

Parental Licensing: A Qualified Defence¹

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Parental licensing is the idea that parenting competency should be demonstrated *prior* to the attribution of full legal parental rights. Such rights generally include permissions to exclude others from interacting with the child, to decide where the child lives and is schooled, and other rights that it is necessary for a guardian to have in order to meet the child's needs. In many contemporary societies, surveillance measures and checks on parental competence are used at various stages by health and educational professionals, and are consistent with full legal parental rights, but that surveillance and intervention is kept to a minimum.

The putative justifying aim of parental licensing is to minimize parental child abuse and inadequate parenting and the harms associated with it.² While no parent has a right to abuse their child or to provide them with an inadequate upbringing, indeed they have duties to do the opposite, parents' legal rights and social status provide opportunities for such abuse that would not be available without the legal rights and status. Part of the reason for this is that parenting well requires a measure of discretion, authority and intimacy all of which are arguably inconsistent with very close surveillance from agents who can override parental decisions. While, discretion, authority and intimacy may be consistent with a lot more surveillance than we do currently allow, it undoubtedly increases the risk of harm to a child perpetrated by the people who are given legal rights to parent. Parental licensing promises to minimize child abuse and inadequate upbringing consistent with low levels of surveillance and monitoring by introducing of a system of testing competence before full

¹ I am grateful for Sarah Hannan and R. J. Leland for details comments on a previous draft and much discussion.

² NSPCC.co.uk: <https://www.nspcc.org.uk/services-and-resources/research-and-resources/statistics/>

parental rights are awarded.³ If the acquisition of parental rights is made conditional on proving that you can be expected to be a good parent, or, at least, not to be a bad one, then something like the status quo of limited surveillance may be more easily justified.

In spite of the uncontroversial nature of its aim, parental licensing proposals have met with significant criticism in both a principled and a pragmatic form. In this paper I will offer a rebuttal of these objections and defend parental licensing as, in principle, justifiable in order to reduce harm, while also raising a new pragmatic concern, which directs us to take into account the likely effects of parental licensing on the supply of prospective adoptive parents. I aim to motivate a re-examination of licensing by showing that the principled objections fail.

The paper is structured as follows. In Section One, I consider the force of the pragmatic and principled objections to parental licensing and show that they all rely on the same premise: *that there is a stringent moral right to parent which would be violated by any feasible parental licensing system*. According to defenders of such a moral right to parent, it is constraint on efforts to minimize harm. In Section Two, I deny the existence of a sufficiently stringent right to parent, though I do not deny the existence of a right to parent per se. This implies that parental licensing could be justified even though it denies some competent parents the legal rights to parent, so long as it reduces harm. This, I believe clears the ground for a re-examination of parental licensing. In Section Three, I argue that the real practical problem with licensing, and obstacle to its implementation, is that we may end up with too few licensed parents under any currently feasible testing regime. This possible consequence of licensing parents, and not the violation of a stringent right to parent, justifies a cautious attitude towards the implementation of parental licensing. Section Four concludes.

³ Further interventions and follow-up meetings could be put in place, but that would be prior to full rights are granted. Of course, parents should be subject to other sorts of monitoring e.g. from teachers and doctors with suspicion, but this would be less invasive than the kind I envisage from licensing.

I

In 1980, Hugh LaFollette set out a compelling and provocative argument for parental licensing. LaFollette observed that we license a number of activities and those activities meet three conditions, which justify their being subject to licensing:

- 1) The activities are potentially harmful to others
- 2) Safe performance of the activity requires a certain competence
- 3) We have moderately reliable procedures for determining that competence. (1980: 183)

La Follette points out that like driving and practicing medicine, parenting is an activity that meets these conditions. Parenting can harm the child if not done well. Parenting well requires a certain competence and not merely good luck. And we do have procedures that are reliable for determining parental competence and we use them successfully in identifying suitable adoptive and foster parents, where rates of parental abuse of children are considerably lower than in the general population. So, we can assume that the introduction of a licensing program similar to vetting procedures used in adoption would result in a lower incidence of child abuse and neglect than the status quo.⁴ I will not argue for this here, but if licensing were worse in this respect it would be a knock-down argument against it, so it hardly seems worth considering.

La Follette's is an argument from analogy. It takes what are assumed to be justified instances of licensing and shows that parenting is morally analogous to those justified instances. But there are drawbacks to approaching the justification of parental licensing in this way. The main drawback is that the argument relies on our thinking that those things that are currently licensed should be licensed. It would be better to have an independent argument that establishes the justifiability of licensing even in the absence of a justification for licensing for other professions. Another important

⁴ We also license child care professionals

drawback is that licensing parents is disanalogous in at least one very important way to licensing doctors or drivers. Licensing parents is a measure that is putatively justified solely by appeal to the harm that will be caused to children who are incapable of giving consent. Licensing doctors and drivers aims at preventing or minimizing harm to adults as well as children and often concerns those who can and do give (some form of) consent to the risks faced e.g. patients and other road users. This disanalogy, might shed doubt on La Follette's argument even if we do think that doctors and drivers should be licensed. I do not aim to explore this possible problem with LaFollette's argument further, I mention it simply to motivate the search for some other basis for parental licensing, one that stands on its own feet, so to speak.

In light of this, we should seek a more general framing of the argument. Parental licensing is a policy that promises to minimize significant harm to non-consenting others through reliable procedures for determining necessary competence in being a primary carer for those non-consenting others. The central question then becomes: can we withhold full legal parental rights in order to minimize such significant harm to non-consenting others? This re-framing does not lead us to rely on the analogy between practicing medicine and parenting. Instead it relies on the more general normative claim that minimizing significant harm to non-consenting others can justify licensing and the costs associated with it.

A Pragmatic Worry: the accuracy critique

One forceful critique of parental licensing comes from Michael Wald and Michael Sandmire who argue that the procedures for determining parental competence are wildly inaccurate and moreover, the prospects for developing an even moderately accurate test are so dim that it isn't worth discussing parental licensing. I use "accuracy" here rather than "reliability", as La Follette does, for reasons made clear by Wald and Sandmire to do with terminology used in social scientific research.

In order to understand why this critique lacks the great force that it may appear to have, it is important to distinguish two ways in which a test can be accurate, each of which can be derived from the general notion of accuracy.

An ideally accurate test of parental competency could be accurate in either, or both, of two ways. First, a test could be accurate in that those who pass the test tend to be competent. A test is perfectly accurate in this sense when 100% of those who pass the test are competent and would not provide their children with an inadequate upbringing. Such accuracy is consistent with incorrectly identifying many competent parents as incompetent. A proposed test would be inaccurate in this sense, and therefore open to criticism, if a high percentage of those who passed were incompetent. Call a test that does poorly on this measure 'Inaccurate due to False Positives' because it *falsely* judges incompetents *positively*. In other words, the test would wrongly give parental rights to bad parents. Second, a test could be accurate in that those who fail the test tend to be incompetent. A test is perfectly accurate in this sense when 100% of parents who fail the test are incompetent and would provide their children with an inadequate upbringing. A proposed test would be accurate in this sense if a high percentage of those who failed were in fact incompetent. Such accuracy is consistent with incorrectly identifying many incompetent parents as competent. Call a test that does poorly on this measure 'Inaccurate due to False Negatives' because it *falsely* judges competent parents *negatively*. In other words, the test would wrongly deny good parents the right to parent.

We should now ask, which of these two senses parental licensing tests are unreliable and whether that sense is truly problematic. After all, the moral significance of inaccuracy stems from the costs to the individual themselves of being falsely labelled an inadequate parent and the costs to others, especially children.

Wald and Sandmire's analysis shows that the tests we have for parental competency are seriously 'Inaccurate on False Negatives' because the group of adults who fail the test contains many competent parents who should have passed. It therefore denies many good parents a license, even if it also denies bad parents a licensing. So, if 'Inaccurate on False Negatives' were a particularly important sense of reliability, one we had very strong reasons to be concerned about, this would tell strongly against parental licensing, at least until far better tests were available.

But Inaccurate on False Negatives is not the most important sense of unreliability. The underlying justification and motivation for parental licensing is that it will minimize child abuse and inadequate parenting. If we are focussed on minimizing child abuse and inadequate parenting we should be much more interested in how well our tests prevent bad parents from getting licenses than in how well our tests allow good parents to get licenses. In other words, the sense in which we should be *most* concerned with accuracy of such tests is to identify False Positives and not False Negatives. Clearly both senses of accuracy are important, and inaccuracy of either kind has costs, but from the point of view of minimizing child abuse and inadequate parenting, Wald and Sandmire show only that the tests are inaccurate on the least important sense. This does not mean that this kind of inaccuracy is not troubling. How troubling it is depends on the strength of the claims that those parents who will be falsely judged inadequate parents have, but it is not obvious that this problem is something that the proponents of parental licensing cannot overcome.

Let's now turn to the underlying costs of inaccuracy of this sort. The first thing it is important to clarify is that denying inadequate parents or would-be parents the right to rear is not morally troubling. Abusive or neglectful parents have no right to parent and so labelling them incompetent is not something we have any moral reason to avoid.

What is troubling is denying those who would be adequate parents or would-be parents the opportunity to parent because they do have a right to do so. So, it is troubling to have a procedure that is inaccurate on false negatives because each false negative is a parent who would do a good job who is prevented from doing so by wrongly being judged inadequate. How can a scheme of licensing that is 'Inaccurate in False Negatives' be justified to those, perhaps many, competent parents who are wrongly denied the opportunity to parent? This is the main argumentative burden for those who wish to justify parental licensing, insofar as it is only inaccurate to a high degree in this sense, as Sandmire and Wald state.

So, what can be said to those competent parents who will falsely be judged incompetent and thereby denied parental rights? The most powerful argument we could give them is that this licensing system is *necessary* to minimize child abuse and inadequate parenting, against which all children have a stringent right. While the inaccuracy critique prompts us to provide justification to those competent parents who miss out on parenting as a consequence, we should note that a failure to implement licensing should prompt us to provide justification to those children who will avoidably be abused or neglected. This pits the putative right to parent against the right to an adequate upbringing. So, to determine whether licensing can be justified, we must now ask whether the right to parent is sufficiently stringent to prevent measures, even effective measures, to protect a child's right against an inadequate upbringing.

I'll now move on to address a principled objection to licensing because it too, unsurprisingly, turns primarily on whether adults possess a right to parent and what that right is like, before discussing the alleged right to parent.

A Principled Objection to Licensing

One recent principled argument against licensing comes from S. Matthew Liao, in his book *The Right to be Loved*. Liao argues that all people have a human right to become biological parents and licensing would interfere with that right by putting an obstacle in the way of it. As such, licensing would violate our right to become biological parents and is unjustified, even when it would minimize inadequate parenting. The precise details of Liao's argument are not as important for my purposes as his general approach. The important claim that Liao makes is that adults have a moral right to parent their biological children which, prior to adoption at least, adoptive parents do not. If true, this could explain why licensing or vetting in the case of adoptive parents could be justified, but licensing biological parents could not.

Now that we can see that parents have a right to parent if they will do so competently, this right would be violated by a licensing system since a licensing system is a non-trivial impediment to competent parents exercising this negative right. In so far as testing is accurate such that no adequate parent is denied a licensing, licensing is a violation of that right. The violation of this right would provide a principled objection to licensing.

So we can see that a stringent right to parent is what gives normative force to the *pragmatic* and the *principled* critique of licensing. If the right to parent were relatively weak and easily overridden then it would not constitute a significant problem for proponents of licensing. The right to parent one's biological children needs to be significantly weighty, even absolute, to block the justification of licensing. In the next section I will argue that if adults have such a right, it is not plausibly strong enough to do this work and so both of the strongest and most prominent critiques of parental licensing fail.

II

There are several ways of thinking about the right to parent. It could be seen as a negative right of parents to exclude others from interactions with the child and to be protected against interference, but such a right would have to be allocated to some adult for some independent reasons. What I mean by this is that the rights of parents, which may include the right to exclude others, would have to be justified by some other reason in order to conflict with licensing. This is because we could see licensing as a requirement or condition attached to acquisition of the rights. If anything is wrong with licensing it must be that it violates a right that prospective or would-be parents have to become parents. So, with this in mind, the right to parent could be a negative right that all adults have against interference with their procreative and then parenting activities. It could be a positive right, which entitles adults to various forms of support in becoming parents either through adoption or biologically. Licensing is an obstacle not so much to being a parent but to becoming one in the first instance as it is proposed as a condition of having those legal rights. So the moral right it conflicts with must be the moral right to become a parent and not the moral right of someone who already is a parent.⁵

In order to understand the stringency of the right to parent we must ask what interest(s) underpins it. Many commentators have argued that parents have a weighty interest in parenting and this grounds the right to (become a) parent. Perhaps the weightiest characterization of this interest that doesn't commit itself to ownership of children, which is problematic for other reasons, comes from Brighthouse and Swift, who claim that what is wrong with raising all children in orphanages is that it would "leave perfectly competent parents missing out on the goods of parenting". A similar consequence follows from licensing where the tests for competence are even slightly inaccurate on false negatives. Brighthouse and Swift argue that parenting is highly and uniquely valuable. It makes a

⁵ The right to continue to parent would, however, be relevant in the first implementation of licensing if it were to apply to universally rather than to new parents.

non-substitutable contribution to the well-being of many adults to parent well. These people cannot fully flourish without it. The greater the number of persons this is true for the stronger the argument against licensing.

However, if licensing is moderately accurate on false positives, i.e. it is good at minimizing the number of incompetents who are given parental rights, then it diminishes the risk of children being abused. Even if the number of children who would be abused by without licensing was much smaller than the number of adults who would be deprived of the means of their fully flourishing by licensing, it would be unjustifiable to not have licensing due to the relative importance of the interests at stake.

This situation resembles transmitter room case whereby a large number enjoy a lesser benefit at the expense of a smaller number or a single individual incurring a large cost. The interest that children have in avoiding abuse, and the very stringent right they have against it, cannot be easily traded off for gains in terms of adult's fully flourishing. Indeed, the category of things one needs to fully flourish does not seem all that weighty a category. There are many things one cannot fully flourish without that one does not have a right to, but even if it were quite weighty it is not plausibly in the same general area as the interest against child abuse. For this reason, it seems that any moderately accurate licensing scheme that identifies parents who would otherwise have a high risk of abusing their children can be justified by helping to avoid abuse which overrides the importance of the parental interest which typically grounds a right.

In order to undermine justifications for parental licensing, parents would have to have a very stringent right to parent. It would have to be grounded in a weightier interest than the interest in fully flourishing. One that was more stringent than the right of children to avoid abuse and neglect.

I submit that the right to parent is simply not that stringent. It cannot require us to adopt sub-optimal policies regarding child abuse because being a victim of child abuse is much worse than not being a parent, even assuming that Brighthouse and Swift are right about the significance of parenting. Since both are protected by right, the right against child abuse is more stringent than the right to parent.

Some critics will balk at the suggestion that rights can be traded-off in this way. If a parent has a right to parent, one cannot simply override it when something weightier is at stake. Any licensing that proceeds on the basis of even slightly inaccurate or false negative testing violates rights and is therefore unjust. However, note that here there is a clash of rights and that the question of how to decide does not evaporate on realising that. The adoption of licensing policies would, if they would identify false negatives, violate the rights of prospective good parents, but a failure to adopt licensing policies would, at least if somewhat accurate in identifying bad parents as such, would allow avoidable child abuse and neglect, thus violating a child's right against such things. The question here is not about whether utility or welfare maximization can override rights. Rather, it is about which right is more stringent when the two clash and resolving such a conflict is consistent with non-consequentialist morality, and certainly non-utilitarian morality. Here I provisionally conclude that if parental licensing would minimize child abuse and neglect, then an objection from stringent parental rights would not be plausible. But there remain two further versions of this argument that provide objections to justifying licensing.

The first objection is that there is another right of parents qua adult human beings not qua parents that would be violated by licensing and together these rights would add to being sufficiently stringent to prevent the justification of licensing.⁶ The truth of this claim depends on how licensing

⁶ I am grateful to Luara Ferracioli for highlighting this problem.

is operationalised. There are broadly three ways to operationalise licensing and they involve violating differently stringent rights.

(Reversible) Sterilisation: on this view, we operationalise a licensing requirement by sterilising everyone and only reverse the procedure for those who pass the test. This would involve a violation of the negative right to procreate. Also, sterilisation, insofar as it is an invasive procedure would violate an important right to bodily integrity.

Adoption at Birth: on this view, we operationalise a licensing scheme by taking children born to unlicensed parents into state custody. This would involve non-consensual physical separation of parents from their children. This has some obvious costs for children, but it isn't clear that it violates any rights of their parents unless they have a right to rear their biological child, which I have addressed earlier.

Incentives: on this view, we operationalise a licensing scheme by incentive test taking and incentivizing voluntary adoption by those who fail the test. By its very definition this does not involve non-voluntary action by the parents, so it is not clear it violates any stringent rights.

Adoption at Birth, may have other bad effects, but it wouldn't violate any new rights. The same might be for *Incentives*. This, we can say, proves there are ways in which licensing could be operationalised without giving rise to further rights violations, so I will proceed on the assumption that this is the way licensing could be operationalised. But there is a second way that one could object to my argument.

In order to be justified, parental licensing not only has to deal with the rights conflict plausibly, it also has to be the only or best way of minimizing child abuse. I will now consider a response from critics of parental licensing based on parental education as a less invasive and troubling way of

minimizing abuse and neglect. If one exists, it may be possible to respect the right to parent without violating the clearly more stringent right against abuse and neglect. In this way, parental education could be more desirable as a policy to address abuse and neglect. Recall that the strongest argument for licensing would be that it was *needed* to minimize the incidence of child abuse. If some other, better, means can achieve that aim almost as well, then the selection of parental licensing policies would not be justified over the selection of that other policy. In other words, it is not enough to show that in order to protect child's rights to a minimally good upbringing we may act in ways that would otherwise violate parents rights. We must also show that there is no superior way of protecting child's rights to a minimally good upbringing. For example, a way that does not involve imposing such large costs on parents.

As an alternative to licensing, Liao suggests mandatory parenting education as does Bortalotti and Cutas as a way of promoting all children's chances of being loved by adequate parents.⁷ The basic idea appears to be that education can increase the likelihood that adults will be adequate parents, thus diminishing the incidence of neglect and abuse without implementing a licensing system that would impose large costs on would-be parents. Mandatory parenting education, appears to be a policy that would achieve the same aim as licensing without the costs.

First, it isn't clear why licensing parents violates a human right, but mandatory education does not and so it is not clear that education can provide the benefit of licensing without similar costs. Liao says "Though basic parenting education would be mandated, students are not required to pass the course in order to be permitted to marry or procreate, as such a requirement would be a form of licensing." (176). Liao is aware that testing students would amount to licensing them and would amount to violating their human rights. However, once the idea of testing or indeed of any

⁷ P. 174.

conditions being met, even mere attendance, it is unclear how the education is “mandated.” What is to stop students from skipping this class? If anything at all, then it amounts to licensing, even a small fine or detention since those who refuse to attend detention or cannot pay the fine will be denied the right to parent, presumably.

We could imagine a system where parenting education is mandated and failure to attend is met with a fine or other punishment *but not a denial of rights to parent*.⁸ Then it would qualify as being mandated but would not appear to be a form of licensing. But on this view, those who rejected the education would be allowed to parent as normal, but that is a major problem. A better solution would be to see licensing and education working together. We need both incentivised parenting education, if necessary, and licensing. One could argue that licensing would not do any further work if parenting education were brought in, but this seems wishful thinking. If there is one person who would be detected as incompetent either because they missed the education or even if they attended the licensing would be of some benefit.

I am inclined to agree with those who have argued that education is likely to diminish neglect, insofar as it is effective, but not abuse, but it is an empirical question that I cannot settle. Moreover, if there is no way of ensuring that all who will parent do take this education, because we do not make education a pre-requisite as licensing would, then it would appear to be less effective than licensing.

III

So, I have argued that insofar as licensing tests would be inaccurate, they are inaccurate in ways that can be justified because they impose a relatively unimportant cost on some parties of depriving them of an opportunity to parent so as to provide others with a very significant benefit of reducing the

⁸ I am grateful to R J Leland and Sarah Hannan for pressing this point.

chance of them being abused as children. But there is a genuine practical problem with licensing, which is related to its accuracy, and that is that it may result in not enough parents passing the test, leaving children without parents.

If there are 1,000 children and the test is so inaccurate on false negatives that there are only places for 500 children with licensed parents, what else can we do? We could rear the remaining children in orphanages or with unlicensed parents who will be heavily monitored. If this were the case, these children would miss out on the sorts of intimate relationships that the family is valued for. But we also know that children in caring institutions are not free from any risk of abuse or harm or neglect and, in all likelihood, will miss out on other things that are good for the long-term development. For these reasons we must think carefully about how to respond when the inaccuracy of the tests means that there may be an insufficient supply of parents.

In response we could pursue two options, aside from improving the accuracy of the test. Either, we could lower the standard of care or competency that must be met until we have a sufficient number of parents. This would consist of taking the top N performers on the test and granting them licenses, where there N parents could parent all available children. It would make judgments about parental competency sensitive to the number of children that required care. This would increase the risk of children being abused, but it would also increase the number of children who will not enjoy the very substantial benefit of being reared by good parents, something to which they are entitled as a matter of right. Alternatively, we could allow all the remaining children to be reared in caring institutions and help fund them and make them better. We should decide between these alternatives based on which would minimize abuse, but alongside making our tests more accurate we should also try to fund non-familial non-parental care so that we can try to eradicate abuse and neglect. It is worth pointing out that licensing and the non-familial alternative are related in this way. The higher

the quality of upbringing and the lower the chance of abuse in care institutions the stricter the licensing regime could be.

IV

In this paper, I have argued that the pragmatic and principled objections to licensing depend on the existence of a stringent moral right to parent. I have argued that it is not plausible to think that such a right exists since it would have to be grounded in an interest weightier than the interest of children in avoiding abuse and the most plausible accounts of the parental interest are not weightier than that interest. I then raised a further practical problem with licensing, which was that a licensing scheme may not grant enough licenses to adults to take care of all the children that need to be reared. When this happens we have a choice, we can either lower the standard that must be met to be licensed, this increases the risk of children being abused by parents or raise the standard of the default institutional child-rearing option. I have claimed that our guiding idea when assessing these alternatives should be to minimize the risk of abuse and neglect. Finally, I suggested that we have some reasons to think that improving institutional child-rearing might be easier and more effective at minimizing abuse than lowering the standard required to get a license, in spite of the additional goods unique to the family.

A further concern we may have would be the state or government would use licensing for nefarious purposes, as has a significant historical precedent. But first, we can note that a government that really wanted to do this could already do so (and arguably do) since they already have powers to remove children and the reasons for doing so could simply be amended to whatever their favourite view is. Second, by sticking to abuse and neglect and not extending it to a more contested standard of excellent or the best parenting we avoid some of the issues that might otherwise arise. Third,

transparency and accountability should be safe guards on government power with any policy and this would be no different.

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