

Against private surrogacy: a child-centred view¹

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Table of contents

I. Introduction

II. The intuitive case against surrogacy

III. Parents, their rights, and the interests of children

IV. What is surrogacy? Three models

V. Full surrogacy with intending parents' gametes

VI. Harm to children? The challenge from the non-identity problem

VII. Conclusions: a respectful and humane form of surrogacy

I. INTRODUCTION

More and more people avail themselves of surrogacy, in the hope of becoming parents. In my view, seeking parenthood through a variety of means is legitimate; but commissioning children, which is what surrogacy as we know it involves, is not. My contribution to this book examines the place of surrogacy in a child-centred upbringing: I consider both existing forms of surrogacy and a deeply reformed version that, unlike existing practices, could fulfil people's desire to raise children and respect women's choice to gestate "for others" in a legitimate manner. I argue that surrogacy – both as we have it now and in the more regulated forms that have been proposed – is indefensible, whether commercial or altruistic. In a nutshell, the argument is that surrogacy involves a private agreement whereby a woman who gestates a child attempts to surrender her (putative) moral right to become the parent of that child such that another person (or persons), of the woman's choice, can acquire

it. Since people lack the normative power to privately transfer custody, attempts to do so are illegitimate, and the law should reflect this fact.

My criticism of surrogacy is part and parcel of what I consider a just and humane form of childrearing, consisting of two desiderata. The justice desideratum is the recognition that children's interests have the same moral importance as the interests of adults. For this reason, the right to become a child's parent is not a claim right but a privilege justified by appeal to the child's interest, and this entails that private re-allocation for the right is wrongful. The humaneness desideratum is the recognition of how our membership in the animal (more specifically, mammalian) world bears on our wellbeing. Our embodiment, the fact that we have, or, perhaps more appropriately, *are*, bodies, and our typically mammalian need for secure attachment, most likely have some bearing on what is good for newborns. A humane and just childrearing, then, reflects both what we have in common with other animals – embodied attachment – and what sets us apart from them – the capacity to acknowledge that might is not right, and that the interests of human beings of all ages place strict limits on the legitimate exercise of power over them.

The moral right to become a parent, or to rear – which I believe should ground the legal right to obtain custody – involves the acquisition of a bundle of rights, including powers to control many aspects of a child's life for the child's own sake. Holding this right is justified by appeal to the child's own interest in a good life, as well as everybody's rights-protected interests, including the interest that children grow up to be autonomous and morality-abiding. But the right is not meant to serve the future custodian's own interest in being a parent, in spite of the fact that many of us desire, and have reason to value, raising children. If so, the moral right to become the parent of a child is held by those who express an interest in raising that child and whose exercise of the right would be in the best interest of the child;² given the justification of the right, custodians lack the moral freedom to sell or gift it.³ These are

decisive arguments against the permissibility of both commercial and altruistic surrogacy. But they don't imply that procreation and traditional forms of adoption are the only legitimate ways to gain custody over a child. A reformed version of surrogacy – indeed, so much reformed that it may deserve to go by an entirely different name – is, as far as I can see, permissible.

The background question that guides my contribution to this book is: Which aspects, if any, of surrogacy as we have it today are consistent with taking seriously children's moral status? Some aren't, I shall say. But the fact that people may not privately transfer custody doesn't mean that each and every component of the surrogacy process is impermissible. More specifically, parents have the freedom (albeit qualified) to surrender custody; however, people, even if they are genetically related to the child, cannot *acquire* it merely because they want to and because those who surrender their right want them to acquire it. This would be incompatible with acknowledging that we may not use children as mere means to advance other people's ends. Further, my argument doesn't entail that women are not morally permitted to bear children whom they don't intend to rear; for everything I say here, considerations of autonomy, and possibly of financial interest, might make this choice permissible. On this point, I don't disagree with Christine Straehle. Indeed, my positive view – which I sketch towards the end – is that we should have a state-overseen practice involving surrogate mothers and allocating custody over the resulting children. Crucially, the allocation of the right ought to be dictated by the child's interest.

As far as I know, this critical view of surrogacy has not yet been considered, let alone defended. But the literature on surrogacy contains several of its elements. The core moral principle driving my account – that the interest of the child is paramount – is endorsed by other writers on surrogacy. Some advocates of (a regulated version of) surrogacy, as well as some of its critics, believe that the sole consideration relevant to custody is the interest of the

child.⁴ Surprisingly, however, in formulating their arguments both sides seem to have missed the full implication of this claim for the permissibility of the practice. Second, several scholars insist on the ethical importance of an emotional bond between gestational mother and her foetus.⁵ I agree with them and advance the additional claim that existing emotional bonds, because they serve the child's wellbeing, are also relevant to the question of which adults should enjoy a protected (but not necessarily custodial) relationship with the newborn. Third, many argue that surrogacy should be regulated to protect the interests of children born of surrogacy and of the women who bear them.⁶ Yet, the kind of practice that I envisage as potentially permissible goes well beyond some kind of vetting of intending parents and ensuring better conditions for surrogate mothers.⁷ The principle that ought to guide regulation is that the newborn's interest dictates custody, to the extent to which this is possible and can be achieved by permissible means. In some cases, my account says that the surrogate mother has a right to raise the child she bears, if she decides to do so during pregnancy or soon after birth. This is not to say that surrogates should always have the opportunity to become the child's custodian; rather, in some cases they have (merely) the moral right to continue the caring relationship with the child that they carried – a right which, I will explain, is different from a right to custody. Most importantly, such a scheme does not ensure intending parents' custody of genetically-related children. Is it appropriate to call this practice “surrogacy”? Not according to what I mean by “surrogacy” in this book – but this of course is a merely semantic point.

Here is a map of the chapter. I start, in the second section, with an intuitive case against surrogacy, by inviting the reader to consider several highly stylised cases that involve the acquisition of custody of a newborn by people other than the gestational mother. The third section makes explicit my main normative assumptions, most importantly those entailing that the right to become the parent of a child is not privately transferable. To judge whether

surrogacy is legitimate, it is necessary to first make sense of what happens in this practice. Therefore, section four discusses the main ways in which surrogacy has been understood: as trafficking children, as engaging in pre-birth adoption, and as providing gestational services (plus, sometimes, gametes). I explain that the first model collapses into the second and that the third is implausible. I conclude that the best model of surrogacy in all but one type of case is the private adoption model, consisting in an attempt to transfer the moral right to custody over a particular child, which makes it impermissible. Cases of surrogacy with the intending parents' gametes seem to escape this analysis; they are treated in the fifth section, where I explore how biological relationships between children and parents are relevant to custody rights. Even if genetic connections are a good proxy for the quality of parenting, their existence should not be seen as either necessary or sufficient grounds for acquiring custody, especially when genetic and gestational connections come apart. Moreover, the gestational connection is an even better proxy for what serves the interest of the child – i.e. bonding – and this provides a *pro tanto* reason in favour of the presumption, present in some legislations, that gestational mothers should be granted legal custody. But it is wrong to take either of these relations – genetic or gestational – to be decisive. I conclude that this type of surrogacy, too, is illegitimate. I then turn, in section six, to what I consider the most important reason to permit surrogacy as far as children's interests are concerned: the fact that children born of surrogacy cannot in most cases be harmed by the practice, given that they would not have existed without it. I meet this challenge by explaining why, whether or not it harms children, surrogacy is wronging them; those who appeal to the non-identity problem to defend surrogacy must accept many repugnant conclusions about permissible childrearing. In the concluding section I sketch the contours of a legitimate practice involving women who gestate with the intention of allowing other people to become custodians of the newborns. I also make the case for the unbundling of two kinds of rights that are currently held only by

custodians: rights to control children's lives on the one hand and, on the other hand, rights to associate with children in protected caring relationships, and to preserve such relationships once established. Gestational mothers, I argue, typically have (at least) rights of the second kind.

The child-centred considerations on the basis of which I criticise surrogacy indict many other aspects of current upbringing practices. For instance, courts often decide custody disputes without prioritising the child's interest;⁸ this is wrong. We fail to license parents even when doing so would not be detrimental to children's interests, as it is the case when we use artificial reproductive technologies⁹; in such cases we ought to license, even though licensing would fail short of ensuring that the best available parents raise children. Further, parents' legal rights are often excessive¹⁰.

Given my belief that much of existing childrearing is disrespectful of children's interests, I should clarify, up-front, two aspects of the view I advance. First, although I believe that we need to rethink upbringing in general, there is something especially troubling about surrogacy: because its core is an illicit attempt to transfer a moral right, surrogacy adds insult to injury. Second, establishing the wrongness of surrogacy does not in itself indicate *who* wrongs the children of surrogacy, and hence who is blameworthy for becoming party to surrogacy arrangements. Possible answers include: surrogates, by attempting to transfer what they lack a moral power to transfer; intending parents, by attempting to acquire custody in a wrongful way; and the state, for permitting wrongful transfer of custody. Here I only provide reasons for the third answer. Accepting my view about surrogacy does not entail the belief that gestational mothers or intending parents are always appropriate targets of blame¹¹; indeed, in many cases they aren't. Surrogates are often pressured, economically or emotionally, into gestating for others. Since prospective parents cannot engage in child-centred practices of upbringing – this, as it will become clear, would involve proper

reformation of parenting practices – they can only access parenthood *via* objectionable practices; and because people have a powerful interest in raising children, they can be excused for availing themselves of the only existing means to do so. My overall aim, then, is not to establish the blameworthiness of individual participants to surrogacy practices, but to explain why these practices must be reformed.

II. THE INTUITIVE CASE AGAINST SURROGACY

Before considering how to best understand what surrogacy is – what is being sold, or gifted, in a surrogacy agreement – and whether it is a permissible practice, I invite the reader to consider a few stylised cases involving the acquisition of a newborn’s custody by people other than the child’s gestational mother. The cases are meant to trigger intuitions about permissible venues into custody, intuitions which, once identified, will hopefully help bring out the appeal of the overall argument I propose. Read them assuming that no coercion of an adult by another is involved at any stage in these stories: all adults involved make fully voluntary choices.

Case 1: A pregnant woman decides she will not raise her newborn, who is her genetic and gestational child, and puts her up for adoption. The state, *via* a certified agency, determines which of the potential adopters would make the better parent for the child, and allow her, or him, or them, to adopt.

This is a run of the mill case of adoption, which may well be morally innocuous in every respect (depending on the gestational mother’s circumstances), and in which the adoptive parents have acquired custody in an irreproachable way. Now let us look at the following, rather different case:

Case 2: A pregnant woman decides she will not raise her newborn, who is her genetic and gestational child, and surrenders custody, indicating she wants a

particular couple to raise her. Without any vetting, the state allows the couple indicated by the gestational mother to get custody over the child.

First, note that while most, or maybe all, states allow Case 1, only some, such as the US and Canada, allow Case 2. That case is properly described as a privately arranged adoption, which is private transfer of the right to parent; according to many legislations, children are not transferable by individual parents.¹² Rather, when a child finds herself without a custodian, the state automatically acquires custody over her in its capacity of *parens patriae*, that is as the agent with the default power to be the guardian of people who cannot take care of themselves. It is therefore up to the state to decide who, if anybody, can acquire custody over the child, and the state must do so by appealing solely to the interest of the child. This is the dominant view and, I will argue, the correct one. Thus, even if the couple in Case 2 happens to make good parents for the child, one may worry that the state fails to discharge its duty towards the child by allowing the adults in question to engage in an act of privately arranged adoption. This is disrespectful towards the child, and therefore objectionable even if the outcome in terms of satisfying the child's wellbeing interests happen to be optimal. Now consider:

Case 3: A pregnant woman decides she will not raise her newborn, who is her genetic and gestational child, and surrenders custody, indicating she wants a particular couple to raise her, on the condition that they transfer a certain, agreed upon, sum of money into her account. The indicated person transfers the money and, without any vetting, the state allows the couple indicated by the gestational mother to get custody over the child.

To the best of my knowledge, no state allows individuals to proceed as in case 3. Indeed, we typically identify the behaviour in it as “child trafficking” and ban it. I believe we are right to be critical of the situation in Case 3, and to prohibit it, but it is hard to see why

exactly the commercial aspect makes it more objectionable than the one in Case 2, assuming that all other things are equal, including the quality of people's will – i.e., that in neither case are they regarding the child as a commodity. Most importantly, imagine the adoptive couple in Case 3 is just as fit to parent as the one in Case 2. Is Case 3 really more objectionable, morally speaking, than Case 3? Let us now move on to the next case:

Case 4: A woman decides she does not want to raise a child, yet she is willing to conceive one with her own gamete, and indicates that she wants a particular couple to raise the child, on condition that they transfer a certain, agreed upon, sum of money into her account. The couple in question transfers the money and, without any vetting from the state, is allowed to gain custody over the child.

The situation in Case 4 is a form of surrogacy arrangement in which the gestational mother is a partial surrogate. Indeed, if one introduces a variation and imagines that the adoptive father is also the genetic father of the child, this is a typical example of traditional surrogacy, as it was practiced before the advent of in vitro fertilisation. Is Case 4 any less objectionable than Case 3? It is not obvious why it should be: indeed, Case 4 is identical in all respects to Case 3, except that the decision not to rear the child, and the decision to engage in an economic transaction with the adoptive couple, take place before conception. But why would the precise time of the intention-formation make any difference?¹³ As we shall see in the next section, some philosophers argue that it does – as I believe, mistakenly so. Perhaps you are tempted to think that Case 4 involves morally permissible behaviour because, and only when, the adoptive father is also a genetic father. But, even if the genetic connection does make a difference in this case (a matter I discuss in section five) there still remains a major objection to Cases 2, 3 and 4: the state's failure to act in its role of *parens patriae*. That is, even if you think that the genetic relationship between the child and the intending father grounds the latter's right to custody (in the variation on these cases in which there is such a

genetic relationship), one may object to the fact that the adoptive mother acquired custody as the result of a purely private understanding between the parties.

In fact, as far as I know, states also disallow individuals to engage in Case 4 unless they enter a surrogacy agreement before the beginning of the pregnancy and if the natural father, when different from the intending one, surrenders his right to custody. Without these two conditions met, Case 4, too, would qualify as “child trafficking” and we would ban it just as we (should) ban Case 3, since there is no morally relevant difference between the two. But, surely, an agreement in itself cannot make the relevant moral difference, at least not concerning the question of whether such an agreement has the normative power to determine the custody of the child. Now consider:

Case 5. A woman decides she doesn’t want to raise a child. Yet, she is willing to get pregnant by having an embryo transferred, genetically unrelated to her, and carry the baby to term. She indicates that she wants a particular couple, who provided the gametes, to raise the child, on condition that this couple transfers a certain, agreed upon, sum of money into her account. The couple in question transfers the money and, without any vetting by the state, is allowed to gain custody over that child.

This is a case of commercial surrogacy involving a full surrogate. Is it a legitimate practice? Is it more legitimate than the practice in Case 4? I submit that commercial surrogacy of the kind illustrated in Case 5 is morally different from Cases 3 and 4 only if the genetic connection between newborn and the gamete providers makes all the moral difference to who has the right to parent. Let us consider one last situation:

Case 6. A woman decides she doesn’t want to raise a child. Yet, she is willing to get pregnant by having transferred an embryo to whom she is not genetically related, and indicates she wants a particular couple, who provided the gametes, to raise the

child. She does this altruistically. The indicated couple is allowed to gain parental status in relation to that child without any vetting from the state.

Case 6, too, I submit, is morally dodgy. It differs from Case 5 only in that the surrogate's motivation is non-commercial. Unless genetic relationships make all the difference to the right to parent, Case 6, too, is morally similar to Cases 3 and 4. Some readers may be tempted to say that the surrogate mothers in Cases 3, 4 and 5 are *selling* their own child. In the next session I discuss the question of whether we are right to think about these cases of selling children proper, or of merely selling the right to parent, and whether it matters how we choose to portray them. Perhaps, then, the best reason to see Cases 3, 4 and 5 as illegitimate transactions is that people lack a moral power to sell their right to parent, since they have this right in virtue of how it serves the child's interests. An additional consideration, which I substantiate in section five, is that often the child has an interest in not being separated from her gestational mother. The same objections, then, are triggered by attempts to gift the right, as in Case 2: the problem is the very attempt to privately transfer the right to another person, not its commercial aspect. If so, this also explains why Case 6 looks objectionable.

The general problem, then, is that neither commercial nor altruistic surrogacy are morally permissible unless one of these two claims is correct: Either (a) it is permissible to privately transfer custody, whether for commercial or altruistic reasons, or (b) the genetic connection between an intending parent and a child alone justifies the granting of custody to intending parents. The next two sections argue against (a), showing that Cases 3 and 4 are impermissible. In section five I argue against (b), and conclude that so are Cases 5 and 6, i.e. that we should also reject full surrogacy as impermissible. Before turning to a principled analysis of surrogacy, I lay out my normative assumptions.

III. PARENTS, THEIR RIGHTS, AND THE INTERESTS OF CHILDREN

III.1. General assumptions

People can bring children into the world permissibly;¹⁴ assuming otherwise would be a nonstarter, since if procreation were always wrong, the same would obviously be true of surrogacy. I distinguish between procreators and parents; a child's parents are the people who rear her, whether or not they have also brought her into the world. I operate with a definition according to which surrogacy involves a woman who gestates a child without the intention of raising her as her own, and with the intention that other people become her custodians; the latter's intention to parent the child pre-dates the pregnancy and provides its motivation. This definition of surrogacy is intentionally strictly descriptive; later in the chapter, I argue that surrogacy should be understood as an attempted transfer, privately agreed upon, of the right to parent.

Much of my analysis concerns rights: children's as well as parents'. Unless otherwise specified, all references are to moral, rather than legal, rights. The right to parent is the same as the right to custody. "Custody" itself is a legal term: to have a right to custody, in this chapter, means to have the moral right to be a custodian.

III.2. The right to become a parent

I assume some version of the interest theory of rights, according to which claim rights generally protect weighty interests of the right holder.¹⁵ In my view, the right to become a parent is a privilege, or liberty right, in the Hohfeldian analytical system of rights, that the parent has with respect to their child. To have a liberty right to become the parent of a particular child means not to be under a duty not to act as the parent of that child.

This goes against the most influential contemporary philosophical accounts of the right to parent, which see it not as a privilege, but as a claim right held by sufficiently good

parents, and protecting their interest in being parents. On this view, people's interest in parenting is weighty enough to ground correlative duties in others, at the very least not to negatively interfere with the right holder's exercise of the right.¹⁶ These are so-called dual interest views, coming in many shapes that share a common feature: the belief that the right to parent is grounded in a combination of children's and adults' interests. For reasons on which I elaborate at length in other work,¹⁷ this view is incompatible with the most plausible understanding of children's moral status. The only feature that distinguishes children from adults, as far as their rights and duties are concerned, is their incompletely developed autonomy.¹⁸ This feature makes it the case that adults may exercise authority over children, but only to the extent to which paternalist behaviour is needed to protect children's important interests. Children's moral status is otherwise no lesser than adults': in particular, their interests may not be sacrificed for the sake of protecting other people's interests any more than it is permissible to sacrifice the interest of an adult for the sake of protecting other people's interests. If so, the exercise of authority over them, including parental authority, must be justified by appeal to their, and not their parents' interests. The adults who raise children often see this activity, and their relationship with the child more generally, as a great source of value in their lives. To many, parenting brings joy, meaning, welcome challenges, and opportunities for self-development, and all these things can greatly contribute to the parents' own wellbeing. However, the adults' interest in enjoying such goods doesn't play a role in justifying their custodial rights just like, say, the child's paediatrician's interest in practicing medicine doesn't play any role in justifying her role in administering medical treatments to the child. The right to become a parent does not protect the interests of would-be parents in holding custody; the right, therefore (and given my endorsement of the interest theory of rights), is not a claim but a liberty, or a privilege: the parent is morally free to

control the child's life because, and to the extent to which, such control is in the child's interest.¹⁹

Since parenting is a fiduciary role, when several parties intend to bring up the same child, custody should go to the party who would make the better rearer for that child²⁰. More generally, the moral right to become the parent of a child is held by the best available parent to that child, where "available" means that the would-be parent has expressed the willingness to parent the specific child. The fact that the right to become a child's parent does not track the interest in being that child's custodian is in line with how we usually think about fiduciary roles. Nobody believes that, say, an occupational therapist has a claim (that is, interest-protecting) right to guide her patients who suffer from dementia.

This understanding of the right to become a parent as a privilege will strike many as counterintuitive – although, as I explain elsewhere,²¹ it need not be exceedingly so. One reason why it appears counter-intuitive has to do with the epistemic hurdles of making comparative judgements of parental excellence. I don't want to underplay this worry, and a fully fleshed-out account of how to allocate custody will have to say a lot more than I can say here about standards or parental competency. These standards should be set relative to the would-be parent's ability to protect children's interests, and I shall presently give a bit more detail about these interests and about the kind of personal qualities generally required for parental excellence. In many cases it will be difficult to make secure judgements about who is the better parent. All this shows, in my view, is that in many cases it will be hard or impossible to determine who has the moral right to become the parent of a particular child. (There may also be cases, however, when there is no fact about this matter, if certain parental abilities are incommensurable *and* if, as a result, it is impossible to compare individuals with respect to their parental abilities.) But the epistemic challenge shouldn't be overestimated either. As a

matter of fact, judges who take into considerations the interest of the child to settle cases of custody disputes frequently make judgements about the claimants' relative parental abilities.

Tensions between child-centred views, like mine, and common sense morality can easily be explained – in a debunking manner – by the long history of seeing and treating children as if they lacked rights. My child-centred understanding of the right to become a parent as a privilege is in line with the “best interest of the child” legal principle, which many take to be a guiding standard in cases when state agents or private institutions make direct decisions about children’s lives. The principle is formulated in Article 3 of the *UN Convention on the Rights of the Child* from 1989, whose Article 3.1 says that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” According to the best interest of the child principle, in disputes concerning children, the interests of the adult parties are subordinated to those of the child, and should not be considered as potential counterweights to the child’s interests. The principle is open to several interpretations, some of which are very implausible.²² I assume that the principle is correct if interpreted to say that children’s interest be given no less consideration than similarly weighty interests of adults. Amongst other things, this excludes (unconsented-to) exercise of power over children in ways that serve the interest of the power holder in exercising authority; therefore, it also excludes a justification of the right to parent by appeal to the parents’ own interests in being parents.

Individuals who hold privileges justified by appeal to *other* people’s interests – for instance to doctor – cannot sell or gift their privileges. My view of the right to parent obviously indicts as impermissible all those cases of surrogacy that are properly described as a privately organised transfer of the right: a privilege to exercise control over another person may not be privately transferred. Nor, more generally, can it be legitimate for an individual to

transfer a control right that she holds only because the person over whom control is being exercised benefits from the fact that the first individual holds the control right. Just like a medical doctor lacks the normative power to sell, or gift, the right she has to treat her patients who are in a coma, so do parents lack a normative power to alienate their right to parent a particular child by transferring it to another party. This is not because the right to custody can never be alienated. It is permissible to put one's child up for adoption in certain cases; but then the allocation of custody should follow the child's interest and is not a matter of private agreement. As I explain in section seven, a form of surrogacy involving women who gestate with the intention to alienate their right to parent may be legitimate.

III.3. Parents's rights and children's interests

The right to become a child's parent is analytically distinguishable from the rights *of* parents (or "parental rights"). In my view, the latter are, in Hohfeldian terms, a combination of claims and powers. To become a parent means to step into a fiduciary role which involves the acquisition of duties concerning the satisfaction of the child's interests²³. To discharge their fiduciary duties, parents must be able to require compliance from the child – for instance, to be able to require the child not to engage in disproportionately dangerous action. They also need to be protected, in their interaction with the child, from disruptions that threaten the performance of parental duties. A mundane example of such disruption is others offering food to the child without parental permission; the food may be dangerous for the child, and hence the parent has a right to control its acceptance. More generally, parental rights enable and protect parents in the fulfilment of their parental role by making it possible for parents to create duties of compliance on the side of the child and of non-interference on the side of other people. Thus, parental rights are necessary for the successful exercise of the parental role, which consists in the creation of a, hopefully securely, attached relationship

between parent and child, and in significant control of the child's life to the child's own benefit.

I don't provide a full account of children's interests²⁴, but for the present purposes I note three elements of such an account. First, alongside interests in physical wellbeing, security and education, children also have interests in emotional and relational wellbeing. Thus, there are several personal qualities that can qualify adults as good parents, which elsewhere²⁵ I call "personal parenting resources". They include patience, kindness, attentiveness, self-knowledge, sound judgment, a nurturing disposition, and emotional maturity. Displaying such dispositions to an unusual extent makes one particularly likely to be the best available parent for a child, as there is no such thing as providing a child with too much patience, kindness, good judgment, etc. By contrast, a person who is very rich because they have more than their fair share of wealth cannot claim custody on grounds that such wealth would benefit the child; not because the latter claim isn't true, but because the right to become a child's parent tracks not only the child's interest, but also the interest we all have in fairness.

Second, it is important to distinguish between (children's) wellbeing interests and their respect interests. The distinction between these two types of interests, and hence between two types of interest-protecting rights, is familiar from the work of Amartya Sen, Dabra Satz, and Harry Brighouse and Adam Swift. Brighouse and Swift distinguish between interests in "anything that contributes to her well-being or flourishing" and those in "having her dignity respected – in being treated in ways that reflect her moral status as an agent, as a being with the capacity for judgment and choice, even where that respect does *not* make her life go better."²⁶ I call the first "wellbeing interests" and the second "respect interests." In my view, the latter protect not only the exercise of individuals' agency (and so, in the case of children, treatment in accordance to the level of developed autonomy of each particular

child), but also the treatment of individuals in situations in which they cannot give consent: for instance during childhood, or while unconscious. Respect interests include an interest in not having one's own wellbeing interest set back in order to advance the interest of an adult in doing the controlling. For instance, imposing a setback of a child's wellbeing-interests for the sake of allowing a suboptimal parent to satisfy an interest in rearing counts as disrespect. Thus, my view about the right to parent does not depend on a commitment to ensure that children's lives are as good as possible; rather, it is fully supported by the deontic constraint against allocating authority over them for the sake of satisfying an adult's interest in the exercise of authority.

Finally, attachments, and hence continuity in caring relationships, are very important to children's wellbeing. Children have a claim to the voluntary preservation of caring relationships with adults, as long as the continuation of such relationships doesn't set back their overall interests. To clarify this, I must introduce a last distinction, which I elaborate further below. It concerns the difference between parents' control rights and their associational rights. The first are powers that enable parents to control children's lives in a number of ways: for instance, the right to decide on children's diet, bed time, daily schedules or discipline. To provide another illustration of a parental control right, one can create a duty in one's child to stop singing an offending tune, and, in other adults, not to encourage the child to keep singing it. The second type of parental right protects parents' relationship with their child. But, in my view, *all* adults, association with whom would be in the child's best interest, have a right with respect to the child to initiate a relationship with her, and a claim right to adequate opportunities to seek such association.²⁷ This is controversial. A bit less controversial is the claim, to which I also subscribe, that adults who have successfully established such a relationship – including, obviously, the child's parents, but also other individuals such as members of the extended family and caregivers – are entitled to the

protection of that relationship as long as it does not set back the child's interests. Because loving parents have a powerful interest in the continuation of their relationship with the child, and the dissolution of the relationship, when good, would harm not only the child but also the adult, they have a claim right that others do not prevent them from continuing the relationship. Roughly speaking, this distinction is similar to the one between having custody over a child and obtaining visitation rights.

While both the right to parent and the rights of parents are justified because they protect the child's best interest, existing practices of custody allocation, and existing legal parental rights, don't always track children's moral rights. Natural parents acquire custody over their children automatically, without any competence check, and lose it only in cases of proven, and usually egregious, parental abuse or neglect. In some jurisdictions, custody disputes are settled in ways that explicitly sacrifice the child's best interest²⁸. And parents typically have, over their children, legal rights that are more extensive than what they need be in order to protect children's interests. Parents can irreversibly modify their children's bodies without medical indication, for religious or aesthetic reasons that children may well grow up to disown. They can deny their children medically recommended treatments, enrol them in educational and religious practices independently from how such enrolment serves the child's interests, paternalise them in excess of what is justifiable given the development of the child's autonomy, and prevent them from establishing or continuing beneficial relationships. Therefore, there is a justificatory gap between the level of procreators' and parents' power over children that are necessary to advance children's own interests and the level of procreators' and parents' power over children that is actually guaranteed by states. Exactly how wide the gap is depends on my (controversial) view about the right to become a child's parent being a mere privilege. But the existence of a gap is widely acknowledged by

contemporary family ethicists; many believe that parents have unjustifiably extensive legal rights over their children²⁹ and this belief plays an important role in my argument.

III. 4. Two caveats

This is the place to also clarify how I distance myself from other child-centred rejections of surrogacy. Mary Warnock, perhaps the best-known critic of commercial surrogacy, believes that surrogacy agreements degrade children by treating them as commodities³⁰. In section four I explain why the trope of surrogacy as child selling is, most likely, a red herring: critics of commercial surrogacy can make their point just as powerfully if they see it as a (mere) transaction in the legal right to parent. In any case, nothing in my account hinges on the presupposition that children born out of commercial surrogacy are likely to feel degraded by the way in which they have been brought into the world. It is not their procreation, but the way in which adults are permitted to acquire custody over them, that disrespects these children.

I am also not exercised by the worry, raised amongst others by Elizabeth Anderson (1990), that children who know that they were born due to commercial surrogacy agreements may be less likely than other children to believe that their parents love them.³¹ This seems implausible, assuming that the parent-child relationship is otherwise good, and in particular if the child is securely attached to the parent. Other concerns about the wellbeing of children of surrogacy, if warranted, generate reasons against both commercial and altruistic surrogacy: children who know that their gestational mother carried them with the explicit intention of separating from them at birth may suffer from feelings of abandonment.³² I am agnostic about the likelihood of this harm, and so my argument does not rely on it. This being said, section five contains a plea for childrearing arrangements that take seriously the more general

emotional grievances of children who have been separated, at birth or soon after, from their birth mothers.³³

Against this normative background, I now proceed to an account of surrogacy than goes beyond the merely intuitive one above. I start by examining surrogacy models and their moral stakes.

IV. WHAT IS SURROGACY? THREE MODELS

There is disagreement over how to understand what goes on in surrogacy, and this disagreement is normatively-loaded. Critics of surrogacy often present it as the selling, or trafficking, of children. Some defenders of surrogacy who reject the child trafficking model rely on the private adoption model, which consists in the transfer of custody. Yet others argue that surrogacy is the provision of services, and maybe of gametes. I discuss these models in turn, and argue that neither the private adoption model nor the provision of services model, succeed in their aim of showing that surrogacy is a permissible practice. But the private adoption model, is, at least, conceptually convincing. However, as I explain, it is also closer to child trafficking than assumed by those who defend surrogacy.

IV.1. The child-trafficking model

The moral difference between selling a child and selling custody over that child, I argue here, is of degree, not of kind. Critics of commercial surrogacy often claim that the practice is equivalent to child selling, or trafficking. Anderson³⁴ says as much in her depiction of surrogacy as commodifying children. And one of the most prominent complaints raised by the Warnock report is that “a surrogacy agreement is degrading to the child who is to be the outcome of it, since, for all practical purposes, the child will have been bought for money.”³⁵ If this charge was correct, then, as Bonnie Steinbock notes, the objection against surrogacy

would be of the same nature as that against slavery, because surrogacy would, in effect, create child-slaves: young human beings to be bought and sold.³⁶

Defenders of surrogacy, unsurprisingly, deny that it is a form of child trafficking. Stephen Wilkinson, for example, notes that surrogate mothers cannot sell their child because they cannot own her and what cannot be owned cannot be sold or bought. The object of the commercial transaction, he writes, is “a limited bundle of parental rights, not the baby itself.”³⁷ Others make a similar point: Richard Arneson claims that the good being bought is the right and obligation to be the parent of a particular infant and that “[a] parent does not in any sense own her child even if she acquires parental rights and responsibilities by purchase.”³⁸

I find these replies convincing as far as they aim to show that surrogacy cannot involve child selling properly speaking – that is, as a transfer of (full) property rights.³⁹ Yet, they are only superficially convincing; the worry that commercial surrogacy is similar to commerce in slaves isn’t fully assuaged by noting that surrogacy involves a transaction in custody, i.e. in parental rights, and not in human beings. The reason is that parents’ legal rights *are*, largely, control rights over their children, just like property in persons partly consists in rights to control the lives of those persons. And, indeed, on some accounts, part of what makes slavery objectionable is the power aspect of the relationship between slave and slave owner. If so, the moral similarity between children and slaves cannot be dismissed merely by saying that rights over children don’t amount to (full) property rights. (A fully reformed childrearing relative to the *status quo*, in which custody consisted only of a right to implement decisions over the child, but that the decisions were not made by parents (but, say, by childrearing experts) would be able to assuage the slavery challenge. In this case, parents wouldn’t have any control rights over children. More generally, the more extensive parents’

control rights over their children are – i.e. the higher the stakes of custody allocation – the more pertinent is the analogy with slavery.)

Let me elaborate. There is an obvious reason to resist the analogy between the predicament of slaves and that of children born through surrogacy. As Steinbock puts it, “there are important differences between slavery and a surrogate agreement. The child born of a surrogate is not treated cruelly or deprived of freedom or resold; none of the things that make slavery so awful are part of surrogacy”.⁴⁰ Steinbock seems to assume that objections to slavery are exhausted by complaints about the *actual* treatment of the slave, which is typically harsh, exploitative and, in case of resale, exposes the slaves to major unpredictable changes in their lives. But this criticism is not exhaustive: the mere arbitrary power that slave owners hold over slaves generates a serious grievance. One objection to slavery survives in the absence of any harsh, exploitative or wrongfully unpredictable treatment of the slave. And this objection is powerful enough to provide the intuitive appeal of a distinctive strand in political philosophy: Neo-republicanism is specifically designed to capture the grievances of slaves who are well-treated by their kind, or perhaps morally enlightened, masters (Pettit 1997). Above and beyond any *actual* harmful treatment, slavery raises the obvious objection that it unjustifiably places people at the mercy of others, who can then use their power with impunity. Liberals, too, can account for this particular wrong of slavery, even if, arguably, not as robustly as republicans.⁴¹ Now, slave owners, in antiquity as in more recent times, have indeed very extensive legal rights over their slaves, including powers to kill, maim or overwork them. Parents in most societies today lack the legal rights to do these things to their children: in property parlance, they have nothing close to full ownership over their children. Yet, parents do have extensive legal rights to control almost every aspect of their children’s lives – and, the younger and more vulnerable the children, the more extensive the parental rights. Imagine a practice whereby slaves may not be killed, maimed or overworked with

impunity, but their lives are comprehensively controlled by other people, from whose authority they cannot emancipate themselves. Whether or not this is proper “slavery”, it raises *prima facie* moral concerns of the same nature, though maybe not of the same degree, as typical cases of slavery, and people subjected to it have a serious grievance. As Frederick Douglass once himself a slave, put it, “it was slavery – not its mere incidents – that I hated”.⁴²

The situation of children in general, then, *is* strikingly similar to that of slaves belonging to benevolent, indeed often loving and occasionally adoring, owners.⁴³ Three conditions, when met, can make all the moral difference between children and (adult) slaves. The first condition is, I assume, always met: unlike adult slaves, children lack the right to control their own lives to the same extent as typical adults; this is why they are not wronged by other people’s control of *some* aspects of their lives, including by the very fact of having custodians. The second condition requires that custody be allocated *via* justified procedures, in which case individual parents occupy a position of legitimate power in relation to their children, unlike slave owners who never occupy a position of legitimate power in relation to their slaves. The third condition is that parents do not hold legal rights in excess of their moral rights, in which case parents’ rights do not constitute objectionable control rights over other human beings, and thus are entirely unlike slaveholders’ rights.

The last two conditions can be, but are not always, met. The most coherent defenders of surrogacy, like Arneson and Cecile Fabre, appear to ignore the second condition and defend their views by assuming that the second is met. They, too, believe that the rights of parents are justified, and hence limited, by the child’s interests: “The rights that parents have to control their children’s behaviour and to make major decisions affecting their lives while they are young are assigned to parents for the sake of their children’s welfare and are supposed to be exercised for the good of their children. The point of parental rights is to

enable parents to carry out their obligations to care for their children”.⁴⁴ A similar view is defended by Fabre.⁴⁵ But this defence of surrogacy is successful only given an equivocation between moral and legal parental rights. I believe Arneson’s and Fabre’s claims are correct if taken to describe moral rights, yet they are implausible as a description of limits to current legal parental rights. As long as in a particular society parental legal rights are unjustified, the argument that surrogacy is not a form of trafficking because children, unlike slaves, cannot be owned is, *in that society*, unconvincing. In the second section above I gave a few examples of how the legal rights of parents extend beyond what is justifiable by appeal to the interest of the child. The view that parents’ moral rights do not extend beyond what is necessary to protect the interests of the child is perhaps not dominant, but nor is it particularly unusual⁴⁶. On this view, then – and, more generally, on any account which indicts the extent of legal parental control rights as illegitimate – children are, to some extent, morally on a par with slaves. The difference is that the law allows more limited mistreatment of children than it permits in the case of slaves, in slave-owning societies. And perhaps the arc of children’s history does bend towards justice: the extent of parental legal rights has been shrinking over time. While it’s still bending, however, those who say that surrogacy is a bit like slave-trafficking have a point. Their point – and this is not yet properly appreciated in the surrogacy debate – depends on parenting itself being a bit like slave-holding.

Similar things can be said about the second condition. Above, I explained why children’s moral status requires custody allocation procedures that track, as closely as possible, children’s own interests. If so, then people who acquire custody by buying it or by receiving it as a gift occupy an illegitimate position of authority over a human being, similar to the slave-owner – albeit to a lesser extent.

But it is interesting to note that, whatever the correct justification and extent of parental rights, it appears that selling custody is no less objectionable than selling children

proper. Remember cases 2 and 3 in the previous section, which looked a lot like “child selling”. Imagine, for example, that the adoptive couples from those cases live in societies in which parents’ legal rights map onto their moral rights; imagine also – *contra* my above-stated view – that the right to custody partly protects the interest of would-be parents, and hence that the right may be privately transferred. It is difficult to see what difference it makes to call the transfer of custody over these children “child selling”, rather than the mere selling of parental rights. And this is why arguments in favour of child selling don’t appear to raise concerns that are *fundamentally* different from those raised by commercial partial surrogacy: For instance, David Boudreaux’s⁴⁷ proposal that we allow parents to sell very young children (who, presumably, are still unattached to their initial custodians) draws its appeal – limited as it is – from the *proviso* that the buyers have no more rights over children than parents usually have. Similarly, Fabre’s defence of surrogacy seems to entail that the sale of (rights over) a child is, all things equal,⁴⁸ just as permissible as commercial surrogacy.

The sale of a child just *is* the sale of control rights over her.⁴⁹ Therefore, the polemic about whether commercial surrogacy is a form of child trafficking or a “mere” selling of custody seems merely semantic. What matters is not how we describe – as child selling or as rights-selling – cases when an intending parent pays a gestational mother, and, as a result, the intending parent is legally free to take home the child and raise her as their own. What matters, instead, are the interrelated issues of whether legal parental rights exceed parents’ moral rights, and whether the holding of custody over children is adequately regulated. To the extent to which parents have excessive legal rights to control their children, their holding these rights is objectionable for the same reasons that make it objectionable for slave owners to hold control rights over slaves. And to the extent to which the conditions on acquiring or retaining custody fail to reflect the full extent of children’s rights, holding custody amounts to

having illegitimate legal control rights over other human beings, again as in the case of slavery.

As I explained, my view is that legal rights to control children ought to be properly limited, in content, by the interest of the child. But this claim requires further interpretation. On a more demanding, neo-republican, account, it is not enough that the rights-protected interests of the child are not *in fact* set back by parental decisions. Rather, parents should not have rights to control children's lives in arbitrary ways, that is, in ways that *can* set back the children's interests. Fully unobjectionable childrearing would then require that the exercise of all legal parental rights be properly and effectively monitored to ensure they can only be exercised in the interest of the child.⁵⁰ On a less demanding, liberal interpretation, it may be permissible for parents to hold legal rights for the exercise of which they cannot be held fully accountable; on this view, it is enough that parents refrain from exercising power over the child in ways that are not justified by the interest of the child.⁵¹ The proper limitation of parents' legal rights, even understood in the more modest key, will surely go beyond the typical requirements of not neglecting or abusing one's child, which, if satisfied, ensure the continuation of parental status in current societies. If so, then children who live in societies that fail to limit parents' legal rights, are (whoever their custodian) in the normative situation that makes even benevolent slavery objectionable.

IV.2. The privately arranged adoption model

If surrogacy is properly thought of as a private transfer of custody from the child's initial custodian (the surrogate) to the intending couple, then it is akin to privately arranged adoption – as in Case 2 above. Another feature that makes this kind of adoption unusual is that parties agree to transfer the rights before the child has even been conceived. Iwan Davies, for example, explicitly defines surrogacy as “adoption controlled by the parties,

planned before conception and involving a genetic link(s) with one (or both) [intending] parent(s).”⁵² In countries that allow gamete sale or donation, of course, the child need not have any genetic link with the intending parents.

The adoption model applies most obviously to cases of partial surrogacy, in which the surrogate, being both a gestational and a genetic mother, meets the legal conditions to qualify, by default, as the child’s initial custodian in a variety of legislations. But while some countries, like the US, take genetic connectedness as the main/sole ground for initial allocation of custody,⁵³ others allocate initial custody to the gestational mother, following the principle that the legal mother is the woman who gives birth. In such legislations, adoption appears to model adequately both partial and full surrogacy. The reason behind this principle is that one can always be sure who is the natural mother of a baby (“*mater semper certa est*”). Yet, if one thinks about the legal mother as being the same as the genetic one this claim is false given the current state of artificial reproductive technologies; alternatively, the claim begs the question of whether the gestational relationship with a child is more relevant to holding the moral and legal right to parent than the genetic relationship. Section six provides a *pro tanto* reason in favour of this principle.

To repeat, it makes little moral difference whether surrogacy is portrayed as the privately organised transfer of custody – which is the same as a private adoption – or as child selling. Indeed, one form of child selling itself has been defended as being on a par with commercial adoption.⁵⁴ If so, the legitimacy of surrogacy depends on whether the sale or donation of one’s custody, as it happens in private adoption as well as in surrogacy, is permissible. This, in turn, depends on the nature of the right to parent, and on the grounds on which it can be acquired. Claim rights in property – for instance my right over my laptop or, closer to the issue at hand, and hence also more controversially, one’s right to one’s pet – can be privately transferred. But if the allocation of custody must be decided by appeal to the best

interest of the child, then neither markets in, nor the gifting of, custody are permissible. (That is, on the assumption that selling or gifting custody are not the allocative mechanisms that serve the child's interests best⁵⁵; I find such assumption entirely convincing.) More generally, it is hard to see how a person can have the moral power to privately transfer a liberty right to control another's life, when the person in case has that right only because this is in the interest of the person over whom the right is being exercised.

Some scholars of surrogacy are aware of this problem and believe that appeal to the child's best interest is a reason to oppose both privately organised adoptions and, if it turns out to be the same kind of thing, surrogacy. In the words of Edgar Page⁵⁶: "Built into the law is the principle that children are not transferable by individual parents. This principle is also rooted in much of our moral thinking and it underlies many objections to surrogacy arrangements. Given the principle, it seems to follow directly that both total surrogacy and genetic surrogacy are unacceptable."⁵⁷ The same principle indicts private adoption as impermissible. It is unclear why philosophers such as Arneson, who agree that the rights of parents are entirely justified (and so, presumably, constrained) by appeal to children's interests, nevertheless think that a market in custody is morally permissible.

Here I have argued that if surrogacy is a kind of privately arranged adoption, it is wrongful since we have no reason to assume that markets in, or the gifting of, custody will match children with the best available rearers; as such, they are disrespectful of children. I next turn to the third model of surrogacy, as the provision of gestatory services and, in some cases, gametes.

IV.3. The provision of services and gametes model

The private adoption model of surrogacy captures well (although it cannot justify) cases of partial surrogacy, when the surrogate, being both a genetic procreator and the

gestational mother, has all the usual bases of custody allocation. But this model seems inadequate in cases of full surrogacy, especially when both intending parents are also the gamete providers. At least on the widespread view that genetic procreators have, by default, the right to custody, full surrogacy cannot be understood as a form of adoption, because on this view the full surrogate lacks the right. This result is welcome for those defenders of surrogacy who, such as Page, worry that appeal to the child's interest makes surrogacy indefensible as a form of private adoption. Many argue for the permissibility of full surrogacy by conceptualising it as the provision of a gestatory service.⁵⁸ If the right to custody is, by default, held by the child's genetic procreators, then in the case of full surrogacy the commissioning couple should automatically have custody when the baby is born. As Page puts it, "the child belongs to the commissioning parents from the outset as they do not at any stage relinquish their rights and duties in respect of it."⁵⁹ I return to cases of full surrogacy, and explore the consistency between appeal to the child's interest and the view that genetic procreators have the default right to parent, in the next section.

Cases where at least one of the gametes has been donated or sold to the intending couple by donor(s) other than the surrogate, are more complicated. In those cases, too, the surrogate mother never had the right and hence no private transfer of the right took place *from her* to the intending parents: she has merely sold, or gifted, her gestatory services. What is less clear is that the intending couple always had the right to custody over the resulting child in those cases: plausibly, it is permissible to obtain gametes from donors⁶⁰ but does the intending couple also acquire, together with the gamete, custody rights over the child developed from it? If they do – in virtue of a principle that says that the genetic procreators always have the right to first custody – this is only possible if individuals have the moral power to privately transfer custody. The problem with the privately organised adoption model necessarily beleaguers full surrogacy with donor gametes. If the intending parents don't

acquire parental rights merely by acquiring gamete(s), then the custody issue is yet to be settled, and hence the act of surrogacy in question may or may not result in them having custody.

Even more ambitiously, Page⁶¹ attempts to extend the model of gestation as mere provision of services and donation to partial surrogacy. If gamete donation or sale is permissible in general, it must also be permissible when the donor or seller is the surrogate herself. Page proposes that we should understand partial surrogacy as a situation in which the surrogate donates her own gamete *in utero*. On his view, then, partial surrogates sell, or donate, services-only (if they are full surrogates) or both gametes and services (if they are partial surrogates). Since they either are genetically unrelated to the child, or have transferred their gamete before conception, they never had a right to custody to transfer. Rather, the intending parents are the parents from the get-go: there has never been a time when the child had another parent. This is the intentional account of parenting. Obviously, this proposal, too, fails unless the genetic parent – in this case, the partial surrogate – is morally permitted to transfer custody over her newborn. Even if the surrogate can sell or donate the gamete, over the course of the pregnancy the moral status of the entity she transferred changes to that of an individual over whom nobody can have full property rights. For Page's account to succeed, then, one needs an independent account of why the surrogate can transfer not only her gamete and services, but also her right to custody.

Some believe it is impermissible to sell gestatory services in the context of commercial surrogacy,⁶² sometimes even while accepting that gametes (or even embryos) can be permissibly donated.⁶³ I don't subscribe to this view, that is, I take no issue with a woman's freedom to provide either gestatory services (including for pay), or gametes, or both. I resist the service and gamete-provision model of surrogacy on a strictly child-centred basis.

Conceptually, the difficulty with this model of surrogacy is the unclarity about the precise service that is being provided by the gestational surrogate. As Kajsa Ekis Ekman puts it: “if pregnancy is a job – what, then, is the product?”⁶⁴ The most plausible interpretation of surrogacy as a gestatory service is that the surrogate provides just that: gestation. But this interpretation, as defenders and critics of surrogacy alike note, does not provide support to surrogacy. Discussing “Baby M”, a widely publicised case of surrogacy from the mid-80’s, Steinbock notes: “If the surrogate were paid merely for being willing to be impregnated and carrying the child to term, then she would fulfil the contract upon giving birth. She could take the money and the child. Mr. Stem did not agree to pay Ms. Whitehead merely to have his child, but to provide him with a child”.⁶⁵ Michelle Moody-Adams (1991, 175) makes this point when she asks, rhetorically, “how many couples would be willing to pay for a surrogate's ‘services,’ and then allow her to keep the baby?” And Fabre argues to the same conclusion by appeal to an analogy between partial surrogacy and baking: “although the surrogate mother, in partial surrogacy, provides her egg, commissioning parents are not buying that egg as well as her service, any more than in buying bread from my local bakery I thereby buy the flour which goes into the bread.”⁶⁶

If the surrogate merely provides the service of gestating the child, not the child herself – or, rather, the right to become her parent – then the question of who may raise the newborn needs to be decided by considerations independent of the agreement between the parties who engaged in the surrogacy process. It will obviously be in the best interest of the newborn to have a parent. In my view, that parent should be determined on grounds of her best interest. This is denied by some proponents of the service and gamete model of surrogacy, for instance Page. His claim that the child belongs to the person whose body produced, or who legitimately acquired, the gametes from which the child develops, is not merely metaphorical. Rather, it is part of what Page presents as a quasi-ownership interest that people have in their

genetically related child.⁶⁷ This ownership model of parenting is needed for his defence of surrogacy, and explains why, on this account, people can sell not only their gametes, but also the right to rear any children that evolve from them. Page's attempt to rescue surrogacy as service-provision fails because it shows too much: if his quasi-ownership of children thesis was correct, it would also vindicate, as permissible, private adoptions, and, more generally, private transfers of custody – and thus run afoul of the child's best interest principle.

Understanding surrogacy as the provision of services and, possibly, gametes, therefore provides no more justification for surrogacy than the privately arranged adoption model. It is, moreover, a less conceptually compelling model since it misrepresents what people seek from surrogacy as the mere provision of a service, and not of a "product". If so, on this model there should be no presumption that the intending parents are entitled to the custody of the child. But, surely, obtaining the custody of the child is *the*, perhaps only, point of surrogacy as actually practiced.

This leaves open the possibility that full surrogacy is permissible when both gametes are provided by the intending parents, because in these cases many will think that the intending parents' right to custody can be justified by appeal to the genetic relationship with the child. I discuss this case in the next section and criticise the view that genetic procreators have the right to custody *merely* in virtue of the fact that the child has developed from their gametes. Allocating custody to genetic procreators is compatible with the best interest of the child only in cases when they are the best available parents. But, as I argue, genetic connections with a child are, at most, a good *proxy* for the quality of parenting her. And while in some cases the genetic connection will be the best available proxy, in other cases we may have better proxies. For instance, gestation can be the best proxy for serving the child's interest, if a bond exists, at birth, between the gestational mother and her child and if the preservation of this bond is beneficial to the child. In such situations, both partial and full

surrogates have a stronger, although not undefeatable, claim to custody than genetic procreators. In any case, if surrogacy is merely the provision of services plus, possibly, gametes, the intending parents have no automatic right to custody.

To conclude this section, the best way to understand surrogacy is as a private agreement between several parties, which consists in the attempt to voluntarily transfer the surrogate's presumptive right to custody to the intending parents. Sometimes, this is accompanied by an attempt to transfer the gamete donors' presumptive rights to rear children born of their gametes. Yet, if the right to become a parent is a liberty right that an individual holds in relation to a particular child on the basis of being the best available parent for that child, such a transfer cannot be morally permissible. Neither markets in, nor the gifting of, the right to parent, are legitimate.

V. FULL SURROGACY WITH INTENDING PARENTS' GAMETES

For a child-centred view like mine, the most interesting case of surrogacy, and the most difficult to assess, is full surrogacy with both gametes coming from the intending parents. As we have seen, this situation seems to (but, I will show, does not always) resist description as an attempted transfer of the right to custody from the surrogate to the intending parents. Common sense morality, legal practice, and most philosophers assume that genetic procreators have a presumptive right to rear their progeny. A defender of surrogacy who accepts the child-centred account of the right to parent might say that, once the child is born (or maybe even before that), the intending couple's right is guaranteed by the genetic connection they have with the child; the surrogate never had the right. When such cases are of the commercial type, the intending parents pay the surrogate merely for her services, and therefore their payment of the surrogate does not, in itself, do anything to establish their right

to parent; and in neither commercial nor altruistic full surrogacy – the objection goes – is there any need to transfer the right to custody from the surrogate to the intending parents.

Here I examine the most widespread justifications of the prevalent view that the genetic procreators are presumptive custodians. I do not oppose the view that a genetic connection is a decent proxy for serving the interest of the child, and this explains why a gamete provider ought to get custody when other parental qualifications are equal across all claimants. But in surrogacy they aren't, and the child's interest is more likely to indicate the full surrogate, *qua* gestational mother, as the holder of the right to parent. Both the genetic and the gestational connection, however, are mere proxies, and there may well exist (detectable) cases when a third party has, in fact, the right.

Therefore, a full treatment of the issue of surrogacy requires an analysis of the normative relevance of biological relationships between parent and child.⁶⁸ In particular, it is essential to clarify how appeal to the fact that one is a gamete provider can do some work towards establishing that person's right to parent the child developed from the gamete. Until recently, of course, gestational mothers were always also genetic procreators; but the separation of the genetic and gestational aspect of the relationship, enabled by artificial reproductive technologies, makes particularly salient the need for a normative analysis of the gestational connection in its own right. Some interesting lessons can be learned by looking at its significance.

I said that on a fiduciary account of parenting it is the child's interest that establishes who has the right to control their lives, but so far I said nothing about how to determine the first acquisition of custody – that is, what considerations are relevant to identifying the person who has the right to parent a newborn. The general practice, across places and times, is to grant custody on the basis of the genetic or gestational connection. (As well as, in many legislations, on the basis of being the mother's husband.) This is what makes surrogacy

intelligible, as a subsidiary practice of granting first custody to those designated by biological parents. It is far from obvious that the general practice of granting custody to genetic parents is *always* in the interest of the child, and hence legitimate; it is even less obvious that, if the general practice is justified by appeal to the child's interest in being parented by her procreators, the subsidiary practice of surrogacy can be justified.

My child-centred view is not inimical to a presumptive right to rear one's biological baby.⁶⁹ I look at child-centred appeals to the moral relevance of genetic connections between parents and children and then examine the prospects of gestational connections to justify the right to custody. The overall conclusion is that, in some cases and other parenting qualifications equal, it is the surrogate mother who has the right to custody even in full surrogacy with the gametes of intentional parents. If so, such instances of surrogacy, too, turn out to be attempts of transferring of the right to parent – the practice that I have criticised in the previous sections as illegitimate.

V.1. Child-centred appeals to genetic connections and the right to parent

The assumption that people have a default right to rear their genetic children is probably one of the most widespread moral beliefs. But many attempts to make sense of it are incompatible with a child-centred account of the right: by appeal to bodily self-ownership⁷⁰ or to a belief that children and parents are not fully separable.⁷¹ Others believe that people have an autonomy right to pursue parenthood with a body part that they own.⁷² But if children's moral status is such that their interests are as weighty as adults' interests, then the pursuit of parenting cannot be protected by a claim to autonomy. Parent-child relationships involve control over the child, who cannot consent; hence, parenting is justified, when it is, as necessary for the protection of the child's interest, not required by the protection of the adult's interest in pursuing their conception of a good life.

More promising justifications of genetic procreators' presumptive right to parent have to do with the child's interest. Not all of these views, however, are successful in defending their intended goal, which is to justify the initial allocation of custody to genetic procreators.

David Velleman advanced the following child-centred argument, popular amongst philosophers. As he notes, many individuals raised in closed adoptions, or whose procreation involved anonymous gamete donation, spend a significant amount of time, energy, and money in search of their genetic procreators. Velleman thinks that the strong desire of which such efforts are indicative is explained by an important interest in self-knowledge that only close acquaintance with one's genetic procreator can satisfy. On this view, knowledge of our genetic procreators plays a crucial role in our identity formation: close acquaintance to our immediate kin provides us with a broader context within which to create meaning about our life than one could have in the absence of such knowledge. It is like having a special mirror that lets us understand and explore possible versions of ourselves. Velleman believes that an interest in close acquaintance with our genetic procreators is so weighty that it is morally wrong to bring into existence a child *via* gamete donation, and concludes that "other things being equal, children should be raised by their biological parents."⁷³ Some resist even the claim that acquaintance with one's genetic procreators is necessary for the satisfaction of the putative interests in identity-formation and self-knowledge.⁷⁴ But even if Velleman's thesis is right, it doesn't show that children's interest requires that genetic procreators raise them. Rather, it entails a child's right to (opportunities to) know, in a face-to-face context, the genetic procreator, and to have access to family stories. This can surely be achieved by recognizing and enforcing a duty of genetic procreators to make themselves available, in person, to their offspring, as well as by requiring gamete donation to be non-anonymous and adoptions to be open. While fully child-centred, and in this sense a good candidate for a proper account of the right to parent a particular child, Velleman's argument doesn't entail

anything as strong as a right of the genetic procreator to control the life of the child in virtue of the child's interest in close acquaintance with the genetic procreator.

Another child-centred argument, defended by Melissa Moschella,⁷⁵ starts from the premise that genetic procreators and their children stand in a personal relationship generated by the genetic connectedness itself, a relationship the preservation of which is in the child's interest. The relationship is supposedly personal because our genetic make-up is, according to Moschella, essential to our identity; this gives the relationship a bodily aspect. But although the relationship is "bodily" (thanks to the genetic connection), it doesn't necessarily involve physical closeness. Moschella also believes that the genetic procreator's love is especially valuable to the child, and from this concludes that genetic procreators have a non-transferable duty to love the child, which usually implies a non-transferable duty to love and raise the child. Should another person take over the parental role, this would involve discontinuing the relationship between procreator and child. The genetic procreator can fulfil their duty, which is non-transferable, only if they have the right to raise the child. To the extent to which the view has appeal, it does not entail its conclusion. It is not clear why a relationship that is not embodied, even with someone who played a major causal role in determining one's identity, can be called a *personal* relationship. After all, the genetic procreators and the child may have never been in any kind of physical contact; and (hence) there is no assumption of an *emotional* attachment being formed. For the same reason, it is unclear why discontinuing the relationship should have a negative emotional impact on the child. Moschella indicates the potential worry that the child may feel rejected by her genetic procreators. I think such concerns should not be dismissed. But how likely feelings of rejection are will, in part, depend on background social expectations. Moreover, even granting Moschella's worry, at least in some cases other people are so much better than the child's procreator at entering an intimate relationship with the child that, all things considered, the child will be emotionally

better off with them even if the discontinuation of the “bodily”, but not physical and in no way attached, relationship with the parent has somewhat offset the emotional interests of the child. Third, and more importantly, her conclusion that the genetic procreator has the right to parent does not follow, for the same reason as in the case of Velleman’s argument. A genetic procreator can love the child they procreated and fulfil some of her emotional needs even without being the child’s custodian. At most, the child’s interest in having a relationship with her genetic procreators indicates that just childrearing arrangements will encourage genetic procreators to be part of the child’s life in a loving capacity.

A promising account of how genetic connections are relevant for holding the right to custody, then, must fulfil two desiderata:

(a) it should be child-centred, i.e. explain why somebody, in virtue of being a genetic procreator, is more likely than other individuals to serve the child’s interests;

and

(b) it should explain why the genetic connection matters in a way that is essential rather than peripheral to the fiduciary parental role – that is, explain how the genetic connection increases the likelihood of a feature of the parental relationship that is necessary to exercise control rights in the child’s best interests.

Neither being the only person who can help the child gain important information about herself, as in Velleman’s view, nor being the only person who can give the child a unique kind of love, as in Moschella’s theory, will do, because none of these features is necessary to enable the parent to serve the child’s interest in a successful relationship with her authority figure. This is not to deny that both features *can* contribute to the quality of parenting, and therefore to singling out a genetic procreator as the best available parent in specific cases. I now turn to the strongest argument in favour of the claim that genetic procreators *in general* have a presumptive right to parent on grounds of children’s interests.

It is widely held that children have a powerful interest in being raised by their genetical procreators because, in virtue of this connection, genetic procreators are more likely than genetically unrelated adults to bond with their children and to display the deep and selfless love that motivates good parents.⁷⁶ If this empirical claim is correct, it goes a long way to explain why genetic procreators are presumptive custodians: to effectively direct a child's life for her own good one needs to have a good, loving relationship to the child. One of children's main interests, of course, is in being loved, and effective custodians are the adults who are most present in the life of a child, especially when the child is young. They are therefore best placed to provide children with the love they need. Further, a loving relationship with the child facilitates (and, perhaps it conceptually requires) knowledge of the child's needs. Finally, it is plausible that children find it easier to trust and obey parental figures in the presence of mutual attachment. It then looks like one requirement for a competent custodian is to be loving, where love partly consists in attachment to the child. Note, however, this view picks out more individuals than genetic procreators as presumptive custodians, other things equal: the twin brother of a genetic procreator may indeed have the same grounds for holding the right!

I don't take a stand on the likelihood that genetic procreators will bond with their children quicker, or better, than other prospective parents. Some philosophers think this thesis warrants high credence and point to studies finding that children are at significantly higher risk of abuse by their adoptive than by their genetic procreators.⁷⁷ But the relevance of these studies is unclear. First, there are many confounding factors that could explain why adoptive parents abuse more than non-adoptive parents do,⁷⁸ factors which are difficult if not impossible to isolate. Second, the studies do not look separately at genetic and gestational procreators, which makes it hard to conclude whether the genetic or the gestational connection is responsible for the lower levels of abuse in genetically related families. Third,

other studies conclude that the rates of abuse in adoptive and foster families is very low, at least in the USA and Canada⁷⁹ and that biologically related parents are more likely to abuse children than adoptive parents.⁸⁰

In any case, the genetic connection is clearly neither necessary nor sufficient for parental love as demonstrated by the existence of bonded and loving adoptive parents and of unloving genetic procreators.⁸¹ So all that the thesis under examination here seeks to establish is not *actual* bonding between genetic procreators and their children but only its higher than average *likelihood*. But, as David Archard observes,⁸² the mere likelihood of bonding has much less weight in establishing the right than does actual bonding.

If genetic procreators really are, other things equal, more likely than genetically unrelated individuals to bond with, and love, their child, this is a reason for them to gain custody when all of those who claim it would otherwise make equally good parents of that child. But this is not to say that genetic procreators automatically acquire the right to parent merely by dint of their genetic relationship to the children; genetic procreative relatedness is only a proxy. And, so, in cases of full surrogacy, intending parents who provided the gametes don't automatically have the right to parent the newborn. First, there is no reason to assume that parents better than the intending parents aren't sometimes available. It is possible that some prospective custodians would make better parents for the newborn than the intending parents on grounds other than likelihood to bond. Mere likelihood to bond may not cut sufficient ice in favour of the intending parents, at least in some cases, thus making the latter less good, all things considered, than alternative custodians. Second, if the surrogate mother seeks custody, her case can be stronger than the intending parents' case *on the same count*, that is, with respect to fulfilling the child's interest in forming a loving relationship. Or so I argue next.

V.3. Appeals to the gestational connection

In past work, I have defended the claim that, typically, children come into the world being already part of an intimate caring relationship with their gestational mother.⁸³ To some extent, the relationship is based on the gestational mother's emotional responses to her pregnancy: anticipation, planning, hopes, imagination and projection, but also anxiety and doubt. But the physical, embodied, nature of pregnancy, including its burdens, is also part and parcel of the formation of the relationship.⁸⁴ The relationship is also created through bodily interactions that, at least for the gestational mother, often have meaning and become part of the history of her relationship with the baby.

I talk about a "relationship" because there is reason to assume some degree of mutuality. While we cannot know what is going on in the minds of newborns, we know that they react positively to the presence of their gestational mother, whose voice and heartbeat they can recognise during the last phase of gestation; and newborns respond preferentially to their gestational mother, physical contact with whom regulates the baby's hormone levels, temperature, metabolism heartbeat, and antibody production⁸⁵. Such findings provide some support for the plausible thesis that the bodily connection between newborns and their gestational mothers has at least a rudimentary psychological counterpart on the side of the newborn. They also sit well with the claim (possibly speculative, but, I think, plausible) that physical proximity facilitates attachment in creatures like us – that is, in a mammalian species.

Both the child and the parent have an interest in maintaining an intimate and caring relationship; then, if gestation is the context in which such a relationship starts, there is a good *pro tanto* reason for the gestational mother's claim right to the protection of the relationship. The relationship need not be custodial in order to be protected, but in cases in which other prospective parents are no better than the gestational mother on other counts, the

fact that she is already attached (when she is – see below) makes her the best available custodian. My main argument has the following shape:

P1. The right to parent is held by the best available custodian.

P2. Gestation usually generates an intimate relationship between gestational mother and newborn, hence it is a good proxy for the existence of parent-child attachment.

P3. It is in the best interest of the child to be reared by competent parents who are already attached to the child.

C1. From P1, P2 and P3, gestation generates a *pro tanto* reason to assign custody to gestational mothers, when they would make no worse parents than other adults willing to parent the baby, in respects other than actual attachment.

I also advance a secondary argument, whose full relevance will become clear in section seven:

P4 Individuals have a right to continue their relationships unless (a) one of the parties does not consent to the continuation of the relationship or (b) the continuation of the relationship sets back the interests of parties that lack the power to consent.⁸⁶

C2. From P2 and P4, gestational mothers whose relationship with the newborn does not set back the newborn's interests have a right to continue the relationship.

If successful, the main argument explains the child-centred case for sometimes giving priority to the gestational mother over the genetic procreator with respect to the right to rear: namely, when other aspects relevant to the prospective custodians' competence are equal. The second argument explains why surrogates who have already established a relationship with the newborn, and association with whom is beneficial for the newborn, have the right to remain in a protected caring relationship with the baby they brought into the world.

The second premise of the first argument has been contested. Some of my critics wonder whether the newborn can have an interest in the maintenance of the relationship

between with her gestational mother.⁸⁷ It is true that, at birth, this relationship is, in some important respects, unlike any other intimate relationship between adults, or between a child and an adult (or another child.) The gestational mother sees the baby for the first time; the baby, being pre-verbal, can only show very little about her mental life and so it is difficult to know with any certainty how it relates psychologically with the mother. On the other hand, gestational mothers do report powerful caring emotions towards, and, often, attachment to, the baby with whom they have been, for several months, as physically intimate as it is possible to be; and, as noted, babies seem, at birth, to prefer their gestational mother to other adults. These considerations about the newborn's responses are also helpful in answering the challenge, raised by some, that what I describe as a bond is in fact a one-directional attitude of the mother, to be explained "as responses to social or cultural cues, rather than as evidence of a two-way maternal-fetal bond."⁸⁸

And yet, it seems very cruel – even inhumane – to separate newborns from their gestational mothers. This is especially so when the latter are unwilling, but perhaps it is cruel to the babies in all cases. The cruelty charge is best explained, I think, by the belief that a significant attachment is already in place. It is not difficult to see the appeal of this belief. The embodied aspect of the relationship may have a powerful psychological counterpart (which Caroline Whitbeck⁸⁹ noted is significant enough to help to debunk the myth of a mysterious maternal instinct.) Further, as Amy Mullin⁹⁰ observes, miscarriages late in a pregnancy tend to involve mourning, the depth of which is not plausibly explained by the loss of a mere hope, or personal project; more likely, the mourning is explained, at least in part, by the existence of attachment, at the same time physical and emotional, to the baby. And, while the newborn's perspective is much harder to fathom, it seems plausible that many months in the closest proximity that is physically possible generates a bond with the gestational mother. Note, however, that even if the attachment is non-mutual, the argument succeeds, because the

second premise states that newborns have an interest in being parented by someone who is attached to them – and hence has a stake in their wellbeing – whether or not the attachment is reciprocal. Admittedly, the presumption established if the attachment is non-mutual is very weak; but even a very weak presumption will do, since the aim is to establish that, at least in some cases of full surrogacy, parties seek to transfer the right to parent from the gestational mother to the indenting parents.

Moving on to the second argument, the claim is not that the relationship between newborns and their gestational mother is as developed as intimate relationships between older individuals. Yet, it is the most developed relationship that a newborn can possibly have, and, for this reason, it is worthy of protection. Facts about the complexity and richness of a relationship do not fully determine its relative importance for the individuals in the relationship. Compare, for instance, a rich friendship between two typical adults who are in close relationships with each other but also with several other adults, to the attachment between a cognitively impaired adult and her caregiver, who is the only person with whom the cognitively impaired adult has a relationship. The second relationship might be much less complex in terms of relational exchanges, and yet be at least as important to the wellbeing of the cognitively impaired adult as the first is to the typical adult's wellbeing. And, for this reason, it may also be worthy of protection, in virtue of its value to at least one of the individuals involved in it.

Another objection to my account is that it fails to respect the parity principle, stating that “any fact by virtue of which a woman laid claim to be a parent could also be a fact in virtue of which a man with equal merit could claim to be a parent, and vice versa.”⁹¹ Some find this principle important⁹² and it is sometimes claimed that any adequate account of parenthood must respect it. I fail to see the principle's appeal. I accept that it is unfair if, through no fault or choice of their own some individuals – in this case, men – have less easy

access to parenting. However, if parenting is a fiduciary role justified by appeal to the child's interests, then, like with other fiduciary functions, some adults qualify and others don't; it may well be that women and men are not equally represented in the two groups. It is tempting to explain the intuitive appeal of the principle itself by the geneticist assumption that children have two parents, one of each sex; but this assumption is hard to justify outside a view of childrearing that is both proprietary and relying on the traditional way of bringing children into the world. Be it as it may, I assume the greatest worry with the account that I provide is that it excludes men in general from access to parenting; but the account certainly doesn't do this, at least in the version provided in this book, for several reasons. First, the existence of a bond is a merely *pro tanto* reason to claim custody; it can be defeated. Second, the account does not presuppose that children should have only one parent; most likely, it is better for children to have several. And, if so, it should be possible for prospective parents to acquire the right by means other than having a bond with the newborn (assuming the gestational bond is exclusive).

A final worry with my argument is its lack of universality: not all gestational mothers will bond to their babies during pregnancy; some don't even know that they are pregnant, or are unwillingly pregnant and resent their pregnancy, and possibly the foetus/newborn. (It is an interesting question whether they can be attached to their baby even while harbouring resentment.) Perhaps gestational procreators who are not bonded at birth cannot claim the right to parent their newborn on grounds of an existing attachment; this is compatible with my account, and hence a reason to qualify, rather than reject, it.

Such a conclusion may, however, be too quick if the newborn's *own* level of attachment to the gestational mother is independent from hers. The newborn's attachment alone, if sufficiently significant, can provide a powerful child-centred reason for the gestational mother's right to rear. In any case, gestation, too, is an imperfect proxy for the

existence of a mutual intimate relationship. But assume that an actual bond between gestational mothers and newborns exists at least as often as it is merely highly likely to develop between genetic procreators and their children. Or, alternatively, assume that the actual bond exists less often, but that the likelihood of bonding between gestational mother and her baby after birth is no lesser than the likelihood of the genetic procreator's bonding with the baby. (That is, even in cases when the gestational mother is not also a genetic procreator.) If so, an "if" highly qualified by empirical facts, appeal to bonding provides better overall support to the gestational mother's presumptive right to custody than to the genetic procreator's right – and, again, assuming the two parties are otherwise equally competent prospective parents. Sometimes, of course, the two parties will not be equally competent prospective parents; but the argument is only meant to show that the gestational connection provides one advantage over the genetic one when it comes to likely qualifications of parental competency vis-a-vis a particular newborn. The genetic connection, by contrast, provides no such advantage.⁹³ It is also worth noting that in cases when a surrogate changes her mind and desires to parent the child whom she carried, appeal to some level of attachment developed during gestation is a plausible explanation of the desire, as well as a reasonably good guarantee that bonding is actually present.

V.4. Creatures of attachment: the general impermissibility of surrogacy agreements

The best case in favour of the genetic procreators' right to parent is the higher than average likelihood that they will bond with the child. Attachment in general, I assume, is of great instrumental value to us, and especially so during childhood. But, since human beings are, for evolutionary reasons, "hard-wired" to seek attachment, bonding has also non-instrumental value: it is, in itself, highly satisfactory, at least when it doesn't take an unhealthy form. Once formed, the loss of an attachment is very painful. Moreover,

attachment between parents and children is necessary if the parent is to optimally serve the child's interest. All but the last of these considerations provide a powerful presumption in favour of organising childrearing in ways that harness the (putative) higher than average chances of bonding that adults have with their genetic offspring. Yet, all these considerations provide even better support for organising childrearing in ways that do not threaten the *actual* bonding that is likely to develop during gestation.

In the vast majority of cases, gestational mothers are also genetic procreators, so considerations of the former's actual bonds and considerations of the latter's likelihood to bond with the child do not support different practical requirements. But in other situations, and in particular in surrogacy, the two considerations do result in different practical guidance. Where does this leave us with respect to full gestation with the intending parents' gametes – the easiest form of surrogacy to justify on a child-centred account? I conclude this section by noting that intending parents, *qua* genetic procreators, cannot automatically claim the right to parent the newborn by pointing to the best argument in their favour, namely higher likelihood to bond with the baby; sometimes such a bond already exists between the newborn and the gestational mother. If it is in the best interest of the child that it be reared by the gestational mother even if *she* isn't attached to the child, but merely in virtue of a non-mutual bond that the newborn has formed, the cases may be indeed numerous. In all these cases, where the gestational mother has the right to custody, surrogacy could only be understood as an attempted transfer of the right; as I argued above, such transfer cannot be legitimate.

This of course is not to pass a judgement about how often gestational mothers will *in fact* have the right to rear their newborn. Such an overall conclusion depends on too many factors: not only those concerning actual or likely bonding, but also other aspects that determine parental competence and, obviously, on the existence and attributes of other willing prospective parents for the child. No doubt that in some, possibly many, cases the

intending parents *will* be the best available custodians. The important point is that we have no reason to assume that they will always be, and that the surrogate herself will never be, the best available custodian. And therefore there is no reason to assume that intending parents in cases of full surrogacy always have the right to parent *qua* genetic procreators, and hence that the right needn't be, at least sometimes, transferred from gestational surrogates to them.

An account that gives attachment such a crucial role in acquiring the right to parent invites the question of whether it matters, for custody allocation, whether the attachment between the child and the adult who seeks custody has been wrongfully created. If it does matter, defenders of surrogacy could try another line of argument: perhaps surrogates are under a duty not to form such attachment, which would in turn weaken their claim to a right to parent their newborn. I resist this line of reasoning, and in doing so I oppose the belief, assumed as evident by some bioethicists, that the wrongful creation of an attached relationship with the child implies that the adult lacks a right to custody. Steinbock, for instance, writes (as it happens, in the context of discussing the Baby M surrogacy case): "We certainly would not consider allowing a stranger who kidnapped a baby and managed to elude the police for a year to retain custody on the grounds that he was providing a good home to a child who had known no other parent."⁹⁴ I think this is wrong. It is of course likely that the kidnapper could be disqualified as the best available custodian by various features that are strongly correlated with one's tendency to engage in crime. But, assuming this wasn't the case, and the kidnapper really was the best custodian, the mere fact that the (presumably, loving) relationship between the kidnapper and the child came about as a result of wrongdoing does not speak against the kidnapper's right to continue rearing the child. Nothing, in fact, could speak against that other than the child's own interest.⁹⁵

The main objection to all forms of surrogacy that I provide here has to do with the general lack of normative power to privately transfer a privilege. Before concluding this

section, I provide an additional rebuttal to the potential objection sketched above, one which contains a very different type of criticism to surrogacy. A practice which encourages gestational mothers not to bond with the babies they carry is one that, I submit, we have reason to reject as inhumane because it is generally disrespectful of, and possibly detrimental to, human beings' powerful interest in emotional attachment. The possibility that bonding happens anyway, as suggested by cases in which surrogates change their mind and try to rear their newborn in the face of adversity⁹⁶ or the possibility that the newborn has some attachment to the gestational mother independently from her psychological states, suggest that discouraging the formation of the bond can also be futile. But leaving futility aside, if attachment has great value for human animals, and if it cannot be taken for granted even in adult-child relationships – where it is most valuable – it is objectionable to systematically discourage it. This, I take, is one of the strongest objections that feminists raise against surrogacy, for instance when they argue that, in Anderson's words, "[t]he demand to deliberately alienate oneself from one's love for one's own child is a demand which can reasonably and decently be made of no one".⁹⁷ This grievance against surrogacy, is not (or not only) that it demands of surrogates something that many find very difficult to do, i.e. to remain emotionally detached from the baby. It is also that it requires surrogates to deny, or at least disregard, in themselves, a tendency that is a valuable expression of one's humanity. To the extent to which it gives gestational mothers reason to resist being emotionally involved in their labour, the practice of surrogacy not only fails to promote or honour the value of attachment, but it is straightforwardly inimical to it.

VI. HARM TO CHILDREN? THE CHALLENGE FROM THE NON-IDENTITY PROBLEM

The most powerful rebuttal of a child-centred criticism of surrogacy would show that the following claims are jointly true: (a) the practice does not harm children; and (b) lack of harm to children of surrogacy is sufficient to show they cannot be wronged, and to make the practice morally permissible as far as their treatment is concerned. I raise some doubts that (a) is true, then reject (b) and, with it, the challenge.

(a) is open to interpretation, because it requires a specification of “harm”. I cannot provide here a full treatment of this difficult matter, but I examine a few obvious possibilities before I conclude that the most plausible allegation of harm concerns the respect interests of children of surrogacy, not their wellbeing interests. “Harm” may be understood non-comparatively, as a state that is significantly bad for the harmed agent in absolute terms;⁹⁸ on such an account of harm, it is implausible that surrogacy as such is harmful to the children born through this practice. Even if the speculative claim that children tend to suffer when they know that their gestational mother has willingly given them up was correct (and if withholding the information is impermissible), such suffering would have to be significant, and maybe impairing,⁹⁹ in order to qualify as “harm” in a non-comparative sense.

“Harm” is more usually employed as a comparative term: an individual is harmed if their wellbeing is set back relative to a threshold. One may propose the following way to argue that children of surrogacy can be harmed: namely, to apply a counterfactual notion of harm to the decision to separate the child from the surrogate. The proposal is that surrogacy harms children relative to how they would do if raised by their gestational mother. If the correct account of harm was counterfactual, and people were to respond with emotional suffering at the separation from their gestational mother, such suffering could qualify as harm even if it did not amount to a particularly debilitating state. Above I said that newborns are

likely to have an interest in continuity of care with their gestational mother, especially if the latter is attached to them. There is also some evidence that separation from the gestational mother has a negative impact on children's adjustment,¹⁰⁰ which I take to be different from freedom from emotional pain. However, it is hard to establish that children of surrogacy incur harm in a counterfactual sense, *all things considered*. Continuity in care, adjustment, and freedom from suffering are important interests, but a lot more would have to be shown in order to establish that surrogacy is *always* harmful to children in the sense considered here. Maybe other important interests of children are better served if they are raised by the intending parents. Presumably, typical intending parents are highly motivated, and prepared, to raise the child while the surrogate, who wasn't planning to become a parent, is more likely not to be so. Most plausibly, children of surrogacy would sometimes be better off with their gestational mothers, sometimes with the intending parents and sometimes with others who are willing to raise them.

Assume it could be shown that surrogacy harms children in *this* comparative counterfactual sense, i.e. when the considered alternative is for them to be raised by their gestational mother. Many will find the above proposal unconvincing, because they object to taking the transfer of custody as the baseline of comparison, rather than procreation. If transferring custody was wrong, people would have a duty to refrain from surrogacy practices. If they acted on the duty, surrogacy agreements would not exist. And so, the children in question would *not* be raised by gestational mothers; rather, they would not exist at all. In this case, neither their emotional suffering, nor discontinuity in care, nor the negative impact on their adjustment can constitute harms in a counterfactual sense – unless they make the children's lives not worth living, which, I assume, they usually don't. In a counterfactual world without surrogacy, those children would never come into existence. But only if one's life goes so badly for one that it is worse than non-existence can that person be said to be

harmed relative to not being born. This aspect of the non-identity problem seems to raise a formidable challenge to a child-centred criticism of surrogacy:¹⁰¹ that it doesn't harm surrogated children relative to a world without surrogacy, in which they wouldn't exist. In other words, the challenge is that (a) is true on both the non-comparative and the comparative account of harm.

Against this challenge, I now explain why surrogacy is indeed wrong, and why it is likely to be wrong because it wrongs the children who are subject to it. Note that the challenge is real, rather than apparent, only if it is also true that (b) lack of harm to children is sufficient to make the practice morally permissible as far as the treatment of children of surrogacy is concerned. I don't believe (b) is true, and therefore I don't think that appeal to the non-identity problem can rescue the legitimacy of surrogacy. Here is an argument that, I hope, will appeal to most readers: If (b) were true, the non-identity problem would also make it formidably difficult to establish the illegitimacy, on child-centred reasons, of many other procreative practices which we believe are wrong. This is because a legal permission to engage in what it is generally recognised as child mistreatment can be necessary as incentives for certain instances of procreation. For example, there may be people who would only have children, or would have more children, if they were allowed to exploit them economically. Another, more extreme case, is discussed by Gregory Kavka:¹⁰² a couple enters a contract with a wealthy man, whereby the former bind themselves to procreate and surrender the child to the latter for a large sum of money, under the understanding that the child will be a *de facto* slave for the couple. Slavery doesn't make this child's life as bad as not to be worth living, and therefore the adult parties' agreement doesn't harm (in the comparative sense of harm specified above) the child, who would not have existed in the absence of the contract. But it seems obvious that the contract is morally wrong. If so, then (b) is false. It may be tempting to object that, in the slavery case, what makes the contract wrong are the non-comparative

harms that the child suffers as a slave; yet, as discussed above, plausible accounts of the wrong of slavery identify it as wrong even when the slaves are treated well by their benevolent masters who don't impose non-comparative harms.¹⁰³ Similarly, the economic exploitation of children would be wrong even if it didn't involve non-comparative harms, and even when needed as incentive for their procreation. Both cases are wrong because of how the children are being treated; the same is true of surrogacy.

As this analysis shows, the fact that children of surrogacy can have lives not only worth living but also free from non-comparative harm doesn't preclude all child-centred complaints against surrogacy – not unless one is willing to concede that enslavement, or economical exploitation of a child whose procreation was exclusively motivated by the prospects of enslavement or exploitation also involves morally permissible treatment of that child.¹⁰⁴

I assume that most readers agree that the implications of (b) are widely implausible. Yet, a full account must not only reveal the costs of accepting (b), but also explain what makes all these cases of morally impermissible procreation wrong. One possibility is that they are wrong without being wrongful – for instance, it may be wrong to bring about suboptimal states of affairs even when nobody's interests are being set back in doing so¹⁰⁵ if so, all the cases under discussion involve wrong actions when they make the world a worse place, all things considered. This may be true. But there is a complementary explanation of the wrongness of these cases, one that claims that children of surrogacy are themselves wronged even if they are not harmed.

People have grievances against unjustified set-backs not only to their wellbeing interests, but also to their respect interests. Enslaved people in general have grievances even when the masters are so benevolent as to not set back any of their wellbeing interests (relative to either pre-enslavement or non-enslavement). Similarly, a person can have a grievance

against economic exploitation even if the alternative to it is worse with respect to the fulfilment of her wellbeing-interest – for instance, because she lives in dire poverty and she would benefit from exploitation. The fact that slavery or exploitation wrongs those subjected to them doesn't seem to depend on whether, in the absence of these practices, they would have never come into existence: If a woman is only permitted to carry to term and give birth to a child only because that woman's masters want another life-long slave, we think about that woman's child as a *victim* of slavery, that is, someone who is wronged by the practice. If, as I claimed, the private transfer of custody sets back a child's respect interests, it is wrongful even when it doesn't negatively affect her wellbeing interests. In this case, children's grievance against surrogacy – or economic exploitation, or slavery – does not concern their procreation as such, but their treatment once they exist, namely the settling of their custody by means of a private agreement. The very bringing into existence of children of surrogacy is not wrongful; the allocation of control rights over them after birth is.

It is worth noting two ramifications of this rebuttal of the non-identity challenge. First, on one view about what makes life go well for people, being subject to injustice can be bad for them.¹⁰⁶ If this view is correct, then having one's respect interests set back is a form of harm and (a), too, turns out to be false. Accepting this could show that children of surrogacy are harmed in one respect; but it would be a long shot to show that the harm makes their lives not worth living, and so that surrogacy imposes on them a net harm. Second, some accounts of the permissibility of procreation make it dependent on the intentions that motivate people to have children.¹⁰⁷ Such accounts could explain why procreation that wouldn't take place in the absence of surrogacy, and not merely the treatment of children of surrogacy once they exist, is wrongful. Since none of these ramifications is necessary to indict surrogacy as impermissible, I need not commit to any of them here.

To conclude this section, let me put its argument into a wider perspective. Procreation is, in itself, a morally suspect activity because of the harms it imposes on non-consenting persons.¹⁰⁸ A child-centred account may have particular difficulties justifying procreation, since simply invoking the ways in which it is good for procreators or third parties seems insufficient. More likely, procreation is all things considered justified by the benefit to procreatees of being alive. Or, alternatively, it is merely excused by the bads of a world with no children in it,¹⁰⁹ for instance the horror of the imminent extinction of humanity.¹¹⁰ Assigning custody, i.e. control over persons, to procreators, by default, introduces another layer of moral risk, given that one's genetic and gestational relationship with a child is a very imperfect proxy for the quality of that person's parenting. Perhaps we simply lack a better proxy, in which case relying on biological connections is overall justified. But existing surrogacy practices compound the moral reservations that one may reasonably have about procreation as such and about the automatic granting of the right to parent to procreators. Surrogacy, I argued throughout this chapter, is a practice whereby some people (intending parents) gain custody over other persons (the child); sometimes they gain custody because the initial holders of the moral right (gestational mothers) have these rights as a result of two morally risky practices (procreation and automatic allocation of the right to parent to procreators) and attempt to sell or gift those rights. At other times, when the intending parents are the best available, they gain custody in ways that are not overseen by any authority. This makes surrogacy extremely difficult to defend. The most powerful child-centred defence, in the face of these worries, is that, without surrogacy, the children over whom custody rights are being transferred would not exist at all. If the benefits of procreation are so great that they can justify, or at least excuse, the imposition of significant risks on non-consenting persons, one may think they can also render surrogacy permissible when the alternative is non-existence. And yet, I showed, this consideration doesn't dispel the child-centred objection to

surrogacy,¹¹¹ unless one is also willing to accept as permissible a range of universally-indicted practices such as the bringing into existence of children predestined to economic exploitation or slavery. For those unwilling to bite such bullets, an account of why surrogacy does after all wrong children is available: not because it (necessarily) sets back their wellbeing, but because it disrespects them.

VII. CONCLUSIONS: A RESPECTFUL AND HUMANE FORM OF SURROGACY

Many people who cannot procreate wish to become parents; I believe that society should provide them with adequate opportunities to fulfill this desire, if they would make adequate parents. Adoption is one venue into non-procreative parenthood but, for various (and potentially good) reasons, some people dis-prefer it. In particular, many people desire to parent genetically-related children. I conclude this chapter by explaining how, and the extent to which, a child-centred account of childrearing can accommodate such preferences. Elements of this blueprint (in the broadest brush) of a radically reformed sort of surrogacy can be more or less easily grafted on the current surrogacy practices.

For everything I said here, it may be possible to defend a practice whereby women gestate “for others” – that is, without an intention to acquire custody over their newborns. The practice would be open to women willing to either gift, or sell, their gestational ability, as well as to intending parents, and could allow the latter to provide gametes in the hope, but with no guarantee, that they will gain custody over the child developed from some gametes. If genetic connections really are serving children’s interest, these hopes would not be unfounded but, as I explain below, they would be merely reasonable hopes, not expectations, to obtain custody.

This practice would have three features that make it radically different from surrogacy as we have it now. First, any children born in this way would automatically become the

charge of the state when the surrogate mother relinquishes custody¹¹² – and, as I argued in section five, the surrogate mother *will* in some cases be the first holder of the right, namely whenever she would make the best possible parent to the child.

Further, custody over a particular baby would go to the best available custodian, and therefore not *automatically* to the intending parents, not matter how intensely they hope to parent her, and in spite of having contributed one or both gametes to her procreation. In some cases, possibly a majority, either a strong desire to parent a particular newborn, or a genetic connection with the baby, or both, would make intending parents the best custodians of their genetic offspring. When surrogates changed their mind about wanting to raise the child themselves, they too would be considered as potential parents and, if my argument in section five is correct, in many situations they will indeed have a right to custody. Such situations could occur if the surrogate's already formed attachment recommends her as parent, and the genetic and gestational mother are otherwise similarly likely to be good parents. In any case, the interest of the child would have the last say in custody allocation – making the practice respectful towards the child – and no legitimate expectations could be formed on anybody's side (intending parents, the surrogate or any third parties) that they will become custodians. This feature would, indeed, make a dent in intentional parents' own interests, but a well motivated one. As a result, the practice wouldn't involve contractual expectations, enforceable or not, that the gestational mother refrains from attempts to gain custody. Nor could there be any presumption that bonding during pregnancy is objectionable; the form of surrogacy that I envisage as legitimate would, in this respect, be humane. What, if anything, would surrogates who have changed their mind owe intentional parents for having used their gametes is a downstream question, requiring further investigation.

Finally, this practice would protect any bond that the gestational mother had established, during pregnancy, with the child she carried, and so it would ensure the

continuation of the relationship between newborn and the gestational mother, whenever this is in the interest of the child. This of course is not the same as claiming that attached gestational mothers always have a right to custody; they don't if, in spite of such bond, other individuals would make all things considered better custodians. But while surrogates lack the right to parent in such situations – that is, they lack control rights over their newborn – they do have the right to maintain a relationship that is beneficial for the child. If we were to become reasonably sure that children in general have a powerful interest to remain in some sort of caring relationship with their gestational mother, then children may turn out to have a right to the protection of the relationship that is independent from the gestational mother's interests; this possibility raises another set of complications that are far beyond the scope of the present discussion. Maintaining the relationships could, in practice, justify a legal right to visitation. Since the right is partly grounded in the *child's* interest, and since the child cannot claim the right, let alone secure the means to exercise it, courts may require that intending parents and surrogates jointly ensure the practical conditions necessary to protect the relationship between the child and her gestational mother. Such constraints may be easily respected in cases of surrogacy relationships between, say, neighbours, and likely to rule out most international surrogacy.

In spite of its radical revisionism, this proposal, I hope, does chime in with our sense that surrogacy is not a morally neutral kind of work. Moreover, this reformed surrogacy would be quite similar in outcomes to some aspects of the existing practice as far as many surrogates and intending parents are concerned, albeit with a suitably expanded and more robust rights for surrogates to be involved in the child's life. Perhaps, then, my positive view, which I could only sketch here in the barest of details, captures the core of what people *should* want out of surrogacy.

When custody is allocated to individuals other than the genetic parents – in adoption as well as in a radically reformed surrogacy – one question is what remaining rights and duties do genetic parents have, if any. It is generally believed that genetic parents, when they procreate intentionally and avoidably, incur significant duties of care towards the child – if not duties to directly provide for the child, then at least duties to ensure that the child is well provided for.¹¹³ Lindsey Porter argues that one cannot fully divest oneself of such duties¹¹⁴. One can permissibly put a child up for adoption, for instance, in which case others will become primary duty-bearers in relationships for the child; but, should the adoptive parents fail to care for the child adequately, procreators would be under a duty to make up for such failure. Others have suggested that procreators have a right to ensure that the duties of care towards the child, which they incur in the first instance, as procreators, are discharged.¹¹⁵ If either of these accounts is correct, then genetic parents, too, have a right to be part of the child's life to a sufficient extent to be able to gauge whether her upbringing goes wrong, and to step in and discharge their procreative duty in ways compatible with the child's overall interest. This applies to genetic parents who contributed gametes in the hope that they will, *qua* best available parent, gain custody; it may also apply to gamete donors who never had an intention to rear – but, of course, a separate discussion is required to establish this.

I remind the reader that surrogacy as we have it is driven by many adults' wish to parent genetically related children. My criticism of surrogacy is not dismissive of this desire. But if people really have a powerful interest in raising children developed from their own gametes, interest that is significant enough to warrant societal support, then we should also look favourably to the claim that alienation from their genetic parents can go against children's interest. The interest may be merely subjective, to be understood as a desire of the child – or future adult – that must be taken as important as individuals' desire for genetically related children. That is, at least, in the absence of an account explaining why adults' desire in

genetic children is significant, but children's desire to be acquainted with their genetic parents isn't. Or it may be an objective interest – for instance in self-knowledge, along the lines suggested by Velleman. If either of these explanations is correct (and I remain agnostic about this matter), a full account of permissible procreation with the help of gestational surrogates, must reflect children's interest in having their genetic parents in their lives in some capacity.

I end with the hope that my readers now see why existing surrogacy wrongs children by allowing adults to privately decide on their custody. In doing this, it fails to respect children's moral status, which requires all control over them to be guided by their, and not by their (potential) custodians', interests. Unlike most common criticism of surrogacy, mine does not find altruistic versions any better than commercial ones – unsurprisingly, since I am concerned with the child's interest. And, unlike other criticism, it is not in itself inimical to the use of artificial reproductive technologies, including help from surrogate mothers. Gestating with the intention that others raise the children may be morally permissible; “commissioning” children is not.

¹ I am grateful to David Archard, Teresa Baron, Zlata Bozac, Paula Casal, Matthew Clayton, Andree-Anne Cormier, Daniela Cutas, Axel Gosseries, Sabine Hohl, Connor Kianpour, R. J. Leland, Colin Macleod, Erik Magnusson, Tim Meijers, David O'Brien, Serena Olsaretti, Gregory Ponthiere, Adam Swift, Riccardo Spotorno, Christine Straehle, Isabella Trifan and an audience in Louvain-la-Neuve for discussions about the issues at stake, or written comments on previous drafts, or both.

² As well as other powerful interests; for the rest of this chapter I leave aside considerations about third parties' interest in childrearing.

³ I provide a defense of this, child-centred understanding of the right to parent in Anca Gheaus 'The Best Available Parent', *Ethics*, 131(3) (2021b), 431–459. (2021b). The argument of this chapter relies on a child-centred view of the right to parent; but some dual-interests accounts, such as that developed by Liam Shields, support the same conclusion that surrogacy is illegitimate because individuals lack a moral power to transfer custody at will. In 'Parental rights and the importance of being parents', *Critical Review of International Social and Political Philosophy* 22(2) (2019): 119–33.

⁴ Mary Warnock is a prominent critic, in *Question of Life: Warnock Report on Human Fertilisation and Embryology* (Oxford: Oxford University Press, 1984). Another one is Elizabeth Anderson, in 'Is Women's Labor a Commodity?' *Philosophy and Public Affairs* 19 (1990): 71–92. Advocates include Richard Arneson, 'Commodification and Commercial Surrogacy,' *Philosophy and Public Affairs*, vol. 21 (1992): 132–64 and Cecile Fabre, *Whose Body Is It Anyway? Justice and the Integrity of the Person*. (Oxford: Oxford University Press, 2006).

⁵ Anderson, 'Is Women's Labor a Commodity?'; Kajsa Ekis Ekman, *Being and Being Bought – Prostitution, Surrogacy and the Split Self* (Melbourne: Spinifex Press, 2013).

⁶ Warnock, *Question of Life*; Bonnie Steinbock, 'Surrogate Motherhood as Prenatal Adoption', *Law, Medicine &- Health Care* 16(1) (1988): 44-50; Arneson, 'Commodification and Commercial Surrogacy'; Fabre, *Whose Body Is It Anyway?*

⁷ Elements of surrogacy which have been proposed by Christine Overall, ‘Reproductive ‘Surrogacy’ and Parental Licensing’, *Bioethics*, 29(5) (2015): 353-361 and Andrew Botterell and Carolyn McLeod, ‘Licensing parents in international contract pregnancies,’ *Journal of Applied Philosophy* 33(2) (2016): 178-196.

⁸ Norvin Richards, *The Ethics of Parenthood* (Oxford: Oxford University Press, 2010).

⁹ Andrew Botterell and Carolyn McLeod, ‘Can a Right to Reproduce Justify the Status Quo on Parental Licensing?’, in S. Brennan, S. Hannan and R. Vernon, (eds.) *Permissible Progeny* (Oxford: Oxford University Press, 2015), 184-207.

¹⁰ For this view, see Matthew Clayton, *Justice and Legitimacy in Upbringing* (Oxford University Press, 2006) and Harry Brighouse and Adam Swift, *Family Values* (Princeton University Press, 2014).

¹¹ I am grateful to David O’Brien for encouraging me to clarify this.

¹² Warnock, *Question of Life*.

¹³ One possibility is that when the intention antedates the pregnancy, the child typically wouldn’t have existed but for the intention; this line of reasoning is addressed in section six, where I discuss the challenge from the non-identity problem.

¹⁴ Which doesn’t go without saying. See for instance David Benatar and David Wasserman, *Debating Procreation: Is It Wrong to Reproduce?* (Oxford University Press, 2015). I say more about the moral challenges raised by procreation in section six.

¹⁵ For a brief explanation of the will and interest accounts of rights, and of the Hohfeldian system of rights, see Leif Wenar, ‘Rights’, *Stanford Encyclopedia of Philosophy* (2020):

<https://plato.stanford.edu/entries/rights/>

¹⁶ Matthew Clayton, *Justice and Legitimacy in Upbringing*; Sarah Hannan and Richard Vernon. ‘Parental Rights: A role-based approach,’ *Theory and Research in Education* 6(2) (2008): 173-189.; Colin Macleod, ‘Parental Responsibilities in an Unjust World,’ in David Archard and David Benatar (eds.), *Procreation and Parenthood* (Oxford: Oxford University Press, 2010), 128–150, at p.142;

Norvin Richards, *The Ethics of Parenthood*; Brighthouse, Swift, *Family Values.*; Matthew Liao, *The Right To Be Loved.* (Oxford: Oxford University Press, 2015); Joseph Millum, *The moral foundations of parenthood.* (Oxford: Oxford University Press, 2018); Serena Olsaretti, 'Liberal Equality and the Moral Status of Parent-Child Relationships', in *Oxford Studies in Political Philosophy*, in David Sobel, Peter Vallentyne, and Steven Wall (eds.), 3: 58–83. (New York: Oxford University Press, 2017); Liam Shields, "Parental rights and the importance of being parents"; Tim Fowler. *Liberalism, Childhood and Justice. Ethical Issues in Upbringing* (Bristol: Bristol University Press, 2020).

¹⁷ In Anca Gheaus, 'The Best Available Parent' and *Child-Centred Childrearing*, book in progress. Other philosophers who hold a child-centred account of the right to parent include James Dwyer, *Religious Schools v. Children's Rights* (Ithaca: Cornell University Press, 1998); David Archard, *Children. Rights and Childhood*, 3rd edn. (Oxford and New York: Routledge, 2015); and Peter Vallentyne, 'The Rights and Duties of Childrearing,' *William & Mary Bill of Rights Journal* 11(3) (2003), 991–1009.

¹⁸ Some may worry that children's lack of (full) autonomy is incompatible with them having the same moral status as adults. If having the same moral status means having the same rights, this is correct. Here, however, I go with the more common assumption that adults and children are moral equals in the sense that they are right-holders, and that their equally powerful interests are equally protected by rights. For defences of the view that children are rights-holders see David Archard, 'Wrongful Life,' *Philosophy*, vol. 79 (2004): 403–20, and Samantha Brennan and Robert Noggle. 'The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice', *Social Theory and Practice* 23(1) (1997): 1–26.

¹⁹ For an extended version of this argument, see Gheaus, 'The Best Available Parent'. Hugh LaFollette makes very similar points in defence a scheme licensing biological parents in 'Licensing Parents,' *Philosophy & Public Affairs* 9(2) (1980):182–186.

²⁰ I try to dispel obvious worries that a child-centred view is implausibly friendly to changes of custody in Anca Gheaus, ‘Sufficientarian Parenting Must be Child-Centered’, *Law Ethics and Philosophy* 5 (2017): 189-197.

²¹ Gheaus, *The Best Available Parent*.

²² Millum, *The moral foundations of parenthood*.

²³ For defences of the view that the parental role is fiduciary see Dwyer, *Religious Schools v. Children’s Rights* and Brighouse and Swift, *Family Values*.

²⁴ For a very helpful treatment of children’s interests, see chapter 3 in Brighouse and Swift, *Family Values*.

²⁵ Gheaus, *The Best Available Parent*.

²⁶ Brighouse and Swift, *Family Values*.

²⁷ I argued for this view in Anca Gheaus, ‘Is There a Right to Parent?’, *Law Ethics and Philosophy* 3 (2015b): 193-204; Anca Gheaus, ‘Children’s Vulnerability and Legitimate Authority Over Children,’ *Journal of Applied Philosophy* 35(S1) (2018b): 60-75; Anca Gheaus ‘Child-rearing with Minimal Domination’, *Political Studies* 69 (3) (2021a): 748-766; and Gheaus, ‘The Best Available Parent’.

²⁸ Richards, *The Ethics of Parenthood*.

²⁹ Clayton, *Justice and Legitimacy in Upbringing*; Hannan and Vernon, ‘Parental Rights: A role-based approach’; Brighouse and Swift, *Family Values*; Samantha Brennan and Colin Macleod, ‘Fundamentally incompetent. Homophobia, Religion, and the Right to Parent’, in Jaime Ahlberg and Michael Cholbi (eds.), *Procreation, Parenthood, and Educational Rights Ethical and Philosophical Issues* (Routledge, 2017).

³⁰ Warnock, *A Question of Life* 1984, 45.

³¹ A worry raised by others – see Margaret Brazier, Alastair Campbell, and Susan Golombok (eds.). *Surrogacy: Review for Health Ministers of Current Arrangements of Payments and Regulation*. (London: Stationery Office, 1998).

³² Cecile Fabre flags this possibility, which she neither rejects nor endorses, in ‘Surrogacy’, in Hugh LaFollette (ed.), *The International Encyclopedia of Ethics* (Wiley & Sons, 2015).

³³ See Catherine Lynch, ‘Putting Children First: What Adoption Can Teach Us About Surrogacy’, in Marie Josephe Devillers and Ana-Luana Stoicea-Deram (eds.), *Towards the Abolition of Surrogate Motherhood*, Spinifex Press, 2021.

³⁴ Elizabeth Anderson, “Is Women’s Labor a Commodity?”

³⁵ Warnock, *A Question of Life*, 45.

³⁶ For the same claim that child-selling amounts to child slavery, see Overall, ‘Reproductive ‘surrogacy’ and parental licensing’.

³⁷ Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (London: Routledge, 2003), at p.147.

³⁸ Arneson, ‘Commodification and Commercial Surrogacy’, at p. 149.

³⁹ Not everybody finds them convincing, thought: Fabre denies the claim that one cannot legitimately sell something over which one cannot have property, in *Whose Body Is It Anyway*, at p.190. She points to the case of animals, which can be sold yet not treated as property. I find this unpersuasive; I suspect that people who believe that it is impermissible to treat animals as property should also object to the permissibility of selling them. In any case, this disagreement is irrelevant to the normative point I make in the current section.

⁴⁰ ‘Surrogate Motherhood as Prenatal Adoption.’

⁴¹ For the current purposes it doesn’t matter whether the objection is one that liberals see as an objection to insufficiently secure right to non-interference in the case of the slave (as suggested by Robert Goodin in ‘Folie Républicaine,’ *Annual Review of Political Science* 6 (2003): 55–76) or to wellbeing in the case of the child (as does Gheaus in ‘Child-rearing with Minimal Domination’), or as the more *sui generis* wrong of domination that exercises republicans.

⁴² Frederick Douglass, *My Bondage and My Freedom* (New York: Dover Publications, 1855), at p. 161.

⁴³ Interestingly, some child liberationists see children's subjugation as the last stronghold of slavery; see John Holt, *Escape From Childhood: The Needs and Rights of Children* (New York: EP Dutton and Company, 1974). Others, too, have compared children's dependence on the will of parents to the situation of slaves owned by (benevolent) masters; see Daniela Cutas, 'Sex is over-rated: On the right to reproduce' *Human Fertility* 12(1) (2009): 45-52.

⁴⁴ Arneson, 'Commodification and Commercial Surrogacy,' at p. 149.

⁴⁵ Cecile Fabre, *Whose Body Is It Anyway?*

⁴⁶ Clayton, *Justice and Legitimacy in Upbringing*; Brighthouse and Swift, *Family Values*.

⁴⁷ In 'A Modest Proposal to Deregulate Infant Adoptions', *Cato Journal* 15(1) (1995): 117-135.

⁴⁸ According to Fabre, a feature that renders both some cases of surrogacy and some cases of child selling impermissible is the wrongful attitude of parents who may treat their fetuses or children as commodities, by gestating, or raising, them with a view to sell them. This, of course, rules out as impermissible only some cases of child selling and those cases of surrogacy that are entirely motivated by financial gain (in *Whose Body Is It Anyway*, at p.191).

⁴⁹ As Fabre who defends a similar view as the one I advance here, also notes. In *Whose Body Is It Anyway*.

⁵⁰ In Gheaus 'Child-Rearing with Minimal Domination' I argue that the second condition cannot be met – at least, not in good childrearing. Children's interest in protected intimacy with their parents means that states have all things considered reasons to always allow some domination in the child-parent relationship – that is, some degree of arbitrary parental power. I think that Republicans should conclude that even the most justified form of childrearing doesn't fully eliminate domination, i.e. the normative similarity between being a child and being a slave.

⁵¹ Even though it may be wrong to enforce this ideal in ways that stripe parents off any arbitrary power, for the reasons explained in my 'Child-Rearing with Minimal Domination.' See also Brighthouse and Swift, *Family Values*, at pp.141-142.

⁵² Iwan Davies, 'Contracts to Bear Children', *Journal of Medical Ethics* 11(2) (1985): 61-65.

⁵³ I discuss this in Anca Gheaus, 'Biological Parenthood: Gestational, Not Genetic', *Australasian Journal of Philosophy* 96(2) (2018a): 225-240.

⁵⁴ Boudreaux, 'A Modest Proposal to Deregulate Infant Adoptions'.

⁵⁵ I am grateful to Connor Kianpour for pressing me to make this explicit.

⁵⁶ Edgar Page, 'Review article: Warnock and surrogacy', *Journal of Medical Ethics* (12) (1986): 45-52.

⁵⁷ Page uses "genetic surrogacy" for what I call "partial surrogacy"; "total surrogacy", in this quote, refers to cases in which the child evolves from the surrogate mother's and her husband's own gametes.

⁵⁸ See R. J. Kornegay, R. J. 'Is Commercial Surrogacy Baby-selling?', *Journal of Applied Philosophy* 7(1) (1990): 45-50; Steinbock, 'Surrogate Motherhood as Prenatal Adoption'; Strachle in this book.

⁵⁹ In 'Donation, Surrogacy and Adoption,' *Journal of Applied Philosophy* 2(2) (1984): 167.

⁶⁰ I make that assumption and so does Page. The belief that rights over gametes can be privately transferred accepted even by proponents of the view that the gestational mother always has the right to parent, such as Warnock, *A Question of Life*.

⁶¹ In 'Parental Rights' and 'Donation, Surrogacy and Adoption.'

⁶² Prominently, Anderson in 'Is Women's Labor a Commodity?'

⁶³ Warnock, *A Question of Life*. Some believe this isn't a coherent position. According to John Harris, "The Warnock Committee set its face firmly against womb leasing or lending, but thought on balance that egg or embryo donation should be permitted provided that the woman giving birth should in all cases be regarded in law as the mother of the resulting child. It is not clear from the report how Warnock could justify the distinction between egg or embryo donation on the one hand, and womb leasing or lending on the other." In *The Value of Life* (London: Routledge, 1990), at p.141.

⁶⁴ Ekis Ekman, *Being and Being Bought*, at p. 145.

⁶⁵ Steinbock, 'Surrogate Motherhood as Prenatal Adoption' at p.48.

⁶⁶ Fabre, *Whose Body Is It Anyway*, at p. 189.

⁶⁷ In general, Page appears quite literal in his talk about parents having rights over their own children. He talks about "the rights and duties of ownership" over embryos, without any indication of how, if at all, the change in moral status between embryo and child bears on his views. For instance, he writes that: "It is natural to take the donation of an egg or embryo to involve the surrender and transfer of all the rights and duties in respect of the child that would otherwise be the donor's as the child's genetic parents. A donation is a gift and if you give something away any rights and duties you have in respect of that thing are lost and transferred to the person to whom it has been given. If you give away a building you would normally expect to lose your right of access to it along with whatever liability you had to maintain it." In 'Donation, Surrogacy and Adoption,' 163.

⁶⁸ This section is a development of the view which I present in Gheaus, 'Biological Parenthood: Gestational Not Genetic'.

⁶⁹ Competitor accounts don't grant more than a presumptive right to biological parents, either, since they make custody conditional on being an adequate parent (in some versions) or, at the very least, in not being found guilty of child abuse or neglect (in the legal and scholarly *status quo*.)

⁷⁰ Barbara Hall, 'The Origin of Parental Rights', *Public Affairs Quarterly* 13(1) (1999): 73–82.

⁷¹ Page 1984; Nozick 1989; Jean Kazez, *The Philosophical Parent: Asking the Hard Questions about Having and Raising Children* (Oxford University Press, 2017).

⁷² For instance, Richards, *The Ethics of Parenthood*; Fowler, *Liberalism, Childhood and Justice*; Magnusson, 'Can Gestation Ground Parental Rights?', *Social Theory and Practice* 46(1) (2020): 111-142.

⁷³ David Velleman, 'Family History', *Philosophical Papers* 34 (2005): 362.

⁷⁴ See David Archard, 'What's Blood Got to Do with It? The Significance of Natural Parenthood', *Res Publica* 1(1) (1995): 91–106 and Sally Haslanger, 'Family, Ancestry and Self: What Is the

Moral Significance of Biological Ties?,' *Adoption and Culture* 2 (2009): 91–122.

⁷⁵ In Melissa Moschella, *To Whom Do Children Belong? Parental Rights, Civic Education, and Children's Autonomy* (Cambridge: Cambridge University Press, 2016).

⁷⁶ See David Archard, *Children. Rights and Childhood*.

⁷⁷ See Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002).

⁷⁸ Susan Golombok, et al., 'Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment', *Journal of Child Psychology and Psychiatry* 54(6) (2013): 653–660.

⁷⁹ Mark Vopat, 'Parent Licensing and the Protecting of Children', in Samantha Brennan and Robert Noggle (eds.), *Taking Responsibility for Children* (Waterloo, ON: Wilfrid Laurier University Press, 2007), 73–96.

⁸⁰ Hugh LaFollette, 'Licensing Parents.'

⁸¹ David Archard, 'What's Blood Got to Do with It? The Significance of Natural Parenthood', *Res Publica* 1(1) (1995): 91–106.

⁸² Archard, *Children. Rights and Childhood*.

⁸³ In Anca Gheaus, 'The Right to Parent One's Biological Baby', *Journal of Political Philosophy* 20(4) (2012), 432–55 and Gheaus, 'Biological Parenthood: Gestational, Not Genetic.'

⁸⁴ Alternative gestationalist accounts rely exclusively on the costs of pregnancy; see 'Family Ties: Rethinking Parental Claims in the Light of Surrogacy and Custody', in Uma Narayan and Julia J. Bartkowiak (eds.), *Having and Raising Children: Unconventional Families, Hard Choices, and the Social Good* (University Park: Pennsylvania State University Press, 1999), 65–86 and Millum *The moral foundations of parenthood*. Thus, they advance a parent-centred version of gestationalism. Susan Feldman, by contrast, defends a child-centred form of gestationalism based on the fact that gestational mothers can, during pregnancy, greatly influence the development of the foetus and therefore the future child's well-being. In 'Multiple Biological Mothers: The Case for Gestation', *Journal of Social Philosophy* 23(1) (1992), 98–104. Making sure that gestational mothers have a

secure right to the custody of the children they bear is, the argument goes, the best means to motivate gestational mothers to take proper care of the developing baby. Feldman's account falls short of establishing that gestational mothers have a *moral* right to custody.

⁸⁵ Antonella Sansone, *Mothers, Babies and Their Body Language* (London: Karnac, 2004).

⁸⁶ A very important question is relative to what is the relevant setback of interests: to the level of wellbeing that the party who cannot consent would have if the relationship continued, or to the level of wellbeing she would enjoy if, due to the discontinuation of the first relationship, she would become available to become part in an even better relationship? Here I assume the first answer; in my monograph I discuss at length this important point.

⁸⁷ Brighouse and Swift, *Family Values*; Lindsey Porter, 'Gestation and Parental Rights: Why Is Good Enough Good Enough?', *Feminist Philosophy Quarterly* 1(1) (2015), 1–27; Magnusson, 'Can Gestation Ground Parental Rights?'

⁸⁸ Magnusson 'Can Gestation Ground Parental Rights?', at p. 122.

⁸⁹ Caroline Whitbeck, 'The Maternal Instinct', in J. Trebilcot (ed.), *Mothering: Essays in Feminist Theory* (Totowa, NJ: Rowman & Allanheld, 1984), 185–98.

⁹⁰ Amy Mullin, 'Early Pregnancy Losses: Multiple Meanings and Moral Considerations', *Journal of Social Philosophy* 46(1) (2015): 27–43.

⁹¹ This formulation belongs to David Archard and David Benatar (2010, 26). Tim Baynes and Avery Kolers, who coined the principle, put it more vaguely, as saying that "being a mother doesn't make a person more of a parent than being a father, or vice versa" (2001, 280).

⁹² Porter 'Gestation and Parental Rights: Why Is Good Enough Good Enough?' at pp. 14-15; Magnusson 'Can Gestation Ground Parental Rights?', at pp. 123-126; Fowler, *Liberalism, Childhood and Justice*, at p. 104.

⁹³ There is some longitudinal research comparing children of surrogacy to children born through gamete donation who were not separated from their gestational mother. The latter showed no developmental difference from children born and raised by traditional families, while the former

showed higher levels of adjustment difficulties at age seven. The study concludes that: “The absence of a gestational connection to the mother may be more problematic for children than the absence of a genetic link.” In Susan Golombok, Lucy Blake, Polly Casey, Gabriela Roman, and Vasanti Jadva, ‘Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment’, *Journal of Child Psychology and Psychiatry* 54(6) (2013): 653–660.

⁹⁴ Steinbock, ‘Surrogate Motherhood as Prenatal Adoption’, at p. 46.

⁹⁵ An interesting child-centred argument against (genuinely loving) kidnappers keeping custody is that, even if they are the best custodian with respect to the child’s wellbeing interests, the child has a respect interest in not being raised by someone who kidnapped her. I am grateful to David O’Brian for flagging this possibility which, if correct, does not bear on the permissibility of bonding during gestation.

⁹⁶ Ekis Ekman, *Being and Being Bought*.

⁹⁷ Anderson, ‘Is Women’s Labor a Commodity?’, at p.82.

⁹⁸ Seana Shiffrin offers one such account in ‘Wrongful Life, Procreative Responsibility, and the Significance of Harm’, *Legal Theory* 5 (1999):117-148.

⁹⁹ On Shiffrin’s non-comparative view, harm entails being in a state the badness of which prevents the agent from being in control of her life (‘Wrongful Life, Procreative Responsibility, and the Significance of Harm’, at pp. 123-124).

¹⁰⁰ Golombok et al. 2013 Susan Golombok et al., “Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment”, *Journal of Child Psychology and Psychiatry* 54(6) (2013): 653–660.

¹⁰¹ Amongst those who think this challenge indicates the permissibility of surrogacy are Harris, *The Value of Life*; Steinbock, ‘Surrogate Motherhood as Prenatal Adoption’; Arneson ‘Commodification and Commercial Surrogacy’; Wilkinson *Bodies for Sale*, and Fabre, *Whose Body Is It Anyway?* For an attempt to resist, see Archard ‘Wrongful Life.’

¹⁰² Gregory Kavka, 'The Paradox of Future Individuals,' *Philosophy and Public Affairs* 11:93-112. (1982).

¹⁰³ Or, perhaps, even non-comparative harms, understood as set-backs to one's agency, in the spirit of Shiffrin's proposal. First, a sufficiently benevolent master will not interfere with their slave's agency. (This kind of slavery seems significant less objectionable; but is it not objectionable at all?) Second, wouldn't it be wrong to enslave accomplished stoics?

¹⁰⁴ Perhaps procreation with the mere *intention* to violate the moral claims of the child is itself wrongful, in which case the child has complaints not only against the enforcement, but also against the drafting, of the surrogacy contract. I do not take a stand on this issue.

¹⁰⁵ Derek Parfit, *Reasons and Persons* (Oxford. Oxford University Press, 1984).

¹⁰⁶ For instance, John Broome thinks that "a person's good consists partly in how fairly she is treated; unfairness is bad for a person, whatever she may feel about it." (1991, 128)

¹⁰⁷ Mianna Lotz 'Rethinking Procreation: Why it Matters Why We Have Children,' *Journal of Applied Philosophy* 28(2) (2011), 105–121 and David Wasserman, 'The Nonidentity Problem, Disability, and the Role Morality of Prospective Parents,' *Ethics* 116(1) (2015), 132–152.

¹⁰⁸ This is a snappy summary of Shiffrin's view, which I find correct. David Benatar's anti-natalist work contains a detailed discussion of the risks and actual harms of life. In *Better never to have been. The harm of coming into existence* (Oxford: Oxford University Press, 2006.) The fact that I am not ultimately convinced by anti-natalism is not to say that Benatar's challenge can be easily dismissed.

¹⁰⁹ Gheaus, *Could there ever be a duty to have children?*

¹¹⁰ This may be (dis)value to persons – think, for instance, of how disturbing it is to suspect that one is part of the last generation – for which see Samuel Scheffler, 'The Afterlife. Part I', in Niko Kolodny (ed.) *Death and the afterlife* (New York: Oxford University Press, 2013) – or impersonal (dis)value.

¹¹¹ At least if procreation were to continue in the absence of surrogacy; indeed, this empirical assumption can hardly be doubted given the long-term trend of population growth.

¹¹² Just like, in many societies today, they become the charge of the state when birth parents relinquish custody.

¹¹³ Archard, 'Introduction' to *Procreation and Parenthood*.

¹¹⁴ Lindsay Porter, 'Why and How to Prefer a Causal Account of Parenthood', *Journal of Social Philosophy* 45(2) (2014): 182–202.

¹¹⁵ Olsaretti, 'Liberal Equality and the Moral Status of Parent-Child Relationships'.