Children, Custody, and the Costs of Promoting Gender Justice

By
Sebastian Engler

Submitted to
Central European University
Department of Philosophy

In partial fulfilment of the requirements for the degree of Master of Arts

Supervisor: Dr Anca Gheaus

Vienna, Austria
2024

Special copyright notice

I, Sebastian Engler, hereby declare that I have reused material from coursework for the course *POLS5195 – The Family: Gender and Childrearing* (Fall 2023/24) in this thesis, in accordance with the "Departmental policy on reuse of coursework for MA thesis" of CEU's Department of Philosophy. This has been approved by Dr Anca Gheaus, my thesis supervisor and instructor in said course, as required by the departmental policy and in accordance with the "Policy on Student Plagiarism" of CEU.

Sebastian Engler

Abstract

In this thesis, I argue that in gender-unjust social circumstances, considerations of gender justice should bear on the determination of the post-separation allocation of custody over children. Given unjust gender norms about childrearing within a society, promoting gender justice offers a compelling reason in favour of allocating custody gender-equally on a societal level. This view faces two major difficulties which I address. First, at least sometimes, gender-equal custody allocation will not track the moral right to parent a child. But we have a weighty reason to allocate custody to the holder(s) of the moral right to parent. Therefore, I argue that considerations of gender justice can outweigh the reason we have to allocate custody to the holder(s) of the moral right to parent a child. Second, shared custody can impose net costs (in terms of how well their lives go) on the relevant parties. In particular, it can impose costs on children. Therefore, I defend the claim that it is at least sometimes permissible to make children bear some of the costs of promoting gender justice.

Acknowledgements

Against the unfortunately still influential idea that academic work in philosophy is the product of a single mind, I acknowledge with pleasure that I am indebted to many others whose contributions have made this thesis much better than it would have been without them.

Anca Gheaus has simply been the best supervisor imaginable. From the earliest stages of coming up with a worthwhile topic, through rounds of extensive comments up until the completion of this thesis, she has been extraordinarily supportive, enthusiastic and encouragingly critical. I owe a lot to Anca and I am deeply grateful that I will be able to continue working with her.

At conferences at CEU and Warwick, I have received valuable feedback from (in alphabetical order) Sanjar Akayev, Matthew Clayton, Maria Kronfeldner, Cécile Laborde, Lilian Lehmann, Cathy Mason, Zoltan Miklosi, Riccardo Spotorno, Patrick Tomlin, Emily Williamson, and Neelam Yadav. I am grateful for their challenging questions and interesting points, and sorry for potentially having forgotten others who contributed in this way.

I have been lucky to have a wonderful colleague in Xiyue Yang, whose probing questions and smart objections have motivated me to find better answers each time she raised them. I am thankful that our shared interests have allowed us to challenge and help each other during the writing of our theses. My thanks also go to my other colleagues and professors in the philosophy and political science departments who have shown an interest in my thesis.

For all that they taught me about feminism, I am grateful to my sisters Susanna and Magdalena Riedl. Magdalena also read a full draft of this thesis and provided helpful comments, as did my mother, Elisabeth Jakob. To my entire family and my friends, I am grateful for their love and support. Given the topic of this thesis, I thank my parents in particular for how they handled their divorce and the ensuing shared custody arrangement.

Finally, I am grateful beyond imagination to my partner, Veronika Engler. A lot of the thoughts about family, responsibility, gender justice and childrearing that have made it into the thesis have sprung from our conversations about these topics over the years. Vero has been extraordinarily supportive and encouraging – from the early stages up until the final draft, she has pushed me to give my best to this thesis. Without her, I could not have written it.

Table of contents

1 Introduction

Consider the following scenario.

> *ABC*. Alice and Bert have a son, Charlie. Now Alice and Bert are separating. Both parents want custody, they are willing to share custody equally, and Charlie has a good relationship with both of them. Out of all possible custody allocations, shared custody would make all of their lives go maximally well.

Who should be allocated custody over Charlie in this scenario? You might think that it is obvious. We should allocate shared custody to Alice and Bert! Primarily, such an allocation is clearly in each individual's best interest;[1] in other words, it is the prudentially best custody allocation for all of them. Absent strong moral reasons against allocating shared custody to Alice and Bert, and under ideal social conditions, doing so seems to be morally required.[2]

Now consider the second scenario.[3]

> *DEF*. Doris and Edgar have a daughter, Frankie. Now Doris and Edgar are separating. With Doris as her sole custodian, Frankie's life would go maximally well; so would her parents' lives. This is because, if shared custody were allocated to Doris and Edgar, having to make joint decisions for and about Frankie would cause them to quarrel a lot. In addition, Doris and Edgar's joint decisions would be worse for Frankie than those that Doris would make on her own, because Edgar did not really participate in Frankie's upbringing so far and is, consequently, just not very good at parenting her.

[1] By interest, I mean that which, when promoted, makes one's life go well.
[2] In chapter 2, I show that this is (i) because custody should track the moral right to parent when there are no stronger countervailing reasons, and (ii) because on the most plausible accounts of the moral right to parent, Alice and Bert are its joint holders.
[3] Both scenarios involve families which consist of mother-father-child(ren). It is to separations in these sorts of families – rather than in families composed of two or more fathers, or mothers, or without children – to which the arguments in my thesis apply.

It is plausible that an absentee father like Edgar would, on average, be a worse custodian than an involved mother like Doris.[4] It is equally plausible that continuous quarrelling about matters of custody would negatively affect the well-being of all three. Unlike in *ABC,* and even in otherwise ideal circumstances, shared custody is clearly not in each individual's interest in *DEF* and scenarios like it. Rather, it would impose net costs[5] on Doris, Edgar, and – crucially, for the topic of my thesis – their child Frankie. Still, might there be a compelling reason for allocating shared custody to Doris and Edgar?[6] More generally, are there compelling reasons which should guide custody allocation even when following them would impose net costs on the individuals involved?

1.1 Thesis statement

In this thesis, I argue that in gender-unjust social circumstances, considerations of gender justice should bear on the determination of the post-separation allocation of custody over children. In *ABC*, *DEF* and similar scenarios, provided that they take place in societies with unjust gender norms about childrearing, promoting gender justice offers a compelling reason in favour of allocating custody gender-equally on a societal level.[7]

I do not argue here that considerations of gender justice can justify the state in compelling parents to carry on in the role of custodian against their wish after a separation. The arguments I offer here do not support this stronger conclusion, which I intend to defend in future work. Rather, they support the limited conclusion that, in case parents are willing custodians, considerations of gender

[4] This is meant to generalise: "To the extent that caregiving is not just a value, preference, or natural 'talent' but a skill and to the extent that the stereotypes about competences and the identities shaped by norms affect the acquisition of such skills, there are likely to be differences in male and female practical competence in caregiving." Brighouse and Olin Wright, 'Strong Gender Egalitarianism', 366–67.

[5] I understand 'costs' to people in terms of setbacks to how well their lives go.

[6] One preliminary reply is that Doris and Edgar are – by stipulation – willing to share custody over Frankie at some cost to themselves. This indicates that they would prefer shared custody, all things considered, and their preference is morally weighty. I discuss the importance of their consent to having costs imposed on them in later parts of the thesis.

[7] For an explanation of how I understand *gender-equal custody allocation*, see section 3.1. Note already that in some scenarios, considerations of gender justice might point specifically to sole custody for fathers like Bert and Edgar.

justice should go into – and can determine – custody decisions. Therefore, I bracket scenarios in which (one or both) parents are unwilling to be custodians after a separation.

My task in this thesis is to overcome two major difficulties for this proposed view. First, I have to show that at least sometimes, our considerations of gender justice will outweigh the reason we have to allocate custody to the holder, or holders, of the moral right to parent a child. This argument is necessary because there will be scenarios in which the moral right to parent is held only by the mother. So, if custody is to be allocated gender-equally, custody allocation must sometimes depart from tracking the moral right to parent. Second, shared custody can impose net costs on the relevant parties, as we have seen in *DEF*. In particular, it can impose costs on children. Therefore, I defend the claim that it is at least sometimes permissible to make children bear some of the costs of promoting gender justice.

1.2 Situating the thesis

My arguments rely on a liberal egalitarian theory of justice. Liberal egalitarianism is committed to the central notion that individuals are both free and equal, and that our treatment of each other and the social distribution of burdens and benefits should reflect this fact.[8] Starting from circumstances of injustice, respecting individuals as free and equal can require reforming institutions to fit this moral commitment even when doing so imposes considerable costs on (some of) us.[9] However, the liberal concern for individual freedom requires that we justify to others the costs we

[8] For some foundational texts of liberal egalitarianism, see Dworkin, 'What Is Equality? Part 1: Equality of Welfare'; Dworkin, 'What Is Equality? Part 2: Equality of Resources'; Anderson, 'What Is the Point of Equality?'
[9] Brighouse, 'Egalitarianism and Equal Availability of Political Influence', 124.

impose on them for the sake of promoting justice, and that we do so in a way that respects their autonomy. My arguments are intended to do so.[10]

I see my thesis as a first step to approach a larger research project about what children, parents, and society owe each other as a matter of liberal egalitarian justice in unjust conditions. How should we understand the normative web of rights, obligations, and duties of justice that characterises the relations between children and parents, parents and society, and children and society when social institutions are unjust? My thesis contributes to this larger project in two ways. First, it contributes to an ongoing debate about the rights and duties of parents and children within philosophy by connecting it to the literature on gender (in)justice. There is a strand of feminist philosophy which has done so fruitfully for some time.[11] Second, it contributes to a better understanding of children's moral status, which is another ongoing debate in moral philosophy.[12] Especially, it raises and affirmatively answers the question whether children, like adults, can be permissibly made to bear at least some of the costs of promoting justice in unjust circumstances. This goes against a widespread presumption in folk morality that, if possible, adults should bear costs instead of children.[13]

Lastly, there is a compelling moral, legal, and political reason to investigate the moral foundation of custody allocations in gender-unjust conditions. The separation rate in many current societies is

[10] I expect that the arguments will not be thought equally powerful in all societies. They have more force in societies (i) in which institutions are more likely to already conform to liberal egalitarian principles of justice, even if very imperfectly; (ii) in which individual autonomy and social equality are taken to be core principles of political morality; and (iii) in which it is relatively easy (non-costly) for parents to separate, compared to societies in which there are social/religious penalties for separating. I think that this is so because consistency in holding liberal egalitarian values requires endorsing my proposal.

[11] See, for example, Okin, *Justice, Gender, and the Family*; Gheaus and Robeyns, 'Equality-Promoting Parental Leave'; Behrends and Schouten, 'Home Economics for Gender Justice?'

[12] For contributions from each of the four most recent decades, see e.g. Brennan and Noggle, 'The Moral Status of Children'; Archard and Macleod, *The Moral and Political Status of Children*; Dwyer, *Moral Status and Human Life*; Floris and Spotorno, 'What Does It Mean to Be Moral Equals?'

[13] By folk morality, I mean the moral commitments that are widespread in society, often unencumbered by moral theorising.

high, and has been for several decades.[14] Post-separation custody decisions thus affect – and will probably continue to affect – many children and their parents. Therefore, the normative considerations that go into the allocation of custody have a high moral, legal, and political salience. While I remain at the relatively abstract level of moral principles and arguments throughout this thesis, at least some policy implications can be inferred from my proposal. In particular, considerations of gender justice do not currently standardly figure in lawmakers' or judges' justifications of custody policies. Rather, justifications often concentrate on the 'best interest' of the child, at the price of excluding other considerations.[15] Ultimately, my arguments are intended to provide a basis for the inclusion of considerations of gender in custody policymaking at least as long as societies remain gender-unjust.

1.3 Structure of the thesis

In chapter two, I discuss the right to parent, its relation to custody, and children's moral status. Chapter three contains the feminist argument for gender-equal allocations of custody as a pro tanto duty of promoting gender justice. Chapter four uses the conclusion of chapter three as a premise for the argument that such duties of gender justice should be weighed against, and can at least sometimes outweigh, the interests protected by the right to parent. From there, I conclude that custody allocation need not always track the moral right to parent. Lastly, I argue that it is permissible to impose some of the costs of discharging duties of gender justice on children. In chapter five, I consider two – ultimately unsuccessful – objections against my proposal. Finally, I offer some concluding remarks in chapter six.

[14] In Austria, for example, the divorce rate has always been between 34.5% and 46.4% in the 21st century, affecting 11,471 children in 2022 alone: see Kaindl and Schipfer, 'Familien in Zahlen 2023', 42–44. The divorce rate can serve as a reasonable proxy for separations more generally, as in 2022, cohabiting couples without marriage or civil partnership made up only 20% of cohabiting couples. See Kaindl and Schipfer, 16.

[15] For a discussion from US law, see e.g. Reno v. Flores, 507 U.S. 292.: '"The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody" – *feasible* and thus valuable, unlike other potential criteria.

2 Custody allocation and the moral right to parent

In this chapter, I introduce the conceptual framework and the debates to which my thesis responds. First, in section 2.1, I explain how the legal institution of custody is related to the moral right to parent. I then introduce two current accounts of the moral right to parent - dual-interest accounts and child-centred accounts – in section 2.2. My later arguments aim to show in which way these accounts apply to custody allocation in gender-unjust conditions. Finally, in section 2.3, I discuss the features of the debate about children's moral status that necessitate my later arguments for the permissibility of children as cost-bearers.

2.1 Custody and its relation to the moral right to parent

How is custody over children related to the moral right to parent? The right to parent a child is a moral right which is held by one or more adults who stand in the appropriate relation to the child.[16] The holder of the right to parent a particular child is either morally permitted or morally entitled to do so.[17] The moral right to parent is weighty and thus provides a strong reason for the state to protect it. As such, ideally, the legal right to parent, which takes the form of a legal regime of custody over children, ought to track the moral right to parent.

What is it to have custody? To have custody over a child is to have global legal authority over the child. The authority is global insofar as exercising it is to "act as proxy decision-maker"[18] for a child in *all* areas of their life. With custody comes the responsibility to properly discharge the functions of the custodian – a weighty moral duty. Note, however, that global authority does not exhaust the components of parenting protected by the right to parent: Anca Gheaus distinguishes between

[16] Different accounts of the right to parent specify the appropriate relation differently – see section 2.2 for examples.
[17] Gheaus and Straehle, *Debating Surrogacy*, 100–101.
[18] Millum, *The Moral Foundations of Parenthood*, 142.

(i) global parental authority and (ii) association with a child in a long-term and caring relationship.[19] With Gheaus, I accept that one can have (ii) without (i). Hence, since it is analytically – and sufficiently practically – independent of custody, I do not thoroughly discuss the second component in this thesis.

As an illustration of the analysis so far, consider again the scenario *ABC*. Before their separation, Alice and Bert are Charlie's joint custodians. As I discuss in the next section, on any plausible account, both of them (jointly) hold the moral right to parent Charlie. If my analysis is correct, then their moral right is protected by the state when Alice and Bert are allocated shared custody after their separation, and infringed when they are not. If sole custody were allocated to Bert instead, the state would infringe Alice's right. One might point out that, as Gheaus argues, Alice could (at least in principle) maintain a long-term and caring relationship with Charlie even without being Charlie's custodian. Then, at least the second component of Alice's right to parent might still be protected. Yet, in this scenario, custody does not track the right to parent.

From this scenario, we see that when custody allocation does not track the right to parent, it might involve a rights infringement. While infringing a person's rights might sometimes be permitted or even required,[20] we can still draw the following conclusion: Custody allocation should track the moral right to parent, absent strong enough reasons to justify infringing the right.

[19] Gheaus, 'The Best Available Parent', 433.
[20] For this understanding of rights, see Thomson, *The Realm of Rights*; Brennan, 'Thresholds for Rights'.

2.2 The moral right to parent: two accounts

Having clarified the relation between custody and the moral right to parent, let me say more about this moral right. To that end, I introduce the two types of competing accounts of the moral right to parent. The first (and currently more widespread) are dual-interest accounts of the right to parent, such as Harry Brighouse and Adam Swift's *Dual-Interest View*. As the 'dual-interest' label indicates, Brighouse and Swift see both children's interest in being parented and most adults' interest in parenting, if they would be adequate parents, as morally relevant for determining who holds the moral right to parent.[21] In contrast, (revisionary) child-centred accounts such as Anca Gheaus's *Child-Centred View* exclude parents' interests in exercising authority over the child - a core component of parenting – from the considerations relevant to determining who holds the right.[22]

Both the Dual-Interest View and the Child-Centred View agree that it is in children's interest to be parented by adults, and that strong enough interests establish rights which protect them.[23] I also interpret them as agreeing that third parties' weighty interests must be counted in determining the allocation of custody.[24] On this basis, I argue in chapters 3 and 4 that third parties' interest in gender justice are weighty enough to counter, and sometimes outweigh, the other interests at play.

Furthermore, both accounts agree that children's interest in at least good enough parenting is a central consideration in the determination of the right to parent.[25] Where the views differ is the treatment of adults' interest in parenting. Brighouse and Swift believe that

> "parenting a child can make a distinctive and weighty contribution to the well-being of the parent. It cannot be substituted by other forms of relationship, and it contributes to the parents well-being so substantially, and in a manner so congruent with the interests of children, that it grounds a (conditional, limited) right to parent. The goods

[21] Brighouse and Swift, *Family Values*, 54.
[22] Gheaus, 'The Best Available Parent'.
[23] Gheaus, 432; Brighouse and Swift, *Family Values*, 53.
[24] Gheaus, 'The Best Available Parent', 434–35; Brighouse and Swift, *Family Values*, 52.
[25] See e.g. Brighouse and Swift, *Family Values*, 87. Also Gheaus, 'The Best Available Parent'.

> in question are important enough, and children's interests well enough served, to impose a duty on others to allow, and indeed to enable, adults to enjoy them."[26]

Note that for Brighouse and Swift, whether any given parent holds the right to parent is conditional on that parent's adequacy for discharging the duties that correspond to a child's right to be parented. In other words, the right depends on whether a parent is "good enough" at actually serving the child's interest.[27]

Gheaus disagrees with counting adults' interests in parenting, and thus rejects even a conditional and limited right that protects adults' interests in parenting when they would be (merely) good enough parents. For her, the moral right to parent can only be held by the person who is willing and able to best promote a child's interests.[28] Her argument against counting adults' interests builds on the liberal principle that the authority exercised over a person must be justified strictly by appeal to that person's interests and considerations of justice. Respect for free and equal persons requires that authority over them be justified either by their consent *or* by their and third parties' interests in having authority exercised over them. Because children are free and equal persons, and because they lack full autonomy and thus cannot consent to parents' authority over them, only children's (and third parties') interests in having authority exercised over them can justify parents' authority over children.

The second relevant difference between the views is how they understand the nature of the right to parent. For Brighouse and Swift, adequate parents have a claim right to parenting. In other words, Doris is morally entitled to parent Frankie when she holds the moral right to parent, and should therefore be given custody. For Gheaus, on the other hand, the right to parent is a liberty

---

[26] Brighouse and Swift, *Family Values*, 86.
[27] Brighouse and Swift, 95.
[28] Gheaus, 'The Best Available Parent', 434.

right.[29] In other words, Doris can permissibly parent Frankie when she holds the moral right to parent. Entitlement requires that others (such as the state) actively support the enjoyment of the entitlement, whereas permissibility merely requires non-interference by others.

These two differences are crucial for my arguments, as will become clear in chapter 4. Ultimately, I believe that supporters of both types of accounts, insofar as they are moved by liberal egalitarian values, should be able to take on board my arguments for the normative weight of duties of gender justice as sometimes outweighing the right to parent. As we will see, however, they do not do so with equal ease.

2.3 Children's moral status

In the previous section, I have introduced two accounts of the moral right to parent which assume that children's moral status allows for us to speak of them as holders of interest-protecting rights. Let me continue by explaining why children's moral status is relevant to my argument. When someone has moral status, they have to be considered in and of themselves in our moral deliberations. Contrast this with objects without moral status, which are morally relevant only insofar as their treatment impacts others with moral status.[30] If, on one hand, children did not have moral status, we would not need to worry about imposing costs on them. If, on the other hand, children do have moral status, their moral status must be such that it allows us to impose some of the costs of promoting gender justice on them.

[29] Gheaus and Straehle, *Debating Surrogacy*, 100.
[30] Jaworska and Tannenbaum, 'The Grounds of Moral Status'.

The philosophical debate about children's moral status is too extensive to receive a fully-fledged exposition here.[31] Therefore, I limit myself to a quick introduction of three major positions on children's moral status with a focus on what these positions imply for my claim that children can at least sometimes permissibly bear the costs of promoting gender justice.

At one extreme of the spectrum of possible views on children's moral status lies the view according to which children, or at least young children,[32] lack moral status entirely. This historically influential view has traditionally taken the form of a children-as-property view on which parents stand in a relation of ownership to their children. An ownership relation presumes that the owned object does not have moral status. Recently, a variant of the view has been defended by Jan Narveson: since (on his account) children cannot have rights, but they deserve some moral consideration, it must be because they are owned by adults with moral status.[33] If the children-as-property view is correct, then the argument in chapter 4 which justifies imposing costs on them is unnecessary. On Narveson's view, I would only need to establish that we can permissibly impose the costs of promoting gender justice on adults. This is because the costs imposed on children must be understood as costs indirectly imposed on their parents and other adults.

At the other extreme lies the position according to which children have the same moral status, including all the same rights and duties, as adults. Defenders of this view have been labelled 'liberationists'[34] or 'extreme child libertarians.'[35] Like the view which denies children's moral status, this view would simplify my argument significantly. Again, I would only need to show that those with

[31] For an introduction, see Matthews and Mullin, 'The Philosophy of Childhood'. For a more extensive outline of the debate with a focus on children's rights in particular, see Archard, 'Children's Rights'. For the debate on moral status in general, see Jaworska and Tannenbaum, 'The Grounds of Moral Status'.
[32] Since many versions of this view base the denial of children's moral status on their deficit in, for example, rational capacities, there is a question whether teenagers must be seen differently than young children.
[33] Narveson, *The Libertarian Idea*, chap. 19.
[34] Archard, 'Children's Rights'.
[35] Brennan and Noggle, 'The Moral Status of Children', 5.

moral status can permissibly be made to bear the costs of promoting gender justice without the additional complication of distinguishing between scenarios in which some costs fall on children, and scenarios in which they do not.

Between these extremes, we can find a range of positions which accord children some form of moral status that differs from that of adults. Such views form the current mainstream in the debate. Some believe that children and adults have unequal moral status,[36] others hold that their moral status is the same, but the bundle of rights and duties which comes with moral status is relevantly different for adults and children. An example of the latter position is the view developed by Samantha Brennan and Robert Noggle.[37] They propose two principles. First, a child deserves the same moral consideration that other persons deserve. Second, a child also deserves unequal treatment, compared to adults, based on some of their relevantly different characteristics.[38]

On views such as that of Brennan and Noggle, it becomes clear why I must address the question whether any costs can be permissibly imposed on children for promoting gender justice. If children's and adults' rights and duties differ, then it is unlikely that a general argument for the permissibility of imposing costs for promoting gender justice will suffice. I need a special argument for the permissibility of imposing costs for promoting gender justice *on children*, given their distinct moral status and/or bundle of rights and duties.

Naturally, the scope of my thesis does not allow me to argue for a position on children's moral status here. Going forward, I therefore assume the position which puts the biggest burden of proof on my proposal: children have moral status, but their bundle of rights and duties is so different

[36] For an example which accords *higher* moral status to children, see Dwyer, *Moral Status and Human Life*.
[37] Brennan and Noggle, 'The Moral Status of Children'.
[38] Brennan and Noggle argue that, while these principles might seem contradictory at a first glance, they are compatible after all. See Brennan and Noggle, 7.

from that of adults that it is at least questionable whether we can permissibly impose costs on them for the sake of promoting justice if we can impose those costs on adults instead.

This position on children's moral status is captured in the folk morality principle that adults, not children, ought to always bear the costs if costs have to be distributed. Think of a sinking ship with too few lifeboats to save all the passengers. As long as children are on the ship, we should all be able to agree that they will be prioritised when we allocate seats on the lifeboat. In other words, adults will be expected to bear the costs in children's stead. In the lifeboat case, the principle's implication seems quite plausible. It might seem equally plausible when it comes to making the world a better place – since adults have created the injustices that shape our world, it is incumbent on them to bear the costs imposed by the solutions. Let us assume that promoting gender justice is an instance of this more general pattern. Therefore, in the following chapters, I argue that the folk morality principle must allow of exceptions. Since gender-equal custody allocation sometimes imposes costs on children, and I show that we sometimes have compelling reasons to impose these costs on children, we should reject the view that the principle is exceptionless.

3 Custody and gender justice

In this chapter, I argue that it is a pro tanto duty of gender justice to allocate custody over children gender-equally after parents separate. I rely on the standard distinction between pro tanto duties and all-things-considered duties. Whenever there are no countervailing reasons that are (jointly) at least as strong, a pro tanto duty becomes an all-things-considered duty. The distinction is necessary for my purpose since I show that in the case of the duty to allocate custody gender-equally, strong enough countervailing reasons will in fact sometimes exist. Thus, the duty in question can only be pro tanto. Henceforth, unless otherwise specified, any talk of duties refers to pro tanto duties.

After some definitional work in section 3.1, I propose two arguments in sections 3.2 and 3.3. They are built on the feminist literature on gender (in)justice in the family. The first argument is direct: I argue that, given parents' equal moral responsibility for their children, equal legal responsibility for them after a separation is the only permissible option to fulfil this moral responsibility from the point of view of gender justice. The second argument is indirect: gender justice requires undermining the gendered division of labour (GDL), so gender norms about childrearing (which generate the GDL) must be eliminated. For that purpose, fathers must contribute at least as much as mothers to childrearing, for which a regime of gender-equal custody allocation is part of the most effective strategy. Both arguments support the conclusion that promoting gender justice requires the gender-equal allocation of custody. At the end of the chapter, I suggest that the duty is best understood as a duty to aim for a gender-equal allocation of custody in the aggregate, i.e. at a societal level. Recall the *ABC* scenario from before: in such scenarios, instead of shared custody, father-only custody might be required by gender justice.

Note that the arguments of chapter 3 are conditional on a certain social background: I assume societies in which women are not appropriately compensated for the disadvantages which arise

from the GDL. In a society which offered compensation, the case for gender-equal custody allocation would have to be built on different arguments.[39]

3.1 Definitions and clarifications

Let me first provide accounts of the central concepts of this chapter: *gender*, *gender-equal custody allocation*, *gender justice*, the *gendered division of labour* (GDL), and *gender norms*. By *gender*, I mean the social roles of 'man' and 'woman' as they structure current societies.[40] In the context of custody allocation, the relevant gender roles are 'father' and 'mother'.[41] By *gender-equal custody allocation*, I refer to the allocation of custody aiming to have equal numbers of female and male custodians in society. As such, gender-equal custody allocation is distinct from *gender-blind* custody allocation, which is the allocation of custody to the holder(s) of the right to parent independently of considerations of gender. By a moral commitment to *gender justice*, I mean the commitment to "equal respect for all [of society's] members, and to justice in social distributions of benefits and responsibilities … [in which] gender-based structures and practices" do not conflict with these fundamental principles.[42]

The arguments in this chapter – and indeed in the thesis as a whole – take it for granted that gender justice is a worthy goal and a necessary component of a just society. Note that I also do *not* argue that a gender-equal custody allocation is a duty of gender justice in *all* societies, including those that are perfectly gender just.[43] Instead, I propose a duty of allocating custody gender-equally in non-ideal societies which exhibit a gender-unjust division of labour, to which feminists usually refer as a 'gendered division of labour' (GDL), both within and outside of the family.

---

[39] For instance, see the argument from misogyny in Gheaus, 'Political Liberalism and the Dismantling of the Gendered Division of Labor'.
[40] For the purpose of this thesis, I remain neutral on the metaphysical debates on gender, gender identity, sex, and so on. As far as I can tell, they have no immediate bearing on the arguments I propose.
[41] Recall that my arguments only apply to families which consist of at least one father and one mother.
[42] Okin, *Justice, Gender, and the Family*, 22.
[43] Still, I expect that it might well be, given that over time, sufficiently wide-spread gender-unequal custody allocation could presumably lead to the development of (new) unjust gender norms about childrearing even if we start with a gender-just society. However, this line of argument goes beyond the scope of my thesis.

Following Anca Gheaus, I understand the GDL as the division of labour that consists in men specialising in one type of labour, such as paid labour, while women specialise in another type of labour, such as unpaid childcare, insofar as this specialisation is the result of gender norms.[44] The GDL includes, but need not take the exact form of the 'traditional' breadwinner/homemaker arrangement. Nowadays, the norm is not exclusive specialisation – most women *also* work for pay, and while more men also perform unpaid labour, they do so to a much lesser extent.[45] So, even though the GDL's form has changed, the underlying gender norms still seem to be at work. By *gender norms*, again following Gheaus, I understand

> "the norms [which] sort out people in two kinds (women and men) and hold them to different standards, by encouraging them to display different virtues and interests, to take on different social roles, and sometimes assign them different rights and duties based on their sexual characteristics."[46]

For example, that men ought to provide economically for their families, and that women ought to be caring, are gender norms which plausibly contribute to generating the specialisation of the GDL. Insofar as such norms are unjustified, and the GDL's consequences are detrimental for the fair distribution of social burdens and benefits along the gender dimension, the GDL is unjust.

On the basis of these definitions and the empirical evidence, for example the evidence recently compiled by Gina Schouten, it seems plausible that our current societies warrant a negative assessment: we live in societies with a gender-unjust division of labour.[47] Throughout the arguments of the following sections, I introduce some of this evidence to support or illustrate the philosophical points.

[44] Gheaus, 'Political Liberalism and the Dismantling of the Gendered Division of Labor', 153–54.
[45] Schouten, *Liberalism, Neutrality, and the Gendered Division of Labor*, 2.
[46] Gheaus, 'Political Liberalism and the Dismantling of the Gendered Division of Labor', 157.
[47] For a reasonably up-to-date discussion of the relevant empirical literature, see Schouten, *Liberalism, Neutrality, and the Gendered Division of Labor*, chap. 1.

3.2 The equal responsibility argument

Allocating custody gender-equally is a duty of gender justice in gender-unjust circumstances because of the negative effects of the GDL on women. My first argument, which I call the 'equal responsibility argument,' builds on Susan Moller Okin's work in her seminal book *Justice, Gender, and the Family* from 1989. In particular, the argument starts with Okin's claim that it is a "reasonable assumption that women and men are equally parents of their children, and have equal responsibility for both the unpaid effort that goes into caring for them and their economic support."[48] For this argument, let us accept Okin's assumption. On its basis, I propose the following line of reasoning.

If parents are equally morally responsible for their children, there are at least two *prima facie* permissible ways for parents to fulfil that responsibility: by working equally, either (i) with or (ii) without a division of labour between them. Separating parents are often incentivized to (continue to) divide the required labour.[49] One party, often the mother, specialises (or continues to specialise) in childrearing, which includes custody over the child in case of the parents' separation. The other party, often the father, specialises (or continues to specialise) in paid labour, which includes paying sufficient alimony and child support.[50] This division is often economically rational.[51] Additionally, it is *prima facie* conceivable that parents can fulfil most moral responsibilities they have towards their child in this way.[52]

[48] Okin, *Justice, Gender, and the Family*, 175–76.
[49] In reality, they often end up dividing the labour *unequally*; this further complication, however, is not strictly necessary for the argument I make in this section.
[50] This outlines the 'ideal' case of dividing labour – unfortunately, often fathers do not live up to their end of the bargain.
[51] For evidence from the mid-1980s up until the very recent past, see e.g. Okin, *Justice, Gender, and the Family*; Schouten, *Liberalism, Neutrality, and the Gendered Division of Labor*.
[52] Consider, though, Okin's arguments against this possibility in her *Justice, Gender, and the Family*, chap. 8. She argues that by dividing the labour, parents perpetuate children's unjustified enrolment in gender roles, and thus fail to fulfil their moral responsibility. For a similar line of argument about how children are wronged when shaped by a gendered division of labour, see Gheaus, 'Political Liberalism and the Dismantling of the Gendered Division of Labor'.

However, a regime of custody which allows (and, via economic rationality, often encourages) a mother-only custody allocation contributes to gender-unjust outcomes. This speaks in favour of gender-equal – and against gender-blind – custody allocation.[53] Sole custody by mothers – being stuck with the responsibility for one's children on one's own after a separation – disadvantages women in several ways. First, sole custody over children decreases women's likelihood of finding a new life partner,[54] thereby decreasing the likelihood of pursuing one possible way of flourishing. Second, childrearing on one's own is very demanding, such that it creates barriers to the enjoyment of social goods.[55] This claim plausibly applies to sole custody as well, even when the father continues to participate in other aspects of childrearing, especially against a background of gender injustice. Legal custody is a huge responsibility, especially when it is *not* shared.[56] Third, the low social prestige of childrearing responsibilities (such as custody) is perpetuated through mother-only custody allocation[57] – with detrimental effects not only for present, but also for future girls and women. Fathers without custody avoid all these negative consequences.

The consequences of a mother-only custody allocation, as a continuation of the gender-structured household, are extremely likely to perpetuate and solidify "both practical and psychological barriers against women in all the other spheres of life."[58] These, on Okin's analysis, warrant their classification as unjust:

> "A society that is committed to equal respect for all of its members, and to justice in social distributions of benefits and responsibilities, can neither neglect the family nor

[53] For the explanations of the terms, see section 3.1.
[54] Okin, *Justice, Gender, and the Family*, 166.
[55] Okin, 116. Okin claims that childrearing on one's own "prevents those who do it single-handedly from the pursuit of many other social goods" – this claim seems too strong.
[56] At the end of section 3.3, I argue in favour of father-only custody allocations in some circumstances. I contend that, while sole custody would also be a very demanding responsibility for any father who assumed it, the background conditions of gender injustice make it relevantly different for fathers so that the demandingness does not speak conclusively against father-only custody allocation. A certain level of demandingness is to be expected when addressing large-scale injustices.
[57] On the social norms that assign much less value to childrearing responsibilities, such as custody, see Schouten, *Liberalism, Neutrality, and the Gendered Division of Labor*, 36–37.
[58] Okin, *Justice, Gender, and the Family*, 111.

> accept family structures and practices that violate these norms, as do current gender-based structures and practices."[59]

One possible way of addressing the injustice perpetuated by mother-only custody allocation would be some form of adequate compensation for women for the burdens of being sole custodians. There are two reasons why we should nevertheless look at gender-equal custody allocation as a solution. First, it is unlikely that most societies would be willing to implement the large-scale compensation schemes which would be necessary to adequately compensate mothers who are sole custodians. Second, it is preferable to address injustices at their root, rather than to mitigate their symptoms. But compensation for mothers with sole custody mitigates the symptoms, while gender-equal custody allocation contributes to the eradication of the underlying injustice. (I further defend the latter claim in the following section.)

Then, we should draw the following conclusion: if gender-blind custody allocation could be justified, then it could only be justified in gender-just circumstances or in circumstances in which mothers who are sole custodians are adequately compensated. However, neither is the case in our current societies. Thus, gender-blind custody allocation is not currently justified in our societies. Again, this conclusion is supported by Okin's insights: gender-blind family and divorce policies, such as gender-blind custody allocation, are a source of further injustice because the law treats equally those who are made unequal in other relevant regards.[60]

Thus, from the point of view of gender justice, custody allocation which results in an equal distribution of responsibility is the only custody allocation that allows fulfilling parents' shared moral responsibility. Since gender justice is undermined by the alternative (i.e., a gendered division of labour, even one in which the burdens are equally distributed), we should conclude that it is a duty

[59] Okin, 22.
[60] Okin, 4–5.

of gender justice to allocate custody gender-equally instead. A norm to share custody equally alleviates a big risk women face when deciding to become mothers.

3.3 The norm elimination argument

The second argument of this chapter is indirect in the sense that it establishes the duty to allocate custody gender-equally via the role custody regimes play in the perpetuation of unjustified gender norms about childrearing. As introduced in section 3.1, I assume that these unjustified gender norms generate the gendered division of labour (GDL) and thus result in the gender injustice flowing from it.

First, let me introduce the argument. In the remainder of the section, I defend the premises in turn.

> (P1) The most effective strategy for promoting gender justice requires undermining the GDL.
>
> (P2) Gender norms about childrearing must be eliminated to undermine the GDL.
>
> (P3) Fathers must contribute at least as much as mothers to childrearing in order to eliminate gender norms about childrearing.
>
> (P4) A regime of gender-equal custody allocation is part of the most effective strategy for ensuring that fathers contribute at least as much as mothers to childrearing.
>
> (P5) It is a duty of gender justice to pursue the most effective strategy for promoting gender justice.
>
> (C) Therefore, it is a duty of gender justice to allocate custody gender-equally.

The first premise claims that to promote gender justice most effectively, we must undermine the GDL. The negative effects of the GDL on women, which I have discussed in section 3.2, should

already be sufficient to make this premise an attractive starting point.[61] Recall that a gender-just society is a society in which gender does not influence the equal respect for all its members and the distribution of social burdens and benefits. It is hard to imagine that, given what we know about the GDL and its effects on women, the best strategy for promoting a gender-just society would leave the GDL intact. In that sense, the indirect argument in this section is dependent on the argument of the previous section.

Premise two is built on an analytic claim. As I have defined the GDL, it is necessarily the case that gender norms must be eliminated to undermine the GDL, since the GDL is generated by gender norms. Considering the empirical evidence discussed in this chapter, it certainly seems correct that gender norms about childrearing are among the most important norms that must change to undermine the GDL. For example, even though women's labour force participation is (almost) as high as men's, women still do much more childrearing work than men.[62]

The third premise contains the claim that fathers must contribute at least as much as mothers to childrearing to eliminate gender norms about it. This premise is empirically speculative, but its plausibility is supported by the following considerations. First, we can see that while women's increased participation in paid labour has barely changed gender norms about childrearing, it has changed some of the gender norms about other work. As a new norm, women are now generally expected to contribute equally to the family income while still doing most of the childrearing. It seems eminently plausible, then, that the norms about childrearing can only be eliminated if childrearing practices themselves change such that men do at least as much. Second, as Okin points out,

[61] One might object that the GDL could still be morally justified because it is part of the most efficient organisation of society. For a convincing rebuttal, see Schouten, *Liberalism, Neutrality, and the Gendered Division of Labor*.
[62] See, for example, Haney and Barber, 'The Extreme Gendering of COVID−19'. The authors show that crises such as the Covid-19 pandemic exacerbate the GDL. Interestingly, the authors found that women did not report more dissatisfaction with the situation – a possible indication of the continued influence of norms about childrearing.

children will continue to be socialised according to current gender norms if most childrearing is performed by mothers and other women.[63] If that is correct, then it is very unlikely that gender norms about childrearing can be eliminated in the absence of men's proper participation. The fact that most of the childcare outside of the family is also performed by women explains why fathers should contribute *at least* as much as mothers. Potentially, they would have to contribute significantly more to outweigh the feminisation of non-family childrearing. Third, if fathers and mothers were to perform the same labour, their roles would become similar. If our understanding of their roles in childrearing were sufficiently similar, then it would be strange for gender norms about childrearing to persist. In that case, to use Okin's phrase, 'mothering' and 'fathering' a child will ultimately mean the same thing.[64]

On this view, fathers contributing at least as much as mothers to childrearing is a necessary condition for gender norm elimination. One might object that, while necessary, it is unlikely to be sufficient since gender norms are shaped as well in other spheres of people's lives. In addition, one might claim that gender norms about childrearing are shaped much more by other tasks, such as everyday caretaking, than by taking responsibility for a child (i.e., custody). Luckily, (P3) does not make a sufficiency claim. It only requires necessity. However, there are optimistic assessments of norm change through changing practices and institutions.[65] If these are correct, we might be justified in optimistically thinking that fathers starting to contribute at least as much to childrearing as women *before norms change* will also be sufficient to eliminate the norms about the practice of childrearing.

[63] Okin, *Justice, Gender, and the Family*, 131. Also, chapter 8.
[64] Okin, 12.
[65] For an optimistic assessment of the likelihood of norm change through institutional change, see Brighouse and Olin Wright, 'Strong Gender Egalitarianism'.

The fourth premise is that a regime of gender-equal custody allocation is part of the most effective strategy for ensuring that fathers contribute at least as much as mothers to childrearing. Again, there are several good reasons for accepting this premise. First, gender-equal custody allocation is relatively unintrusive, compared to other possible measures that could ensure that fathers participate equally. This is because post-separation custody allocation happens when custody decisions are made anyway. Compare it to more intrusive measures such as mandatory reduced working hours for fathers of small children, or mandatory reporting of fathers' sufficient contribution to childrearing as a condition of accessing child support. Both of these would require much more sustained state interference. In addition, their vulnerable emotional state during separation proceedings might, on a practical level, make fathers less likely to resist gender-equal custody allocation.[66] Gender-equal custody allocation might, thus, face less resistance when first introduced. Second, there are lots of separations of parents.[67] So, if gender-equal custody allocation has the desired effect on fathers' post-separation participation in childrearing, the effect would likely be significant enough for it to be part of the most effective strategy.

Furthermore, gender-equal custody allocation forces men to actually do childcare work if they are to properly discharge the duties that come with custody while living independently of their ex-spouses. It is much harder to divide work such that one parent concentrates on providing economically while the other concentrates on childrearing when the parents no longer form a common household. So, there is a larger incentive for fathers to personally discharge part of the duties of childcare that come with custody when they live independently. Of course, this is a big 'if.' Some fathers will not discharge their duties properly and thus negatively affect their children. In such cases, the costs imposed on the child will have to count against gender-equal custody allocation. However, I cannot help but to be somewhat optimistic regarding most fathers' good will, once

[66] I am grateful to Magdalena Riedl for raising this point.
[67] See footnote 14 and, generally, Kaindl and Schipfer, 'Familien in Zahlen 2023'.

they are nudged to participate properly by being given the responsibility of shared custody. This is especially true since my arguments are limited to scenarios in which fathers agree to continue taking on custody in the first place. Together with other measures, such as Gheaus and Ingrid Robeyns's proposal of nudging fathers to take parental leave,[68] gender-equal custody allocation thus is a promising contender for being part of the most effective strategy for ensuring that fathers contribute at least as much as women to childrearing.

The final premise, (P5), is that it is a duty of gender justice to pursue the most effective strategy for promoting gender justice. Recall that when I talk of duties, I talk of *pro tanto* duties, i.e. duties which should be performed in the absence of stronger countervailing reasons. It almost seems like a truism that, in the absence of strong reasons against it, it would be a duty of gender justice to do that which is most effective in promoting it.

If these five premises are acceptable, then the conclusion follows: it is a duty of gender justice to allocate custody gender-equally in gender-unequal circumstances.

***

There are two ways to understand the duty for which I have argued.[69] It can, on one hand, be understood as a duty which applies in each particular custody case. Recall Alice, Bert, and their son Charlie from the introduction. If the duty applies in each particular case, and – like in their case – there are no strong enough countervailing reasons, the duty becomes an all-things-considered duty. Then, we should allocate shared custody to Alice and Bert. If, on the other hand, the duty to allocate custody gender-equally is best understood as about custody allocation on a societal level,

[68] Gheaus and Robeyns, 'Equality-Promoting Parental Leave'.
[69] I am grateful to Emily Williamson for raising this point.

then it might require father-only custody allocations in circumstances of highly feminised childrearing. Then, absent countervailing reasons, we should allocate sole custody to Bert. Thus, in circumstances of highly feminised childrearing, a regime of gender-equal custody allocation is compatible with father-only custody allocations in particular scenarios to offset single motherhood. In societies such as ours, gender-equal custody allocation is, however, never compatible (from the point of view of gender justice) with mother-only custody allocations after parents separate, as I have argued in this chapter.

It remains for me to explain why I believe that the duty to allocate custody gender-equally is best understood as a duty to ensure a gender-equal allocation of custody in the aggregate, i.e. at a societal level. I have three reasons for it. First, requiring some father-only custody allocations possibly contributes to faster norm-change than we would get otherwise from strictly gender-equal shared custody. Second, in situations in which only the father is enthusiastic about custody, strictly gender-equal shared custody would presumably be quite costly to mothers who do not particularly desire custody, but might feel pressured to still accept it. In addition, it would waste such opportunities to more thoroughly de-feminise childrearing. Third, even without separations, we generally find more single mothers than single fathers in our current societies. Therefore, it is necessary to get a sufficient number of father-only custody allocations after separations to counterbalance the influence of single mothers on gender norms about childrearing. Allocating custody after separation to compensate for the surplus of single mothers seems a more feasible and desirable course of action than to get single mothers to share custody with other men.

4 Distributing the costs of promoting gender justice

Let me recapitulate what I have argued so far. I have argued in the previous chapter that in gender-unjust circumstances, gender justice requires us to allocate custody gender-equally after parents separate. A societal-level regime of gender-equal custody allocation at the point of parental separation enables us to counteract the unjust gender norms about childrearing which generate the gendered division of labour and some of the gender injustice flowing from it. In chapter 2, I have also proposed that the allocation of custody should normally track the moral right to parent. I.e., custody over a particular child should normally be allocated to the holder(s) of the right to parent a particular child. There is no obvious exception to this presumption in the case of separating parents. However, if we allocate custody gender-equally when parents separate, this might at least in some scenarios result in custody allocations which do not track the moral right to parent. In this chapter, I argue that such a divergence is morally permissible, even when it is costly to children. Consequently, since the duty to promote gender justice is weighty, considerations of gender justice should at least sometimes properly guide the allocation of custody.

The chapter is structured as follows. In section 4.1, I argue that it can in principle be permissible to allocate custody such that it does *not* track the moral right to parent. In section 4.2, I argue that there are scenarios in which the moral right to parent is less weighty than considerations of gender justice. But gender-equal custody allocation can at least sometimes be costly for children relative to an allocation of custody which tracks the moral right to parent. Therefore, in section 4.3, I propose via an argument by analogy that children can permissibly be made to bear some of the costs of promoting gender justice.

4.1 The moral/legal divergence argument

In section 2.1, I have proposed that custody should normally be allocated to the holder(s) of the moral right to parent. This claim sits nicely with both accounts of the right to parent: the Dual-Interest View, which holds that the right to parent is a claim right, and the Child-Centred View, which holds that it is a liberty right. In this section, I show that this presumption does not always hold: custody allocation should be constrained by the requirements of justice. If so, then it can in principle be permissible to allocate custody such that it does *not* track the moral right to parent when other considerations of justice are weightier.

4.1.1 Defeasible Rights Claims

The moral right to parent, like most other rights, plausibly grounds at most a defeasible claim: state-protected *indefeasible* claims grounded in rights generally have unacceptable implications. This is the central reason why custody allocation should only track the moral right to parent insofar as it is compatible with other requirements of justice. Consider this scenario.

> *Midnight walk*. Gerald enjoys midnight walks. One night, he notices that the door to Hilda's house is unlocked and, out of curiosity, walks in. When Hilda confronts him, Gerald claims that walking into Hilda's living room at midnight is protected by his right to free movement. When the police arrives at the scene, he expects them to protect his right.

Gerald's justification is clearly unacceptable. His right to free movement does not entitle him to walk unconstrainedly anywhere he likes. Hilda's weighty interest in having privacy in her home constrains his right in this scenario: the right to free movement plausibly grounds at most a defeasible claim.

We should think about the right to parent in the same way. Consider the next scenario.

> *Aid mission.* Idris, a wonderful dad, gets sole custody over his son Karl after separating from Karl's not very enthusiastic, but still adequate, other father, Jack. This is prudentially best for all three people involved and has their full agreement. But then, Idris – due to his unique skill set – comes to be under a very weighty moral duty to go on a humanitarian aid mission of indeterminate duration which makes it impossible to act as Karl's custodian while he is away.[70]

Suppose that the mission is required by justice. It seems plausible that Idris ought to go and that custody should now be allocated to Jack instead. Jack reluctantly agrees. Given that there is an adequate parent available for Karl, it would be counterintuitive to say that Idris cannot permissibly discharge his duty of justice to go on the humanitarian aid mission. But this is what we would have to say if custody were to always track the right to parent. At the same time, we presumably do not want to claim that Idris loses his moral right to parent Karl, or that Jack suddenly holds the moral right. Consider this: if the mission were cut short, it would be permissible for Idris to, once again, be Karl's custodian. This can best be explained by custody once again tracking the moral right to parent, which Idris held all along.

These considerations, when generalised, support my view that the claim grounded in the right to parent can in principle be outweighed by strong enough social interests, such as those protected by requirements of justice. If I am correct, custody allocation to the holder(s) of the moral right to parent should be constrained by duties of justice.

[70] Anca Gheaus (work in progress) proposes a similar scenario – except that it involves soldiers engaged in just war and the allocation of custody.

4.1.2 Defeasible Justice Claims

Even if the right to parent plausibly grounds at most a defeasible claim, the constraints that duties of justice put on the claim must be defeasible in turn. I must rule out scenarios in which the burden of justice on individuals would be too extensive. Consider the following scenario.

> *Abusive man*. Lana is divorcing Mario. The reason for their divorce is that Mario has developed into an abusive father and partner. Shared custody would make the lives of Lana and her children extremely bad.

On any plausible account, only Lana can hold the moral and legal right to parent in this scenario. The costs which a gender-equal custody allocation would impose on the children and on Lana are clearly too big to be permissibly imposed for the sake of promoting gender justice. Consequently, in scenarios such as *Abusive man*, and absent other countervailing reasons, custody should consequently track the right to parent unconstrained by considerations of gender justice.

One way to think about *Abusive man* is that the costs put Lana and the children below a relevant threshold of welfare. In this scenario, it is the minimal threshold which plausibly underpins the 'Clear and Present Danger Standard'[71] for state intervention in the family. When the costs which are imposed on children by remaining in their families put them below this threshold, the state can permissibly intervene. In the following section, however, I propose a higher threshold which underpins a more demanding restriction on gender-equal custody allocation. Nevertheless, on the basis of the argument so far, the following general principle seems correct: It is only permissible to impose costs of promoting gender justice when the costs would not put the cost-bearers below a certain threshold of welfare.

***

[71] Brennan and Noggle, 'The Moral Status of Children', 19.

To sum up, the allocation of custody to the holder(s) of the moral right to parent should be (A) constrained by weighty duties of justice, as long as (B) discharging the duties of justice is not too burdensome. From the acceptance of this principle, it follows that there might in fact be scenarios in which it is permissible to allocate custody such that it does not track the moral right to parent.

4.2 Two arguments showing that the right to parent is outweighed

By now, I have shown that we can weigh the moral right to parent against other moral considerations, such as other considerations of justice, in the allocation of custody. I have not yet shown that the duty to allocate custody gender-equally in gender-unjust circumstances does in fact at least sometimes outweigh the other interests in play in custody allocation cases. Thus, I now offer arguments for it. I also discuss a more demanding threshold than the minimal welfare threshold of *Abusive man* of the previous section. I propose that children should not be put below the threshold which corresponds to Brighouse and Swift's 'adequate parenting' standard by the costs of promoting gender justice.

As I have stated in section 2.2, the Child-Centred View and the Dual-Interest View will sometimes come to different conclusions on who holds the right to parent in custody cases, and which interests must be considered when said right is weighed against the duty of gender justice. Therefore, let me construct different arguments in subsections 4.2.1 and 4.2.2. On the basis of these arguments, I draw general conclusions at the end of the section. I start with the argument that targets child-centred accounts.

4.2.1 Outweighing on the child-centred account

Recall *DEF*. Doris and Edgar, Frankie's parents, are separating. Since Doris is (by stipulation) the best available parent for Frankie, on the Child-Centred View, Doris holds the moral right to parent her. So let me take this as my first premise. The previous section supports the second premise:

Custody allocation to the holder(s) of the moral right to parent should be constrained by duties of justice unless they are too demanding. The third premise is the conclusion of chapter three: There is a duty of gender justice to allocate custody gender-equally, i.e. shared custody to Doris and Edgar, or sole custody to Edgar. Now, what is needed to establish the conclusion that custody should be allocated gender-equally is the following fourth premise: Doris's moral right to parent Frankie is less weighty than the duty of promoting gender justice, and discharging the duty of promoting gender justice is not too demanding.

Is the fourth premise plausible? Let us look at the interests on either side of our imaginary moral scale. The interest protected by the right to parent is Frankie's interest in the best available parenting. The interests advanced by a gender-equal custody allocation are third parties' interests in promoting gender justice, Doris and Edgar's interests in discharging a duty of gender justice, and (potentially) Frankie's interest in discharging a duty of gender justice.[72] So there already is an advantage in the number of subjects whose interests count on the gender justice side. However, the relative importance of the interests to their subjects should also count. Frankie's interest in the best available parenting is central to her. It is also very important to Doris and Edgar, and the rest of Frankie's family and friends. In a more abstract sense, on the child-centred view, it should be important to all of us. This is because (i) children are vulnerable to adults and cannot take care of their own well-being to the same extent as adults can, and (ii) children cannot consent to being parented. Therefore, their interest in getting the best available parenting should be important to adults in general. But so should the steps towards a gender-just society. Think of the arguments in chapter 3 and the liberal egalitarian commitment to institutions which respect society's members

[72] Whether Frankie, *qua* child, can have such an interest is controversial. See the positions, outlined in section 2.3, which deny that Frankie has the required moral status, but also the positions which hold that Frankie's bundle of rights and duties is relevantly different from adults'.

as free and equal persons: our institutions do not respect women to the extent that they should. Therefore, promoting gender justice is a cause for which it is worth sacrificing quite a bit.

Plausibly, we can allow a trade-off between Frankie's interest in the best available parenting and gender justice, as long as the costs imposed on Frankie do not put her below the relevant welfare threshold.[73] Overall, then, this weighing of interests – while it might not be entirely sufficient to determine that (P4) is plausible enough – at least points towards its plausibility.

What else can be said in its favour? First, if Doris were to get sole custody over Frankie, this would contribute to sustain unjust gender norms about childrearing, as I have argued in chapter 3. For this reason, Doris should value custody tracking her right to parent less than she would value it in gender-just circumstances. But even if she were to value it maximally, the fact that she lives in gender-unjust circumstances seems to count against the weightiness of her claim. In addition, on an objective conception of interests, having her right to parent weigh heavily might be less in Doris's interest than she is aware – again, given what we know about the unjust division of labour.

Second, by hypothesis, some potentially weighty reasons in favour of protecting the right to parent are absent in this scenario. For example, shared custody does not put an undue burden on the parents. I think this claim is plausible: Doris and Edgar are willing to accept shared custody. By expressing this willingness, they consent to having the related costs imposed on them. Finally, since by hypothesis, shared custody or father-only custody would not make Doris, Edgar, and Frankie fall below a reasonable threshold, having to impose these costs is no barrier to a gender-equal custody allocation.

[73] I defend my interpretation of the relevant threshold in the next subsection.

The argument, then, supports the conclusion that, on child-centred views, custody over Frankie should be allocated gender-equally. This means that, in *DEF* and in similar scenarios, the supporters of a child-centred account of the right to parent should accept that the allocation of custody need not track the right to parent.

Nevertheless, one might think that there is a tension between the maximising aspect of the Child-Centred View – the right to parent is held by the *best* available parent – and an allocation of custody that results in a merely *good enough* custodian. However, the tension is only apparent. Doris remains the holder of the *moral* right to parent, as required by the view. My view only requires that her right does not outweigh the competing interests in the determination of the *legal* right to parent.

4.2.2 Outweighing on the dual-interest account

Things look different on Brighouse and Swift's Dual-Interest View. Recall that for them, the interests of parents in parenting have to be considered as rights-protected moral entitlements, as long as they would be adequate parents. Thus, as long as Doris and Edgar would still make adequate co-custodians for Frankie, each of them would be a holder of the right to parent. So, in scenarios such as *DEF*, custody allocation would not have to diverge from the moral right to parent, and nothing significant is added by my argument from gender justice. Assuming that most separating parents are adequate parents, gender-equal custody allocations – at least in the form of shared custody – are overdetermined.

So, to see how the Dual-Interest View interacts with my arguments, I need to first introduce a scenario in which one parent is inadequate.

> *NOP*. Nadine and Oscar are separating. Both want custody over their daughter Pia. Nadine is a well-meaning and competent mother, but Oscar is an ill-willed, irascible and unloving father. He has so far not been willing to discharge the duties of parenting

properly, but still wants at least shared custody. The reasonable expectation is that he will keep doing an inadequate job.

Recall that parents who do not discharge the duties of parenting fail the adequacy standard which is built into the Dual-Interest View. On the Dual-Interest View, then, only Nadine is an adequate parent, and thus only she holds the right to parent. Oscar's parenting does not promote Pia's interests enough for his interest in parenting to be protected by the right to parent. Furthermore, let me stipulate that since Oscar is such a hopeless case as a father, giving him even shared custody would make Pia's parenting inadequate overall.[74] Now suppose, for the sake of the argument, that the costs of shared custody for the parents are negligible, so that the costs imposed on Pia are the only relevant costs in the scenario. Even though the costs for Pia are probably not as high as for the children in the *Abusive man* scenario, they are substantial since they arise from a failure of discharging parental duties, i.e., of not giving Pia what she is owed by her parents.

These considerations lead me to the conclusion that we should think that the duty to allocate custody gender-equally in *NOP* is outweighed by Pia's interest in at least adequate parenting. Generalising to other scenarios, and across accounts of the right to parent, I propose that we take the adequate parenting standard and its corresponding threshold of welfare for children as the measure of inappropriate demandingness when we weigh duties of gender justice against children's and/or parents' interests.

Let me now move on to a second interesting interaction between my arguments and the Dual-Interest View.

[74] This outcome seems likely enough. Since Oscar would be responsible for his share of discharging parental duties while in a different household than Nadine, he is even less likely to do so than when they shared a household. Then, it seems reasonable to suppose that Pia's parenting under shared custody will be inadequate overall.

> *QRS*. Quirinia and her husband Robert are separating. Custody over their son Sven must be decided. Robert is a particularly brilliant father, but Quirinia is also well above the adequacy threshold. Both parents want custody.

Suppose that *QRS* takes place in a society with an extreme gendered division of labour. In such a society, or so I have proposed at the end of chapter 3, gender-equal custody allocation on a societal level might require father-only custody allocation in some instances. *QRS* seems like a prime contender for father-only custody allocation in these circumstances, given that Robert is a great father. But remember that the right to parent on the Dual-Interest View is a moral entitlement. Thus, in scenarios such as *QRS,* Quirinia and Robert (*qua* adequate parents) are both entitled to continue parenting Sven. So, if sole custody were allocated to Robert in the name of promoting gender justice, this would infringe Quirinia's entitlement. Thus, the question is whether the infringement of this entitlement in the name of gender justice can be justified to Quirinia, in case she does not consent.

It is a plausible moral principle that, in the absence of consent to have costs imposed on them, we can nevertheless impose certain costs on adults. The costs of having one's entitlement to parent infringed in the way I propose can presumably be quite substantial. So, can we deal with the costs to Quirinia in this way? Recall the egalitarian commitment that "when it is reasonably possible to propose and effect change in the direction of justice without massive costs, we think that respect for others obliges us to do that."[75] If this is correct, Quirinia might be required to bear substantial, though not massive, costs against her will. Provided that withholding custody from her does not prevent her from associating with Sven in a long-term and caring relationship, the costs – while substantial – are unlikely to outweigh the benefit of promoting gender justice.

[75] Brighouse, 'Egalitarianism and Equal Availability of Political Influence', 124.

One might object that, in this scenario, imposing the costs of promoting gender justice squarely on Quirinia, the *mother*, should give us pause. This objection is especially salient for mothers who value childrearing, including custodianship, highly.[76] I agree that this implication of my view sits uneasily with the motivation behind the feminist argument to promote gender justice. Nonetheless, I believe that it is unlikely that gender justice can be promoted without imposing some costs on some women; my custody proposal shares this feature with other proposals to promote gender justice.[77] Therefore, I propose that we should bite the bullet and accept that promoting gender justice can require sacrifices from both men and women, which we should think about as transitional costs.

A further worry is whether the considerations of the *QRS* scenario can generalise to scenarios in which the father is not the better parent, i.e., scenarios in which additional costs are imposed on the child. In the next section, I argue that imposing additional costs of promoting justice on children should be seen as acceptable. However, whether the costs to mothers and children will be outweighed by the benefits of father-only custody allocation in terms of promoting gender justice will depend on the extent to which the society in which custody decision is made is marked by a gendered division of labour.

***

I have argued in this section that we have good reasons to believe that at least sometimes, the duty of promoting gender justice to allocate custody gender-equally does in fact outweigh the right to parent in determining who should get custody. However, as I have shown, deliberations about

[76] I am grateful to Cathy Mason for raising this point.
[77] E.g., parental leave policies which ensure a higher share of leave-taking fathers will be costly for those mothers who would prefer to stay at home as long as possible.

custody will have to take different forms, depending on the correct account of the moral right to parent. As we have also seen in this section, and in several of the scenarios considered before, a gender-equal allocation of custody will at least sometimes impose costs on children. The view which I defend introduces a threshold of welfare which, I hope, will be acceptable to both accounts of the right to parent. Below the adequacy threshold, the costs imposed on children to promote gender justice are indefensible. I outline the reasons why we can permissibly impose costs on children at all in the next section.

4.3 Children as cost-bearers

Once again, remember *DEF*: Allocating custody gender-equally to her parents Doris and Edgar imposes the following costs on Frankie: (i) her joint custodians will make worse decisions for her than Doris would as a sole custodian; and (ii) Doris and Edgar's conflicts about matters of custody will negatively affect Frankie's well-being, compared to how she would be if Doris were her sole custodian.[78] Suppose that these costs are net costs. That is, they are not outweighed for Frankie by the benefit of living in a more gender-just society. All things considered, then, Frankie will be worse-off than she would be if custody allocation were to track Doris's moral right to parent.

Hence, I now proceed to offer an argument for why imposing these costs on Frankie is morally permissible. The argument relies on the support – by analogy – of two arguments from the philosophical literature on children. An argument for the moral permissibility of imposing costs on children is required because of a strong presumption against children as cost-bearers. This presumption is plausibly viewed as supporting generally accepted moral norms such as prioritising

[78] Recall that nothing in my argument rules out a continued relationship between Frankie and her father even if he does not get custody. It seems plausible that such a relationship might even be easier to sustain if Edgar did not participate in decision-making about (and for) Frankie.

children in, for instance, rescue missions. It also underpins the idea that parents should abstain from imposing risks on their children when the children are not likely to benefit directly from them.

This latter idea is attacked by Joseph Millum in chapter six of his book *The Moral Foundations of Parenthood*.[79] Millum investigates whether parents are ever justified in volunteering their children for necessarily risky paediatric research (i.e., medical research on children's diseases). He argues that in general, parents ought to apply a 'reasonable subject standard' as the principle for moral decision-making in their role of their children's custodian:

> *Millum's Reasonable Subject Standard.* "[D]ecisions should be made on the child's behalf as she would make them if she were a rational agent who acted prudently within the constraints of what morality requires"[80]

According to Millum, if the child were a prudent rational agent guided by moral requirements, she would sometimes volunteer to participate in socially beneficial paediatric research projects. Paediatric research is necessary to provide safe and effective medications for children's diseases.[81] As Millum describes, not enough paediatric research is done in order to provide enough safe and effective medications. Given the current technological level of development, paediatric research cannot be replaced by other means to provide safe and effective medications for children. Thus, the only morally acceptable option is to impose costs on children by making them participate in paediatric research to a sufficient degree. Millum concludes that making children bear some costs is permissible because it is a way of discharging an imperfect duty of beneficence.[82]

Here is a good reason to accept Millum's argument: if arguments such as Millum's fail, the alternative does not look satisfactory at all. Imagine a world in which it is never permissible for parents to

[79] Millum, *The Moral Foundations of Parenthood*, 128–53.
[80] Millum, 153.
[81] Millum, 145.
[82] Millum, 147.

make their children participate in much needed, socially beneficial paediatric research which could benefit countless other children. Access to safe and effective medications could not be provided, with dire consequences for all children. Thus, we should accept that Millum's argument shows that it is at least sometimes permissible to volunteer children for paediatric research when such research promotes large enough social benefits.

Given that volunteering children for paediatric research imposes net costs – in terms of risks to children's health – on children who participate, it follows that it is at least sometimes permissible to impose net costs on them for promoting social benefits. This is exactly the conclusion which my argument needs. Indeed, the fact that Millum identifies the reason as an imperfect duty of beneficence should make it even more convincing that duties of justice, such as the duty to promote gender justice, will provide even stronger reasons than beneficence.

Next, I introduce another argument which makes it clear that justice can require that we impose costs on children for its promotion. In their 2004 paper "School Choice and the Burdens of Justice,"[83] Matthew Clayton and David Stevens argue that parents in unjust societies ought not to send their children to private schools. They argue that this is required by justice, so as not to exacerbate socio-economic inequalities through making the quality of a child's education depend on parents' socio-economic status. The evidence they consider shows that if parents discharge this duty of justice, then children will be worse off – in terms of a worse education than they could have had in a private school. Although they do not focus on this question, Clayton and Stevens's argument implies that these costs can permissibly be imposed on children.

[83] Clayton and Stevens, 'School Choice and the Burdens of Justice'.

Based on Clayton and Stevens's argument, the following argument can be constructed to mirror the custody case which I consider here.

(P1) In socially unjust circumstances, it is a duty of promoting social justice to send children to public schools.

(P2) Sending children to public schools sometimes imposes costs on children.

(P3) At least sometimes, the duty of (P1) is significant enough, but not too demanding, to outweigh countervailing reasons.

(C) Therefore, it is at least sometimes permissible to impose costs for promoting social justice on children.

The first premise is the conclusion which Clayton and Stevens establish in their paper. Let us accept it for the sake of the argument. The second premise captures an empirical insight about unjust societies in which private schools are on average better than public schools. Thus, the costs are to be understood in terms of a worse education. Again, let us accept the premise. The third premise is a combination of the plausible moral principle about weighing reasons which I have defended in section 4.1 with an assessment of the moral considerations in Clayton and Stevens's paper. Now compare this with the following argument:

(P1) In gender-unjust circumstances, it is a duty of promoting gender justice to allocate custody gender-equally when parents separate.

(P2) Allocating custody gender-equally sometimes imposes costs on children.

(P3) At least sometimes, the duty of (P1) is significant enough, but not too demanding, to outweigh countervailing reasons.

(C) It is at least sometimes permissible to impose costs for promoting gender justice on children.

Here, the first premise is what I have defended in chapter 3. The second premise has been illustrated by scenarios such as *DEF* and others throughout the thesis. The third premise is a combination of what I have defended in sections 4.1 and 4.2. If all three premises are accepted, the conclusion follows.

Does the analogy between the paediatric research case, the school choice case, and the custody case hold? I believe that it does. First, all three cases involve imposing costs on children for the sake of large social benefits. Second, all arguments build in a threshold to avoid imposing costs for promoting justice (or, in the case of Millum, other social benefits) which are too harsh. Third, in all of them, a principle such as Millum's *Reasonable Subject Standard*, on which imposing costs is justified if the child were a prudent rational agent guided by moral requirements, would support imposing costs.

One reason to think that the custody case is nonetheless different would be that the alternative to imposing costs on children is relevantly different.[84] One could think that the alternatives to imposing costs in the medical and school choice cases are much worse than the alternative in the custody case. I do not believe that this is correct. Let me consider the alternatives: without imposing the costs of necessary paediatric research on children, there would be no safe and effective medications for children's diseases. All children would bear the costs of this. Without imposing the costs of promoting justice through avoiding private education, unfair socio-economic differences would increase rather than decrease, so the path to justice would be harder or even blocked. The future society, in which these children grow up, would bear the costs. Finally, without imposing the costs of gender-equal custody allocation, the path to gender justice would be harder or even blocked. Who would bear the costs in that case? While most of the costs would be borne by girls and future

[84] I am grateful to Darren Rondganger for proposing this objection.

women, some men would bear some of the costs as well, as they are also affected by unjust gender norms about childrearing.[85] So again, it seems to me that the cases are relevantly similar.

***

In this chapter, I have argued that on both the Child-Centred View and the Dual-Interest View of the moral right to parent, considerations of gender justice can sometimes outweigh the allocation of custody according to the moral right to parent. This is the case even when gender-equal custody allocation imposes costs on children, as long as children's welfare remains above the threshold which corresponds to the adequate parenting standard. That children can permissibly bear costs for promoting gender justice is explained by the conjunction of (i) liberal egalitarian principles regarding institutions which show respect for society's members as free and equal, and (ii) the application of Millum's *Reasonable Subject Standard* to children.

[85] See the 'flourishing deficit' argument in Brighouse and Olin Wright, 'Strong Gender Egalitarianism'. They argue that gender norms about childrearing prevent at least some men (who otherwise benefit from gender norms) from leading fully flourishing lives.

5 Two objections

5.1 "Let adults bear the costs instead!" – The special vulnerability objection

Against my view that we can permissibly impose costs of promoting gender justice on children, one might push back with what I call the 'special vulnerability objection.' Children's special vulnerability to adults creates, amongst others, a special welfare interest which is specific to them *qua* children. The special welfare interest is protected by a welfare right, which in turn imposes a corresponding obligation on adults to protect it. This line of reasoning supports the *special vulnerability principle*: adults should bear costs in children's stead because children are vulnerable to them. If so, the costs of gender-equal custody allocations should be borne by adults in a way that is not costly to children. It follows that gender-equal custody allocation is only permissible in scenarios such as *QRS*, but not in others such as *ABC*, *DEF,* or *NOP*.

On one hand, I see the powerful intuition behind the special vulnerability objection. On the other hand, it is important not to lose the costs of the status quo from sight. Our current childrearing practices keep imposing costs on women (see chapter 3). If the special vulnerability principle holds, the costs required to alleviate women's burden can only be borne by other adults. However, large-scale redistribution of costs between adults (i.e., from women to men) is impossible without implicating children. This is because, under current gender-unjust circumstances, imposing costs on fathers by asking them to be custodians will also derivatively impose at least some costs on children. The same goes for other ways of increasing fathers' participation in childrearing. This is a plausible claim because fathers are currently (on average) not as skilled as mothers at parenting, due to less childrearing practice.[86]

[86] For a discussion of the skill differential and its sources, see Brighouse and Olin Wright, 366–67.

Now, as I have argued in chapter 3, to alleviate costs imposed on women, men would have to do at least as much childrearing as women to undermine the gender norms about childrearing and thus undermine the GDL. If that is the case, then some of the cost of having less good carers and custodians (on average) will necessarily fall on the children. So, accepting the principle means committing to not addressing gender justice via gender-equal custody allocation on a societal level. This is an unpalatable conclusion because it creates a morally unacceptable cost-bearer shortage. Thus, in a gender-unjust society, the special vulnerability objection has very undesirable implications which might seriously block progress towards gender justice.

Furthermore, the status quo in which fathers are on average not as skilled at parenting as mothers presumably also imposes costs on current children, who get worse fathers than they could have in the absence of gender norms about childrearing. If it is correct that fathers' lack of childrearing practice lies behind the skill differential, and if the lack of practice is explained by gender norms, then it seems hypocritical to use the special vulnerability objection against a proposal to impose costs on children for the benefit of (mostly) women if this means supporting a status quo which imposes costs on children for the sake of men, who benefit from the current gender structure.[87] For these reasons, the special vulnerability principle should better be understood as allowing of exceptions, in keeping with what I have argued in section 4.3.

5.2 "You may not enforce this!" – The legitimacy objection

A regime of gender-equal custody allocation would require changing custody law to allow judges to consider the background of gender injustice in their custody judgements. This raises the question of whether such laws can be justified in terms that satisfy the ideal of free and equal citizens respecting each other. Based on this ideal, the justification principle of political liberalism requires

[87] I am grateful to Elisabeth Jakob for proposing this line of reasoning.

justifications of state interventions which exclusively rely on reasons that reasonable citizens share. So, state interventions which promote gender justice must be based on reasons that are independent of comprehensive conceptions of the good, about which citizens in pluralist societies disagree. Since not every reasonable citizen finds the gendered distribution of labour morally objectionable, implementing policy justified by my arguments might be illegitimate. This is the final objection I consider here; I call it the 'legitimacy objection.'

Recall *QRS*, in which Quirinia does not get custody over her son Sven against her will after separating from Sven's father Robert. Suppose that Quirinia reasonably rejects the claim that treating others as equals is incompatible with the GDL. Then, she might have a complaint against the state for not allowing her to keep custody if custody law is justified in terms that do not respect her autonomy, e.g. her choice of a GDL-conforming lifestyle.

One way to proceed is to reject the legitimacy objection. This comes at the cost of having to reject the attractive justification principle of political liberalism. Some, like Okin, argue in this way that injustice in the family, and thus the gendered division of labour, is incompatible with a thicker theory of justice and can thus legitimately be targeted.

> "A society that is committed to equal respect for all of its members, and to justice in social distributions of benefits and responsibilities, can neither neglect the family nor accept family structures and practices that violate these norms, as do current gender-based structures and practices."[88]

The liberal egalitarian theory of justice which I have assumed throughout the thesis is one such theory. Thus, if gender norms about childrearing are incompatible with just liberal egalitarian institutions, then interference to promote gender justice might be permissible. But this strategy will of

[88] Okin, *Justice, Gender, and the Family*, 22.

course not convince those who endorse political liberalism if they also, like Quirinia, claim that gender norms about childrearing are compatible with liberal egalitarianism.

A more promising strategy accepts political liberalism's core commitment to non-comprehensive justification, but offers a reinterpretation of the constraints and requirements of politically liberal justification in unjust circumstances. This is Gina Schouten's approach.[89] She argues that, *because* of political liberals' concern with the ideal of free and equal citizens who respect each other, interventions that promote a gender egalitarian ethos are legitimate. The reasoning is this: there is an institutionalised presumption that people will specialise along gender lines in gender-unjust societies such as ours.[90] This is a problem for political liberals because an institutionalised GDL conflicts with the value of autonomy which is a crucial component of the politically liberal ideal. On Schouten's reading, the problem is that in gender-unjust circumstances, with an institutionalised GDL, it is unduly costly to act autonomously by rejecting the GDL in one's life. Then, she argues, it is not only legitimate for the state to promote gender justice, but it is even required by the very ideal on which the politically liberal justification constraint is based. The scope of this thesis does not allow me to fully defend Schouten's strategy; her full argument can be found in her book.[91] However, if it works, then gender-equal custody allocation as a policy which promotes a gender egalitarian ethos by undermining gender norms about childrearing is likely to be legitimate after all.

Let me finish my reply with this: if neither strategy against the legitimacy objection works, then the duty to allocate custody gender-equally could still be understood as a duty of individual morality. Parents will (sometimes) be morally required to agree on costly shared custody, or father-only custody, even when the state cannot legitimately enforce it.

---

[89] Schouten, *Liberalism, Neutrality, and the Gendered Division of Labor*.
[90] Schouten, 174.
[91] Schouten, chaps 4–7.

6 Concluding remarks

I have argued that in gender-unjust social circumstances, considerations of gender justice should bear on the determination of the post-separation allocation of custody over children. Furthermore, I have shown that there are scenarios in which they are decisive. Given current unjust gender norms about childrearing and their unjust effects on women, promoting gender justice provides a weighty reason in favour of allocating custody gender-equally on a societal level.

My view faces two major worries which I have attempted to dispel. First, at least sometimes, gender-equal custody allocation will involve a divergence of the legal right to parent from tracking the moral right. Not tracking this weighty moral right must be justified to the right holder(s). Therefore, with the moral/legal divergence argument, I have argued that this divergence is sometimes permissible. Second, a regime of gender-equal custody allocation can impose net costs on the relevant parties, including on children. Again, imposing costs for promoting gender justice must be justified to those on whom we impose them. Therefore, with the outweighing arguments and the argument for children as cost-bearers, I have argued that imposing these costs is sometimes permissible.

Finally, let me mention two limitations of my project. First, by concentrating on the post-separation division of labour in childrearing, I am bracketing the pre-separation division of labour. I do *not* claim here that my arguments are strong enough to justify re-allocations of custody across the population to immediately address the pre-separation division of labour. Hence, I believe that other measures are needed to address the pre-separation division of labour within families, which I have not discussed. Second, I am convinced that shared custody is overdetermined as the morally preferable custody allocation in many scenarios, purely based on the interests of children and (if permissibly included) parents. In such scenarios, while considerations of gender justice should play a role in a full moral deliberation, they are unlikely to be the decisive factor since so much else speaks in favour of at least shared custody.

7 Bibliography

Anderson, Elizabeth S. 'What Is the Point of Equality?' *Ethics* 109, no. 2 (1999): 287–337.

Archard, David. 'Children's Rights'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta and Uri Nodelman, Spring 2023. Metaphysics Research Lab, Stanford University, 2023. https://plato.stanford.edu/archives/spr2023/entries/rights-children/.

Archard, David, and Colin M. Macleod, eds. *The Moral and Political Status of Children: New Essays*. Oxford: Oxford University Press, 2002.

Behrends, Jeff, and Gina Schouten. 'Home Economics for Gender Justice? A Case for Gender-Differentiated Caregiving Education'. *Ethical Theory and Moral Practice* 20, no. 3 (1 June 2017): 551–65.

Brennan, Samantha. 'Thresholds for Rights'. *The Southern Journal of Philosophy* 33, no. 2 (1995): 143–68.

Brennan, Samantha, and Robert Noggle. 'The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice'. *Social Theory and Practice* 23, no. 1 (1 January 1997).

Brighouse, Harry. 'Egalitarianism and Equal Availability of Political Influence'. *The Journal of Political Philosophy* 4, no. 2 (1996): 118–41.

Brighouse, Harry, and Erik Olin Wright. 'Strong Gender Egalitarianism'. *Politics & Society* 36, no. 3 (2008): 360–72.

Brighouse, Harry, and Adam Swift. *Family Values: The Ethics of Parent-Child Relationships*. Princeton: Princeton University Press, 2014.

Clayton, Matthew, and David Stevens. 'School Choice and the Burdens of Justice'. *Theory and Research in Education* 2, no. 2 (2004): 111–26.

Dworkin, Ronald. 'What Is Equality? Part 1: Equality of Welfare'. *Philosophy & Public Affairs* 10, no. 3 (1981): 185–246.

———. 'What Is Equality? Part 2: Equality of Resources'. *Philosophy & Public Affairs* 10, no. 4 (1981): 283–345.

Dwyer, James G. *Moral Status and Human Life: The Case for Children's Superiority*. Cambridge University Press, 2010.

Floris, Giacomo, and Riccardo Maria Spotorno. 'What Does It Mean to Be Moral Equals?: The Special Case of Children's Moral Status'. *Social Theory and Practice*, 4 April 2024.

Gheaus, Anca. 'Political Liberalism and the Dismantling of the Gendered Division of Labor'. In *Oxford Studies in Political Philosophy Volume 9*, edited by David Sobel and Steven Wall. Oxford University Press, 2023.

———. 'The Best Available Parent'. *Ethics* 131, no. 3 (April 2021): 431–59.

Gheaus, Anca, and Ingrid Robeyns. 'Equality-Promoting Parental Leave'. *Journal of Social Philosophy* 42, no. 2 (2011): 173–91.

Gheaus, Anca, and Christine Straehle. *Debating Surrogacy*. Oxford, New York: Oxford University Press, 2024.

Haney, Timothy J., and Kristen Barber. 'The Extreme Gendering of COVID−19: Household Tasks and Division of Labour Satisfaction during the Pandemic'. *Canadian Review of Sociology* 59, no. suppl. 1 (October 2022): 26–47.

Jaworska, Agnieszka, and Julie Tannenbaum. 'The Grounds of Moral Status'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta and Uri Nodelman, Spring 2023. Metaphysics Research Lab, Stanford University, 2023. https://plato.stanford.edu/archives/spr2023/entries/grounds-moral-status/.

Kaindl, Markus, and Rudolf Karl Schipfer. 'Familien in Zahlen 2023: Statistische Informationen zu Familien in Österreich'. 2023. https://doi.org/10.25365/PHAIDRA.445.

Matthews, Gareth, and Amy Mullin. 'The Philosophy of Childhood'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta and Uri Nodelman, Fall 2023. Metaphysics Research

Lab, Stanford University, 2023. https://plato.stanford.edu/archives/fall2023/entries/childhood/.
Millum, Joseph. *The Moral Foundations of Parenthood*. Oxford; New York: Oxford University Press, 2017.
Narveson, Jan. *The Libertarian Idea*. Broadview Press, 2001.
Okin, Susan Moller. *Justice, Gender, and the Family*. Basic Books, 1989.
Reno v. Flores, 507 U.S. 292, No. 507 U.S. 292 (US Supreme Court 23 March 1993).
Schouten, Gina. *Liberalism, Neutrality, and the Gendered Division of Labor*. Oxford University Press, 2019.
Thomson, Judith Jarvis. *The Realm of Rights*. Cambridge, Mass.: Harvard University Press, 1990.