Teresa Baron*

Justice for Thwarted Fathers? Problems for Retrospective Parental Rights Claims

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Abstract: This paper examines the legitimacy of retrospective parental rights-claims through the lens of so-called 'thwarted father' cases: men who are unaware of their progeny's existence until the window for establishing legal parentage (and associated rights) has passed. In some famous cases of thwarted fathers, courts have found that an injustice has been done which must be rectified by awarding retrospective parental rights and custody to those men, even when their genetic child has already lived for some extended period with their adoptive parents. In this paper, I critically examine Norvin Richards' liberty-based defence of the parental rights of these fathers. He argues that the decision to overturn an adoption in a thwarted father case is justified if we agree that a man's contribution of sperm was indeed the first act of a parenthood project that he should have had the liberty right to continue. Although Richards' account might allow us to say that a thwarted father has been wronged, justice cannot demand that the situation be rectified through specific performance (as in cases when property is stolen and justice requires that it be returned).

Keywords: parenthood; parental; children; deception; justice

1 Introduction

What makes my child 'mine'? This is a question that few parents think to ask; we often take parents' moral and legal rights over their children for granted, especially in 'uncomplicated' cases of biological procreation. However, problem cases – whether real or hypothetical – call into question the social practices and legal frameworks concerned with rights and responsibilities to children. Philosophical accounts of *moral* parenthood aim to justify or critique these practices and laws by explaining what distribution of moral rights and obligations they should reflect. The problem cases with which accounts of parental rights are concerned are generally

***Corresponding author: Teresa Baron**, Department of Philosophy, School of Humanities, University Park Campus, University of Nottingham, NG7 2RD, Nottingham, UK,
E-mail: teresa.baron@nottingham.ac.uk. https://orcid.org/0000-0001-9930-209X

those in which multiple couples or individuals assert competing parental rights. These include dramatic but mercifully rare situations such as surrogacy agreements in which one party reneges, baby-swap cases, and 'embryo mix-up' cases, in which a woman receiving fertility treatment has another couple's embryo implanted in error. However, relevant problem cases also include more commonplace situations – which may be no less distressing for those involved – such as disagreements over the adoption of a child by their stepparent at the expense of their birth parent's rights. The exclusive model of parenthood that predominates in Western societies cannot comfortably accommodate such competition.[1]

One kind of contemporary clash – on which this paper will focus – is that present in thwarted father cases. These are cases in which a man is unaware (whether due to deliberate withholding of information, deception, or his own disinterest) of the existence of his offspring until past the point at which he had the right to establish his legal rights, and the child is adopted without his consent. (If he had been a legal parent, the child's adoption would have required his consent as much as the mother's.) Many have the strong intuition that an injustice has been perpetrated against the genetic father in such cases, particularly where deception is involved: an opportunity has been withheld that he should have been able to pursue. If this is the case, it is either because the father had a moral right to parent the child on the basis of the genetic connection; or because the father had a pro tanto moral right to take up the parenting opportunities afforded to him by his *legal* rights. This paper is concerned with both moral and legal parental rights over children, and the relationship between the two. In the case of thwarted fathers, the rights being pursued are legal rights (and particularly, the right to custody) but, as we will see, these legal rights are often defended by appeal to putative moral claims.

Genetic connections are considered not only socially important but deeply morally weighty throughout Western culture. This is evident not only from the lengths to which many individuals and couples go in attempting to have 'their own' children, but also from the lengths to which some go in trying to avoid what they consider the 'intolerable' weight of genetic parenthood. When couples disagree over the fate of their frozen embryos, this weight – even in the absence of an actual social or legal parental role – is widely considered great enough to justify upholding the claim of the partner petitioning for the destruction of the embryos over that of the partner who wishes to implant them (Waldman 2002; Williams 2010). It has been argued in some contexts that custodial claims by estranged fathers, when made only on the basis of genetic connection, are symptomatic of a patriarchal, proprietary conception of parenthood. However, it is clear that women often feel equally deeply about their genetic children, even when these children are hypothetical. Further, even if the interests of genetic

1 This is itself an independent and important problem, to which we return briefly in Section 3.3.

fathers in claiming parental rights are indeed the product of a patriarchal culture that lionises genetic parenthood, it is not clear that these interests do not themselves have moral significance. As observed in *Lehr v. Robertson*:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. (463 U.S. at 262, quoted in Hamilton 1988, 978)

In light of the social and legal importance granted to genetic fatherhood it is unsurprising that some men who find themselves in this position would have a deep interest in claiming that opportunity. The question, though, is whether justice requires that he should be allowed to pursue this opportunity *after* the child has been adopted and has settled into another family. In a small number of cases, courts have upheld the thwarted father's claim to legal parental rights in retrospect and ordered the adoptive parents to hand over the child to his custody; however, this kind of ruling has also been criticised as contrasting starkly with other long-established socio-legal practices relating to changes in parentage and custody (for discussion, see Baron 2023; Oren 2006; Richards 2010; Shanley 1995).

1.1 The Legal Rights of Birth Parents

In nearly all jurisdictions, the birth parents of a child have legal parental rights and responsibilities by default; they must be found unfit in order to have these rights and responsibilities denied or terminated. By birth parents is here meant the gestational mother of a child and her legal partner or spouse, for whom the traditional 'presumption of legitimacy' grounds parental rights and responsibilities regardless of their genetic relationship to the child. However, if the gestational mother's spouse is not the genetic father of the child, it is possible in many countries for (a) the genetic father to seek legal parenthood in their place; and/or (b) the spouse to seek to disavow their default legal parental status. If the unmarried genetic parent is able to establish their legal parentage at this point, determination of their ongoing rights (like those of the birth mother) must be judged against the fitness standard, rather than the best interests standard (Baron 2023, 98–101). At the same time, there is often a limited window of opportunity for either of these processes to be undertaken, since courts are less likely to accept an application for parentage (or dispute of parentage) in cases where the relevant parent–child relationship is more firmly established. To disrupt such a relationship is widely considered to be contrary to the best interests of the child.

This attitude is reflected in law across a number of countries, including the United States, the United Kingdom, Germany, and France (Black 2018, 19–20). For example, in a recent case (*A Local Authority v. SB & ORS*), HHJ Case (KC) concluded that under UK law, the lack of genetic connection between father and child was insufficient to automatically terminate his parental responsibility. She observed that 'section (2A) [of The Children Act 1989] is the only means by which the court can consider removing parental responsibility from a father who has gained it under subsection (1); [and] that it is a welfare-based decision' ([2022] EWFC 111, para. 35). HHJ Case (KC) found further 'that the fact that the man in question has been found not to be the biological father will feed into that welfare consideration, but that the discharge of parental responsibility is not automatic' ([2022] EWFC 111, para. 35). Similarly, in the United States, the Unified Parentage Act (2000, revised 2002) 'gives the court authority to deny a motion for genetic testing to determine paternity where this is not in the best interest of the child, taking account of factors such as the length of time during which the presumed father has acted as father, the nature of their relationship, and the age of the child' (Black 2018, 19). This Act also establishes a concrete time limit for unmarried genetic fathers to establish their legal rights: unless they can show 'compelling reasons' for failing to do so, they must register their paternity before the child's birth or within 30 days after the birth (Oren 2006, 174).

The man who is not married or in a civil partnership with his child's mother must therefore take action within a relatively short period of time to ensure his parental status. The biological link is insufficient: as Seymore (2016) observes, a genetic father 'is not a legal parent unless he takes affirmative steps to grasp fatherhood' (819). But what if the genetic father – due to some omission or deception on the part of the birth mother – does not know that he has a child, and therefore misses the window to establish legal parentage? That leads us to the subject of this paper: the 'thwarted' father.

1.2 Who is a Thwarted Father?

In defining this category, we may begin with the fathers who are *not* included. I am not concerned here with the plight of men whose legal parental rights were historically held as purely a matter of marital 'legitimacy' despite their actual custody and care of their offspring. A classic example is found in the 1972 landmark case *Stanley v Illinois* (405 US 645). Peter Stanley had lived with his partner Joan intermittently for 18 years, during which time they had three children but never married. When Joan died, the children were declared wards of the state on the basis of the Illinois statute that defined parents as 'the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and

includes any adoptive parent' (Ill. Rev. Stat. 1967, ch. 37, par. 701–14 (1967), quoted in Carbone 2005, 17). Peter Stanley was treated as a legal stranger to his children despite the practical facts of their upbringing. On appeal, 'the Court found that the state could not take his three children from the custody of the man who had "sired and raised" them on a pure best-interests basis and without making a finding of actual parental unfitness' (Oren 2006, 158). In a moral sense, Stanley was indeed treated unjustly, and the changes to US law that followed this and similar cases were a reflection of the gradually more egalitarian treatment of unmarried fathers and 'illegitimate' children. However, Stanley was not a thwarted father in the sense of interest in this paper. This paper is about fathers who have never been allowed to take custody of their genetic children and have therefore never had the opportunity to establish a parent–child relationship with them. But more specifically, the thwarted father is not thwarted by the law – the opportunity withheld from him is one that the law ordinarily would have afforded him.

To make this distinction clearer, let us look at another example of a father who – whilst treated unjustly – was also not thwarted in the sense on which this paper focuses. Donald Kirkpatrick was a central figure of the 1982 Texas case *In re Baby Girl S* (628 S.W.2d 261). Kirkpatrick was the twenty-five-year-old unmarried father of a baby girl. He knew of the mother's pregnancy; attempted to support her (including by offering to marry her); and tried to maintain contact with her. When he found out that the mother – who was 16 at the time – planned to give up the child for adoption, 'he made plain his desire to raise the child himself, and he even deposited money with the Texas court for the child's support' (Buchanan 1984, 378). Under Texas law at the time, however, the trial court 'could declare paternity only if it found legitimation to be in the best interests of the child' (379). The trial judge found against Kirkpatrick, deciding that the child's interests would be best served by placing her for adoption. In this case, the genetic father was thwarted in his pursuit of parenthood. However, he knew of his child's existence, and his pursuit of parenthood was thwarted by the law at the time (albeit a law which a gradually more progressive society eventually found to have been unjust).

Another case, decided a decade later and with an entirely different outcome, is 'Baby Richard' (*O'Connell v. Kirchner*, 513, US 1303). In this case, the parental rights of a four-year-old child's adoptive parents were retrospectively declared illegitimate; parental rights and custody were awarded instead to the child's genetic father, Otakar Kirchner. Kirchner, unlike Kirkpatrick, had been thwarted not by the law but by the mother of the child. He had known of his former partner's pregnancy but been told that the child had died shortly following birth, and he had therefore not made a parental claim during the standard time period following birth. Kirchner was therefore a paradigmatic thwarted father in the relevant sense for this paper. Had he

legitimated the child, his consent (as well as the mother's) would have been necessary to approve the adoption; post facto, all he could do was petition for the adoption to be overturned. The lower court found that it was not in the best interests of the child to grant Kirchner parental rights. However, on appeal, the Illinois Supreme Court invalidated the adoption on the basis that the genetic father's parental rights had never been properly terminated on *unfitness* grounds. In this case, as I have argued elsewhere:

> A crucial role was played by the claim that the genetic father's legal rights had not been properly terminated at the time that the child was adopted. According to this line of reasoning, something was withheld from him to which he had a right; and further, the nature of that right is such that justice demands a particular kind of resolution (custody of the child) rather than another kind of compensation for lost opportunity. (Baron 2023, 187)

In other words, the reason for deviating from standard practice in some thwarted father cases seems to presuppose that the moral rights of the father justify – and even require – this kind of a deviation. It is this presupposition, and the significance of a perceived injustice, that this paper explores. Even if (as a number of accounts of moral parenthood suggest) a genetic father has pro tanto moral rights to parent his child, *and* these moral rights justify his having legal parental rights, several further steps are required to show that he should be allowed to claim the opportunity to parent months or even years following the child's birth.

In Section 2, I outline and critically examine Norvin Richards' account of parental rights and their need to withstand specifically *unjust* interruptions, as applied to thwarted father cases. This account is unique in challenging the assumption, otherwise generally shared among philosophers of parenthood, that the best interests of the child require us to prioritise established parent–child relationships over the interests of other prospective parents in raising the child in question. Although some other accounts would substantiate the thwarted father's claim to having initially had moral rights over the child, only Richards' account makes an explicit case defending the child's 'return' to the thwarted father. I argue, however, that this account cannot plausibly justify the claim that the thwarted father has a moral right to custody of the child in question even when that child already has a caring relationship with their adoptive parents. I argue this on the grounds that (a) it is implausible in most such cases that the genetic father has parental rights at the time that the child is born; and (b) the only right that the liberty-based account might reasonably justify at the time the child is born is the moral right to *begin* rearing the child, which has different defeasibility conditions to moral parental rights in the full sense.

2 How Do We Acquire (Moral) Parental Rights?

When individuals or couples do have children, it is undeniable that biological parents generally have strong interests in keeping and rearing their offspring. However, it is an entirely separate question whether these interests provide moral grounds for parental rights as these are usually characterised (comprising more-or-less exclusive custody and control of a child, including direction of its schooling, diet, moral education, hobbies, religion, medical care, playmates, contact with other friends and family members, and so on).[2]

Some older theories defend moral parental rights by appeal to parental interests alone (or relations such as parents' ownership of the genetic materials from which a child is created); however, few philosophers today are willing to defend proprietary conceptions of moral parental rights or accounts based unilaterally (or even primarily) on parents' interests in rearing their offspring. Instead, two approaches currently predominate: the child-centred approach and the dual-interest approach. The former hold parental rights to be justified only insofar as they best serve children's interests (Brennan and Noggle 1997; Gheaus and Straehle 2024; Montague 2000; Vallentyne 2003). The latter appeal to both the interests of children (e.g. in exclusive care and attention, in a stable and intimate parent–child relationship, in their parents' ability to exercise autonomy in childrearing) and the interests of parents (e.g. in developing and maintaining a close parent–child relationship, in the autonomous exercise of parental authority, in the freedom to parent according to their own values and principles) (Gheaus 2012; Macleod 2015; Shields 2019). The partial appeal to biological parents' interests in raising their own offspring (as opposed to an interest in parenting per se, which could be satisfied by being allocated any child to raise), is seen by some as necessary for explaining why parents have a right to parent their own children, even though other potential parents might theoretically better serve the interests of those children (Baron 2023, 156–62).

2.1 The Liberty-Based Account

Norvin Richards' (2016) account of the rights of biological parents to rear their offspring is grounded in an appeal to more general liberty rights. He begins from the basic principle that 'we are at liberty to do anything we choose, as long as it is not morally wrong' (2016, 271). We are also at liberty 'to continue any morally innocent

2 Some philosophers have put forward accounts of parental obligation suggesting that adults other than parents may also have responsibilities to children; however, parental rights are near-universally conceptualised as highly exclusive. I return to this point in Section 3.3.

action we have underway, as long as it continues to be morally innocent, just because it is what we are doing' (2016, 272). Richards then applies this reasoning to the project of 'creating a child whose parents they will be in the years to come': if one is entitled to begin and continue this project, then one must also be entitled to parental rights regarding that child, since having parental rights is part and parcel of being the parent of a child (2016, 272).

In unplanned pregnancies, Richards argues, the gestational mother has parental rights in virtue of her liberty to decide to continue her pregnancy and parent the resulting child. Whether or not the child will be created is a decision about what she will do with her body; it is therefore entirely determined by her liberty rights. If she decides to have the child and parent it, the same liberty-based logic applies as in the original version of the argument: she has the right to continue doing what she was doing. However, whether the genetic father has the right to parent the child depends upon whether the mother had promised he could be a (social) father to any child they might happen to conceive: 'Having made that promise, she wouldn't then be perfectly free to choose not to inform him that she was pregnant, to choose a different partner for the next stage, or to choose to go it alone' (2016, 273). Alternatively, he might have this legitimate expectation if 'their history together made this a reasonable belief that she did not discourage' (2016, 265).

We may note here that this immediately restricts the pool of genetic fathers who acquire parental rights in unplanned pregnancies, since there will be many situations in which no legitimate expectation of this kind could be formed. Richards' example is the man who fathers a child during a one-night stand under circumstances where a child could potentially have been conceived and doesn't make any efforts to follow up with the mother.[3] Other examples might include the man whose donated-for-research sperm is used in fertility treatment due to administrative error, or the man who finds out he is a genetic father after the break-up of an unhealthy or abusive relationship with the child's mother. We could even extend this to genetic fathers who find out that a child was conceived after any breakup in which the couple did not end on good terms. Embarking upon the project of having and parenting a child with an ex-partner is a project that few couples (if any) undertake deliberately. It is therefore not particularly plausible that a man could have a reasonable expectation that his ex-partner would let him be a father to her child, even if this would have been entirely reasonable to expect of her *during* their relationship. If 'legitimate expectations' are to be determinative of a genetic father's

3 Whilst some argue that the mother has a strong moral obligation to inform the father if this is at all possible for her (see e.g. Hamilton 1988), others take a similar stance to Richards here. Shanley (1995), for example, argues that 'the responsibility to know of a child's existence should fall on the man who would assume responsibility for raising the child' (194).

parental rights in unplanned pregnancy, it stands to reason that this should include expectations nourished during and following a break-up, and not only during the relationship itself.[4]

2.2 Returning to the Thwarted Father

Richards attends closely to the situation of the thwarted father, looking in particular at the cases of 'Baby Richard' (mentioned above) and another similar case, 'Baby Jessica' (*In re Clausen*, 442 Mich. 648, 502 N.W.2d 649 (1993)). Richards argues that it would be strongly morally objectionable for judges to make their custody decisions in such cases on the basis of the child's best interests: 'the deepest wrong is that a judge who did this would ignore the right that biological parents have to raise their children themselves or to decide that it would be better if someone else did' (2010, 12). The rights of biological parents to keep and raise their own children can ordinarily only be given up voluntarily or be terminated on grounds of unfitness; as mentioned above, where judges have 'restored' children to the care of thwarted fathers, this has generally been on the grounds that those fathers' rights were never properly terminated. In the 'Baby Richard' case, for example, the Illinois Supreme Court observed that 'if the best interests of the child were a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc. might challenge and deprive the parents of their right to their own children. The law is otherwise and was not complied with in this case' (*In re Doe*, 638 N.E.2d 181 (111. 1994) 182–183).

In agreement with this reasoning, Richards asks, 'Assuming we agree that the state should not ordinarily enforce its judgment of what is best for a child by deciding who her parents are to be, why should it do so in the Baby Jessica case?' (2010, 14). This question presupposes, however, that the state can only decide who the social and legal parents of Baby Jessica 'are to be' if we deny that her adoptive parents are parents in any morally relevant sense. This can only be the case if we accept that the thwarted father has always been and continues to be a parent throughout the period in question *and* that this means that no other party can acquire legitimate parental rights, regardless their relationship with the child.

Richards argues that 'a biological parent is the child's parent at the start and ordinarily has a right to continue, but a free choice to stop forfeits that right, and it leaves no residual right to resume at some time of one's choosing' (2010, 52). If our

4 This is because the man who finds out that he is the genetic father of his ex-partner's child and knows that – given their negative relationship – she would not want him to play a parental role in the child's life, can only base his expectation of doing so on his 'mere' genetic connection.

parental rights are essentially grounded in our liberty to continue undertaking a project that involves our *having* parental rights, then it stands to reason that voluntarily interrupting the project will interrupt those rights. However, the kidnapping of a child might interrupt the biological parents' project of parenting, but 'can't cost them their right to be the child's parents, if there is to be any sense at all in speaking of their having had that right' (2010, 52). The biological parents' claim to have their child returned is especially strong because of the injustice causing the interruption of their project: they have not been accidentally separated, their child has been kidnapped. If we learned of this injustice and did not rectify it by returning the child, Richards argues, we would be complicit with the original injustice.

The barring of the thwarted father from asserting his legal parental rights is (Richards argues) analogous analogous to a kidnapping case. Although not an actual kidnapping, the biological mother's deception makes this 'a case in which wrongdoing by another person separated a biological father from his child' (2010, 52). The adoptive parents – even if they knew nothing of the original wrongdoing – would be complicit with the original injustice if they did not return the child to her father. Richards does recognise that the reasons for overriding the biological father's priority are significantly stronger the older the child and the longer-established her relationship with her adoptive parents. The distress to both these parties will be far greater when the child is five years old than when she is five months old. He nonetheless argues that the father's moral parental rights are no different between the two cases (assuming that he genuinely falls into the category of thwarted father).

According to Richards, the father has a moral right to parent the child because he began the morally permissible project of parenthood by co-creating a child; this right is only meaningful if it can withstand unjust interruptions; his parental rights are therefore enduring and are not eroded by either the child's best interests or the fact that the adoptive parents' own parenthood project establishes their parental rights. Although it could be argued that the adoptive parents' own moral rights make them strong contenders to claim custody, Richards appeals to the injustice originally inflicted upon the thwarted father and the moral requirement for the adoptive parents to relinquish the child, rather than be (knowingly) complicit in that injustice. All this leads Richards to agree that both the 'Baby Richard' and 'Baby Jessica' cases were resolved correctly: with the 'return' of both children to their genetic fathers.

3 What Does Justice Require?

I agree with Richards that the right to raise one's offspring must be able to endure in the face of clearly unjust interruptions such as kidnapping. However, in order to be described as being separated from *his* child (in the moral, rather than merely

biological sense) by being barred from the opportunity to parent, we have to agree that a man's contribution of sperm was indeed the first step of a parenthood project he should have had the liberty right to continue. Let us consider again the grounds of parental rights according to the liberty-based account: Richards argues that when a couple conceives a child through sexual intercourse, 'this entitles them to continue their project of creating a child whose parents they will be in the years to come'.[5] In his words, continuing this project means something different for each of them: 'in her case, to be the gestational mother of the child; in his, to be "supportive" during the pregnancy' (2010, 52). It seems clear that some shared intention regarding their co-parenthood of the hypothetical child is necessary for a couple to undertake the project together.

The man who simply contributes sperm and nothing else to a parenting project cannot plausibly be said to have a continuing role in parenthood such that he has full parental rights at birth; otherwise, Richards' account would collapse into geneticism.[6] In both the planned and unplanned pregnancies, however, the father's involvement *following* conception depends upon how the mother chooses to exercise her own liberty; she will not always be obliged to allow him to support her (or take other parenthood-related steps) during pregnancy.[7] As argued elsewhere, the child is *born in* the gestational mother's custody; owing to the nature of human procreation, there is no clear timepoint at which we can say that she begins caring for her child (Baron 2020; Rothman 1996). However, if the genetic father has not been involved in the pregnancy (as we would expect in most standard cases of thwarted fatherhood) then the next step in his project must be the *acquisition* of custody, rather than its *reinstatement*.[8] The appeal to liberty to continue with an ongoing, morally innocent project cannot do the job here.

The unmarried genetic father today has legal protections that provide him with another opportunity to start the project of being a parent to his genetic offspring, and if this opportunity is taken up, we could plausibly (re)apply Richards' account; now

5 It is worth noting here that, due to the wording used in this and similar instances, the scope of his statement is ambiguous between (a) 'the project of [creating a child] whose parents they will be' and (b) 'the project of [creating a child whose parents they will be]'.

6 As noted above, Richards agrees on this point in the case of certain one-night stands: those in which the couple's actions could foreseeably have resulted in a pregnancy and in which the father made no effort to find out if they did result in pregnancy.

7 Richards is not alone in making fathers' parental rights dependent on mothers' decisions in at least some cases; the same can be said of other accounts, such as Gheaus' (2012; 2018) gestationalist relationship-based account and Millum's (2010) 'investment principle'.

8 Again, we cannot say that impregnation constitutes the beginning of parenting independent any other involvement, lest we (a) grant parental rights to the feckless one-night stand father, contra Richards' argument, and (b) risk a collapse into a geneticist or causal account of parental rights.

that the genetic father has started parenting, his liberty rights might translate into parental rights. In this sense, the thwarted father is relevantly different from the man whose child has been kidnapped: he has been denied an opportunity to which he had a legal right, and which would (if exercised) have allowed him to acquire parental rights. However, if his only act of parenthood has been to impregnate his partner, he does not have parental rights at that point: as Richards emphasises himself, 'parenthood is not a single action, but a continuing role in the life of the child' (2010, 22). We might still be able to say that the thwarted father has been wronged, since the mother's deception has prevented him having an opportunity he would otherwise have been in a position to take up. However, justice cannot demand as a matter of course that the situation be rectified through specific performance, as in cases when property has been stolen and justice requires that it be returned to the rightful owner.

3.1 Justice, the Right to Rear, and First Refusal

Richards, like many philosophers of parenthood, treats moral parental rights as something of a package deal: he refers throughout to either 'parental rights' or 'the right to parenthood' rather than considering more specific rights. This makes sense, given his appeal to the liberty to undertake projects as the basis for parental rights. However, I would argue that there are individual parental rights that can and should be separated from others given their differing conditions. One of these, as I have previously argued, is the gestational mother's strong pro tanto negative liberty right not to be separated from her newborn child (Baron 2020). The facts of gestation and a commitment to liberty from grave harms are sufficient to justify this right, but they do not straightforwardly entail that the gestational mother has other rights commonly characterised as parental (such as the right to decide on the child's medical treatment or their upbringing). The young adolescent mother may therefore have the right to keep her newborn with her, but not to make authoritative decisions regarding the child's medical treatment.

The right to begin rearing one's biological offspring in an intimate parent–child relationship – as opposed to continuing to do so – would seem to be a right with quite particular entry and exit conditions. Let us call this a 'maker right' for the time being (in loose parallel with Lindsey Porter's definition of maker obligations). The maker right would be a right to the opportunity to begin parenting and to establish a parent–child relationship, rather than to a specific role, status, or 'ownership' claim on one's child. But this means that it may well have different defeasibility conditions to the right to *keep* one's child and *continue* parenting. This means that although justice would demand the return of a kidnapped child to her parents, it cannot

necessarily require the overturning of an adoption to provide a genetic father with the opportunity to *begin* rearing the child. For the thwarted father whose only putatively parental act to date has been conception, acquiring moral parental rights depends upon the (legal) right to rear being exercised. Further, if the opportunity in question ceases to exist, so too must the right. In the words of the South Dakota Supreme Court: 'Children are not static objects. They grow and develop… The basis for constitutional protection is missing if the parent seeking it does not take on the parental responsibilities timely. The opportunity is fleeting. If it is not, or cannot be grasped in time, it will be lost' (*In re Baby Boy K*, 546 N.W.2d 86, 97 (S.D. 1996), quoted in Oren 2006, 181).

Again, this is not to say that the thwarted father has not been *wronged* if the mother deceives or manipulates him so that he loses out on an opportunity to which he originally had a legal right. However, the wrong in question is not – contra Richards – the violation of the thwarted father's (moral) parental rights. Nor is it a wrong that must necessarily be rectified by granting the thwarted father custody. In cases where the father finds out that he has a biological child years after that child has been adopted, it would seem clear that the opportunity in question cannot be reclaimed. In this sense, the maker right is more like a right of first refusal than a property right, citizenship right, or inheritance right. We can imagine a situation in which A has a right of first refusal regarding a certain job, should the position ever become available. However, they find out at some point that the job became available and was given to B (who knew nothing about A's agreement with the university). A has certainly been wronged, but justice for A cannot demand that B is fired from their position and that A is instated in B's place. The most that justice can demand is that A is compensated for the wrong – for example, through financial compensation or by finding another suitable position for them.

A 'right of first refusal' to parent one's genetic child, if it exists, must clearly be defeasible. By referring (above) to the development of a parent–child relationship between the child and adoptive parents, it might appear that what I am arguing here is that the child's best interests *outweigh* the father's enduring right to custody. To clarify, then, I am arguing that the genetic father's right to the relevant opportunity is eroded sometime after the opportunity in question has been taken up by (morally innocent) others. I use 'eroded' here rather than a more determinate term such as 'overridden' or 'defeated' because the passage of time and the building of relationships are morally relevant. A thwarted father's moral claim to be allowed to establish legal parenthood is stronger when it is brought forward the day after a child has been adopted than when it is brought 6 months later, and so on. This should also give rise to a moral impetus for courts to settle such cases as quickly as possible. As Justice Sotomayer observed in a more recent case, there has been a tendency for the parent currently 'in possession' of the child to extend the litigation process, and to be

rewarded for doing so; but the law 'cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation"' (*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) [Sotomayor, J., dissenting]).

This brings us on to the next point: what justice might demand for the thwarted father. We have said that it cannot necessarily demand that an established parent–child relationship be overturned in order to give the father a new opportunity to parent the child. However, the fact of his original legal entitlement together with the fact of wrongdoing (in the form of deception or manipulation) that caused him to lose this entitlement, might give courts strong reason to consider overturning adoptions under some circumstances – especially if the deception is discovered within the first few days, weeks, or even months of the child's life. The father's claim to take over custody of the child might also be given priority over the claims of other prospective adoptive parents if the first adoption fails for other reasons (or should the adoptive parents die).[9] This would seem straightforwardly analogous to the hiring case described above, in which we might expect A to have a right of first refusal should B's job become available again. But courts should also be prepared to consider the reasons for the deception in question. Why was this father 'thwarted' in the first place? Here, we may note Shanley's (1995) argument on this point:

> A court should be required to hear a mother's objections, if she has any, to a father's assuming custody of the child, both because the birth of a child has resulted from a web of social interactions and relationships, and because the mother's relinquishment of the child for adoption should be viewed as the last in a series of actions meant to provide care for the child, not as an act of abandonment that gives her no interest in the child's placement. In cases in which the mother objects to the father's assumption of custody, a court should listen to the reasons the mother opposes placing the child in the biological father's custody. (Shanley 1995, 92)[10]

3.2 Three Objections

Richards – or an advocate for his view – might argue here that a genetic father could form the reasonable expectation of fatherhood of any child he might help conceive on the basis that he lives in a country that allows unmarried genetic fathers to claim parental rights (including by challenging the presumption of legitimacy in the case of a child conceived in an extra-marital affair). In this sense, he might *unknowingly* take

9 Many thanks to an anonymous reviewer for raising this point.

10 This would seem straightforwardly to imply limits on the thwarted father's presumptive right of first refusal should the adoption fail or the child otherwise become 'available' again for parenting.

the first steps in a parental project by conceiving a child with the gestational mother, who would then interrupt that project unjustly by keeping the child from him.

I would reject this interpretation; accepting such an approach makes Richards' account unreasonably generous in cases of unintended pregnancy. Liberty rights are those that prevent others interfering with our decisions, actions, or projects, whether before they begin or once they are underway. But to say that the gestational mother's deception interrupts the father's parental project is to stretch the meaning of *project* beyond the reasonable protection of standard appeals to liberty. We may be aware of the legal structures in our social context and the putative rights they might afford us under specific circumstances, but this cannot reasonably imply that we can simply find ourselves already in the midst of a specific kind of project in the morally relevant sense. Accepting such an interpretation would also make redundant Richards' appeals to the mother's historical promises to the father – or to her nourishing 'reasonable expectations' to the same effect – as a basis for the father's parental rights.

A different objection might point specifically to the wrongdoing of the gestational mother (and any associated third parties) in barring the genetic father from exercising his legal rights. In parallel with the appeal to intuition on which Richards bases the kidnapping argument, one might argue that this deception 'can't cost [the father] the right to be the child's parent, if there is to be any sense at all in speaking of their having had that right'. After all, if the right to continue in a parental project is strong enough to withstand substantial interruptions imposed as the result of wrongdoing, then we might think that it must be strong enough to protect fathers' reasonable expectations of parenthood in the case that wrongdoing prevents them from 'grasping' that parenthood.

However, I would argue that this begs the question: deception in thwarted father cases is not equivalent to the kidnap case unless we can show that the genetic father *already had* moral parental rights (and not only the opportunity to claim legal rights). The above paragraph, and in Sections 2.1–2.2, make clear that Richards' liberty-based account grants the genetic father moral rights to parent the child only if he actively affirms his participation in the project with the consent of the mother – or at the very least, with reasonable expectations that he would have had this consent. The 'true' thwarted father thus has the moral right to continue in the parental project; but many genetic fathers who are deceived in the relevant sense did not have such a (moral) right on the liberty-based account. They might have initial rights to moral parenthood on other accounts, such as the proprietary geneticist approach put forward by Page (1985). This account requires no shared intentions, or active involvement in supporting the gestational mother – the biological tie and his ownership of his gametes is sufficient to establish his rights to the child at birth. But – and here I reiterate my reason for focusing on Richards' account in this paper – Page's account, as is the case with most accounts of moral parenthood, aims to establish the distribution of parental rights at the moment of a child's birth. These accounts provide an

answer to the question: what should we do when there are competing claims to *begin* parenting a child? However, they do not engage with the more particular issue that arises in thwarted father cases, where the genetic father's rights-claim to begin parenting a child is presented in competition with the adoptive parents' rights-claim to continue parenting that child.

A final objection might be made to the arguments I have laid out above, on the grounds that strong protections for the rights of genetic fathers – of a nature that would allow courts to terminate adoptions and reallocate custody to thwarted fathers – might be instrumentally justified. Even if the liberty argument does not, in all individual cases, strictly apply to the father (because he had not originally begun a parental project which he then had liberty to continue), one might argue that the liberty rights of biological parents in general are best protected by establishing generous principles in their favour. For example, as Page puts it, 'if the right of natural parents to possess and raise their own children were seriously threatened, this would undermine the possibility of parenthood as the valued activity that it is' (1984, 198). This argument might concede that there will be individual cases in which the child's best interests would not be served by a transfer from their adoptive parents to the genetic father's custody; but we already allow that the protection of parental liberty and autonomy will sometimes mean that children's best interests are not optimally served, and may indeed be undermined.[11] We could also, arguably, expect there to be fewer thwarted father cases to begin with if paternal claims to custody could not be thwarted by deception and secret adoption.

The problem with this line of argument is that it is not clear why, if we are appealing to an instrumental justification, the interests of one small subset of genetic fathers carries more weight than the interests of adoptive parents and adopted children in the security of their relationship. Further, the requirement that unmarried genetic fathers take at least some affirmative steps to 'grasp' parenthood of their children within a certain time window can also be justified on instrumental grounds. This justification can be made not only by reference to the needs of mothers and children for reasonable certainty in the father's commitment, but also by appeal to the need to prevent what Oren (2006) describes as the 'pop-up Pop': the genetic father who asserts his rights out of spite, or to block a stepfather's attempt to adopt the child they have been raising.

3.3 A Final Note: Parental Exclusivity

As noted in the introduction to this paper, the standard legal and social model of parenthood that predominates in Western societies is an exclusive one: parent–

11 Parental discretion regarding childhood vaccination is a paradigmatic example.

child relationships recognised and protected by law are quite strictly limited. I would argue that the clash of intuitions central to thwarted father cases is produced – or at least exacerbated – by the fact that this model of parenthood forces us into an 'all or nothing' prescription for the thwarted father. We ordinarily think that changes of custody and the termination of established parent–child relationships can only be justified by the best interests of the child. This means that any account of moral parenthood that would ordinarily grant parental rights to the unmarried genetic father must, in the case of the thwarted father, contend with a tension between the best interests principle and *parental* interests.[12] The situation would be far easier to resolve if we did not have to make the thwarted father either a legal stranger to the child or her exclusive legal custodian.

Although there is not space in this paper to consider alternative frameworks, other scholars have criticised the exclusive parenthood model and have called for different social and legal approaches to protecting caring relationships between children and adults (Bartlett 1984; Brennan and Cameron 2015; Gheaus 2019). On such approaches, we can imagine ways in which the father's desire to know his genetic progeny and be a part of her life could be protected alongside the established custodial relationship between that child and her adoptive parents. Gheaus, for example, argues that it is likely that 'adults' weighty interest in rearing children can be satisfied by establishing beneficial intimate and caring, though not globally authoritative, relationships with children, relationships which are protected from outside interference' (2019, 455). In the end, there are many cases in which a child's mother and stepparent have primary custody and the genetic father has a less involved parental role, albeit one which is legally protected (for example, through visitation rights). It is far from inconceivable that the thwarted father could have the same role in his child's life even if her primary custodians are adoptive parents rather than her biological parents.

12 These cases are, of course, not alone in giving rise to tensions: others might include those of unmarried women detained in Irish 'mother and baby homes', whose children were adopted at birth without their consent. The same tension conceivably arises here in the case that some of these women were able to find out, some years later, where their child had ended up. Like the thwarted father, they were not allowed to assert the parental rights that would have otherwise been their due – but in both kinds of case, a parent–child relationship now exists between the child and the adoptive parents. I have focused on thwarted father cases because it is easier for men to become fathers without their knowledge; and because in most jurisdictions (barring institutional miscarriages of justice such as those mentioned above) gestational mothers have parental rights and responsibilities by default, and so cannot miss the window of opportunity for legal filiation.

4 Conclusions

The liberty-based argument put forward by Richards cannot straightforwardly provide an account of the moral right that might underpin the unmarried genetic father's *legal* entitlement to claim parental rights and responsibilities, particularly in thwarted father cases. This is because, as I've aimed to demonstrate here, there is a natural gap between the father's 'first act' of parenthood and his beginning to parent the child unless the gestational mother enables him to be involved in the project in between those stages. (And as Richards notes, we might not even agree that the act of conception is an act of parenthood, especially in the case of unplanned pregnancies.)

Whilst the steps taken by mothers to 'thwart' fathers from claiming that legal entitlement may sometimes constitute an injustice, it is not an injustice that always demands that the thwarted father receive custody of his genetic child.[13] If the child is settled in an established caring relationship with her adoptive parents, the opportunity to which the father was originally legally entitled no longer exists to be claimed. However, this is not to say that he has no moral right to know his child or play some role in her life; the ethical tensions to which thwarted fathers give rise would be eased greatly if the strict, exclusive model of parenthood predominant in Western societies were more flexible and could accommodate a greater variety of caring relationships.

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13 Justice might demand that the wrongdoing is recognised and compensated in other ways, for example through a financial settlement, as is the case in other areas of the law. Given the above discussion, it seems reasonable to expect the allocation of such settlements (or not) to be responsive to the mother's reasons for keeping her pregnancy or the child's existence a secret from the genetic father.

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