The Harm Principle and Parental Licensing[1]

I. Introduction

In 1980, Hugh LaFollette proposed parental licensing.[2] The proposal was not for a requirement that one be licensed to get pregnant, carry a baby to term, or to give birth, but a requirement that one be licensed to *raise* a child. If you have a baby, are not licensed to raise children and do not get licensed, the baby would be removed from your home and put up for adoption (by someone who is licensed). The proposal was not popular. He reiterated it in 2010; it has not become more popular. In this paper, I argue that if we accept John Stuart Mill's harm principle—as I think we should—we ought to endorse the proposal. That is, I seek to show that invoking the harm principle strengthens the case for parental licensing.[3]

In the rest of this first section, I briefly explain the harm principle and show that it captures a central intuition that most endorse.[4] In the second section, I explain what I mean by parental licensing, explicate LaFollette's arguments for it, and discuss some standard objections. Those objections seem to me weak. In section three, though, I indicate some disagreement with LaFollette that, perhaps paradoxically, strengthens the case for endorsing

[1] Many people helped me clarify my thinking in this paper. Shanna Slank and Jon Ravenelle helped with the earliest formation of the arguments. Various members of the bleedingheartlibertarians.com group and some commenters there were also helpful. Andrew I. Cohen, Jessica Flanigan, Lauren Hall, Steve Horwitz, Avery Kohlers, Hugh LaFollette, Henry Richardson, Robert Taylor, and James Taggart all read drafts and offered helpful advice. I've discussed the ideas with numerous others, including students. Finally, two anonymous referees for this journal were very helpful. I am grateful to all.

[2] See Hugh LaFollette, "Licensing Parents," *Philosophy & Public Affairs* 9(2) (1980): 182-197. All parenthetical references in the text are to this unless indicated otherwise, but see also Hugh LaFollette, "Licensing Parents Revisited," *Journal of Applied Philosophy* 27(4) (2010): 327-343.

[3] For an argument that Rawlsians ought to accept parental licensing, see Michael McFall, *Licensing Parents* (Lanham, MD: Lexington Books, 2009). McFall argues that stability requires that we have a society of individuals with a sense of justice (107) and that "that the best way to ensure healthy families with competent parents for the sake of children and society is to license parents—to allow the state to forbid some potential parents from parenting" (108).

[4] I detail the case for this more extensively in my *Toleration and Freedom from Harm* (New York, NY: Routledge, forthcoming).

parental licensing. Put simply, I think he underestimates one of the objections he considers, but then show how invoking the harm principle provides a powerful reply. I end by considering further objections in section four.

John Stuart Mill's harm principle reads: "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection … the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[5] Importantly, this is not the principle *primum non nocere*—first, do no harm. It does not merely mandate that we not harm others, but indicates that doing harm to others *is (the only) warrant for interference*. In other words, it sets a normative limit to toleration such that all *must* be tolerated *except* that which is harmful. While Mill ends up allowing interferences for other reasons, we can (and, I think, should) take the harm principle as a necessary condition for interference. Doing so means endorsing the claim that harm and only harm justifies ending toleration by any agent, state or otherwise, and permits interference. This allows the most extensive liberty that should be provided in society. Of course, no one denies that harm is *prima facie* a good reason for interference. As no one wants to be harmed, we all want this limit to others' liberty and should accept it for ourselves.

It is important that the limit just specified is determined by harm and not mere hurts. To clarify: harms, for our purposes, are *wrongful setbacks to interests*—not *mere hurts*, which are setbacks to interests but not wrongful. (In his magnum opus, Joel Feinberg argues that this is the

[5] John Stuart Mill, *On Liberty* (Indianapolis, IN: Hackett Publishing, 1978 (1859)): 9.

way harm is best understood in the harm principle.)[6] Jack's tripping on a stone in his path and thus skinning his knee is, in the ordinary case, a hurt, but not a harm. While Jack surely has an interest in not skimming his knee, if we assume—what is reasonable—that no one wronged Jack but that the stone just happened to be in the wrong place causing him to fall, with no one at fault, there is no wrongfulness and thus no harm understood as a wrongful setback to interests. With no harm, there is no reason for interference. Put simply, we don't think Jack has any justified complaint against anyone with whom we could interfere. By contrast, if you take Jill's laptop computer without her permission and claim it as your own, you wrongfully setback her interests in the computer, she is justified in complaining, and interference with you to rectify the situation is warranted. Similarly, if Albert stabs Charles in order to satisfy his (Albert's) desire to see blood, Charles is justified in complaining and interference with Albert is warranted to rectify the situation. Jack is hurt but not harmed. Jill and Charles are both harmed. According to the harm principle, interference is warranted in the latter cases but not the former.[7]

Many, of course, want the government to interfere in more instances than would be permitted if the harm principle were taken as providing the sole warrant for interference. They would allow that interference is permissible for reasons in addition to the prevention and

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[6] The four-volume *The Moral Limits to the Criminal Law*. See, e.g., *Harm to Others* (New York, NY: Oxford University Press, 1984), p. 36. (On Feinberg's view, the harm principle is only part of the core of liberal thinking.) Recent thinkers argue against Feinberg's understanding of harm being in Mill's work. See Dan Jacobson, "Mill on Liberty, Speech, and the Free Society," *Philosophy and Public Affairs* 29(3) (2000): 276-309; Dale Miller, *J. S. Mill* (Cambridge, UK: Polity Press, 2010); and Piers Norris Turner's "'Harm' and Mill's Harm Principle," *Ethics* 124(2) (2014): 299-326. I put this aside as I am not interpreting Mill. In "Doing Away with Harm," *Philosophy and Phenomenological Research* 85(2) (2012): 390-412, Ben Bradley argues that the existing definitions of harm are a "mess" so "it should be replaced by other more well-behaved concepts" (391). His treatment of Feinberg's definition is, though, unsatisfying (see, in particular, footnote 10, page 395). I defend a modified Feinbergian understanding of harm in my *Toleration and Freedom from Harm,* but cannot include that defense here.

[7] Some would suggest we understand harms in terms of rights violations. What I say throughout should be compatible with all philosophical accounts of rights. I suspect, though, that we do best to talk about rights violations when someone has a justified complaint because an interest of theirs has been set back. For more on "harming as right violating," see Feinberg 1984, 109-114. See also chapter three of my *Toleration* (Cambridge, UK: Polity Press, 2014).

rectification of harm. I do not here defend the insistence that it is *harm alone* that justifies interference (or the corresponding extensive liberty that insistence would allow)—that is a task for another time. I agree, of course, that the desire to help others is notable and to be encouraged, but I wish to show how leaving such concerns aside and concentrating only on harms is sufficient to conclude that we ought to license parents though it is clear that this is or can be a great interference with the way people live their lives.[8]

I should also be clear that the harm principle indicates when interference with individual behavior is warranted, but not when it is required—nor what sort of interference should be used. The warrant is something more than mere permission. When X is warranted, it is permitted and there is reason to X, but X is not required. X being warranted means there is *pro tanto* reason for X. Absent any (weighty enough) countervailing reasons, when X is warranted, X should occur. But there are often countervailing reasons. To take a simple example, if I caused you a minor harm—say I slap you across the face—it may not be that I should be arrested or even approached if, for example, I flew to another country immediately after slapping you. What I did would have been a harm and interference is thus permitted, but not required. The costs of interference can reasonably be taken into account by the authorities.[9]

It is worth pointing out here that states normally and acceptably use police, courts, and other institutions—and taxation to pay for them—to prevent or rectify harms. One of these, I intend to show, should be a parental licensing scheme. That, of course, will also require police

[8] I take "interference" to be any act that has the effect of impeding or preventing (even partially) an agent from doing as they wish, intend, or will. That is, it is hindrance or obstruction. Some instances of interference will be wrongful and thus harms; while interference may be permitted as a response to harm, wrongful interference is not.

[9] We would say the same about *de minimis* harms. Douglas Husak's discussion of inchoate offenses and the use of criminal law to reduce risks of harm may be of interest. See his *Overcriminalization* (Oxford, UK: Oxford University Press, 2008), 159-177. Husak offers "four distinct principles to limit the authority of the state to punish persons who engage in conduct that creates the risk of harm" (161). I believe—but will not here defend the claim—that parental licensing laws (designed to reduce the risk of harm to children) satisfy the requirements.

(or social workers empowered with certain police powers) and courts as well as an administrative agency to run the licensing program itself (including the administration of testing for the license).

The point of the harm principle is simple: while there is a general constraint against interference with the activity of individuals in a free society, the constraint ends when one harms another. If I smack you across the face for no reason, you would rightly be aggrieved and could reasonably ask for interference.

II. Parental Licensing and LaFollette's Arguments

My smacking you across the face for no reason makes interference permissible. Yet many people are smacked across the face on a regular basis with no interference: children, smacked by their parents. Even when parents seem to (or actually) have no reason for smacking their children, most people are loath to interfere or ask the government to interfere. We needn't determine whether interference in such cases is warranted; we need only see that there are some acts by parents that harm their children and that do warrant interference. Throwing boiling water on one's child, not letting one's child ever leave the bathroom, selling sex with one's child, and sexually forcing oneself on one's child all harm the child. In these sorts of cases, interference is permitted. These acts cannot be ignored.

Interference in the sorts of child abuse cases just mentioned (all real) generally takes the form of state agents (from CPS or DFCS) removing the child from the parent's home. This is not usually a penal response but a protective and assistive response.[10] Reunification of the

[10] In "Licensing Parents Revisited," LaFollette distinguishes between punishing abusive parents as "retributive, past oriented" and licensing parents "to protect children," as "future directed in both aim and execution" (335). Obviously, some actions that set back an individual's interests are not punishments. That someone has an interest in raising her biological child does not mean disallowing her doing so is a punishment.

family is generally a primary goal and abusive parents are often given assistance meant to ensure the problematic behavior is not repeated. The parent might receive counseling, job assistance, or other welfare benefits. This helps the parent and, the thinking suggests, helps the child by allowing the parent to *better* parent the child. In some cases, these interventions fail and parental rights are terminated. Unfortunately, the child harmed by the parent in these cases is hurt *at least twice*—when her parent wrongfully hurts her and again when she is forcibly removed from her parent's home. Even though removing the child from the home in cases of genuine child abuse is not wrongful—and hence not harmful—it does *hurt* the child (and perhaps the parent). Removing a child from her home is inevitably traumatic—no matter how abusive the parent has been. To state the obvious, it would be better, all other things equal, if both the abuse and the trauma of separation were avoided. Parental licensing is offered as a way to avoid both.[11]

Hugh LaFollette proposed licensing parents in 1980. His argument there is simple: When an activity is both potentially harmful and requires a certain competency to do safely, it should be regulated; if we have a reliable way of testing for that competency, the regulation ought to be licensing.[12] This is why, he thinks, we have driver licenses, medical licenses, legal licenses, etc.

[11] I assume transfer of a newborn from unlicensed biological parents to licensed parents is not traumatic for the child; this should be clear when one considers that hospitals have mismatched newborns and parents without causing trauma to the child. Admittedly, being adopted because one's birth parent(s) were unlicensed might be traumatic later in life. The evidence appears mixed. For contrasting views, see Brent Miller *et al*, "Comparisons of Adopted and Nonadopted Adolescents in a Large, Nationally Representative Sample," *Child Development* 71(5) (2000): 1458-1473 and L. DiAnne Borders *et al* "Adult Adoptees and Their Friends: Current Functioning and Psychosocial Well-Being," *Family Relations* 49(4) (2000): 407-418. The contrast is not extreme; most seem to agree "that the older children are at the time of adoption, the more likely they are to experience emotional and behavioral adjustment problems" (Miller et al, 1472). The adoptions in a parental licensing scheme, of course, would be at infancy. Still, we should aim for a shift in how these issues are viewed so, the trauma adoptees experience would be reduced as adoption is normalized.

[12] The main difference in LaFollette's "Licensing Parents Revisited," is the addition of this condition: "The benefits of the licensing program outweigh any theoretical reasons against it" (328). The argument is thus that when there is an activity that may involve harm by those who participate in the activity on those they serve and that safely performing the activities requires competency, we ought to require a license to do so when the benefits outweigh any opposing theoretical reasons. Being generally costly, LaFollette seems to think, is a *general*—and thus *theoretical* reason—against such a program (328). The costs include making a reliable test of the involved competency, so the third condition of the 1980 argument is built into this newer condition. (LaFollette does not provide much indication

The same reasoning, he says, leads to the conclusion that parenting ought to be licensed (183). Driving a car can result in great harm; doing it safely requires a certain competency; we have a means of reliably testing that competency, so we license drivers and those who cannot pass the licensing test are not permitted to drive. Practicing medicine (or law) can cause great harm; practicing it safely requires a certain competency; we have a means of reliably testing that competency, so we license medical providers and those who cannot pass the licensing test are not permitted to practice medicine. Clearly, parenting can cause great harm; parenting safely requires a certain competency; if we have the means of testing that competency, we ought to license parents and those who cannot pass the licensing test ought not be permitted to parent.

LaFollette points out that there are several ways to deny his conclusion: (i) deny the need for *any* licensing, (ii) deny that an activity's being potentially harmful and requiring a certain competency to do safely implies regulation is warranted, (iii) deny that parenting is potentially harmful or that it requires a certain competency to do safely, (iv) show that there are special reasons to think it a bad idea to license parenting despite it being potentially harmful and requiring a certain competency to do safely, which would otherwise warrant regulation, or (v) show that there is no reliable way of testing for parental competency. He doubts anyone would press (i), (ii), or (iii), so concentrates on (iv) and (v) (185-6).

Some (anarchists or libertarians) may be tempted by (i), wishing to deny that any licensing is needed, but I do not see how that can be a *prima facie* claim and know of no empirical evidence to support it. There are infinite types of activities and one cannot know in

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of what sorts of opposed theoretical reasons we should consider and, I would suggest, the earlier article already considered many.) The earlier condition is built in as once we believe it "theoretically appropriate to license parents," we seek to determine if it is practical—by specifying criteria of competency and the means (if there are) to test those, and then considering the costs thereof (336). In "Licensing Parents Revisited," LaFollette also further emphasizes the possible use of incentives (e.g., tax breaks) to encourage better parenting.

advance that none will need to be licensed.[13] We would need to determine, for each type of activity, how it is best to prevent harms that might be committed with that activity. Absent further argument, this objection appears to merely beg the question.

Objection (ii) seems more plausible than objection (i); I will discuss it in section III, suggesting that some activities that are potentially harmful and requiring of a certain competency to do safely warrant regulation and that some do not. As for (iii), I think LaFollette is just clearly right: parenting is potentially harmful and does require a certain competence to do safely. The first conjunct is entirely obvious given the sorts of real life examples I mentioned in the first paragraph of this section. The second conjunct does not seem particularly worrisome: knowing that one ought not throw boiling water on a child or allow a child to go into a shower without being sure the water is not too hot, knowing that one ought not sell one's child for sexual use or use the child for one's own sexual pleasure, knowing that children need space and need to play and talk, etc., simply *is* a competency. It is a competency most humans have or easily gain, but it is a competency nonetheless.[14]

What of (iv)—the claim that there are special reasons to think it a bad idea to license parenting despite it being potentially harmful and requiring a certain competency to do safely? Some may think "people have a right to have [bear and raise] children" (186). Of course, even if this were true, rights are often limited. There is a right to free speech, after all, but not slander; a right to religious expression, but not human sacrifice as part thereof; a right to private property, but not a right to insist someone not step on one's grass rather than get run over by a car. Etc.

[13] Even if one thinks the advocate of government interference always has a burden of proving the need, one must admit that such a burden *might* be met.

[14] In "Licensing Parents Revisited," LaFollette argues that there will be "relevant knowledge, abilities, judgment, and dispositions" in the competency (e.g., at 329). This seems right. He spends much of this later article articulating these elements of parental competency and defending them as elements thereof.

So, it might be that people have a right to raise children, but not in a way that harms the children (186). At best, it can be a right to raise children if one makes a good faith attempt to raise them well (187). It is not, after all, a right to be provided a child to raise! There is no right to be made fertile, to be given IVF treatment, etc. The "right to have children," if there is such, is limited and narrow. John Locke makes this clear when he notes that one might have such a right "but only as he is guardian of his children … when he quits his care of them, he loses his power over them, which goes along with their nourishment and education, to which it is inseparably annexed."[15]

A parental licensing program would be one way we limit the right to be a parent; it would be designed to ensure that people raising children do so with a good faith attempt to raise them well. This is not an extremely intrusive limit. For most, there would be a small hassle of taking an exam and nothing more. The *denial of a license* may be perceived as intrusive. Yet it's no more intrusive—indeed less intrusive—than the current system that interferes with biological parents only *after a child has been harmed.* (As we will see below, adoptive and foster parents accept much more intrusion in their lives now.)[16] In the current system, the force of the state is

[15] John Locke, *Second Treatise of Government*, §65. In their "Licensing Parents To Protect Our Children?," *Ethics and Social Welfare* 6(2) (2012): 195-205, Jurgen DeWispelaere and Daniel Weinstock argue that parenting is special because it "is not merely a *valuable activity*" but also "*non-substitutable*" (198, their emphasis). In a footnote, they compare parenting to being a surgeon and claim the desire to be a surgeon "amounts to a form of expensive taste." They think this might be "comparable to a taste for being the parent of a child with very specific features" but not comparable to the taste for being a parent (footnote 7). But perhaps the desire to be a brain surgeon is comparable to the desire to parent a child with specific features, the desire to be a surgeon is comparable to the desire to be a parent, and both are more specific (and expensive) then the desire to have a life project. (While DeWispelaere and Weinstock speak of a surgeon in the footnote, in the text they speak of a brain surgeon and note it is "very specific.") In any case, I do not see why they think being a brain surgeon—or any sort of surgeon—is more substitutable than being a parent. See Harry Brighouse and Adam Swift *Family Values* (Princeton, NJ: Princeton University Press, 2014), 93-97, for what I take to be a reasonable view (consistent with parental licensing) about the right to be a parent.

[16] Some argue for a general requirement of parental licensing from the fact that adoptive (and foster) parents are currently licensed and the reasons for this licensing are compelling. The argument can be either that simple parity requires that biological parents ought also to be licensed as well or that the compelling reasons to license adoptive parents are also compelling reasons to license biological parents. For one example of this sort of argument, see Carolyn McLeod and Andrew Botterell's "'Not For the Faint of Heart': Assessing the Status Quo on Adoption and

used to divide an entire family; in a system with parental licensing, an individual (or individuals) is prevented from rearing a child. Where people believe it is acceptable to pour boiling water on a child, this advance prevention seems well warranted—just as we are well warranted in not granting permission to drive to a five year old, a blind person, or someone who thinks it's acceptable to use a car to run over people they dislike.

As LaFollette points out, someone wishing to assert a right to raise a child may retreat to a weaker version of the right—a right to raise children so long as you meet certain minimal standards of child rearing (187). This, though, is not an objection to parental licensing as here envisioned which is only designed to be sure those who raise children meet the minimal standards (188).[17] Whatever moral right to raise a child an individual might have is defeated when she is significantly likely to cause—or does cause—the child substantial and avoidable harm. Those who are likely to harm a child should be refused a parental license. Those who harm a child should have their parenting license revoked.[18]

To reiterate: I am not discussing a licensing requirement for pregnancy, but a licensing requirement for the *raising* of a child. With a parental licensing program, if someone becomes pregnant before being licensed to raise a child and wants to raise the child, they must get licensed to do so. Ideally, they would do so before the child is born; we might extend this until the child

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Parental Licensing" in *Family Making: Contemporary Ethical Challenges*, ed. Françoise Baylis & Carolyn McLeod (Oxford, UK: Oxford University Press, 2014), 151-167. Importantly, what I propose *is* a single form of parental licensing for all—both biological and non-biological parents. Part of the hope is that any stigma attached to adoption would be removed in the process.

[17] In "Licensing Parents Revisited," LaFollette follows Onora O'Neill in saying that would-be parents must have a "feasible plan for their children to be adequately reared by themselves or by willing others" (334).

[18] In our system, which assumes biological parents have defeasible rights to raise their offspring, the "termination of parental rights" is functionally equivalent to having a parental license revoked. The claim that biological parents *should be* assumed to have such rights is in need of defense. (Such rights are best conceived of as rights against state or other interference with one's raising one's offspring, not as *rights over the child*.)

is a month or two old.[19] Importantly, becoming pregnant or giving birth would violate no law. The licensing law would only be violated if a person tries to raise a child without a license. (The system should allow—even encourage—parenting classes in advance of the exam, taking the exam before seeking to become pregnant, and, perhaps, some set number of permitted attempts to pass the exam.) At the point in which the individual does violate the law—by trying to raise the child without being licensed, the child would be removed from the birth parents and adopted by licensed parents. The earlier this can occur the better (see footnote 11).

Before moving on to LaFollette's last sort of objection, I should note a worry about the use of prior restraint (interference before there is any harm) involved in licensing. All licensing programs essentially involve prior restraint. People are prohibited from practicing medicine or driving a car *before they do harm* unless they get a license, just as people in a society with a parental licensing program would be prohibited from parenting before they do harm unless they get a license. Such use of prior restraint is not uncommon and given the significant harms we seek to avoid, seems at least plausibly warranted (188-9).[20] Admittedly, with some sorts of practices we allow apprenticing rather than complete prior restraint. Teenagers of a specific age

[19] In "The Place of Parenting within a Liberal Theory of Justice," *Social Theory and Practice* 36(2) (2010): 233-262), Daniel Engster argues against parental licensing in part by indicating that there is no good time to license parents; there are problems with failing to receive a license before becoming pregnant and both during and after pregnancy (247-248).

[20] Some may claim parents are required by nature or god to raise their biological offspring. Consider, though, that "In a typical matrilineal descent system … [w]hen a woman marries, she and her children may not even live with her husband. Instead, her brother takes on the familial duties and responsibilities we typically associate with a head of household: managing the household duties, providing the food and economic support, raising and disciplining the children, etc. … The husband/biological father may not even be recognized as a kinsman to the children." In such cultures, "the maternal uncle raises the children of his sister. The children inherit property from their uncle, not their biological father. A child's allegiance is to the mother's brother rather than to the biological father" (Christopher M. Dawson, *We the People, Servants of Deception* (Bloomington, IN: Xlibris Corporation, 2012), 408-409. See also Stephanie Coontz, *Marriage, A History* (New York, NY: Penguin, 2006), e.g., at 29 and David Schneider and Kathleen Gough, eds., *Matrilineal Kinship* (Oakland, CA: University of California Press, 1961). Simply put, though we are the result of natural biological processes, those processes do not determine how we are raised. More concretely: Phil's being the biological offspring of Bill and Jill does not mean Bill and Jill must be responsible for Phil's rearing. (They may have responsibility to be sure he is cared for.)

can get a "learner's permit" and drive under supervision before receiving a license. Medical students sometimes assist doctors. Perhaps we can have "learner's permits" for people becoming parents. Some may find this attractive, but I suspect it is more intrusive than parental licensing, not less.[21] Still, it may be a good option—similar to parenting classes—for individuals unable to pass the licensing exam on their first try.

Now to consider the final objection (v) LaFollette countenances: that there is no reliable way of testing for parental competency. It is important that what is endorsed here is not licensing only very good parents or those that are willing to raise their children according to some state-approved child-rearing method; what is endorsed is merely refusing to license very bad parents—*abusive parents*. If you think it's OK to pour boiling water on a child you are wrong and should not be allowed to raise children, just as someone who thinks it's OK to use a car to run over people they dislike is wrong and should not be allowed to drive. Some may think there is no way to predict who will mistreat children (190-2), but while we can't guarantee accuracy, I suspect we can do some good here even with existing mechanisms. We can likely determine if people, within some limits, are prone to violence for example (191). Of course, we should work to gain accurate competency-testing instruments before instituting the full program. The main instrument recommended here would be a questionnaire designed to determine if the individual in question would be prone to badly mistreat a child in their care,[22] perhaps because of psychological inability to deal with stress. As we will see there are already similar sorts of

[21] In "Licensing Parents To Protect Our Children?," De Wispelaere and Weinstock suggest we might consider "non-intrusive monitoring" instead of parental licensing (204), but this sounds like an oxymoron. *I* would feel that my life is being intruded upon if I were being monitored.

[22] The questionnaire could be administered in written or spoken form. I can't here delve into how the state would guarantee that a license was acquired. Clearly, hospitals could report births to the licensing administration, but that may incentivize some to give birth at home, which might also increase the dangers of childbirth. In part, what I think is required is a cultural shift so that the program is not seen as burdensome. Why this might work involves noticing that a parental licensing program could bring with it decreased state involvement in the ordinary citizen's life, as I discuss below.

questionnaires available, though not as yet ready to be used for a parental licensing program.

Consider how we test people to go into "special ops" in the military.[23] A large part of that is psychological examination to be sure the soldier would not "crack" under pressure. Those with children know that there is tremendous pressure in child-rearing. I suspect that some child-abuse is committed by biological parents who simply "cracked."[24] The test for a parental license might make use of some of what exists in these military tests in order to prevent such individuals from being in that situation.

Consider also that we can ask people fairly simple questions about what they might do. While we would not ask a man if he would rape a two-year-old girl, we might beneficially ask if he has ever "been in a situation where [he] tried, but for various reasons did not succeed, in having sexual intercourse" with a child, or if he "ever had sexual intercourse [or oral sex] with [a child who] … didn't want to because you used or threatened to use physical force (twisting their arm; holding them down, etc.) if they didn't cooperate?" David Lisak & Paul Miller got surprising affirmative responses when they asked men these sorts of questions about adults. They asked roughly 1800 men (college students, but of significantly varying ages); 120 said they had done one or more of these sorts of things; 76 of those admitted to committing an average of 5.8 of these acts.[25] (McWhorter et al did similar work with new Navy enlistees.) Child rapists

[23] See Ben Sherwood's "Ultimate Stress Test: Special Forces Training" in *Newsweek* 2/13/2009 (at http://www.newsweek.com/ultimate-stress-test-special-forces-training-82749 (accessed June 22, 2015).

[24] Cf. LaFollette "Licensing Parents Revisited," 339. Some worry the mentally ill will be unable to be parents, but this depends upon the mental illness in question.

[25] See David Lisak and Paul Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists," *Violence and Victims* 17(1) (2002): 73-84. Note "Participants who completed the PH [Perpetration History] questionnaire and who were subsequently interviewed yielded a 87.8% agreement in their classification as perpetrators (kappa = .75). This cross-method verification yielded no false positives … and 12.2% false negatives" (77). See also Stephanie McWhorter, et al, "Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel," *Violence and Victims* 24(2) (2009): 209-224. See also David Lisak, et al, "Abuse-Perpetration Inventory: Development of an Assessment Instrument for Research on the Cycle of Violence," *Family Violence & Sexual Assault Bulletin* 16(1-2) (2000): 21-30.

might admit crimes just as these men did (perhaps without considering them to be crimes); this would provide reason to deny them parental licenses.

Next, consider that there is significant testing—including a home inspection—for people that adopt or foster parent children. Current requirements for adoption require somewhat rigorous testing to determine if the person can be a good parent. The formal application procedures are *more* rigorous than what I would propose for licensing. Those procedures—and the associated costs—surely exclude some that would make good parents. Adoption of an infant, domestic or foreign, can take years and costs of $40,000 to a $80,000 are normal. I don't think it's surprising that adopted children are "less than half as likely to be maltreated compared to children reared by their biological parents"[26]—adoptive parents have generally worked hard to be able to adopt and are likely to be well settled.

Finally, realize that we already have tests for this purpose. Claudia Pap Mangel discusses the "Child Abuse Potential Inventory" and the "Family Stress Checklist" in her "Licensing Parents: How Feasible?" While these are not ready to be used for parental licensing, they provide a starting point.[27] Mangel also provides evidence that our court system has had rulings

[26] LaFollette "Licensing Parents Revisited," 336. In "Licensing Parents," LaFollette notes adopted children were "5x less likely to be abused than children reared by their biological parents" (94). The 2010 claim is about adopted children (less than half as likely to be maltreated than if they stayed with their biological parents) while the 1980 claim is about all children (those raised by biological parents are far more likely to be abused than adoptees). In "Licensing Parents Revisited," LaFollette also reports "Nearly 92% of parental abusers are biological parents" (336). Parental abusers are likely to abuse multiple children.

[27] Claudia Pap Mangel, "Licensing Parents: How Feasible?," *Family Law Quarterly* 22(1) (1988): 17-39, esp. 26 ff. In their "Licensing Parents—A Response to Claudia Mangel's Proposal," *Family Law Quarterly* 24(1) (1990): 53-76, Michael Sandmire and Michael Wald argue that the empirical evidence regarding the CAPI and other existing instruments does not support their use. The biggest problem is the number of false positives produced. This argues for waiting for a better instrument, perhaps one that makes use of the Lisak-Miller style questions. We can agree with Sandmire and Wald as well as Rebecca Peters and Jane Barlow ("Systematic Review of Instruments Designed to Predict Child Maltreatment During the Antenatal and Postnatal Periods," *Child Abuse Review* 12 (2003): 416-439), that "the use of such instruments cannot [now] be supported other than for benign purposes such as … interventions that do not involve … the removal of the child from the home" (436) and suggest work be done to improve them. Again, part of the strategy recommended here is to shift how our culture views parenting such that not attaining a parental license would not be seen as punishment. I do not deny that most women—and many fathers—form emotional attachments to their biological children even before they are born. (See Elizabeth

that amount to "licensing parents on a case-by-case basis" and concludes that parental licensing "would be more objective, expeditious, and less costly" than our current system (36).

Given the existing exams for soldiers entering special ops, the fact that rapists will admit their acts if asked in particular ways, existing tests for foster and adoptive parents as well as the tests Mangel discusses, I submit that we likely can, with further work, test for parental incompetence and that disallowing the parentally incompetent from raising children would save some of the biological offspring they would create from harm.[28] This, to my mind, would be an advance over the current system wherein DFCS or CPS interferes with child-rearing only *after* harm has been done—and then creates further trauma for the child. That is what happens in our system. A teacher, doctor, nurse, or neighbor notices a problem and calls DFCS. A social worker investigates. If they are convinced there was a harm—in some cases it's obvious, in some cases not—the child is removed from the home, inevitably causing the child trauma because of the separation from her parents, even if it is for the best. Both (some of) the harm the biological parent does and the trauma DFCS inflicts would be avoided with a parental licensing program. Unlicensed individuals would either not have a child in the first place or would have the child removed from their home and adopted out before the child was old enough to experience the situation as traumatic.

LaFollette's argument in favor of parental licensing is able to withstand the objections thus far considered. As I indicated earlier, though, more must be said about the objection against

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Anderson's "Is Women's Labor a Commodity," *Philosophy and Public Affairs* 19(1) (1990): 71-92, especially 81-82.)

[28] Some might add a means test for licensure—a requirement that one have the *financial resources* to raise the child. I think this reasonable but suggest that it should leave open how the means are provided. For example, if Susie is pregnant and broke but *The Sisters of All Children* commit to providing her housing, food, etc. until the child is 18 years old, Susie should pass the means test. Similarly, if the state has a program to help poor people with children, they should pass the test (if the state provides the means for all those who have the need, there is no reason to actually test means since all would have it).

the claim that an activity's being potentially harmful and requiring of a certain competency to do safely implies regulation is warranted. I turn to that now and address final objections in section IV.

III. Disagreement With LaFollette & Why Those Endorsing the Harm Principle Ought to Endorse Parental Licensing[29]

On LaFollette's view, an activity's being potentially harmful and requiring a certain competency to do safely implies regulation is warranted. I think advocates of the harm principle should challenge this even though—or when more clearly understood, *because*—I think harm and only harm justifies interference. Boxing and coaching boxing are activities that most would say are potentially harmful. Both are also activities that require a competency to do safely. Endorsing the harm principle, however does not suggest that either should be regulated.

Boxing is in no more need of regulation then is writing philosophical papers. As *ordinarily* practiced, though such writing may *hurt* individuals, it does no harm. Some readers of my first blog post about parental licensing certainly seemed to have their interests set back.[30] Though they were quite perturbed, they were not harmed—because my writing and posting the piece was not wrongful, it did not wrongfully set back their interests. Of course, it is possible to wrongfully write and publish something. This happens in libel and slander cases. Similarly, when boxers abide by the rules of the game (as I assume is normal), they do not wrongfully hurt their opponents (or anyone else) though they would wrongly hurt an opponent *if they cheated*. And again, someone offering to coach a boxer does no harm unless they act in a wrongful

[29] It's worth noting that in both "Licensing Parents" and "Licensing Parents Revisited," LaFollette offers a more moderate proposal: tax breaks for those who get "licensed" rather than any intervention with those who do not ("Licensing Parents Revisited," 338-339; there he talks of the intervention as a form of punishment).

[30] On December 27, 2011. See http://bleedingheartlibertarians.com/2011/12/licensing-parents-2/.

fashion—lying about their qualifications to coach, for example. Coaching is not made wrongful by being subpar or by leading the coached to lose a match.

Perhaps what we should say, if we endorse the harm principle, is that only when an activity's being potentially *harmful* in the sense of wrongfully setting back interests, is regulation warranted. Yet, writing a philosophy paper is potentially harmful—it might include libelous claims about the defender of an opposing view, for example. What we should say, I think, is that only when an activity is statistically likely to be *harmful* in the sense of wrongfully setting back interests, is regulation warranted.[31] Driving a car is like that—it's not that driving merely potentially causes significant harms, but that it does so in a statistically significant number of cases.[32] Writing philosophy papers, I assume, is not like that. Because I also do not think medical practitioners are engaged in that sort of activity, I do not think regulation is warranted in their field. Of course, a medical doctor *might* cause a harm (far more likely, they cause a hurt). But so too might a philosophy professor. In both cases, legal cases (criminal charges or civil suits) might well be warranted if they do—but prior restraint laws are not needed.[33]

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[31] This is likely also LaFollette's view (he suggested as much in personal correspondence). If it is—and if the rest of what I say is right—I am not so much objecting to LaFollette's argument as clarifying (one of) the premises and using it in a different argument. As he would advocate continued use of licensing programs for medical doctors, who I suspect are *not* statistically likely to wrongfully set back the interests of patients (see footnote 33 below), there remains a substantive difference in our views.

[32] I leave open *how statistically likely* the harm must be. I do not mean merely that the odds of a harm occurring on any given occasion of the practice in question are more than zero. They must be non-negligible. Surely, though, the odds need not be 9 to 1 either. Consider that most believe driving licenses are justified. There are roughly 320 million people in the US and roughly 2.35 million of those people are injured (with 37,000 killed) in car accidents per year (see http://asirt.org/initiatives/informing-road-users/road-safety-facts/road-crash-statistics). That is less than 1% of the population injured in a given year. The odds of being abused by one's birth parents are more than triple that, though still low (see footnote 42 below). If licensing is warranted for driving, the numbers suggest (prima facie) it is warranted for parenting. Of course, in no case will we get harms to zero and the costs of reducing harms are legitimate concerns. A parental licensing program, however, may be *less expensive* than what we have now—as I discuss below.

[33] Someone might think I am to sanguine about medical doctors. Though I suspect many medical students pursue their career for financial gain, I assume most prefer to help—even if that does not motivate them—and would not intentionally hurt a patient. Admittedly, one may wrongly hurt another without intending to do so, but it's not clear this is a common occurrence in the medical field. See Anupam Jena *et al* "Malpractice Risk According to Physician Specialty," *New England Journal of Medicine* 365(7) (2011): 629-636. As there are deaths from negligence or other

Endorsing the harm principle allows one to defend state activity meant to prevent statistically likely harm (including coercion)[34] and allows for defense of state activity meant to punish, or at least stop, those who harm others. In the rest of this section, I explain why this should include defense of parental licensing.

Is child rearing an activity that is statistically likely to involve *harm* in the sense of wrongfully setting back interests? Unfortunately, yes. LaFollette tells us:

> In the US, more than four children a day die from abuse and neglect. Others suffer significant long-term physical effects. 'Individuals who have been maltreated during childhood are more likely to develop diabetes, cancer, cardio- vascular disease, et cetera'. Recent studies suggest 'that childhood traumatic stressors represent a common pathway to a variety of long-term behavioural, health, and social problems' including premature death. Many others are emotionally scarred for life (LaFollette 2010, 331).[35]

Neglect and abuse of one's children are, I assume it's clear, wrongful. They also result in clear setbacks to interests. The immediate and physical effects of child neglect and abuse are clear: burn scars, broken limbs, and death. The less immediate physical effects are also clear: long term disease and social problems.

It should be clear that bad—neglectful or abusive—parenting can cause harms. In the interest of not understating the case, we should recognize that children are decidedly vulnerable to all of those they come in contact with—and more (and *more often*) vulnerable to those they

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mistakes in medicine *with* licensing (see Marshall Allen and ProPublica's "How Many Die from Medical Mistakes in Hospitals?;" https://www.scientificamerican.com/article/how-many-die-from-medical-mistakes-in-us-hospitals/), we might think of medical and parental licensing as at opposite points of experience. Perhaps instituting parental licensing and *removing* medical licensing would both reduce harm.

[34] Coercion is a form of harm as it wrongly sets back an agent's interests in acting as they wish.

[35] See LaFollette "Licensing Parents Revisited" for his references, but see also McFall, *Licensing Parents,* 111-113 (and 129 note 8) and the U.S. Department of Health and Human Services Administration for Children and Families Administration on Children, Youth and Families Children's Bureau annual reports on Child Maltreatment. The 2013 Report is at http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2013 (accessed 2/1/15). According to the Adverse Childhood Experiences Study (see www.acestudy.org), if children live with six of the following ten experiences, their life expectancy is twenty years less than it would otherwise be: emotional abuse, physical abuse, sexual abuse, neglect, feeling unsupported, divorce or separation, domestic violence, substance abuse (by others in the home), mental illness, depression or suicide (by others in the home), or a family member being in prison. The presence of four of these more than doubles the chance of heart disease, more than quadruples the chance of depression, and increases the chance of suicide twelve-fold.

come in contact with regularly: parents. The duration and intensity of the exposure children have with parents is tremendous. No one is in a position to harm a child as often as a parent. And the damage they can do is extreme: a father raping a two-week-old, a mother throwing boiling water on her daughter, another parent drowning her children, and the list goes on. These are the sorts of harms that a licensing program might help avoid. As it is now, these are things the state *responds* to—*after* the harm is done.

The case for parental licensing can be put succinctly:

1. Interference is warranted when (only when) harm has been done, is being done, or is statistically likely to be done. (I.e., harm and only harm provides *pro tanto* reason for interference; this is the harm principle.)
2. Parenting is such that it is statistically likely that some, the parentally incompetent, will harm children.
3. Harm to children matters as much as harm to adults (i.e., #1 is relevant here).
4. Hence, interference to prevent or stop harm to children by the parentally incompetent is warranted. (I.e., we have a *pro tanto* reason to interfere.)
5. Parental licensing is interference to prevent harm to children by the parentally incompetent.
6. Parental licensing is warranted.

There is an obvious serious worry that moving from premise five to the conclusion (six) requires an assumption that licensing is a valid form of interference and this may be mistaken. If that is correct, we should not go past the sub-conclusion at statement four. Perhaps the next warranted step would then be that it permissible to remove children from the homes of those that do harm, as we do now. The argument would then only defend the status quo.

Let's consider the objection further. If the claim is that licensing is prima facie never permitted, we've already seen the response in section II above: since there are infinite types of activities, it would seem impossible to rule out in advance that none is permissibly licensed. As already indicated, we need to determine, for each type of activity, how it is best to prevent harms that might be committed with that activity. So far as I can tell, n*o better means* has arisen to

prevent the harms to children that occur in all states and that parental licensing seeks to address. As such, assuming we are to have a state, one of the things it ought to do is license parents so as to prevent harm to children. Admittedly, though, if a less intrusive (and less expensive) means of preventing harms to children were available, I would endorse that rather than licensing. Explicit proposals, though, are scarce. Many have suggested monitoring programs, but these do not seem less intrusive. Many have suggested parenting assistance, but these do not seem promising.[36] Absent better (or less intrusive) proposals, licensing appears reasonable. Put simply, my view can be revised to the claim that if a state is to exist and there is no better means to prevent harm to children by biological parents, then that state ought to license parents.[37]

As strong as I think the case is thus far, it can be made stronger. Here's a revision, with amendments based on the preceding discussion and one addition (new premise 4):

1. Interference is warranted when (only when) harm has been done, is being done, or is statistically likely to be done. (I.e., harm and only harm provides *pro tanto* reason for interference; this is the harm principle.)
2. Parenting is such that it is statistically likely that some, the parentally incompetent, will harm children.
3. Harm to children matters as much as harm to adults (i.e., #1 is relevant here).
4. Harm to children is statistically likely to result in future harms to both children and adults when the abused harmed children grow.
5. Hence, interference to prevent or stop harm to children by the parentally incompetent is warranted. (I.e., we have a *pro tanto* reason to interfere.)
6. Parental licensing is interference to prevent harm to children by the parentally

[36] "David P.H. Jones notes that 20 percent to 87 percent of families were unchanged or worse at the end of treatment and the recidivism rate was between 16 percent and 60 percent … most of those who are at the highest risk to maltreat their children and who also usually maltreat their children most severely are not included in such studies. Such parents are often too socially isolated, apathetic, or irresponsible to take part or participate consistently" (McFall, *Licensing Parents*, 114). Some suggest private organizations like churches, neighborhood associations, and extended families can help, perhaps by offering parenting classes, but there are already private associations that do this sort of work and child abuse and neglect continue. Moreover, "If a parent does not *know* that it is wrong to abuse or neglect his child before taking a parenting class, then we should pause to consider how effective such a class would be" (McFall, *Licensing Parents*, 113; he also points out "those most at risk to maltreat children are least likely to attend parenting classes").

[37] As already noted, the status quo has us interfering with families when children are abused. The trauma of removing a child from her parents' home may well be a reason *against* it. Whether it is enough of a countervailing reason depends on the nature of the abuse. Here, though, we are concerned with reasons for a licensing program, not for or against licensing a particular parent or for or against removing a particular child from her home.

incompetent *and* to prevent future harms abused children might later inflict.
7. There is no better or less intrusive means to prevent the relevant harms than a program of parental licensing.
8. Parental licensing is warranted, so long as there is to be a state. (I.e., any existing state has a *pro tanto* reason to maintain a parental licensing program.)

This improved argument seeks to make clear that not only are neglect and abuse harmful to the children who are the *immediate* victims, but that they likely to lead to future harms and that these too would be avoided with parental licensing.

Regarding the future harms, LaFollette tells us:

> The damage [of child neglect and abuse] does not stop with the [immediate] victims. Their maltreatment affects how they will treat others when they grow up. They are far more likely to abuse their own children, and they are more likely to become criminals. Some researchers claim that child abuse creates 'an additional 35,000 violent criminals and more than 250 murderers'. Others found that 'child maltreatment roughly doubles the probability that an individual engages in many types of crime'. This is much higher than the effects of factors normally thought to cause criminality—including unemployment and crack cocaine use.[38]

If parental licensing can prevent child neglect and abuse—and surely it can prevent some—it can reduce those future violent crimes, including murders. The case for parental licensing seems overwhelming if one wishes to prevent harms. If this isn't clear, imagine we had perfect and indefeasible evidence that parental licensing would end *all* child neglect and abuse and *also* significantly reduce—say by 50%—violent crimes, including murder (those that would otherwise have been be committed by grown victims of child neglect and abuse). If you would endorse parental licensing in that case but not endorse it in our world because we lack evidence, you are not in principle opposed to parental licensing, but simply dubious of the empirical evidence. That is reasonable. If, though, you would not endorse parental licensing even given the sort of evidence just imagined, it is unclear what to say. For comparison, consider that one may understandably oppose making all asphalt pink given no (or limited) evidence that doing so

[38] LaFollette, "Licensing Parents Revisited," 331.

has benefits, but if doing so was known to significantly reduce both the numbers and intensity of wrongful setbacks to individuals' interests (including significantly reduced instances of coercion), surely opposing doing so would be a mistake for those in favor of interference to prevent and rectify harm (at least on the assumption that pink asphalt was no more costly than other asphalt).

My point here is simple: principled opposition to parental licensing is not consistent with endorsement of the harm principle unless it is due to the evidence regarding the sorts of harms that could be prevented (that the harms prevented would be fewer and/or less extreme than those likely to occur due to the institution of a licensing program). The evidence regarding harms by biological parents is clear and there is reason to believe that much of that harm could be prevented with parental licensing. Even if there is not now sufficient social scientific evidence, with enough, we should endorse parental licensing.

IV. Worries & Conclusion

Some may initially oppose parental licensing even if they find the harm principle plausible as a jurisprudential principle. The principle, after all, does not indicate that interference is *required* when there is harm and it is reasonable to be concerned to avoid an overly intrusive state. The response to this objection is straightforward: a parental licensing program, if instituted, could actually rid the state of the need for many other regulations and interventions and thus be part of an overall less intrusive regulatory system.[39]

Parental licensing would render many regulations unnecessary while simultaneously reducing the numbers of harms committed throughout society. Consider that if we could be

[39] This may not occur all at once. The idea is that the institution of parental licensing will reduce the need for regulations as time passes (and fewer children are subject to neglect and abuse).

assured that children were well parented, we could use fewer regulations regarding schooling, toys for children, etc. Regulations regarding truancy, neglect, and abuse might remain, but there would be fewer uses of such regulations, because fewer offenses. Safety regulations for toys, clothing, food, and the like would be similarly less needed as competent parents could determine for themselves what was safe and what was not. This may seem to be expecting too much from parents—especially if we mean only to rule out the genuinely incompetent—for many will simply not have the time or resources to do the research necessary. There is, though, no reason to think parents in the sort of society I envision would be on their own, without assistance. Even if *the state* no longer took responsibility for safety regulations, for example, institutions like Underwriters' Laboratories (now "UL"), Consumer Reports, Angie's List, and the like would continue (and prosper) in a system where competent parents need impartial information and advice. Churches, schools, and other private organizations—the American Academy of Pediatrics, for example—would remain and provide useful information. Because we could assume parents were competent, though, we would have less need of *coercive* mechanisms to encourage reasonable choices for children.

It's also important that immediate harms to children—the abusive acts of their biological parents—would be reduced as fewer people that would abuse children would raise children. Those that would have been abused would either not be born or would be raised by adoptive (competent) parents. State interference in families would thus be reduced. Rather than increasing the need for CPS, DFCS, and foster care, we would have fewer children raised in homes likely to require such. (Possibly, too, we would have less need for welfare programs.)[40]

[40] In footnote 28 above, I noted that some would insist on a means test as part of a parental licensing program. If charitable and governmental aid did not count toward the available means, only those with their own financial resources would be able to raise a child, thus preventing children from being raised in families in need of aid. Of course, this would discriminate against the least advantaged. Allowing charitable and governmental aid to count

Fewer abused children, as we saw, also means fewer future violent criminals. This means state activity in response to those crimes would also be limited. The overall number of harms in society would be drastically reduced. We would need fewer police officers, as we would have fewer violent crimes. We would need fewer courts and court officers, as we would have fewer cases to adjudicate. In short, while parental licensing would increase the power of the state in one specific area of human life, it seems the most appropriate area for such power (since children are by definition vulnerable to harm and are, indeed, most vulnerable to those that raise them) and would bring about a reduction of the power of the state in many other areas. On a whole, it seems likely that we would see a reduction in state programs that are intrusive. This would also be a reduction in the cost of a state.

Licensing programs, of course, impose costs of their own.[41] While I think a parental licensing program is likely to provide a net gain, it's worth discussing these. At the very least, there is a test for those seeking a license and a prohibition on offering the service without a license. Ordinarily, that prohibition is a cost to those who seek the service but would be willing to purchase it (perhaps for less) from an unlicensed practitioner. Putting the point differently, licensing serves as a barrier to entry into a field—whether it be hair-styling, medical doctoring, lawyering, or parenting. Often there is a fee to take licensing exams. In some fields, expensive schooling may be required. Licensing is thus always the government giving professionals an

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would limit the discrimination. Even then, though, we may have less need for the welfare programs my parenthetical is meant to address—children raised by competent parents likely need less assistance as adults than those raised by incompetent parents.

[41] Given all of the costs and a normal concern for quality service, some might instead endorse *certification* programs for medical doctors and other professionals. After all, at best, licensing programs guarantee some minimal competence or proficiency while excluding anyone that does not have the license, no matter competence. Certification programs can promise more, but cannot prevent uncertified practitioners. If such practitioners can gain a paid clientele without deception, all gain—their clients' right to choose their practitioner is protected. This, though, requires that the customers can consent to the service knowing the practitioner is uncertified. Some suggest a certification program for parents as well, but there is a clear difference: the children we are discussing—newborns and infants—are *clearly not competent* to choose parents. Any concern about prohibiting their choice is farcical.

ability to charge customers higher prices by limiting competition. Parenting, of course, is not (currently) a profession in the relevant sense—it is not paid work. Still, as in all fields, licensing would limit the number of parents available. Some may think this an objection to parental licensing: there will be fewer available parents and children will effectively be prohibited from being raised by their biological parents. The response to both of these claims should be clear. There *will* be fewer parents, but the reduction will be from those who are not competent to raise children. This would likely be a reduction of about three percent[42] and, we should add, is likely offset by the number of people who would be enabled to adopt a child given the licensing program. Some children *will* effectively be prohibited from being raised by their biological parents—but this will save them from the harms they would otherwise suffer at the hands of individuals unfit for parenthood.

There can be no denying that parental licensing exams would yield some mistakes. Administering any test allows for mistakes (192), but that does not mean we rule out licenses in other areas—whether for drivers, lawyers, doctors, or otherwise—i.e., it is not ordinarily taken as a definitive argument against licensing. Whether to require licenses in a particular field is dependent on factors about that field. As should be clear, on my own view (see § III), whether we should require licenses in a field depends on whether doing so is likely to reduce harms therein. I have argued that this is the case with parental licensing. Moreover, as already indicated, we could allow for multiple (though limited) attempts to pass the exam and classes where people learn what parents should and should not do. This is intended to reduce the possibility of mistakenly forbidding someone from parenting. The system will still not be perfect.

[42] McFall, *Licensing Parents*: "I assume that roughly only three percent of [biological] parents would be forbidden from parenting" (120). "I use this number because it is approximately the current number of parents who maltreat their children" (132 footnote 35).

I do not deny that there can be abuse in the administering of licensing exams. But again, this does not mean we rule out licenses in other arenas, should not mean that here and, again, and we could allow for multiple attempts to pass the exam, perhaps in different facilities with different administrators.[43] Moreover, I would recommend experiments with the use of the testing instruments (seeking ways to avoid abuse thereof as well as ways to improve the instruments themselves) and phasing-in of the program so that we might be alerted to any problems.[44]

Some might push the objection harder, insisting that I am mistakenly attributing to government qualities it does not have—fair-mindedness, altruism, intelligence, generosity of spirit, and more.[45] This objection is worth considering, but two factors are important. The first concerns the nature of the work in this paper; the second concerns how far to take the objection.

This paper is a work of *non-ideal theory*.[46] It begins by noticing an injustice in the world and offers a way to move us from the situation with injustice to a more just scenario. In considering whether to have a system of parental licensing, we take people as they are and hope to improve the system they live in so that injustice is avoided. The idea is that there is a possible change to the basic legal system that would help us move, over time, to a more just society.

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[43] In "Licensing Parents Revisited," LaFollette expresses deep concern about the potential of abuse in the administration of a licensing program—for the good reason that post-9/11 it is clear the "ways that an administration can take a sensible goal (controlling terrorism) and pervert it" (338). Still, he thinks it is not enough to scrap the project. After all, he says we "know that adoption programs favour rich, white Christians" and we are "not tempted to scupper them" in favor of an easy, low-cost, no-testing adoption program. "[A]doption programs do considerable good that we could not achieve in any other way" (338) and licensing programs would have a similar affect.

[44] Perhaps we could start the testing with a longitudinal study giving the exams to a sample of eighteen to twenty-six year olds and keeping track of that group to see how their lives go—i.e., without using them as a prerequisite to a license. Once we were satisfied that we had exams that had few enough false negatives and, especially, false positives, we might institute the program in a particular region to see how it fares before rolling it out further.

[45] Michael Munger calls this "unicorn governance" (see https://fee.org/articles/unicorn-governance/).

[46] The distinction between ideal and non-ideal theory is introduced by John Rawls in his *Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); see, in particular, 216 ff. The distinction has been the topic of concern in the last dozen years or so, but what I say here does not depend on any particular interpretation thereof.

What is offered here is not ideal theory, where we assume full compliance with the principles of justice or the basic laws that follow from those principles. This may seem to make my argument particularly susceptible to the objection. After all, if I was offering an ideal theory, I might assume away non-compliance and injustice, and thus also take for granted a perfectly just government, not run by individuals with incentive structures of their own. What can I say about the objection, given the nature of this work as non-ideal theory?

The problem that parental licensing is meant to address is, of course, that of substantial harms done to children in cases of child abuse and neglect. The objection here can be understood as a worry that the change in law caused by the addition of parental licensing may create additional unforeseen harms, some due to rent-seeking behavior about what counts as acceptable parenting. That is, even given that our current system (without parental licensing) allows for harms to exist, the change (to including parental licensing) may open the door for more harms. This is clearly true, but cannot be a decisive argument against the change—for the harms created, if any, may be significantly fewer and less substantial than the harms eliminated.

Consider an analogy. Say Cray University has a byzantine system of course requirements for graduation. The system is so disorderly and unintuitive that many students are delayed in graduating or fail to graduate at all. One solution is to provide more advising interventions to help students get through the system. Another solution is to redo the system of requirements to make it more orderly and intuitive. The first is akin to what we do now with DFCS: in addition to the basic legal system, we add a layer in an attempt to reduce or rectify the harms caused to children. The second is akin to instituting a parental licensing scheme—it is an attempt to change the basic laws regarding child welfare. The idea is to change the system of child protection—a system that clearly needs attention—so that fewer harms are realized, rather than to add an *ad*

hoc layer to the system that allows harms. This is the move of someone who thinks the legal system must be set up to prevent harms from occurring. It is a move to improve the basic way we think of raising children so that fewer children are harmed by parents.

I have not, of course, given anything like conclusive empirical evidence that fewer harms would be realized with parental licensing than are realized without it. If I could provide that, my call for change would be more urgent, but I am decidedly *not* saying we should institute parental licensing immediately and completely. I am saying there is some reason to think a system with it is better than what we have, so we should further explore instituting it. The ideal is a system wherein children are never abused. That should guide what we do. Given LaFollette's reasoning and the reasoning I offered in the previous section, my claim is that we ought to implement a system of parental licensing so long as doing so would not—because of (mostly contingent) factors about our society—make matters worse. The empirical social sciences will be needed to make this sort of final determination. This would include considerations about how we could (or not) institute parental licensing without having it invite rent-seeking about what counts as good or bad parenting so that only the best evidence from psychology about avoiding child abuse is used.

My second response to the objection is that taken seriously, it proves too much. Any change to an existing legal system is subject to the worry that it will invite rent-seeking behavior that will cause more harm than is eliminated.[47] Consider police services, for example. In an era where there are increasing concerns about the injustices of over-criminalization and over-incarceration, this cannot be easily dismissed. Many call for an overhaul of the criminal justice

[47] All legal systems must deal with rent-seeking behavior, but the problem is likely worsened when changes are instigated.

system so as to end the sorts of injustices that are present in the U.S.[48] Such overhauls must be handled carefully. Changes invite rent-seekers. But the existing systems so clearly allow injustice, that we must look for some change, despite the possibility of problems—while recognizing and seeking to avoid them. The same, I suggest, is true with regard to the injustices done children in our current system. In both cases, caution is required in moving forward.

The objection that we should not see government as a unicorn, then, should either make us doubt government can handle improving the basic system of police services (arguably essential to government) to prevent harms or simply leave us cautious about making changes. I advocate cautious progress. I do not think any government is perfect—and suspect no one does—but we don't argue against improving police services on these grounds and should not argue against improving the basic system meant to protect child welfare on them either. Government is meant to protect us all from harm. It does not do these things perfectly; there is corruption in police forces as well as in child welfare services but we—all but anarchists—think we are better with them than without them. The same would hold with parental licensing: there would be corruption in the system because individuals working in government will have their own interests, but that does not mean we would not be better with it than we are without it. In short, if we rule out parental licensing on these grounds, it is not clear why we ought not rule out police services as well.

If we reject anarchism, we need a morally justifiable method of delimiting government activity. The view discussed in this paper provides that: we should not allow government to do anything that does not prevent or rectify harm. We have government provide police services to

[48] For some examples, see Michelle Alexander's *The New Jim Crow* Revised Edition (New York, NY: The New Press, 2010), Amy Bach's *Ordinary Injustice* (New York, NY: Holt Paperbacks, 2009), Douglas Husak's *Overcriminalization* (Oxford, UK: Oxford University Press, 2008), and Chris W. Surprenant's edited volume *Policing and Punishment: Philosophical Problems and Policy Solutions* (New York, NY: Routledge Press, 2017).

prevent harm and it might issue parental licenses for the same reason. Again, my argument is theoretical and I readily admit that if it turned out *in practice* that parental licensing causes more harm than it prevents, we would have reason to reject it.[49] Similarly, a police force that does more harm than good ought to be disbanded. That sort of issue, though, must be dealt with "on the ground," as it were. This paper seeks to show that parental licensing is a proper role of the state that accepts the harm principle, not that every state does so or does so consistently or well.

To return to an earlier analogy: if making all asphalt pink dramatically improved (by reduction) the number and significance of harms committed in a society, all else equal, it would be worthwhile to make all asphalt pink. If it were possible to eliminate or significantly reduce harms to children without government regulation or interventions, I would not advocate parental licensing. That is not the world we know—or any reasonably close possible world. In the sort of world that human beings as we know them inhabit, parental licensing has the potential to be like that pink asphalt and seems similarly worthwhile.

One final concern is worth briefly addressing. Some might think I am attacking the very institution of the family.[50] I am not. If I am attacking anything, it is an unconditional natural right to raise one's biological offspring. As already indicated, I do not think such exists. Importantly, there is no reason to think families are limited to adults raising their biological offspring. Indeed, far from attacking the family, the sort of parental licensing program I advocate would *help create healthy families*. *Adoptive families are families*. In the sort of parental licensing scheme I would favor, a few people would not be allowed to raise their biological offspring; any children born to them would quickly be adopted so that a family was

[49] Arguably, if instituting a parental licensing program would result in mass protests, violence, and delegitimizing of our government, we ought not institute parental licensing until *after* we can convince more people about the right view of parental rights.

[50] Adam Gurri does at http://bleedingheartlibertarians.com/2014/08/gurri_on_cohen/.

created or enlarged. (There are always waiting lists to adopt newborns in our system, wherein it is also very expensive; I see no reason to think the demand would decrease in a system with parental licensing.)

I'll end simply: as we saw earlier, no one has an absolute right to raise their biological offspring. We can now add—as if it needs stating—that those offspring are not in a position to choose, in any meaningful moral sense, their parents. If we share a commitment to limiting harms—wrongful setbacks to interests—a system of parental licensing for all can help improve our social system dramatically, not merely by limiting harms to children, but also by limiting harms abused children may do to others when they grow up and by limiting other sorts of intrusions that governments now commit but whose need would decrease. We may not be ready for such a system, but with further work on the psychological testing of potential parents and local testing of a licensing program before full implementation, it could be a way to help improve society across the board.