

GENETIC TIES: ARE THEY MORALLY BINDING?

GIULIANA FUSCALDO

Keywords

genetic parent,
parental obligations,
intentional parent,
causal parent,
gamete donation,
blood ties

ABSTRACT

Does genetic relatedness define who is a mother or father and who incurs obligations towards or entitlements over children? While once the answer to this question may have been obvious, advances in reproductive technologies have complicated our understanding of what makes a parent. In a recent publication Bayne and Kolers argue for a pluralistic account of parenthood on the basis that genetic derivation, gestation, extended custody and sometimes intention to parent are sufficient (but not necessary) grounds for parenthood.¹ Bayne and Kolers further suggest that definitions of parenthood are underpinned by the assumption that 'being causally implicated in the creation of a child is the key basis for being its parent'.² This paper examines the claim that genetic relatedness is sufficient grounds for parenthood based on a causal connection between genetic parents and their offspring. I argue that parental obligations are about moral responsibility and not causal responsibility because we are not morally accountable for every consequence to which we causally contribute. My account includes the conditions generally held to apply to moral responsibility, i.e. freedom and foreseeability. I argue that parental responsibilities are generated whenever the birth of a child is a reasonably foreseeable consequence of voluntary actions. I consider the implications of this account for third parties involved in reproductive technologies. I argue that under some conditions the obligations generated by freely and foreseeably causing a child to exist can be justifiably transferred to others.

INTRODUCTION

In September 1999 an unusual child access dispute was brought before the Family Court of Australia.

¹ T. Bayne & A. Kolers. Toward A Pluralist Account of Parenthood. *Bioethics* 2003; 17: 221–242.

² *Ibid.* p. 241.

The case (Re: Patrick)³ involved a lesbian couple, a gay sperm donor and their two-year old son, Patrick. In what was thought to be Australia's first such dispute, the sperm donor sought regular fortnightly and overnight visits with the boy while the

³ Family Court of Australia Media Release at <http://www.familycourt.gov.au/media/html/patrick.html> (accessed 4 June 2003).

Address for correspondence: Giuliana Fuscaldo, Centre for The Study of Health and Society, University of Melbourne, Victoria, Australia. g.fuscaldo@pgrad.unimelb.edu.au

biological mother and her partner (the co-parent) wanted to remain Patrick's exclusive parents. The women applied for restricted twice-yearly contact between the sperm donor and the child. The child's mother told the court that the man had agreed, before the insemination took place, that his role would be as a donor and not as an active parent and that an ongoing, traditional father-son relationship was not in the boy's best interests.⁴

The Patrick case serves to illustrate the focus of this paper. Is blood really thicker than water? Does the passing on of genes (begetting) define who is a mother or father (in the moral sense) and who acquires parental duties and privileges? Does the sperm donor's genetic tie to Patrick generate moral ties to the boy or, as argued by Patrick's mothers, is parenting a matter of what is voluntarily undertaken?

In a recent paper Bayne and Kolers reject the possibility that genes alone define parenthood by rejecting what they call 'monist' views – the view that one essential feature is both a sufficient and necessary basis for parenthood.⁵ They (and others previously)⁶ argue for a pluralist account of parenthood on the basis that several different relationships including genetic, gestational, custodial and intentional are also sometimes sufficient grounds for parenthood.⁷ Bayne and Kolers suggest that causal connections underpin parenthood and while they do not develop or defend causal accounts of parental roles, they suggest that any causal account must be able to accommodate the fact that many different activities causally contribute to the existence of a child. In what follows I propose just such an account. I examine a view put forward by Nelson that causing a child to exist incurs immutable paren-

tal obligations.⁸ I suggest a more plausible account of how causation grounds parenthood by appealing to standard views of moral responsibility. My account, that any action that reasonably foreseeably results in the birth of a child generates responsibilities for that child, is compatible with pluralist accounts of parenthood and I deal with the problem of too many parents generated by strictly causal accounts of parenthood.

GENES DEFINE PARENTHOOD

Does genetic relatedness define parenthood? Clearly for many people genetic ties are indeed a very important aspect of what makes a parent. The growth of DNA paternity testing and the application of such tests to settle disputes over child access and welfare payments illustrates popular views about the significance of genetic kinship and who is a parent. A recent Victorian court battle adds legal weight to the notion that genetic ties define parental obligations. In the case of *Magill vs Magill*, a man successfully sued his former wife for damages in respect of child support payments made on the basis of false assertion of paternity.⁹ DNA tests revealed that Mr Magill was not the genetic father of two of the three children he had financially supported for over eight years. In what is thought to be a world-first, the court found that Mrs Magill had deceived her husband, and awarded him \$70,000 for general damages and economic loss.¹⁰ The implications from this case are clear: that genes define parental roles and that in the absence of a genetic relationship with a child a putative father is relieved of any (financial) obligations irrespective of his relationship with the child or the child's mother.

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

⁵ Bayne & Kolers, *op. cit.* note 1.

⁶ See for example K. Bartlett. *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When The Premise of the Nuclear Family Has Failed.* *Va Law Rev* 1984; 70: 879–927; R. Alta Charo. *Biological Determinism in Legal Decision Making: The Parent Trap.* *Tex J Women Law* 1994; 3: 265–306; T. Murray & G.E. Kaebnick. *Genetic Ties and Genetic Mix-Ups.* *J Med Ethics* 2003; 29: 68–69; G. Fuscaldo. *What Makes A Parent? It's Not Black or White.* *J Med Ethics* 2003; 29: 66–67.

⁷ Bayne & Kolers, *op. cit.* note 1.

⁸ J.L. Nelson. *Reproductive Ethics and the Family.* *N Z Bioeth J* 2000; 1: 4–10; J.L. Nelson. *Parental Obligations and the Ethics of Surrogacy: A Causal Perspective.* *Public Aff Q* 1991; 5: 49–61.

⁹ I. Munro. *\$70,000 Paternity Ruling Sets Precedent.* *The Age.* 23 November 2002, p. 3. See also *Duped Father to Fight Appeal.* *News.Com.Au* at http://news.com.au/common/story_page/0,4057,5699645%5E1702,00.html (accessed 4 June 2003).

¹⁰ This ruling was later overturned, and is to date not finalised. P. Gregory. *Judges strip damages from man who paid maintenance for another's children.* *The Age.* 18 March 2003, p. 3.

PARENTHOOD: A MATTER OF PERSONAL PREFERENCE

However, genes are not the only determinant of family, as evidenced by the many successful experiences of foster parents, adoptive parents, blended families following divorce, same sex couples raising children, single parent families, shared parenting and other 'non-traditional' family arrangements. The controversy surrounding a recent legal challenge to Victoria's IVF laws highlights the diversity of opinion on how families should be constructed.¹¹ The case focused on whether single women and lesbian couples should be allowed access to IVF and gave rise to heated community debate over what kinds of families are best for raising children. On the one hand it was argued that the natural family is the ideal, that children raised by other than their 'real' (genetic) parents are disadvantaged and that children have a right to know their genetic heritage. By contrast, those in support of changing the Victorian law argued that what is important is that a child is raised in a stable and loving environment. They maintained that the traditional biological family is only one of many possible choices for raising children and that how families are constructed is a matter of personal preference.¹²

CAUSAL ACCOUNTS OF PARENTHOOD

According to some commentators the question of who should raise children is not open to individual preferences and it misrepresents matters to ask which family forms get the best results. James Nelson argues that reproductive technologies that allow the separation of genetic and social parenting invite a 'consumer-choice' approach to families. In his view the moral significance of being a parent is based on a *causal* rather than a *contractual* model.¹³ Nelson's claim is that the importance given to genetic relatedness is not a matter for choice, that

genetic ties give rise to special obligations and that a child's genetic parents have a *prima facie* obligation to remain in a child's life in an ongoing way. Nelson reasons that because children are born in a helpless and needy condition and because genetic parents have caused such children to exist, they have an obligation to care for them. On his view, the only acceptable reason for a genetic parent to divest themselves of parental duties is in the event that they are seriously unable to do so.¹⁴

Similarly, Daniel Callahan argues that biological relationships are not a matter of voluntary undertaking; he claims that once formed, genetic ties cannot be repealed.¹⁵

Once a father, always a father. Because the relationship is biological rather than contractual, the natural bond cannot be abrogated... Fatherhood, because it is a biological condition, cannot be abrogated by personal desire or legal decisions. Nor can the moral obligations be abrogated either...¹⁶

According to Callahan it is morally irrelevant that a sperm donor may not intend or desire to act as a father, that the woman whose ovum his sperm fertilizes does not want him to act as a father or that society is prepared to excuse him from such obligations. Like Nelson, Callahan holds that genetic parenthood incurs *immutable* obligations, that genetic ties are not elective; we cannot simply choose to acknowledge them or sever them at will, because kinship comes with moral obligations. According to these accounts, the sperm donor in *Re: Patrick* would have irrevocable lifelong duties towards his son and he breaches these duties by allowing others to raise the boy. Note that Nelson and Callahan's accounts do not entail that only genetic parents incur parental duties or have parental rights. They accept that others, including adoptive parents, step parents, teachers, guardians or nannies might have some or all of parents' duties. However, according to causal definitions of parenthood, while others may voluntarily take on parental roles, genetic parenthood is sufficient to generate obligations because

¹¹ For discussion of this case see L. Skene. Voices in the ART Access Debate. *Monash Bioeth Rev* 2001; 20: 9–23; G. Fuscaldo. Fatherless Families: How Important is Genetic Relatedness? *Monash Bioeth Rev* 2002; 21: 18–29.

¹² *Ibid.*

¹³ Nelson, *op. cit.* note 8.

¹⁴ *Ibid.*

¹⁵ D. Callahan. Bioethics and Fatherhood. *Utah Law Rev* 1992; (3): 735–46.

¹⁶ *Ibid.* pp. 738, 739.

begetting amounts to causing a child to exist, and we are morally accountable for things that we cause.

There are, however, some difficulties with this causal account of parenthood. How do we determine what or who among the countless contributing factors is *the* cause of a child's existence? In the case of an IVF pregnancy, for example, is it the action of the man and woman who provide the gametes, the embryologist who inseminates the egg, the clinician who performs the embryo transfer, and so on? I contend that strictly causal accounts of parenthood are implausible because they generate too many parents. A workable causal account of parenthood needs somehow to identify a few individuals as moral parents. If everyone who causes a child to exist is a moral parent then the very concept of parenthood as a 'special role' with unique rights and duties must be rejected.

BEGETTING INCURS PARENTAL OBLIGATIONS

Nelson suggests that just as no one person is fully responsible for the existence of any other, all the actors in the causal train have *some* responsibility for the existence of a child. On his account moral responsibility for the birth of a child includes gamete donors and third parties involved in IVF who are merely helping parents to do what they cannot do unaided. Nelson argues that making available one's gametes, even in the absence of any intention to take on parenting, is an act highly proximate to conception and, in combination with the actions of the other parent, is jointly sufficient to incur parental responsibilities.

Whether the instrument used for introducing sperm into the appropriate environment is a plastic syringe or the more traditional vessel, the father is irreplaceably involved in the production of the child, in a way that other causal agents (apart from the mother) are not.¹⁷

He reasons that in the absence of coerced conception or fraud, gamete providers are morally responsible for children that result even unintentionally or

accidentally from their gametes: '... barring rape or other kinds of coercive intercourse, if you've been involved in making a baby, you're responsible for it, whether you consent to such responsibility or not.'¹⁸

Nelson is concerned to account for our intuition that biological parents cannot simply be excused responsibility for children that result from accidental and unintended pregnancies simply because they do not accept or consent to assuming such responsibilities. Nelson contends that in the absence of force or fraud we are morally accountable for all of the consequences of our actions, intentional and unintentional. While this account has initial plausibility, some gaps remain. I present the following bizarre case report to highlight problems with Nelson's causal account. I suggest that the following case shows that contributing genetic material to a child is not in itself sufficient to generate parental obligations.

'Son of a gun'¹⁹ is a published case report based on an incident that occurred in the 1860s during the American civil war. According to Dr T.G. Capers of Vicksburg,²⁰ on 12th May 1863, during a battle, a young soldier friend of his was hit in the scrotum by a bullet that carried away his left testicle. The same bullet apparently penetrated the left side of the abdomen of a young woman nursing the injured nearby. To her surprise, 278 days later, the woman gave birth to a healthy baby boy. The infant was shortly after operated on to remove a malformed bullet. Dr Capers concluded that this was the same bullet that carried away the testicle of his young friend and, with some spermatozoa on it, penetrated the ovary of the young woman.²¹

¹⁸ Ibid. p. 51.

¹⁹ It is claimed that the case report may be the origin of the phrase 'son of a gun'. See <http://www.mythbustersfanclub.com/index.html>.

²⁰ L.G. Capers. 1874. Notes from the Diary of a Field and Hospital Surgeon, C.S.A. *The American Medical Weekly* 1 (19): 233–234, cited by D. Napoleon. *N Y State J Med* February 1959: 492–93; D.A. Hicks. Oral Conception. Impregnation via the Proximal Gastrointestinal Tract in a Patient with an Aplastic Distal Vagina. *Br J Obstet Gynaecol* 1989; 96: 501–502.

²¹ After the publication of this story in the *American Medical Weekly* the following appeared as an Editor's Note on 21 November 1874: 'Dr. L.G. Capers, of Vicksburg, Miss., disclaims responsibility for the truth of that remarkable case of impregnation by a minnie ball, as reported in No. 19 of this Journal. He tells the story as it was told to him. He does not say it is untrue, but is disposed to appositely remember the truth of the old adage, that "accidents may happen in the best regulated families". While I accept that the veracity of this case report is in doubt,

¹⁷ Nelson 1991, *op. cit.* note 8, p. 59.

It seems implausible to suggest that the genetic link between the gamete providers and the child in 'son of a gun' entails that the soldier is responsible for his care. Our intuition is, I believe, that even though the soldier and the nurse are part of the causal train of events that led to the child's existence, his birth was an unforeseeable accident. I suggest that the gamete providers above are not accountable for the boy because we are not accountable for *everything* that we are causally connected to, including things beyond our control. A plausible causal account of parental obligation must in some way narrow down the range of situations in which the causal connection carries moral weight. Simply sharing a genetic connection does not in itself entail that progenitors are obligated to their genetic offspring.

MULTIPLE AGENTS AND MORAL RESPONSIBILITY

One type of narrowing account is proposed by Robert Munson. On his view, in the case of artificial insemination (AID) a sperm donor is not a moral father because it is not he that causes the conception but the subsequent agent, i.e. the person who transfers the sperm.

... the sperm donor does nothing to impregnate the recipient of the sperm. He is *not responsible* for her becoming pregnant, even though it is his sperm that makes her pregnant. He is the biological father ... but he is not the causal father, for ... he is not the causal agent.²²

Munson reasons that because the sperm donor is not the causal agent he can make no claim on the child nor can the child's representatives make any claim on him.²³ Further he argues that the scientists and doctors involved in the artificial insemination are acting merely as agents, extensions of their

as I'm sure does the reader, I continue to use this case to illustrate my argument. In some ways it makes no difference whether or not the case represents a true event because the point made applies to all examples of accidental pregnancies, as will be become obvious.'

²² R. Munson. 1988. Artificial Insemination and Donor Responsibility. In *Intervention and Reflection*. R. Munson, ed. Belmont, CA. Wadsworth: 448 (original emphasis).

²³ Ibid. p. 449.

patients' wills, and not as independent persons and that it is the patients' intentions and actions that cause a child to exist. While he acknowledges that the sperm donor and the physician who performs the insemination are both part of the 'causal complex' that produces an AI child, they are not causal agents so do not acquire parental obligations. Munson uses the following example to argue that we are not morally accountable²⁴ for every consequence that we contribute to.

If a terrorist has filled a hospital ward with methane gas and by unsuspectingly turning on the light I cause the gas to explode, I am causally responsible for the explosion. That is, I performed the action that completed the causal chain. However, moral responsibility lies with the terrorist who filled the room with explosive gas.²⁵

Munson's use of the terms causal agent, causal responsibility and moral responsibility is somewhat confusing, but I suggest that what he intends is that the role of the sperm donor is analogous with that of the unsuspecting passer-by and that they are both causally responsible but neither are morally responsible. According to Munson's example it appears that the reason that neither the passer-by nor the sperm donor are morally responsible is because neither is the 'initiating cause'. In his view in the case of AID the individuals seeking to become parents initiate the causal chain and a sperm donor is merely one of the agents that subsequently intervene.

However, while Munson is correct in concluding that the passer-by is not blameworthy, I suggest that the reason we hold this to be correct is not a reason that could be used to claim that sperm donors are not morally accountable for children that they cause to exist. In other words the reason that the passerby is blameless is not because he was not the 'initial causer'. The reason that the passer-by is not blameworthy, despite causing the explosion, is that she or

²⁴ Munson uses the word 'responsible' not 'accountable', but here I suggest that what he means is 'accountable' because we are in fact responsible for what we (foreseeably) cause. To say that someone is morally responsible for an outcome is not to say they acted wrongly in bringing it about but only that this is an outcome that falls inside the realm of consequences for which they might be called on to give an account, or for which they might be judged praiseworthy or blameworthy.

²⁵ Munson, *op. cit.* note 22, p. 448.

he had no knowledge or choice about the fact that this could be the consequence of turning on the light.²⁶ In Munson's example the role of the passerby is disanalogous with the role of a sperm donor or the medical staff who assist in AID because the latter voluntarily undertake actions for which they can foresee the consequences. A closer analogy would be to compare the sperm donor with a passerby who voluntarily turned on the light even after knowing that there was a good chance an explosion might follow. Of course a further complication is that the birth of a child is not (usually) analogous with causing an explosion.

While Munson's position nicely accommodates our intuitions regarding the role of sperm donors his account is too narrow in that it absolves all but the last intervening agent of any responsibility for the consequences of their actions. As Nelson asks, why does separating the supply of gametes and the delivery of gametes now entail that responsibility is neither doubled, halved nor shared but '*simply leaks away*'?²⁷ A more plausible causal account of who is responsible for children must accommodate the standard view of moral responsibility: in situations where there are multiple agents, where two or more individuals causally contribute to an outcome, they share responsibility for that outcome.²⁸ Accordingly, gamete donors share some responsibility for a child that results from their donation, even when other agents subsequently become involved in the process that causes this child's existence. Munson's account does not successfully narrow down the causal account of parental duties and the problem remains that many people contribute to a child's existence; do they all incur parental obligations?

INTENTION AND MORAL OBLIGATION

John Lawrence Hill suggests another narrowing account which aims to distinguish between individ-

uals who contribute to the birth of a child. He reasons that it is the 'intended parents' who are the 'first cause' of a procreative relationship. Hill argues that what is essential in determining competing claims over children is not the biological tie between a parent or a child but the '*preconception intention*' to have a child.²⁹ According to this 'but-for' causation argument, '*... while all the players in the procreative arrangement are necessary in bringing a child into the world, the child would not have been born but for the efforts of the intended parents*'.³⁰ Hill maintains that although it might seem peculiar to determine parental status on the basis of mental states and not tangible biological fact, there is a legal precedent for the relevance of mental states in other areas of law including contract torts and criminal law. According to this account the sperm donor in *Re: Patrick* would not have claims over and duties towards Patrick if his preconception intention was to act merely as a gamete provider and not as a social father. Hill gives rights-based and consequentialist reasons for why gamete providers who do not intend to take on a parental role should keep their preconception promises.³¹

It seems, however, counter intuitive to claim that genetic parents can choose whether or not to have a role in their children's lives. If parental obligations are determined according to intent then why do we pursue and label 'recalcitrant' men who never intended to be fathers and who refuse to pay child support? What would be wrong with a woman, who became pregnant accidentally, abandoning her children simply because she never intended to become pregnant? Hill suggests a default position: where a child comes into existence in the absence of any preconception intentions, then that child's genetic or gestational parents should constitute its legal parents; presumably, because in the absence of intended parents they are the 'but-for' cause of the child's birth. However, it remains unclear why Hill gives intended parents the 'trump' in the case of competing claims between intended and biological

²⁶ It is relatively uncontroversial to assert that moral responsibility requires free choice, a point discussed further below.

²⁷ Nelson 1991, *op. cit.* note 8, p. 58.

²⁸ See for example M. Zimmerman. 1991. Sharing Responsibility. In *The Spectrum of Responsibility*. P.A. French, ed. New York. St Martin's Press: 276; G. Mellema. 1988. *Individuals, Groups and Shared Moral Responsibility*. New York. Peter Lang.

²⁹ J.L. Hill. What Does It Mean To Be A 'Parent'? The Claims of Biology As The Basis for Parental Rights. *N Y Univ Law Rev* 1991; 66: 353-420.

³⁰ *Ibid.* p. 414 (original emphasis).

³¹ *Ibid.*

parents.³² The intentional parents may be necessary for the existence of the child in dispute, but the biological parents also stand in a ‘but-for’ relationship with this child.³³ Hill’s claim, that intended parents are in a unique causal relationship with a child and that this gives them priority in the case of competing claims, is not supported.³⁴ Further, standard accounts of moral responsibility do not support the contentious claim that we are only responsible for consequences that we intend, or that we only have duties that we voluntarily agree to take on. In contrast to strictly causal accounts, if parental status is defined by preconception intent there is the possibility that a child would have no parents.

THE STANDARD ACCOUNT OF MORAL RESPONSIBILITY

To recap, the arguments presented thus far attempt to ground parenthood on causal relationships. Underlying Munson’s and Hill’s accounts is the premise that we are morally accountable for only the intended consequences of our actions and if we intend a child to exist, then we incur obligations for the child that results from these intentions. Nelson’s position, on the other hand, implies that we are morally responsible for all of the consequences of our voluntary actions, whether intended or not. On his view making a genetic contribution to a child is sufficient to generate parental duties for that child irrespective of whether or not parenthood was intended. Both accounts fail to adequately take into account the conditions under which an agent can be held answerable for their actions and are therefore problematic. To be more plausible an account of how moral responsibility for children is generated should be consistent with at least the standard views about causation, consequences and moral responsibility. In what follows I propose such an account by appealing to two well-accepted conditions

³² The approach that Hill suggests settles disputes between intended (commissioning) parents and gamete providers in the case of surrogacy arrangements.

³³ As argued by Bayne & Kolers, *op. cit.* note 1.

³⁴ For further discussion of the problems associated with intentional parenthood see M. Roberts. Good Intentions and a Great Divide: Having Babies by Intending Them. *Law Philos* 1993; 12: 287–317.

which limit the consequences for which an agent is accountable.

The issue of moral responsibility is complex and a full discussion is outside the scope of the present analysis. There is however, common agreement on at least two conditions to be met before we can hold someone accountable for the consequences of their actions. One of these conditions is freedom: we are not responsible for actions that are unavoidable, or in situations where we are not free to do otherwise.³⁵ Exactly what is meant by ‘acting freely’ involves discussion of determinism and questions about what is beyond our control, and remains much debated.³⁶ For the purposes of my analysis I accept that being free entails that either a) an agent ‘could have done otherwise’ or b) in the case where no alternative was possible, that she reflectively endorsed or owned her actions (as described by Frankfurt and Fischer).³⁷ For the present analysis suffice it to say that in the absence of force, begetting or donating gametes are usually actions free enough to generate moral accountability.

A second condition standardly applied to causal accounts of moral responsibility is that we cannot be held to account for *all* of the consequences of our free actions, but only for those consequences that are foreseeable.³⁸ The common understanding of foreseeability is that consequences are foreseeable if a reasonable person would have reason to expect that they might occur.³⁹ Similarly according to legal definitions ‘reasonably foreseeable’ entails ‘Such as reasonably can or should be anticipated. Such that

³⁵ M.J. Zimmerman. 1992. Responsibility. In *Encyclopedia of Ethics*. L.C. Becker & C.B. Becker, eds. New York. Garland Publishing: 1089–95.

³⁶ R.A. Duff. 1998. Responsibility. In *Encyclopedia of Philosophy*. New York. Routledge: 290–94. See also M. Zimmerman. 1998. *An Essay On Moral Responsibility*. Totowa, NJ. Rowman & Littlefield: ch. 1, 4.

³⁷ J.M. Fischer & M. Ravizza. 1998. *Responsibility and Control: A Theory of Moral Responsibility*. Cambridge. Cambridge University Press; H. Frankfurt. Alternate possibilities and moral responsibility. *J Philos* 1969; 66(23): 829–39; H. Frankfurt. 1993. Identification and wholeheartedness. In *Perspectives on Moral Responsibility*. J.M. Fischer & M. Ravizza, eds. Ithaca. Cornell University Press: 170–87.

³⁸ See G. Dworkin. 1987. Intention, foreseeability, and responsibility. In *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*. F. Schoeman, ed. Cambridge. Cambridge University Press: 338–54.

³⁹ Although commonly accepted, responsibility for foreseeable consequences, as opposed to foreseen consequences, is not universally held. For discussion see M. Zimmerman, *op. cit.* note 36, ch. 4.

a person of ordinary prudence would expect to occur or exist under the circumstances (a foreseeable risk) (the foreseeable expenses).⁴⁰

Predictably, there is continued debate over who is reasonable, what they might foresee and whether responsibility should be limited to what is foreseen, not merely foreseeable. However, this debate does not concern the present discussion. It is obviously unreasonable, by any standard, to fail to understand that a child might be the consequence of providing gametes. That the gamete donation might result in the birth of a child is both foreseeable and foreseen, even if only because this fact is reiterated many times during the (compulsory)⁴¹ counselling sessions attended by potential donors. Intentional parenthood does not succeed as a narrower account of what makes a parent. Standard accounts of moral responsibility do not support the claim that we are morally responsible only for intended consequences. Even proponents of the Doctrine of Double Effect accept that we are morally accountable for non-intended consequences.⁴²

In summary a less problematic interpretation of causation and moral accountability is that *we are morally accountable for the intended and unintended reasonably foreseeable consequences of our free actions*.⁴³

A MORE PLAUSIBLE ACCOUNT: 'CANDIDATE PARENTHOOD'

I suggest that a more plausible account of who should be held accountable for children is that parental obligations are generated when a child is a

reasonably foreseeable consequence of a free action. On my account simply being part of the causal chain of events that leads to the birth of a child is not sufficient to generate obligations for that child. My account incorporates the requirement for freedom and foreseeability and explains why attempts to attribute blame to the passer-by in the terrorist example and the soldier in 'son of a gun' are implausible. Obviously in the examples above it is not reasonably foreseeable that a soldier will become a father as a result of a battlefield injury, nor that turning on a light will cause an explosion. Conversely, on my account genetic parents are morally accountable for their offspring where the actions which gave rise to the birth of a child were undertaken freely and where the child's existence was reasonable foreseeable. Clearly, it is foreseeable, even if not guaranteed, that voluntarily donating gametes or engaging in sexual intercourse (even with contraception) will cause a child to exist. Thus, all individuals that freely contribute to the existence of a child are morally accountable for that child, where this child's existence was a reasonably foreseeable outcome of their free actions.⁴⁴ Note that this account does not exclude the possibility that parental obligations can also be incurred voluntarily or that other general ethical obligations might account for some of our duties towards children. My aim has been merely to address the claim that genetic parents are morally accountable for their offspring because they caused them to exist. I develop an account that explains why and when progenitors are required to give a moral account of the consequences of passing on their genetic material. My account, for ease hereby referred to as 'candidate parenthood', accommodates the standard conditions under which an agent can be held accountable for the consequences of their actions and narrows down strictly causal accounts of parenthood.

⁴⁰ Merriam-Webster's Dictionary of Law. 1996. At <http://www.answers.com/topic/foreseeable>.

⁴¹ It is legally required in several Australian states that gamete and embryo donors and couples seeking artificial insemination or IVF undergo counselling prior to commencement.

⁴² According to DDE in some circumstances it is permissible to bring about unintentional harms (e.g., as side effects of an action) which it would be impermissible to bring about intentionally. The fact that unintentional harms are sometimes justifiable entails that such consequences are within the realm of an agent's moral responsibility; a point elucidated in J. Boyle. Who is Entitled to Double Effect? *J Med Philos* 1991; 16: 476.

⁴³ For discussion see S. Kagan. 1989. *The Limits of Morality*. New York. Oxford University Press; W. Quinn. 1993. *Morality and Action*. Cambridge. Cambridge University Press.

⁴⁴ Note, however, that this account does not entail that everyone that contributes to the existence of a child is *equally* responsible for that child. The question of whether intending a consequence that eventuates is morally weightier (more blameworthy or praiseworthy) than merely unintentionally causing a foreseeable consequence is complex and outside the scope of the present analysis. For discussion see M. Zimmerman, *op. cit.* note 36, ch. 4.

CANDIDATE PARENTHOOD – POSSIBLE OBJECTIONS

Too many parents

A possible objection to my ‘candidate parenthood’ account is that the birth of a child is a reasonably foreseeable consequence of many different actions, not just begetting. If parental obligations are incurred by all parties whose actions could reasonably foreseeably result in the existence of a child, then how can we resolve competing claims (or disclaimers) such as, for example, those that have arisen between intended parents and genetic or gestational parents in surrogacy disputes? More interestingly, does this account entail that embryologists and clinicians who act to bring about IVF pregnancies also incur parental duties? It appears that candidate parenthood suffers from the some of the same difficulties as Nelson’s strictly causal account.

Firstly, the problem of too many parents is only a problem if, as legally and historically required, a child can have only two parents.⁴⁵ Several commentators have suggested that it is time to relinquish the view that biological and social parenthood are competing positions and that we should align the social facts with an acceptance of the new scientific facts – that a child can have many different parents.⁴⁶ (However, no-one is suggesting that IVF scientists or clinicians have duties for all of the children they help to bring about.)

Secondly, what makes the idea of too many parents problematic is the assumption that causally-generated obligations are irrevocable and lifelong obligations. However, accepting candidate parenthood (or even strict causal parenthood for that matter) does not entail that individuals who bring about a child with needs must fulfil the needs they created themselves.⁴⁷ As Jeffrey Blunstein observes, it is not clear why causal agency is the source of parental duties. He argues that there is a gap between the premise that parents cause children to exist in a

helpless condition and the conclusion that they are morally blameworthy for harming the child through neglect.⁴⁸ Blunstein suggests that the best candidate for filling the gap between cause and responsibility is that biological parents are somehow in a better position than most other people to care for their issue. However, he argues that biological parents are only in this better position because of the social arrangements they find themselves in. According to Blunstein it is possible to imagine a child born into a different type of social arrangement where someone other than her biological parents was better placed to look after her, for example as was the case in the early days of the Israeli kibbutzim.⁴⁹

Nelson disagrees that parental roles are assigned according to best fit. He argues that if you place someone in peril of serious harm you have a prima facie obligation to help them out of danger, and even if it were true that someone else were in a better position to do so, this does not absolve you of your responsibility. He gives the example of an unintended accident that might result from your actions – if your neighbour’s child becomes trapped in an old refrigerator that you left in your front yard, the fact that someone else may be in a better position to free the child does not absolve you of liability.⁵⁰ But notice that Nelson’s example is not analogous to gamete donation. Sperm donors are asked to donate their sperm on the understanding that this may result in the birth of a child with needs that many people are not only willing and able to meet, but often desperate to take on. Sperm and egg donation are more analogous with asking someone (repeatedly) to leave their old fridge on the front yard and assuring them that there are hundreds of people on the waiting list longing to free and care for a child should one enter the fridge.

Parental obligations are transferable

Even if we agree with Nelson and others that genetic parents are morally accountable for the needs of children they caused to exist, it is easy to imagine

⁴⁵ As argued by R. Alta Charo. Biological Determinism in Legal Decision Making: The Parent Trap. *Tex J Women Law* 1994; 3: 265–306.

⁴⁶ Bayne & Kolers, *op. cit.* note 1; Bartlett, *op. cit.* note 6.

⁴⁷ The problem of why causing something to happen entails that it is the ‘causer’ who is obliged to do something about the outcome is discussed in depth by S. Kagan. Causation and responsibility. *Am Philos Q* 1998; 25: 293–302.

⁴⁸ J. Blunstein. 1979. Child Rearing and Family Interests. In *Having Children*. O. O'Neill & W. Ruddick, eds. New York. Oxford University Press: 115–22.

⁴⁹ *Ibid.*

⁵⁰ Nelson 1991, *op. cit.* note 8, p. 50.

different ‘accounts’ of causing such needs. Genetic parents could raise their offspring themselves, they could transfer or discharge their obligations to others, or they could share the responsibilities of parenting with other willing individuals. In other words, even if the genetic relationship between begetters and children generates parental obligations, if these obligations are fulfilled equally well by individuals other than the genetic parents, then failing to raise one’s genetic child does not, as Nelson suggests, amount to failing in one duties.

According to Nelson it is only the interests of children that justify a transfer of parental duties. He argues that, other things being equal, children’s interests are not best served by transferring parental duties because we cannot guarantee (but only predict) that the replacement parents will fulfil their duties.⁵¹ However, I suggest that biological parents are in no better position to guarantee that they will continue to fulfil their duties in the future.⁵² In fact there are many instances when the opposite is true, that even if they initially fulfil their obligations, the ability of some parents to continue to care for their offspring will foreseeably diminish. Consider for example men who become fathers in their seventies or parents with a long-term progressive disease.

According to Nelson even given that sperm or egg donors took some steps to ensure that no harm would come to their offspring they breach their moral duties by undertaking a responsibility which they ‘intend not to fulfil’.⁵³ The fact that there is someone else around who can do the job as well or better than the genetic parents does not, in Nelson’s view, relieve the genetic parents of their responsibilities. If this view is correct it seems that genetic parents can never voluntarily be relieved of parental duties. However, it remains unclear, as argued above, why a sperm donor’s intentions make him accountable and further why donating gametes amounts to ‘*an intention to breach parental duties*’ rather than *an intention to transfer* them.

In support of the claim that parental duties are transferable, we already recognise and accept the transfer of at least some of our parental duties, for

example to nannies, tennis coaches, doctors and teachers. In fact we regard as negligent in many cases a parent who *fails* to delegate some of their parental duties to someone who could do a better job. We also accept that we can delegate our duties even when the person taking them on is not doing a better job. For example even if it is true that home-cooking is better for children than, say, McDonalds, we frequently accept that as long as a child’s need to be fed is adequately met, we have not breached our duty. The question is not, will someone else do a better job, but will they do a good enough job?⁵⁴

In summary my claim is that candidate parenthood generates moral obligations but that these obligations are transferable provided that it is reasonably foreseeable that such a transfer would not amount to causing harm. Note that this position is importantly different from the account recently published by Bayne in his discussion of gamete donation.⁵⁵ He suggests that transferring gametes could be thought of as transferring *proprietary* not parental claims, and that transferring gametes amounts to transferring reproductive autonomy over these gametes from the donors to the recipient.⁵⁶ Bayne argues that gamete donors *do not* incur parental obligations because transferring ownership of gametes amounts to transferring *potential* parental responsibilities. Should any children result from such a transfer Bayne concludes that the new owners – the recipients – would have responsibility for them.⁵⁷

Underlying Bayne’s account is the notion that we are not responsible for the consequences after our gametes have been transferred. I suggest however that this position suffers from the same difficulties as intentional parenthood in excluding too much from the realm of consequences for which we can be held accountable. Consider the following example: suppose that I transfer control of my gun to a woman knowing that she intends to use it to kill her unfaithful husband. If she carries out her intention surely the fact that I no longer own or control the

⁵¹ Ibid. p. 60.

⁵² See T. Bayne. Gamete Donation and Parental Responsibility. *J Appl Philos* 2003; 1: 83 for further discussion of this point.

⁵³ Nelson 1991, *op. cit.* note 8, p. 60.

⁵⁴ As argued by C.L. Ten. A child’s right to a father. *Monash Bioeth Rev* 2000; 19(4): 36.

⁵⁵ Bayne, *op. cit.* note 52.

⁵⁶ I leave the topic of parental claims and the possibility that these are analogous with proprietary claims to a forthcoming paper.

⁵⁷ Bayne, *op. cit.* note 52, p. 79.

gun does not absolve me of all responsibility for the death of her husband. As argued above, it is clearly foreseeable that gamete donation will result in the birth of a child and it is problematic to claim that gamete donors are not morally accountable for consequences that follow from their donation because what happens to their gametes is no longer in their control. Like Munson's account, Bayne's position assumes that only the last agent in the causal chain has moral responsibility for a consequence, but as I have argued, plausible accounts of who is responsible for children must accommodate standard conditions of moral responsibility. Of relevance here is the requirement that where two or more agents causally contribute to an outcome they share responsibility for that outcome.⁵⁸ Given this requirement, gamete donors share some responsibility for what foreseeably eventuates for their donation. On my account gamete donation does generate parental responsibilities but under certain conditions these are transferable.

CONDITIONS FOR TRANSFERRING PARENTAL OBLIGATIONS

When is the transfer of gametes and parental obligations permissible?⁵⁹ Nelson is concerned that having a child should be understood to include a commitment to stability and warns against the idea that parental duties are terminable 'at a whim'. He argues that a 'no-fault divorce' approach to parent-child relationships breaches our obligations to children.⁶⁰ Obviously there are strong consequentialist reasons to prevent 'child swaps' or the transfer of parental roles after relationships are formed. But this is not the case for gamete and embryo donation. Gamete donation is not analogous to no-fault

divorce of children because here a pre-conceptual transfer of parental duties is understood. When such pre-conceptual transfers involve assigning parental duties to individuals that do undertake a commitment to stability, and who are foreseeably good enough parents, a biological parent's obligations are not breached.

One problem with this account is that frequently pre-conceptual transfers do not involve such assurances. David Benatar, like Nelson, argues that sperm donors take their responsibilities too lightly and often fail to ensure, in transferring their parental obligations, that these will be adequately performed by the replacement parents.⁶¹ He states that taking their duties seriously would require that donors took some steps to ascertain more about the suitability of those who will raise their offspring, at very least learning the identity of the recipients.⁶² Clearly it cannot be reasonably foreseeable that gamete donation will result in the transfer of parental duties to individuals that can fulfil such duties unless the capacity of the recipients is known. This 'gatekeeping' role is to a limited extent provided by ART clinics through the screening and counseling of gamete and embryo donors and recipients prior to treatment. Gamete donors can fulfil their obligations by choosing carefully the clinics or programs they donate to. Similarly, doctors, scientists and others who help to bring about a child, like gamete donors, should ensure that it is not reasonably foreseeable that the child will be harmed. This would require some knowledge of and confidence in the ability of those at the 'front-line' to undertake to determine the competence of gamete and embryo recipients. One way to further facilitate adequate parental replacements is to encourage directed gamete and embryo donation or 'open adoption' the way it is practised in some states of America.⁶³ Such programs permit negotiated levels of interaction between donors and recipients and acknowledge the roles and responsibilities of both social and genetic parents.

⁵⁸ Although, as highlighted earlier, this does not entail equal responsibility.

⁵⁹ It could be argued that just as some rights are inalienable perhaps some obligations cannot be abrogated. (I am indebted to Justin Oakley for raising this point.) The question of whether there are indeed inalienable duties and whether parental duties are of this type is however outside the scope of the present discussion and remains a topic for future consideration. For further discussion of conditions under which it is permissible to transfer parental obligations see Bayne, *op. cit.* note 52, p. 82.

⁶⁰ Nelson 2000, *op. cit.* note 8, p.10.

⁶¹ D. Benatar. The Unbearable Lightness of Bringing into Being. *J Appl Philos* 1999; 16: 173–180.

⁶² *Ibid.*

⁶³ For an example of open embryo adoption programs see *Creating Families* at <http://www.eggdonorfertilitybank.com>; *Snowflakes Embryo Adoption Program* at <http://www.snowflakes.org/FAQs.htm>.

Benatar maintains that donating sperm or ova in many cases reflects a cavalier approach to the transference of parental responsibilities.⁶⁴ However, studies undertaken to examine the motives and attitudes of gamete and embryo donors suggest that many donors feel concerned about the future happiness and wellbeing of children that result from their donations.⁶⁵ Perhaps 'altruistic', as opposed to 'cavalier', better describes individuals who respond to advertisements recruiting 'men who care' and individuals to 'give the gift of life'.⁶⁶

An obvious question arising from the conclusion that parental obligations are transferable (under some conditions) is whether such transfers are revocable? The possibility that individuals who have transferred their parental obligations might at any point change their minds requires that negotiated arrangements are clearly understood prior to undertaking or relinquishing parental roles. On my view parental obligations are transferable; however the revocability of such transfers is subject to the same conditions that apply to other morally weighty promises and contracts.⁶⁷ In general we accept that contractual arrangements and promises made involving personal human relationships can be broken (as exemplified by divorce, custody disputes and more recently surrogacy contracts). However, when a strong degree of reliance is placed on keeping to the contract or promise, then a mere unwillingness to do so would not normally justify breaking it.⁶⁸ Further, as argued above, there are strong conse-

quentialist reasons to prevent the transfer of parental roles after relationships are formed. I suggest that the role of third persons who assist in causing a child to exist, e.g., IVF staff, can be understood as a preconception transfer of obligations where a promise or contractual arrangement entails that others and not the IVF staff will take on parental roles.

CONCLUSION

I have argued that being a progenitor does not necessarily generate parental duties for one's genetic offspring. I show that strictly causal accounts of parental obligations are too broad and fail to incorporate standard accounts of moral accountability and the requirement for freedom and foreseeability. Similarly, I reason that intentional parenthood is too narrow an account of how parental duties are incurred. I propose that parental duties are incurred by everyone whose actions reasonably foreseeably result in the existence of a child. However, this conclusion does not entail that gamete donors or third parties who assist in bringing about a child have irrevocable obligations for the children that result from their actions. I argue that it is not the case that only individuals who incur parental duties can fulfil these duties and that obligations for children are, under some conditions, transferable. In summary, my account involves a two-step test to determine moral parenthood. In the first instance any causal contribution to a child's existence entails that an individual is a candidate for moral parenthood; thus a genetic parent is necessarily a causal parent. But the first test involves determining whether this individual is morally accountable for the child they

edu.au/PDF%20Files/Gillam1.pdf (retrieved 10 March 2005); R. Bronaugh. 1992. Promises. In *Encyclopaedia of Ethics*. L.C. Becker, ed. New York. Garland Publishing: 1020–23. In response to a question raised by Professor Charles Weijer: in the unlikely event that IVF doctors or technicians refused to relinquish the children they helped to bring into existence the same considerations apply. Conversely an IVF doctor who secretly created a number of embryos and (were it possible) artificially gestated these embryos to viability would be held to be morally accountable for the resultant children. On my view, in this case the progenitors are not responsible for their genetic offspring because the theft of their gametes was unforeseeable, however the question of whether they have any special claims with regard to these children requires further analysis.

⁶⁴ Benatar, *op. cit.* note 61, p. 176.

⁶⁵ See K. Daniels. 1998. The Semen Providers. In *Donor Insemination: International Social Science Perspectives*. K. Daniel & E. Haimes, eds. Cambridge. Cambridge University Press: 76–104.

⁶⁶ These type of phrases are repeatedly used in advertising campaigns aimed at recruiting sperm donors, e.g., see the DHS press release published Wednesday 26 January 2005, ref. no. 2005/0023, which asks potential gamete donors to 'give life, give hope'. http://www.dh.gov.uk/PublicationsAndStatistics/PressReleases/PressReleasesNotices/fs/en?CONTENT_ID=4102044&chk=NqHeZk.

⁶⁷ For discussion of contracts and advanced directives in relation to embryo and gamete donation see G. Pennings. What are the ownership rights for gametes and embryos? Advance directives and the disposition of cryopreserved gametes and embryos. *Hum Reprod* 2000; 15: 979–86; A.M. Capron. Parenthood and Frozen Embryos More Than Property and Privacy. *Hastings Cent Rep* 1992; 22(5): 32–33; G. Fuscaldo. Gamete Donation: when does consent become irrevocable? *Hum Reprod* 2000; 15: 515–19.

⁶⁸ For a discussion of the obligations associated with promising see L. Gillam. 2002. Surrogacy, Autonomy and Promising. At www.cappe.

caused to exist. Recall that this is only true if a child's existence was a foreseeable consequence of the 'causer's' free action. At this point the candidate parent can be held to account. The second step involves evaluating the explanation given by an 'accountable parent' and explains why 'Candidate Parenthood' does not result in an unworkable number of parents. Some accounts might justify releasing or excusing an 'accountable parent' from any obligations regarding the children they helped to bring about. I have argued that transferring parental obligations to others is under some conditions an example of a justifiable account. On my account the 'sperm donor' in *Re: Patrick* does incur parental duties for Patrick; however it is possible that these obligations were freely and legitimately transferred.⁶⁹ I argue that it is not the sperm donor's genetic tie to Patrick that generates a moral tie, but rather the fact that Patrick was the reasonably foreseeable consequence of his actions. The question of how obligations are connected to claims and whether the sperm donor's parental obligations generate special claims or privileges with regard to Patrick is the subject of future analyses. However, on my view even if parental obligations do generate

⁶⁹ Without knowing the details of the understanding between the 'sperm donor' and Patrick's mothers it is difficult to know whether or not both parties agreed to such a transfer. It is precisely this sort of confusion that supports lesbian couples' access to the conventional donor insemination programs offered by most IVF clinics, where the role and future obligations of sperm donors are made clear from the outset.

parental entitlements,⁷⁰ where these obligations are freely and legitimately transferred *they* cannot be the grounds for claiming parental privileges.⁷¹

In rare circumstances (such as case 1) accountable parenthood will fail to identify any moral parents, but this problem is not any more significant than the existing problem associated with current genetic definitions, of finding parents for orphaned or abandoned children. In most cases 'Candidate Parenthood' generates many more potential parents and assigns them to children in a non-arbitrary way.

Acknowledgments

The author gratefully acknowledges Dr Lynn Gillam for helpful insights and comments in the presentation of this paper. Thanks also to Professor Julian Savulescu and Dr Justin Oakley for stimulating discussions, which are reflected in this paper.

⁷⁰ E.g., as argued by Almond and Callahan that parental obligations give rise to parental claims because preventing a sperm donor from accessing or sharing in the rearing duties of his son prevents him from discharging his duties and causes him to breach his moral obligations. B. Almond. 1994. Parenthood – social construct or fact of nature? In *Constituting Families: A Study In Governance*. D. Morgan & G. Douglas, eds. Verlag, Stuttgart. Franz Steiner: 105; see also Callahan, *op. cit.* note 15.

⁷¹ Note that this does not entail that the sperm donor in *Re: Patrick* has *no* claim to access Patrick. Even without any parental obligations for Patrick, there may be other factors that justify the 'sperm donor's' claim for access, e.g., the possibility that he and Patrick have an established relationship that should be allowed to continue in the boy's best interest.