

‘Not for the faint of heart’: assessing the status quo on adoption and parental licensing

Carolyn McLeod and Andrew Botterell

Abstract

The process of adopting a child is “not for the faint of heart.” This is what we were told the first time we, as a couple, began this process. Part of the challenge lies in fulfilling the licensing requirements for adoption, which, beyond the usual home study, can include mandatory participation in parenting classes. The question naturally arises for many people who are subjected to these requirements whether they are morally justified. We tackle this question in this paper. In our view, while strong reasons exist in favour of licensing adoptive parents, these reasons support the licensing not only of adoptive parents, but of all or some subset of so-called “natural” parents as well. We therefore conclude that the status quo with respect to parental licensing, according to which only adoptive parents need to be licensed, is morally unjustified.

1. Introduction

The process of adopting a child is “not for the faint of heart.”¹ This is what we were told the first time we, as a couple, began this process. Much of the challenge presented by making a family by means of adoption lies in fulfilling the licensing requirements for adoption, which, beyond the usual home study, can include mandatory participation in parenting classes. Overcoming these hurdles is not for the faint of heart, we discovered, because it is time-consuming and frustrating (not because it is intellectually challenging²). Prospective adoptive parents invest significant amounts of time and money without always having a clear sense of why the requirements are necessary or why they are imposed on adoptive parents alone.

¹ For their insightful comments on earlier versions of this paper, we would like to thank the other authors in this volume as well as Reuven Brandt and Anthony Skelton. McLeod presented our argument at Trent University in their colloquium series, at the Fourth International Conference on Adoption and Culture of the Alliance for the Study of Adoption and Culture, at the 2012 Congress of the International Network on Feminist Approaches to Bioethics, and in the Health Law and Policy Seminar Series at Dalhousie Law School. Thanks to the audiences at these venues for their helpful feedback. McLeod is also grateful for funding from the Graham and Gale Wright Fellowship program at Western University and the Canadian Institutes for Health Research.

² To the contrary, some parts of the process were intellectually numbing, in particular the parenting classes, which appeared to be directed at individuals who lack basic common sense concerning what children need.

In this paper, we consider the question of whether licensing adoptive parents is morally justified. In brief, should the state have the right to screen prospective adoptive parents by subjecting them to potentially intrusive background checks and vetting? Should the state require that such individuals participate in educational programs from which “natural parents” are exempt?³ Should it have the right to deny prospective adoptive parents the opportunity to parent if it has concerns about their parental competency? In our view, while strong reasons exist in favour of licensing adoptive parents, these reasons are not unique to adoptive parents: they support the licensing not only of adoptive parents but of all or some subset of natural parents as well. We therefore conclude that the status quo with respect to parental licensing, according to which only adoptive parents need to be licensed, is morally unjustified.⁴

After discussing parental licensing in some detail (e.g., the nature of it, what actual systems of licensing are like), we turn to various arguments in favour of licensing adoptive parents. In our view, each of these arguments fails to justify licensing only these parents. Due to limitations of space, we do not survey the many arguments against

³ The term “natural parents” in the literature refers, it seems, to parents who are not currently licensed. The default assumption is that these people will care for their children properly—they are natural or naturally parents—and do not need to be licensed. Notice that the class of parents who are not now licensed includes not just biological parents, but also step-parents and the social (and predominantly heterosexual) parents of children created through gamete donation. Natural parenthood is therefore not equivalent to biological parenthood.

⁴ Below, we elaborate on this description of the status quo.

licensing adoptive parents specifically or against licensing parents generally.⁵ Thus, we cannot conclude that any parents, adoptive or otherwise, ought to be licensed. Rather, our goal is simply to challenge the common assumption that a license to parent is morally justified in the case of adoption but not in the case of (assisted or unassisted) biological reproduction.

2. Licensing

Let us begin by doing three things: first, defining “parental licensing”; second, presenting a sample licensing scheme for adoptive parents (the one that we experienced); and third, describing what we take to be the status quo on licensing and adoption.

Parental licensing refers primarily to restrictions imposed on people’s ability to be a parent *before* they become a parent in the social sense.⁶ In other words, typically such

⁵ These arguments are significant. In our view, the most significant among them rests on the claim that we cannot screen for bad parents, because we lack the tools needed to do so. Hence, we should not have parental licensing. The necessary tools include tests that can predict whether someone will satisfy a certain standard of parenting and good criteria for meeting this standard. There is disagreement in the literature about whether reliable tests that can predict whether someone will be a bad parent exist (see e.g., Mangel [1988] and Sandmire & Wald [1990]). There is also concern about whether we can devise appropriate criteria for being a good or decent parent (de Wispelaere & Weinstock, 2010).

⁶ As Hugh LaFollette (1980) notes, parental licensing, like all licensing, involves “prior restraint”: “a parental licensing program would deny licenses to applicants judged to be

licensing involves restrictions that are in the first instance prospective rather than retrospective. When the state interferes retrospectively with people's ability to parent—that is, only after they have become parents—such interference typically does not involve licensing people to parent.⁷ The state normally interferes with natural parenthood only to this extent, for example, and only then if the parenting is disastrous (de Wispelaere & Weinstock, 2010). By contrast, most people who wish to adopt children must fulfill state-mandated requirements before taking a child into their care. The state licenses them to be parents.

Parental licensing schemes are therefore alike in that they primarily involve prospective restrictions on becoming a parent. Otherwise, these schemes can differ substantially. For example, they may or may not restrict parenthood retrospectively, that is, by requiring that families in which parents are licensed be monitored. (In our case, after adopting our son, we had four mandatory visits with our social worker, who then had to report her findings to our provincial government.) Systems of licensing can also vary in what sort of parenting they aim to exclude—disastrous, not good enough, or sub-optimal parenting—which in turn should influence what kinds or degrees of restrictions they impose, *ex ante* or *ex post*. To illustrate these variations in kind and degree,

incompetent even though they had never maltreated children” (p. 188). Similarly, we deny licenses to drive cars to people who have never caused an accident. One has to show some competency in the area before being licensed.

⁷ On the other hand, parental licensing requirements *could* be merely retrospective. As suggested below in a discussion about children with special needs, we can imagine situations in which retrospective restrictions alone function as a form of licensing.

respectively, consider that licensing need not involve mandatory parenting classes (these classes are a relatively recent requirement in our province, Ontario) and the frequency of monitoring families after they have been created can, of course, differ.

The general definition of parental licensing just offered identifies what is at the core of parental licensing; however, it does not explain why being licensed is often onerous for prospective parents. To gain a sense of why actual licensing schemes, those that target adoptive parents, may not be for the faint of heart, consider the scheme currently in place in Ontario.⁸ The licensing system here is somewhat unusual only in that it requires prospective parents to take parenting classes. Anyone who is a resident of Ontario and who wishes to adopt a child domestically (either publicly or privately) or internationally must have a home study conducted and must complete parenting classes called PRIDE: Parent Resource for Information Development and Education.⁹ The stated purpose of these requirements is to determine whether prospective adoptive parents are ready to become adoptive parents and to determine what sort of child they might be willing to adopt. The home study requires references and criminal background clearances. It includes details concerning one's personal and family background; significant people in one's life; one's family relationships; why one wants to adopt a child; one's expectations for the child; one's parenting skills; how one plans to integrate the child into one's family; one's current family environment; one's health, education,

⁸ In our province, adoption is regulated by two pieces of legislation: the *Child and Family Services Act*, RSO 1990, c. C-11, and the *Intercountry Adoption Act*, 1998, SO 1998 c. 29.

⁹ See <http://www.children.gov.on.ca/htdocs/English/topics/adoption/how/index.aspx>.

employment, and finances; and the social worker's recommendation. The home study must be updated if one's adoption is not complete within two years. An update is also required if one wants to adopt another child. Thus, one is licensed for one adoption at a time, and that adoption has to occur within two years.

There are challenges in meeting the above requirements in terms of time, and often money and privacy. Collecting all of the data for the home study takes a significant amount of time. For example, one must schedule multiple meetings with a social worker, undergo a physical examination by a physician, and apply in person for criminal background checks. The parenting classes are also time-consuming: the total class time is 28-32 hours.¹⁰ The financial costs for PRIDE training are \$700 per individual or \$1,400 per couple, and for the home study, upwards of \$2,500. These costs are borne by the prospective adoptive parents in the case of an international or private domestic adoption, while they are borne by the state in the case of a public domestic adoption. As noted above, the investment of time or money in being licensed for adoption is frustrating when prospective parents lack a clear sense of why they alone have to meet these requirements. The process can also seem intrusive, given that one has to provide information about one's self and one's family that is normally deemed private (normally, that is, if one is a natural parent).

We have said that according to the status quo, only adoptive parents have to satisfy licensing requirements such as the home study. However, this description of the status quo needs to be unpacked, in part because there are different forms of adoption and not all forms involve licensing. The key distinction for our purposes is between what we

¹⁰ See <https://secure.adoptontario.ca/pride.main.aspx>.

will call *family member adoption* and *non-family member adoption*.¹¹ As we take it, with few exceptions,¹² the status quo requires licensing only in the context of non-family member adoptions.¹³ There are two types of family member adoption: step-parent adoptions, where an individual who has remarried wishes to adopt the children of his or her new spouse; and relative adoptions, which occur where parents can no longer care for a child and a relative wishes to adopt that child.¹⁴ Focusing again on Ontario, where all parties—prospective adoptive parent, current parent, and child—reside in Ontario, the process of family member adoption entails simply submitting an application to an Ontario Family Court. No agency is involved and no licensing is required.

¹¹ This is the terminology used in Ontario. Other jurisdictions may employ different language to draw the same distinction.

¹² An exception in Ontario is a family member adoption where the child resides in another country; for explanation, see fn 14.

¹³ The most common forms of non-family member adoptions are public or private domestic adoptions, where a private or a government agency, respectively, facilitates the adoption of a child residing in the same country as the prospective adoptive parents; and international or intercountry adoptions, where a private adoption agency licensed by the government of the prospective adoptive parents' country of residence assists in the adoption of a child residing in a foreign country.

¹⁴ “Relative” is a legal concept. According to Ontario’s legislation, a relative is a grandparent, uncle or great-uncle, or an aunt or great-aunt. Thus, for the purposes of relative adoption, a relative need not be related to the adoptive child by blood, since an individual could adopt, via relative adoption, the child of his or her spouse’s sister.

In summary, when we refer to the status quo on licensing and adoption, we have in mind licensing only for non-family member adoption.¹⁵ Our research tells us that this is the status quo in most Western jurisdictions, including Canada, Australia, New Zealand, the UK, and the USA.¹⁶ Thus, we focus in what follows on whether there should be licensing for prospective *non-family member* adoptive parents, but not for other prospective parents. (For simplicity's sake, we call the parents who require licensing according to the status quo simply adoptive parents.) To be clear, our aim is to determine whether licensing of some form or other, for these parents alone, is morally justified; our goal is not to examine what form parental licensing should take. Thus, we consider

¹⁵ Which is not to say that all family member adoptions are exempt from licensing requirements. For example, family member adoptions in which the child lives outside of Canada are treated in Ontario like international or intercounty adoptions. Similarly, if a prospective adoptive parent wishes to adopt a child to whom she is related in a way that is not captured by Ontario's legal definition of a relative, she must follow the same steps as for any other (non-family member) adoption. See

<http://www.children.gov.on.ca/htdocs/English/topics/adoption/how/index.aspx>.

¹⁶ One exception that we know of is the licensing in the U.K. for the intended parents of children created through embryo donation and contract pregnancy (see <http://www.hfea.gov.uk/1424.html#5>). Here, there is licensing with some assisted biological reproduction. (Also note that sometimes with assisted reproduction, parental screening is mandated not by the state, but by a fertility clinic or embryo "adoption" program. See Krueger, 2011 and Frith, Blyth, & Berger, 2011.)

arguments in favour of licensing adoptive parents that support different kinds of licensing schemes. Let us turn to those arguments now.

3. The Arguments in Favour of Licensing Adoptive Parents

We are interested in arguments in favour not of licensing parents generally, but of licensing adoptive parents specifically. An example of the former type of argument comes from Hugh LaFollette. He contends that the problem of disastrous parenting provides the state with a reason to license all parents (LaFollette, 1980). Others¹⁷ would claim, by contrast, that because disastrous parenting is more likely to occur in adoptive families, the state is justified in licensing adoptive parents alone. This latter view is clearly specific to the adoption context. We consider four arguments that are intended to be specific in this regard. They are based either on (1) harm to prospective adoptive children; (2) the feasibility of licensing adoptive parents; (3) the transfer of parental responsibility that occurs during an adoption; or (4) the lack of a claim by prospective adoptive parents to a specific child. Our goal is to show that insofar as these arguments purport to be adoption-specific, they fail either because they are more general than they might initially appear to be and so do not support licensing only adoptive parents, or because they do not establish that licensing is justified for adoptive parents, and so do not justify the licensing requirement in the first place.

¹⁷ By “others,” we simply mean members of the general public, whom we think are likely to have the beliefs described below that would support the view that disastrous parenting is more common among adoptive parents. An example is the belief that the lack of a biological tie signals a lack of natural affection.

3.1 Harm to children

The first of the above arguments revolves around concerns about harm to children. Some would argue that adopted children are at greater risk of harm from bad or incompetent parenting than are non-adopted children. Screening prospective adoptive parents is therefore important insofar as it reduces this risk. The reasons one might give in favour of such a view are twofold: (1) the lack of a biological tie between parent and child in an adoption increases the possibility of harm to the child; and (2) adopted children have special needs that not everyone is competent to satisfy; these children will be harmed unless the state ensures that their parents possess the relevant competence. Our analysis of each of these reasons shows that they fail to justify the status quo on parental licensing.

Why would the lack of a biological connection between parent and child increase the likelihood of abuse or neglect in the parent-child relationship? For many, the answer to this question is obvious: parents who are not biologically related to their children have no “natural affection” for them and so are more likely to harm them (LaFollette, 1980, p. 195). The thought here, presumably, is not that adoptive parents cannot feel affection for their children—that would be absurd—but that the affection is not instinctual in the way in which it supposedly is with biological parents. Such ideas explain why we have screening for adoptive parents in the first place, according to Elizabeth Bartholet (1993, p. 81).

However, the claim that adopted children are at heightened risk of abuse from their parents is unsubstantiated, as Bartholet and others, including LaFollette, explain (see

Bartholet, 1993, ch. 8; LaFollette, 1980, 2010). In a recent paper in which he revisits the topic of parental licensing, LaFollette cites a study on the “importance of biological ties for parental investment” which concludes that adoptive parents are as invested in their children as biological parents are (LaFollette, 2010, p. 336; citing Hamilton *et al*, 2007). He also writes that adopted children “are less than half as likely to be maltreated compared to children reared by their biological parents” (LaFollette, 2010, p. 336). Additionally, in her work on the value of biological ties, Sally Haslanger (2009) cites research showing that compared to non-adoptees, adoptees “do not suffer in developing a core self” (i.e., a self imbued with worth, confidence, and the like; p. 105), a result that would be unlikely if abuse from adoptive parents was more common than from non-adoptive parents.

However, perhaps there is insufficient evidence of adopted children being at heightened risk of abuse from their parents precisely because adoption licensing is effective at screening out people who would abuse their non-biological children. If people could simply walk into an adoption agency and walk out with a child, then abuse rates might be quite high within adoptive families. In responding to this concern, one must ask, first, whether the rates of abuse would be higher than they are with biological parents, and second, whether those higher rates would justify screening one group but not the other. In our view, one should not simply speculate about what the answers are. And regardless, one cannot assume that current screening of adoptive parents explains why levels of abuse by adoptive parents are low. The screening might not be effective. (*It is not effective, according to Bartholet, and it could not now be effective, according to Michael Sandmire and Michael Wald, who argue that we lack reliable tools for predicting*

who will abuse children.) Thus, for all this argument says, it may be that people who want to adopt children are simply not likely to abuse them.

In short, arguments in favour of licensing based on harm to children and a lack of biological relatedness in adoptive families may not be empirically valid. But more important for our purposes is the observation that even if such arguments were empirically valid, they would not be specific to the adoption context and so would not support the status quo. The arguments justify licensing for a larger group of parents than just adoptive ones.¹⁸ The reason, of course, is that some non-biological (more specifically non-genetic¹⁹) parents are not adoptive parents. Examples include parents whose children were conceived using donor gametes. If the lack of a biological tie signals a heightened risk of abuse and a need for parental screening, then these parents ought to be screened along with adoptive parents.

A different sort of argument in favour of licensing that is based on harm to children focuses not on the lack of a biological tie but rather on the special needs of adopted children and the harm that parents can cause if they are not competent to meet these needs. For example, David Archard maintains that because adopted children “may present particular and possibly serious difficulties ... arising from the fact that they have

¹⁸ And they support licensing for some adoptive parents who are not currently licensed, such as adoptive step-parents.

¹⁹ Some maintain that the class of biological parents includes gestational but non-genetic parents who develop a biological connection with their children (i.e., the children they gestate) during the gestational process (e.g., Feldman, 1992). The argument we are considering now does not include these biological parents.

been rejected or abused by their natural parents,” regulating adoption is justified (Archard, 1993, p. 146; cited in Engster, 2010, p. 253). (The suggestion that if the natural parents of children who are adopted have not abused these children, then they have at least rejected them is seriously problematic, given that these parents may act in their child’s best interests by giving them up for adoption. Nonetheless, some adopted children may *feel* rejected and have special needs as a result.) Adopted children could have special needs for reasons beyond having been abused or feeling abandoned by their natural parents. Some people—such as David Velleman (2005)—suggest that these children face special challenges insofar as they lack an ongoing connection with biological relatives (see **Witt, DATE, in this volume**). These same people oppose the donation of gametes for others’ reproductive use because the practice deprives children born as a result of it of their biological identity. Others would worry that adopted children’s lives are especially difficult by virtue of them having a non-biological (and possibly transracial) family in a culture that is biased against such families. As Bartholet (1993) explains, our society has a “biologic bias” (ch. 2), that is, a bias in favour of biological families, which are presumed to be more “real” somehow than adoptive families. Licensing—especially if it includes an educational component—can serve to ensure that adoptive parents are competent to parent children with such needs.

Our response to the above argument is unsurprising: if children’s special needs justify licensing adoptive parents, then they must also justify licensing some natural parents, namely those who have children with special needs. But while some children who are not adopted have special needs, we do not license their parents. Moreover, the needs of adopted children in general do not seem so dire that we need to ensure that *their*

parents, but not the parents of other children with special needs, are competent to care for them. In our view, the point about special needs speaks in favour only of education for—not necessarily licensing of—adoptive parents. The education should also not be mandatory, at least not unless similar educational programs are mandatory for other parents of children with special needs.²⁰ Finally, the educational programs in question should not be driven by views about the needs of adopted children that support and entrench the biologic bias of our society. The claim that these children need ongoing contact with biological relatives in order to form a stable identity, *regardless* of whether they live in a society that privileges biological families over other families,²¹ is arguably a case in point. We agree with others who suggest that such claims are purely speculative (Haslanger, 2009; Kolodny, 2010, p. 61, note 33; **Lotz & Witt, DATE, in this volume**).

In short, arguments based on harm to children that favour the licensing of adoptive parents cannot explain the status quo on parental licensing. For it is not at all

²⁰ Some might worry that adoptive parents will not care enough about their children to seek out these educational opportunities. However, this objection is predicated on the view that adoptive parents lack affection for their children, which we have noted is unsubstantiated.

²¹ The biologic bias might explain the need that some adopted children feel to know their biological relatives (see Haslanger, 2009, p. 113). Our society's response to this need (e.g., in the education we give to adoptive parents) should differ depending on whether we understand it to be a byproduct of a culture that stigmatizes adoptive families (Haslanger, 2009, p. 114).

clear that adopted children are at *special* risk of harm from parents who are either abusive or not competent to satisfy these children's needs.

3.2 *Feasibility*

Now consider a different argument in favour of licensing adoptive parents: while all parents ought in principle to be licensed, licensing adoptive parents is feasible or manageable in a way in which licensing natural parents is not. Because the latter would have too many negative effects, particularly on women and children, licensing adoptive parents is a “next best” solution. Daniel Engster (2010) makes this sort of argument,²² and in doing so emphasizes the “unequal impact” that licensing biological parents would have on women compared to men (p. 248). For example, women without a license to parent a child who experience an unplanned pregnancy would be forced to consider having an abortion or having a child with whom they were in a close physical relationship for nine months taken away from them (Engster, 2010, pp. 247-248). To try to avoid this second outcome, they could try to hide their pregnancy, which would involve foregoing assistance from health care professionals during pregnancy and birth; but, of course, this option would pose serious risks to their health and to the health of their child (Engster, 2010, pp. 247-248). On the other hand, men would not face choices as distressing as these as a result of parental licensing. Even after the birth of their child, their situation would not be the same as that of women who give birth. For example,

²² “Above all, the main reason for supporting a screening and licensing program for adoptive parents but not for biological parents is because of the greater viability of the former” (Engster, 2010, p. 253).

given the unequal economic status between women and men, the choice between staying with a partner who is denied a parental license and keeping one's child would not be as difficult, on average, for heterosexual men compared to heterosexual women (Engster, 2010, p. 248). In general, men leave women without experiencing as much financial hardship as women do when they leave men. For Engster (2010), the disproportionate burden that widespread parental licensing would have on women is too great. He also worries about harm that would befall children who are created but do not have a home to go to because their parents do not have a parenting license and so lose custody of them at birth (p. 250).

We think the feasibility argument is very important; however, our complaint, again, is that the argument does not justify licensing adoptive parents alone. The reason is that parental licensing is as feasible for people who reproduce with assisted reproductive technologies (ART) as it is for people who create families by adopting children. To explain, consider the point made by Engster that if we were to license biological parents, then ideally applications for licenses would occur before women become pregnant. But there is an obvious problem with timing the applications prior to pregnancy: namely that “many pregnancies are unplanned” (Engster, 2010, p. 246). What Engster fails to notice, however, is that the problem of planning does not affect all biological parents equally. In particular, it does not arise with biological parents who reproduce using ART. (There will be no unplanned pregnancies in this group!) By Engster's own lights, then, licensing is an option for these biological parents, since the women involved would not have to make difficult decisions about abortion or about having to avoid prenatal care. In sum, the feasibility argument does not support the status quo, in which infertile people are free

from scrutiny as prospective parents before they attempt technologically assisted conception. To the contrary, the feasibility argument encourages a system in which access to ART is available only to people with a parenting license.²³

3.3 *Transfer of Responsibility*

A third argument in favour of licensing adoptive parents hinges on certain important facts about the adoption context: before an adoption occurs there exists a child for whom someone—the state or an actual person—is responsible, and during an adoption, this responsibility is transferred to someone else, namely the child’s adoptive parent(s).²⁴ The argument then proceeds as follows: the transfer of parental responsibility in an adoption ought to occur in a morally serious manner, but that can happen only if the party or parties relinquishing responsibility for the child can reasonably expect that the child’s

²³ One could run a similar argument that focuses on procreative rights, rather than on feasibility. That is, one could insist that women’s procreative rights prevent the state from interfering in their pregnancies, but not with their access to ART. This conclusion presumably follows if procreative rights are merely negative rights.

Since we have a separate project in which we examine procreative rights and how they should influence the way the state treats biological parents compared to adoptive ones, we do not discuss these rights in this paper.

²⁴ For ease of exposition, we will assume in the remainder of this section that responsibility is being transferred to two parents, rather than one.

future will be good (or at least good enough). Licensing provides such assurance to the child's pre-adoptive guardians and is justified for this reason.²⁵

Although we find the transfer of responsibility argument intriguing, we doubt that it supports the status quo on licensing. To see why, consider first that transfers of parental responsibility may not be unique to the adoption context; they might occur in certain assisted reproductive contexts as well. For example, David Benatar insists that such transfers happen whenever people donate their gametes for others' reproductive use.²⁶ He makes this claim in "The Unbearable Lightness of Bringing Into Being" (Benatar, 1999), which provides the main impetus for the transfer of responsibility argument in favour of adoption licensing, as we have constructed it. Benatar argues as follows. In providing gametes to others for their reproductive use, one is transferring child-rearing responsibilities that one has in any children "who result from" one's gametes (Benatar,

²⁵ The reasoning here is straightforward. If we think—as we surely do—that *delegating* responsibility for a child to someone else, such as a nanny, should occur in a morally serious manner—that we ought to do so only after having met the nanny and seen her references, for example—then surely we ought to conclude that *transferring* responsibility for a child from a pre-adoption guardian to a post-adoption guardian (i.e., the child's adoptive parent) should occur in that way as well.

A version of the transfer of responsibility argument can be found in Engster (2010): he argues that the state has "a special responsibility to assure the biological parents of an adoptive child" that their child is well placed (p. 253).

²⁶ See Weinberg (2008) for a similar discussion about gamete donation and parental responsibility.

1999, p. 174). Moreover, transferring child-rearing responsibilities is a morally serious business: no one should do it lightly. However, most gamete donors *do* do it lightly, according to Benatar. Typically, they do it anonymously and thus give little to no consideration to whether the people who will obtain their gametes are competent to parent a child. Hence, their actions are morally wrong. The “lightness” with which gamete donors allow beings created from their gametes to come into being is unbearable to Benatar. He does not insist that people who reproduce using donor gametes be licensed, which could allow gamete donors to transfer their responsibilities in a morally serious way. The transfer of responsibility argument that we have been considering would certainly support this conclusion, however. Thus, the argument extends to the licensing of gamete donors, assuming that Benatar is correct about their moral situation.

Another possibility (one that we think is more likely) is that transfers of parental responsibility occur in the context of contract pregnancy, which would mean that people who become parents through this practice should also be licensed. For what it is worth, we find it unlikely that gamete donors transfer parental responsibility to the social parents of the children produced from their gametes, for we are not convinced by Benatar that they acquire any such responsibility.²⁷ However, we are more persuaded that women who

²⁷ Benatar’s (1999) specific claim is that “[p]eople have a presumptive responsibility for rearing children who result from their gametes” (p. 173). He explains this responsibility in terms not of mere biology (i.e., of biological parenthood), but of the exercise of one’s *reproductive autonomy* (Benatar, 1999, p. 174). Reproductive autonomy involves the freedom to make reproductive decisions, and with this freedom comes responsibility for—as Benatar (1999) puts it—one’s “reproductive conduct” (p. 174). He argues that if

gestate children for others assume parental responsibility that they must then transfer to the child's social parents at birth. The relationship formed between the pregnant woman and her fetus during gestation arguably grounds parenthood better than mere genetics.²⁸ Of course, so long as either a genetic connection or gestation gives rise to parental responsibilities, transfers of these responsibilities will occur outside of adoptions and within what has been called "third party reproduction." In addition, if the transfer of responsibility argument is sound, then some or all people who reproduce with the assistance of third parties will have to be licensed, just as adoptive parents are licensed. Again, the status quo finds little support within the argument we are considering.

One could further question whether the transfer of responsibility argument justifies the status quo on licensing by making the following observation. According to this argument, *transfers* of parental responsibility require the kind of scrutiny that

the conduct results in a child, then one is responsible for rearing this child, that is, unless one transfers this responsibility to someone else. To apply this argument to gamete donors: their conduct involving their gametes results in a child, making them presumptively responsible for rearing this child; however, they defeat the presumption when they transfer the responsibility to the recipients of their gametes. The weakness in Benatar's argument for why gamete donors have this childrearing responsibility is his failure to spell out what counts as reproductive conduct. He seems to exclude donations of gonadal tissue from this category, for example (even though gametes are part of the tissue; Benatar, 1999, p. 175), but gives no explanation for why these donations would not count, while donations of sperm and eggs do count, as "reproductive conduct."

²⁸ On the "grounds of parenthood," see Bayne and Kolers (2006).

licensing provides; however, a similar claim could also be made about *acquisitions* of parental responsibility.²⁹ Do we really think that more thought and information should go into transferring or delegating responsibility for children than goes into acquiring that responsibility in the first place?³⁰ If, as we think, the answer is “no,” then the considerations that led us to accept parental licensing when there are transfers of parental responsibility should prompt us to accept it more generally.

Thus, it is not at all obvious that the transfer of responsibility argument can ground a system of licensing in which only adoptive parents are licensed. One could use the reasoning found in this argument to show that some (or all) people who have children as a result of third party reproduction need a parenting license. Moreover, one could use similar reasoning to prove that LaFollette is correct in thinking that all parents—whether they acquire their parental responsibility on their own or have others transfer it to them—should be licensed.

But it might be objected that thus far, we have ignored an important fact about transfers of responsibility for children who are adopted: that these transfers inevitably involve the state. We have also ignored an important distinction: namely between the state’s doing something and the state’s allowing something to happen. In short, one might insist that when the state *does* something—namely transfer responsibility to adoptive

²⁹ We owe this point to Reuven Brandt.

³⁰ Of course, we think that people ought to take the question of whether to bring a child into the world very seriously. We think it irresponsible of people to engage in unprotected sexual intercourse when there is a risk of pregnancy but no desire to create a child.

parents—it acquires an obligation to ensure that those individuals are or will be minimally competent parents, an obligation that it discharges by the licensing requirement. On the other hand, when the state merely *allows* something to happen, as when it allows individuals to engage in procreative sex or to engage in third party reproduction, it acquires no such obligation, and so the licensing of those individuals is not necessary. It is this distinction—between the state’s doing something and the state’s merely allowing something to happen—that explains why licensing adoptive parents is permissible but licensing non-adoptive parents is not.

This is an interesting argument. All the same, in our view it can and should be resisted. For one thing, the doing/allowing distinction is notoriously slippery, and it is unclear how much normative weight it can bear.³¹ But even if we are prepared to accept the distinction for present purposes, it by no means follows that appeal to it can justify the status quo. With this in mind, note that because there are different ways in which transfers of responsibility occur in the adoption context, there are different ways in which the state can be implicated in those transfers. For example, in some cases responsibility for a prospective adopted child is transferred from the biological parents to the state, which then transfers responsibility for that child to the adoptive parents. In this sort of situation the state is, at some point, legally responsible for the child in its care and is therefore directly implicated in the transfer of responsibility. And it might be argued that it is this fact that justifies the state’s licensing of adoptive parents: because the state is actively *doing something* by transferring *its* responsibility for a child to somebody else, it

³¹ For discussion see Quinn (1989) and Thomson (1976).

has an obligation to ensure that those prospective parents are minimally competent. Public domestic adoptions clearly conform to this model.³²

The problem, however, is that not all cases of adoption involve the state assuming and transferring parental responsibility. For in many cases the state never assumes legal responsibility for the child, although it may play a role in overseeing the transfer of responsibility for the prospective adopted child from the biological parents or other legal guardians to the adoptive parents. In international adoptions, for example, two states are involved: the foreign state where the prospective adopted child resides and the domestic state where the prospective adoptive parents live. In an international adoption, however, responsibility for the prospective adopted child is never transferred to the domestic state. What the domestic state does is ensure that the foreign adoption process conforms to its own domestic laws and regulations and perhaps to universal conventions, such as the Hague Convention.³³ The domestic state signals its approval of this process by agreeing to issue various government documents, such as a visa and/or a citizenship certificate for the adopted child. Similarly, in the case of private domestic adoptions, the prospective

³² In such cases, responsibility for the child is initially transferred, sometimes voluntarily, sometimes involuntarily, from the biological parent to the state—which is to say that the child becomes a ward of the state—after which the state transfers that responsibility to the child’s adoptive parents.

³³ That is, the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. See http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

adopted child never becomes a ward of the state, and so *the state* never assumes responsibility for the child, and so never transfers that responsibility to someone else.

What does the foregoing indicate about the transfer of responsibility argument? It shows that the argument fails to justify the status quo on parental licensing, if the normative principle underlying the argument is that with adoption, the state inevitably *does* something normatively significant, namely transfer *its responsibility* for a child to somebody else. The problem is that only some adoptions, namely public domestic adoptions, are captured by this principle. Hence, the transfer of responsibility argument, so understood, can only justify licensing prospective parents in these adoptions.

Conversely, the claim that the state takes no responsibility or ought not to do so when it merely allows (assisted or unassisted) procreative activity to occur seems doubtful. The state *does* sometimes intervene in such contexts, as when it removes a child from a biological parent who has a history of child abuse or has previously had a child apprehended and removed from his or her care. Moreover, if the following is true—that transfers of responsibility occur in the context of contract pregnancy, that there is no relevant normative distinction between them and transfers that happen in private domestic or international adoptions, and that the state is prepared to require that prospective parents in these adoptions be licensed—then the state ought to require that people who become parents via contract pregnancy are licensed. But this point makes trouble for the transfer of responsibility argument framed using the doing/allowing distinction, since in cases of contract pregnancy the state merely allows a certain kind of procreative activity to occur. This way of framing the argument is therefore not persuasive.

Finally, consider the suggestion that the transfer of responsibility argument should be based instead on the following normative principle: that prospective adoptive parents should be licensed because the state, in *overseeing* the transfer of responsibility, has an obligation to ensure that children have parents who are minimally competent. Here again it is plain that the transfer of responsibility argument cannot justify the status quo, since this normative principle applies to adoptive parents who are currently exempt from the licensing requirements, such as step-parents, and also, arguably, to the social parents of children born through contract pregnancy. In addition, the principle must extend to the overseeing of *acquisitions* of parental responsibility (e.g., through procreative sex and pregnancy), if one accepts the moral equivalence of transfers and acquisitions of this responsibility (see above). In that case, the principle applies to all prospective parents, adoptive and non-adoptive alike.

In short, the problem with the transfer of responsibility argument is that its core normative principle results in an argument that is either underinclusive—since it does not apply to all adoptive parents—or overinclusive—since it applies to adoptive and non-adoptive parents equally. Either way, the argument does not justify the status quo.

3.4 *No Claim to a Specific Child*

The final argument we will consider in support of the status quo points to what is taken to be a unique feature of the situation of prospective adoptive parents: unlike people who reproduce with or without assistance, prospective adoptive parents do not have a legitimate claim to a particular child. That is to say, there is no child that they could possibly say is *theirs* before the adoption occurs. But according to this argument, the

same is not true of natural parents, not even those who reproduce with assistance from third parties. For example, people who initiate contract pregnancies can claim to be the parents, or at least to be included among the parents, of the resulting child. (They are what have been called the child's "intentional" parents. See Hill (1991).) The argument then proceeds as follows. Natural parents have a legitimate complaint to make against a system of licensing that might deny them the opportunity to parent, given that the child it would prevent them from parenting is their own. The situation is different, however, for prospective adoptive parents, since licensing them does not ignore or interfere with any claim they have to a specific child (de Wispelaere & Weinstock, 2010). Licensing them is therefore permissible.

However, can the fact that prospective adoptive parents lack a claim to a specific child justify licensing them, and them alone? In our view, the answer is "no," for two reasons. First, the view that prospective adoptive parents lack a claim to a specific child is, for some adoptive parents, simply false. For example, in many jurisdictions, lesbian couples that have children via donor insemination or IVF are treated differently from heterosexual couples that have children in the same way. For while the lesbian partner who gives birth to the child is, as a result of that biological fact, considered to be the child's legal parent, the other lesbian partner is not, and must adopt the child to become its legal parent. (The law treats homosexual and heterosexual couples differently in this regard because of the parentage presumption: the legal principle that says where a heterosexual couple has a child, the husband is presumed to be the father of the child. See Crawford in this volume.) Consequently, the situation of lesbian couples constitutes a case where a prospective adoptive parent *does* have a legitimate claim to a specific child,

or where there is a specific child who *is* hers prior to the adoption. So our first objection is that the argument that prospective adoptive parents do not have a legitimate claim to a particular child is open to counter-examples.

But let us set that worry aside. For even supposing that prospective adoptive parents do not have a claim to a specific child, we cannot get from this fact an argument that licensing adoptive parents is justified. All that we can get from it is that a particular kind of complaint against licensing is not available to prospective adoptive parents: that the licensing might prevent them from parenting *their* child. Something other than the fact that there is no child that is in any sense theirs must explain why prospective adoptive parents must undergo screening. Consider that one could respond to prospective adoptive parents having no claim to a specific child by simply matching them with a child or by allowing them to pick one. That is, one could meet the challenge of the no-claim-to-a-specific-child argument without testing the parental competency of prospective adoptive parents at all. Thus, the conclusion that adoptive parents ought to be licensed cannot be based on the fact that there is no specific child to which they have an antecedent claim.

Yet perhaps one could strengthen the above argument in favour of licensing adoptive parents by adding the following premise to it: children who are not tethered to a particular adult should get good parents or even the best possible parents.³⁴ Indeed, it is

³⁴ One might add that children available for adoption are in short supply, so “why not select those who will do the best job,” or at least a good job, at parenting them?

(Bartholet, 1993, p. 82). Bartholet rightly responds that these children are not in short supply, given in particular “the untold millions” of children around the world who live in

arguable that the reason why we do not ensure that all children have good parents or the best possible parents is that redistributing children at birth violates the rights of adults who have an interest in rearing their own biological children.³⁵ In other words, while we might think that all children are owed good parents, there are other interests that must be taken into account when children have biological parents who want to care for them.

The question that naturally arises, then, is whether the interest many people have in raising their biological children trumps the interest these children have in being raised by good parents. The answer must be “yes” for the strengthened argument set out above to work. Yet finding a good argument to support this conclusion is difficult. Like Harry Brighouse and Adam Swift (2006), we are unaware of such an argument in the literature (pp. 97-98). But without one, it is impossible to say with confidence that the fact that natural parents have a claim to a specific child is what precludes the state from licensing them, while the fact that prospective adoptive parents have no such claim explains why they can legitimately be licensed.

4. Conclusion

orphanages. (See also **Rulli, DATE, in this volume.**) If our experience with visiting orphanages in Africa is any indication of the current supply of prospective adopted children, then the supply is large indeed.

³⁵ In an influential paper on parents’ rights, Harry Brighouse and Adam Swift (2006) argue that redistributing children at birth can violate the rights of adults, but only those who “would be adequately good parents” (p. 98). Their view is not incompatible with licensing natural parents.

In this chapter we have canvassed a number of arguments—the best we could think of—that are designed to establish that the status quo on parental licensing is justified. As we have tried to show, none of these arguments succeeds in this task, since all of them support licensing for a larger group of parents than just (non-family member) adoptive parents. The relevant larger group is, for the arguments based on the risk of harm to children, either all non-biological parents or all parents who have children with special needs; for the feasibility argument, all people who reproduce using ART and all adoptive parents; and for the transfer of responsibility and no claim to a specific child arguments, most likely all parents.

We do not, and cannot, conclude that parental licensing ought to occur for any of the above groups. To do so, we would need to show that all arguments *against* licensing these parents are flawed, or are at least not as strong as arguments in favour of licensing them, and this is not something we have tried to do. We are also uncomfortable concluding that those who engage in unassisted reproduction should be licensed, because the feasibility argument speaks so strongly against licensing these people. On the other hand, from our perspective, it seems unfair to license only prospective adoptive parents and people who reproduce using ART. Thus, we are unsure what system of licensing, if any, we would endorse.

What we are fairly certain of, however, is that the differential treatment of adoptive and non-adoptive parents with respect to licensing is unjustified. Let us end by explaining why it is important to challenge this practice. A core issue, as we have noted, concerns fairness. Simply put, it strikes many as unfair that one class of prospective parents are subject to potentially intrusive licensing and screening requirements while

other groups of prospective parents are not. Again, what is it about adoptive parents that make them, and them alone, subject to licensing requirements? Our answer, in a nutshell, is: nothing. A deeper concern, however, is the following. The current licensing regime serves to reinforce the belief that biological families are superior to (more natural, less likely to be dysfunctional, than) adoptive families; it promotes, in other words, the biological bias. For this reason, requiring licensing for adoptive parents alone may in fact harm adopted children and their families, given that it expresses, either explicitly or implicitly, the view that these families are normatively suspect.

References

- Archard, D. (1993). *Children: Rights and childhood*. New York: Routledge.
- Bartholet, E. (1993). *Family bonds: adoption, infertility, and the new world of child protection*. Boston: Beacon Press.
- Bayne, T., & Kolers, A. (2003). Parenthood and procreation. *Stanford encyclopedia of philosophy*. Retrieved June 23, 2013 from <http://plato.stanford.edu/archives/spr2003/entries/parenthood/>
- Benatar, D. (1999). The unbearable lightness of bringing into being. *Journal of Applied Philosophy*, 16(2), 173-80.
- Brighouse, H., & Swift, A. (2006). Parents' rights and the value of the family, *Ethics*, 117(1), 80-108.
- de Wispelaere, J., & Weinstock, D. (2010). Licensing adoptive parents. Presented in a panel entitled 'Childish subjects' at a meeting of the American Philosophical Association.
- Engster, D. (2010). The place of parenting within a liberal theory of justice. *Social Theory and Practice*, 36(2), 233-62.
- Feldman, S. (1992). Multiple biological mothers: the case for gestation. *Journal of Social Philosophy*, 23(1), 98-104.
- Frith, L, E., Blyth, M. P., & Berger, R. (2011). Conditional embryo relinquishment: choosing to relinquish embryos for family-building through a Christian embryo adoption programme. *Human Reproduction*, 26(12), 3327-3338.

- Hamilton, L, Cheng, S., & Powell, P. (2007). Adoptive parents, adaptive parents: evaluating the importance of biological ties for parental investment, *American Sociological Review*, 72(1), 95-116.
- Haslanger, S. (2009). Family, ancestry and self: what is the moral significance of biological ties? *Adoption & Culture* 2(1), 91-122.
- Hill, J. L. (1991). What does it mean to be a 'parent'? The claims of biology as the basis for parental rights, *New York University Law Review*, 66(2), 353-420.
- Kolodny, N. (2010). Which relationships justify partiality? The case of parents and children. *Philosophy & Public Affairs*, 38(1), 37-75.
- Krueger, A. (2011). An overview of embryo donation in Canada. *Infertility Awareness Association of Canada*. Retrieved July 3, 2013 from <http://www.iaac.ca/en/584-269-an-overview-of-embryo-donation-in-canada-by-angela-krueger-spring-2011>
- LaFollette, H. (1980). Licensing parents. *Philosophy & Public Affairs*, 9(2), 183-97.
- LaFollette, H. (2010). Licensing parents revisited. *Journal of Applied Philosophy*, 27(4), 327-343.
- Mangel, C. (1988). Licensing parents: how feasible? *Family Law Quarterly*, 22(1), 17-39.
- Quinn, W. (1989). Actions, intentions, and consequences: the doctrine of doing and allowing. *Philosophical Review*, 98(3), 287-312.
- Sandmire, M., & Wald, M. (1990). Licensing parents: a response to Claudia Mangel's proposal. *Family Law Quarterly*, 24(1), 53-76.
- Thomson, J. (1976). Killing, letting die, and the trolley problem. *The Monist*, 59(2), 204-217.

Velleman, D. (2005). Family history. *Philosophical Papers*, 34(3), 357-378.

Weinberg, R. (2008). The moral complexity of sperm donation. *Bioethics*, 22(3), 166-178.