offspring's existence but that they are not necessarily morally accountable.

The issue of moral responsibility is complex and a full discussion is outside the scope of the present analysis. There is however, common agreement on at least two conditions to be met before we can hold someone accountable for the consequences of their actions. One of these conditions is freedom; it is widely held that we are not responsible for consequences that are unavoidable or in situations where we would have done otherwise had we been free to⁶⁸. Exactly what is meant by 'acting freely' involves discussion of determinism and questions about what is beyond our control, and remains much debated⁶⁹. I briefly summarise two divergent accounts of the type of freedom required for moral responsibility accept both for the purposes of my thesis.

The second condition identifies which consequences we can be held to account for, and entails that that an agent is morally accountable for the consequences of her actions where these consequences were reasonably foreseeable. It is relatively

⁶⁸Zimmerman. Responsibility.

⁶⁹ Duff. Responsibility. . See also Zimmerman. *An Essay On Moral Responsibility*. Chapters 1 and 4.

uncontroversial to conclude that we cannot be held to account for outcomes that there was no reason to foresee. I discuss each of these conditions in turn.

7.1 Condition 1: Freedom

The question of how freely people engage in genetic parenthood is often raised in particular in relation to women's decision to become mothers, to undertake IVF, or to volunteer their services as gestational surrogates. It has been claimed that strong societal pressures for women to give birth and raise children, sometimes referred to as 'pronatalism', undermine autonomous decision-making. This type of argument rests on the extent to which a factor that influences our actions or decisions can be said to make them 'unfree'. It is also true that this decision is one frequently besieged by external influences including the wishes of one's spouse, parents and friends, cultural and religious contexts and even the political milieu⁷⁰. There exist many accounts of what constitutes free actions and the difference between coercion, manipulation and persuasion⁷¹. While I accept that societal pressure and/or technological advances can influence and perhaps sometimes manipulate our choices, I reject the claim that pronatalism entails that the decisions made in relation to begetting are necessarily coerced. I accept that moral accountability for an action or decision does not require *absolute* freedom from influence, but merely *substantial* freedom. As Beauchamp and Childress point out, influence is a matter of degree⁷²; at one end of the spectrum of influence it is possible for begetting to be an action for which one is not morally accountable because it was coerced and therefore involuntary. I reject the notion that genetic parenthood is *necessarily* 'unfree'.

⁷⁰ Decisions or actions regarding whether or not to beget might also be rendered 'unfree' or inauthentic based on an inability to understand the consequences of this action or in the case of fertility treatment, because inadequate information about treatment is given. Note however, that, in general, fertility clinics are required to go to great lengths to ensure that their patients receive comprehensive information, to ascertain their patient's competence and that their patients are not unduly pressured by spouses, relatives or others prior to treatment. Arguably, while not a universal requirement, these are statutory requirements in Victoria and governed by national guidelines elsewhere in Australia. Failing to meet these requirements attract hefty penalties throughout Australia.

⁷¹ See for example Gert, B. (1972). Coercion and Freedom. In J. R. Pennock & J. W. Chapman (Eds.), *Nomos XIV, Coercion* (pp. 30-48), Nozick, R. (1969). Coercion In *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* (pp. 440-472). New York: St. Martin's Press

⁷² Beauchamp, & Childress. *Principles of Biomedical Ethics*. p164

What kind of freedom, or voluntariness, is required before we can hold that an agent is responsible for her actions? This question has engaged philosophers since the time of ancient Greece and is still vigorously debated. It is outside the scope of this thesis to present a detailed analysis of this issue. In what follows I provide a brief sketch of some of the most influential accounts⁷³ in order to explain the position I adopt for the purpose of my thesis.

On the one hand some philosophers maintain that none of our actions are really voluntary and accept the philosophical proposition known as *determinism*; that every event, including human thought, decision and action, is causally determined by an unbroken chain of prior events. In other words this proposition suggests that for all my decisions and actions there is some a prior condition that is the sufficient cause of what I do. Philosophers known as ‘incompatibilists’⁷⁴ maintain that free will is not compatible with determinism. So called ‘hard determinists’⁷⁵ are incompatibilists who accept determinism and reject free will. They argue that if determinism is true, then and all of our decisions are caused by prior circumstance or events and we cannot act differently than we do act. Thus, we cannot ever be said to have acted freely or to have free will. So called ‘Libertarians’ hold the alternative incompatibilist view and believe that we do have free will and that this entails that determinism is false.

On the other hand some philosophers hold that determinism *is* compatible with free will. ‘Compatibilists’, as they are known, maintain that we have good reason to believe that we have free will and that this is true even if determinism is true.

⁷³ Based on Clarke, R. (2005). Incompatibilist (Nondeterministic) Theories of Free Will. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2005 Edition). <http://plato.stanford.edu/archives/sum2005/entries/incompatibilism-theories/>, McKenna, M. (2004). Compatibilism, *The Stanford Encyclopedia of Philosophy* (Summer 2004 Edition). In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2004 Edition). <http://plato.stanford.edu/archives/sum2004/entries/compatibilism/>, O’Conner, T. (2005). Free Will. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2005 Edition). <http://plato.stanford.edu/archives/sum2005/entries/freewill/>, Thornton, M. (1989). *Do we have free will?* Bristol: Bristol Classical Press.

⁷⁴ So named because they hold that determinism is incompatible with free will.

⁷⁵ See Vihvelin, K. (2003). Arguments for Incompatibilism. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2003 Edition). <http://plato.stanford.edu/archives/win2003/entries/incompatibilism-arguments/>

The ethical implications of these opposing positions are obvious. It is a basic assumption that some kind of freedom is a necessary precondition for moral responsibility and it is largely because of the connection between free will and moral responsibility that the question of free will is so vigorously discussed⁷⁶. Even hard determinists who discard the concept of moral responsibility do so because they believe that we lack moral freedom⁷⁷. Both incompatibilists and compatibilists agree that it is unreasonable to hold that an agent is morally responsible for her actions if it did not entail the exercise of her free will. Where compatibilists and libertarian incompatibilists differ is on the understanding of free will that they endorse.

Libertarian free will involves rejecting determinism and is generally associated with the Principle of Alternate Possibilities (PAP)⁷⁸. According to this principle, free will requires the availability of some alternative possibility and that the ability to choose between alternatives be available to the agent. While widely held, this definition is not universally accepted. An influential and rival compatibilist account rejects PAP, and maintains that in some cases an agent can be morally responsible for an action, even where she is unable to avoid performing the action. This type of account is famously associated with Harry Frankfurt and a variety of science fiction style examples known collectively as Frankfurt-style examples.⁷⁹ Typically these involve imagining a situation where an agent could not have avoided doing something but would have performed exactly the same action even if she could have done otherwise.⁸⁰ To clarify consider the following example Frankfurt-style example by John Fischer.

“...Jones is in the voting booth deliberating about whether to vote for Gore or Bush...After some reflection he chooses to vote for Gore, and does vote for Gore by marking his ballot in the normal way. Unbeknownst to him, Black, a liberal neurosurgeon working with the

⁷⁶ As pointed out by Eshelman, A. (2004). Moral responsibility. In E. N. Zalta (Ed.), *The Stanford Encyclopaedia of Philosophy* (Fall 2004 edition). <http://plato.stanford.edu/archives/fall2004/entries/moral-responsibility/>

⁷⁷ Thornton. *Do we have free will?*

⁷⁸ Discussed by van Inwagen, P. (1978). Ability and responsibility. *Philosophical Review*, 87(2), 201-204

⁷⁹ Fischer, J. M., & Ravizza, M. (1998). *Responsibility and Control: A Theory of Moral Responsibility*. Cambridge: Cambridge University Press, Frankfurt, H. (1969). Alternate possibilities and moral responsibility. *Journal of Philosophy*, 66(23), 829-839

⁸⁰ Fischer, & Ravizza. *Responsibility and Control: A Theory of Moral Responsibility*, Fischer, J. M., & Ravizza, M. (Eds.). (1993). *Perspectives on Moral Responsibility*. Ithaca: Cornell University Press

*Democratic party, has implanted a device in Jone's brain that monitors Jone's brain activities. If he is about to choose to vote (say) Republican, the device triggers an intervention that involves electronic stimulation of the brain sufficient to produce a choice vote for the Democrat (and a subsequent Democratic vote).*⁸¹

Most commentators on this example would agree that Jones is both morally responsible for his act and that he acted freely. They differ on whether Jones 'could have done otherwise' at the time of his act.

On some incompatibilist accounts, it is Jones's will that directly causes his voting for Gore and his 'will' is free, even though the possibilities that Jones can 'will' are restricted. These types of accounts are sometimes referred to as self-determination accounts and have in common the notion that agents determine their own will and are therefore not causally determined by external influences⁸². On some versions of self-determining accounts because Jones could have chosen to 'refrain from willing' to vote for Gore he 'could have done otherwise'⁸³. Some incompatibilists suggest that Frankfurt-style examples actually support their position. As they explain, a feature of these examples is that the 'intervener's' device is connected in such a way as to detect what could have happened but did not actually occur. For example in 'Jones' the brain device detects Jones's intention to do otherwise. The possibility of an intention to do otherwise, sometimes referred to as a 'flicker of freedom' is held to be the 'alternative possibility' required for moral responsibility⁸⁴.

Conversely on compatibilist accounts Jones is morally responsible *even though* he does not have any alternative possibilities. Frankfurt argues that where the reasons for performing an action are not affected by the fact that a person had no other choice, then this person is morally responsible for her action *even though* she had no other

⁸¹ Fischer, J. M. (2002). Contours of agency : essays on themes from Harry Frankfurt In S. Buss & L. Overton (Eds.), (pp. 1-26). Cambridge, Mass: MIT Press p3

⁸² For an example of this type of account see Campbell, C. A. (1967). *In the defence of Free Will & other essays*. London: Allen & Unwin Ltd.

⁸³ Campbell. *In the defence of Free Will & other essays*.

⁸⁴ Rocca, M. D. (1998). Frankfurt, Fischer, and Flickers. *Nos*, 32, 99-105

choice. Frankfurt suggests that PAP should be revised to assert that a person is not morally responsible for what she has done if she did it *only because* she could not have done otherwise⁸⁵. In short, Frankfurt argues that an agent is morally responsible for an action if she reflectively endorses it. Thus, if on reflection, voting for Gore was an action that Jones wanted to perform it makes no difference if in fact he was unable to do anything other than vote for Gore. Frankfurt distinguishes between having a free will and acting on the basis of one's own free will, that is, on the basis of desires one wants to have.

More recently Fischer and Ravizza have introduced a more nuanced compatibilist account centred on the notion that moral responsibility is associated with control. They distinguish between two types of control, guidance control and regulative control, only the first of which is required for moral responsibility. On their account, guidance control involves two elements, an agent's 'ownership' of the mechanism that results in the behaviour and the 'reasons- responsiveness' of the mechanism. In summary they state that 'an agent is morally responsible for an action to the extent that it issues from the agent's own, reasons-responsive mechanism'⁸⁶. In the case of Jones above, Jones exercises guidance control in that he takes responsibility for the mechanism that results in his voting for Gore and his action in doing so is an action that is reasons-responsive and not an action triggered by a brain device. Fischer and Ravizza maintain that regulative control, that is the ability to regulate between different alternatives, is not required for moral responsibility.

In summary much of the debate surrounding free will and moral responsibility hinges on the question of what type of freedom is required before an agent is morally responsible for her actions. On libertarian accounts moral responsibility requires the alternative choices, whereas on compatibilists accounts moral responsibility does not require the type of freedom associated with alternative choices. On Frankfurts

⁸⁵ Frankfurt, H. (1993). Identification and wholeheartedness. In J. M. Fischer & M. Ravizza (Eds.), *Perspectives on Moral Responsibility* (pp. 170-187). Ithaca: Cornell University Press

⁸⁶ Fischer, & Ravizza. *Responsibility and Control: A Theory of Moral Responsibility*. p243

account reflective endorsement entails moral responsibility. On Fischer's account guidance control entails moral responsibility.

A 'flood of ink has been spilled'⁸⁷ on how to understand the concept of alternative possibilities and whether this is the sort of freedom required for moral responsibility. It is not within the scope of this thesis to fully consider this complex issue, nor is it necessary for me to decide between competing accounts of freedom or control. While many other subtly different and nuanced incompatibilist and compatibilist accounts exist⁸⁸, it is not necessary for my purpose to consider every variation on the themes summarised above. I do not adopt any particular conception of freedom or control, nor do I choose between compatibilism or incompatibilism. It is generally accepted that moral responsibility requires freedom and it is also widely held that the type of freedom required for moral responsibility requires alternative possibilities or that an agent own or control their actual choices⁸⁹. The issue of whether or not alternative possibilities are required for moral responsibility is academically fascinating, however, it is obviously possible to make meaningful determinations about whether or not an agent is morally responsible without resolving this question. I accept that, until this question is settled (if this is indeed possible) both accounts of the types of freedom required for moral responsibility are plausible.

I suggest that in all of the cases of genetic parenthood that I discuss, questions about whether or not the condition of freedom was met can be answered by asking whether either of these two broad types of conditions were met. In other words, I will accept the position that an agent is morally responsible for the consequences of an action if 1) this action was free; where being free entails that either a) the agent 'could have done otherwise' or b) that she reflectively endorsed or owned her actions as described by Frankfurt⁹⁰ and Fischer⁹¹.

⁸⁷ According to O'Conner. Free Will.

⁸⁸ See O'Conner. Free Will. for a review.

⁸⁹ O'Conner. Free Will.

⁹⁰ Frankfurt. Alternate possibilities and moral responsibility.

⁹¹ Fischer, & Ravizza. *Responsibility and Control: A Theory of Moral Responsibility*.

To return to case 1 (the civil war story) it is clear that neither genetic parent could have prevented their genetic contribution to the child that resulted from their gametes, nor did they reflectively endorse the action that lead them to contribute gametes. The mechanism of the action that lead to the release of their gametes, a bullet's trajectory, was not an action that was responsive to reason or one owned by either the soldier or the nurse. I suggest that, based on my accepted definition of freedom as above, this case is an example of 'unfreely' begetting. Because we cannot be held to account for consequences for which we are not free, the genetic parents in this case are not morally accountable for their genetic offspring they caused to exist and hence are not moral parents.

7.2 Condition 2: Foreseeability

While case 1 represents a very unusual case of 'unfree' begetting, in case 2 (the knife fight story) it could be said that begetting or making gametes available was not equally unfree, (at least for the male involved). Engaging in fellatio and releasing gametes, in the absence of coercion, is on my definition a free action because those involved could have done otherwise and their actions were both responsive to reason and owned by them. Therefore the release of male gametes in this example is an action for which the agent can be held accountable for the consequences. Of relevance to this case is the second condition standardly applied to causal accounts of moral responsibility. This states that we cannot be held to account for *all* of the consequences of our free actions, but only for those consequences that are foreseeable⁹². Clearly no-one foresaw or could have foreseen that the instance of oral sex described in case 2 could result in the existence of a child. While there is some debate over how to determine foreseeability, the fact that not even the medical staff could explain how the pregnancy in case 2 eventuated, attests to the fact that in this example at least, pregnancy was unforeseeable.

⁹² See Dworkin, G. (1987). Intention, foreseeability, and responsibility In F. Schoeman (Ed.), *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (pp. 338-354). Cambridge: Cambridge University Press

Intended and Unintended Consequences

Notice that the claim that we are only morally accountable for the foreseeable consequences of our actions does not exclude consequences that we did not intend to bring about. It is clearly possible to bring about a consequence that was unintended, but one that was foreseeable⁹³. For example imagine that I hurl a vase at the wall intending to smash it. If my husband is standing in the vicinity of the wall that I intend the vase to strike, it is foreseeable that I could cause the vase to smash on him instead of on the wall. While I could appeal to my husband that smashing a vase on him was an accident and that this was not my intention, most of us would agree that my explanation that 'it was not my intention' or 'I didn't mean it to happen' do not release me from responsibility for any injury I cause him as a result of throwing the vase. This is a good example of what is sometimes referred to as the intention/foresight distinction and the fact that we can be held accountable for consequences we did not intend when these were foreseeable. Obviously injuring someone as a result of throwing vases near him is foreseeable, even if unintended.

One of the reasons that unintended consequences are sometimes incorrectly believed to fall outside the realm of consequences for which we are accountable again relates to the confusion pointed out earlier between holding that someone is accountable for consequences and holding that they are to blame. To hold that one is accountable for unintended outcomes is not to say that they are equally as blameworthy as if they had intentionally caused the same outcome. An example may clarify this point. Recall Kagan's example of the near drowning when Agnes pushes Victor into a swimming pool. Let us assume that in case (a), Agnes's intention was just to have fun with Victor and to give him a fright. Unfortunately, it turns out that Victor is not a strong swimmer and that he drowns. Now assume that in case (b), this incident is replayed, but that Agnes pushes Victor into the pool intending to drown him. We do not accept that Agnes is free of blame in either case (a) or case (b). In both cases in this example,

⁹³ Note also that it is possible to intend that something happen and not cause it. For example I might intend that a child exist but if I do not act on this intention then no child will actually come to exist and it cannot be said that my intention caused her existence. Conversely, in the Danish surrogacy case it was clearly the intentions of the commissioning parents that led to the instigation of the surrogacy arrangements and finally to the birth of the twin girls. For the present analysis I am concerned only with intention where it *is* in fact 'a cause' of a child's existence and more specifically to show that it is possible to unintentionally cause a foreseeable outcome.

both conditions for moral responsibility are clearly met. Agnes is both free not to push Victor into the pool and can foresee that doing so may cause him to drown. Obviously if we could escape moral accountability by simply proving that we intended only some and not other consequences of our actions, then we would be free to engage in many dangerous activities. As Shelly Kagan points out accountability for only intended consequences would be ridiculously permissive⁹⁴.

However, the fact that we are morally accountable for the unintended consequences of our actions does entail that both unintentionally and intentionally causing the same consequence deserve the same ascription of blame. In the example of Agnes and Victor, it is clear that in case (a) Agnes can be held to account for Victor's drowning and that some blame should be attached to her actions even though she did not intend for Victor to drown. It is also clear that in case (b) Agnes does something worse than in case (a) even though Victor drowns in both cases. Blame is a combination of accountability and moral weight. To assign blame to Agnes is to assign moral weight to an action for which Agnes was morally accountable, and moral weight is a matter of evaluating how bad something is. It is generally held that intentionally causing a bad outcome, as does Agnes in b) is worse (more morally bad) than unintentionally causing the same outcome and therefore attracts more blame.

Confusion over unintended and intended consequences is also evident in interpretations of the 'Doctrine of Double Effect' (DDE). This doctrine is often falsely understood to mean that an agent is not morally responsible for unintended consequences. DDE is credited to Thomas Aquinas and has modern formulations in Catholic theology with broad secular appeal. According to DDE it is sometimes permissible to perform an action with impermissible bad consequences when these are not intended but merely foreseeable and unintended side effects. In other words where an action has both good intended consequences and bad unintended side effects DDE holds that the former sometimes outweighs the former and thus that the action is justified. The following examples clarify this point:

⁹⁴ Kagan, S. (1989). *The Limits of Morality*. New York: Oxford University Press.p 152.

1. *A doctor who intends to hasten the death of a terminally ill patient by injecting a large dose of morphine would act impermissibly because he intends to bring about the patient's death. However, a doctor who intended to relieve the patient's pain with that same dose and merely foresaw the hastening of the patient's death would act permissibly.*
2. *A doctor who believed that abortion was wrong, even in order to save the mother's life, might nevertheless consistently believe that it would be permissible to perform a hysterectomy on a pregnant woman with cancer. In carrying out the hysterectomy, the doctor would aim to save the woman's life while merely foreseeing the death of the fetus. Performing an abortion, by contrast, would involve intending to kill the fetus as a means to saving the mother.⁹⁵*

The DDE is often thought to show that an agent may permissibly bring about harmful consequences provided that these are merely foreseen side effects of promoting good consequences. However, as many philosophers have shown⁹⁶, this is a misinterpretation of the DDE. What is frequently overlooked are the conditions that apply to DDE. These are formulated in several different ways but always include the requirement that there exist strong moral reasons for bringing about the unintended harms⁹⁷.

Alison McIntyre provides the following clear example from The New Catholic Encyclopedia, which provides four conditions for the application of the Principle of Double Effect.

1. The act itself must be morally good or at least indifferent.
2. The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary.

⁹⁵ As cited in McIntyre, A. (2004). Doctrine of Double Effect In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy (Fall 2004 Edition)*. <http://plato.stanford.edu/archives/fall2004/entries/double-effect/>

⁹⁶ McIntyre. Doctrine of Double Effect

⁹⁷ As cited in McIntyre. Doctrine of Double Effect

3. The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed.
4. The good effect must be sufficiently desirable to compensate for the allowing of the bad effect.

It is condition four of the above formulation of DDE that requires a justification for bringing about unintended consequences.

In the words of Alison McIntyre⁹⁸ traditional formulations of DDE “*require that the value of promoting the good end outweigh the disvalue of the harmful side effect*”. What this condition entails is that unintended consequences are only permissible in *some* circumstances and that they require a moral justification. If it were *always* permissible to bring about unintended consequences, then no justification would be required. In other words to require that an agent morally justify the unintended consequences of their actions is to hold them morally accountable for those consequences even though they were unintended. Thus it is not the case that unintended consequences fall outside the realm of consequences for which we can be held to account.

What this analysis of the intention/foresight distinction reveals is that an agent is morally accountable for both the foreseeable consequences of both the intended and unintended consequences of her action. To recap we can now state that in addition to the conditions of freedom and foreseeability, the existence of a child is a consequence for which an agent can be held to account even if this child’s existence was unintended. The only unintended consequences for which we are not morally responsible are those that are unforeseeable.

⁹⁸ McIntyre. Doctrine of Double Effect

Predictably, the next problem in this analysis of causal accounts of moral parenthood is in defining when a consequence is foreseeable.

The common understanding of foreseeability is that consequences are foreseeable if a reasonable person would have reason to expect that they might occur⁹⁹. Similarly according to legal definitions ‘reasonably foreseeable’ entails: “*Such as reasonably can or should be anticipated. Such that a person of ordinary prudence would expect to occur or exist under the circumstances (a foreseeable risk) (the foreseeable expenses) (a foreseeable plaintiff)*”¹⁰⁰. However, there is continued debate over who is reasonable, what they might foresee and whether responsibility should be limited to what is foreseen, not merely foreseeable.

Clearly weighty judgments about moral responsibility are attached to how foreseeability is defined. It is therefore necessary to clarify the interpretation of ‘foreseeability’ that I will use to address question about moral parenthood. I draw once again on the work of Lynn Gillam¹⁰¹ who points out that an established interpretation of foreseeability is absent from the philosophical literature and sets out her own account. Gillam begins noting the importance of distinguishing between what is foreseen and what is foreseeable. Consequences are ‘foreseen’ when an agent consciously realises that they might occur. However consequences are ‘foreseeable’ when ‘*a reasonable person in the agent’s situation, knowing what the agent knows or ought to have known, would have foreseen them*’¹⁰². She uses the example of a negligent train driver to illustrate that importance of this distinction. Imagine that a train driver goes through a red signal killing several workers on the line and that this occurred because he was not looking at the signal light, but occupied eating his lunch. As Gillam points out, in this case we hold that the train driver is to blame even though he did not intend the deaths or foresee them. We believe that he ought to have been looking at the signal and that a reasonable person in the train driver’s position could have foreseen what happened.

⁹⁹ Although commonly accepted, responsibility for foreseeable consequences, as opposed to foreseen consequences, is not universally held. For discussion see Zimmerman. *An Essay On Moral Responsibility*. Chapter 4.

¹⁰⁰ Merriam-Webster’s Dictionary of Law 1996. . (1996). Retrieved 12-10-05, from <http://www.answers.com/topic/foreseeable>

¹⁰¹ Gillam. Using fetal tissue and Nazi data

¹⁰² Fischer, & Ravizza. *Responsibility and Control: A Theory of Moral Responsibility*, Frankfurt. Alternate possibilities and moral responsibility. , Gillam. Using fetal tissue and Nazi data p88

The difference between foreseen and foreseeable is what allows us to blame a negligent agent and entails that there are some consequences that all reasonable people in the agent's position ought to foresee. To clarify, there are consequences that a negligent person should have foreseen because these would have been foreseeable to a reasonable person.

But which consequences are foreseeable to a reasonable person? Gillam approaches this question by considering the features that might be thought to make consequences unforeseeable. She argues that neither certainty nor statistical likelihood are conditions of foreseeability. Gillam reasons that given a range of possible consequences, each of which is mutually exclusive, all of these possibilities are foreseeable provided there is some reason for expecting they might occur. Similarly, unlikely consequences are foreseeable if they can be expected in some circumstances. Gillam gives the example of a one in a hundred risk of an antibiotic causing nausea and reasons that nausea is a consequence that is foreseeable to a doctor who prescribes the antibiotic even if the doctor believes it is very unlikely to occur.

In the analysis of parental claims that follows in subsequent chapters, I adopt my own account of foreseeability, which is based on a modified version of Gillam's account. My account draws out what will later come to be an important distinction; that is the distinction between the 'reasonable person standard' and the 'particular person standard'. The inclusion of the 'reasonable person standard' in the definition of 'foreseeability' allows that there are some consequences which are foreseeable to all reasonable people. However, the definition also states that this reasonable person is in the position of a particular person, or knows what they know or should know. In other words the 'reasonable person standard' is a minimum or baseline measure of what it is that we should foresee. I cannot claim that a consequence was unforeseeable if any reasonable person in my position would have reason to expect it. For example, imagine that I am late for lunch at my mother's because I am unexpectedly delayed in the flow of traffic leaving a football match. My excuse to her is that I am not a football fan and I did not foresee that there would be traffic on the road to her house.

She replies that any reasonable person living in Melbourne knows that there will be traffic on Saturday afternoons in July near the football stadium.

While there are things I ought to foresee, there are also some things that because of my particular experience or knowledge I might expect to happen, that other reasonable persons would expect, because they were not 'in my shoes'. For example because of my experience and knowledge I might expect that if I serve my daughter fish for dinner she will have a tantrum. However, no other reasonable person, who does not know my daughter like I do, would have reason to foresee that this would be a consequence of serving her fish for dinner.

The upshot of this distinction is that there are some things which only I can foresee and there are some which are foreseeable to me and all other reasonable persons. However, there are some things that a reasonable person might expect to happen to them, but which I have no reason to expect will happen to me, despite the fact that I am a reasonable person. For example a reasonable person has reason to expect that she could contract Hepatitis B if she came in contact with human body fluids. However, even though I am a reasonable person, I have been vaccinated against Hepatitis B and so I have no reason to believe that I will contract Hepatitis B.

In future my references to foreseeability assume a 'particular person standard', defined as those consequences for which an agent who is otherwise also a reasonable person, could have and should have foreseen. Finally in defense of my reasoning, I point out that increasingly the particular person standard is replacing the 'reasonable person standard' in considering consent for medical treatment. While the reasonable person standard has been used as a measure of how much information and risk a health care professional is required to give to a patient, there is now a growing emphasis on providing information pertinent to each particular patient¹⁰³. I suggest that just as there are some important decisions that hinge on what is relevant to particular person

¹⁰³ See for example the judgement in *Rogers v Whitaker*, disussed in Chalmer, D & Schwartz, R. (1993). *Rogers v. Whitaker and informed consent in Australia: a fair dinkum duty of disclosure. Medical Law Review*, 1(2), 139-59.

this standard could be used to define the actions and consequence that an agent could foresee and thus be held to account for.

To complete this section I point out that the possibility that gamete donation (in a clinical setting) might result in the birth of a child is both foreseeable *and* foreseen, even if only because this fact is reiterated many times during the (compulsory) ¹⁰⁴ counselling sessions attended by potential donors. Genetic parenthood following gamete donation is an example of a foreseeable consequence of an action freely undertaken. Similarly many unintentional pregnancies are foreseeable, while arguably the birth of a genetically related child following rape, theft of gametes or hospital mix-ups is not the result of a free action and may not always be a foreseeable consequence.

The question of whether a child's existence was foreseeable has important implications for my analysis of whether causing a child to exist generates moral parenthood. I discuss different examples of bringing a child into being, and when this is a foreseeable consequence, in a later chapter of this thesis. The aim of this section has been to set out the conditions that apply before we can hold that an agent is morally accountable for the consequence of her actions and to specify the type of consequence for which she can be held to account. I have discussed the two conditions standardly held to apply to moral responsibility; freedom and foreseeability and specified each of these conditions for the purpose of my analysis. On my reasoning an agent can be held to account for the consequence of her action 1) if the action was free in the sense that alternative possibilities were available to her or that she reflectively endorsed or owned her action; 2) if the consequence where foreseeable in the sense that a reasonable person in her particular situation would have reason to expect this consequence.

¹⁰⁴ It is legally required in several Australian states that gamete and embryo donors and couples seeking artificial insemination or IVF undergo counselling prior to commencement.

Summary

I began this chapter with reference to a claim elucidated from the Frozen Embryo study; that genetic parents are morally responsible for their offspring because they cause them to exist. In this chapter I analysed this claim with reference to the current philosophical literature and different accounts of how causing a child to exist might generate moral parenthood.

I began by clarifying the term moral responsibility and explained that for my purpose moral responsibility is understood as moral accountability and not blameworthiness. I then illustrated the problems and questions raised by causal accounts of parenthood in general, beginning with the question why is a ‘causer’ responsible? I suggested that while this is a difficult question to answer it is relatively uncontroversial to assume that the person who causes harm has a special obligation to correct or compensate for this harm and I accepted this principle as a ‘fixed point’.

I then addressed the analogy between causing a child to exist and causing a harm. I argued that causing a child to exist creates needs which a child cannot meet herself, and therefore creates obligations to meet these needs, even if no harm is caused.

I suggested that strictly causal accounts of moral parenthood are implausible because very many individuals contribute to causing a child to exist, and thus causal accounts identify too many. I then presented three ‘narrower’ causal accounts of parenthood, those of Nelson, Munson and Hill. Each of these accounts distinguishes in a different way between all of the causers and ‘the’ cause of a child’s existence

I showed that many of the problems with these causal accounts stem from confusion over causes and consequences and conflating causal responsibility and moral responsibility. I discussed a standard account of causation and explained that attempts to identify ‘the’ cause are misguided. According to standard accounts, every individual that causally contributes to the existence of a child is ‘a’ cause of her existence, and

this child is a consequence of each of their actions. However, I explain that causal responsibility does not necessarily entail moral responsibility. I discussed the two conditions generally held to apply to moral responsibility; freedom and foreseeability. It is generally accepted that an agent can be held to account for the consequence of her actions only if this consequence was foreseeable and the result of her free actions.

I discussed various incompatibilist and compatibilist accounts of freedom and accepted for my purpose that being free entails that either a) an agent 'could have done otherwise' or b) that she reflectively endorsed or owned her actions (as described by Frankfurt and Fischer¹⁰⁵). I discussed different interpretations of foreseeability and presented my own account which reasons that a consequence is foreseeable to an agent if a reasonable person in the agent's particular situation would have reason to expect this consequence.

My analysis has shown, as illustrated through case 1 and case 2, that begetting does cause a child to exist but that this is not always a foreseeable consequence of a free action. Where these two conditions are not met, begetters cannot be held to be morally accountable for their genetic offspring. Thus it is not the case that genetic parents are necessarily always moral parents. To return to the argument as formally set out at the beginning of this chapter:

P1: Causing a child to exist generates moral parenthood (moral responsibility for that child)

P2: Begetting causes a child to exist

C: Begetters are moral parents

¹⁰⁵ Fischer, & Ravizza. *Responsibility and Control: A Theory of Moral Responsibility*, Frankfurt. Alternate possibilities and moral responsibility.

I have shown that while P2 is true, the argument is not sound because P1 is false where the two conditions attached to moral responsibility, freedom and foreseeability, are not met.

Further, I showed that standard accounts of moral responsibility do not support the claim that we are morally responsible for only intended consequences, even proponents of the Doctrine of Double Effect accept that we are morally accountable for non-intended consequences.¹⁰⁶ A plausible causal account of parenthood must incorporate these standard accounts of moral accountability. A strictly causal definition of moral parenthood which would always make genetic parents moral parents fails to do this.

This chapter concludes that causal accounts of parenthood as found in the current literature do not provide a sound theoretical basis for the claim elucidated by the Frozen Embryo study that begetting generates parental obligations.

However, we have not seen the last of causal explanations. In the following chapter I re-consider causal accounts of moral parenthood in light of the missing conditions, foreseeability and freedom. I reason that moral parenthood is generated by moral responsibility and not causal responsibility. Unlike the attempts presented in chapter 2 to ground moral parenthood on emotions, physical resemblance, or physical connections, I propose that a modified causal account, which shows how moral responsibility, is generated is a promising explanation of moral parenthood, and that in some cases genetic parents are moral parents.

¹⁰⁶ According to DDE in some circumstances it is permissible to bring about unintentional harms (eg as side effects of an action) which it would be impermissible to bring about intentionally. The fact that unintentional harms are sometimes justifiable entails that such consequences are within the realm of an agents moral responsibility. A point elucidated in Boyle, J. (1991). Who is Entitled to Double Effect? *Journal of Medicine and Philosophy*, 16, 475-494, p 476.

CHAPTER 5. “CANDIDATE PARENTHOOD”: A TWO STEP ACCOUNT OF MORAL PARENTHOOD

Introduction

What is the role of genes in determining moral parenthood? In the previous chapter, I considered the possibility, as revealed by the Frozen Embryo study, that genetic parents are moral parents because they causally contribute to a child’s existence. My analysis in chapter 4 showed that even though genetic parents do causally contribute to the existence of their offspring, and even though this is a morally significant consequence, they are not always morally accountable for children they cause to exist. I discussed the two conditions generally held to apply to moral responsibility, these entail that we are not morally accountable for everything we causally contribute to, but only for the foreseeable consequences of our free actions¹. I reasoned that moral parenthood is a matter of moral responsibility and not causal responsibility.

In this chapter, I apply the conditions of freedom and foreseeability to causal explanations of parenthood and put forward a novel and more plausible account of moral parenthood, which I refer to as ‘Candidate Parenthood’. This account entails that all of the individuals that causally contribute to the existence of a child are ‘candidates’ for moral parenthood, but whether or not they must fulfill the parental obligations they have brought about is determined via a two step test. In the first step a test for accountability determines whether or not ‘a causer’ is in fact morally accountable for the child they brought about. The second test involves an assessment of their accounts and determining whether or not it releases a ‘candidate parent’ who seeks to be released from parental responsibilities. I consider the implications of Candidate Parenthood and its coherence and workability.

The discussion that follows is in three parts. In section 1, I begin by ‘fleshing out’ a causal explanation of moral parenthood including the hitherto missing conditions and presenting my account of moral parenthood, ‘Candidate Parenthood’. I follow this, in

¹ For discussion see Kagan. *The Limits of Morality*.

section 2 by tackling the objection that ‘*Candidate Parenthood*’ suffers from the same problems as strictly causal accounts in that it identifies *too many* parents. I present three possible defenses to this objection. Firstly in 2.1, I consider the contention that too many parents is not a problem and that it is historical and legal norms that require that a child have two and only two parents. While there is some intuitive appeal about this argument, I accept that as it stands *Candidate Parenthood* does identify an ‘unworkable’ number of parents. In 2.2, I consider, but ultimately reject a possible defense of the problem of too many parents which rests on the notion of ‘diluted responsibility’. According to this notion, it could be claimed that ‘*Candidate Parenthood*’ does not generate too many parents because some individuals incur only a small share of responsibility. However I show that it is incoherent to claim that where several individuals causally contribute to an event their responsibility for this event is diluted. In 2.3, I present a more plausible way of dealing with the problem of too many parents, which hinges on the fact that different agents can give different account of their contribution to the existence of a child. The fact that a number of agents are morally accountable entails only that they are required to give an account. I argue that there are some accounts that would release a ‘candidate parent’ from taking on the parental roles they have generated (in combination with others) and from holding them responsible for not doing so. I argue in section 2.4, that under some conditions, *transferring* the responsibilities one has incurred to others is an acceptable moral account of one’s contribution to the existence of a child, and that such transfers are implicit in many of our social conventions around parenthood.

In section 3, I consider the opposite problem, if freely and foreseeably causing a child to exist defines moral parenthood, then a child could be born and have *no* parents. I accept this objection but point out that it is only on very rare occasions that *Candidate Parenthood* is unable to identify any individuals as accountable for the existence of a child. I stress that the inability to identify a moral parent does not entail that a child can justifiably be left with its needs unmet.

The analysis in this chapter concludes that 'Candidate Parenthood' provide a sound theoretical basis for the claim that begetting generates parental obligations.

1. Reconsidering Causal Parenthood: '*Candidate Parenthood*' a more plausible explanation

Chapter 4 concludes by showing that begetting does cause a child to exist but that this is not always the result of a free and foreseeable action or decision. Where these two conditions are not met, a begetter cannot be held to be morally accountable for their genetic offspring. Thus it is not the case that genetic parents are necessarily always moral parents. To return to the argument as formally set out at the beginning of that chapter:

P1: Causing a child to exist generates moral parenthood (moral responsibility for that child)

P2: Begetting causes a child to exist

C: Begetters are moral parents

In the previous chapter, I showed that P1 is false where the two conditions attached to moral responsibility, that is freedom and foreseeability are not met. Thus the argument could be rewritten as follows:

P1: we are morally accountable for foreseeable consequences of our free actions

P2: some begetting freely and foreseeably causes children to exist

C: begetters who freely and foreseeably cause a child to exist are morally accountable for such children

In the following discussion I consider the implications of this argument and attempt to specify examples of when P2 is true.

On my analysis a more plausible account of who can be held accountable for children, is that parental obligations are generated when a child is a foreseeable consequence of a free action. Simply being part of the causal chain of events that leads to the birth of a child is not sufficient to generate obligations for that child. My account incorporates the requirement for freedom and foreseeability and explains our intuition that the genetic parents in case 1 (the civil war story) and case 2 (the knife attack) are not morally accountable for the children to which they are causally linked. Obviously in case 1 the genetic parents could not avoid contributing gametes, nor was it foreseeable for both genetic parents in both cases that their actions (soldiering, nursing or fellatio) could result in the birth of a child.

Conversely, on my reasoning genetic parents are morally accountable for their offspring where the actions which resulted in the birth of a child were undertaken freely and where the child's existence was reasonable foreseeable, even if unintentional. Clearly, it is foreseeable, even if not guaranteed that voluntarily donating gametes or engaging in sexual intercourse² will cause a child to exist.

What are the implications of this account? Firstly Candidate Parenthood entails that all individuals that freely contribute to the existence of a child, whether genetically related or not, are morally accountable for that child. Secondly Candidate Parenthood entails that where a child's existence was a foreseeable outcome of an agent's free actions, this agent is morally accountable for the child even where her existence was not intended and where the agent did not ever intend to 'parent' her.

Candidate Parenthood does not exclude the possibility that parental obligations can also be taken on voluntarily but individuals that are not morally responsible for the existence of a child (for example by adopting a child), or that other general ethical obligations might account for some of our duties towards children. My aim is limited

² Whether this is true even when contraception is employed is a controversial question to which I return in the final chapter of this thesis.

to addressing the claim that genetic parents are morally accountable for their offspring because they caused them to exist.

2. Candidate Parenthood– the too many parents objections:

A possible objection to my ‘Candidate Parenthood’ is that the birth of a child is a foreseeable consequence of many different actions, not just begetting. If parental obligations are incurred by all parties whose free actions could foreseeably result in the existence of a child, then how can we resolve competing claims (or disclaimers) such as for example, those that have arisen between intended parents and genetic or gestational parents in surrogacy disputes? Further, does my account entail that technicians and clinicians, grandparents and nurses who are causally linked to a child also incur parental duties? As I argued in chapter 1 a workable causal account of parenthood needs somehow to identify a few individuals as moral parents. If everyone who causally contributes to a child’s existence is a moral parent, then the very concept of parenthood as a ‘special role’ with unique rights and duties must be rejected. It appears that Candidate Parenthood suffers from some of the same difficulties as strictly causal accounts in that it produces too many parents.

In the following discussion, I present three possible defenses to this objection.

2.1 Too many parents is not a problem

Firstly, it could be argued that the problem of too many parents is only a problem if, as legally and historically required, a child can have only two parents³. Several commentators have suggested that it is time to relinquish the view that biological and social parenthood are competing positions. Their views suggest that we should realign the social facts of parenting with an acceptance of the new scientific facts, and that a child can have many different parents, biological and non-biological⁴.

³ As argued by Alta Charo, R. (1994). Biological determinism in legal decision making: The parent trap. *Texas Journal of Women and the Law*, 3, 265-306

⁴ See for example Bartlett, K. (1984). Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When The Premise of the Nuclear Family Has Failed. *Virginia Law Review*, 70, 879-927, Alta Charo. Biological determinism in legal decision making: The parent trap. ,Fuscaldo, G. (2003b). What Makes A Parent?

Interestingly some commentators go further and suggest that the modern nuclear family is a product of an increasingly insular, self-centered and economically rational world and that in reality “*it takes a village to raise a child*”⁵. In support of this claim I suggest that there is some irony in the fact that affluent first world nations like Australia adequate child care is a significant problem and long waiting lists exist in many cities for places to become available at preschool child care centers⁶. At the same time local governments are increasingly implementing policies that attempt to increase community cohesion and ‘neighbourliness’⁷. These policies stem in part from evidence that significant social and health problems are associated with social isolation especially amongst senior and elderly citizens. In other words the situation in many Australian cities currently is that many children need care and there appear to be many people with time to care for children. It is also ironic that hundreds of individuals and couples seek treatment for infertility and are on waiting lists for donor gametes or embryos, while the number of places available to children who require foster care remains significantly lower than demand

I do not wish to imply that all childcare is equivalent, or that *any child* can satisfy a desire to parent. My point is that if, as is proposed, some of our social needs could be addressed by expanding our definitions of who is a parent (or grandparent) and the children we are responsible for, then a definition of parenthood that produces many parents might sometimes be a solution rather than a problem. I do not take up this discussion further, but raise it merely to illustrate the argument that the problem of ‘too many parents’ is one tied to social mores and not necessarily to moral rules.

It's Not Black or White. *Journal of Medical Ethics*, 29, 66-67, Murray, T., & Kaebnick, G. (2003). Genetic Ties and Genetic Mix-Ups. *Journal of Medical Ethics*, 29, 68-69, Bayne, T., & Kolers, A. (2003). Toward a Pluralist Account of Parenthood. *Bioethics*, 17(3), 221-242

⁵ See for example Ainsworth, J. W. (2002). Why does it take a village? The mechanism of neighborhood effects on educational achievement. *Social Forces*, 81(1), 117-152

⁶ Gooch, L. (2005, July 1). Families' big bill for their little ones. *The Age*.
<http://www.theage.com.au/news/national/families-big-bill-for-their-little-ones>

⁷ Wallis, J., & Dollery, B. (2002). Social Capital and Local Government Capacity *Australian Journal of Public Administration*, 61(3), 76-85

However, while I do not accept that a child necessarily requires two and only two parents, I maintain as argued previously, that any account that fails to distinguish between all of the persons involved in the existence of a child is simply unworkable. I do not specify exactly what the workable number of parents would be, but I suggest that the conclusion that IVF scientistss, clinicians, nurses and every other 'accountable parent', is a moral parent, is obviously unworkable. I suggest that just as many families today accommodate the contributions of more than two and sometimes more than four parents, there is room for some negotiations on the workable number of parents.

I accept that as it stands 'Candidate Parenthood' does identify many people as morally accountable for an individual child, (even though it identifies fewer parents than would a strictly causal account), and that it is unworkable to hold that all of these are moral parents.

In the following section I consider, but ultimately reject a further possible defense of the problem of too many parents that hinges on the idea that moral responsibility can be diluted. In section 2.4 I present a solution to the problem of too many parents which is based on the claim that under some conditions 'accountable parents' can justifiably transfer their parental obligations.

The possibility that "too many parents" is a more serious problem in the context of competing parental *claims* is considered further in the following chapter, in light of the possibility that different causal contributions justify different parental entitlements.

2.2 'Diluted' Moral Responsibility

A second possible defense of the problem of too many parents revisits a discussion introduced in chapter 4 about the significance of intervening agents. A commonly held view is that, where a number of different agents co-operate to bring about an outcome, their share of the responsibility for this outcome is diluted compared with the responsibility one agent receives for bringing about the same outcome alone.

'Diluted responsibility' accounts could be used to address the problem of 'too many parents' generated by my 'Candidate Parenthood' account. For example it could be argued that 'Candidate Parenthood' identifies many people as sharing moral responsibility for a child. But some individuals incur a smaller share of responsibility and a child's moral parent is the individual(s) with the *greatest* share of responsibility.

Take for example the Danish surrogacy case. While in reality it appears that the twin girls were left with no parents, on my account every person that (freely and foreseeably) contributed to their existence has obligations with regard to the girls. However, I believe that a common intuition in the Danish surrogacy case, is that the gestational mother, the genetic father, the commissioning parents and all of the clinicians, technicians and nurses involved do not share equal responsibility for the fate of the twin girls. To conclude that the staff involved are also the twin's moral parents would, I suspect, be widely rejected on the grounds that this assigns too much responsibility to them and the role they played in the surrogacy case. The intuition that the staff involved are not the moral parents of the twin girls could be explained as Munson suggests by the fact that other agents intervened (both prior to and subsequent to the involvement of the medical staff) and therefore that the staff's responsibility for bringing about the birth of the twins was diluted. However, I will show that 'diluted responsibility' explanations are implausible and incoherent. I discuss two possible versions of 'diluted responsibility' referred to below as 'the pie analogy' and the 'magic pudding analogy'⁸.

2.2.1. The Pie analogy

In chapter 4 I concluded that where two events, A and B are both necessary for consequence P, it makes no sense to claim that A is *more the cause* of P than B is. Further I showed that A can be said to be a cause of P even if B, C and D intervene in the causing of P. While it may seem clear where B, C and D are *events*, an agent A is still accountable for P, it is sometimes claimed that where other *persons* intervene or co-operate to contribute to an outcome, that the responsibility for that outcome is

⁸ The following discussion is indebted to Gillam. Using fetal tissue and Nazi data

diluted and shared. As Michael Zimmerman points out, some philosophers appear to suggest that the degree to which someone is responsible for an event is related to the total number of people that can be held to account for the same event⁹. In short these views suggest a ‘pie’ analogy where responsibility is finite and the more people who are responsible for an event the less responsibility they share, just as the more people there are to share in a pie the smaller will be the piece of pie they each receive.

The suggestion that not all ‘candidate parents’ are moral parents because they attract different amounts of responsibility or different sized pieces of the pie could explain our intuition that technicians and gamete providers are not moral parents. However, as many writers have shown, the assignment of moral responsibility is not analogous with distributing something of fixed quantity, such as a pie.

The ‘spirit’ of the pie analogy has been rejected by a number of philosophers¹⁰. The most common argument against this analogy is simply that it generates counter-intuitive conclusions. Douglas Lackey provides an example to illustrate this point;

“If two men simultaneously, voluntarily and intentionally fire bullets into the heart of an innocent person, both men are full-murderers, not half-murderers.”¹¹

Lackey suggests that our intuition is that in his example moral responsibility for the murders is not diminished just because there are two murderers.

In support of this intuition, Gillam shows that the pie analogy is an example of *reductio ad absurdum*. She reasons that if moral responsibility is a fixed quantity, then the more agents the less responsibility each agent has. Gillam shows that this model of responsibility has a ridiculous conclusion;

⁹ Zimmerman. *An Essay On Moral Responsibility*. p95

¹⁰ Mellema, G. (1988). *Individuals, Groups and Shared Moral Responsibility*. New York: Peter Lang., Nozick, R. (1975). *Anarchy, State, and Utopia* Oxford :: Blackwell, Zimmerman, M. (1991). Sharing Responsibility. In P. A. French (Ed.), *The Spectrum of Responsibility* (pp. 276). New York: St Martin’s Press

¹¹ Lackey, D. (1983). Professional sins and unprofessional excuses. In B. Baumrin & B. Freedman (Eds.), *Moral Responsibility and the Professions* (pp. 242-258). New York: Haven Publicationsp 245

*“If I stab a taxi driver on my own, then I have 100% of the moral responsibility for it, but if I can get nine others to help me, I have only 10%, 99 others and I have only 1% of the responsibility”.*¹²

Gillam’s reasoning implies that an agent can contrive to reduce their responsibility for any deed, no matter how terrible, simply by co-opting others to contribute to bringing it about. As she concludes this is clearly a ridiculous conclusion. Further she adds that there are odd metaphysical implications from the notion that responsibility is, like a pie, a fixed quantity. It suggests that moral responsibility exists independently of moral agents ‘as a thing, floating around in the world waiting to attach itself to people’.¹³

To this discussion of the pie analogy, I add a final observation. If moral responsibility were indeed a fixed quantity, it would at least be theoretically possible that a point could be reached where no responsibility was available to distribute. For example some future generation could claim to have no responsibility for an event (even though they may continue to contribute to this event through an act or an omission) on the grounds that hundreds of agents have previously contributed to the event and no responsibility remained¹⁴.

2.2.2 The ‘Magic Pudding’ Analogy

The problem of fixed quantity could however be resolved without losing the notion of diluted moral. To return to Gillam’s taxi driver example; if responsibility is more like a ‘magic pudding’¹⁵ than a pie of fixed size then it could be, as suggested by Gregory Mellema, that where two people stab the taxi driver they each have less

¹² Gillam. Using fetal tissue and Nazi data p 138

¹³ Gillam. Using fetal tissue and Nazi data p 138

¹⁴ Interestingly this appears to be the kind of argument preventing the current Australian Prime Minister John Howard from accepting responsibility for the plight of indigenous Australians today. His arguments imply that today’s Australians cannot be held responsible for the state of modern day indigenous Australians because our forefathers have already attracted moral responsibility for their plight

¹⁵ The ‘Magic Pudding’ is a well known Australian children’s story by Norman Lindsay’s first published in 1918. The Magic Pudding refers to a magical pie that never runs out and no matter how many slices are cut, there is always something left over. Lindsay, N. (1979). The magic pudding

responsibility than they would have if they acted alone. Imagine that a third assailant now joins in. According to the magic pudding analogy three stabbers could share responsibility and each have less responsibility than they would do if they acted alone. But this does not entail that the amount of responsibility they are allocated is in any way dependent on what each of the others receive. In other words, the assailants do not necessarily each receive $1/3$ of the moral responsibility. In the magic pudding analogy the share of responsibility allocated to each stabber does not become smaller as more stabbers become involved. All the stabbers could all receive two or ten or twenty shares of the magic pudding if they act together, as compared with, say, 50 shares if they acted alone. The point of this analogy is that sharing moral responsibility could arguably dilute moral responsibility irrespective of how much responsibility any one agent incurs. The upshot of the ‘magic pudding’ analogy is that it could account for our intuition that the technicians and clinicians in the Danish surrogacy case do incur some moral responsibility but less than do the commissioning parents.

The ‘magic pudding’ view of moral responsibility does not suffer from the same counter-intuitive problems as does the ‘pie analogy’. Never the less, ‘magic pudding’ does have problems because like the pie analogy it also fails to explain why moral responsibility should be diluted at all. Zimmerman offers the following example to argue against ‘magic pudding’¹⁶. He asks us to imagine a case where ten teenagers push a rock down a slope, wrecking a car at the bottom, and to compare this with the case where only one teenager, Sam, pushes the rock with the same effect on the car. Zimmerman argues that we would have no hesitation in assigning full moral responsibility to Sam. He adds that there is no relevant difference between the case of Sam acting alone and the case of Sam acting with nine others that would justify attributing diminished responsibility to Sam when others act with him. While some writers have attempted to distinguish the responsibility incurred by sufficient as opposed to merely necessary causes, Zimmerman shows that there is no difference in the causal status of each of the teenagers or of Sam in either case. As discussed in chapter 4, each of the teenagers, like each of the stabbers in Gillam’s example is ‘a

¹⁶ Although of course he does not refer to it as such. Zimmerman talks instead about direct appraisability and intervening agents. Zimmerman. *An Essay On Moral Responsibility*.

cause' or 'an inus condition'. Sam may at first glance appear to be a sufficient cause when he acts alone, but recall from chapter 4 that the notion of 'the cause' is one that makes sense in a particular causal field. Sam is just as necessary 'a cause' and no less so when he acts with the co-operation of the nine others as when he acts alone. In other words where ten teenagers push the rock, all ten are a necessary cause of wrecking the car, even if in a separate incident one teenager could have achieved the same result. Where the causal field remains constant it is clear that there is no difference in the teenagers causal status. This suggests that they share equal and full moral responsibility for the outcomes they caused.

Finally, both the pie and the magic pudding analogies fail to explain how, even if responsibility were diluted, this dilution should be effected. Recall that I have already shown that it is not possible to distinguish between or measure different causal contributions. Further, even given that we could identify a sequence of 'causers', how could one's place in this sequence determine the measure of responsibility one would be allocated? Do first 'causers' receive more responsibility than subsequent causers?

I suggest that taken together the arguments presented above show that 'diminishing' views of moral responsibility are implausible. I conclude that it is not possible to distinguish between different parental candidates by trying to determine what share of moral responsibility different individuals incur. In the following section I show however, that such explanations are not necessary to explain the intuition that different causers are more or less to blame. I explain that while all of the causers share the same responsibility for bringing about an outcome, their contributions may result in different judgments because each can provide a different account of what they have caused and why.

2.3 Equal accountability but different accounts

An alternative more plausible account which addresses the problem of too many parents is that even though all 'candidate parents' share equal and full responsibility, different accounts can be given to justify their different contributions. Recall from

chapter 4 that, to hold an agent responsible for an outcome is not necessarily to say that they are blameworthy. It may be the case that they are in fact praiseworthy or it may be that an agent can avoid blame for a problematic outcome by justifying her action. In other words to hold that someone is responsible for a child's existence is to hold that they can be called to account, to explain, justify or admit culpability for harming or failing to prevent harm to this child. Whether or not we judge the agent to be praiseworthy or blameworthy will depend on what account or explanation she gives and on how we evaluate her account. Sometimes an agent's explanation for an action will be such that she is 'off the hook'. On the other hand, some accounts do not amount to valid justifications and failing to take on obligations without a justification attracts blame and that the blameworthy agent makes reparation.

What is it that a 'candidate parent' must account for? Recall from chapter 4, that causing a child to exist causes certain needs to exist and causes the need for a parent. On my reasoning, a moral parent is the person who is required to meet the needs of a child and who could incur blame for failing to meet such needs. In attempting to determine who is a moral parent, I am attempting to distinguish who has the future role of caring for and raising a child and who is to blame if a child's needs are not met. Thus far I have argued that every agent that freely and foreseeably causes a child to exist causes the need for a parent and is accountable for this consequence. However, to say that an agent must account for causing the need for a parent is not to say that she is therefore a moral parent. Generating needs does not necessarily entail that the 'causer' must satisfy those needs herself; it entails that the causer must give an account for causing such needs. I suggest that there are some accounts that would release a 'candidate parent' from taking on the responsibilities associated with parenthood. In other words, freely and foreseeably causing a child to exist generates accountability, but sometimes an account is available that releases, excuses or eliminates the agent from fulfilling the needs she has freely and foreseeably generated.

The question of interest is now, what amounts to a justifiable account of causing a child to exist and generating the need for a parent?

The most obvious account that any ‘candidate parent’ could offer is that they agree to take on the needs they have generated. But, equally obvious is the fact that many candidate parents do not act to bring about a child that *they* intend to raise and care for. Take for example the case of IVF staff whose work is to bring about the existence of children that others hope to raise and care for. We do not hold that IVF staff are blameworthy for failing to take up the needs they (combine to) generate. I suggest that one explanation for the conclusion that IVF scientists are not moral parents is that they can give a justifiable account of not taking on the needs they have caused. This account might include the fact that IVF scientists help to produce children for whom a preconception arrangement has been made regarding who will take on parental obligations. In other words IVF staff are not moral parents because their account of freely and foreseeably causing the need for a parent is that, prior to any work beginning, others promised (or contracted) to take on the needs generated. More simply an IVF scientist could state the following: *‘Yes , I know I caused the need for a parent to exist but, I am not going to parent this child myself. My justification for this is that other people asked me to help bring about the child and promised to be her parents. I have no reason to believe that they are unable or unwilling to do what they promised to do.’* I suggest that this type of account is implicit in many of our social conventions and that despite being unspoken these types of accounts are well recognized and generally accepted. Given that it is not foreseeable that an IVF scientist will cause a child to exist for whom *no-one* is destined to take on parenting then her account (that others will take on parenting roles) might justify her actions and we could hold that she is not blameworthy for failing to raise the child she contributes to bringing about.

The upshot of this account is that a moral parent is someone who is morally accountable for the birth of a child and this child’s needs who does not have an account that would release them from taking on these needs.

It may seem peculiar to suggest that parenthood amounts to a process of elimination between different accounts releasing obligations. Many parents might object that they

have parental duties because they want them and not because they are unable to provide an account that would release them. In response, I am not suggesting that parenthood cannot be voluntarily taken on or, that only persons who are accountable for causing a child to exist can meet her needs. Recall that I am interested in how genes generate parental obligations and the answer to this question is of particular significance in cases where parenthood is disputed or where competing claims and disclaimers have arisen. In the context of such disputes my question is, in the first instance, who is accountable and secondly what account do they give? I have argued that all 'free and foreseeable causers' are accountable and therefore that many more people than we usually acknowledge could be held to account for the fact that a child exists. The reason that we do not usually require IVF scientists, doctors, nurses or gamete donors to give an account of the fact that they contributed to the existence of a child, is because frequently there is no dispute over who should raise a child. In other words, no-one is claiming that IVF staff should raise the children they contribute to bringing about and no-one is asking for an account, but this does not entail that IVF staff are not accountable. I suggest that IVF staff can in fact be held to account, but that the reason that they are not required to parent is because their accounts eliminate them from contention. In other words a releasing account exists and is available, it is therefore morally operative even though it is not proffered or perhaps even sought.

Note, that I am also not suggesting that we must eliminate all but two parents from taking on the role of moral parent. I reiterate that the problem of too many parents is one attached to social and legal norms and not to moral rules. My aim here is to show how different accounts might justify releasing from obligations an agent that is accountable for such obligations. Obviously however, some agents may not seek to be released. This is only a problem where some agents seek to exclude others who do not seek to be released from parenting, for example as occurred in the case of re: Patrick. I discuss the problem of competing parental claims further in the following chapters. For now I point out only that, just as an account releasing an agent from parenthood must be evaluated, so too must a claim that one is entitled to parent.

In the Danish surrogacy case, our intuition is I believe, that the technicians, clinicians and nurses are not equally as blameworthy as the commissioning parents for failing to take on parental responsibilities. While I have argued that both the technicians and the commissioning parents are accountable for causing the twins to exist and their need for parents, they can each give a different account. Some accounts, such as the one I described above from the IVF staff, might amount to a justifiable releasing account and therefore the IVF staff would not be blamed for failing to meet the childrens' needs. The account of the commissioning parents however, (in as much as we have the relevant facts) appears to amount to a change of mind. In general, we do not accept that simply choosing not to do what we are otherwise obligated to do amounts to a valid justification or releases us from such obligations.

In this section I have introduced a second defense of the problem that 'Candidate Parenthood' generates too many parents. In this defense I began by rejecting the possibility that where many agents intervene to bring about an event, such as the birth of a child, that each attracts diminished responsibility for that outcome. I presented and rejected the 'pie' analogy and the 'magic pudding' analogy of diminished moral responsibility. I have argued that, as in the Danish surrogacy case, our intuition that the different contributors to a child's existence are not all moral parents is correct. This is so not because responsibility is diluted, but rather because different contributions entail that different accounts can be given some of which can justifiably release a 'candidate parent' from any blame for failing to take on parental roles. I argue that the staff do something 'less wrong' (and in fact nothing wrong) in failing to parent the girls than do the commissioning parents and that although both parties share undiluted moral responsibility for the fact that the girls exist and need care, they are not equally blameworthy for failing to meet the obligations they caused to exist. I have left assessment of exactly what judgment each contribution attracts somewhat vague. For my purpose it is important to show only that, while 'Candidate Parenthood' identifies many people as morally accountable for children they freely and foreseeable cause to exist, their contributions may not attract the same judgement. I consider the problem of evaluating competing parental claims and disclaimers and

the implications of my 'foreseeable account' in more detail in the final chapter of this thesis.

Notice that I am arguing that foreseeably and freely causing an outcome does generate obligations, but that sometimes an account can be given which could release one from these obligations. In summary then, a genetic parent is a moral parent where she is 'candidate parent' who does not have a justifiable account to release her from parental obligations.

In the following discussion I expand on the third defense of the problem of too many parents and describe an account that I suggest would release 'candidate parents' from their obligations.

2.4 Transferability

In this section, I present a further explanation of the idea of releasing accounts. I address a claim underlying Nelson's and Callahan's accounts of parenthood, that biological parents incur *immutable* obligations. In relation to my question about the role of genes, their claims entail that the obligations associated with genetic ties are not elective and that we cannot simply choose to acknowledge them or sever them at will. The problem of too many parents is partly generated by the assumption that causally generated obligations are irrevocable and lifelong obligations. However, accepting 'Candidate Parenthood' does not entail that individuals who bring about a child with needs must irrevocably fulfill the needs they created themselves.

This claim underlying Nelson and Callahan's accounts is important for my investigation of the role of genes. As I will show, even though a coherent case can be made for the claim that begetters are morally accountable for the children they cause to exist, they can 'account' in many ways. One possibility is that a begetter could transfer the job of raising their offspring to others. If, however, Nelson and Callahan are correct in claiming that causal parenthood gives rise to (inalienable) immutable

moral obligations, then it could also be argued on that genetic parents incur non-transferable obligations.

2.4.1 Parental Obligations are Transferable

As discussed in chapter 4 Nelson and Callahan disagree that parental roles are elective or can simply be assigned to others persons who can do the job. Recall that Nelson's argument states that if you place someone in peril of serious harm you have a prima facie obligation to help them out of danger. Even if it were true that someone else was able, or in a better position to do so, this does not absolve you of your responsibility. Nelson gives the example of an unintended accident that might result from your actions, "*... say if your neighbour's child becomes trapped in an old refrigerator that you left in your front yard, the fact that some one else may be in a better position to free the child does not absolve you of liability*"¹⁷. But, notice that the actions of Nelson's careless 'fridge dumper' are not analogous to the actions of 'candidate parents'. Take for example gamete donation; sperm donors are asked to donate their sperm on the understanding that this may result in the birth of a child with needs that many people are not only willing and able to meet, but often desperate to take on. Sperm and egg donation are more analogous with asking someone (repeatedly) to leave their old fridge on the front yard and assuring them that there are hundreds of people on the waiting list who long to free and care for a child should one enter the fridge.

Even if we agree with Nelson and others, that genetic parents are responsible for meeting the needs of children they caused to exist, it is easy to envisage different ways to meet such obligations. Genetic parents could raise their offspring themselves, they could transfer or discharge their obligations to others, or they could share the responsibilities of parenting with other willing individuals. In other words, even if the genetic relationship between begetters and children generates parental obligations, if these obligations are fulfilled well enough by individuals other than the genetic parents, then failing to raise one's genetic child does not, as Nelson suggests, amount to failing in one's duties.

¹⁷ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. , p50

According to Nelson it is only the interests of children that justify a transfer of parental duties. He argues that, other things being equal, childrens' interests are not best served by transferring parental duties because we cannot guarantee (but only predict) that the replacement parents will fulfill their duties¹⁸. However, I suggest that biological parents are in no better position to guarantee that they will continue to fulfill their duties in the future than are any other potential 'parents'¹⁹. In fact there are many instances when the opposite is true, that even if they initially fulfill their obligations, the ability of some biological parents to continue to care for their offspring will foreseeably diminish. Consider for example men who become fathers in their seventies or people with a long term progressive disease who become parents.

Nelson argues that even given that sperm or egg donors took some steps to ensure that no harm would come to their offspring they breach their moral duties by undertaking a responsibility which they '*intend not to fulfill*'²⁰. The fact that there is someone else around who can do a good enough job does not, in Nelson's view, relieve the genetic parents of their responsibilities. If this view is correct it seems that genetic parents can never voluntarily be relieved of parental duties. However, it remains unclear, as argued in chapter 4, why a sperm donor's intentions make him a moral parent and further why donating gametes amounts to '*an intention to breach parental duties*' rather than *an intention to transfer* them.

Further, I suggest that the claim reflected in the findings of the Frozen Embryos study, that genetic parents are 'the best people for the job' of raising their offspring, is both empirically disputed and as argued in chapter 1, not strictly relevant. In support of the claim that parental duties are transferable, I point out that we already recognise and accept the transfer of at least some of our parental duties, for example to nannies, tennis coaches, doctors and teachers. In fact we regard as negligent in many cases a parent who *fails* to delegate some of their parental duties to others, precisely because

¹⁸ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. p 60.

¹⁹ See also Bayne. Gamete Donation and Parental Responsibility. p83, for further discussion of this point.

²⁰ Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. p60.

we acknowledge that parents are not in fact always ‘the best person for the job’. We also accept that we can delegate our duties, even when the person taking them on is not doing a better job. For example even if it is true that home-cooking is better for children than say McDonalds™, we frequently accept that as long as a child’s need to be fed is adequately met, we have not breached our duty. In other words as argued in chapter 1 our obligations to children do not require that we always do what is *best* for them and therefore there is no need to select parents on this basis. Further, selecting parents on the basis of who will do the best job has counterintuitive implications and would allow that children could be removed from one set of parents to be raised by another set of parents who would do a better job. Finally there is no conclusive empirical evidence that biological parents are in fact the best people for the job of raising their offspring.

In summary, my claim is that Candidate Parenthood generates moral obligations but that these obligations are transferable provided that it is foreseeable that such a transfer would not amount to causing harm²¹. I suggest that my reasoning places the ‘burden of proof’ on those who would argue against the claim that parental obligations are transferable.

Note that my position is importantly different from the account recently published by Tim Bayne in his discussion of gamete donation²². He suggests that transferring gametes could be thought of as transferring *proprietary* not parental claims, and that transferring gametes amounts to transferring reproductive autonomy over these gametes from the donors to the recipient. Bayne argues that gamete donors *do not* incur parental obligations because transferring ownership of gametes amounts to transferring *potential* parental responsibilities. Should any children result from such a transfer Bayne concludes that the new owners, the recipients, would have

²¹ See also Fuscaldo, G. (2003a). Stored Embryos and The Value of Genetic Ties. In J. Gunning & H. Szoke (Eds.), *The Regulation of Assisted Reproductive Technologies* (pp. 177–190). Hampshire, UK: Ashgate for discussion of transfer of obligations in the context of frozen embryo donation.

²² Bayne. Gamete Donation and Parental Responsibility.

responsibility for them²³. I take up the topic of parental claims, and the possibility that these are analogous with proprietary claims in the following chapter,

Bayne's account does however have direct relevance to my claim that parental obligations are transferable. Underlying Bayne's account is the notion that we are not responsible for the consequences after our gametes have been transferred. I suggest however that this position suffers from the same difficulties as intentional parenthood (discussed in chapter 4) in excluding too much from the realm of consequences for which we can be held accountable. Consider the following example; suppose that I transfer control of my gun to a woman knowing that she intends to use my gun to kill her unfaithful husband. If she carries out her intention, surely the fact that I no longer own or control the gun does not absolve me of all responsibility for the death of her husband. As argued above, it is clearly foreseeable that gamete donation will result in the birth of a child and it is problematic to claim that gamete donors are not morally accountable for consequences that follow from their donation because what happens to their gametes is no longer in their control. Like Munsen's account, Bayne's position assumes that only the last agent in the causal chain has moral responsibility for a consequence, but as I have argued, plausible accounts of who is responsible for children must accommodate standard conditions of moral responsibility. Of particular relevance here is the requirement that where two or more agents causally contribute to an outcome they are equally accountable for that outcome. Given this requirement, gamete donors share responsibility for what foreseeably eventuates from their donation. On my account gamete donation does generate parental responsibilities, but under certain conditions these are transferable.

2.4.2 Conditions for Transferring Parental Obligations

Under what conditions is the transfer of gametes and parental obligations permissible? In the following section I argue that parental obligations are transferable under two conditions; 1) that parental duties are transferred to individuals who can do a good

²³ Bayne. Gamete Donation and Parental Responsibility. p 79.

enough job of caring for children and 2) where a strong degree of reliance is placed on this transfer it is not revocable.

Nelson is concerned that having a child should be understood to include a commitment to stability and warns against the idea that parental duties are terminable 'at a whim'. He argues that a 'no-fault divorce' approach to parent-child relationships breaches our obligations to children²⁴. Obviously there are strong consequentialist reasons to prevent 'child swaps' or the transfer of parental roles after relationships are formed, but, this is not the case for gamete and embryo donation. Gamete donation is not analogous to 'no-fault divorce of children' because it involves a pre-conception transfer of parental duties. I argue that when such pre-conception transfers involve assigning parental duties to individuals who do undertake a commitment to stability, and who are foreseeably 'good enough' parents, biological parent's do not breach their obligations.

One problem with this account is that frequently pre-conception transfers do not involve such assurances. David Benatar, like Nelson, argues that sperm donors take their responsibilities too lightly and often fail to ensure, in transferring their parental obligations, that these will be adequately performed by the replacement parents²⁵. He states that taking their duties seriously would require that donors took some steps to ascertain more about the suitability of those who will raise their offspring, at very least learning the identity of the recipients²⁶. Benatar maintains that donating sperm or ova in many cases reflects a cavalier approach to the transference of parental responsibilities²⁷. Clearly it cannot be reasonably foreseeable that gamete donation will result in the transfer of parental duties to individuals who can fulfill such duties, unless the capacity of the recipients is known. This 'gatekeeping' role is to a limited extent provided by ART clinics through the screening and counseling of gamete and embryo donors and recipients prior to treatment. Gamete donors can fulfil their obligations by choosing carefully the clinics or programs they donate to. I point out that studies

²⁴ Nelson. *Reproductive Ethics and the Family* p10

²⁵ Benatar. *The unbearable lightness of bringing into being*.

²⁶ Benatar. *The unbearable lightness of bringing into being*.

²⁷ Benatar. *The unbearable lightness of bringing into being*. p 176

undertaken to examine the motives and attitudes of gamete and embryo donors suggest that many donors do consider the consequences of their donation and are concerned about the future happiness and well being of children that result from their donations²⁸. Perhaps altruistic as opposed to ‘cavalier’, better describes individuals who respond to advertisements recruiting “men who care” and individuals to “give the gift of life”²⁹. Similarly, doctors, scientists and others who help to bring about a child, like gamete donors, should ensure that it is foreseeable that others will meet the needs of this child. This would require some knowledge of and confidence in the ability of those at the ‘front-line’ to undertake to determine the competence of gamete and embryo recipients.

One way to further facilitate adequate parental replacements is to encourage directed gamete and embryo donation or ‘open adoption’ the way it is practiced in some states of America³⁰. Such programs permit negotiated levels of interaction between donors and recipients and acknowledge the roles and responsibilities of both social and genetic parents.

I suggest that parental obligations *are* transferable where these obligations are transferred to individuals that can foreseeably do ‘a good enough job’ of caring for and raising a child. I accept that it is not possible to guarantee how well others will fulfill their duties and I point out that we accept a vast range of ideas about what constitutes ‘a good life’ and how children should be raised. I suggest however that in the case of gamete and embryo donation this condition can be met by allowing that donors choose potential recipients or by ensuring that donations are made to reputable clinics with clear guidelines for accepting potential recipients. I return to the

²⁸ See Daniels, K. (1998). The Semen Providers. In K. D. a. E.Haimes (Ed.), *Donor Insemination: International Social Science Perspectives* (pp. 76-104). UK: Cambridge University Press

²⁹ These type of phrases are repeatedly used in advertising campaigns aimed at recruiting sperm donors., for example see the DHS press release published Wednesday 26th January 2005, Reference number: 2005/0023, which asks potential gamete donors to ‘give life, give hope’.

http://www.dh.gov.uk/PublicationsAndStatistics/PressReleases/PressReleasesNotices/fs/en?CONTENT_ID=4102044&chk=NqHeZk

³⁰ For example of an open embryo adoption program see Snowflakes Embryo Adoption Program, *Snowflakes Embryo Adoption Program* .

implications of my account for ARTs and in particular with respect to the findings of the Frozen Embryo study in the final chapters.

An obvious question arising from the conclusion that parental obligations are transferable under the condition outlined above is whether such transfers are revocable? The possibility that individuals who have transferred their parental obligations might at any point change their minds requires that negotiated arrangements are clearly understood prior to undertaking or relinquishing parental roles. I reason that parental obligations are transferable, however the revocability of such transfers is subject to the same conditions that apply to other morally weighty promises³¹ and contracts. In general we accept that contractual arrangements and promises made involving personal human relationships can be broken (as exemplified by divorce, custody disputes and more recently surrogacy contracts). However, when a strong degree of reliance is placed on keeping to the contract or promise, then a later mere unwillingness to do so would not normally justify breaking it³². In many cases involving parenthood, for example arrangements relating to IVF procedures, surrogacy arrangements, foster parenting and adoption it is clear that the degree of reliance on contracts or promises is very strong, in fact so strong that without such promises most of these arrangements would not have been entered into. I contend that where a promise is a necessary cause of an action, this is evidence that a very strong degree of reliance has been placed on the promise. For the purpose of my thesis it is this understanding of 'a strong degree of reliance', that entails that a promise to transfer parental obligations is not rescindable. Further, as argued above, there are strong consequentialist reasons to prevent the transfer of parental roles after relationships are established. Finally I point out as argued in chapter 4 that just as freedom is a condition of moral responsibility, the transfer of parental obligations

³¹ For discussion of contracts and advanced directives in relation to embryo and gamete donation see Pennings, G. (2000). What are the ownership rights for gametes and embryos?: Advance directives and the disposition of cryopreserved gametes and embryos. *Human Reproduction*, 15, 979-986 Also Capron, A. M. (1992). Parenthood and Frozen Embryos More Than Property and Privacy. *Hastings Center Report*, 22(5), 32-33 and Fuscaldo, G. (2000). Gamete donation: when does consent become irrevocable? *Human Reproduction*, 15(3), 515-519. <http://humrep.oxfordjournals.org>

³² For a discussion of the obligations associated with promising see Gillam, L. (2002). *Surrogacy, Autonomy and Promising*. Retrieved 3/10/05, 2005, from www.cappe.edu.au/PDF%20Files/Gillam1.pdf and Bronaugh, R. (1992). Promises. In L. Becker (Ed.), *Encyclopaedia of Ethics* (pp. 1020-1023). New York: Garland Publishing

must also be undertaken freely. Clearly the theft of gametes or hospital cases of baby swaps are not examples of the voluntary transfer of parental obligations, just as in case 1 (the civil war story) and case 2 (the knife fight), the provision of gametes was not a free action.

I conclude this section by reiterating my arguments. I reason that parental obligations are generated by all those who freely and foreseeably contribute to the existence of a child. I then address the problem that my account identifies an unworkable number of people with parental obligations. However I argue that these obligations are transferable under two conditions. Firstly, that the role of fulfilling parental duties is transferred to individuals that can 'do a good enough job' of caring for and raising a child. Secondly, that transfer of parental obligations is subject to the same conditions that apply to other morally weighty contracts or promises. In short this entails that where there is a strong degree of reliance on such contracts and promises the transfer is not revocable. I explain that the role of third persons who assist in causing a child to exist, for example IVF staff, can be understood as a preconception transfer of obligations where a promise or contractual arrangement entails that others and not the IVF staff will take on parental roles. In the following section I consider a second objection to 'Candidate Parenthood', that my account might sometimes fail to identify any parents.

3. 'Candidate Parenthood' and the problem of no parents

Unlike strictly causal explanations or genetic definitions of parenthood, my account suggests that in case 1 (the civil war story) and case 2 (the knife fight) the genetic parents are not moral parents because their causal contributions were not voluntary or foreseeably linked to the existence of offspring. As I have already suggested, no-one could have foreseen that children would result from the events that transpired in either case. Who then is responsible for the care of these children, does 'Candidate Parenthood' entail that sometimes a child could have no parents?

One possible defense of 'Candidate Parenthood' in light of this problem rests on the claim explored in section 2.1 that children are a communal responsibility. Thus it could be claimed that the problem of no parents is not a problem when we accept that we all have responsibilities to all children, just as we have responsibilities to rescue any stranger. This is a conclusion that many people reject precisely because we frequently fail to rescue strangers. Among them, Elizabeth Anderson³³, Gregory Pence³⁴ and Avery Kolers³⁵ argue that one reason for attaching significance to genetic relatedness is that it ensures that a particular adult or adults are 'bound beyond question'³⁶ to the care of particular children. Similarly Elizabeth Anderson argues that we should not tamper with genetic definition of parenthood where there is no need to. She argues that genetic definitions function successfully in assigning parents to children and while they may not be perfect, they provide some assurances that children will not remain abandoned.

While obviously there is a need to have in place a system that identifies adults to care for children, the concerns raised above are rarely a problem for my account of moral parenthood. I accept that in theory Candidate Parenthood fails to identify any moral parents in case 1 (the civil war story) and case 2 (the knife fight). However, the events that lead to this conclusion for case 1 and case 2 are arguably too bizarre (and for case 1 possibly not even true) to expect that they could happen often. I concede that my account does not identify any moral parents for the children born in case 1 and case 2. These two cases are examples of bizarre accidents for which no individuals can be held to account, however, this does not entail that no-one is required to care for the children. Even strict genetic definitions of moral parenthood cannot prevent the possibility that a child will be left no parents, for example, as occurs when children are orphaned by the death of their genetic parents. Just as there are systems in place to care for such children, we are all obligated to ensure that the children in case 1 and case 2 and indeed all parentless or abandoned children are cared for.

³³ Anderson, E. S. (1990). Is Women's Labor a Commodity? *Philosophy and Public Affairs*, 19(1), 71-92

³⁴ Pence, G. (1998). *Who's afraid of human cloning?* Lanham, Maryland: Rowman & Littlefield.

³⁵ Kolers. Cloning and Genetic Parenthood.

³⁶ In the words of Gregory Pence. *Who's afraid of human cloning?* p 110

I suggest that ‘Candidate Parenthood’, while it may on rare occasions fail to identify any moral parents, is more coherent, and identifies many more potential parents in many more cases than do accounts which rely on the existence of a person with a strict genetic relationship to a child. As Kim Little suggests, emphasizing genetic connections may actually have the opposite outcome to that claimed by Pence and fail to accommodate some children.

“the consequence of Pence’s overvaluing of the importance of the genetic connection are born by those who can least afford it....Pence reinforces the importance of genetic connections at the expense of those children whose families have died or been forced by poverty or war to give them up, or whose fathers are unknown. The message that genetic connections equal responsibility discourages others from taking responsibility for those children, or from taking that responsibility as seriously as they would with their own genetic offspring.”³⁷

Summary

In this chapter I have presented an account of moral parenthood based on a standard account of moral responsibility. I explained that moral parenthood is about moral responsibility and not causal responsibility because we are not morally accountable for everything to which we make a causal contribution. My account, is a modified causal account of parenthood which includes the conditions generally held to apply to moral responsibility, that is, freedom and foreseeability. I refer to my account overall as ‘Candidate Parenthood’ and present it schematically in Figure 1, for the sake of clarity. In summary, my account involves a two step test to determine moral parenthood.

In the first instance any causal contribution to a child’s existence entails that an individual is a candidate for moral parenthood, thus a genetic parent is necessarily a causal parent. But, the first test involves determining whether this individual is morally accountable for the child they caused to exist. Recall that this is only true if a child’s existence was a foreseeable consequence of the ‘causers’ free action. (In Case 1 and Case 2 the genetic parents cannot be held to account for the children they caused to

³⁷ Little, K. (1999). Monogamous marriages and dead beat dads *Monash Bioethics Review*, 18(1), 54-58p 56

exist because these two conditions were not met). At this point the candidate parent can be held to account, I refer to this individual as an ‘accountable parent’.

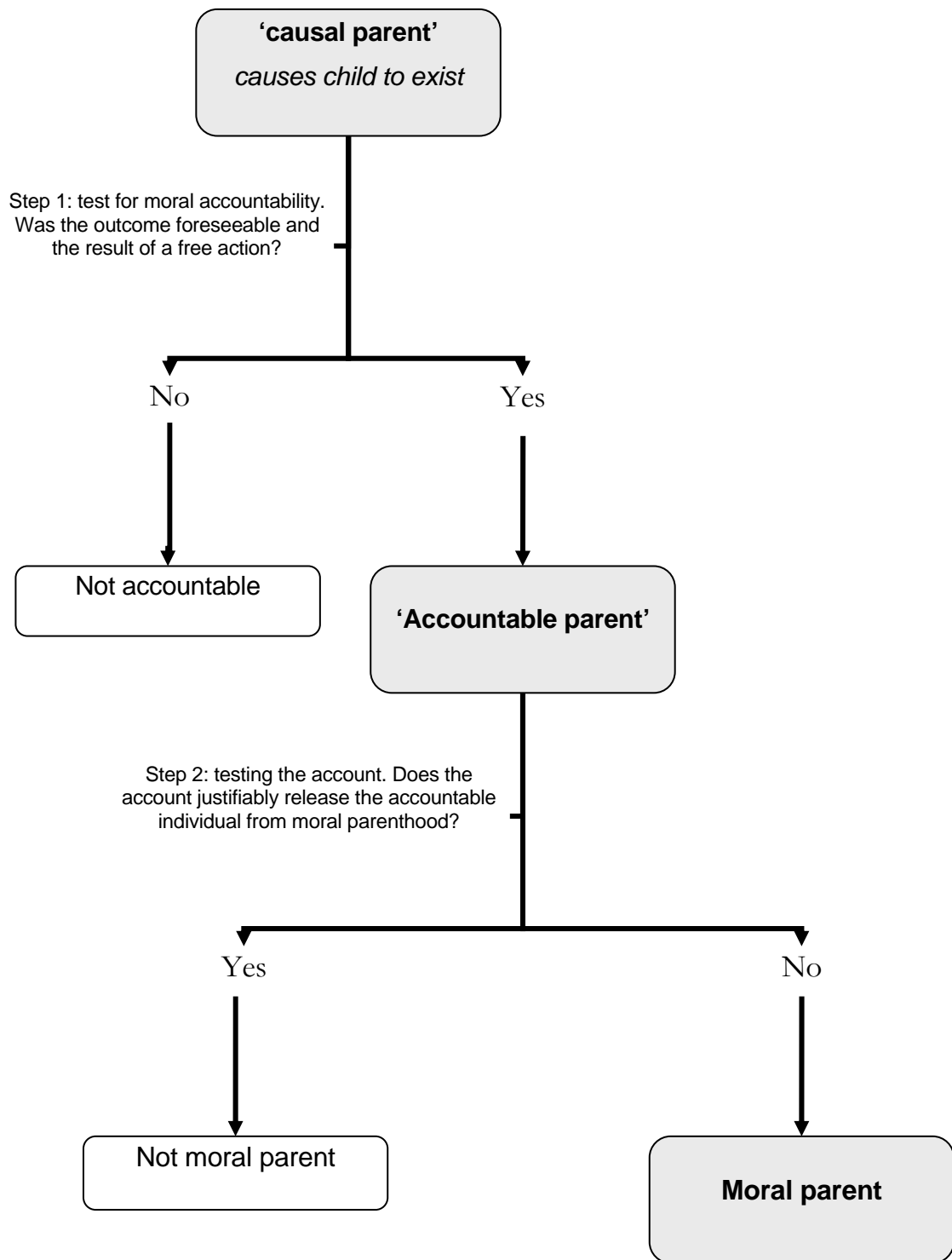
The second step involves evaluating the explanation given by an ‘accountable parent’ and explains why ‘Candidate Parenthood’ does not result in an unworkable number of parents. Some accounts might justify releasing or excusing an ‘accountable parent’ from any obligations regarding the children they helped to bring about. I have argued that transferring parental obligations to others is under some conditions an example of a justifiable account. The conditions that justify a transfer of obligations are: 1) that these are transferred to others who can do a ‘good enough’ job and 2) that this transfer is subject to the same conditions as other morally weighty contracts or promises and is therefore not rescindable where a strong degree of reliance has been placed on the transfer. An ‘accountable parent’ is a moral parent when she does not have an account that justifies releasing or excusing her from parental obligations. In rare circumstances accountable parenthood will fail to identify any moral parents, but this problem is not any more significant than the existing problem associated with current genetic definitions, of finding parents for orphaned or abandoned children,.

I suggest that my account, ‘Candidate Parenthood’ is theoretically more coherent than strictly causal definitions of moral parenthood because it does not confuse causal and moral responsibility and is based on clearer and more consistent understandings of causes and consequences. Further I point out that ‘Candidate Parenthood’ generates many more potential parents and assigns them to children in a non-arbitrary way. As discussed in chapter 1 genetic accounts of moral parenthood are increasingly challenged by advances in reproductive technologies and by changing social rules and family arrangements. The fact that genetic parenthood has successfully tied parents to children for many years does not justify privileging this system in the face of a more coherent and plausible account, more over one that succeeds where genetic definitions do not

This chapter concludes that ‘Candidate Parenthood’ provides a sound theoretical basis for the claim elucidated by the Frozen Embryo study that begetting generates parental obligations.

This concludes the analyses of how parental obligations are generated and whether genetic parents incur such obligations. In the following chapter I turn to the question of parental entitlements and consider how they are linked to obligations and the implications for genetic parents.

Figure 1: Schematic Representation of 'Candidate Parenthood'



CHAPTER 6. DOES GENETIC PARENTHOOD GENERATE ENTITLEMENTS?

Introduction

What is the role of genes in determining parenthood? In the previous chapters I considered the possibility, as raised by the Frozen Embryos study that genetic ties gives rise to parental obligations because genetic parenthood causes children to exist. I rejected strictly causal explanations of moral parenthood and, by incorporating standard accounts of moral responsibility, presented a more plausible explanation of when causing something gives rise to moral responsibility. My explanation, ‘Candidate Parenthood’, entails that *every* individual that freely contributes to the existence of a child, whether genetically related or not, is morally accountable for that child where her existence was reasonably foreseeable. I argued that under some conditions, transferring the responsibilities one has incurred to others is an acceptable moral account of ones contribution to the existence of a child.

Thus far, my discussion has dealt exclusively with the responsibilities associated with moral parenthood and questions about whether genetic parents incur these obligations. But, as discussed in Chapter 1, parenthood in the moral sense is a role that entails not just obligations and duties but is standardly associated with authority or entitlements concerning children. The analysis in previous chapters assumed, for the sake of simplicity, that the entitlements or rights associated with moral parenthood are generated together with parental obligations. In this chapter, I consider the question of parental entitlements separately. I return to the Frozen Embryo study and consider the possibility, as suggested by the participants’ responses, that genetic parenthood gives rise to particular authority or entitlements and that genetic parents can make claims with regard to their offspring.

Recall from chapter 2 that some of the study’s participants suggested that a genetic tie would give them some future entitlement to access or connect with or play a role in

their offsprings' lives. The following two themes, specified in Chapter 2, summarise the responses that relate more specifically to parental authority or entitlements.

Theme 7. Genes = property

The duties and rights associated with moral parenthood are grounded in the fact that we are the owners of our genetic material and therefore the owners of our embryos.

Theme 8. Begetting generates entitlements.

Begetting gives rise to decisional authority over embryos and entitles genetic parents to ongoing contact or information about their genetic offspring.

In this chapter, I take up the claims illustrated by the above themes and discuss how the genetic relationship between parents and children could give rise to parental entitlements, (in the light of philosophical literature on this question). As discussed in chapter 1, I do not specify exactly what are the entitlements of parents, but I accept as given, that amongst these are the freedom to raise a child and the authority to make decisions that concern her (largely) without interference. My question is, does genetic parenthood give rise to the entitlements and authority generally associated with moral parenthood?

Again, while I focus on genetic parenthood, much of the discussion that follows has direct application to and implications for non- genetic parents. However, the conclusions I make about whether genetic parenthood generates entitlements do not necessarily exclude or include non-genetic parents. I accept that parental rights for non-genetic parents may be justified independently of whether this is true for begetters. Most obviously, many of the powers and authority associated with parenthood are based on contractual legal arrangements. For example, adoptive parents are understood to have certain entitlements with regard to the children they agree to care for such as the freedom to fulfill the obligations they have taken on. My interest is not in legally or socially justified parental rights but in whether, as is often claimed, begetting in itself gives rise to moral entitlements with regard to offspring.

The answer to this question, however, will also, incidentally, shed some light on whether non-genetic parents have moral entitlements, outside of any legal or social authority that any adult may have in relation to particular children.

In section 1, I begin by clarifying the concept of a parental entitlement by distinguishing between two different concepts, legal and moral rights. This follows with analysis of three influential accounts of parental rights. In section 2, I discuss *The Proprietarian Argument*, an account of parental entitlements which suggests that these are analogous to property rights. In section 3, I present *The Extension Claim*, a type of claim purporting that parental rights are an extension of other rights held by individuals such as the right to privacy. I ultimately reject both of these types of arguments and argue that a third account, *The Priority Thesis*¹, which entails that parental entitlements are generated by corresponding parental obligations, is a more coherent explanation of parental entitlements. I present arguments in support of the latter and in section 5, I consider how claims about parental entitlements apply to individuals and couples with surplus frozen embryos and their decision about whether or not to donate these embryos to other infertile couples.

The analysis in this chapter concludes that the Priority Thesis provides a sound theoretical basis for the claim that begetting generates parental entitlements.

1. What is a parental entitlement?

Questions about what parents can and cannot do in relation to their children and what children can expect from their parents are often framed in terms of rights. For instance in the case of re: Patrick, introduced in chapter 1, much of the debate revolved around questions about the rights of a genetic father to access his son and about Patrick's right to know his father. The difficulty with asserting that parents have certain rights, (or indeed with asserting any rights in general), is that it is not always

¹ I have borrowed this terminology from David Archard Archard, D. (2003). *Children, Family and the State*. Ashgate Publishing Limited.. And while the arguments are well known each of the theories does also go by other names. For example the Proprietarian Argument is also known more simply as the property model. The Priority Thesis is also referred to as the argument from necessity and the Extension Claim is a claim that parental rights are an extension of other rights for example the right to privacy or to reproductive control.

clear what the moral basis for such claims is. In re: Partick, the sperm donor was asserting a legal right to access his son, that is, a claim justified according to legal principles or rules. However, to agree (for the sake of argument) that Patrick's genetic father had a legal right to access Patrick is not to say that his claim is justified by moral principles. While legal notions are often informed by moral principles, legal rules are not *necessarily* underpinned by moral justification. Moral entitlements and legal rights are frequently conflated, but many legal rights reflect arrangements that serve to facilitate social harmony rather than moral entitlement.

Further confusion surrounds the distinction between absolute and *prima facie* rights, positive and negative rights and the difference between having a right and acting rightly. A full discussion of rights is outside the scope of this thesis². In the discussion that follows, I leave aside questions about the *legal* rights of parents and how these might be justified. My interest is in the question of whether there are *moral principles* that validate the claims or entitlements generally thought to be associated with parenthood. More specifically I address the question, 'do genetic parents have morally justifiable entitlements regarding their offspring?' Henceforth any reference to rights, (unless otherwise specified) refers to moral rights, claims or entitlements and their justification in terms of moral principles or theories.

As to the distinction between positive and negative rights, parenthood is frequently discussed in terms of both. However it is not always clear whether parental entitlements are positive or negative rights because sometimes the boundary between positive and negative rights is blurred. For example a parental entitlement to custody of or access to a child could be described as a positive right 'to be provided with something'. But this same claim can be described as a negative right to be free to make decisions about or have access to offspring. In relation to my question, it is not helpful to distinguish between positive and negative rights.

² I do however return to the question of parental rights and the distinction between absolute and *prima facie* rights later in this chapter.

For the purpose of my discussion a genetic parent can be said to have a justifiable right, entitlement or claim with respect to a child if this can be validated by a moral principle. The question of parental rights is raised in the context of the Frozen Embryo study as a question about whether genetic ‘parents’ of spare embryos have any entitlement or claim over their embryos and/ or the children they become. Similarly, in re: Patrick, a moral claim underpins the question of whether the sperm provider’s genetic relationship confers on him any authority or entitlement over Patrick.

In the following section I explore three possible moral justifications for such entitlements. The *Proprietarian Argument* gives an account of parental entitlements analogous to property rights over offspring, and is a possibility raised by the Frozen Embryo study³. A second group of explanations for parental rights, known collectively as the *Extension Claim* proposes that parental rights are an extension of other rights, such as the right to privacy or the right to autonomy. Finally I explore the *Priority Thesis*, an account of parental rights based on the claim that such rights are *necessary* for parents to fulfil the obligations generated by parenthood.

2. The Proprietarian Argument⁴

I begin by investigating the possibility that the special entitlements or rights usually associated with parenthood are grounded in notions of property ownership and on claims that we have analogous authority over our children, or embryos, or what becomes of our genetic material.

David Archard reminds us (as have many others), that there is a strong precedent for the claim that parents have property rights in their children⁵. Historically, it was not

³ In actual fact this is a claim that was denied by the participant of the Frozen Embryo study, but whether it was proposed or denied it raises a possibility worthy of further analysis.

⁴ I am very much indebted to David Archard’s explication of Lockes private property thesis, its critics and defenders Archard. *Children, Family and the State*.

⁵ Archard. *Children, Family and the State*, Archard, D. (2004). *Children : rights and childhood* (2nd ed. ed.). London ; New York :: Routledge.. See also Murray on history of childhood Hart SN. (1991). From property to person status: historical perspective on children’s rights. *American. Psychologist* 46, 53-59, Mason, A. (1994). *From Father’s Property*

uncommon to regard children as the chattels of their parents, as exemplified in Roman law during the earlier period of the Roman Empire⁶. The Roman doctrine of *patria potestas* decreed that a father had the power of life and death over his children and could dispose of them as he might dispose of his property. Fathers retained the power to kill or treat their offspring as property throughout the life of their children unless a child was formally emancipated following an application for freedom. While our modern laws and social institutions reflect the belief that treating children (or any persons) as property is inhumane and conflicts with very weighty moral principles, some writers have entertained the possibility that a property model might be useful in clarifying or explaining features of parenthood⁷. However, they also argue that this does not entail that children are literally their parents' property, or that parents can act as if this were so⁸. Putting aside then literal notions of property, do arguments analogous to those that support the ownership of property explain or justify parental entitlements?

Modern proprietary arguments for parental rights rest on John Locke's famous defence of private property⁹. Locke gives an explanation of how an individual can rightly acquire something and come to have overriding claims in relation to that thing. Briefly Locke's theory holds that a person has a right to his own person that no others can claim. Further, that the labour a person produces with her body also belongs to

to Children's Rights: The History of Child Custody in the United States New York: Columbia University Press, Murray, T. H. (1996). *The worth of a child*. Berkeley: University of California Press., for a historical discussion of children as property.

⁶ *Pater familias*: for description see. Wikipedia, the free encyclopedia. http://en.wikipedia.org/wiki/Pater_familias

⁷ Farrell-Smith, J. (1983). Parenting and property. In *Mothering: Essays in feminist theory*. In J. Trebilcock (Ed.). Totowa, N.J: Rowman & Allanheld, Montgomery, J. (1988). Children as Property? *The Modern Law Review*, 51(3), 323-342, Narverson, J. (1988). *The libertarian idea* Philadelphia: Temple University Press.

⁸ Farrell-Smith. Parenting and property. In *Mothering: Essays in feminist theory*. In , Gold, E. R. (1996). *Body parts : property rights and the ownership of human biological materials*. Washington, D.C. :: Georgetown University Press.

⁹ Theory of Acquisition in Locke, J. (1967). *Two treatises of government* (2nd ed. a critical edition with an introduction and apparatus criticus by Peter Laslett ed.). London: Cambridge University Press.. Discussions about property have a long history and appear in the writing of Plato, Aristotle, Aquinas, Hegel, Hobbes, Locke, Hume, Kant, Marx and Mill. While Locke's is not the only argument defending ownership of property, it is one that has recently been used to explore parental rights. I entertain a property account of parental rights only briefly and in the contexts of modern accounts that are based on Locke's arguments. I contend that property arguments are disanalogous with parental entitlements and not promising in terms of producing a coherent account of such rights. While it may be possible to put forward a convincing explanation of parental rights grounded on arguments about property other than those of Locke I leave this to others to explore. My aim is to analyse the arguments present in the current literature and not to develop a coherent account of parental rights based on property rights. Further, as will become clear in the following sections, property accounts are not necessary to explain parental entitlements.

her, and by ‘mixing’ her labour with an ‘un-owned’ thing, she comes to own that thing. Locke’s theories remain very influential in support of claims for property or ownership and justifying special entitlements for that which one produces or creates. More recently his ‘labour theories’ have been used to explore questions of parental authority¹⁰. Locke himself did not equate parental rights with property rights but referred instead to parents as ‘charged with’ the care of children because of their imperfectly developed faculties¹¹. However, as Lawrence Becker points out, Locke’s theories have implications for all of our ‘labour’ including the labour involved in conceiving, giving birth to and nurturing a child¹². Becker maintains that Locke’s labour theory does not distinguish between the ownership of say, flowers from a garden one laboured in, and ownership of the children one laboured to produce or rear. Thus, if the notion of self- ownership and owning ‘the fruits of one’s labour’ are defensible, then a defensible claim can be made that children are their parent’s property.

Locke’s labour theories have been criticized on several fronts including the difficulty of explicating the notion of ‘mixing one’s labour’ with a thing and why this entails a claim to that thing¹³. At least one competing interpretation is that it is not ‘mixing our labour’ that results in ownership but rather ‘just reward’ for the efforts expended to produce or create some thing¹⁴. Of more relevance to this discussion is the paradox created by Locke’s theory, that if all persons are owned by their parents they cannot own themselves. On Locke’s account we would all be the property of our parents and they of their parents etcetera. Thus, only the first ‘un-owned’ person could be self-

¹⁰ Narveson. *The libertarian idea* Hall, B. (1999). The origin of parental rights. *Public Affairs Quarterly*, 13(1), 73-82, Page, E. (1984). Parental Rights. *Journal of Applied Philosophy*, 1(2), 187-203

¹¹ Becker, L. (1977). *Property Rights: Philosophical Foundations*. Boston: Routledge and Kegan Paul.

¹² Becker. *Property Rights: Philosophical Foundations*.

¹³ In particular the problems discussed focus on why ‘mixing with’ and not effort expended, or why labouring should give rise to entitlements and not just compensation or rewards Nozick legitimately asks: ‘...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? If I own a can of tomato juice and spill it in the sea so its molecules... mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?’ (Nozick. *Anarchy, State, and Utopia*, p.174)

¹⁴ Nozick concludes that what is significant about mixing our labor with the material world is that in doing so, we tend to increase the value of it, so that self-ownership can lead to ownership of the external world in such cases (Nozick. *Anarchy, State, and Utopia*, pp. 149-182).

owning. The problem with the idea that parents own their children is how and when do children come to own themselves?

Locke himself attempted to avoid this paradoxical implication of his theory by arguing that we cannot own what we do not 'knowingly design' or that which comes about as a result of processes that are 'opaque'¹⁵. However as Archard points out, Locke's defense is not convincing. Even if the fact of a child's existence is in some sense opaque or not the result of a deliberate design, this is certainly not necessarily true of begetting in general and in particular where reproductive technologies have rendered the process of producing a child 'increasingly transparent'¹⁶.

Locke further suggested that parents do not own their children because God is ultimately the author of his children. This is a claim I do not pursue further, except to borrow an argument from Archard, that if God is the author of her children because God is the author of all things, this negates ownership claims over *any* of 'the fruits of our labour' not just those of parents over children.

Obviously the biggest problem with analogies between property and children is that they cannot accommodate two conflicting notions, that children are owned by their parents and that the capacity of people (including children as they mature) to be self-directing should be respected. While we might be respectful of some property (say an expensive painting) or be sensitive to the needs of commodities or animals that we own (such as our pets), the notion that we can own other persons is highly problematic. Parental rights cannot be explained as a special form of property rights or by claiming that children are a special type of property¹⁷ without resolving the question of how a person can come to be owned. As Becker reasons, arguments that attempt to justify the ownership of property *presuppose* self-ownership¹⁸. Thus if the

¹⁵ Locke. *Two treatises of government* Chapter 1 see Archard for discussion Archard. *Children, Family and the State*.

¹⁶ Archard. *Children, Family and the State*.

¹⁷ See Kolers, & Bayne. "Are You My Mommy" On the Genetic Basis of Parenthood. for discussion of children as different types of property

¹⁸ Becker. *Property Rights: Philosophical Foundations*.

reason that anything can be owned is because we are self-owning, then we cannot own another self-owned person.

Finally, even if a defensible account were available of how one comes to own ‘the fruits of one’s labour’ and therefore one’s children, this account would produce an unworkable number of parents. As with discussion of parental obligations in chapter 4, to be coherent with our everyday judgments any account of parental rights needs to limit or distinguish between all of the persons involved in the existence of a child. If labouring is sufficient to ground a property claim over children then children would be the property of many people, and ‘the fruits of one’s labour’ account would fail to distinguish two parents as its proponents generally accept it does. In the case of the re: Patrick, introduced previously, how can the labour of Patrick’s genetic father in producing sperm be distinguished from the labour of his gestational mother or the labour of the person assisting with the insemination of Patrick’s mother? While various attempts have been made to quantify the ‘labour’ of different contributors to a child’s existence,¹⁹ I suggest that this is a futile enterprise because the difficulties outlined above with notions of self ownership and ‘mixing of labour,’ make ‘labour’ an implausible account of parental entitlements.

Barbara Hall attempts to distinguish between different parental contributions and parental claims with a modified version of Locke’s position and proposes that self-ownership gives genetic parents prior claims over their progeny. Hall accepts that applying Locke’s labour theories to parenthood would not distinguish between genetic, gestational or rearing parents because all three could claim entitlement to a child they ‘mixed their labour with’. Further she reasons that gestational surrogacy now makes it possible for genetic parents to produce a child without any labour on their part²⁰. In her view labour is neither necessary nor sufficient to ground parental rights. Hall is interested to explain an intuition that, in the case of a contractual

¹⁹ See for example ‘sweat equity’, discussed by Annas Annas, G. J. (1999). The shadowlands--secrets, lies, and assisted reproduction. *New England Journal of Medicine*, 340(8), 656-657

²⁰ She does not consider the possibility that the development of a person to reproductive maturity constitutes a type of labour (or at least bodily labour).

surrogacy arrangement, it is the genetic parents and not the gestational surrogate that have a prior claim to their offspring²¹.

Hall takes up the first premise of Locke's position, that a person has a right to her own person, or 'self ownership'. She reasons that just as we own ourselves we own what is part of ourselves, such as say, our kidneys and our gametes. She contends that it is not because we labour to produce children that we own them, but rather, that it is because our genetic offspring are composed of something that we own that we have 'first dibs' over them. Hall illustrates her position with the example of an evil scientist who steals and stockpiles kidneys and lungs. She reasons that upon the discovery of this stockpile it is clear that the unwilling donors have a superior claim not simply to compensation but to the organs from their bodies. She argues that similarly genetic parents have a prior claim to the children that develop from their genes.

Hall claims that her account accommodates both a child's developing self-ownership and autonomy with a genetic parent's property claims over her offspring. She argues that the degree to which a child is constituted from its genetic parents fades over time and so too does parental governance. Hall suggests that parental entitlements 'diminish significantly' upon a child's maturity but like their shared genetic constitution, do not dissipate. According to Hall the fact that a parents hold over their child does not completely disappear in adulthood is not really a problem and is something that we already recognize. To illustrate, she suggests that parental claims over adult children explain why we would find fault with an adult child that neglects his needy parents or fails in his filial duties

Apart from the obvious disanalogies between children and property, the problem with Hall's account is that it rests on the claim that children are 'a product of the parents' own selves'²² or 'composed of'²³ their genetic parents. However, as illustrated in chapter 3, genetically related offspring are not in fact physically 'composed of' their

²¹ Note however that this intuition is not universally shared

²² Hall. The origin of parental rights. p.80

²³ Hall. The origin of parental rights. p.79

genetic parents. Recall Silvers example of the genetic engineering company on Mars (chapter 3). Because genes are only packets of information, it is theoretically possible to produce a genetically related child without any 'material' from either genetic parent. Thus even if the notion of self ownership is a valid one, and a person can be said to own what is derived from themselves, it does not follow that genetic parents own their children. This is simply because genetic children are not composed of their genetic parents in the same way that kidneys or lungs are materially derived from someone's body.

Does Hall's argument show, contrary to what it proposes, that *gestational* parents have prior claims over their offspring? If material composition defines parenthood, then as previously argued, gestational mothers might have a prior claim to the children they gestate. As Lee Silver explains, each of the cells that make up the body of a developing fetus is built from the raw materials that are recovered from the food that the gestating mother consumes. Perhaps we could modify Hall's argument such that; if we own that which is derived from what we own, and if we own the food we consume, then we own a child that is derived from the food we consume? The obvious problem with this argument is the missing step between owning something and owning things that are derived from what we own. Even if we could make sense of the claim that self-ownership entails that we own say, our gametes, this does not entail that we own a child that develops from our gametes. While attempts to define body parts or products as property are increasingly popular²⁴ (to some extent buttressed by advances in biotechnology), ownership of a body part or product does not entail ownership of what develops from these²⁵. As Kolers argues, "*Hall's position would seem to rely on a story about the survival of objects (like gametes) despite fusion with dissimilar objects; or a story about how moral claims over parts of an object might generate moral claims over the object itself*"²⁶. Neither of these 'stories' is apparent or plausible.

²⁴ see Andrews, L. B. (1986). My body, my property. *Hastings Center Report*, 16(5), 28-38 and George, A. (2004). Is property necessary? On owning the human body and its parts. *Res Publica*, 10, 15-42

²⁵ See for example the Henry Moore case, in which donated cells were used to derive a commercially valuable 'Mo' immortal cell line. In the legal battle that ensued over royalties relating to the distribution of the cell line the judgment was, in summary, that that value added to Henry Moore's original contribution precludes his ownership of that value added product. Discussed in Andrews. My body, my property.

²⁶ Kolers, & Bayne. "Are You My Mommy" On the Genetic Basis of Parenthood. p 276

Hall addresses this problem (however, recall that her arguments relate to a genetic constitution and not other material constitution). She argues that even though the genetic material from which a child is derived has undergone substantial changes and cannot be recovered, a biological connection still establishes an initial presumption of parental rights. Hall argues that the loss of genetic material gives rise to this presumption as opposed to a presumption of remuneration. She illustrates this claim with the example of an alcoholic who loses a kidney;

“people who do not take the best care of their bodies; yet we would still give credence to their demands for the return of their organs. Why is this different with the loss of genetic matter that has become a child?”

Hall argues that one has a moral claim over a child derived from one's genetic material even if one is an 'unwitting' or 'unproven' parent. But notice that Hall fails to explain why any begetter has a claim to something derived from their genetic material, irrespective of whether genetic material is lost accidentally or not, and regardless of a begetters capacity to parent. Hall assumes that the loss of genetic material requires recompense, but even if this were the case, it does not follow that this recompense amounts to a claim over one's genetic offspring or that this entitlement is generated by the 'loss' of ones genetic material.

Finally, to complete the discussion of parental rights and analogies with ownership I point out that it makes no difference from what feature of their parent a child is claimed to 'derive from', whether it is from a parent's labour or effort, genetic blueprint, gametes or a combination of these in conjunction with other raw materials. What remains to be shown for parental rights to be analogous to property rights is how the derivation of children from any of these 'self-owned' features entails ownership or parental entitlements over children and this explanation is missing from all of the accounts considered. I leave here the discussion of property rights and conclude that while there appears to be some feature of parenting that intuitively resembles ownership, analogies of parental rights with property are problematic on

several fronts, not the least of which are the problems associated with conceiving of any person as owned by another.

In the following section I explore a different account of parental entitlements based on the notion that these are concomitant with, or extensions of, different types of established rights or freedoms.

3. The Extension Claim

David Archard draws on the work of Aristotle to introduce what he refers to as the Extension Claim. In a discussion of ‘domestic justice’ Aristotle suggests that a fathers entitlements over his children are analogous to his sovereignty over his chattels because “... *a child before it has reached a certain age and acquired independent status, is in a manner of speaking part of oneself* [the father].”²⁷

Archard suggests that this is an early version of a conception of children not as something owned but as an extension, although not in a literal sense, of their parents. He suggests that this claim is an attempt to ground parental authority, say for example to make choices for their children, as an extension of their right to make choices for themselves.

Archard cites Robert Nozick’s description of children ‘*as part of one’s substance*’²⁸ and Charles Fried’s claims about the rights of parents as further examples of the Extension Claim. According to Fried

“*the right to form one’s child’s values, one’s child’s life plan and the right to lavish attention on a child are extensions of the basic right not to be interfered with in doing those things for oneself.*”²⁹

²⁷ Aristotle. (1970). *Ethics*. Hammondsworth: Penguin. Book Five, Chapter six, p.157

²⁸ Nozick. *Anarchy, State, and Utopia*, p.28

²⁹ Fried, C. (1978). *Right and wrong* Cambridge, Mass. :: Harvard University Press. p.152

Archard's conception of an Extension Claim is a useful way of grouping a number of theories that have in common a justification of parental claims grounded on some already established freedom, right or entitlement. To his examples, I would add the explanations of parental entitlements given by Ferdinand Schoeman³⁰, John Bigelow³¹, Edgar Page³² and Phillip Montague³³. In this section I focus on the work of Ferdinand Schoeman who gives an account complete enough to allow an analysis of the general content of an Extension Claim. I return to the work of the latter three writers in the final section of this chapter for the purpose of comparing an Extension Claim with the Priority Thesis.

Ferdinand Schoeman's position is not unlike that of Charles Fried quoted above. Schoeman reasons that a parent's rights to a private and autonomous relationship with their biological children stems from the importance of intimate relationships in general. Schoeman is sceptical of the ability of rights language to capture the essence of proper relationships between children and adults. He denies that parent's rights stem from the rights of children or that they are contingent on what is most beneficial for children. In his words

"firstly I will try to show why intimacy requires privacy and autonomy as its setting, and second why we should recognize a right to intimate relationships. I shall then argue the parent's right to raise her child in a family stems naturally from the right to engage in intimate relationships, even when the recognition of this right involves some comparative cost to the child."

³⁰ Schoeman, F. (1980). Rights of Children, Rights of Parents, and the Moral Basis of the Family. *Ethics*, 91, 6-19

³¹ Bigelow, Campbell, Dodds, Pargetter, Prior, & Young. Parental Autonomy.

³² Page. Parental Rights.

³³ Montague, P. (2000). The myth of parental rights. *Social Theory and Practice*, 26(1), 47-68

Further Schoeman states that,

'Since society cannot determine and should not try to determine who may have intimate relationships with whom, if a person chooses to have his relationships in a family setting society should not interfere, since that kind of choice is essential to intimate relationships in general.'

In summary Schoeman's argument, in a formal sense is as follows³⁴:

P1: people have a right to intimate relationships

P2: the family is an example of intimate relationships

P3: intimacy requires freedom from interference

C: people who choose to have intimate relationships in a family setting should be free from interference

It is not necessary to labour over each premise in turn to test the validity of Schoeman's claim. Obviously, intimacy is a fundamental aspect of family life and as Schoeman points out the sharing of oneself and the sense of identity that comes from intimate relationships is precisely the reason given by many people for having children and forming a family. I accept as given that intimacy is an essential characteristic of meaningful human relationships. Further, it is almost self evident that intimate sharing requires privacy and freedom from interference. As both Schoeman and Fried suggest, the features of intimate relationships, friendship, love and trust are difficult to

³⁴ Although Schoeman does not set his argument out formally as such, this argument captures the essence of his claim. In his own words "firstly I will try to show why intimacy required privacy and autonomy as its setting, and second why we should recognize a right to intimate relationships. I shall then argue the parent's right to raise her child in a family stems naturally from the right to engage in intimate relationships, even when the recognition of this right involves some comparative cost to the child." Further he state that 'Since society cannot determine and should not try to determine who may have intimate relationships with whom, if a person chooses to have his relationships in a family setting society should not interfere, since that kind of choice is essential to intimate relationships in general.'Schoeman. Rights of Children, Rights of Parents, and the Moral Basis of the Family. .p17

conceive of (or according to Fried inconceivable) in the absence of privacy and ‘unauthorised trespass’³⁵.

What needs to be shown for the purpose of my question is why promoting intimate relationships entails that biological parents have parental rights. Schoeman argues, unconvincingly, that

‘The right of a biological parent... [is a]... right against all of the rest of society to be indulged, within wide limits, to share life with each child and thus inevitably to fashion the child’s environment as they see fit, immune from the scrutiny of and direction from others’³⁶.

He further explains that interfering with the choices made about the setting in which people choose to engage in intimate relationships prevents them from having such relationships. In other words that choosing to form a family is choosing to have an intimate relationship. Schoeman suggests that the alternative to the ‘customary distribution of children to their parents’ is a social decision or arrangement for allocating children with adults or to institutions. He claims that such an arrangement, is illustrated by the practice of early adoption, and precludes and interferes with ‘*a practice from which intimacy and life meaning typically emerge*’³⁷.

Notice, however, that Schoeman appears to skip a step in this argument. He appears to claim that arrangements other than those where children are raised by biological parents, free from undue interference, are not conducive to intimacy. But, the problem is that this does not show that biological parents have rights *over their children*. The crucial part of Schoeman’s argument, if it is to explain why a right to intimate relationships entails that parents have rights over children, is to explain why freedom from interference entails authority over other people and not just authority over one’s

³⁵ As evidence in part by the difficulty of conceiving of and establishing intimate relationships in institutional setting where inmates or residents are deprived of privacy and autonomy. Fried. *Right and wrong*, Schoeman. Rights of Children, Rights of Parents, and the Moral Basis of the Family.

³⁶ Schoeman. Rights of Children, Rights of Parents, and the Moral Basis of the Family. p11

³⁷ Schoeman. Rights of Children, Rights of Parents, and the Moral Basis of the Family. p16

self. As Schoeman himself point out, adults can establish intimate relationships with other consenting adults. Obviously such relationships, say for example like those between a husband and wife or between close friends, do not entail that one is entitled to make decisions for or take actions affecting the other (without their knowledge or despite their wishes). Take for example the standardly accepted view that a parent has the right to choose her child's religion or indeed, whether they will enter any religion. If we agree that this is an example of a parental entitlement, it does not appear to be one that can be accounted for by a right to intimacy, privacy or autonomy.

It will not do to respond that the reason that anyone could claim sovereignty over children is that it is unlikely that a (young) child would survive unless someone was placed in this role. It is obviously true that children require looking after and that someone needs to take charge of their care, at least until they are able to care for themselves. Accepting that sovereignty over children is justified and that families require intimacy does not entail that intimacy *justifies* sovereignty. Further, a right to intimacy does not ensure that children are looked after.

Certainly, making decisions about how a child is raised and the values and teachings embraced within families are part of the intimate fabric of family life. But, the value of intimacy does not explain why the choices of biological parents have priority nor why a right to intimacy generates parental sovereignty over children.

I conclude this section by pointing out that any attempt to account for parental rights as 'an extension' of the established rights of individuals will face the problem of explaining why rights generate authority over other people and not, as is standardly accepted, freedom of (self-regarding) actions and freedom of association³⁸.

³⁸While I have not directly addressed his claims, my conclusion also rules out the influential arguments of John Robertson that parents have a right over their gametes or embryos because they have a right to reproductive autonomy., see Robertson. *Children of choice : freedom and the new reproductive technologies*.

In the following section I consider a more promising account of parental entitlements, the ‘Priority Thesis’.

4. The Priority Thesis

An influential and historically prominent view is that parents’ rights in relation to their offspring are grounded on and constrained by their prior obligations to care for their children. An early version of this claim is attributed to Immanuel Kant and is known alternatively as the Priority Thesis, and the argument from necessity³⁹.

In this section I examine the claim that parental entitlements are a necessary corollary of parental obligations with reference to the work of Edgar Page⁴⁰, John Bigelow⁴¹ and Philip Montague⁴². Each of these authors ultimately reject the Priority Thesis as the basis of parental rights and argue instead for a version of the Extension Claim. However, their arguments provide a useful framework in which to consider the priority claim.

Briefly the Priority Thesis is reflected in the following statements, for example “X has an obligation to provide Z with Y”, which might capture a parent’s obligation to provide, say, medical treatment for their child. The Priority Thesis claims that parental rights are necessary to allow parents fulfill their duties. Thus X’s obligation to provide Z with Y gives rise to a correlative right to be free to do so⁴³. As argued by Brenda Almond, “...*parents have a direct moral obligation to care for their children. If society does not permit them to care for their children, it prevents them from fulfilling that duty and thus violates their rights.*”⁴⁴

³⁹ Discussed in Archard. *Children, Family and the State*.

⁴⁰ Page. Parental Rights.

⁴¹ Bigelow, Campbell, Dodds, Pargetter, Prior, & Young. Parental Autonomy.

⁴² Montague. The myth of parental rights.

⁴³ Interestingly, while not directly articulated by the participants of the Frozen Embryo study, this seems to be the basis of the claim underlying some responses; that begetters have decisional authority over their embryos because they would have duties towards the children that developed from these embryos.

⁴⁴ Almond. Parenthood- social construct or fact of nature? .p105

Clearly it is incoherent to require that parents care for and raise their children without also allowing that they are free to do so, that they have the authority to do so and that they are entitled to do so. To apply this argument to genetic parenthood if, as I have shown in previous chapters, genetic parenthood generates parental obligations then to the extent that rights and claims are corollary genetic parenthood must also generate parental entitlements.

But, one of the problems with this argument is that rights and obligations are not always complimentary. Edgar Page considers the question of parental rights and the ‘argument from necessity’⁴⁵. He argues against the claim that parental rights are necessary for the discharge of parental obligations. Page points out that while there are many parental rights which can be accounted for by a corresponding duty this is not so of all rights. For example, Page doubts that a right or claim to be entitled to make decisions about one’s child free from interference, such as the right to choose a child’s religion, is necessary to enable a parent to fulfill her duties. He further suggests that some entitlements exist without corresponding obligations. Page gives the example of a child conceived as a result of rape. In his opinion the mother of such a child could claim the right to “possess or raise the child” even though she has not incurred the duty to look after that child⁴⁶.

In short, Page’s arguments highlight two problems for the Priority Thesis. Firstly, if some obligations do not generate rights then why do parental obligations generate rights? Secondly, if some rights exist independently of obligations then parental rights might also be independent of obligations and therefore cannot be justified solely by the prior existence of obligations. I consider each of these problems in turn.

⁴⁵ Page. Parental Rights.

⁴⁶ I return to Page’s example later in this chapter and consider whether the birth mother does in fact have such an entitlement.

4.1 Do parental obligations generate parental rights?

Beauchamp and Childress draw on the work of Mill and attempt to explain the “untidy” correlation between rights and obligations⁴⁷. They explain the traditional distinction between two different types of obligations, perfect and imperfect obligations. They explain that kindness, generosity and charity are examples of imperfect obligations, or duties that are “self-imposed oughts” and exceed our moral obligations. They reason that, just as no-one can claim a right to someone’s charity or generosity, imperfect obligations do not generate rights. Conversely, justice is an example of a perfect obligation, or one that determines how we should act towards all individuals, regardless of our personal ideals. Perfect obligations, such as justice entail a correlative right or claimable entitlements⁴⁸.

In terms of moral parenthood, clearly there exist many perfect obligations towards children and therefore corollary entitlements. The obligation to feed, clothe, house and provide medical treatment for children are not optional and thus justify a claim to enable these obligations to be met. Therefore, the fact that moral parenthood generates perfect obligation provides a moral basis for rights, entitlements or authority, corollary to at least these type of obligations.

But frequently, claims over children are not claims that relate to perfect obligations, nor arguably to any obligations at all. For example, consider the claim that a parent is entitled to raise a child to follow a particular religion. A particular parent may see this as an obligation, but this is an example of a ‘self-imposed ought’ or an obligation that a parent might believe exists, but one that we hold to be ‘optional’ or imperfect and not prescribed by moral rules. The right or authority to choose a child’s religion cannot therefore be justified by claiming that this right allows a duty to be discharged. Curiously, however, the entitlement to choose a child’s religion is also a right or

⁴⁷ Beauchamp, & Childress. *Principles of Biomedical Ethics*. p73-75, based on the writing of Mill, J. S. (1969). Utilitarianism. In *Collected works of John Stuart Mill* (Vol. 10, pp. 203-259). Toronto: University of Toronto Press . Note however that their discussion refers to the correlation between ‘my right’ generating ‘your duty’, where as I am interested in whether ‘my right’ is generated by ‘my duty’. I introduce the discussion of the correlativity of rights and duties because it helps to clarify the concept of perfect and imperfect obligations.

⁴⁸ Beauchamp, & Childress. *Principles of Biomedical Ethics*.

entitlement that we believe to be a fundamental freedom, even if unrelated to any obligation.

It could be claimed that this discussion is ‘back-to-front’, that obligations do not justify entitlements but that parental rights generate obligations. Thus, a parent’s right to choose their child’s religion could be claimed as a right which imposes an obligation on others not to interfere.

There is certainly a strong philosophical basis for rights based accounts of morality⁴⁹. On such accounts, rights guide our moral actions because the function of morality is to protect individual interests. Obligations follow from rights and not the converse, and are justified on the basis that they secure the liberties or benefits of rights-holders⁵⁰. Note that accepting that rights have priority over obligations does not negate the fact that some rights and obligations are correlative, but merely shifts the direction of the correlation. I suggested above that an obligation to care for a child could be the basis of a parent’s entitlement to raise a child. If, however, rights are prior to obligations then a right to the benefits of parenting might give rise to a correlative obligation that others should abstain from removing this child from its parents. Thus, the correlation between a parental right and obligation exists irrespective of whether parenthood is seen as entitlement or an obligation.

It is not within the scope of this thesis to settle the old ‘chicken and egg’ problem of whether rights or obligations have primacy. My aim is more specifically to investigate how parental entitlements arise and whether begetting gives rise to parental rights. In the previous chapter, I gave a plausible account of how genetic parenthood could generate parental obligations. In the discussion above I highlighted that, on some accounts of morality, at least some entitlements arise as a corollary of parental obligations.

⁴⁹ Dworkin, R. (1978). *Taking rights seriously* London Duckworth, Gewirth, A. (1986). Why Rights Are Indispensable. *Mind*, 95, 329-344, Nozick. *Anarchy, State, and Utopia*

⁵⁰ As discussed by Beauchamp, & Childress. *Principles of Biomedical Ethics*. p75

In response to the first problem raised by Page's account (that some obligations do not give rise to corollary rights) I suggest that the above discussion shows that at least some parental rights are necessary, that is, those which enable the fulfillment of perfect parental obligations. It is therefore irrelevant for my purpose whether any general obligations exist that do not generate correlative rights. What is important is that standard parental obligations are examples of perfect obligations and therefore necessarily generate such rights. In other words, to show that some rights are not matched by obligations does not show that the Priority Thesis completely fails to account for parental rights.

Further, it is quite possible to conceive of a parent's entitlement to choose her child's religion as an imperfect obligation which does not generate a corresponding right and still accept that a parent has some freedom in deciding what constitutes raising a child. Allowing that a parent can choose a child's religion can be accommodated by accepting that parents have the freedom to decide autonomously what they believe to be the requirements of raising a child. In other words the obligation to raise a child generates the right to do so, but precisely what is required to raise a child is an open question and one for which we allow wide latitude. The fact that a parent is not entitled to raise their child in a religious cult that might be physically or psychologically harmful⁵¹ entails there are limits on the freedom that parents allowed in how to fulfill their duties to children. But, (in the case of moral parenthood as defined by Candidate Parenthood) they cannot equally decide that the job of raising the child does not fall to them. On my account of moral parenthood always generates parental obligations and perfect obligations generate corresponding entitlements. Unlike Fried and Schoeman, I am not arguing that parents have rights over children because parental autonomy should be respected, but that parents have rights to allow them to fulfill their obligations. On my account moral parenthood generates parental obligations and

⁵¹ A debatable point but one that is evidenced by the events known as the 'Waco massacre'. In February of 1993, the FBI launched an assault on David Koresh, the leader of the Branch Davidians, a remote religious group, in Waco Texas, believing that he was a criminal and that he sexually abused the children he fathered with his followers. This event illustrates my contention that parents do not have absolute rights to decide what constitutes raising a child.

moral parents thus have a justifiable claim to be free to fulfill their obligations. This freedom also entails some latitude to decide how these obligations are to be filled, which explains why some obligations, namely ‘imperfect obligations’ do not generate parental entitlements.

4.2 Do some parental rights exist independently of parental obligations?

To return to the second problem of the Priority Thesis, can we account for parental rights that exist seemingly independently of any corollary obligation?

John Bigelow (et al) highlights this problem. Recall his example of the swapped babies discussed previously in chapter 4.

“...suppose two babies A and B are born to different sets of parents in a certain hospital. Suppose further that A dies in her cot one night. A nurse finds A dead and judges that there is a very high probability that it would be in B’s best interests to be raised by A’s biological parents rather than her own. The nurse swaps name bracelets.”⁵²

Bigelow reasons that in the above example it is plausible to think that B’s parents have been wronged and that the wrong done to them is not merely because they have been prevented from fulfilling their parental obligations. According to Bigelow what is wrong is that B’s parents have been denied something that is theirs. As discussed in Chapter 4, Bigelow dismisses proprietorial explanations for this intuition and proposes that our intuition is explained by our obligations to respect parents’ autonomy. To recap, Bigelow explains that respect for a person’s autonomy requires respecting their life plans and that interference in parenting can threaten parental autonomy. But as concluded in Chapter 4, Bigelow’s account is problematic in that it does not adequately explain how parental obligations are linked to autonomous desires. Nor in this discussion of parental claims is it clear, even given that preventing

⁵² Bigelow, Campbell, Dodds, Pargetter, Prior, & Young. Parental Autonomy. p184. Formatting added for clarity.

a parent from raising their child frustrates her autonomous desires and actions, how this generates a claim over a child.

As discussed in the preceding section, Bigelow's claim amounts to an Extension Claim and fails to show why a parents right to autonomy or to be self directed entails a right to direct the life of their child, and not simply a right to be free from interference. As Archard suggests, the Extension Claim as described here, sounds suspiciously like a disguised version of a proprietorial claim. Both Extension Claims and proprietorial claims were dismissed as providing an incoherent account of parental rights in the proceeding sections.

Edgar Page argues that the right to possess or raise a child could be claimed by a parent

*“independently of any consideration of duty and even if they denied having a duty to look after the child, as they might if the child was grotesquely handicapped as a result of a culpable negligence on the part of the doctor attending the mother during pregnancy, or if the child was conceived as a result of rape.”*⁵³

Similarly, Phillip Montague uses the case of baby Jessica to argue that biological parents may have obligations but that they do not have even presumptive moral rights ‘to affect the course of their children’s lives’⁵⁴. In this well know case, baby Jessica was adopted shortly after her birth with the consent of her mother and a man falsely identified as her biological father. On learning of the adoption the ‘real’ father sued for custody and won. Baby Jessica, then two years of age and happily attached to her adoptive parents was returned to her biological parents. (I consider whether the biological father had any entitlement with regard to his daughter in the following discussion).

⁵³ Page. Parental Rights. p 189

⁵⁴ Montague. The myth of parental rights. p48

The examples presented by Bigelow, Page and Montague all illustrate the same problem for the Priority Thesis. If parental rights are grounded on parental obligations how can we account for the fact that biological parents appear to have parental rights even in the absence of parental obligations. We could, as Page does, consider the possibility that biological parents simply do not have any such rights, a possibility I return to below. I suggest however, that the authors' interpretations of the examples they cite each illustrate confusion over exercising, waiving, infringing and violating a right.

To borrow from Beauchamp and Childress, a right is a justified claim, and when legitimately claimed creates an obligations on others. While it is sometimes thought that some rights are inalienable (arguably, the right to liberty), it is also widely accepted that rights can be waived, or that we can choose not to exercise our right⁵⁵. For example, we may have the right to vote and choose not to exercise it. Similarly, while some rights are described as absolute (for example the right to life), in general a right creates an obligation only if it does not conflict with some other overriding claim. In other words rights are not necessarily overriding claims, but claims that must be considered in light of, and balanced against, competing claims. Thus it is possible to justifiably override or infringe a right. But, overriding a right without justification or with inadequate justification is an example of violating a right. Similarly, some rights are forfeited by unjust actions, for example a prisoner's right to liberty or a rapists right to parent.

I suggest that in Bigelows example of the baby swap, the rights of parents B to raise baby B have been violated. While it could be said that B's parents have no parental obligations, say, because baby B is in fact well cared for by parents A, the reason that these obligations do not seem to exist is because they have been unjustly removed from parents B. In other words, unlike Bigelow's suggestion, my claim is that B's parents do not own baby B, but own their obligations to baby B. Parents B are entitled to fulfill their obligation and this is what generates their parental rights in

⁵⁵ Beauchamp, & Childress. *Principles of Biomedical Ethics*. p72

relation to baby B. While the exercise of their rights, like the exercise of any rights, must be balanced against the competing claims, in Bigelow's example, parents B's rights were unjustly violated and not waived. Baby B's welfare could theoretically generate a claim that competes with the rights of parents B to raise her, but as argued in chapter 1, if parents B are able to care for baby B adequately, then the fact that parents A might to a better job would not justify overriding the rights of parents B.

In the case of baby Jessica, I suggest that the reason that we might be intuitively troubled by the outcome in that case, is due to the difficulty of balancing competing claims. While Pages account entails that baby Jessica's biological father has no parental rights⁵⁶, I contend that (to the extent that her birth was foreseeable and the result of a free action) he does incur obligations with regard to Jessica. These obligations generate a justifiable claim to be allowed to fulfill his duties. However, as discussed above, rights are not absolute and the rights of Jessica's biological father to raise her are not necessarily overriding. It appears, based only on the superficial details of the case, that Jessica's adoptive parents also have a justifiable claim to be allowed to fulfill the obligations which they undertook, and therefore that they also have a right to raise Jessica. With regard to Jessica's biological mother, by placing Jessica for adoption, she waived her right to raise Jessica. Whether or not this waiver is rescindable is a matter for debate. Recall in chapter 4 that I argued that parental obligations are transferable. In the baby Jessica example, Jessica's biological mother did in fact transfer her obligations and thus waived her right to fulfill an obligation to raise Jessica herself. Conversely, on the basis of the available facts, Jessica's biological father did not voluntarily transfer his obligations to raise Jessica and thus did not waive his right to do so. The fact that Jessica's needs were being adequately met by her adoptive parents (and that no obligations exist which need to be fulfilled by her biological father) is true only because Jessica's father's right to fulfill his obligations was violated (and not waived). Where an obligation is waived so too is the corresponding entitlement but because Jessica's biological father did not waive his obligations he therefore does have some corresponding parental entitlements. However, the biological father's

⁵⁶ Page. Parental Rights.

entitlements in this case must be weighed up against Jessica's interests and the entitlements of Jessica's adoptive parents.

In summary I have argued above that parental obligations generate parental rights. Further that in the examples given (by Bigelow, and Page) to illustrate that parental rights exist independently of parental obligations, the reason that no parental obligations seem to exist is because a parent's corresponding rights were violated. Are there other cases of parental rights existing independently of parental obligations? What of Page's example of a woman who conceives a child as a result of rape?⁵⁷

According to Page, the mother in a rape case has a right to access her child but no corresponding obligations to raise her. Recall from the previous chapters, that I have shown that moral parents, as defined by Candidate Parenthood, incur obligations. I maintain that a woman who conceives a child as a result of rape is a candidate parent, and where she freely and foreseeably continues with the pregnancy, she is also an accountable parent. While this woman did not freely and foreseeably conceive, the decision to continue the pregnancy and to give birth is one that generates parental obligations where she was free not to continue with the pregnancy (based on the definition of freedom accepted in chapter 4). While it could be argued that the termination of a pregnancy is simply not an option for many women, I suggest that where it is freely available to them, the decision not to terminate on moral grounds does not make this decision 'unfree'⁵⁸. It is precisely this type of moral decision that our definitions of freedom are designed to protect. In other words I cannot claim to be 'unfree' about whether or not to continue a pregnancy where in fact I could have done otherwise or in situations where even if I have done otherwise I would not have chosen to do so. Thus unless a woman is prevented from seeking or obtaining a pregnancy termination (by external factors) where she otherwise would have done so, she is in fact morally accountable for the child that results even if she was not free to avoid the conception. According to Candidate Parenthood then, a woman who conceives as a result of rape and is free to terminate the pregnancy but freely chooses

⁵⁷ Page. Parental Rights. p189

⁵⁸ Although I do not wish to imply that this decision is an easy one or one that can or should be taken lightly.

not to do so is accountable for the child she causes to exist. Thus on my account the mother in Page's example *does* have obligations with regard to her offspring, and does therefore have corresponding rights⁵⁹.

The Priority Thesis can give a coherent account of how parental rights are generated by parental obligations, but only where a coherent account of parental obligations is applied. Note that my conclusion, that a woman who is raped and freely chooses to continue a pregnancy to term incurs parental obligations, does not entail that she must therefore raise the child. As explained previously Candidate Parenthood allows that there are some accounts which would justifiably release an 'accountable parent' from moral parenthood. I reiterate, my point is that in Page's rape case, the woman has parental entitlements because in choosing to continue the pregnancy she does incur parental obligations and therefore that it is *not* the case, as suggested by Page, that this is an example of parental rights existing without parental obligations.

I suggest that there are in fact no examples of parental rights existing independently of parental obligations. As argued in the previous sections, the other accounts considered are unable to give a coherent explanation of how parental rights are generated and the Priority Thesis can explain both of the problems raised by Page. Given that no other account is currently available to show how parental rights are generated and that the Priority Thesis is both a coherent and plausible account, I contend that parental rights do not in fact exist independently of parental obligations

Finally, to conclude this discussion of the Priority Thesis I examine Montague's claim that parental rights simply do not exist. Montague argues that the latitude that parents have in making decisions affecting their children's lives does not require the existence of parental rights. On his account this latitude is accounted for in terms of "*the permissions that people have to select the specific ways in which they fulfill their obligations.*"⁶⁰ While

⁵⁹ I do not take up Page's other example of a parental right existing without an obligation i.e. the case of a child *grotesquely handicapped as a result of a culpable negligence on the part of the doctor*. This example conflates a number of issues- including those of responsibility for medical negligence and responsibility for children in general.

⁶⁰ Montague. *The myth of parental rights.*, p61

‘permission to select how an obligation is fulfilled’ sounds very much like ‘having a right or entitlement’, according to Montague the difference is more than merely a difference in terminology. He suggests, drawing from the work of Wayne Sumner⁶¹ that there are two features that distinguish rights that are not shared by ‘putative’ parental rights: 1. that rights are oriented towards rights-holders and 2. that rights are discretionary, they protect freedom of choice. He reasons that while parental authority is often claimed to be a right, the absence of these two features entails that it is not really a right, but the freedom to use some discretion about how to meet an obligation. I discuss each of these distinguishing feature of rights in turn.

Montague explains that the purpose of rights is to protect and promote the autonomy of the right holder. He reasons that parental rights however, are not oriented towards parents, that putative parental rights as described above, are concerned with allowing parents to fulfill their duties. These putative rights are limited in that parental autonomy is justified only to the extent that it serves children’s interests⁶². Thus parents are not free to act in a way that serves their own interest where this is inconsistent with the performance of their obligations to their children. In summary, Montague reasons that rights protect their holders, but the putative rights of parents do not protect parents, but are instead oriented towards children. Accordingly, parental rights do not exist because it is not possible to conceive of parental rights as oriented towards or protecting parents over children.

Montague points out an interesting tension in the claim that parents have a right to fulfil their obligations. Obviously, as he suggests, the duties protected by these rights concern the welfare of children and not the welfare of parents. Further as he also points out, these rights are limited, parents are only free in their actions to the extent that their actions do not conflict with children’s welfare. However, it should be noted that all rights are similarly ‘limited’. As discussed above rights in general are not absolute (save perhaps the right to life but even this is increasingly challenged). My

⁶¹ Sumner, L. W. (1987). *The moral foundation of rights* Oxford : New York :: Clarendon Press ; Oxford University Press.

⁶²Montague. The myth of parental rights.

right to free speech for example is a right that protects my freedom of choice and is oriented towards me. However, this right is limited by the consequences that my exercise of this right will have on the autonomy of others. I am not free to say or publish anything I care to, when this might infringe the autonomy of others or cause them harm. Similarly, a parent's right to make choices that affect their children's lives is also limited to choices that will not harm their offspring.

What of Montague's claim that so called parental rights are not oriented toward their holder?⁶³ It does seem odd to think of a duty generated right as conferring protection on the right holder when its purpose is to ensure actions regarding children. In other words can we make sense of the idea that a parental right protects children and not parents? I contend that Montague is mistaken in his claim that parental rights are not oriented towards parents. Consider again his reasoning

*"Parental decisions regarding their children are properly concerned with the promotion and protection of autonomy, these decisions directly relate to the autonomy of children and only indirectly concern that of parents"*⁶⁴

I suggest that parental decisions regarding their children do not merely *incidentally* concern parents, but that people have children and seek access to them precisely because they enjoy, seek and are fulfilled by having obligations towards them. In other words, I suggest that a fundamental part of what is sought in seeking parenthood is the obligations, entailed in having to look after and care for a child. Thus putative parental rights are oriented toward their holders. To illustrate, consider the case of re: Patrick, introduced in previous chapters. In seeking access to Patrick, surely Patrick's genetic father is seeking just such obligations, for what are the benefits of raising children if not the benefits of fulfilling obligations? We might imagine that Patrick's father does not agree, and that he seeks access to Patrick purely for his own interests. But, even a short visit with Patrick would entail obligations for Patrick. For example, in the event of such a visit Patrick's father is obliged to ensure that Patrick is safe, that

⁶³ Montague. The myth of parental rights.

⁶⁴ Montague. The myth of parental rights. p5

he does not walk in front of a bus, that he does not eat poison for lunch or put his finger in the light socket, etcetera. I suggest that it is inconceivable that someone might seek to parent and not also seek to take on obligations. But, perhaps it is not enough to claim that people understand that parenting entails obligations, perhaps to be the subject of a right, a parental obligation should be something that we desire. In other words perhaps Patrick's father could claim that while he understands that a visit with Patrick will impose obligations on him, he does not enjoy these obligations but merely accepts them. My response here is that the reason that parental rights exist is in recognition that many people enjoy parental obligations and seek to fulfill them. People who do not enjoy parental obligations, but have incurred them, are free to waive their right to fulfill their obligations, that is, they can freely decide to transfer their obligations and attendant rights. For example, I do not have to desire free speech to have a right to free speech, it exists to protect my interests and autonomy whether or not I exercise, desire or enjoy free speech. Similarly parental rights are orientated towards their holders and protect the interests of parents in fulfilling their parental obligations, whether or not they desire these obligations or enjoy fulfilling them.

To recap, in the discussion above I have argued that a right to fulfill parental obligations is a right oriented towards a right holder. In claiming their right to fulfill their duties a parent is actually claiming not only some choice over how to meet their obligations but that they are entitled to fulfill their obligations themselves or that these obligations belong to them. In other words I am arguing, that putative parental rights *are rights* because, contrary to Montague's claim, they are oriented towards right holders. These rights protect parents' interests in, or ability to have, and fulfill parental obligations, and are not, as he claims focused solely on protecting the interests of children that someone should make these decisions.

My discussion above has also in part addressed the second feature that according to Montague is missing from putative parental rights. He suggests that unlike rights proper, parental rights are not discretionary. In other words, the function of rights is to protect our choices, but the problem with putative parental rights is that a parent

cannot choose not to have parental obligations. “ *while parents have broad discretion regarding how to fulfill their obligations, they do not have discretion regarding whether to fulfill them*”.

Montague goes on to show how some latitude in the way parents undertake to fulfill their duties can be accommodated without reference to rights. But, this explanation is not relevant to the present discussion, because as I have already shown above, that to have a right does not entail that it must be exercised. In effect he claims that unlike other rights, parental rights do not protect a parent’s freedom to raise their child because they are not free to do otherwise. Again, I suggest that Montague’s account confuses alienability and obligation. As I have argued, ‘accountable parenthood’ (as defined by Candidate Parenthood) generates obligations and ‘accountable’ parents cannot avoid accountability. But, ‘accountable’ parents do have some choice as to whether they exercise their right to fulfill their duties themselves. In Chapter 5 I argued that parental obligations are transferable under some conditions. If, as I have argued, an acceptable account of transferring parental obligations is possible, then the right to fulfill one’s parental obligations is waiveable. I conclude that parental rights do share the features of other general rights and that contrary to Montague’s claim they are both oriented towards their holders and discretionary.

5. Parental entitlements and frozen embryos

A final consideration for my account of parental rights is how it applies to the claims of the participants of the Frozen Embryo study. It seems odd to suggest that couples with embryos in storage can claim to have entitlements regarding decisions about their embryos because they have duties concerning these embryos. What possible duties could anyone have in regard to a frozen embryo stored in a tank of liquid nitrogen? But, recall that the study’s participants articulated an obligation not to their embryos (other than the obligation some of them felt they had to preserve life in general) but to the children that would potentially develop from their embryos. In other words, as argued in Chapter 4, they articulated the claim that begetting generates obligations because causing a child to exist generates obligations. If, as I have argued, the Priority Thesis explains why parents have rights or entitlements with regard to their children it

might also explain a claim for decision-making authority over embryos. It could be argued that if the existence of a child generates obligations for begetters, one way to dispense with or prevent such obligations from existing is to dispense with the embryo itself.

As argued above in response to Montague's claim, parental rights have limits. A parent's duty to provide say medical treatment for a child entails that they are entitled to seek such treatment and should not be prevented from doing so or unduly interfered with. But, such a duty cannot be dispensed with by killing a child instead, or allowing one to die rather than seeking medical treatment. Recall that a right to make decision regarding medical treatment or any other parental right entails a freedom with regard to the exercise of this right, but within limits. I cannot choose to exercise my right to free speech if this will harm others. Nor, can a parent exercise her right to make decisions about a child's medical needs that might harm her. While the right to seek medical care can be waived, simply waiving a right without making any provision to transfer one's obligations or to ensure that others can fulfill them, amounts to failing in one's duties⁶⁵.

The difficulty of applying this analysis to couples making decisions about embryos is that an embryo is not like a child and while the limits of parental authority are clear with regard to actions that affect children they are not equally clear with regard to embryos. It could be argued that where no child exists no entitlements exist because no obligations exist. But, clearly, if preventing an obligation from existing by preventing a child from existing explains the use of contraceptive devices, it seems to also explain the desire to destroy an embryo. Whether or not destroying an embryo is a permissible way to prevent parental obligations from coming into being hinges on the permissibility of killing an embryo⁶⁶. It is not within the scope of this thesis to

⁶⁵ Similarly, failing to exercise free speech might also entail failing in one's obligations (say by omitting to speak up against injustice, racism or dishonesty).

⁶⁶ Note that this is the same dilemma that arises in the debate about whether a woman's right to abortion entails her right to kill a fetus or merely evacuate a fetus. It has been suggested that in seeking to terminate a pregnancy women are seeking to terminate their parental obligations and that if the fetus continues to develop to term, regardless of where this fetus is gestated, the genetic mother will continue to have parental obligations. See

address this issue here, however, I point out that the very existence of IVF and surplus embryos is based on the assumption that the destruction of embryos is sometimes permissible.

I have argued that the obligations generated by begetters do give rise to parental entitlements where they foreseeably cause a child to exist, but these are not absolute or overriding. I suggest that in the case of decisions about embryos a good case can be made that there are competing claims that might override a begetters entitlements regarding their decisions about the fate of their embryos. I take up this discussion in more detail in the final chapter of this thesis where I suggest that if parental obligations are transferable then embryos could be donated to other infertile couple and therefore that killing an embryo is not the only way to terminate parental obligations.

Summary

In this chapter I explored the claim that begetting generates parental entitlements. I presented and analysed three different accounts of parental rights as found in the current literature.

I have argued that parental rights are not analogous to property rights and that the Extension Claim does not present a coherent account of the entitlements we normally associate with parenthood. I have argued that the Priority Thesis, that parental entitlements are generated by their obligations to fulfill their parental duties, is a more plausible explanation of how parental rights are morally justified. It is incoherent to require that parents 'own' and should fulfill their obligations without also allowing they are free to do so without interference from others. The upshot of my account is that moral parenthood (as defined by Candidate Parenthood) generates parental obligations and corollary rights. Further, my account accommodates and explains the

Cannold, L. (1998). *The abortion myth : feminism, morality and the hard choices women make*. St. Leonards, N.S.W. :: Allen & Unwin.

intuition that genetic parents (where they are moral parents) have justifiable claims with regard to their offspring, but that these claims are not overriding or inalienable.

I conclude that the Priority Thesis provides a sound theoretical basis for the claim elucidated by the Frozen Embryo study that begetting generates parental entitlements.

What remains to be seen is whether my account of moral parenthood and its complimentary rights and obligations has practical application in terms of the question that underlies this thesis; who is a parent? In the final chapter of this thesis, I test and further specify my account of parenthood by applying it to cases that illustrate the difficulty of determining who is a parent. I return to the Frozen Embryo study to test the coherence of my findings, their applications and implications.

CHAPTER 7. 'CANDIDATE PARENTHOOD' PUT TO THE TEST

Introduction

Who is a parent?

I began this thesis by showing that the answer to this question can no longer merely be assumed. I reasoned that parenthood is associated with moral obligations and moral entitlements and that identifying *who these fall on* is a matter for decision and not discovery. I also explained that this question is not simply a matter of personal preference but is a moral question. The answers to this question cannot be justified by appeal to scientific principles, laws of nature, social conventions, or legal rules but are an appeal to moral considerations.

This thesis has focused on the role of genes in grounding parenthood and whether or not genetic relatedness is morally weighty in evaluating competing parental claims and disclaimers. I explored different possible reasons for attaching moral weight to genetic ties by considering the different reasons that people have for valuing genetic relatedness. I designed a study to capture more directly the meanings that people attach to passing on their genes, which acted as a starting point for evaluating possible arguments about the moral relevance of begetting. I then analysed the principles embedded in people's views in light of the current philosophical literature and eliminated several of the possible claims these suggested as either irrelevant to or unsuccessful in defining genetic parents as moral parents. I investigated further the remaining relevant claims, the most promising of which, was the notion that moral parenthood is grounded on causal responsibility. I concluded that a modified causal account, based on standard explanations of moral responsibility, provides a plausible and coherent account of how parental obligations and corollary entitlements are generated.

My account, which I refer to as '*Candidate Parenthood*', entails that any individual who freely and reasonably foreseeably causes a child to exist is morally accountable for this consequence. I have argued that under some conditions causing a child to exist for whom others will take on parental obligation is a justified account of generating parental obligations and that parental obligations and their correlative entitlements are sometimes transferable.

As outlined in the introduction to this thesis, the method I adopt for addressing the question I raised is referred to as "Coherentism". This is a term used by Beauchamp and Childress to describe a model of justification in ethical theory that both *draws from* experience and cases to illuminate principles, and *applies to* experience and cases to test and refine principles and determine action guides. The aim of this process is to arrive at 'reflective equilibrium'¹; that is, to elucidate theories that cohere with our long standing and considered norms. My thesis has engaged in just this process. I have collected a wide variety of experiences and cases to draw out beliefs and principles and applied our long standing and considered judgements about moral responsibility to questions about moral parenthood. I have arrived at what I believe to be a consistent theory of how moral parenthood is determined, coherent with long standing principles of moral responsibility. What remains to be seen is how this theory stands up to testing.

Beauchamp and Childress suggest some general tests that can be used to determine the adequacy of ethical theories², which I summarise as follows; 1) coherence and consistency with considered moral judgments, 2) consistency with our experiences and 3) workability³ in real-life situations. In brief, Beauchamp and Childress explain that an adequate ethical theory must be internally consistent and coherent and should yield similar results in relevantly similar circumstances. An ethical theory should be complete and comprehensive with no major gaps, yet simple enough to apply without confusion. A theory must be complex enough to account for a whole range of moral

¹ As described in the introduction, a term credited to John Rawls Rawls. *A theory of justice* and adopted by Beauchamp and Childress Beauchamp. *Principles of biomedical ethics* / Tom L. Beauchamp, James F. Childress. Chapter 1.

² Beauchamp. *Principles of biomedical ethics* / Tom L. Beauchamp, James F. Childress. Chapter 2.

³ Understood as explanatory power, justificatory power and practicability

experiences including our everyday judgments. As Beauchamp and Childress explain, while coherence is central to ethical justification, it is not the sole condition. An ‘*embryonic theory*’ could be internally consistent and cohere with our considered judgments, but nevertheless be unsatisfactory because it does not illuminate our experiences and what we ought to do. They point out that ethical theories must account for *what we already do*. It is difficult to be confident of a theory that is totally incompatible with our everyday judgments. In this situation we are left unsure about whether the theory should be rejected or our ordinary judgments are mistaken⁴.

Joel Feinberg suggests that this process is similar to the dialectical reasoning in courts of law. In his words:

*“If a principle commits one to an antecedently unacceptable judgment, then one has to modify or supplement the principle in a way that does the least damage to the harmony of one’s particular and general opinion taken as a group. On the other hand, when a solid and well-entrenched principle entails a change in a particular judgment, the overriding claims of consistency may require that the judgment be adjusted”.*⁵

Beauchamp and Childress explain that a theory might score highly on the basis of one test but lower on the basis of another. They give the following examples; utilitarianism is a relatively simple, consistent, coherent and comprehensive theory but some of its critics maintain that it sometimes suggests actions and policies incompatible with our everyday morality. Conversely while some deontological theories appear to be fairly consistent with our everyday judgments they lack simplicity and score lower on the other conditions. I consider how my account scores overall, in the following chapter.

In this chapter I test the theory I have elucidated against our ordinary judgements. Does ‘Candidate Parenthood’ enlighten and explain the attitudes and beliefs held by ordinary people in relation to genetic parenthood? Can ‘Candidate Parenthood’ be applied without confusion and does it guide our decisions and actions in the face of

⁴ Beauchamp. *Principles of biomedical ethics* / Tom L. Beauchamp, James F. Childress. Chapter 1.

⁵ Feinberg, J. (1973). *Social philosophy*. Englewood Cliffs, N.J.: Prentice-Hall. pp 34-35

competing parental claims and disclaimers? I address these questions firstly, in section 1, by referring back to the findings of the Frozen Embryo study. Secondly in section 2, I apply 'Candidate Parenthood' to four cases that have raised questions about how parenthood is determined: 2.1 the case of 'The Tsunami baby' 2.2. the battle over access to 'Patrick', 2.3. the Magill case, an example of 'misattributed paternity' and 2.4 the case of an IVF embryo mix-up.

I acknowledge that 'Coherentism' assumes '*a never-ending search for defect of coherence, for counter examples to our beliefs and for novel situations*'⁶. I do not pretend in this chapter to exhaust the possible tests of my account but, more humbly, present examples that challenge our paradigmatic judgements about who is a parent and constitute part of the motivation for this thesis. The examples I proffer represent experiences and 'hard cases', through which I seek not only to test and corroborate my account, but to illuminate inadequacies and limitations and to provide a direction for future reflection and analysis. Further, recall that my focus is on whether *genetic parenthood* is morally significant, and while my account has implications for non-genetic parents, it is not my aim in what follows to adjudicate between all of the possible competing parental claims and disclaimers. More simply, my aim is to determine whether Candidate Parenthood is able to coherently answer the question of whether the genetic parents in the cases below are moral parents.

On my reasoning, individuals who are accountable for the existence of a child and do not have an account that releases them from parental obligations are a child's moral parents. I have argued that the determination of moral parenthood is based on the following three questions: who is accountable for bringing a child into existence, what account do they give, and does their account release them from parental responsibilities? The examples that follow illustrate that while these questions might appear obvious, answering them is often quite difficult.

⁶ Beauchamp, & Childress. *Principles of Biomedical Ethics*. p 22 after Rawls, Rawls. *A theory of justice* p201

1. The Frozen Embryo study

Does ‘Candidate Parenthood’ enlighten and explain our ordinary beliefs and judgments in relation to genetic parenthood?

In this section I return briefly to the findings of the Frozen Embryo study and consider my account of the moral significance of begetting, in light of the findings of that study. Recall that the aim of the Frozen Embryo study was to elucidate the weight and meaning that is ordinarily attached to genetic parenthood, as revealed by couples who had, or were about to make decisions about their surplus frozen embryos. Participants were asked to reflect on and explain how they chose between each of three options, to donate their embryos to another couple, to discard them or to donate them to research. I explained that this decision necessitates reflection on the possibility of separating of genetic, gestational and social parenthood and the role of genes in parenthood. Further, I reasoned that the relationship that exists between begetters and their frozen embryos is almost exclusively a genetic relationship. The participants’ decisions about the fate of their embryos are therefore a measure of the significance they attach to begetting, separate from the meanings attached to gestating and raising a genetic offspring.

In this section I reconsider the participants’ responses in light of my account of moral parenthood and explore the extent to which my account coheres with or can explain the beliefs captured by the Frozen Embryo study. My aims are summarised by the following questions: does ‘Candidate Parenthood’ address or explain the attitudes and beliefs elucidated by the study participants? Is there some coherence between my account and our ‘everyday morality’ regarding the significance of genetic parenthood as captured by the study?

My account entails that an agent whose free actions reasonably foreseeably result in the existence of a child is morally accountable for the needs of this child. In relation to decisions about surplus embryos, clearly the decision to donate embryos to another couple is both a free action and one for which the existence of a child and the need

for a parent is a foreseeable consequence. Thus embryo donors can be held to account for the children that result from their donation.

I reasoned that one account of causing the need for a parent is to take on parenting, but, that under some conditions, transferring parental obligations to others is also a justifiable account and releases ‘candidate parents’ from moral parenthood.

The Frozen Embryo study revealed many valuable and interesting insights. One of the key findings of this study was that all of the individuals interviewed believed that the donation of surplus embryos to other infertile couples was a good thing. Some individuals described donating embryos as brave or unselfish and no objections were raised to the practice of embryo donation per se. Many participants felt quite distressed and conflicted about their belief that donating their spare embryos was the right thing to do, but also feeling that it was ‘too hard’ to do the right thing and that they would be unable to donate them. In summary the study revealed that many of the participants attached great importance to their relationship with their embryos and many also felt that this relationship was so significant that their embryos should be destroyed rather than donated to other infertile couples. My analysis and interpretation of the participants’ preferences and their reasoning suggested a number of claims about the significance of genetic relatedness. These included that genetic ties give rise to strong emotional attachment, that a genetically related child is more properly ‘the child’ of its progenitors and that genetic ties give rise to ongoing parental obligations and entitlements.

Does my account explain or elucidate the findings of the Frozen Embryo study?

Feelings of ongoing responsibility and moral conflict

My account suggests that embryo donors are ‘candidate parents’ but that they are not necessarily moral parents. Of significance for embryo donors is my conclusion that parental obligations are transferable where it is foreseeable that the recipients are

capable of caring for and raising a child. That is, parental obligations are transferable to someone who can do a 'good enough' job.

On my account embryo donors *are* in fact candidate parents and would be moral parents unless they gave an account that justifiably released them from parental obligations. I suggest that it is therefore not surprising, and is in fact appropriate that many 'prospective donors' feel a sense of ongoing obligation towards their embryos and possible future genetic offspring. While I do not claim that my explanation of moral parenthood can resolve the tension and conflict that exists for couples who believe they should donate but cannot do so, my account may help to explain and may ameliorate some of these feelings. I suggest that part of the moral conflict that is experienced by people in positions to donate surplus embryos results because people often conflate being accountable with being blameworthy. On my reasoning an embryo donor is accountable but not necessarily blameworthy for failing to fulfill their obligations to the children that result from their donation, if they can give an account that releases them from such obligations. I have argued that the transfer of parental obligation to others is under some conditions an example of just such a justification.

While my account appears to vary from the views of some of the participants of the Frozen Embryo study, I suggest that it can help to explain their attitudes and beliefs. Many of the participants attached great weight to their genetic relationship with their embryos and suggested that it entailed ongoing parental obligations, but on my account genetic parenthood is weighty only in so far as genetic parents are 'candidate parents'. On my reasoning embryos donors are not necessarily moral parents and can justifiably divest themselves of parental responsibilities. Thus while many prospective donors may feel like they have ongoing obligations and that donating embryos to others amounts to failing to fulfill one's obligations, I suggest that this is not necessarily so because a justifiable account releases a 'candidate parent' from moral parenthood. It may be that the feelings of emotional attachment expressed by couples who felt that they could not donate their embryos, reflect a sense of 'guilt' or of failing

to do one's duty. It is possible that a clearer understanding of moral accountability and how moral parenthood is generated would alleviate some of these feelings.

It is interesting to note that couples in the study who *had donated* or intended to donate their embryos felt that while they remained genetically connected to their embryos and the children that developed, they *did not* see themselves as having ongoing parental duties⁷. In other words for at least a number of the study participants the notion that parental obligations are transferable was intuitively acceptable. It is also interesting to note that there is some evidence to support the idea that some couples would be more likely to donate their embryos if they had information about or were able to choose the recipients of their embryos⁸. This suggests that it may be possible to organise embryo donation programs in such a way that they relieve donors' feelings of obligation. In chapter 5, I suggested that directed embryo donation and open embryo 'adoption' programs might address the concerns of prospective embryo donors. These types of programs not only meet the conditions I specified justifying transfer of parental obligations but might better assure donors that their parental obligations have been justifiably transferred because they provide more assurances of the capacity of the recipients to parent than does anonymous embryo donation.

Feeling of emotional attachment

Of course there is also evidence to suggest that some couples would *not* donate their embryos, even with further assurances about prospective recipients⁹. It is unlikely that my account could simply eliminate the strong feelings and emotions surrounding the topic of embryo donation. In part this may be because, as Lee Silver explains, some of our feelings and beliefs in relation to genetic kinship are simply 'genetically programmed' and the result of many hundreds of years of evolutionary pressure. It is not surprising that many people feel the urge to have their own child very strongly and

⁷ See Chapter 2

⁸ Fuscaldo G, & Gillam L. Decisions about frozen embryos under review, based on findings of Frozen Embryo study not reported fully in this thesis.

⁹ As articulated by some participants of the Frozen Embryo study.

that people instinctually conceive that physical connections and physical resemblance exist between genetic kin. As Silver explains

‘...how we think a person should feel rationally need not bear any resemblance to how a person does feel when primeval instincts prevail...when intellectualization conflicts with the primeval instinct for a physical connection to one’s child, we are apt to become utterly confused.’¹⁰ (original emphasis)

While I do not wish to trivialize or dismiss the strong feelings and deeply held beliefs generously shared by the participants of the Frozen Embryo study, I do propose that it is both appropriate and necessary to reflect on the reasons given for attaching weight to genetic parenthood. It may be the case that some of the participants’ responses are based on their impulses or on long held conventions and traditions. When faced with new or complex scenarios it is not uncommon to fall back on instinct and tradition and while it may be the ideal, we do not always account for our actions and attitudes on the basis of reflectively held beliefs. I suggest that some of the apparent mismatch between my account and the views expressed by the participants’ of the Frozen Embryo study can be explained by the fact that my account is the product of long and detailed reflection and analysis. While I accept that some of my conclusions appear to conflict with many of our intuitions regarding genetic parenthood, I also contend that some of these intuitions are not supported by sound reasoning. Further I suggest that some of the moral distress articulated by the participants of the Frozen Embryo study reveals that some of the participants themselves were not comfortable with their instincts or beliefs about embryos donation. Perhaps my account could offer couples in a position to donate a way of thinking through the relevant issues that might alleviate some of this moral distress.

I reiterate that I respect that people’s decisions about parenting and children are personal and private. Many people have strong feelings on matters such as embryo donation related to beliefs about genetic parenthood and I do not mean to imply that people should be forced to act against their beliefs. I suggest however, that attitudes

¹⁰ Silver. Confused meanings of life, genes and parents. , p660

about genetic parenthood and decisions about frozen embryos should be guided by reason and should incorporate new insights or reflections. In this case the new insight I proffer is that genetic parents are not necessarily moral parents and that parental obligations can be justifiably transferred. The implication of this insight for decisions about the fate of surplus embryos is that genetic parenthood is not morally incompatible with the donation of embryos to other infertile couples capable of parenting.

In summary, I suggest that my account does explain some of the feelings and beliefs expressed by the study participants. Further I suggest that my account addresses some of the tension captured in the participants' responses and can provide a way of thinking about and perhaps ameliorating through understanding the moral conflict resulting from what they feel and what they believe they should do. Finally I believe I have accounted for the apparent discord between my theory of moral parenthood and our ordinary judgments about the significance of genetic parenthood as articulated by the participants of the Frozen Embryo study. I contend that the weight attached to genetic parenthood as evidenced by the decision to discard surplus embryos is, in the words of Feinberg, an example of an ordinary judgment that '*requires adjusting*'¹¹.

2. Test Cases

In the following section I test my account against a number of cases to further explore its consistency, coherence and intuitive appeal. I begin with a simple case of the need to identify a baby's parents as happened in the case of 'baby 81, the Tsunami baby'. I then apply my account to increasingly more complex imaginary and real cases to test the application of 'Candidate Parenthood' in the determination of competing parental claims and disclaimers.

¹¹ Feinberg, J. *Social philosophy*, p35

2.1 the 'Tsunami baby'

On December 26, 2004 a Tsunami devastated the shores of Indonesia, Sri Lanka, South India, and Thailand and caused serious damage and death as far as the coast of Africa. Reports state that somewhere between 200,000 to 310,000 people perished in the floodwaters. One of the most unlikely survivors of the tsunami was a one month old boy who became known as baby 81¹². In the weeks that followed the tsunami fifteen couples came forward to lay claim to baby 81. DNA tests were conducted and he was reunited with his genetic parents in February of 2005¹³.

I began this thesis by asking, how weighty is the fact of a genetic relationship between begetters and their offspring? Are genetic ties morally relevant in deciding who can take baby 81 home?

On my account an entitlement to parent is generated by a prior obligation to do so. Parental obligations are in turn, generated by free actions that foreseeably cause a child to exist. I have reasoned, based on standardly accepted moral principles of how moral obligations are generated, that individuals incur responsibilities for children, *moral parenthood*, in the same way that moral accountability itself is generated. Similarly, just as morally accountable agents can sometimes give an account which justifiably releases them from obligations or renders them blameless where these obligations are not met, it is possible for a 'candidate parent' to give an account which entails that she is not obligated to take on parental obligations. Conversely where no such account is possible or where it does not amount to a justification, then parental obligations are incurred. To reiterate, on my reasoning the determination of moral parent is based on a two step test and summarized by the following questions: who is accountable for

¹² So named because he was the 81st admission to the pediatric ward of Kalmunai Base Hospital on December 26, the day the tsunami struck. He was brought in by a man who found him amid the rubble and bodies on Sri Lanka's east coast. Prasad, R. (2005, February 15). Family reunion at last after DNA test on tsunami baby *Times Online*. <http://www.timesonline.co.uk/article/0,,18690-1485125,00.html>

¹³ Note that different reports cite different number of parental claimants varying from 9-15. The Age reported that fifteen couples came forward to claim Baby 81. Connolly, E. (2005). *Baby 81's 'parents' charged with staff assault* from <http://www.theage.com.au/news/asia-tsunami/baby-81s-parents-charged-with-staff-assault/2005/02/03/1107409984701.html>. Whereas the Associated press reported that nine women came forward claiming to be this baby's mother The Associated Press. (2005). *Nine women claim to be the mother of Tsunami baby in hospital Claiming 'Baby 81'*, January 14, 2005, <http://www.lankalibrary.com/news/baby81.htm>

bringing a child into existence and does their account release them from parental responsibilities?

Can my account help to determine who should take baby 81 home? I begin by considering the claim of baby 81's genetic parents, are they entitled to raise and care for him?

DNA tests identified that Mr. and Mrs. Jeyarajah, one of the many couples that came forward to claim baby 81, were in fact his genetic parents. On the basis of the available information it appears that Mr and Mrs Jeyarajah became pregnant and gave birth in standard fashion and that they were both willing and able to meet the needs of the child they conceived. This case therefore represents a fairly standard case where parenthood and the use of DNA tests to settle parenthood is routine and uncontroversial.

However, on my account determining parenthood is not quite so simple or routine. I have argued that moral parenthood is determined by a two step test. Genetic tests reveal which individuals have a causal connection to a child. What must then be determined is whether genetic parenthood entails moral accountability. In other words was baby 81 the foreseeable consequence of the free actions of Mr. and Mrs. Jeyarajah? As suggested by the description of events above, it appears that in this case the genetic parents can in fact be held to account for baby 81, because (to the best of my knowledge) his birth was foreseeable, because it was indeed hoped for and planned for, and the actions that lead to the conception and birth were free, in the sense that both individuals owned and reflectively endorsed these actions. Now what remains to be seen is what account Mr. and Mrs. Jeyarajah gave. Again is it fairly obvious that the account they gave is that they intended to fulfill the needs they had created, themselves.

While this appears to be a laboured and artificial method for arriving at an obvious conclusion, my account is significantly different to strictly genetic determinations of parenthood. On my reasoning a genetic tie is *not* sufficient to entail that a genetic parent is an ‘accountable parent’, nor are genetic parents the only possible ‘candidate parents’. In the face of competing claims, genetic tests *alone* cannot establish who incurs obligations and therefore entitlements towards baby 81. There are many individuals whose actions could reasonably foreseeably have led to the existence of baby 81. I have argued that there are many more individuals than we routinely hold to account for the existence of a baby, who can in fact be held to account. However, it is also obvious that many of these individuals could provide a justifiable account. To clarify this point I now introduce several hypothetical scenarios. These illustrate different common accounts of causing a child to exist and involve a) an unplanned pregnancy, b) a contraceptive failure and c) a surrogacy arrangement. Taken together these ‘hypotheticals’ illustrate that while genetic parents are not necessarily moral parents and even though many other people can be held to account for the existence of a child, frequently their accounts are such that genetic parents do turn out to be moral parents.

2.1.1 The unplanned pregnancy

Imagine for the sake of argument that after Mr. and Mrs. Jeyarajah were identified as baby 81’s genetic parents, they stated that he was in fact an accidental pregnancy, that they had not planned to have a child and that they actually did not want to take him home and raise him.

On my account it makes no difference that baby 81 was an unplanned pregnancy. The desire not to parent or the fact that a begetter did not intend to parent does not amount to an account which excuses begetters from the obligations they caused to exist. While it is true in the case of baby 81 that many people welcomed the opportunity to raise baby 81, Candidate Parenthood identifies who initially incurs the obligation to do so, which as I argued in chapter 6, also generates an entitlement to do so. In order to determine who is entitled to take baby 81 home it is first necessary to

ascertain who is obliged to do so and to evaluate their account should they seek to be released from this obligation. If no-one came forward to claim baby 81 then genetic tests would reveal at least one possible 'candidate parent'.

The question of whether Mr. and Mrs. Jeyarajah are moral parents hinges firstly on whether or not they acted freely in bringing him into existence and whether he was a foreseeable consequence of their actions. Recall that I have argued that the existence of influences or incentives does not entail that an action is not free and that even if this couple felt some pressure to have children, given that they were not coerced to do so, their actions can be said to be 'free enough' to hold them accountable if they were a) able to do otherwise or b) would have chosen to act as they did even if they could not have done otherwise. Secondly, I have argued that the appropriate standard of 'foreseeability' is that which a reasonable person in a particular situation has reason to believe will happen. Obviously Mr. and Mrs. Jeyarajah cannot simply claim that they had no reason to believe that baby 81 would be born. As I argued in chapter 4 foreseeability is more than just statistical likelihood and there are some things which all competent people should foresee. It is a general statistical fact that fertile women have a 20% chance of conceiving each month. Thus it is reasonably foreseeable that a pregnancy will be a consequence of 'unprotected' sexual intercourse. Given that their pregnancy was foreseeable and that they could have done something other than continue the pregnancy, Mr. And Mrs. Jeyarajah can be held to account for baby 81. Their account, that baby 81 was not intended, does not provide an account that releases them from fulfilling the needs they caused to exist, and they are therefore baby 81's moral parents. (Note however that this conclusion does not entail that they are baby 81's only moral parents as will become clear when I discuss the surrogacy arrangement below).

2.1.2 The failed contraceptive

Now imagine that as above Mr. and Mrs. Jeyarajah were identified as baby 81's genetic parents but now they state that he was in fact an accidental pregnancy and resulted

due to failure of the contraceptive device they had employed. They claim that it is not their fault that baby 81 exists and that therefore they are not responsible for his fate.

Again on my account whether or not Mr. and Mrs. Jeyarajah are moral parents depends on whether baby 81 was a reasonable foreseeable consequence of their actions. While this is a controversial claim, I contend that all contraceptive failures are foreseeable since no contraception is guaranteed to prevent pregnancy. Recall from chapter 5 that I have accepted that being ‘statistically unlikely’ does not entail that an event is unforeseeable. On the other hand an event is not foreseeable just because it is technically possible. The key part of the definition is whether a reasonable person in a particular situation has reason to believe an event could occur. While Mr. and Mrs. Jeyarajah might claim that they did not foresee that their contraceptive device would fail, this claim illustrates once again the distinction I pointed out between the ‘reasonable person standard’ and the ‘particular person standard’. While there are some events that only particular people can foresee there are others which all reasonable people in Mr. and Mrs. Jeyarajah situation would have foreseen and thus that Mr. and Mrs. Jeyarajah *should* have foreseen. The particular person standard further *specifies* what a reasonable person in a particular situation should foresee; it does not simply negate everything other than that which is foreseen by a particular person. I assume that there is nothing about the particular experience of Mr. and Mrs. Jeyarajah that would explain why they should not foresee contraceptive failure.

Clearly contraceptive failure is not just a theoretical possibility but a statistically expected outcome and the chances of contraceptive failure are widely publicized. Does the fact that some contraceptives carry a very low failure rate impact on the foreseeability of an unplanned pregnancy? I suggest that if a low statistical chance of pregnancy defined foreseeability then any woman who became pregnant even after planning to do so, could claim not to have foreseen this outcome and therefore claim to be free of responsibility. For example the chances of women over 44 years of age becoming pregnant are approximately 1% and therefore lower than the failure rate of

most contraceptives¹⁴. However, we do not accept that a 45 year old woman who sets about to and successfully becomes pregnant can claim that her pregnancy was unforeseeable and therefore not her responsibility. Similarly women over the age of 45 are assumed to be infertile but are routinely advised to continue birth control until their early fifties, precisely because while a pregnancy is unlikely at this age, it is not unforeseeable.

In summary, I suggest that in the case of a failed contraceptive device, even with a very low failure rate, pregnancy is a foreseeable consequence. Thus if things are as they appear and the birth of baby 81 was the result of Mr. and Mrs. Jeyarajah's free actions, then they can be held to account for him, despite the fact that their pregnancy was unplanned or accidental. In this example, the account they give, that is, that they simply deny responsibility on the grounds that they did not intend or foresee the existence of baby 81, does not amount to a justification of failing to meet baby 81's needs.

Before leaving the case of the 'failed contraceptive' it is necessary to point out a further implication of my account. If moral parenthood hinges on what is foreseeable, my conclusion, that accidental pregnancies that result from contraceptive failure are always foreseeable, entails that men and women are accountable for children they cause to exist as a result of this failure. There are many people who reject this conclusion for two reasons a) on the basis that contraceptive failure is not foreseeable and b) because it presents unpalatable implications. They point out a lack of parity; that women have some choice in whether or not to continue a pregnancy while men do not. For example, imagine that Mr. Jeyarajah now claims that while he is the genetic father he did not intend or desire to be a father and he pleaded with Mrs. Jeyarajah to terminate the pregnancy. He reasons that if Mrs. Jeyarajah can choose

¹⁴ The live birth rate for women over 44 (non IVF) is approximately 1% Contraceptives with the lowest failure rates include Depo-Provera, female sterilization, male sterilization and are quoted as having 'failure rates' of less than 1%, Condom 'failure rates' are cited as approximately 14%. Phyllis G Cooper and McKesson HBOC Clinical Reference Systems. (2001). *Methods of Contraception: Summary*, from <http://scc.uchicago.edu/contraceptionoverview.htm>

whether or not to continue with the pregnancy that he should have the same choice and that freely engaging in sex does not amount to agreeing to become a father.

It has been suggested that men should not be held to account for pregnancies that continue against their wishes and despite the fact every attempt was made to avoid this outcome¹⁵. This possibility leads to the disturbing conclusion that if a woman chooses not to terminate a pregnancy that a man desires to terminate, he could deny moral accountability for the child that results. Many arguments have been put forward attempting to account for a lack of parity between men and women's choices regarding pregnancy. These include the claim that terminating a pregnancy is not really a choice for many women and that the asymmetry in the nature of reproduction (that is, that women gestate) grounds women's rights to choose whether or not to terminate a pregnancy¹⁶. It is not within the scope of this thesis to take up each of these arguments here and in fact on my account this is not necessary. I have argued that the question of who is accountable is determined independently of the rights and interests of children and whether or not the existence of a child is intended, planned or desired. On my account a candidate parent would be accountable for a child that results from contraceptive failure because this is a foreseeable consequence, provided that it is the result of a free action.

I agree that lifelong obligations seem like a weighty responsibility to incur from a 'rash' encounter or a simple mishap such as a broken condom. Further I accept that my account entails that a woman can release herself from parental obligations by terminating a pregnancy while a man cannot. I suggest that there is no incoherence in the lack of parity between the way parenthood is determined for men and women because there is in fact a lack of parity about how a child comes to exist.¹⁷ I point out

¹⁵ For example McCulley, M. G. (1988). The male abortion: the putative father's right to terminate his interests in and obligations to the unborn child. *Journal of Law & Policy*, 7(1), 1-55 and Schultz, W. L. (1975). The father's rights in the abortion decision. *Texas Tech Law Review*, 6(3), 1075-1095. See Sally Sheldon for discussion Sheldon, S. (2005). Fragmenting Fatherhood: The Regulation of Reproductive Technologies. *The Modern Law Review*, 68(4), 523

¹⁶ See Sheldon for review Sheldon. Fragmenting Fatherhood: The Regulation of Reproductive Technologies.

¹⁷ However this is a contentious point and one outside the scope of the present analysis, see Sheldon. Fragmenting Fatherhood: The Regulation of Reproductive Technologies. for further discussion of this issue.

that moral accountability does not entail moral parenthood or blameworthiness. Men who do not want to raise children do have some options other than taking on these responsibilities themselves. They can take on some parental responsibilities (say for example by paying for education or nannies) or by transferring their role as a father to someone who is willing and capable. I acknowledge that this may sound somewhat idealistic, but I point out that hundreds of couples wait for many years for a chance to adopt a child and that in Australia there are few options but to try an overseas adoption program which is both a very lengthy and expensive enterprise. My point is that there are many people who would welcome the opportunity of adopting and caring for a child and therefore that unwilling fathers do have some options¹⁸. Further I point out that if causing a child to exist and failing to raise a child oneself did not amount to unmet needs, or at least amounted to less harm to children than is presently the case, then the obligations of an unwilling moral parent would be less onerous. As Sally Sheldon suggests, if children were accepted as more of communal responsibility and less of a private one then support obligations would not need to be imposed solely unwilling fathers¹⁹. To conclude this section I accept that there is room to debate my contention that contraceptive failure is foreseeable. However as to the unpalatable implications of my account I suggest that the extent to which men's responsibilities are palatable are to a large extent a function of the social context in which their obligations arise.

2.1.3 The Surrogacy Arrangement

In this hypothetical example imagine that two of the couples that came forward to claim baby 81, in addition to the genetic parents, were as follows; a couple that commissioned a surrogate to gestate the embryo that became baby 81, and the gestational surrogate and her partner. While genetic tests reveal that the genetic parents have a causal link to baby 81, obviously all three couples are causally connected and could be 'candidate parents' according to my definition. Gestating a

¹⁸ Note that I am not suggesting that couples should continue with unwanted pregnancies or anything at all about the moral permissibility of abortion. More simply I am suggesting that where the wishes of one of the 'candidate parents' are different to those of another 'candidate parent with regard to whether or not to continue with a pregnancy, there are alternatives other than forcing a genetic mother or father to take on parental obligation themselves against their wishes.

¹⁹ Sheldon in fact argues against 'voluntary creation of a need' as the basis of an unwilling fathers obligations, a position I rejected in chapter 5.

child is clearly a cause of the child's existence as is commissioning a surrogate to do so. Recall, that I have argued (in chapter 4), based on standard accounts of causation, that it is not possible to distinguish which 'causers' are most important or more necessary, nor is it possible to rank or measure different causal contributions and that all of the 'causers' are necessary no matter where they come in the causal chain. Are all of these parties accountable? This involves determining whether all of the individuals causally concerned acted freely and whether the fact that their actions could result in a child was foreseeable. Once again circumstances will differ in different cases, but assume for the sake of argument that all of the parties involved acted freely, that is, that neither the genetic, gestational or intentional parents were coerced to act as they did, and that they could have chosen to act differently, or would have done as they did even where it was not possible to do otherwise (based on the definition of freedom given in chapter 5). Given that their actions were free was the birth of baby 81 foreseeable? I suggest that this was clearly a foreseeable outcome but it was not only foreseeable but, because it was intended it was actually foreseen by all the parties involved. Thus all three parties could be held to account for causing baby 81 to exist. Ultimately it is each of the accounts that they give will determine whether or not they have obligations towards the baby.

Imagine that all three acknowledge that the surrogacy arrangement involved an agreement that the commissioning parents would raise baby 81. In agreeing to the arrangements the genetic and gestational parents agreed to cause a child to come into existence but acknowledged that they would transfer their parental obligations. Imagine also that both of the conditions that I proposed for a transfer of parental obligations are met. Recall that condition 1 states that it is not foreseeable that the intending parents cannot adequately carry out the job of parenting. Condition 2 states that where a strong degree of reliance is placed on a promise or contract, it is not rescindable. In coming forward to claim baby 81 the genetic and gestational parents are now seeking to rescind their promise to transfer parental obligations to the intending parents. The key question then is how strong was the degree of reliance on this promise? I have argued (in chapter 5) that if a promise or contract is a necessary cause of an action, that this is evidence of a strong degree of reliance on the promise

and makes a promise irrevocable. On my reasoning where the intending parents placed a strong degree of reliance on the genetic parents then the genetic parents cannot rescind their promise to transfer the obligations they contributed to causing. Thus, if we imagine that the genetic parents give the following account, 'yes we did promise to transfer our obligations but we have changed our minds and now wish to raise baby 81, who is our genetic offspring', on my reasoning this does not amount to an account which entails that the genetic parents are moral parents. On my account, having transferred their obligations, the genetic parents have waived their entitlements and are not baby 81's moral parents even though they are in fact his genetic parents.

A similar account can be imagined in relation to the gestational parents. On my account a gestational parent that has transferred her parental obligations under the conditions set out above cannot rescind her promise to transfer her parental obligations to the intending parents and is therefore not a moral parent. I accept that many would argue that gestating a child gives women a greater claim in the face of competing parental claims. Recall however that my interest is in determining the significance attached to genetic parents. There may be additional factors to consider in weighing up the claims of the gestational parent, perhaps related to the initial promise-making²⁰, however I leave consideration of these factors and their moral weight for future analysis.

My account entails that the genetic parents in this hypothetical version of the baby 81 case are not moral parents even though they are in fact 'accountable' for baby 81 because their account includes an irrevocable transfer of parental obligations. The determination of whether baby 81's genetic parents are his moral parents is essentially a determination of who is accountable, what account they furnish and whether this account releases them from parental obligations. As I argued in chapter 5, a moral parent is someone who has the job of meeting the needs of a child. 'Candidate parents' may be accountable for the existence of such needs but are not necessarily

²⁰ For example see Dodds, S., & Jones, K. (1989). Surrogacy and Autonomy. *Bioethics*, 3(1), 1-17

moral parents where their account justifies releasing them from parental obligations and where this involves an irrevocable transfer of obligations.

While it may appear that this conclusion is no different to that arrived at by viewing parenthood as a voluntary or contractual arrangement, I stress that the question of ‘who is a moral parent?’ is not simply a matter of evaluating contractual arrangements, or what promises were made. On my reasoning the answer to this question involves firstly determining whether a candidate parent is *accountable* and then evaluating the account that they give. Promises and contractual arrangements are one among many of the morally significant features that may be referred to in the account given.

I reiterate that genetic tests alone do not identify all ‘candidate parents’ and that many individuals other than genetic parents may also be ‘candidate parents’. I suggest however, that evidence of a causal connection is often obvious and that evaluating competing parental claims and disclaimers requires firstly identifying who is accountable, and secondly evaluating what account they proffer. I have argued that different contributions attract different accounts and that these in turn might be differently judged. Without knowing what accounts were proffered in the baby 81 case it is not possible on my reasoning, to identify baby 81’s moral parents. However, what my account does provide is a way of determining parenthood that does not rely solely on genetic tests or on problematic assumptions about the role of genes in determining parenthood. It could result in identifying more than one or two moral parents, but, as I argued in chapter five, the requirement that a child has two and only two parents is one based on social and legal norms and not on moral principles. In what follows I discuss the case of re: Patrick where my account does in fact identify three parents.

2.2 Patrick

Re: Patrick, (a case introduced earlier), involved access to Patrick, a boy born on September 11, 1999, following an arrangement between a sperm provider and a lesbian couple²¹. Essentially the case amounted to conflict between the genetic father, and the biological mother and her partner, the co-parent, over parental access to Patrick. The genetic father²² made a legal application on the 18th of October, 1999 in which he sought joint responsibility for making decisions concerning Patrick's care and welfare and regular (twice weekly) contact with Patrick (who resided with his biological mother), including overnight visits. On November 9, 1999, the biological mother²³ filed a response seeking that the 'fathers' application be dismissed and that instead he have twice yearly supervised contact with Patrick. On December 1999, the co-parent filed a response seeking that she and the biological mother be jointly responsible for Patrick and that the fathers contact be limited. The mother claimed that her terms were in fact as per their prior arrangement; however, this was bitterly contested at the hearing. What is clear is that the father responded to an advertisement placed in a gay and lesbian newspaper on October 1997 stating the following:

*"Intelligent gay woman seeks sperm donor/co-parent. Gay man/couple preferred. Level of involvement negotiable...."*²⁴

All of the parties were ordered to attend counseling but no resolution was achieved and their relationships became *'progressively embittered'*²⁵. Among the more unusual pieces of evidence presented was a list of conditions imposed by the 'mothers' on the fathers contact with Patrick. These included restrictions on the number of photos he could take, the number of toys he could bring to visits with Patrick, and that the father should not permit or encourage Patrick to refer to him as 'dad' or 'father'.

²¹ For details see *Re Patrick : (An Application Concerning Contact) [2002] FamCA 193 (5 April 2002)*

²² Munro, I. (2002, November 23). \$70,000 Paternity Ruling Sets Precedent. *The Age*, p. 3
http://news.com.au/common/story_page/0,4057,5699645%5E1702,00.html

²³ Hereafter referred to simply as the 'father'

²⁴ Hereafter referred to as the 'mother', while her partner is referred to as the co-parent.

²⁵ As cited in *Re: Patrick 2002 judgment*, see *Re Patrick : (An Application Concerning Contact) [2002] FamCA 193 (5 April 2002)*

²⁶ *Re Patrick : (An Application Concerning Contact) [2002] FamCA 193 (5 April 2002)*

After nine days of evidence and deliberation the case was decided on April 5, 2002 by Justice Paul Guest. Basing his decision on a legal requirement to give Patrick's best interests paramount consideration, Justice Guest dismissed the mother's application and ordered that the father spend more time with the child. As outlined earlier, Guest acknowledged that the law makes no provision for the role of sperm donors outside of the traditional heterosexual model²⁶. He concluded that a sperm donor is not the *parent*²⁷ of a child conceived as the result of self-insemination. Justice Guest reasoned that if the sperm donor in Re:Patrick is a parent, then any sperm donor could find themselves with parental responsibilities. Guest made a call for legislative reforms to deal with changing notions of parenthood and family and the role of the law in regulating arrangements within the gay and lesbian community.

In his judgment Guest made the following observations about the father,

“He was the donor of his genetic material upon the understanding (as I have found) that he was to have a role in the life of any prospective child. He has at all times following Patrick's birth intelligently demonstrated by both sacrifice and concession a sensitive tolerance of a secondary role to that of the mother and co-parent. I am quite satisfied that he has never relinquished nor waived in his desire to be a part of Patrick's life. He has actively, solicitously and patently contributed to his conception. He has persevered, despite the imposition of the many unreasonable conditions...’ in his contact with Patrick and collaterally maintained ‘...a strong and unrelenting wish to be a part of his life’. He has demonstrated an ability to foster a positive and loving relationship with Patrick.” (original emphasis)

Leaving aside legal questions about what makes a parent, how does my account of moral parenthood address the claims of the genetic parents in relation to Patrick? In essence, the father's claims amount to an argument that as a begetter he shares some entitlement to parent Patrick. But recall that on my account genetic parenthood does not necessarily entail moral parenthood. In assessing the fathers claim according to my

²⁶ Whereas in heterosexual model where a husband consents to the insemination procedure he is the legal parent of the wife's child, the sperm donor is not a legal parent and incurs no financial liability.

²⁷ That is, he does not incur liabilities or have parental authority as discussed earlier

reasoning, Patrick's genetic father would be justified in claiming an entitlement to parent Patrick if in fact he could show that he has a prior obligation to do so. This in turn depends on whether or not he is morally accountable for the birth of Patrick. Clearly, Patrick's birth was in part caused by the contribution of the sperm provider and the oocyte provider. It is also not necessary to labour the point to show that both of their contributions foreseeably resulted in Patrick and were the result of free actions. I conclude that both of the genetic parents in this case were indeed 'accountable parents'. Additionally it is possible that the 'co-parent' in this case is also an 'accountable parents'. While the co-parent did not make a physical contribution to Patrick, it may be that she was nevertheless a necessary cause of his existence because it could be that without her actions the events that lead to the conception and birth of Patrick would not have occurred. However, I do not pursue this speculation here, because my interest is in when genetic parenthood entails moral parenthood. On my reasoning, all 'accountable parents' can be held to account for meeting the needs of children they bring into existence. What is of particular importance in resolving this case is evaluating the accounts given by each of the 'accountable parents'.

From their responses to the father's application, it is clear that neither the genetic mother nor the co-parent, (given that she was in fact an accountable parent) transferred their parental obligations. What is less clear is whether the father did so. According to Justice Guest's, Patrick's father '*never relinquished or waived in his desire to be a part of Patrick's life*'²⁸. But, what is important is not what Patrick's father desired, but what he can be held to account for. 'Candidate Parenthood' entails that Patrick's father can be held to account for Patrick even where he does not desire to raise him, in which case he requires an account which would justify releasing him from the obligations he has generated.

I suggest that Patrick's father did not voluntarily transfer his parental obligations and that the legal conflict that ensued illustrates that he intended to meet the parental obligations he generated himself. Given that Patrick's father did not voluntarily

²⁸ *Re Patrick : (An Application Concerning Contact)* [2002] FamCA 193 (5 April 2002) section 275

transfer his obligations I conclude that he could be held to account for Patrick's needs and therefore that he was entitled to parent Patrick. I further suggest that the reason that a conflict arose between the three parties was because the arrangements prior to Patrick's birth were not sufficiently clear. While Patrick's mothers may have believed that Patrick's genetic father transferred his obligations, their understanding that the arrangements *entailed* a transfer were not based on any clear or formal arrangement, nor were they shared by Patrick's father. In cases of IVF involving gamete and embryo donation, donors are left in no doubt that their donation amounts to such a transfer and are required to sign consent forms acknowledging that they relinquish all parental entitlements. While I am interested in moral and not legal arrangements, I suggest that legal transfers of obligations should be based on moral transfers, and that legal fiat could serve to make the latter clear and unambiguous.

On my reasoning Patrick could have had *at least* three candidate parents none of whom, it appears, sought to be released from their parental obligations. Given that none of the three candidate parents voluntarily transferred their obligations, all three would be entitled to act such that they fulfilled their obligations towards Patrick, and would be moral parents on my reasoning. Interestingly, Justice Guest acknowledged changing conceptions of family and the possibility that a child can have two mothers, two fathers or various combinations involving more than two parents. He was, however, constrained from making a legal declaration acknowledging this view in the case of Patrick. It is also important to note that his legal decision was based on a legal requirement to make Patrick's best interests his paramount consideration. I suggest that this requirement is not necessarily in conflict with my conclusion that Patrick could have at least three moral parents. In any case, as I argued in chapter 1 it is problematic to claim that we are obligated to do what is best for our children. I suggest that even if it were not in Patrick's best interest to have three parents, the question is not what is best, but what is good enough. If it were in fact a) possible to determine what is best for a child and b) a moral imperative to place children in situations that best promote their interests, then perhaps Patrick should have been removed from his biological mother. This statement is particularly poignant in light of the fact that the case of Patrick ended tragically with his death and that of his

biological mother at her own hand. In hindsight, despite his careful deliberations and sincere intentions Justice Guest's decision did not serve Patrick's best interests. I do not mean to imply that things could have turned out differently if parenthood had been determined using my account. My point is that it proves very difficult to make determinations based on what is in a child's best interests and that while children's interests are one important consideration they are not the only or overriding consideration²⁹.

More importantly, what the case of Patrick illustrates is that while I have endeavored to develop a consistent and coherent theory, it may, on application, sometimes result in conclusions that are not easily compatible with our every day judgements. This was obviously true for Patrick's biological mother. Similarly, this 'incompatibility' is illustrated in chapter 1 in my analysis of the changes to Victoria's IVF laws permitting single and lesbian women to access IVF. The public debate that ensued suggests that many people would find my conclusions untenable in relation to *re: Patrick*, no matter how consistent or coherent my arguments. Although I accept that this may be true for many people, I point out that there appears to be a groundswell of interest in addressing notions of parenthood and that the possibility that a child can have more than two parents is not without precedent. At the time of writing both the Victorian Law Reform Commission (VLRC) and its New Zealand counterpart have released opinion papers and reports based on their review of legal parenthood³⁰. In one of its recommendations, the latter specifically advises that the law be amended to allow that a sperm donor can be appointed as a third parent³¹. Similarly, the VLRC recommends that the state's adoption law be amended to permit more than two people to be recognised as the legal parents of a child and that in some cases donors of sperm or eggs should be recognised as parents. The VCLR appears to be open to the idea of

²⁹ I am not suggesting that any such considerations obviously presented themselves in the case of *re: Patrick* or that Justice Guest failed to take them into account. More humbly, I suggest that had anyone been aware of the extremely fragile state of Patrick's biological mother then a different decision might have been reached, even if it could be argued that it is in a child's best interest to be raised by its biological mother.

³⁰ New Zealand Law Commission. *New Issues in Legal Parenthood*, Victorian Law Reform Commission. (2005). *Assisted Reproductive Technology & Adoption: Position Paper Two*.
[http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/\\$file/Position_Paper_2.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/$file/Position_Paper_2.pdf)

³¹ New Zealand Law Commission. *New Issues in Legal Parenthood*

four legal parents³². I further point out that many societies and communities have and continue to evolve where children are raised communally and are less exclusively the obligation of two and only two parents of the opposite sex. Finally, in defense of my conclusions I suggest that opposition is frequently the first response to change and often fiercest in response to challenges to long-held views. Only continued reflection and analysis will ultimately reveal whether the theory I have elucidated is so incompatible with our ordinary judgments that it must be rejected or whether in fact it is our ordinary judgments that are mistaken.

In the following section I discuss the Magill case, an example of ‘misattributed paternity’, to further explore the notion of foreseeability and to test the explanatory power of ‘Candidate Parenthood’.

2.3 Magill vs Magill

The case of Magill vs Magill, centers on the question of what was foreseeable to whom. As introduced earlier, this case involved a man who successfully sued his former wife for damages in respect of child support payments made on the basis of false assertion of paternity³³. DNA tests revealed that Mr. Magill was not the genetic father of two of the three children he had financially supported for over eight years. The court found that Mrs. Magill had deceived her husband and awarded him \$70,000 for general damages and economic loss. This ruling was later overturned, and is to date not finalised³⁴. Does my account help to resolve the problem of misattributed paternity? Recall that the focus of my analysis has been to determine the significance of genetic relatedness. In what follows I do not adjudicate on the claims and disclaimers of all of the genetic and non-genetically related individuals involved in the case. My aim is to show how ‘Candidate Parenthood’ would apply and what sorts of questions and analysis it requires before a final adjudication could be made.

³²Victorian Law Reform Commission. Assisted Reproductive Technology & Adoption: Position Paper Two

³³ Munro. \$70,000 Paternity Ruling Sets Precedent. See also Munro, I. (2002, November 15). Man sues former wife over children. *The Age*, p. 5

³⁴ Gregory, P. (2005, 18 March). Judges strip damages from man who paid maintenance for another's children. *The Age*, p. 3

On my account the question of moral parenthood hinges on the determination of Candidate Parenthood. Who are the candidate parents of the children in question (referred to as baby M and baby N) in the Magill case? Clearly as indicated above both genetic parents are causally connected to baby M and baby N. On the basis of the available evidence it appears that Mrs Magill freely and foreseeably chose to continue with the pregnancies and thus she is also morally accountable for these children. Additionally, it appears that the children's genetic father is an accountable parent. It is clearly foreseeable that any act of sexual intercourse could result in the existence of a child. This is true even if 'reliable' contraception is used as I argued earlier. To my knowledge, there is nothing about the particular experience of the genetic father or of Mrs. Magill that would explain why they should not foresee contraceptive failure. Further, given that Mrs Magill did not rape or otherwise coerce the genetic father, his actions in bringing about the birth of the child are also free enough to generate moral accountability.

What is of particular interest in this case is the role of Mr. Magill. If, as I have argued, non-genetically related individuals can also be moral parents it is possible that Mr. Magill has obligations to the children whose paternity he is attributed despite the fact that he is not in fact their genetic father. According to 'Candidate Parenthood' whether or not he is a moral parent is determined by the following questions; is Mr. Magill a cause of the existence of baby M and N. Is he morally accountable for their birth and what account does he have? To begin with, was the birth of baby M and N a consequence of Mr. Magill's actions? Was Mr. Magill necessary to bring about the existence of baby M and N? While it seems unlikely, I suggest that it is *possible* that without the actions of Mr. Magill that this baby would not have been born. Recall from chapter 4 that, to say that Mr. Magill's was a cause of the existence of M and N is to say that his contribution was necessary for the fact that they were born. It could be true that Mr. Magill caused that outcome because he was a supportive and loving partner and Mrs. Magill decided to continue her pregnancy because she felt comfortable raising a child with Mr. Magill. Or, alternatively he may have been a cause of M and N's birth because he was not an attentive partner and perhaps the lonely and disenfranchised Mrs. Magill sought sexual gratification outside of her marriage. It

is at least *possible* on either of these accounts that Mr. Magill in part caused the existence of babies M and N. Conversely, had Mrs. Magill decided to become pregnant regardless of Mr. Magill or to continue with a pregnancy despite anything he said or did, then perhaps we could conclude that Mr Magill was not causally connected to the children in question. Without knowing further details of the actual circumstances that led to the birth of these children it is not possible to come to a final conclusion on this question.

If Mr. Magill was in fact a cause of these children's existence the next question regards whether or not his actions were free. Clearly whatever one's position on the morality of extra-marital sex, Mrs. Magill did something wrong if she deceived Mr Magill into thinking that the child she carried was his genetic child. However, as I reasoned in Chapter 4 our actions are often influenced by the actions or attitudes of other. The fact that we have been influenced or even deceived or tricked does not entail that our actions were not free, if in fact we could have done otherwise, or would not have done otherwise where we could have done so. Consider the classical example of the used car salesman; imagine that I buy a car believing it to be reliable based on the salesman's assurance that it is only one year old and later I discover that it was in fact ten years old. If nobody coerced me to buy that car and if I could have bought another car then I acted freely in doing so, even though I was deceived. Similarly, I suggest that Mr. Magill *could be* at least part of the cause of baby M and baby N's existence and that he acted freely in so doing, even if he was deceived. On my accepted account of freedom, if Mr. Magill's actions were in fact a cause of the children's birth, in regard to these actions he can be said to have acted freely if he could have done otherwise or owned the actions that lead to the outcome in question. For example it might be that Mr. Magill was free not to remain with Mrs. Magill and free not to support her pregnancy, he was free to ask questions about the pregnancy and to state his desire not to father those children.

Assuming that Mr. Magill was both a cause of baby M and N's existence and that this was a consequence of Mr. Magill's free actions the remaining question now is, did Mr.

Magill have any reason to believe that baby M and N could result from his actions, in other words, was the consequence foreseeable?

Estimates of misattributed paternity in the general population range from 5% to 20% and every other week the media appears to release a story about infidelity, extra marital affairs and children born out of wedlock. Not even the British Royal family has escaped this speculation, and the claim that Prince Harry is not the (genetic) son of Prince Charles continues to titillate tabloid readers³⁵. Also interesting is the recent development and growth of men's groups advocating for men's rights in the face of 'paternity surprises' and 'unfair' child support responsibilities and publishing 'evidence of the extent of the problem' ³⁶. Similarly the growth in paternity testing services and the vigor with which some men's advocacy groups have sought rights to access this testing suggests that misattributed paternity is not only foreseeable but expected!

Recall however that if we apply the 'particular person' standard the question is whether Mr. Magill had reason to foresee that his actions would result in the birth of a baby genetically unrelated to him. As suggested by the 'evidence' above a reasonable person would be hard pressed not to foresee such an outcome, but this does not entail that a particular 'reasonable' couple can foresee this possibility or should act as if it were likely. Many people in loving and committed relationships could claim that they have *no reason* to foresee that this might happen to them. Recall that foreseeability is more than just possibility. To return to the used car analogy, while a 'buyer beware' policy might operate when dealing with some used car sales people, there are many used car vendors and establishments that make promises or have reputations, or with whom a relationship might exist, such that a reasonable person would have no reason to expect a deception.

³⁵ BBC News. (2002). *Hewitt denies Prince Harry link*, from http://66.102.7.104/search?q=cache:MZVnppRyz_IJ:news.bbc.co.uk/1/hi/uk/2273498.stm+prince+harry+father%3F&hl=en

³⁶ See for example Abbott, J. *The Black Shirts: Marriage, Family, Children*, 2005, from <http://www.blackshirts.info/> and Pearson, B. (2002). *"Knowledge is bliss"- Towards a society without paternity surprises*. Retrieved 8th October, 2005, from <http://www.childsupportanalysis.co.uk/papers/knowledge/>

Obviously, Mr. Magill had reason to foresee that ‘a’ baby might result, but the question hinges on whether he had reason to believe that any child genetically unrelated to him could result. This is an important distinction. Recall from chapter 4 that an event is foreseeable if a particular person has reason to believe it might happen. In the case of Mr. Magill we are interested in whether Mr. Magill had reason to believe that his actions could result in *his wife* giving birth to a child not related to him and not whether he had reason to believe that any woman could misattribute paternity. Further, in thinking about what Mr. Magill should foresee, it does not appear to matter that Mrs. Magill could be pregnant with baby O, P or Q from different genetic fathers. What is relevant to this case is not *which particular child* Mr. Magill could reasonably foresee would be born, but whether he could reasonably foresee that *any* child genetically unrelated to him could be born.

On one account it seems that Mr Magill *did* seem to have some reason to believe that what happened might happen. He is cited in one newspaper report as stating that sexual relations between he and his wife had ceased or were intermittent and that he was aware that she had a lover³⁷. On the other hand in another report he claims that he had ‘no reason’ to believe the children were not his.³⁸

The difficulty in the Magill case is again in ascertaining a) whether in fact Mr. Magill is ‘a cause’ of the children in question and b) whether this outcome was foreseeable. My account suggests that *if* in fact Mr. Magill was necessary for the fact that these children were born and *if* he did have reason to believe that Mrs. Magill was pregnant with ‘another man’s child’ then his actions might amount to ‘foreseeably’ causing a child with needs to exist. It is possible to conceive of circumstances where a man can in fact be the ‘candidate parent’ of a genetically unrelated child. I agree that this conclusion is to some extent counterintuitive because on the available facts it appears that Mr Magill was wronged and suffered considerable distress over his wife’s deceit. I do not

³⁷ “Judge Hanlon ...accepted Mr Magill's testimony that the couples' sexual relationship had all but ceased by the time the third child was conceived, and it was likely that Mrs Magill was having sex more frequently with her lover than with her husband.” As quoted in Munro. \$70,000 Paternity Ruling Sets Precedent

³⁸ “I believed that I was the father of the children, I had no reason not to believe it...” as quoted in Munro. Man sues former wife over children

mean to imply that he was not wronged or that he should embrace the child anyway. More simply my claim is that the fact that he does not share a genetic relationship with some of the children he undertook to raise with his wife does not entail that he is therefore not accountable for them. Obviously some further assessment of the available facts would be required to determine whether Mr. Magill was indeed a 'candidate parent' of the children in question and even if this were so, the question of whether or not he is a moral parent hinges on the account he gives. A further consideration however, is that if the children love and are attached to Mr Magill, this may mean that Mr Magill has obligations for the children based on the general obligation we all have to protect children's welfare. Even if Mr Magill can be shown *not* to be their moral parent, he is certainly accountable for how they fair if he abandons them after twelve years of parenting them.

Without knowing more of the details of the case, I conclude only that it is *possible* that Mr Magill was an 'accountable parent' of all of Mrs. Magill's children because he entered into a joint project with her to raise and care for children despite having reason to believe they were genetically unrelated to him. I further conclude that it is clear that Mrs. Magill and the children's genetic father are 'accountable parents' and are required to give an account of the fact they have contributed to causing children with needs to exist. Whether or not they are moral parents depend on their accounts, but on the face of the facts, it is hard to see that they could have a releasing account. I acknowledge that this conclusion is unusual in that it provides that there are three possible moral parents. However, as I argued above, this conclusion is not completely incompatible with our ordinary moral judgements.

I now turn to an even more difficult case again made complex by the problem of defining what is foreseeable.

2.4 The IVF Embryo Mix Up

In 2000, an embryo mix up in a British IVF clinic resulted in a white couple (whom I refer to as Mr. and Mrs. White) giving birth to two black twins. Genetic tests revealed that the wrong sperm, that of a black man (I refer to as Mr. Black), had been used to inseminate the ova of the Mrs. White who gave birth to the twins³⁹. How weighty is the fact that Mr. Black has a genetic relationship to the twins in determining who should raise the children?

I have argued that genetic relatedness is weighty because it provides evidence in the first instance of a causal connection between an adult and a child. However, I have also argued that genetic parenthood does not necessarily entail moral parenthood.

Of significance in considering this mix-up is the fact on my account a child need not have two and only two moral parents, nor is moral parenthood restricted to genetic parents. It is possible to conceive of a situation where Mr. White and Mrs. Black are the twins' moral parents, despite the fact that they do not share a biological connection with the twins. Equally, the fact that Mr. Black and Mrs. White do share such a connection, does not in itself entail that they are morally accountable for the twins, (whom I refer to as the Grey twins).

Obviously, in the case of an IVF pregnancy many agents can be shown to have a causal link to the existence of the twins. Among these, the many IVF staff whose work involves helping others to conceive entails that they share not only a causal link, but that they must reasonably foresee that a child with needs will result. However, as I argued in chapter 5, in general, IVF staff can provide an account which releases them from the obligation to parent the children they have freely caused to exist. I return to the question of what constitutes a justifiable account of causing a child with needs to exist further below. The more interesting problem is whether either the Blacks or the Whites are 'accountable parents'. Clearly they could all foresee that they might cause a

³⁹ See Spriggs, M. (2003). IVF mix up: white couple have black babies. *Journal of Medical Ethics*, 29, 65

child to exist, but it is not equally clear that they could foresee the birth of a genetically ‘mixed-up’ child. This distinction is important in considering IVF babies because in general people undergo IVF precisely because they do not wish to parent *any child*, but desire a particular child⁴⁰.

Also interesting is the fact that this mix-up resulted in a legal dispute between the Whites and the Blacks who both sought custody of the twins. The courts ruled that the twins should remain in the home of the White’s where they had lived continuously since their birth. While both couples subsequently agreed with this decision, the High court was asked to settle the question of legal paternity of the children. In essence this involved a decision between genetic and social paternity. The question on which I focus is, are the genetic parents in this case moral parents and could ‘Candidate Parenthood’ help in adjudicating between the competing paternity claims of the Blacks and the Whites?

To begin with the genetic parents, Mrs. White and Mrs. Black, are they moral parents? Again, on my account the determination of this question begins by asking whether there is a causal connection, and clearly genetic parenthood entails causing a child to exist. Secondly, are the genetic parents accountable for the Grey twins? Was the action of the genetic parents in causing the Grey twins to exist free and was their existence foreseeable? To take each of these questions in turn, again it is clear that both genetic parents freely made available their gametes to the IVF clinic for the purpose of becoming parents. What is less clear is whether the birth of the Grey twins was foreseeable to Mrs. White and Mr. Black. It has been claimed that errors such as the insemination of an ova with the wrong sperm, ‘*must be almost an accepted part of embryology laboratory practice*’⁴¹. However I suggest that the existence of the Grey twins or any genetically ‘mixed-up’ children was not foreseeable to the genetic parents. In chapter

⁴⁰ Sometimes a couple might specify that they wish to have their own genetic child, sometimes they might undertake preimplantation genetic diagnosis for the purpose of selecting a child free of genetic anomalies or for the purpose of selecting a particular gender. In other words while in the case of a contraceptive failure the distinction between a child and this child is not relevant, in the case of an IVF pregnancy where a couple seek services that undertake to provide them with a particular child, this distinction is very important.

⁴¹ Ford, M., & Morgan, D. (2004). Misconceived conceptions. *Journal of Medical Ethics*, 30(5), 478-479, p478

4, I described the difficulty in defining precisely what is meant by ‘foreseeable’ as distinct from merely theoretically possible, expected or foreseen. I suggested the notion of ‘foreseeable’ entails what a reasonable person in a particular situation would have reason to expect might occur. I contend that it is unlikely that individuals not familiar with laboratory procedures, in particular those undertaken in IVF clinics, would have reason to believe that a mix-up involving them might occur. In my experience⁴² while occasionally IVF patients ask ‘*are you sure that’s my embryo*’ this is by no means a common question and many patients appear to trust that clinics can guarantee that the correct gametes have been used, particularly since providing genetically related children is what they profess to provide. It could be argued that this mix-up was not the first⁴³ and that IVF patients should be aware that this is a real possibility. However, again I suggest that there is something unfair about offering a service and then holding people accountable for staff errors⁴⁴. As Harris argued on this case;

*“I have a right to expect high standards of competence and professionalism when seeking assisted reproductive services and I am entitled to expect that my sperm and my partner’s eggs or our embryos will not be mixed up or damaged or disposed of in ways of which we do not approve.”*⁴⁵

I acknowledge that the question of what Mrs White and Mr. Black could reasonably foresee is open to debate. However I contend that the whether the IVF staff could foresee such a mix-up is not equally in doubt. It is simply implausible to claim that anyone working in an IVF laboratory could not reasonably foresee a ‘mix-up’. In fact I suggest that it is not just reasonably foreseeable, but that in any IVF clinic that treats more than one patient at a time it is a statistically likely occurrence.

⁴² As a clinical embryologist.

⁴³ See Spriggs. IVF mix up: white couple have black babies. and Robertson, J. A. (1995). The case of switched embryos. *The Hastings Center Report*, 25(6), 13-20

⁴⁴ Note that my analysis also entails that despite the fact that there have been incidences of sperm theft, and theft of ova and embryos it is not the case that a particular person has reason to believe this will befall them where they have no reason to mistrust the clinic whose services they employ. While a ‘buyer beware’ policy might release a used car salesman from accountability, it does not equally make unaccountable agents that promise to deliver genetically related children.

⁴⁵ Harris, J. (2003). Assisted reproductive technological blunders (ARTBs). *Journal of Medical Ethics*, 29, 205-206, p206

To repeat the above analysis for each of the ‘candidate parents’ I suggest that the same considerations are applicable for the non-genetic ‘parents’. Did Mr. White and Mrs. Black cause the grey twins to exist? Recall from chapter 4 that the statement that X is a cause of Y entails only that X was required for Y to occur. In other words, X is necessary but not always sufficient to bring about Y. Is it the case that Mr. White and Mrs Black’s actions were necessary to bring about the birth of the Grey twins? While I concede that this point is arguable, it seems plausible to suggest that their actions in part caused their partners to make available their gametes. After all, current genetic and intentional definitions of parenthood are based on the premise that one agent can be the *‘but for’* cause of another person’s actions. For example Hill’s intentional account entails that commissioning parents are the ‘but-for’ cause of the fact that a gestational surrogate produces a child⁴⁶. While our conclusions may be different, my account agrees with other accounts in relation to the claim that third parties can cause others to act. The difference between my account and these accounts is the significance we attach to the actions of third parties. I suggest that even though many more actions were required to produce the twin pregnancy, it is possible to conceive of Mr. White and Mrs. Black as one of the causes of this consequence.

Were the actions of Mr. White and Mrs. Black relevant to contributing to the birth of the twins also free actions? As I discussed in chapter 4, while there is some debate over the extent to which ‘pronatalism’ and a ‘technological imperative’ influence the decisions of infertile couples, it is clear that both partners could have acted differently. I contend that their actions in seeking IVF treatment with their partners were, if not absolutely free, and least *free enough* to generate moral responsibility for the consequences of those actions. As to the question of foreseeability I suggest that the above analysis applies equally to the non-gentic partners and entails that Mr. White and Mrs Black are not accountable for the Grey twins. The case of the Grey twins is in fact not unlike the case of the nurse and soldier in the civil war story; the difference

⁴⁶ Recall from chapter 4 that Hill puts forward an intentional account of parenthood which hold that it is the intended parents that have overriding entitlements to parent a child because they are the ‘but for’ cause of this child existence and it is because of their actions that others bring this child into existence.

being that in the Grey case a pregnancy was foreseeable to all the parties, however, the existence of ‘mixed-up’ children was not. As with that civil war story, ‘Candidate Parenthood’ does not identify either genetic parent as a moral parent.

In a final consideration, I acknowledge that on my account the staff who have a causal connection to the twins, who acted freely in bringing them about and who could foresee that their actions would result in just such a mix up appear to be accountable for the Grey twins.

This possibility may strike the reader as quite unpalatable and somewhat at odds with our ordinary judgments. However, I point out that my suggestion that neither the White’s nor the Black’s can be held to account for the Grey twins does not entail that they cannot voluntarily undertake to meet the twins needs. Nor does the possibility that the staff are accountable for the needs of the twins, entail that therefore they should to take them home and raise them, or that they are entitled to do so. Recall from chapter 5 that I have argued that the job of IVF staff entails a preconception transfer of parental obligations and that transferring parental obligation to others who can do a ‘good enough job’ is an account that might justify release an ‘accountable parent’ from moral parenthood. The problem however with the case of the Grey twins, is that no-one can be identified as the person to whom responsibility for the Grey twins was transferred. Even though a plausible case can be made showing that IVF ‘mix-ups’ are foreseeable to IVF clinics and practitioners, no attempt has been made by clinics to ensure that in the event of a mix-up someone can be identified as the recipient of the parental obligations generated. Perhaps the reason for this is that it is simply too difficult to plan for such a contingency and that this is a matter that can only be resolved by negotiation after the event. In any case I suggest that even though a case could be made that the IVF staff can be held to account for foreseeably causing a ‘mixed-up’ child to exist, the staff could provide an account that would release them from moral parenthood. An example of such an account might include the fact that it is an implied condition of their jobs that IVF staff are not expected to fulfill parental obligations.

The case of the IVF twins ended quite happily and it was fortunate for all concerned that Mrs. White wished to keep the twins she had given birth to. While the high court determined that Mr. Black was the twins legal father, all the parties agreed that the twins would continue to reside with Mr. and Mrs. White, and Mr. White subsequently sought to adopt them.

I acknowledge that 'Candidate Parenthood' does not resolve unambiguously who are the moral parents in the event of an IVF 'mix-up'. I have suggested that none of the 'candidate parents' in the case of the Grey twins are moral parents and that the staff could be accountable, but could also provide an account releasing them from parental obligations. Many of my conclusions are tentative and clearly they revolve around nebulous definitions of who is a cause of which actions, and what is foreseeable to whom.

However, while tentative, I suggest that on reflection the conclusions arrived at above are not completely counterintuitive. While it seems odd to suggest that IVF staff might be 'candidate parents' and 'accountable parents' recall that these terms merely denote causal responsibility and moral accountability for a child. Even authors who argued for the parental rights of the Whites or the Blacks concluded that the IVF clinic was blameworthy and required to offer recompense⁴⁷. The difference between my account and other conflicting findings in this case is not about the possibility that IVF staff were morally accountable, but the extent to which the Whites and Blacks were entitled to parent the twins. I argued in chapter 6 that parental entitlements are generated by prior obligations to meet the needs of children. Thus on my account neither the Whites nor the Blacks have any entitlement over the twins despite the fact that both Mr. Black and Mrs. White are biologically related to the twins. Further, as with my discussion of the civil war story, the conclusion that no-one is the moral parent of the Grey twins does not entail that no-one should care for them.

⁴⁷ Ford, & Morgan. Misconceived conceptions.

In speculating on who should raise the Grey twins John Harris argues that *'it would be unconscionable to contemplate taking a child away from the woman who had undergone the risks and pain of pregnancy and childbirth...when she wishes to keep the child particularly when there is no substantial pressing evidence that she would be an unsafe parent.'*⁴⁸ But note, that this comment implies that it is Mrs. White's choice whether or not she raises the twins. In other words it appears that it would be also be unconscionable to force her to parent the twins against her wishes. I suggest that the reason that it is intuitively appealing to conclude that Mrs. White can choose whether or not she takes on the care of the twins is because we do not believe that she has incurred non-voluntary parental obligations. If my account, (that parental obligations are prior to and generate parental claims) is correct, then Mrs. White does not have parental entitlements. This is not to say that Mrs. White is not permitted to raise the twins, nor that the hardship and pain she has undergone in gestating the twins is not morally weighty. On my account no one can claim to be entitled to the twins on the basis of prior obligations. Given that no one has parental entitlements, other considerations such as the welfare of the children and of the gestational mother should be weighed up to determine who should raise the children. Clearly the fact that Mrs. White gestated and gave birth to the twins and that she felt a strong affection and close bond with them would be a weighty consideration in deciding between competing interests.

Summary

To conclude, in this chapter I have presented a number of cases to test the coherence, consistency and intuitive appeal of 'Candidate Parenthood'. With regard to the Frozen Embryo study I have shown that my account 'Candidate Parenthood' can explain some of the feelings and attitudes of couples making decisions about surplus embryos. My study provides a way of understanding and explaining and giving a sound basis for the feelings of ongoing responsibility that some participants described they would have for any embryos they donated. It also explains why they might feel conflicted over the desire to help others and their preference to destroy embryos rather than

⁴⁸ Harris. Assisted reproductive technological blunders (ARTBs). p205

donate them. Further, by providing a way of thinking about and explaining the nature of their moral conflict and by suggesting possible changes to procedure that better address this conflict, my account of moral parenthood may be able to ameliorate the feelings of moral distress experienced by some couples deciding the fate of their surplus embryos.

My analysis of the test cases, the tsunami baby, re: Patrick, the Magill case and the IVF 'mix-up', reveal both the 'workability' and the limitations of my account. Candidate Parenthood is able to explain most of our everyday intuitions regarding parental claims and disclaimers and generally coheres with our intuitions about who is a parent. However it also challenges some of these intuitions, specifically in that it allows that a child need not have two and only two parents of the opposite sex. Further my account entails that some non-genetic parents who never intended to raise a child may also incur parental obligations. While Candidate Parenthood could be judged as impractical and unworkable on the basis of these types of conclusions, I suggest my account reflects family situations that are increasingly becoming part of our everyday experiences and provides a more coherent understanding of these arrangements than do conventional biological definitions of family.

A more serious limitation of Candidate Parenthood is that it does not easily resolve competing parental claims and disclaimers and does not always answer unambiguously the question of 'who is parent'. Moreover on some occasions it concludes that a child has no moral parents. I have shown that the answer to this question depends on the definition and interpretation of number of imprecise notions such as freedom and foreseeability, or notions of causing and consequences which are difficult to resolve because they require the consideration of detailed facts and counterfactuals. I suggest that there is need for a more detailed analysis of these concepts and their implications.

In its favour 'Candidate Parenthood' does explain some of our ordinary judgments and does cohere with our long-standing principles about causal and moral responsibility. While it is not unproblematic it does provide a way of thinking about and sorting through questions relating to parental entitlements and obligations. Ultimately only continued reflection, pruning, specifying and refinement will determine whether the 'embryonic theory' I have elucidated can achieve 'reflective equilibrium'.

CHAPTER 8. CONCLUSIONS

The Role of Genes in Determining Parenthood

How important is genetic relatedness? This thesis has examined the claim that genes ‘define’ parenthood. I have argued that genetic parenthood is not as morally weighty as is often assumed. On my account genetic parents are one among many candidates for moral parenthood, but the genetic relationship between begetters and offspring does not necessarily entail parental obligations and entitlements.

Why do people attach importance to genetic relatedness? The Frozen Embryo study revealed a number of different answers to this question. For some people, genetic ties physically connect children to parents and family. Some describe these connections as emotional attachments effectively binding genetic kin. For many, genetic relatedness gives rise to duties and obligations, authority and entitlements.

Genes are essentially ordered nucleotide sequences and yet have significance beyond their physical properties. Indeed as argued by Dorothy Nelkin and Susan Lindee genes appear to be taking on ‘quasi mythical proportions’. The gene has become a slippery concept and a powerful symbol whose meaning is magnified throughout popular culture.

“In supermarket tabloids and soap operas, in television sitcoms and talk shows, in women’s magazines and parenting advice books, genes appear to explain obesity, criminality, shyness, directional ability, intelligence, political leanings, and preferred style of dressing. There are selfish genes, pleasure-seeking genes, violence genes, celebrity genes, gay genes, couch-potato genes, depression genes, genes for genius, genes for saving and even genes for sinning. These popular images convey a striking picture of the gene as powerful, deterministic, and central to

an understanding of both everyday behavior and the 'secret of life'...Both a scientific concept and a powerful social symbol, the gene has many powers.”¹

But genes do not have the power to determine moral questions.

I have argued that the question of who is a parent is a moral question. To answer this question we must firstly determine which factors are morally relevant and then which have the greater moral weight in the face of competing parental claims and disclaimers.

My analysis has de-mystified the role of genes in parenthood. I have presented an account of moral parenthood based on a standard account of moral responsibility and shown that genes are not particularly important in determining who has parental obligations and entitlements. On my account, genes are relevant in deciding parenthood not because of any physical connection or emotional tie between genetic parents and offspring, but only to the extent that any causal connection to a child is relevant. I have argued that genetic ties are causal ties, and that just as causal responsibility *sometimes* generates moral responsibility, begetters are *sometimes* morally accountable for the children they cause to exist.

My analysis shows that genes may be morally relevant in sorting out the candidates for parenthood, but that there are many other possible candidates. Many people causally contribute to the existence of children and are therefore ‘candidate parents’; conversely some people voluntarily take on parental obligations with no causal connection to a child. On my account moral parenthood can be incurred even when parenthood is not voluntarily sought. However, there are some examples of causing a child to exist that do not generate moral parenthood. I have argued that causing the need for a parent makes one morally accountable for that outcome where it was a foreseeable consequence of a free action. But, to be accountable is not to say that one

¹Nelkin, D., & Lindee, S. (1995). *The DNA mystique : the gene as a cultural icon*. New York Freeman. p2

is to blame for failing to parent or that one has overriding entitlements. I argue that sorting out the claims and disclaimers of competing parental candidates is a matter of evaluating their different accounts. Under some conditions transferring parental obligations to others is a justifiable account of having caused the need for a parent. On my reasoning entitlements are generated by prior obligations and therefore transferring obligations amounts to transferring parental rights.

Who is a parent? In summary I presented a two-step test for answering this question which is captured in two questions: who is morally accountable for the existence of the child and what account do they give? My account, 'Candidate Parenthood' releases some genetic parents from moral parenthood but provides that gestational, intentional, social and other non-genetically related people could also be moral parents. In other words genetic ties are *neither necessary nor sufficient* for moral parenthood.

My account provides a way of sorting out who are a child's moral parents, but it implies that a child can have more than two moral parents of either gender. It implies that moral parenthood is pluralistic and that the claims of genetic, gestational, intentional or social parents are not necessarily in competition. A genetic parent *is* usually uniquely matched to her offspring, just as gestation identifies only one 'mother'. But uniqueness is not a morally relevant characteristic and it does not determine who has duties and rights. In my view children can have many moral parents, even if they usually have only two genetic and one gestational parent.

The practical applications of my thesis relate not just to determining moral parenthood and evaluating competing claims but to decisions about abortion, adoption and the fate of surplus embryos. I have argued that under some conditions the transfer of parental obligations to others is an example of an account that justifiably releases an 'accountable parent' from moral parenthood. Thus, on my account raising one's genetic offspring oneself is not the only way to fulfill one's parental obligations, and the termination of a pregnancy or disposal of surplus

embryos is likewise not the only way to divest oneself of parental obligations. The implication of this reasoning for couples making decisions about their surplus embryos is that genetic parenthood is not incompatible with the donation of embryos to other couples capable of parenting. One practical implication of my empirical study is that couples might find it easier to make these decisions or to donate their embryos to others, if they could direct their donations to particular recipients or if they had some information about prospective recipients. This finding has direct practical application for the way in which embryo donation procedures are organized.

I have presented an account that explains the significance of genetic parenthood in determining moral parenthood. Further I have presented a way of sorting out conflicts between ‘would be’ parents, however the question of how to adjudicate between the competing parental claims and disclaimers of genetic and non-genetic ‘parents’ remains one for future analysis. My account provides a starting point for working through complex cases involving many parental candidates, however, further investigation is required to understand the moral weight attached to non-genetic contributions such as gestation, intention to parent, social and cultural rules and the other ties that bind children to parents.

While I have arrived at what I believe to be an explanation of moral parenthood that coheres with our long standing accounts of causation and moral responsibility, it is an account that has several limitations. ‘Candidate Parenthood’ is based on having agreed upon accounts of causation and the conditions required for moral responsibility, freedom and foreseeability. It entails that we can determine who causes a child’s existence and on (rare) occasions fails to identify any moral parents. Further Candidate Parenthood does not score well on two of the general tests outlined by Beauchamp and Childress; it is not simple, and it does not account for some of our everyday judgments. ‘Candidate Parenthood’ is not an easy explanation for the purpose of sorting out disagreements and legal conflicts and, as discussed, it diverges markedly from many of our social norms and structures.

As many authors point out genetic definitions are simple definitions of parenthood that have served us well for long periods of history, and there are good reasons not to undermine the traditional place of genetic parenthood.

In the words of Elizabeth Anderson

*“By upholding a system of involuntary (genetic) ties of obligation among people, even when the adults prefer to divide their rights and obligations in other ways, we help to secure children’s interests in having an assured place in the world, which is more firm than the wills of their parents....The genetic principle also places children in a far wider network of associations and obligations ...It supports the roles of grandparents and other relatives in the nurturing of children, and provides children with a possible focus of stability and an additional source of claims to care if their parents cannot sustain a well-functioning household.”*²

Similarly Gregory Pence argues that

*“...society should not be too eager to throw of the traditional supports of parenting. One such support is the biological genetic basis of the relationship. If we downplay that relationship, if we publicly say it doesn’t matter, and if legislatures act similarly, we risk destroying the foundation of the family.”*³

These are weighty concerns and as the saying goes ‘*if it’s not broken - why fix it?*’

However, I contend that ‘it is broken’, as are the lives of Patrick’s father and the Magill children. Even though genetic definitions of parenthood have historical utility, they now fail to ‘*secure children’s interests*’ or their ‘*assured place in the world.*’ Genetic definitions did not secure the place of the twins in the Danish surrogacy, nor did they serve the interests of Patrick and his mothers and father, of baby M, of the Magill children or baby Jessica.

² Anderson. *Is Women's Labor a Commodity?* p 80

³ Pence. *Who's afraid of human cloning?* p108

By the end of 2003, 15 million children under 18 had been orphaned by HIV/AIDS worldwide⁴. At least 100 million children around the world are homeless or spend some time living on the streets⁵. Who is responsible for these children? The network of associations and obligations generated by genetic definitions of parenthood does not appear to be big enough to include the staggering number of children around the world who suffer needlessly. If we accept narrow definitions of moral parenthood and we only parent those who share 0.05% of our DNA, then we exclude all those who share 99.95% of our genetic heritage and leave many children without someone who is responsible for their welfare.

‘Candidate Parenthood’ is not as simple as genetic definitions, but it would be very surprising, given the complex variety of ways in which people do bring children into existence, if the definition of moral parenthood was in fact simple. Nor should we strive to find artificially simple rules for complex situations. As the examples I referred to throughout my thesis show, simple definitions may serve legal purposes but frequently fail to reflect the rich and complex relationships that individuals build between each other.

Many of us have experienced the pleasure of building genealogies, of marveling at family resemblances in old photographs and predicting children’s traits. We treasure our grandmother’s brooch, our father’s spirit and our mothers will. Genetic ties are powerful sentimental ties. But genetic ties are not necessarily moral ties, nor the only ties that bind adults to children. If we expand our definitions of parenthood then perhaps we could rewrite the part of the step-parents in the fairy stories of our childhood and the fate of children to come, and perhaps the different combinations of people that come together to make families *could* ‘live happily ever after’.

⁴ UNAIDS. (2004). *Report on the Global AIDA epidemic* from <http://www.unaids.org/bangkok2004/report.html>

⁵ UNICEF. *Monitoring the Situation of Women and Children*, from <http://www.childinfo.org/>, UNICEF. (2005). *The State of The Worlds Children Reports*, from <http://www.unicef.org/sowc/index.html>

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APPENDIX I: PUBLISHED PAPERS

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