# Is There Such a Thing as a Right to Be a Parent?

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## A Introduction

The moral right to be a parent has been left surprisingly under-theorised. In this article I am concerned with showing that there is such a right. My starting point will be Raz's analysis of rights, whereby a right exists only if the right-holder's interest is of sufficient weight to: a) hold some subjects bound by a duty (a duty being a peremptory reason for action); and b) overcome possible counter-considerations.[1] On the basis of these observations, I shall take two steps in order to argue that there is such a thing as a right to be a parent. First, I shall elaborate on why the interest in parenting is valuable; secondly, I shall argue that the interest is valuable to such an extent as to ground certain duties. In the process of arguing this, relevant counter-considerations will be taken into account, and shown not to outweigh the importance of the interest in parenting.

I shall begin by briefly elaborating on the moral importance of the interest in parenting, with a view to making a case for its ability to ground duties and, hence, to ground a general right to be a parent. I shall go on to suggest that from this general moral right two different classes of rights can be derived: procreative and parental rights. I shall then examine several claims to the effect that there should be no such thing as procreative rights or parental rights, and which thereby cast doubt on the existence of a general moral right to be a parent in the first place. I shall explain that to the extent that these

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1 As Raz explains, 'where the conflicting considerations altogether defeat the interest of the right-holder … then there is no right. Where the conflicting considerations override those on which the right is based on some but not all occasions, the general core right exists but the conflicting considerations may show that some of its possible derivations do not.' Joseph Raz, *The Morality of Freedom* (1986) 184.

claims suggest that counter-considerations prevent the importance of the interest in parenting from working as a ground for duties in the areas of reproduction or parenting, they are unconvincing and/or lead to absurd conclusions. On the other hand, to the extent that these claims oppose procreative and parental rights because they regard rights discourse as problematic, I shall argue that the claims tend to misunderstand or misrepresent the concept of right.

## B The importance of the interest in parenting

The point that the interest in parenting is just about one of the most fundamental interests human beings have hardly deserves any discussion. Having children is, as John Harris put it, 'often cited not only as among the most worthwhile experiences and important benefits of life, but as … giv[ing] point and meaning to existence.'[2]

Raz points out that humanists believe that 'the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality.'[3] Saying that parent-child relationships are morally valuable is the same as saying that children contribute, or have the possibility to contribute, to the value of their parents' life, and vice-versa. The interest in parenting is morally valuable inasmuch as it is oriented toward the creation and maintenance of a morally valuable relationship.

The reasons why parent-child relationships are morally valuable are apparent. Traditionally, commentators have elaborated on the value of parent-child relationships in unduly restrictive ways. For example, one commentator, drawing on Hegel, has concluded that:

> a man and a woman love their children not only for themselves but also as outward signs of the love they have for one another. Here children are valued not because they will continue the family, or are potential sources of relief and aid, but because they are new bonds of love. Their lives become part of the personal lives of both child rearers, to be harmoniously shared like other personal values, and mutual love of child rearers becomes inextricably bound up with a common

2 John Harris, 'The Right to Found a Family' in Geoffery Scarre (ed), *Children, Parents and Politics* (1989) 133, 149 (see also 133, 139).

3 Raz, above n 1, 194.

> love for their children. This may happen whether or not the child rearers are their children's biological parents.[4]

Once rid of its heteronormativity, this quote illuminates why parent-child relationships in general (even if they involve a child and a sole parent, or two same-sex parents, or three parents) are valuable for parents: in coming into existence, these relationships are new bonds of love, and the child becomes an enriching part of the personal life/lives of the child rearers.

For the parent then, the coming into existence and flourishing of a parent-child relationship provides a new scenario in which love can be powerfully expressed and nurtured. That many parent-child relationships fall short of doing so and that they may even go horribly wrong does not count as an argument against the proposition that people have an interest in parenting. People still have that interest because parent-child relationship have the potential for flourishing – the risk that parent-child relationships may go wrong is, if anything, a consideration for society's creating the conditions under which parent child relationships can fulfil their potential for the expression and nurturing of love.

A successful parent-child relationship may be thought to foster a number of virtues in a parent: a willingness to prioritise the needs of another person over one's own; an ability to compromise; a greater capacity to empathise with younger generations; greater concern for the future of the world, etc. In general, successful parenting may develop and refine one's ability and willingness to care for others, both in the sense of being concerned for their well-being and practically looking after their needs.

The special relationship between parenting and the capability for care, and hence the special importance of the interest in parenting, is captured in the following observation by Carlos A Ball:

> Parenting … raises fundamental questions about our needs and capabilities as human beings to participate in relationships of care … [T]he capability to care for others is a constitutive human capability that we all share, one that is especially evident in the way in which adults nurture, protect, guide and love children.[5]

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4 Jeffrey Blustein, 'Child Rearing and Family Interests' in Onora O'Neill and William Ruddick (eds), *Having Children: Philosophical and Legal Reflections on Parenthood* (1979) 115, 118.

5 Carlos A Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (2003) 133.

Of course parenting is not the only type of relationship or social practice that contributes to developing the ability and willingness to care for others, or the other virtues mentioned above. It is, however, one that is particularly apt to do so, because developing many of these virtues is necessary to successful parenting on account of the vulnerability and dependency of children, particularly very young ones.

The virtues that successful parenting fosters and refines are intrinsically valuable to those who possess and develop them (parents), and they are instrumentally valuable to both those who directly benefit from them (the children being parented) and society at large. The instrumental value of parent-child relationships and of the virtues developed therein contributes to the importance of the individual interest in parenting and hence reinforces the conclusion that that interest is a ground for the right to be a parent. As Raz explains, although it is a distinctive feature of rights that they are grounded in some interest of the right-holders,[6] sometimes, or even often, the right-holder's interest is considered sufficiently important to ground a corresponding right because of its instrumental, rather than merely its intrinsic, value.[7] (Protecting) The interest in parenting is instrumentally valuable to society because the virtues that successful parenting fosters benefit us all.[8]

In popular rhetoric about bad parenting much is made of the parent (often gendered as a female in this discursive domain) who 'uses' her child to make up for the 'failures' in other areas of her life. The antipathy shown for this parent can be accounted for in several ways, from the classist and eugenic notion that only 'success cases' have a right to reproduce themselves, to the mystifying idea that a clear distinction can be drawn between selfish and selfless reasons for wanting a child. In contrast to this rhetoric on bad parenting, I would argue that the case of parents who want children to make up for personal 'failures' in other fields of their lives highlights two further important reasons why parenting may significantly contribute to a person's well-being, and hence why the interest in parenting is of high importance. The first of these reasons is that parenting provides people with an opportunity to experience success in an enterprise which, for the reasons stated above, can be of great value to society. The second reason is that parenting allows people to experience success, as it were, by proxy, that is through the success of their children. There is nothing inherently repugnant in this, as the very ability of a parent to rejoice in her child's success is predicated on the parental virtues

6 Raz, above n 1, 166.

7 Ibid 178-80.

8 Parenting is instrumentally valuable to society also in the more pragmatic sense that older generations who are past their working age rely on younger ones to provide for their needs.

upon which a successful parent-child relationship is built: the ability to care for and empathise with other human beings.

Plainly, none of the above means that having children is a necessary ingredient of a life worth living, or that everybody should want children. All it means is that we rightfully ascribe moral value to parent-child relationships, and therefore recognise the importance of people's desire to parent. To the extent that a life with children is a particularly valuable form of life for human beings, human beings have an interest in parenting whether or not they desire to satisfy it.

Some commentators have conceptualised the rights parents have with respect to their children as trustees' rights – the child figuring in the analogy as the beneficiary of the trust.[9] The trust analogy may provide some insight into the interest in parenting which grounds the right to be a parent. William Ruddick has argued that the trust model in light of which it makes sense to understand parent-child relationships is a two-party trust, in which the trustee is also the settlor of the trust.[10] Under this model, parents undertake 'parental commitments to the *child*' (rather than to the State, as would be the case if the trust where a three party one with the State as the settlor of the trust).[11]

A person's interest in parenting can be viewed exactly as the interest in being able to undertake and meet these commitments towards a certain child.

9 Many scholars have used the trust analogy to support different beliefs about the role played by parental rights in protecting the interests of parents. See eg Melinda Jones and Lee Ann Basser Marks, 'Mediating Rights: Children, Parents and the State' in Melinda Jones and Lee Ann Basser Marks (eds), *Children on the Agenda: The Rights of Australian Children* (2001) 283, 294-5, 304 (children's interests come first, but parental rights protecting parental interests deserve some recognition too); Margaret M Coady, 'Reflections on Children's Rights' in Kathleen Funder (ed), *Citizen Child: Australian Law and Children's Rights* (1996) 11, 22 ('parental right … is more like a duty than a right'); Kenneth Henley, 'The Authority to Educate' in O'Neill and Ruddick (eds), above n 4, 254, 260-1 (parental rights only exist to protect children's interests); Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (1997) 318 (parents have no parental rights). Some have criticised the analogy insofar as it supports the view that parents have no interests deserving of protection: William Duncan, 'The Constitutional Protection of Parental Rights: A Discussion of the Advantages and Disadvantages of According Fundamental Status to Parental Rights and Duties' in John Eekelaar and Petar Sarčević (eds), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (1993) 431, 438.

10 See William Ruddick, 'Parents and Life Prospects' in O'Neill and Ruddick (eds), above n 4, 123, 127.

11 Ibid.

This makes the interest in parenting somewhat similar to the interest grounding the right to promise, which, as Raz argues, is 'the interest people have in being able to impose on themselves obligations to other people as a means of creating special bonds with other people'.[12] Being able to impose on oneself certain obligations through promises serves an aspect of one's well-being (ie, an interest of one's) by functioning (or having the potential for functioning) as a means to creating a special interpersonal bond. Likewise, being able to impose on oneself parental commitments serves an aspect of one's well-being by functioning as a means to creating a special interpersonal bond which is a constitutive aspect of a valuable form of life (a life with children).

## C The right to be a parent: procreative and parental rights

When an individual interest has proved important enough, after being weighed against relevant counter-considerations, to ground one or more duties, then we will have satisfied the requirements for validly stating that a right grounded in that interest exists. If the individual interest in parenting is indeed as important as I claim, then one would expect it to be a ground for several duties which will have the effect of protecting or promoting that interest (eg the duty not to abduct a child from its parent). What specific duties the interest in parenting actually grounds depends on an examination, in respect of each duty, of the counter-considerations involved in recognising that that particular duty exists. Those counter-considerations must then be weighed against the importance of the interest in parenting and a conclusion will be drawn on whether or not the interest in parenting is in fact a ground for the hypothesised duty. Generally speaking, it seems plausible to assume that the interest in parenting is sufficiently important to ground duties both in the area of social life that we call reproduction, and in the domain of parent-child relationships. Given these two broad areas in which the right to be a parent is a ground for duties, it can be usefully said that at least two classes of specific rights can be derived from the core or general right to be a parent: procreative and parental rights.

Above I have suggested that the interest in parenting is the interest in being able to undertake and meet certain commitments towards a certain child. This characterisation of the interest in parenting clarifies the connection between the two general derivations of the right to be a parent. The class of procreative rights can thus be seen as the right to be able to undertake parental

12 Raz, above n 1, 173.

commitments, and that of parental rights can be seen as the right to be able to perform those commitments.[13]

Potential candidates for the class of procreative rights might be, for example, the right to procreate by intercourse, the right to use reproductive technologies, the right not to undergo sterilisation against one's will or the

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[13] This understanding of procreative rights as derived from the right to be a parent, and hence grounded in the interest in parenting, conceives of rights not to reproduce as a separate set of rights, grounded in a different interest. On the other hand, others have grouped together rights to reproduce and rights not to reproduce: John Harris, 'Rights and Reproductive Choice' in John Harris and Søren Holm (eds), *The Future of Human Reproduction: Ethics, Choice, and Regulation* (1998) 5, 34-6 (justifying rights to reproduce by invoking the notion of a right to moral autonomy in questions fundamentally related to the meaning and value of life – a notion used by Ronald Dworkin to justify rights not to reproduce: Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (1995) 158, 167; Sheila McLean 'The Right to Reproduce' in Tom Campbell et al, *Human Rights: From Rhetoric to Reality* (1986) 99, 99-103 (making freedom of choice about whether or not and when to reproduce the fundamental good protected by the right to reproduce). John Robertson has also grouped together rights to reproduce and rights not to reproduce under the umbrella of procreative liberty: John A Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1994) 22-42. However, he has also added that the two sets of rights are supported by separate sets of interests: John A Robertson, 'Liberalism and the Limits of Procreative Liberty: A Response to my Critics' (1995) *6 Stanford Law and Policy Review* 233, 234-5. Robertson connects the interests justifying the right to reproduce with the fact that 'reproduction is an experience full of meaning and importance for the identity of an individual and her physical and social flourishing because it produces a new individual from her haploid chromosomes': John A Robertson, 'Procreative Liberty in the Era of Genomics' (2003) *29 American Journal of Law and Medicine* 439, 450. Thus Robertson grounds procreative rights at least in part in genetic concerns. For a critique of this and other conservative aspects of Robertson's work on procreative liberty see Joan Callahan, 'Procreative Liberty: Whose Procreation, Whose Liberty?' (1995) *6 Stanford Law and Policy Review* 121. Grounding procreative rights, as I do, in the interest in parenting does not deny that people may have other procreation-related interests, such as 'an interest in having heirs ... an interest in passing on one's genes ... a woman's interest in experiencing pregnancy or childbirth ... [and] a psychological interest in possessing the 'normal' human attribute of fertility': Alexander M Capron, 'What Rules for Procreation?' in Cosimo Marco Mazzoni (ed), *A Legal Framework for Bioethics* (1998) 67, 71. It is possible that even taken in isolation from the interest in parenting some of these interests may be a ground for some duties under certain circumstances, but this hypothesis need not be explored here.

right to benefit from cures for infertility. The category of parental rights, on the other hand, would include the right to care for one's child, to make decisions for it, to have it reside in one's home, not to have the child removed from one's care without good reason, etc.

In this article I do not discuss what specific procreative and parental rights the interest in parenting actually grounds. Instead, I shall address some general objections that have been levelled at the idea of procreative or parental rights.

Statements to the effect that there are (and should be) no such thing as procreative or parental rights stem from at least two different stances. The first of these does not necessarily deny that the interest in parenting is important enough to ground duties, and that these duties should be recognised by laws regulating issues of reproduction and parenting. However, it denies that such laws should do so by using the language of rights. Presumably it also objects to couching the circumstance that people's interest in parenting is important enough to ground *moral* duties in the area of reproduction and parenting in terms of these people having (moral) procreative and parental rights.[14] I shall call this type of argument 'right discourse-critique'.

Secondly, statements to the effect that there should be no such thing as procreative or parental rights can be understood to mean that the interest in parenting is not important enough to ground duties. The implication is that laws regulating issues of reproduction and parenting should not recognise parental or procreative rights because these rights do not exist even as moral rights. This sort of opposition to procreative or parental rights stems from a belief that the interest in question is not sufficiently important or morally valuable in the first place, or that counter-considerations outweigh its importance. I shall call these arguments 'interest's inability to ground duties'.

Part D in this article will deal with both 'rights-discourse critique' and 'interest's inability to ground duties' versions of the claim that procreative rights do not and should not exist. Part E will do the same in the context of parental rights. Taken together, these two claims, if they have merit, would deny the existence of a moral right to be a parent. But I shall argue that these claims are unsound. On the one hand, I shall argue that 'rights discourse-critique' arguments are invariably built on conceptual misunderstandings. On the other hand, I will respond to 'interest's inability to ground duties' arguments using either or both of the following strategies. First, I shall argue

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14 According to the definition of 'right' accepted here, a right exists when an interest is of sufficient importance to ground duties. Thus from my perspective it makes little conceptual sense to say that an individual interest is a ground for duties but does not ground a correlative right.

that the concerns or assumptions on which these arguments base their resistance to accepting that the interest in parenting is a ground for duties (and hence for the right to be a parent) are unsound. Secondly I shall engage in a 'case-implication critique', to use Amartya Sen's terminology, of these claims. That is, I shall 'check the implications of the [claim] by taking up particular cases in which the results of employing that [claim] can be seen in a rather stark way, and then ... examine these implications against our intuitions.'[15] I shall conclude that the proposition that parental or procreative rights should not exist, understood as the claim that the interest in parenting is not a sufficient ground for duties, should be rejected because it leads to absurd conclusions.

## D Procreative rights

### 1 Arguments Belonging to the 'Rights-Discourse Critique' Class

#### a The argument from an absolute right to procreate

Routinely, those who oppose the notion of procreative rights or a right to procreate implicitly or explicitly translate such propositions as 'people have a right to reproduce' or 'people have procreative rights' into claims to an absolute right.[16] The following passage, from a decision of the High Court of Australia on the sterilisation of intellectually disabled children, is illustrative:

> It is debatable whether the [right to reproduce] is a useful concept, when couched in terms of a basic right, and how fundamental such a right can be said to be[[17]]

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[15] Amartya Sen, 'Equality of What?' in Stephen Darwall (ed), *Equal Freedom: Selected Tanner Lectures in Human Values* (1995) 307 (emphasis removed).

[16] See eg J K Mason, *Medico-Legal Aspects of Reproduction and Parenting* (2nd ed, 1998) 85; Margaret Brazier, 'Reproductive Rights: Feminism or Patriarchy?' in Harris and Holm (eds), above n 13, 66, 72-4; Robin Rowland, *Living Laboratories: Women and Reproductive Technologies* (1993) 276-7. On the contrary, Onora O'Neill suggests that most people who believe that there is a right to be a parent (and hence procreative and parental rights) do not understand this right as an unrestricted one: Onora O'Neill, 'Begetting, Bearing, and Rearing' in O'Neill and Ruddick (eds), above n 4, 25. John Robertson has also noted that critics of the right to procreate tend to view the right in absolute terms: Robertson, 'Procreative Liberty in the Era of Genomics', above n 13, 448.

[17] Other jurisdictions, such as the United States, do regard the right to reproduce as a fundamental one: see eg Ball, above n 5, 163. For an analysis of the extent to which the right to reproduce is constitutionally recognised in the USA, see John A Robertson, 'Noncoital Reproduction and Procreative

> ... For example, there cannot be said to be an absolute right in a man to reproduce (except where a woman consents to bear a child), unless it can be contended that the right to bodily integrity yields to the former right, and that cannot be so. That is to say, if there is an absolute right to reproduce, is there a duty to bear children? ... Furthermore, it is quite impossible to spell out all the implications which may flow from saying that there is a right to reproduce, expressed in absolute terms...[18]

In this passage, a slippage occurs from the notion of a fundamental right to reproduce to that of an absolute right to reproduce. But the slippage is conceptually erroneous. As Raz clarifies, rights may be 'fundamental ... in the sense that they are part of the deepest level of moral thought. It does not follow, of course, that they are either inalienable or of absolute or near absolute weight.'[19]

The Court's argument appears to belong to the 'rights-discourse critique' class. The Court does not deny that the interest in parenting might be a ground for certain duties in the area of reproduction. However, it is concerned that if we speak of a right to reproduce this would imply that people have a right to a child by whatever means possible and under any circumstance. But this concern seems to rest on a misunderstanding. Raz's observations on the concept of rights are again relevant. As he points out, it is mistaken to think that

> to every right there corresponds one duty, [and] that that duty is to guarantee the enjoyment or possession of the object of the right... Many rights ground duties which fall short of securing their object, and they may ground many duties not one. A right to personal security does not require others to protect a person from all accident or injury. The right is, however, the foundation for several duties, such as the duty not to assault, rape or imprison the right-holder.[20]

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Liberty' in Kenneth D Alpern (ed), *The Ethics of Reproductive Technology* (1992) 249, 251-5.

18 Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218, 254 (Mason CJ, Dawson, Toohey and Gaudron JJ).

19 Raz, above n 1, 255. This observation certainly conforms with how rights (even human or constitutional rights) tend to be interpreted by both domestic and international judicial or quasi-judicial bodies.

20 Ibid 170-1 (see also 183-4).

It follows that stating the existence of a fundamental right to procreate does not entail the proposition that the right-holders may exact that they be secured a child by whatever means possible (and hence does not imply, for example, 'a duty to bear children' in the female partner of a man who wants to be a father).[21]

### b The argument from children's interests

Another version of the argument that procreative rights should not exist is provided by Laura Shanner. Shanner argues that we should reject claims to procreative rights grounded in the interest in parenting because they would necessarily result in claims to an essentially unlimited right to procreate. Shanner's argument is that procreative rights, being rights, could be limited in the presence of other rights; but because un-conceived children cannot be right-holders, then they cannot have a right not to come into existence even where it is morally objectionable to bring them into existence; consequently, the prospective parent's procreative rights, if recognised, would remain unchallenged and unrestricted under any circumstance.[22]

Shanner's argument is not that moral reasoning cannot meaningfully accommodate the proposition that we should not conceive and give birth to children who would be harmed by being born. Her argument is rather that rights discourse cannot accommodate such a proposition, because non-entities cannot have rights and you need a right in order to restrict another right, such as the right to procreate.[23]

But while it may be true that non-entities do not have rights, the proposition that only another right (rather than, more widely, other considerations) can be used to limit the scope of a recognised right is misconceived. Neither the concept of a right, nor judicial practices on fundamental rights pose such a requirement (for example rights, even if fundamental, are routinely restricted on the basis of State interests). Thus, if

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21 In the Marriage of F (1989) 13 Fam LR 189, Lindenmayer J held that a husband could not require that his wife refrain from aborting. Although the decision did not make it clear whether a right to procreate exists at common law, it is to the effect that even if such a right exists, a husband's right to prevent his wife from terminating her pregnancy cannot be derived from it, 193.

22 Laura Shanner, 'The Right to Procreate: When Right Claims Have Gone Wrong' (1995) *40 McGill Law Journal* 823, 826, 844-6.

23 'It is imperative that we consider the interests of future children, and that we exercise responsibility and restraint in our reproductive behaviours when the resulting children would be at risk of harm; however, there is no avenue for incorporating those interests within the framework of the rights of adults to conceive': Ibid 846.

we believe that moral reasoning can meaningfully accommodate the proposition that we should not conceive children who would be harmed by being born, surely we can find ways of making that proposition bear upon the content of procreative rights regardless of our being able to characterise un-conceived children as right-holders.[24]

In sum, 'rights-discourse critique' versions of the argument that there are and should be no such things as (moral and legal) procreative rights grounded in the interest in parenting fail because they rest on dubious understandings of the concept of 'right'.

## 2 Arguments Belonging to the 'Interest's Inability to Ground Duties' Class

### a The argument from the asymmetry of the interest in parenting

Shanner's case against procreative rights also include arguments that seemingly fall into the 'interest's inability to ground duties' category. Shanner argues that reproductive rights are justifiable to the extent that we can view them as grounded in sexual privacy or bodily integrity. Thus, the obligations we may wish to recognise towards reproducers or prospective reproducers are those which can be conceptualised as correlative to rights grounded in sexual privacy or bodily integrity (eg the obligation not to force abortion on people, or not to interfere with their consensual heterosexual intercourse).[25] On the contrary, the existence of procreative rights, that is reproductive rights grounded in the interest in parenting, cannot be justified because that interest is not an appropriate foundation for rights and correlative duties in the area of reproduction:

> In reproducing I am not making decisions only for myself, but necessarily for another who not only cannot consent or refuse, but who would not even exist if not for my choices…
>
> The claimed right to have children is in essence the assertion of a right to create … offspring with whom to engage in a parenting relationship. While we may easily defend the unobstructed formation of mutually

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[24] That making the right to procreate the starting point of one's reasoning does not have to result in isolating such right from counter-considerations based on concern for children's well being is illustrated by the analysis in Kristen Walker, 'Should There Be Limits on Who May Access Services?' in Jennifer Gunning and Helen Szoke (eds), *The Regulation of Assisted Reproductive Technology* (2003) 123, 124-5, 128-37.

[25] Ibid 841-3.

> agreeable relationships among existing persons, … [t]here is no obligation to produce or assist in the production of children for those who want to be parents, nor even a clear right of adults to produce children (without third party assistance) for themselves.[26]

Shanner does not elaborate on this argument, but she appears to suggest that the interest in becoming a parent cannot ground duties because its moral value is dubious, the interest being premised on an asymmetry between the position of parents and children. Consider that it has been suggested that the desire to procreate is morally objectionable because it treats children only as means to the end of benefiting existing people (normally the children's parents), while it cannot treat the children as an end in themselves by reason of the impossibility of benefiting as yet un-conceived children.[27] Shanner's argument is perhaps premised on an analogous understanding of the desire to procreate, that is, of the desire to satisfy the interest in parenting – which leads her to doubt the moral legitimacy of the interest in parenting in the first place, and hence to object to the right to procreate grounded in that interest.

However, even if one can agree that as yet un-conceived children cannot be benefited, it does not follow that the desire to procreate thereby treats children as a means to gratify one's wish for parenthood. The value of the interest in parenting is predicated on the view that a life with children is an intrinsically valuable form of life, and that children are a *constitutive* part of that life, thus contributing *non-instrumentally* to its value.[28] It follows that the

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26 Ibid 860.

27 Joseph S Spoerl, 'Making Laws on Making Babies: Ethics, Public Policy, and Reproductive Technology' (2000) 45 *American Journal of Jurisprudence* 93, 94-7. John Harris, responding to an argument against cloning based on the Kantian injunction never to treat people merely as means, has argued that the injunction

> [a]pplied to the creation of individuals who are, or will become, autonomous, … has limited application. …[E]ven where … a child is engendered exclusively to provide 'a son and heir'… it is unclear how and whether Kant's principle applies. … The child's eventual autonomy, and its clear and substantial interest in or benefit from existence, take precedence over the comparatively trivial issue of parental motives.

John Harris, 'Clones, Genes, and Human Rights' in Justine Burley (ed), *The Genetic Revolution and Human Rights* (1998) 61, 68-9.

28 'Something is instrumentally valuable to the extent that it derives its value from the value of its consequences, or from the value of the consequences it is likely to have, or from the value of the consequences it can be used to

desire to satisfy that interest (through procreation or otherwise) may be characterised as the desire of a life with children, and that wanting such a life is wanting children for their own sake rather than instrumentalising them for the sake of some other goal.[29] Thus, if appropriately understood, the interest in parenting and the desire to procreate appear morally acceptable and hence a suitable ground for duties.

### b Case-implication critique of the argument

If the argument that it is morally indefensible to consider the interest in parenting a ground for duties retains some degree of persuasiveness, I would argue that it is because the argument does not practically jeopardise the parenting aspirations of those who have traditionally enjoyed adequate procreative options. Fertile heterosexual couples have the luxury of taking for granted what is their normal way to procreate. In the West, it is not their elective way of attempting procreation (ie sexual intercourse) that risks being practically affected by the proposition that there is no right to be a parent or no right to procreate. What is affected is, rather, lesbians', gay men's, single women's and infertile heterosexual people's prerogative to use what is their own ordinary – some would say 'necessary' – way to attempt procreation (ie their use of means of non-coital reproduction).

And yet, practically unlikely though it may be, a logically necessary implication of the claim that there is no right to procreate is that States are under no obligation to allow heterosexual people's the union of their sexual organs to attempt procreation. Similarly, if there is no such right, States are free to carry out compulsory sterilisation programmes, and may force abortion on women. Of course, virtually anybody in the West would be outraged at each and any of these suggestions, and that outrage is grounded in a certain moral intuition. That intuition – whether or not explicitly articulated – is that people's interest in parenting is a ground for certain duties and hence for the

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produce': Raz, above n 1, 177. Conceiving a child is the pre-condition to creating a relationship which is intrinsically and ultimately valuable – the value of the relationship deriving equally from its contribution to the child's well-being as it does from its contribution to the well-being of the parent. In other words, the child non-instrumentally contributes to the well-being of the parent and vice-versa: cf Ibid 177-8.

29 This view of the desire to parent is consistent with Carlos A Ball's point that 'in an intimate relationship our sense of happiness and fulfilment is linked to that of the other. We care about the life of the intimate other for its own sake and also for the meaning and purpose that that life gives our own': Ball, above n 5, 99.

right to be a parent,[30] of which procreative rights, including the right to engage in procreation-oriented sexual intercourse, are a derivative specification.[31]

Shanner, as we know, would retort that the reason why we object to such interventions as forced abortion or forced sterilisation is that these procedures involve an intolerable encroachment on bodily integrity. I do not wish to deny that we rightly object to forced sterilisation and abortion also because of this reason. But this does not mean that our moral objections reflect exclusively a concern for the right to bodily integrity. We would still object to such policies even if they did not involve intrusions on bodily integrity. Think, for example, of the hypothetical scenario where a State induced sterilisation by overtly treating all of its drink supplies with a chemical which were tasteless and had no adverse effect other than that of making you infertile.

One could try to defeat this case-implication critique through the following argument. It is not true that our opposition to non-intrusive methods of sterilisation necessarily invokes the right to reproduce, thus contradicting the proposition that there is no such right. Rather, that opposition can be based exclusively on the right to bodily integrity because even non-intrusive methods of sterilisation are invasions of the right to bodily integrity. This is because whether or not an invasion of bodily integrity has occurred cannot be judged exclusively on the basis of the nature (intrusive or otherwise) of the

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30 Cf Raz, above n 1, 246.

31 Freeman has tried to justify the right to reproduce without appealing to the interest in parenting. After lamenting some commentators' failure to explain why we have the right to reproduce, and criticising others' explanations of why we have the rights we have as 'purely formal', Freeman defends the right to reproduce on the ground that 'the rights we have we have simply by virtue of being human [and t]he right to reproduce is one of these rights': Freeman, above n 9, 377, 380, 384. This appears to me like a rather formal justification itself, and I would argue that it is a consequence of Freeman's rejecting the proposition that rights are grounded in interests. Freeman discusses and rejects a particular version of that proposition, because it does not allow one to ascribe rights (such as the right to reproduce) to persons who, like the severely mentally disabled or infant children, do not (or are socially understood as being unable to) have desires/interests: at 379-80. But that version does not distinguish the question of whether something is in my interest (or promotes an aspect of my well-being) from the question of whether I am interested in (or have a desire for) that thing. Cf AI Melden, 'Do Infants Have Moral Rights?' in William Aiken and Hugh LaFolette (eds), *Whose Child?: Children's Rights, Parental Authority, and State Power* (1980) 199, 214-18 (arguing that it makes sense to think of even a very young child as a moral agent who has the capacity for rights if we understand it as a 'human being in its infancy' who depends 'upon its parents … for the surrogate … interests they supply in its behalf during the course of its life within the life of the family': at 217, 218).

interference. Rather, it depends also on the result which is brought about: if the result is serious enough, then bodily integrity is violated regardless of the intrusiveness of the measure adopted to achieve the result. Thus the loss of the biological capacity to have children is a consequence of such gravity that, if deliberately inflicted upon us without our consent or strictly compelling reasons, and however effected, involves a violation of our right to bodily integrity.[32]

This line of argument follows from understanding the right to bodily integrity as the 'right to do with one's person what one chooses.'[33] But, clearly, not all of one's choices to do with one's person what one chooses are equally important, and equally protected under the rubric of 'bodily integrity'. The reason why most people would agree that the loss of the biological capacity to have children is very grave, and thus conclude that it would involve an unjustifiable violation of the right to do with one's person what one chooses, is that in our culture the interest in parenting is understood as fundamentally important. If this is true, the position according to which even non-intrusive forms of sterilisation can be said to violate the right to bodily integrity ultimately rests on the appreciation that they unduly impinge upon people's interest in parenting. In other words, that position recognises that the interest in parenting is important enough to ground one's right not to have one's reproductive capacity removed from one. But this effectively amounts to including the right to be a parent and procreative rights under the rubric of the right to bodily integrity rather than making a case against the right to be a parent.

A possible objection to this could be that it is not true that the non-intrusive sterilisation procedure described above would invade bodily integrity because its end-result – the loss of the biological capacity to have children – would frustrate the interest in parenting. Rather, so the objection would go, physical integrity would be violated because '[e]ach of us perceives his or her own identity and personality in terms which reflect the subjective appreciation of his or her own body, its attributes and functions. ... The right to physical integrity protects a person's self-estimate.'[34] According to this objection, a

32 In discussing the issue of whether parents have the power to authorise sterilisation of their intellectually disabled children, in light of 'a fundamental right to personal inviolability existing in the common law' a majority of the High Court of Australia pointed out that '[t]he gravity of the consequences of wrongly authorising a sterilisation flows both from the resulting inability to reproduce and from the fact of being acted upon contrary to one's wishes or best interests': Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218, 252 (Mason CJ, Dawson, Toohey and Gaudron JJ).

33 Ibid 254.

34 Ibid 268 (Brennan J).

person's self-estimate would be compromised by involuntary sterilisation because this would affect a person's sense of being biologically 'whole' – in the sense of having all of her bodily functions intact.

However appealing I may find this notion of physical integrity, it seems strained to say that the interest in not having my sense of full bodily functionality compromised is important enough to ground a State's duty not to sterilise me against my will, but my interest in parenting is not. After all, it is hard to believe that my feeling that my wholeness as a human being has been compromised as a result of sterilization can be conceived apart from my interest in parenting – even if at this point in time I may have no wish to have children, and am only interested in being able to act upon that wish in the unlikely event that I happen to have it.[35]

In short, even the 'interest's inability to ground duties' versions of the argument that there are and should be no procreative rights fails. This is because they depend on false assumptions and they do not withstand a case-implication critique.

Having examined both 'rights-discourse critique' and 'interest's inability to ground duties' versions of the argument that we have and should be deemed not to have procreative rights, in the next part I shall do the same with respect to parental rights.[36]

## E Parental rights

### 1 Arguments Belonging to the 'Rights-Discourse Critique' Class

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35 Finally, consider the objection that the reason why we do not want governments to implement forcible sterilisation programmes has not so much to do with certain individual interests (such as the interest in being a parent or the interest in the integrity of one's self-perception) but rather with the need to allow for the continuation of the human species. This argument fails because at best it only explains our objections to mass (as opposed to selective) sterilisation programmes.

36 'Parental rights' are the rights which parents have with respect to their children (eg the right to make decisions for their children, to have them reside with themselves, etc) and which are grounded in the interest in parenting. Parents also have individual rights 'as against' their children's (eg the right to relocate), grounded in interests other than the interest in parenting (eg the interest in freedom of movement). The question of whether this latter type of rights are automatically defeated by their children's best interests in cases of conflict should be distinguished from the question of whether or not parents should have parental rights. It is the latter, rather than the former, question that is relevant to the discussion in the next Part.

### a The argument from communitarianism

Twenty years ago, Bernard M Dickens noticed that, out of concern for children's welfare, '[m]odern legislation tends to lay emphasis upon parental duties to children and underplays the role of parental rights'.[37] In Australia, that tendency eventually resulted, following the introduction of the *Family Law Reform Act 1995* (Cth), in the abolition of parental rights as a category in the *Family Law Act 1975* (Cth).

As the 1995 Australian Report to the UN Committee on the Rights of the Child on Australia's implementation of the *Convention of the Rights of the Child* states: 'It is important to note that the concept of parental responsibility [introduced in the *Family Law Act 1975* (Cth) by the *Family Law Reform Act 1995* (Cth)] does not expressly confer any rights on the parents in respect of the child'.[38] The Report also explains why: 'There is, for example, no longer a right of custody'[39] which 'has carried with it notions of ownership of children.'[40]

The association between parental rights and ownership of children is not unique to Australia. When the *Children's Act 1989* (UK) replaced 'parental rights' with the notion of 'parental responsibility', the rationale for the change was the same as in Australia six years later: that parental rights are 'redolent of the notion of children as property.'[41] (However, unlike Australia, where the expression 'parental rights' has been removed altogether from the *Family Law Act 1975* (Cth), the UK Act has been content with 'demoting' parental rights by subsuming them under the category of 'parental responsibility').[42]

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37 Bernard M Dickens, 'The Modern Function and Limits of Parental Rights' (1981) *97 The Law Quarterly Review* 462, 463.

38 Australia's Report under the Convention on the Rights of the Child (1995) 109.

39 Ibid.

40 Ibid.

41 Freeman, above n 9, 306. But the traditional view that parental rights are akin to ownership rights had ceased to represent the position of English law for quite a while. Three decades ago Lord Denning noticed that a parental right is 'a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice': Hewer v Bryant [1970] 1 QB 357, 369. The same is true of Australian law: Richard Chisholm, 'Assessing the Impact of the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 177, 192.

42 See Children's Act 1989 (UK) s 3.

Nor is the association between parental rights and ownership of children specific to certain legal systems belonging to the common law tradition: in 1982, Norwegian law replaced 'parental rights' with 'parental responsibility' on the ground that parental rights involve considering children as the 'possession of their parents' who 'have absolute power over their minor offspring and can do whatever they want to or with their children'.[43]

The fact that the concept of 'parental responsibility' has been chosen, in both Australia and Britain, as the appropriate alternative to the discourse of parental rights suggests that communitarian ideology has played a significant role in shaping the parental rights critique. As a conceptual alternative to rights discourse, 'responsibility' is very much a communitarian category.[44] In communitarian terms, the notion of private property feeds, conceptually, into that of rights,[45] and the emphasis on rights fosters an atomistic, fragmented and conflict-ridden society in which self-absorbed individuals pursue their own private interests.[46] On this view, recognition of parental rights may result all too easily in encouraging parents to treat and conceive of children as property.

The connection between communitarian ideology and the objection to parental rights as a category of (legal and presumably moral) discourse is made more explicit in the work of family law experts supporting that objection. Consider, for example, Stephen Parker's argument that 'the rights of parents ... are part of the problem for children',[47] with its emphasis on 'isolated, self-absorbed right-holders', a 'world [that] lacks connectedness', and a 'self [that] regularly and persistently comes before other.'[48] Likewise, Michael Freeman's rhetoric suggests that his stance against parental rights is predicated on communitarian ideology:

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43 Malfrid Grude Fekkøy, 'Attitudes to Children – Their Consequences for Work for Children' in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (1992) 135, 136, 137.

44 See eg Amitai Etzioni, *The Spirit of Community* (1994): 'A return to a language of social virtues, interests, and, above all, social responsibilities will reduce contentiousness and enhance social cooperation': at 7.

45 See eg Mary E Turpel, 'Aboriginal Peoples and the Canadian Charter' in Richard F Devlin (ed), *Canadian Perspectives on Legal Theory* (1991) 503, 509.

46 See eg Mary Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* (1991), 13-15.

47 Stephen Parker, 'How 'Rights-Talk' Can Help Children: An Academic Perspective' in Philip Alston and Glen Brennan (eds), *The UN Children's Convention and Australia* (1991) 16, 18.

48 Ibid. See also Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1993) 14 *Cardozo Law Review* 1747, 1841-4.

> The shift from parental rights and duties (a property concept, almost) to parental responsibility ... has to be welcomed. We clearly have to get away from the notion of children as consumer durables, completing a family after a CD player and video recorder.[49]

However, as we have seen above, the concept of right itself does not require an exclusive focus on the interest of the right-holder, and commits one neither to absolutism nor to disregard the responsibilities of the right-holder. Thus the communitarian critique of rights makes sense not as a critique of the concept of right, but only to the extent that it is understood to object to specific uses of rights discourse. If one, applying one's political and moral beliefs, is inclined to afford the individual interest grounding a given right much greater importance than any counter-consideration, and reaches the conclusion that the right in question is of absolute or nearly absolute value, then one may well be guilty of the sins identified by communitarians.[50] However, if one adopts a more balanced approach and believes neither that rights are absolute,[51] nor that an attractive morality can be based exclusively on rights,[52] one will be much less likely to use the discourse of rights in a way that justifies the communitarian critique of that discourse.[53]

Parental rights do not have to be understood (and, in my experience, many parents do not commonly understand them) in absolute terms. Surely children have rights and interests in their own right, against which parental rights must be balanced and, indeed, in light of which they must be defined. My having parental rights does not make me treat my children as property in any meaningful sense, if I have to exercise my parental rights in my children's interest, and cannot impinge upon the rights to which my children are entitled. Thus, particularly if one accepts that children's rights (should) exist – as some

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49 Freeman, above n 9, 318. See also ibid 180-1 (where Freeman, among other things, quotes leading communitarian Amitai Etzioni). For a critique of communitarian familial ideology see, Elizabeth Frazer 'Unpicking Political Communitarianism: A Critique of the Communitarian Family' in Gill Jagger and Caroline Wright (eds), *Changing Family Values* (1999) 150.

50 Thus, as Bamforth has pointed out, that critique of rights may be appropriate in the context of libertarian usages of the discourse of rights: Nicholas Bamforth, *Sexuality, Morals and Justice: A Theory of Lesbian and Gay Rights Law* (1997) 96, 98.

51 Raz, above n 1, 186-7.

52 Ibid 193-216.

53 See also Bamforth, above n 50, 96-8. Cf also Robertson, Children of Choice, above n 13, 223-5 (responding to rights-discourse critiques in the context of procreative rights).

communitarianism-influenced critiques of parental rights do[54] – the proposition that legal recognition of parental rights involves treating children like property is a *non-sequitur.*[55]

Therefore we need not dispense with the notion of parental rights either at the level of moral argumentation (when we want to make the point that the interest in parenting is the ground for certain moral duties owed to parents, for example by the State) or at the level of legal discourse (when we want to give legal significance to that point).[56]

### b Is 'parental responsibility' better than 'parental rights'?

Note also that 'parental responsibility' does not necessarily offer a discursive alternative that is less liable than 'parental rights' to overemphasise

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54 For example, Freeman's antipathy for parental rights is not matched by an opposition to children's rights: Freeman, above n 9, 19-41.

55 See also Naomi R Cahn, 'Reframing Child Custody Decision-making' (1997) 58 *Ohio State Law Journal* 1, 49-50. However, some communitarian critics of parental rights, such as Parker, are troubled by the idea of pitting children's interests against parents' interests, and thus oppose both parental rights and the notion of children's rights: Parker, above n 47, 18-19. From this perspective, re-conceptualising parent-child relationships in terms of responsibilities is not simply a matter of avoiding an excessive emphasis on individual interests, but a matter of moving beyond the notion of individual interests altogether. In these cases the critique of parental rights may be regarded as belonging to the 'interest's inability to ground duties' class: in dispensing with the individual interest in parenting, the critique results in the proposition that the interest should not be regarded as a ground for duties. The discursive shift towards parental responsibility, presumably, is expected to redefine parent-chid relationships so that parents serve their children's well-being by promoting the interest of the family, viewed as a community where differences are reconciled out of a sense of responsibility for collective well-being and the interests of its most vulnerable members. The risk is that this vision will distract us from the realities of intra-familial conflict: cf Jeremy Roche, 'The Politics of Children's Rights' in Julia Brannen and Margaret O'Brien (eds), *Children in Families: Research and Policy* (1996) 26, 30-1.

56 There are empirical indications that the explicit recognition of parental rights does not engender the view that children are property. In a study conducted before the substitution of parental rights with parental responsibility in the Family Law Act 1975, it was found that Australians 'overwhelmingly rejected the notion of the ownership of children': Australian Institute of Family Studies, Evaluation of the Impact of Part V11 of the Family Law Reform Act 1995: Public Attitudes to Parental Responsibilities and Children's Rights after Parental Separation (1996) 58.

the interests of parents at the expense of those of children.[57] Consider, for example, the argument made in Australia's 1995 *Report under the Convention on the Rights of the Child* that the rights to custody and access encouraged viewing children as property, and thus were rightly replaced, by the *Family Law Reform Act 1995*, with the notion of 'parental responsibility':

> In some cases, [the right to custody] has tended to lead to the belief that the child is a possession of the parent who is granted custody, to do with as that parent pleases including making the child available for access when that person pleases, despite court orders to the contrary.[58]

Consider next that '[b]efore the *Reform Act*, the most common form of order ... provided for sole custody to be vested in one parent (usually the mother), with the non-custodial parent having regular access to the child.'[59] Note also that, '[prior] to the passage of the *Reform Act* the case law had established that there was no parental right of access to a child',[60] such that those who wanted contact with the child (post-divorce fathers) did not have a particular stake in the retention of the notion of parental rights.

Against this background, the *Report*'s concern for children being treated as 'a possession of the parent who is granted custody' looks suspiciously like a preoccupation with fathers' interests. It is hard to resist the impression that the picture which the *Report* implicitly paints is that of a legal system unduly privileging mothers, giving them rights denied to fathers, and

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57 Parental responsibility has been defined as a 'key concept – both ideologically and practically' of the Family Law Act 1975 (Cth): Rebecca Bailey-Harris and John Dewar, 'Variations on a Theme – Child Law Reform in Australia' (1997) 9(2) *Child and Family Law Quarterly* 149, 155. Freeman himself has criticised the assumption that the Children Act 1989 (UK) makes, in deploying the notion of parental responsibility, that parents naturally behave in a responsible manner with respect to their children's interests: Freeman, above n 9, 320. In the Australian context it has been observed that 'requiring parents to take responsibility does not offer any sort of benchmark for ensuring that members of the family are treated with the respect which is entailed in a rights model': Jones and Basser Marks, above n 9, 285, 299. For a defence of the re-conceptualisation of parent-child relationships in terms of parental responsibility, see Katharine T Bartlett, 'Re-Expressing Parenthood' (1988) 98 *Yale Law Journal* 293, 299-302.

58 Australia's Report under the Convention on the Rights of the Child (1995) 109. See also Peter Nygh, 'The New Part VII – An Overview' (1996) 10 *Australian Journal of Family Law* 4.

59 Helen Rhoades, Reg Graycar, Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (2000) 37.

60 Ibid 64. See B and B (Family Law Reform Act 1995) (1997) 21 Fam LR 676, 722-3 (Nicholson CJ, Fogarty and Lindermayer JJ).

allowing them to get away with undermining father-child relationships. The *Report*'s understanding of the new discourse on 'parental responsibility' as a means to remedy this situation reveals the potential for conservative redeployments of that discourse – redeployments, it would appear, quite removed from a genuine concern with stopping treating children as property.[61]

There are no reasons to believe that conceptualising parental control in terms of rights has a tendency to reduce children to property. And although parental rights discourse can be misused to deny proper recognition to children's interests, the same is true (as illustrated by the example in this section) of conceivable alternatives to that discourse, such as the rhetoric of parental responsibility.

## 2 Arguments Belonging to the 'Interest's Inability to Ground Duties' Class

### A The argument from child liberationism

Above I have pointed out that the perceived soundness of the connection between parental rights and the view that children are property has motivated the demise of parental rights in relevant Australian legislation (as

[61] In both England and Australia, the discursive shift from parental rights to parental responsibility appears to have been ideologically bound up with the principle of shared parental responsibility after divorce or separation: see Eva Ryrsted, 'Joint Decision – A Prerequisite or a Drawback in Joint Parental Responsibility?' (2003) *17 Australian Journal of Family Law* 155, 157-9, 165. Cf also Bainham's observation that 'if parenthood is primarily seen as a matter of responsibility then there is a strong case for encouraging, even requiring, all fathers to accept it': Andrew Bainham, 'Changing Families and Changing Concepts: Reforming the Language of Family Law' (1998) 10 *Child and Family Law Quarterly* 1, 8. No wonder then that the Family Law Reform Act 1995 (Cth), even while substituting parental rights with parental responsibility, appears to have 'increased men's sense of entitlement in relation to residence and contact with their children': Helen Rhoades, 'The Rise and Rise of Shared Parenting Laws: A Critical Reflection' (2002) 19 *Canadian Journal of Family Law* 75, 97. The Family Law Amendment (Shared parental responsibility) Act 2006 (Cth), introducing into the Family Law Act 1975 (Cth) a rebuttable presumption of shared parental responsibility as being in the child's best interest, has further confirmed the suitability of the rhetoric of parental responsibility to promoting in practice both the traditional nuclear family and parental interests (specifically, those of fathers), quite possibly at the expense of those of children: NSW Parliament Legislative Council Standing Committee on Law and Justice, Impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (2006) 29-32.

well as the legislation of other countries). In addition to communitarianism, another ideology postulating that connection is child liberationism.

At its origin the children's rights movement was essentially welfare-oriented and paternalistic,[62] but during the seventies the emphasis shifted, with the child liberation movement,[63] to children's status as autonomous human beings entitled to self-determination.[64] Nowadays the welfare and self-determination components are both part of children's rights discourse,[65] but it is chiefly within the discursive domain shaped by liberationism that the connection between parental rights and 'children as property' makes sense.

Chapter 3 of Richard Farson's book *Birthrights* is entitled 'Self-determination and the Double Standard' – 'the double standard' referring to the law's differential treatment of children and adults, whereby the latter but not the former have 'the right to decide the matters that affect them most directly.'[66] Farson opens this chapter with the following remark: 'Children are treated as the private property of their parents.'[67] By way of explanation, in the same paragraph Farson refers to the fact that '[t]he parent has both the right and the responsibility to control the life of the child.'[68]

The association between parental rights and children as property here starts from philosophical premises quite unlike those of communitarian ideology. In child liberationist discourse, rights are good rather than bad – they define one's status as an autonomous human (ie moral) being. Indeed, rights are so good that children should have them because they are human beings and not property. Conversely, parents should have no rights qua parents, but only the rights that all human beings have, whether or not they have children.

Even if contemporary mainstream children's rights advocacy is no longer distinctly liberationist, when it decries the treatment of children as property it does so in a rhetorical field populated by the remnants of the imagery of liberationist ideology: 'every individual, solely by virtue of being human, is entitled to enjoy a full range of human rights … [C]hildren should

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62 Freeman, above n 9, 48-50; Jones and Basser Marks, above n 9, 285, 293.

63 On the children's liberation movement see Philip Veerman, *The Rights of the Child and the Changing Image of Childhood* (1992),133-48

64 Freeman, above n 9, 51-2.

65 Ibid 53.

66 Richard Farson, *Birthrights* (1974) 27.

67 Ibid 26.

68 Ibid.

be treated as people in their own right and not as mere appendages of, or chattels belonging to, … adults'.[69]

Communitarians, as we have seen, think that the crucial issue is how parental control is conceptualised: if conceptualised as a right it is bad, if conceptualised as a matter of responsibility it is good. On the other hand, liberationists think that children are reduced to objects of property because of the factual reality that their lives are controlled by their parents (or by the State), regardless of how we choose to conceptualise that control.[70] In other words, according to the liberationist position parental rights are bad because they take control away from children. On this view, parental rights should not exist because the interest in parenting, when weighed against children's interest in leading an autonomous life, is not a sufficient ground for duties (in particular, the duty to respect and support parents' ability to make decisions for their children). Thus, unlike communitarianism, child liberationism opposes parental rights through an 'interest's inability to ground duties' argument rather than a 'rights-discourse critique' argument.

But do parental rights, as a form of taking control away from children, actually reduce children to property, as child liberationists suggest? Laura Purdy has made a compelling case against child liberationism.[71] Her argument, in relevant part, is a thorough analysis of why children and adults are sufficiently different, in a morally relevant sense, to justify differential treatment.[72] As she summarizes it:

> The liberationist argument that justice requires equal rights for children because they are as rational as we depends on a minimally demanding instrumental conception of reason. … More demanding conceptions of rationality, such as the ability to plan systematic utility-enhancing projects and having a rational life plan, are plausible alternatives to this first view. But examination of these notions reveals that they presume substantial knowledge about the world and sensitivity to human interests. They also require certain character traits. It is doubtful that children, especially young children, could meet such demands. The extent to which older children … meet them generally increases by degrees. But some differences in degree are so

69 Philip Alston, 'Australia and the Convention' in Alston and Brennan (eds), above n 47, 1.

70 See eg Colin A Wringe, *Children's Rights: A Philosophical Study* (1981) 11, referring to the position of N Berger.

71 Laura M Purdy, *In their Best Interest: The Case against Equal Rights for Children* (1992).

72 Ibid 21-54.

> significant as to be morally relevant. Given the desirability of helping children to develop self-control and enabling virtues, and the likelihood that it is easier for them to do so when they are young and have help ... it is justifiable to treat children in ways that would be paternalistic were they adults...[73]

Purdy's argument makes clear that denying children the full control of their lives is not a way of dehumanising them (reducing them to chattels), but stems precisely from considerations about their well being (their interests).[74] Thus, children's interests do not defeat the ability of the interest in parenting to ground duties relating to the recognition of parental authority, that is, its ability to ground parental rights. Rather, children's interests appear to contribute to grounding parental rights.

## b The argument that parental rights is a misnomer for parental duties

### i the argument

This circumstance – that it is in children's interest that somebody have, and be recognised as having, parental rights over them – has led to the idea that parents have legal rights only to be enabled to discharge their parental duties. This is yet another way of suggesting that the interest in parenting is not a suitable ground for the duty to recognise parental authority. While the liberationist argument opposes parental authority on the basis of children's interests, this argument makes children's interests, rather than the interest in parenting, the only real basis of parental authority. On this view, because recognising parental authority is justified only by children's interests, the essence of that authority is a responsibility towards children. Thus to the extent that we speak of that authority in terms of 'parental rights', that is really a misnomer for parental duties.[75] As summarised by the European Court of Human Rights in a case involving the United Kingdom:

> Underlying the Government's description of the notion of parental rights as outmoded was the view that those rights were derived from parental duties and responsibilities and exist only so long as they are

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73 Ibid 53-4.

74 It is beside the point that we may be concerned about the well-being of entities which are not human as well – entities which can be owned, for example plants; for clearly we do not care about children's interests in the same way as we care about those of our miniature roses.

75 See Chris Barton and Gillian Douglas, Law and Parenthood (1995) 23.

> needed for the protection of the person or the property of the child.[76]

According to Michael Freeman, this idea is nowadays 'little more than a platitude'.[77] Similarly, in Ruth Deech's words, it is the object of 'general agreement amongst modern writers'.[78] Even Locke pointed out that 'to speak properly of [them, parental rights are] ... rather the Priviledge of Children, and Duty of Parents, than any Prerogative of Paternal Power.'[79]

However, the idea that parental authority is justified only by children's interests and is therefore less a matter of parental rights than one of parental duties does not explain why some people but not others can be regarded as having justifiable claims to parental authority over a specific child.[80] A focus on children's interests alone does not explain why we may feel that a newly born child should be entrusted to the care and authority of the woman who gives birth to it and wants to raise it rather than that of a stranger equally eager and qualified to raise the child.[81] However, the assumption that, under the circumstances, the interest in parenting of the birth-mother deserves respect and is a ground for the duty not to unjustifiably remove the child from her does account for such a feeling.

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76 R v United Kingdom (1988) 10 EHRR 74 [79].

77 Michael Freeman, above n 9, 319.

78 Ruth Deech 'The Rights of Fathers: Social and Biological Concepts of Fatherhood' in Eekelaar and Sarčević (eds), above n 9, 19, 23.

79 John Locke, Second Treatise of Civil Government, para 67, excerpted in John Locke, 'Paternal Power' in O'Neill and Ruddick (eds), above n 4, 241, 243. Another famous statement to the same effect is 'parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child': Gillick v West Norfolk AHA (28) (1986) AC 112, 184 (Lord Scarman). The statement was quoted approvingly by the High Court of Australia in Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218, 237 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also J v Lieschke (1987) 162 CLR 447, 458 (Brennan J).

80 However, it does explain why parental authority, whenever possible, tends to be vested in people rather than the State, as it is generally agreed that it is in the interest of children to have a personal, close relationship with one or more individual adults rather than having an impersonal relationship with a State agency: Joseph Goldstein, Anna Freud and Albert J Solnit, *Before The Best Interest of the Child* (1979) 11-12.

81 Unless we assume that biological parenting tends to be in children's interest, but this is highly dubious.

### ii case-implication critique of the argument

Likewise, if our reason for recognising parental authority were exclusively children's interests, then we could regard it as morally acceptable to forcefully make each child newly born in a destitute family available for adoption by well-off people on account of the expenses the State may incur in order to support poor families with children. The reason why we think of such State action as morally repugnant is clearly that it would intolerably violate the interest in parenting (here specifically of poor people), which we consider so important as to hold States under certain duties.[82]

In short, the interests of children may well be a ground for recognising that somebody should have parental authority over and for children even if the interest in parenting, in the absence of the circumstance that it is in children's interest that they be provided with care and guidance, would not be. But it is people's interest in parenting, weighed against any counter-considerations – including that recognising a class of persons' interest in parenting a child (eg strangers) may undermine another class of people's more important interest in parenting the same child (eg birth-mothers) – that grounds the duty to vest parental authority in certain people rather than others.[83]

### c The analytical usefulness of 'parental rights'

The notion of parental rights is particularly analytically appropriate in capturing this insight about the role played by both children's interests and the interest in parenting in justifying parental authority.

Remember that, although it is a distinctive feature of rights that they are grounded in some interest of the right-holder, sometimes the right-holder's interest is considered sufficiently important to ground a corresponding right because of its instrumental, rather than merely its intrinsic, value. The intrinsic value of the interest in parenting alone would not be a sufficient justification for parental authority and for the duty to recognise it. The instrumental value of the interest in parenting – which derives from the way in which (giving protection to) that interest is in the interest of children, who need somebody to be entrusted with parental authority – is such a justification. Thus the instrumental value of the interest in parenting grounds parental rights.

Affording protection to children's interests through the concept of parental rights, however, allows us to recognise also the intrinsic value of the interest in parenting. It is by concentrating on the intrinsic value of the interest

82 See also Barton and Douglas, above n 75, 25.

83 It is beyond the scope of this article to determine who those people should be.

in parenting (as an aspect of the well-being of people interested in parenting) that we decide in whom parental authority should vest. Children's interests in themselves would be compatible with policies which regarded considerations other than the importance of the interest in parenting the controlling factor in distributing parental authority, such as economic efficiency. But just as we cannot make sense of our moral objections to certain practices in the area of reproduction except by reference to procreative rights grounded in the interest in parenting, so we need to invoke the intrinsic value of the interest in parenting (as a ground for parental rights) in order to rationalise our objections to such policies as the forcible removal of babies from poor families.[84] Affording protection to children's interests through the concept of parental rights emphasises that there is a duty to recognise that parental authority over a child should preferentially vest in people who are particularly circumstanced vis-à-vis the child.

Of course, saying that the concept of parental rights affords protection to both the interest in parenting and children's interests does not mean that in practice the interests of children may not conflict with those of their carers. Children's interests are a ground for an independent right, held by children, to adequate care (among others). When a specific child's right to adequate care conflicts with the parental rights of its carers, then the former takes precedence over the latter.

Thus the comments of the European Court of Human Rights on the view that parental rights are derived from parental duties and exist only to protect the child are particularly appropriate: 'The main thrust of this view seems to be not to deny the existence of parental rights but rather to stress that they are not absolute and may be overridden if not exercised in accordance with the welfare of the child.'[85]

I agree with Bainham that a stance

> admit[ting] the co-existence of independent rights and interests for children and parents whilst emphasising the *primacy* of the rights and interests of children ... would probably represent a more ... theoretically accurate approach than that which attempts to subsume

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84 Rights do not have 'a privileged status in the moral firmament' even though they 'play a central role as important ingredients in a mosaic of value-relations whose significance and implications cannot be spelled out except by reference to rights': Raz, above n 1, 255. See ibid 193-216. My argument in the text is that the right to be a parent plays such a central role in explaining parent-child-State relationships.

85 R v United Kingdom (1988) 10 EHRR 74 [79].

> everything within the notion of parental responsibility and the welfare role of the courts.[86]

### d The strategic usefulness of 'parental rights'

The analytical usefulness of the discourse of parental rights is perhaps testified to by the fact that that discourse has never been completely abandoned. Thus, in *B and B and Minister for Immigration and Multicultural v Indigenous Affairs*[87] the Family Court of Australia pointed out that the 1995 amendments to the *Family Law Act 1975* replaced ideas of parental rights to custody, guardianship, and access with the notion of 'parental responsibility'.[88] But, after putting into doubt that any common law parental rights have survived the amendments,[89] the Court went on to un-problematically speak both of a parent's 'right to determine where the child shall live and attend school' and of the 'normal rights of parents'.[90]

A more open acknowledgement that parental rights exist because the interest in parenting is a ground for duties may be particularly important for groups whose parenting interests have not been traditionally supported by the law. Consider, for example, the experience of the stolen generations. The

86 Andrew Bainham, *Children: The Modern Law* (2nd ed, 1998) 103-4. See also Bainham, 'Changing Families and Changing Concepts', above n 61, 4-5. Recently, Shelley Day Sclater and Felicity Kaganas have documented the assimilation of legal rhetoric on parental responsibility and the child's welfare by English parents in contact disputes, who attempt to use it, among other things, in order to support moral claims based on interests of their own: see generally Shelley Day Sclater and Felicity Kaganas, 'Contact: Mothers, Welfare and Rights' in Andrew Bainham et al (eds), *Children and their Families: Contact, Rights and Welfare* (2003) 155. Sclater has pointed out that the rhetoric of children's welfare 'leaves little room for any recognition of the psychology of the adults involved': Shelley Day Sclater, *Divorce: A Psychosocial Study* (1999) 126. (She also provides examples of how internalisation of that rhetoric may play a role in imperilling a parent's psychological well-being: at 138).

87 (2003) 30 Fam LR 181 (Nicholson CJ, O'Ryan and Ellis JJ).

88 Ibid 216. Before the 1995 reform, the heading in section 63F of the Family Law Act 1975 (Cth) referred to 'Rights of Custody and Guardianship of Children.' Section 63E(2) defined custody as 'the right to daily care and control.' However, according to the Family Law Court, '[a]ny view that until the Reform Act the law in Australia spoke in terms of the rights of parents to custody or access seriously misunderstands the development of the law long before 1995': B and B (Family Law Reform Act 1995) (1997) 21 Fam LR 676, 747 (Nicholson CJ, Fogarty and Lindenmayer JJ).

89 B and B and Minister for Immigration and Multicultural and Indigenous Affairs (2003) 30 Fam LR 181, 216 (Nicholson CJ and O' Ryan J).

90 Ibid.

forcible removal of Aboriginal children from their families in Australia was wrong not only because the children suffered as a result, and not only because of the devastating effects the policy had on Aboriginal society. It was wrong also because it violated the interests that specific Aboriginal adults had in raising the children who were unjustifiably removed from them.[91] This is surely why the recommendations of the Human Rights and Equal Opportunities Commission include, among those entitled to reparations, 'family members who suffered as a result of the children's removal'.[92]

The Australian Human Rights and Equal Opportunities Commission has pointed out that the phenomenon of the stolen generations continues, in a variety of guises, to this day.[93] It is worth wondering if the continuation of this injustice is partly facilitated by the fashionable reluctance openly to admit that the interest in parenting is important enough to ground a corresponding right.

It is hard to deny that (some conception of) the child's best interest standard should ultimately be determinative of the question of whom a child (including an Aboriginal child) should be placed with when the parenting provided by its carers is called into question.[94] Even so, it is possible that downplaying the importance of the interest in parenting has the effect of blinding adjudicators to the fact that determining what is in a child's best interest is in many cases not an objective assessment which admits of one clear answer.[95] It is entirely conceivable that cases deciding that an Aboriginal child

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91 'The right to the society of the child is a parental right, and it is appropriately considered as a parent-centred right... it is true that a child benefits from the society of its parents, but that fact surely is ground for asserting the child's right to parental society, which is another right altogether': Alexander McCall Smith, Is Anything Left of Parental Rights? in Elaine Sutherland and Alexander McCall Smith (eds), *Family Rights: Family Law and Medical Advance* (1990) 10.

92 Human Rights and Equal Opportunities Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) Appendix IX, Recommendation 4. See also ibid Part 3.11. As the Commission's recommendations suggest, depending on the particular socio-cultural context and specific situation of each case, the rights to raise, care for, and have a relationship with children – ie parental rights – do not have to be concentrated in a child's biological parents.

93 Ibid Part 6.20.

94 For an illuminating analysis of the operation of the child's best interest standard in the context of Australian law see: Richard Chisholm, '"The Paramount Consideration": Children's Interests in Family Law' (2002) 16 *Australian Journal of Family Law* 87.

95 Marygold S Melli, 'Towards a Restructuring of Custody Decisions-Making at Divorce: An Alternative Approach to the Best Interests of the Child' in Eekelaar and Sarčević (eds), above n 9, 325, 325-7.

should be raised outside its family of origin on the ground that this is in its best interest could be decided differently if an equally plausible interpretation of the child's best interest standard were adopted. In a discursive context where the primacy of the child's best interests is accompanied by an emphasis on parental responsibility and a denial of the relevance of parental rights, an adjudicator may fail sufficiently to explore the possibility that there may be plausible interpretations of the child's best interest which happen not to violate the interests in parenting of Aboriginal adults. In such a context, it may be the case that interpretations of the child's best interests which conform instead with the adjudicator's western notions of what amounts to good parenting end up being favoured.[96]

To illustrate this, consider the case *In re CP*.[97] This was an appeal to the Full Court of the Family Court of Australia against orders vesting the daily care and control of an Aboriginal Tiwi child in a Torres Strait Islander, and against residence orders with respect to the same child in favour of the same person. The Full Court allowed the appeal for a number of reasons. For our purposes, it is notable that the Court pointed out that too 'little significance' was placed by the trial judge on the evidence that 'the idea of adoption outside the family or group is a repugnant concept from the point of view of the Tiwi Islands, whereas ... it is an accepted practice in the culture of the Torres Strait Islanders.'[98]

It may be that the Court stressed this difference as part of its point that an Aboriginal child's interest in being connected with its specific cultural background is not simply catered for by placing the child in an Aboriginal family/community, if this is different from the community of origin.[99] However, this impression is belied by the fact that the Court refers to the different attitudes towards adoption as being a 'highly relevant difference between the parties in this case'[100] – rather than between the two cultural groups.

The Court in this passage seems to be implicitly suggesting that the child's parents' interest in parenting – an interest whose significance in this case was given shape by a peculiarly Tiwi connotation – should have been

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96 For a classic discussion of the traditionally ethnocentric bias of the child's best interest standard see Marlee Kline, 'Child Welfare Law: "Best Interests of the Child" Ideology and First Nations' (1992) 30 *Osgoode Hall Law Journal* 375.

97 (1997) FLC ¶92-741 (Nicholson CJ, Ellis and Moore JJ). For a discussion of this case see John Dewar, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217, 222-6.

98 In re CP (1997) FLC ¶92-741, 83989.

99 Ibid 83990-91.

100 Ibid 83989.

taken into account by the trial judge. Other passages of the decision imply that it could not be ruled out that an order in favour of the Tiwi parents would have been in the best interests of the child.[101]

On the whole, this decision may be taken to indicate that the notion of parental rights and interests can be a valuable discursive category when it comes to meeting the parenting aspirations and needs of groups, such as racialised minorities, who do not buy into traditional understandings of procreation, family and 'good' parenting. This is because the construct of parental rights has the potential for opening up the minds of decision-makers to understandings of the best interests of the child standard which are more respectful of those aspirations and needs, and no less plausible than other conceptions of that standard.[102]

In this respect, heteronormativity is as much a risk as ethnocentrism. For example, Jonathan Erring has denied that the child's welfare standard has generally prevented parental interests being adequately protected in England, but he has recognised that the case of homosexual parents is an exception.[103] Adults in white heterosexual nuclear families can perhaps afford giving up the notion of parental rights for that of parental responsibility, but it is less clear that racialised minorities or sex/gender outsiders can afford that luxury.[104]

## F Conclusions

I have argued that the interest in being a parent is morally valuable, and important to such an extent as to presumptively make it a ground for duties. That the value of a person's individual interest be sufficiently important to hold others under a duty to act in certain ways is precisely the condition which defines the existence of a right, according to the definition of a right accepted

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101 Ibid 83991.

102 See Dewar, above n 97, 216. For the different point that the child's best interest (or welfare) standard should be abandoned on the ground (among others) that it generally gives no sufficient consideration to the interests of adults, and replaced by a standard favouring (with certain qualifications) the solution that avoids inflicting the most damage on the well being of any interested party see John Eekelaar, 'Beyond the Welfare Principle' 2002 14(3) *Family Law Quarterly* 237.

103 Jonathan Erring, 'The Welfare Principle and the Rights of Parents' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is A Parent? A Socio-Legal Analysis* (1999) 89, 100.

104 From this perspective I think it is misguided to abandon the concept of parental rights to those conservatives who champion it in all but its Roman sense of patria potestas: see eg Barry Maley, *Children's Rights: Where the Law Is Heading and What It Means for Families* (1999).

in this article.[105] I have argued that, unless the importance of the interest in parenting proves to be outweighed by counter-considerations on all occasions, it therefore grounds a general right to be a parent. From this core right, which is not absolute, we can derive two sets of more specific rights: procreative rights and parental rights.

I have examined several claims to the effect that we should not speak of either procreative or parental rights at all. I have classified these claims into two categories. The first category contains claims which object to procreative or parental rights on the ground that rights talk is an inappropriate or undesirable discursive framework to conceptualise issues of reproduction and parenting, but do not necessarily deny that the interest in parenting can be a ground for duties owed to the interest-holder. I have argued that this class of claims is built on dubious understandings of the concept of right. The second category of claims opposing procreative and parental rights comprises ones to the effect that the interest in parenting cannot be regarded as a ground for duties owed to the interest-holder. I have responded to these claims by criticising their assumptions or arguments, and by using a case-implication critique.

I have also pointed out that speaking of procreative rights may be particularly important for those who have been traditionally excluded from the sphere of reproduction. Likewise, parental rights, lending themselves as they do to bringing to the fore the importance of the interest in being a parent (everyone's such interest), may work so as to correct the ethnocentric and heteronormative biases of our systems of family law.

In sum, this article has argued that the interest in parenting is important enough to ground certain duties towards people choosing to reproduce and parent. The precise content of those duties awaits discussion elsewhere.

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105 See Raz, above n 1, 166.