Rawls’ Original Position and Parental Licensing

The rights of children have been underdeveloped in social contract theories for centuries. Normally the rights of children are completely neglected, merely because children are viewed as the property of their parents. The idea that children are perceived as the property of their parents in social, as well as philosophical, discourse is detrimental when it comes to determining the rights of children. This problem becomes evident in situations in which a parent is accused of abusing his or her child. However, I believe that there is at least one social contract theory in the literature that can adequately defend a theoretical policy that would protect children from parental abuse and neglect. The social contract theory I am referring to is the one put forth by John Rawls in his book entitled *A Theory of Justice*. In this paper I will argue that individuals in Rawls’ conception of the original position ought to allow parental licensing.

Before I introduce my argument in support of my thesis, I believe it is pertinent to provide a brief description of what I mean by parental licensing. For the purpose of this essay whenever I make reference to parental licensing it will be parallel to the position put forth by Hugh LaFollette. LaFollette suggests that the relationship between a parent and his or her child is not categorically different from the relationship between a professional (i.e. doctor, lawyer, pharmacist, etc.) and the people he or she serves (328). LaFollette makes the claim that “professionals can cause so much harm because their clients are especially vulnerable to them” (329). The layperson does not have the requisite knowledge that a professional has in a certain field, which is why a person seeks the advice of a professional. A person may seek the advice of a lawyer because he or she does not have the requisite knowledge to defend him or herself in a court of law.
Similarly, a person may go to a doctor because he or she does not have the requisite knowledge to determine if his or her persistent cough is something to be medically concerned about. Lack of knowledge is why an individual is especially vulnerable when dealing with a professional. LaFollette sees the same relationship reproduced in the parent-child relationship. LaFollette states, “As a group, children are the most vulnerable members of a society. That is why it is especially important that someone shield them from harm” (331). Children cannot take care of themselves, because they lack the requisite knowledge to do so, which is why they rely on their parents. Based on the similar nature of the parent-child and professional-client relationships, LaFollette believes that parents should be licensed just as professionals are licensed (328). LaFollette sees three conditions that can theoretically justify licensing an activity (328). One condition for licensing is that: “People are engaged in an activity that may harm those they serve, either directly or by failing to fulfill their fiduciary duties; the harm can be significant and life-altering” (LaFollette 328). Another condition for licensing is that: “People can safely perform these risky activities only if they are competent” (LaFollette 328). Finally, the last condition that theoretically justifies licensing is that: “The benefits of the licensing program outweigh any theoretical reasons against it” (LaFollette 328).

From this point on, I will critically analyze LaFollette’s idea of parental licensing under Rawls’ conception of the original position to further my claim that individuals ought to allow parental licensing under such conditions.

The original position, according to Rawls, is a hypothetical situation in which individuals would agree to a certain conception of justice, which would amount to justice as fairness (11). Any social institution would be considered just if it were agreed upon by
individuals in a fair environment, such as that of the original position (Rawls 15).

According to Rawls, there are three characteristics that individuals have in the original position, which make it a fair and equal situation. Those characteristics are that each individual is rational, self-interested, and unbiased. These characteristics are vital, because they help individuals in the original position determine the principles of justice from a fair position (Rawls 12). We would then be able to say that parental licensing would be a just institution if we could reasonably conceive individuals in the original position agreeing to such a program. In order to determine whether or not individuals in the original position would agree to parental licensing, I will consider whether these three characteristics should lead an individual to accept parental licensing. I will first speak about what it means for an individual in the original position to be unbiased.

In order for individuals in the original position to be in a fair situation, so anything agreed upon will be considered just, they must be unbiased (Rawls 118). Rawls considers individuals in the original position to be behind a veil of ignorance. The veil of ignorance is a mechanism that takes away an individual’s biases when situated in the original position. Certain contingencies are not known by individuals behind the veil of ignorance, such as their own age, their conception of the good life, their own society, their own political situation, and other features of their psychology (Rawls 118). It is obvious that contingencies such as the ones just mentioned could lead to biases, and therefore an unfair situation, when trying to determine what constitutes just principles. In addition, it is taken for granted that individuals behind the veil of ignorance still know basic facts about human society, such as political affairs, social organization, laws of human psychology, and economic theory (Rawls 119). Based on what individuals know,
and do not know, behind the veil of ignorance, we can assume that individuals would know the institution of a family. However, an individual would not know his or her possible status in a family, since he or she is unaware of knowing age. Let us suppose that Rawls is correct in assuming that the institution of the family is just, and that the authority parents have over their children is also just (405). Even if we assume these claims about the family, it does not rule out the possibility that individuals in the original position would accept parental licensing. Since it is taken for granted that individuals under the veil of ignorance know human psychology, then, presumably, they would understand that parents who abuse, or neglect, their children could significantly harm them. Knowledge about human psychology, and the fact that individuals do not know their own age behind the veil of ignorance, should therefore lead individuals to accept parental licensing, rather than reject it.

The previous argument is not sufficient to show that individuals should accept parental licensing in the original position. However, an understanding of what it means for a person to be rational and self-interested in the original position, according to Rawls, strengthens the argument as a whole. Rawls considers a rational person to have “a coherent set of preferences between the options open to him…[whereby] he follows the plan which will satisfy more of his desires rather than less…[and] that…[he] does not suffer from envy” (124). What it means for individuals in the original position to not be envious is that rational individuals are mutually disinterested in each other’s affairs (Rawls 125). Rawls makes the assumption that rational individuals in the original position try to advance their ends to the highest limit, without worrying about their success relative to others (125). Rational individuals attempt “to win for themselves the
highest index of primary social good” (Rawls 125). Primary social goods refer to dispositions of society such as rights, liberties, and opportunities (Rawls 54). Taking into consideration the characteristics of a rational individual in the original position, such a person should not reject parental licensing. Let us consider the liberty known as freedom of the person that is protected by the Principle of Equal Liberty, which I will discuss at length later on in this essay. It could reasonably be assumed that a rational individual behind the veil of ignorance would accept principles of paternalism within a family, for children. It would be wrong to assume that the same individual would not also accept parental licensing. The rational individual would not know his or her age, but would understand that parents do need authority over their children based on what he or she knows about human psychology. However, this rational person would still also understand that abuse and neglect by a parent could cause significant damage to a child based on what he or she know about human psychology. By accepting parental licensing, the rational individual still realizes that principles of paternalism are needed between parents and their children, but also furthers his or her attempt at maximizing primary social goods by protecting his or her liberty of freedom of the person. Since rational individuals in the original position are always trying to get the maximum primary social goods, then they should also accept parental licensing. Rawls believes that the rational individual attempts to maximize his or her self-interest based on a specific rule, which I will discuss herein.

Rawls suggests that the way the original position is set up will lead rational individuals to choose principles of justice based on the maximin rule. For an individual to follow the maximin rule means that he or she must “rank alternatives by their worst
possible outcomes” and choose “the worst outcome of which is superior to the worst out-comes of the others” (Rawls 133). Rawls suggests that individuals in the original position to do not assume that they will be put in the worst situation. However, the veil of ignorance forces them to choose the principles of justice to protect themselves from the possibility of being placed in the worst situation. There are three key features to the maximin rule. The first feature is that individuals who follow the maximin rule do not account for the likelihood of all possible circumstances (Rawls 134). The second feature states individuals following the maximin rule do not care about a greater possible payoff than the minimum possible payoff (Rawls 134). The third feature claims individuals following the maximin rule conceptualize the rejected alternatives to the superior worst outcome as highly risky, which are outcomes that they can hardly accept (Rawls 134). Although Rawls speaks of the maximin rule in terms of economic situations for the most part, I believe it can also be applied to social situations as well, such as the parent-child relationship. It should be noted that applying the maximin rule to the parent-child relationship does not mean that children as a whole are to be considered in the worst situation, but that certain relationships between a parent and child can be considered to be worse than others.

There is one parent-child relationship that would arguably produce the minimum possible payoff for a child. What I consider this parent-child relationship to be is the non-loving parent. The non-loving parent is not physically, or sexually, abusive to his or her child, or neglectful in any way, but simply does not love his or her child. The non-loving parent will still help his or her child in any way he or she possibly can and for any reason, but he or she does so in a way that is not affectionate. Furthermore, let us assume
that this non-loving parent competently provides care for his or her child until his or her child reaches a certain age, at which time the parent’s legal obligation concludes. I believe that this level of care is the bare minimum that should be required from a parent-child relationship. This non-loving parent is what I determine to be the superior of the worst possible outcomes of a parent-child relationship. Now, let us further assume that the individuals in the original position also accept a non-loving parent to be the minimum possible payoff that a child should expect to get from a parent-child relationship. Once individuals in the original position accepted a non-loving parent to be the minimum possible payoff for a child, they would have to determine principles that would justly maximize such an outcome in accordance with the maximin rule. As I see it, parental licensing would be the only just institution that individuals in the original position should propose to ensure that children get at least the minimum possible payoff from a parent-child relationship. This argument can be strengthened if we remember the first two conditions to licensing that LaFollette states. Parenting is unquestionably an activity that can cause significant harm to a child either directly (i.e. abuse) or by failing to fulfill their fiduciary duties (i.e. neglect). Furthermore, an individual can only be a good parent if he or she is competent, which means that he or she would have the requisite knowledge of how to provide for, and take care of, a child. For example, we would not say that a parent is competent if he or she thought that his or her four-year-old child should make his or her own dinner. It is implausible to think that individuals in the original position would accept the possibility of being a child with incompetent or abusive parents. The maximin rule that individuals follow in the original position would not allow them to accept such an outcome. By following the maximin rule, an individual is risk averse,
which means such an individual only looks to maximize the superior of the worst possible outcomes. It would obviously be too risky for an individual to accept being the child of a parent who was incompetent or abusive. Although individuals in the original position should accept parental licensing based on the maximin rule, some people may have objections to parental licensing. However, it is not clear that any objection to parental licensing would be substantiated, because it would violate the Principle of Equal Liberty.

Rawls identifies two principles of justice that he believes would be agreed upon by individuals in the original position (52). However, for the purposes of my argument it is only necessary to look at the first principle, which is the Principle of Equal Liberty. The Principle of Equal Liberty states: “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all” (Rawls 220). The list of basic liberties that are protected by the Principle of Equal Liberty are political freedom, freedom of speech and assembly, liberty of conscience, freedom of thought, freedom of the person, right to hold personal property, and the freedom from arbitrary arrest and seizure (Rawls 53). Given these basic liberties, I will determine if possible arguments against parental licensing can be substantiated or not. I will first address an objection that LaFollette considers, which is the argument for the right to have children (334).

LaFollette describes the argument of the right to have children to mean three different claims. There is one claim that is utterly implausible, which is that the state (or others) should provide children to people who are incapable of having a child (LaFollette 334). However, the two other claims that LaFollette believes to come from the argument
for the right to have children demand further consideration. I will first consider the claim that if people have the ability to procreate, then no one should forbid them from procreating (LaFollette 334). On a prima facie look at this claim, it may seem to be a strong claim, but when it is considered in the realm of the original position, it does not have a leg to stand on. Under the Principle of Equal Liberty, there is no basic liberty listed that would suggest that an individual has a right to procreate. Someone who supported the idea that individuals do have a right to procreate may suggest that this right is covered under the freedom of the person. However, closer analysis of what freedom of the person truly means would suggest otherwise. Rawls describes freedom of the person to be “freedom from psychological oppression and physical assault and dismemberment” (53). By this description, freedom of the person does not necessarily mean that people have the liberty to do what they please with their body, but rather that they have a negative right to not be harmed in any manner. Also, the idea that if someone has the ability to do ‘x’, then they have a right to do ‘x’ raises questions. I do not believe that individuals in the original position would suggest that if someone has the ability to kill, then he or she also has a right to kill. Although these are two drastically different scenarios, they demonstrate the problem that arises in the argument of the right to procreate. Having an ability to do something does not automatically give someone a right to act on that ability. Such a claim cannot be substantiated by the Principle of Equal Liberty.

LaFollette considers the negative right to rear as another claim that can be derived from the right to have a child argument (334). This claim refers to the idea that “If people have children under their control (whether by procreation or other means), then no
one should forbid them from rearing them” (LaFollette 334). However, just like the right to procreate, this claim does not seem to be supported by the Principle of Equal Liberty. An individual may suggest that the negative right to rear claim is supported by the right to hold personal property. An individual could argue that children are the property of their parents, so parents have a right to rear their child in any manner they please. However, it could be argued that individuals in the original position would not allow anyone to be the property of another, no matter what the circumstances were. Rational individuals behind the veil of ignorance should not accept a principle of justice whereby some people were considered the property of others. Accepting such a principle would be far too risky, since there would be a high potential for abuse in such a situation (i.e. slavery). In fact, Rawls states that there is not necessarily a restriction on the inequality that is permissible in the general conception of justice, but that it only requires that everyone’s position be improved (55). It is hard to imagine a scenario in which someone’s position could be improved who was considered to be another person’s property. Individuals in the original position should realize that being considered another person’s property is unjust since they are rational, self-interested, and follow the maximin rule. Based on all of the previously stated factors, it does not seem that the negative right to rear a child can be supported by the Principle of Equal Liberty. Overall, possible objections to parental licensing based on the right to have a child argument are unwarranted from the original position.

Susan Moller Okin rightly points out, “Rawls…specifically mentions the family as a just institution…however, [he says] not to consider whether the family is ‘in some form’…just, but to assume it” (185). Although this may be true, I believe that Rawls is
safe in assuming that the family is a just institution, at least within his own theory of
justice. That is why I believe that I am able to attempt to justify the claim that
individuals in the original position ought to allow parental licensing. I have shown how
the three characteristics that Rawls believes to belong to all individuals in the original
position should lead them to allow parental licensing. I have also shown how the
maximin rule, which Rawls believes individuals will follow in the original position,
ought to lead them to accept parental licensing. Finally, I provided possible objections
individuals might have to parental licensing, which I argued were unwarranted based on
the Principle of Equal Liberty. It should be noted that my argument only determines
whether or not the theoretical policy of parental licensing is justified under Rawls’ theory
of justice. Therefore, this paper does not cover whether or not such theoretical
justifications are of practical value in a society whose principles of justice were not
formed under fair conditions, such as the conditions of the original position.

Work Cited
LaFollette, Hugh. "Licensing Parents Revisited." Journal Of Applied Philosophy 27.4
Interpretations and Political Theory. Ed. Mary Lyndon Shanely, and Carole