REVISITING DIVINE, NATURAL, AND COMMON LAW FOUNDATIONS UNDERLYING PARENTAL LIBERTY TO DIRECT AND CONTROL THE UPBRINGING OF CHILDREN

WILLIAM WAGNER, NICOLE WAGNER, AND JEREMY MARKS*

ABSTRACT

Notwithstanding scientific evidence showing unfinished childhood brain development in the area of judgment, international law continues a contemporary jurisprudential drift toward bestowing broad rights of decision-making on children. In our article we revisit, therefore, a jurisprudence confirming what perhaps every fit parent already knows; that is, that parents know best what is in the best interest of their children. Historically, divine, natural, and common law traditions all support an underlying legal philosophy recognizing an inalienable parental liberty to direct and control the upbringing of children. We review each of these jurisprudential traditions suggesting perhaps that, at least in the upbringing of children, some jurisprudential regress might be progress.

---

* Professor William Wagner, JD is an internationally recognized expert in constitutional law. As lead amicus counsel in various matters before the United States Supreme Court, he authored briefs on behalf of various Christian organizations. He also authored written testimony, evidence, and briefs in such forums as the Swedish Supreme Court, the United States Congress, and the United Kingdom Parliament. He has addressed many executive, legislative, parliamentary, and judicial audiences throughout the world and presented at various diplomatic forums, including the United Nations Human Rights Council in Geneva. Professor Wagner's public service posts have included serving as a Federal Judge in the United States Courts, Legal Counsel in the United States Senate, Senior Assistant United States Attorney in the Department of Justice, and American Diplomat. His writing is featured in numerous journals, books, and other publications. Nicole Wagner is an MPA Candidate at the School of Public Affairs and Administration at Western Michigan University. Jeremy L Marks, JD is an Associate Attorney at Shermeta, Adams & Von Allmen, PC. He is admitted to the State Bar of Michigan and is licensed to practice law before various Federal courts. His practice areas include creditor rights, consumer law, and bankruptcy law. The authors gratefully acknowledge the contributions of Research Assistant Ross Holec.

Modern studies demonstrate that the parts of the brain responsible for judgment in decision-making remain underdeveloped throughout the teen years and into early adulthood.[1] Notwithstanding the scientific evidence, international law continues a contemporary jurisprudential drift toward bestowing broad rights of decision-making on children. For example, the United Nations Convention on the Rights of the Child rejects the traditional jurisprudential approach recognizing parental decision-making authority as an inviolable standard limiting government action. In its place the treaty substitutes a system where government is legally obligated to interfere in parental decisions in ways that ensure its own view of what is in 'the best interest of the child'. Specifically, Article 3(1) provides that '*[i]n all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.'[2] Replacing the inalienable

---

[1] See Nitin Gogtay et al, 'Dynamic Mapping of Human Cortical Development During Childhood through Early Adulthood' (2004) 101 *PNAS: Proceedings of the National Academy of Sciences of the United States of America* 8174, 8177; Elizabeth R Sowell et al, 'In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions' (1999) 2 *Nature Neuroscience* 859, 860-1 <http://www.loni.ucla.edu/~esowell/nn1099_859.pdf>; C B Romine and C R Reynolds, 'A Model of the Development of Frontal Lobe Functioning: Findings from a Meta-Analysis' (2005) 12(4) *Applied Neuropsychology* 190, 190-201, abstract accessible at <http://ukpmc.ac.uk/abstract/MED/16422660>; Jay Giedd, 'Structural Magnetic Resonance Imaging of the Adolescent Brain' (2004) 1021 *Annals of the New York Academy of Sciences* 77, 77-85, abstract accessible at <http://onlinelibrary.wiley.com/doi/10.1196/annals.1308.009/abstract/>; Sarah-Jayne Blakemore, 'Imaging Brain Development: The Adolescent Brain' (2012) 61 *Neuroimag*e 397, 397-406, abstract accessible at <http://www.sciencedirect.com/science/article/pii/S1053811911013620>. See also John R Best and Patricia H Miller, 'A Developmental Perspective on Executive Function' (2010) 81 *Child Development* 1641, 1641-60.

[2] *Convention on the Rights of the Child* art 3(1). It is important to note that traditionally, governments only intervened and made decisions in the best interest of the child after the government proved the parent abdicated the parental role (ie, due to

jurisprudential standard that parents are best equipped to control and direct the upbringing of their children, the treaty instead confers upon the child a right to have his or her views be given due weight *in all matters affecting the child*.[3] Other parts of the treaty involve a child's rights in connection with decisions concerning education, religious instruction, and health.

Given the children's unfinished brain development in the area of judgment, we thought it prudent in this article to revisit a jurisprudence confirming what perhaps every fit parent already knows; that is, that *parents* know what is in the best interest of their children better than their children or a U.N. bureaucrat does. Historically, divine, natural, and common law traditions all supported an underlying legal philosophy recognizing an inalienable parental liberty to direct and control the upbringing of children. It is to these traditions that we now turn.

I DIVINE LAW TRADITIONS

A *Parental Authority in the Mosaic Covenant*

In the ancient Holy Scriptures, when Moses introduced the Divine Law, God bestowed on parents a duty to provide their children with moral guidance.[4] Moses instructed children: 'hHnor your father and your mother, as the Lord your God has commanded you, so that you may live

physical or sexual abuse of the child). Now, in any disagreement between a fit parent and child, the treaty puts law-abiding parents in the same position as an abusive parent when the government intervenes in connection with its obligations under the treaty.

[3] *Convention on the Rights of the Child* art 12(1) provides: 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, *the views of the child being given due weight* in accordance with the age and maturity of the child' (emphasis added).

[4] *Deuteronomy* 6:1-9, 11:19 (New International Version).

long and that it may go well with you in the land the Lord your God is giving you.'[5]

Throughout the law and the prophets, spiritual messages passed from parent to child. When God made his transcendent covenant with Abraham he, *inter alia,* instructed Abraham and his offspring to keep the covenant and, in this regard, instructed the parent to direct the upbringing of his children:

> Then God said to Abraham, "As for you, you must keep my covenant, you and your descendants after you for the generations to come. … For I have chosen him, so that he will direct his children and his household after him to keep the way of the Lord by doing what is right and just, so that the Lord will bring about for Abraham what he has promised him."[6]

B *Parental Authority in Wisdom Literature*

In many of the chapters in *Proverbs* we find parents sharing sacred wisdom with their children. *Proverbs* 1:8-9 urges 'listen, my son, to your father's instruction and do not forsake your mother's teaching.' *Proverbs* 4:1-6 implores:

> Listen, my sons, to a father's instruction; pay attention and gain understanding. I give you sound learning, so do not forsake my teaching. For I too was a son to my father, still tender, and cherished

---

[5] Ibid 5:16. See also *Ephesians* 6:1-3 (New International Version). Here God also promises a long life and that it will go well for those who follow the Commandment.

[6] *Genesis* 17:9 and 18:19 (New International Version) It should also be noted that in the same way that biological parents spiritually advise their offspring, so do adoptive parents. The Biblical Queen Esther followed the advice of her adoptive father Mordecai and prevented genocide. To read her story, see the *Book of Esther*, especially *Esther* 2:5-7 (New International Version), which clarifies that Mordecai is Esther's adoptive father; *Esther* 4:6-12, in which Mordecai advises her; and *Esther* 5:1-5, 7:3, and Chapter 8, in which her heroic actions and their results are recorded.

> by my mother. Then he taught me, and he said to me, "Take hold of my words with all your heart; keep my commands, and you will live. Get wisdom, get understanding; do not forget my words or turn away from them. Do not forsake wisdom, and she will protect you; love her, and she will watch over you."[7]

Later in *Proverbs*, God reveals that parents are to use appropriate discipline, that is to say, discipline grounded in love.[8] *Proverbs* 22 advises parents to 'train' their children in the way they should go, so that when they grow old they '[would] not depart from it.'[9]

C *Parental Authority in the Gospels*

In the *Gospel of Luke*, Jesus sought training from both his Father in Heaven and his parents on earth. When he was twelve years old his parents brought him to Jerusalem. There he took the opportunity to abide in the temple (his Father's house) where he conversed with teachers of the law. While immersed in his father's business, his caravan left without him. Discovering he was missing, his earthly parents, Mary and Joseph, looked for him first among friends and relatives. Then, not finding him among his earthly kin, they discovered him in the house of God the Father.[10] Once reunited with his earthly parents Jesus travelled back with them to Nazareth and 'was obedient to them.'[11] There, he 'grew in wisdom, stature and favor with God and men'.[12] Jesus, in his ministry,

---

7 See also the opening verses of *Proverbs* 2, 3, 5, 6, 7, and 31, and *Proverbs* 8:32 (New International Version).

8 Ibid 13:24.

9 Ibid 22:6.

10 *Luke* 2:41-52 (New International Version).

11 Ibid 2:51.

12 Ibid 2:52.

repeatedly reiterated the command to honor one's father and mother, and rebuked teachers of the Law who distorted that command.[13]

D *Parental Authority in the Early Church*

The Apostle Paul's letter to the Ephesians encourages parents to bring up their children 'in the training and instruction of the Lord.'[14] It also commands, 'children, obey your parents in the Lord, for this is right'.[15] Obedience to parents is named the 'first commandment';[16] it is naturally the first lesson that any child learns. Thus, the Bible clearly implies that in children's minority, their most important decision-makers are parents. Having established this First Principle in the context of Divine Law, let us examine the Natural Law traditions.

II NATURAL LAW TRADITIONS

A *The Idea of Natural Law*

Sir Edmond Coke defined Natural Law as 'that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction.'[17] Some, who seek to discover the Natural Law, begin their quest with the understanding that God writes it on each human heart. Others, meanwhile, embark on their journey postulating that the Natural Law is hardwired into the human species through instinct and rational

---

13 See *Matthew* 15:4-9, 19:19 (New International Version); *Mark* 7:7-13, 10:18-19 (New International Version); *Luke* 18:19-20 (New International Version).

14 *Ephesians* 6:4 (New International Version).

15 Ibid 6:1. See also *Colossians* 3:20 (New International Version).

16 *Ephesians* 6:2. Additionally, compare elsewhere where God delegates to the state the authority to govern other aspects of the world (ie, maintaining order and security, punishing wrongdoing). The purpose of this sphere is articulated in *Romans* 13:1-6 (New International Version).

17 *Calvin's Case* (1608) 7 Coke Rep 12 (a); 77 ER 392 (Coke), as cited by Augusto Zimmerman, 'Evolutionary Legal Theories – The Impact of Darwinism on Western Conceptions of Law' (2010) 24(2) *Journal of Creation* 108, 113 <http://creation.com/evolutionary-legal-theories#txtRef49>.

endowment.[18] Similar ideas flow from both ideological beginnings due to a common philosophical denominator, namely, that the Natural Laws are internal to every human. In the following section we review various matters relating to parents and their children through the jurisprudential lens of the Natural Law.

B *Parental Love and Care*

When it comes to parents and children, the Natural Law begins with practical assessment about the natural conditions of childrearing. Francisco Hutchinson observed that the task of bringing up children requires 'perpetual labor and care,' and such effort, he thought 'could not be expected from the more general ties of benevolence.'[19] For humans to be motivated to undertake the task of parenting, they must experience a 'desire, sufficient to counter-balance the pains of labor, and the sensations of the selfish appetites [because] parents must often check and disappoint their own appetites, to gratify those of their children'.[20]

Generally speaking, Natural Law philosophers teach that such desire is deeply embedded in human nature to surmount the biological challenges

---

[18] Compare, for example, Sir Edmond Coke, above n 17, with Beccaria, who defined Natural Laws as 'those which nature dictates in all ages to all men, for the maintenance of that justice which she (say what they will of her) hath implanted in our hearts.' Marquis Beccaria, *An Essay on Crimes and Punishments* (Anonymous trans, W C Little, 1764, 1872 ed) 202, accessible at The Online Library of Liberty <http://files.libertyfund.org/files/2193/Beccaria_1476_Bk.pdf>. Also, Hobbes wrote that '[a] law of nature, *lex naturalis*, is a precept or general rule, found out by reason …' Thomas Hobbes, 'Leviathan' in Sir William Molesworth (ed), *The English Works of Thomas Hobbes of Malmesbury* (John Bohn, first published 1651, 1839-45 ed) vol 3, 75, accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/585/Hobbes_0051-03_EBk_v6.0.pdf>.

[19] Francis Hutcheson, *An Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense* (Aaron Garrett ed, Liberty Fund, first published 1742, 2002 ed) 39, accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/885/Hutcheson_0150_EBk_v6.0.pdf>.

[20] Ibid.

that parents face in raising their offspring up from the helpless state of an infant. Burlamaqui wrote, for example:

> Man considered in his birth is weakness and impotency itself, in regard as well to the body, as to the soul. It is even remarkable, that the state of weakness and infancy lasts longer in man than in any other animal. He is beset and pressed on all sides by a thousand wants, and destitute of knowledge, as well as strength, finds himself in an absolute incapacity of relieving them: he is therefore under a particular necessity of recurring to external assistance. Providence for this reason has inspired parents with that instinct or natural tenderness, which prompts them so eagerly to delight in the most troublesome cares, for the preservation and good of those whom they have brought into the world.[21]

Similarly, according to Plutarch, nature bestows in man 'a kind love and tender affection towards his children.'[22] This love exists independently of the gift of reason and does not depend upon the influences of civilization as evidenced by the parental behaviors of animals, which propagate their species without regard to individual loss or gain.[23]

---

[21] Jean-Jacques Burlamaqui, *The Principles of Natural and Politic Law* (Thomas Nugent trans, Petter Korkman ed, Liberty Fund, first published 1747, 2006 ed) 61, accessible at The Online Library of Liberty <http://files.libertyfund.org/files/1717/1347_LFeBk.pdf>.

[22] Plutarch, 'Of the Natural Love or Kindness of Parents to their Children' in Ernest Rhys (ed), *Plutarch's Moralia: Twenty Essays* (Philemon Holland trans, E P Dutton, first published 1717, 1911 ed) 296, accessible at Internet Archive (18 March 2010) <http://archive.org/details/plutarchsmoralia00plutuoft>.

[23] Ibid 290-303. Plutarch shared this illustration, among others:

Our hens which we keep about our houses so ordinarily, and have daily in our eyes, how carefully do they look unto their young chickens whiles they receive some under their wings, which they spread and hold open … that they might creep in, others they suffer to mount upon their backs, gently giving them leave to climb and get up on every side, and this they do not without great joy and contentment, which they testify by a kind of clucking and special noise that they make at such a time; if when they are alone, without their chickens, and they have no fear but for themselves, a dog or serpent come in their way, they fly from them; let their brood be about them when

The parental affections, Plutarch theorized, 'appeareth no less in mankind than in the wild beasts.'[24] He acknowledged that parental love could be 'blemished and obscured by occasion of vice that buddeth up afterwards.'[25] Yet such vices do not disprove the existence of inborn parental affections, he argued, 'otherwise we might as well collect and say that men love not themselves because many cut their own throats, or wilfully fall down headlong from steep rocks and high places.'[26] Such vices that render parental instinct ineffectual he classified 'like as those other passions and maladies of the mind'[27] which 'transport a man out of his own nature, and put him besides himself, so as they testify against themselves that this is true, and that they do amiss'.[28]

In a similar spirit, Adam Smith taught that love for one's offspring was entrenched in biological design. He wrote:

> Nature in its wisdom has, in most and perhaps all men, installed a much stronger drive towards parental tenderness than towards filial respect. The continuance and propagation of the species depend entirely on the former, and not at all on the latter. The existence and

---

such a danger is presented, it is wonderful how ready they will be to defend the same, yea, and to fight for them, even above their own power: at 295.

24 Ibid 302.

25 Ibid.

26 Ibid.

27 Ibid.

28 Ibid. In addition, Burlamaqui wrote:

With regard to those who in the most enlightened and civilized countries seem to be void of all shame, humanity, or justice, we must take care to distinguish between the natural state of man, and the depravation into which he may fall by abuse, and in consequence of irregularity and debauch. For example, *what can be more natural than paternal tenderness? And yet we have seen men who seemed to have stifled it, through violence of passion, or by force of a present temptation, which suspended for a while this natural affection.* What can be stronger than the love of ourselves and of our own preservation? It happens, nevertheless, that whether through anger, or some other motion which throws the soul out of its natural position, a man tears his own limbs, squanders his substance, or does himself some great prejudice, as if he were bent on his own misery and destruction. Burlamaqui, above n 21, 141 (emphasis added).

> survival of the child usually depends altogether on the care of the parents, whereas parents' existence and survival seldom depend on the care of the child. That's why Nature has made the former affection so strong that it generally requires not to be aroused but to be moderated … But moralists do urge us to an affectionate attention to our parents, and to make a proper return to them in their old age for the kindness that they showed us in our youth. In the Ten Commandments we are commanded to honour our fathers and mothers; and nothing is said about our love for our children, because Nature had sufficiently prepared us for the performance of this latter duty.[29]

Pufendorf regarded parents' empathy for their offspring as a natural extension of self love.[30] He wrote:

> Frequently parents would prefer to have transferred to themselves the pain which they see their children suffering. Thus it is well established that many have met death with equanimity, in order to save others united to them by a special bond. But, in truth, this was done either because, as the result of an intimate relationship, they regarded the good or evil of others as their own, or else because, by that display of affection or fidelity, they were on the way to acquire some special good for themselves. Thus some parents rejoice more effusively in the blessings of their children than in their own blessings, because the blessing which affects equally both themselves and their offspring is in their judgment doubled. Thus we would often be willing to redeem the suffering of one of our

---

[29] Adam Smith, *The Theory of the Moral Sentiments* (David Daiches Raphael and Alec Lawrence Macfie eds, Liberty Fund, first published 1759, 1982 ed) vol 1, 169, accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/192/Smith_0141-01_EBk_v6.0.pdf>.

[30] Samuel von Pufendorf, *Two Books of the Elements of Universal Jurisprudence* (William Abbott Oldfather trans, Thomas Behme ed, Liberty Fund, first published 1660, 2009 ed) vol 1, 206, accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/2220/Pufendorf_1495_EBk_v6.0.pdf>.

> loved ones by our own suffering, because the weapon, as it were, which seeks us would be inflicting a more severe wound by passing through so dear a body.[31]

Thus, to Pufendorf, Smith, Plutarch, and Burlamaqui alike, parental love was a basic component of the parent-child relationship. Another ubiquitous component is parental authority.

C *Parental Authority*

Thomas Hobbes theorized that parental authority emerges out of children's dependence upon their caregivers for survival. He declared that 'preservation of life' is 'the end, for which one [person] becomes subject to another'. Therefore, children must obey the one on whom they depend.[32]

More generally speaking, Hobbes theorized that in order to protect life and the materials that sustain life, humans in the state of nature which he thought to be a state of unlimited license, formed social contracts; that is to say they made collective agreements to lay down a portion of liberty in subjugation to a ruler, to the end that each individual's life and the materials used to sustain it might be secured against violence and theft.[33]

Now, one might observe in the context of established civilization where each person must earn an honest living and respect the property rights of neighbors, the immediate survival of children ceases to be a sufficient end of parenting; if children when they are grown are to enjoy what liberty is retained under contract, and if they are to raise up children of their own, then they must first be equipped to become citizens capable of

---

31 Ibid.
32 Hobbes, above n 18, vol 3, 115.
33 Ibid 75-6.

independence. In Pufendorf's view, parental authority arises from the necessity that children should be brought up to become 'fit members of human society'.[34] Conducive to this end, nature endows parents with a proclivity to care for their children. Pufendorf reasons that 'for the exercise of that care there is needed the power to direct the actions of children for their own welfare, which they do not yet understand themselves, owing to their lack of judgment.'[35]

Pufendorf observed that although humans sacrifice some degree of sovereignty when they bow to the authority of the state, parents in almost every civilization retain the power to bring up their children.[36] They first acquire this power when they give their children life, because 'in the way in which it is most natural for him who is the owner of the thing to be the owner of the fruits' so it is natural that 'he who is the master of the body out of which the offspring was generated, has the first place in acquiring sovereignty over offspring'.[37] This sovereignty comes with social responsibility: 'In taking up the infant, the parent in deed declares that he

---

34 Samuel Pufendorf, *The Whole Duty of Man According to the Law of Nature* (Andrew Tooke trans, David Saunders and Ian Hunter eds, Liberty Fund, 2003 ed) 179 [trans of: *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo* (first published 1673)], accessible at The Online Library of Liberty <http://files.libertyfund.org/files/888/0217_LFeBk.pdf>.

35 Samuel Pufendorf, 'On the Duties of Parents and Children' in *De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo* (Frank Gardner Moore trans, Oceana Publications, revised ed, 1964) [1]-[2], accessible at Constitution Society <http://www.constitution.org/puf/puf-dut_203.txt>.

36 See Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (C H Oldfather and W A Oldfather trans, 1995 ed) vol 2, 923. Pufendorf wrote: 'Parents in societies, where they themselves are subjects, retain a power over their children, and have as much right to their subjection, as those who are in the state of nature.' See also John Locke, *Two Treatises of Government* (Hackett Publishing, first published 1690, 1980 ed) vol 2, 35, accessible at <http://epublish.biz/pdf/Two_Treatises_of_Government.pdf>.

37 Samuel von Pufendorf, *Two Books of the Elements of Universal Jurisprudence* (William Abbott Oldfather trans, Thomas Behme ed, Liberty Fund, first published 1660, 2009 ed) vol 1, 244 accessible at (September 2011) <http://files.libertyfund.org/files/2220/Pufendorf_1495_EBk_v6.0.pdf>.

will fulfill the obligation laid upon him by nature, and will bring it up well, as far as in him lies'.[38] The infant, who does not yet posses the ability to agree formally, agrees implicitly, because, 'it is presumed that, if the infant had had the use of reason at the time when it was taken up, it would have consented expressly to such sovereignty of its parent over it without which a suitable bringing up is impossible'.[39] Nature bestows on the parent enough power to meet children's needs and guide their behaviors up until the point where they are 'able to look out for themselves and to temper their actions to their wills, and see to it that they become useful members of human society'.[40] Thus, the parent directs the child so that the child might one day become a free agent, capable of moral decision-making and independent living.

John Locke believed that the Creator of both parent and child designed this natural contract to occur. He taught that parents possessed authority because 'God hath made it their business'[41] to care for their children, and 'hath placed in them suitable inclinations of tenderness and concern to temper this power' so that they 'apply it, as his wisdom designed it, to the children's good, as long as they should need to be under it.'[42] He affirmed that parents hold no more power than is necessary 'to give such strength and health to [the children's] bodies, such vigour and rectitude to their minds'[43] so as to 'best fit'[44] them 'to be most useful to themselves and

38 Ibid 244.
39 Ibid 245.
40 Pufendorf, above n 36, vol 2, 917.
41 Locke, above n 36, 32.
42 Ibid.
43 Ibid.
44 Ibid.

others'.[45] Locke believed parents possess a natural right to make decisions for their children for their welfare and education.[46]

Grotius in his writings on the Natural Law likewise affirmed parental authority.[47] Drawing from classical wisdom, he identified three stages where expression of parental authority varies, based on the offspring's stage of life:

> The first is that ["] of *imperfect judgment*["], as Aristotle calls it, while there is a lack of ["]discretion["], as the same author elsewhere says. The second is the period of *mature judgment*, but while the son still remains a part of the family of the parents, that is ["]so long as he has not separated from it["], as Aristotle says. The third is the period after the son has *withdrawn from the family*.[48]

D *Three Stages of Parental Authority*

1 *Parental Authority over Children Who are Not Yet Rational*

In the stage of imperfect reason, Grotius wrote 'all the actions of children are under the control of the parents' because 'it is fair that he who is not able to rule himself be ruled by another.'[49] Similarly, Richard Price wrote that in so long as children cannot find their own way and they have no resources or means of acquiring them, one can infer that 'the Author of Nature has committed the care of them to their parents, and subjected

---

45 Ibid.

46 John Locke, *The Second Treatises of Government* (Prentice Hall, first published 1690, 1952 ed) 96.

47 Hugo Grotius, 'The Preliminary Discourse' in *The Rights of War and Peace* vol 1 [15]. Grotius wrote that '[b]y [g]eneration, [p]arents, both [f]ather and [m]other, acquire a [r]ight over their [c]hildren…'

48 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Francis W Kelsey trans, James Scott ed, first published 1625, 1925 ed) vol 2, 231.

49 Ibid.

them to their absolute authority'.[50] Hobbes also wrote about this.[51] This state of parental authority entails that in matters not spoken for in the Natural Law parents may direct their children's upbringing according to their personal consciences. Thomas Aquinas, addressing the question of whether the young people should be indoctrinated and baptized without their parents blessing, wrote:

> The son naturally belongs to his father. Indeed at first he is not distinct in body from his parents, so long as he is contained in his mother's womb. Afterwards when he leaves the womb, before he has the use of reason, he is contained under his parents' care as in a sort of spiritual womb … *it would be against natural justice for a child to be withdrawn from his parents' care before he has the use of reason, or for any arrangement to be made about him against the will of his parents* ... before the use of reason the child is in the order of nature referred to God by the reason of his parents, to whose care he is naturally subject; and it is according as they arrange, that the things of God are to be done upon him.[52]

Reason, according to Montesquieu, 'comes only by slow degrees'.[53] During the period when reason is being developed, young citizens need

---

50 Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (Edward and Charles Dilly, 9th ed, 1776) 23, accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/1781/Price_0895_EBk_v6.0.pdf>.

51 Thomas Hobbes wrote: 'Because the first instruction of children, dependeth on the care of their parents, it is necessary that they should be obedient to them, whilst they are under their tuition.' Hobbs, above n 18, vol 3, 188.

52 Thomas Aquinas, *Aquinas Ethicus: Or, the Moral Teaching of St. Thomas* (Joseph Rickaby trans, Burns and Oates, 1892 ed) 183 [trans *of Summa Theologica – Prima Secundae, Secunda Secindae* (first published 1274)], accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/1965/Aquinas_1015-01_EBk_v6.0.pdf> (emphasis added).

53 Montesquieu wrote of humans: 'Their children indeed have reason; but this comes only by slow degrees. It is not sufficient to nourish them; we must also direct them: they can already live; but they cannot govern themselves.' Charles Louis de Secondat, Baron De Montesquieu,'The Spirit of Laws' in *The Complete Works of*

the rational oversight of their parents, even as much as they need physical nourishment.[54] Similarly, Locke wrote of the young citizen:

> To turn him loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free; but to thrust him out amongst brutes, and abandon him to a state as wretched, and as much beneath that of a man, as their's [sic]. This is that which puts the authority into the parents[sic] hands to govern the minority of their children.[55]

2 *Parental Authority over Offspring who are Rational, Yet Dependent*

Young adults enter what Grotius terms the second stage of life, 'mature reason,' only after they become competent to make grown-up decisions. Herein they posses 'a moral faculty of action'; they begin to please their parents out of 'filial affection, respect and gratitude' rather than out of moral incapacity.[56] Parents in this stage retain the right to require that their offspring's behavior conform to the interests of the family unit, of which they are still a part.[57] Nevertheless each young adult is free to think for himself or herself. Aquinas observed:

> After he begins to have the use of reason, he begins to be his own at last, and can provide for himself in things of divine or Natural Law; and then he is to be induced to the faith not by compulsion, but by persuasion; and he may even consent to the faith against the will of

Montesquieu (Thomas Nugent trans, T Evans, 1777 ed) vol 2, 111 [trans of: *De l'esprit des Lois* (first published 1748)] accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/838/Montesquieu_0171-02_EBk_v6.0.pdf>.

54 Ibid.

55 Locke, above n 36 at 32.

56 Grotius, above n 48, vol 2, 232.

57 Locke, above n 36, 32.

> his parents, and be baptized, but not before he has the use of reason.[58]

3 *Parents Relationships with Offspring who are Rational and Self Sufficient*

Once adults have physically 'withdrawn from the family' and established their own livelihoods, relying on their own reason, they enter Grotius's third stage. They continue to offer their parents love and gratitude, since 'the cause remains.'[59] Yet, they are 'in all things independent.'[60] Pufendorf affirms that parental power ceases once the offspring are able to care for themselves.[61] Likewise, he agrees that there remains a 'debt of honour and gratitude on the part of children towards parents, which in due course does not cease as long as the latter are among the living ...'[62]

---

58 Aquinas, *Aquinas Ethicus*, above n 52, 183.

59 Grotius, above n 48, vol 3, 231.

60 Ibid 233. Additionally, Richard Price wrote: 'There is a period when, having acquired property, and a capacity of judging for themselves, they become independent agents; and when, for this reason, the authority of their parents ceases, and becomes nothing but the respect and influence due to benefactors.': Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (Edward and Charles Dilly, 9th ed, 1776) 23 accessible at The Online Library of Liberty (September 2011) <http://files.libertyfund.org/files/1781/Price_0895_EBk_v6.0.pdf>.

61 Pufendorf, above n 34, 183.

62 Pufendorf, above n 30, 76. Pufendorf wrote:

Now among adventitious obligations there can be listed here the debt of honour and gratitude on the part of children towards parents, which in due course does not cease as long as the latter are among the living, although it might appear that cases could arise in which that obligation would utterly disappear; that is to say, when parents, without any compulsion of necessity, cast aside all care for the child born to them and expose it destitute of all human aid; or when, in later years, they shamefully neglect its education, or are otherwise heartlessly proceeding to destroy its well-being. For that obligation on the part of children proceeds primarily from the law of gratitude, and this regards antecedent benefactions: at 76-7.

Also, Locke wrote:

Though there be a time when a child comes to be as free from subjection to the will and command of his father, as the father himself is free from subjection to the will of anybody else, and they are each under no other restraint, but that which is common to them both, whether it be the law of nature, or municipal law of their country; yet this

Having established that parents have natural authority over their offspring, which extends to independence, we will now look at what Natural Law says about government's relationship to parental authority.

E *Parental vs Government Authority*

Locke, in his *Second Treatises on Government*, recognized an important distinction between the foundations of (1) a parent's right to govern the upbringing of their children, (2) a state's political power to govern for the security of society, and (3) a dictator's despotical power to take for self-enrichment – and raised a caution about the state confounding the categories:[63]

> First, then, Paternal or parental power is nothing but that which parents have over their children, to govern them for the children's good ...
>
> The affection and tenderness which God hath planted in the breast of parents towards their children, makes it evident, that this is not intended to be a severe arbitrary government, but only for the help, instruction, and preservation of their offspring …[64]
>
> And thus, 'tis true, the paternal is a natural government, but not at all extending itself to the ends and jurisdictions of that which is political. The power of the father doth not reach at all to the property of the child, which is only in his own disposing.[65]

freedom exempts not a son from that honor which he ought, by the law of God and nature, to pay his parents: Locke, above n 36, 33.

63 Locke, above n 36, 79. Locke wrote: 'Though I have had occasion to speak of these separately before, yet the great mistakes of late about government, having, as I suppose, arisen from confounding these distinct powers one with another, it may not, perhaps, be amiss to consider them here together.'

64 Ibid 79.

65 Ibid.

> Secondly, Political power is that power, which every man having in the state of nature, *has given up into the hands of the society*, and therein to the governors, whom the society hath set over itself, with this express or tacit trust, that it shall be employed for their good, and the preservation of their property …[66]

> *Nature gives the first* of these, viz paternal power to parents for the benefit of their children during their minority, to supply their want of ability, and understanding how to manage their property ... *Voluntary agreement gives the second*, viz political power to governors for the benefit of their subjects, to secure them in the possession and use of their properties. *And forfeiture gives the third* despotical power to lords for their own benefit, over those who are stripped of all property.[67]

According to Locke, the powers of parents and of the state 'are so perfectly distinct and separate' and are 'built upon so different foundations' and 'given to so different ends' that 'every subject that is a father, has as much a paternal power over his children, as the prince has over his.'[68] Moreover, 'every prince, that has parents, owes them as much filial duty and obedience, as the meanest of his subjects do to theirs; and can therefore contain not any part or degree of that kind of dominion, which a prince or magistrate has over his subject.'[69] Hobbes provided a different perspective; unlike Locke, who considered powers separate by nature in accordance with a benevolent design, Hobbes, generally speaking, treated social powers as hierarchical.[70]

---

66 Ibid (emphasis added).

67 Ibid 80 (emphasis added).

68 Ibid 35.

69 Ibid.

70 Concerning children, Hobbes wrote, '[h]e that hath right of governing them may give authority to the guardian.' Hobbes, above n 18, 93.

It is important to note that Locke's separation between state and parental powers does not preclude government from providing free public education and other programs which could improve the quality of life; for if parents, in a modern context, have the right to direct their children's upbringing, they may choose to enrol them in a public school system. By making this choice, parents do not relinquish parental power to the government any more than business owners relinquish control over their businesses when they delegate book-keeping to their accountants. Natural law writers recognize that parents may delegate portions of their children's upbringing while still retaining authority.

Pufendorf wrote:

> [A]lthough the obligation to educate their children has been imposed upon parents by nature, this *does not prevent the direction of the same from being entrusted to another*, if the advantage or need of the child require, *with the understanding, however, that the parent reserves to himself the oversight of the person so delegated.*[71]

We also note that the separation of state and parental powers does not impede government from protecting children from abuse, neglect, or endangerment. Since the state possesses power to secure the liberties and rights protected under the Natural Law,[72] parental rights cannot hinder government from protecting children from parents who violate the Natural Law concerning them.

Regarding discipline, Pufendorf wrote that the Natural Law does not by any contortion of the imagination grant parents the right to abuse or

---

71 Samuel Pufendorf, 'On the Duties of Parents and Children' in *Two Books on the Duty of Man and Citizen According to the Natural Law* [9], accessible at Constitution Society <http://www.constitution.org/puf/puf-dut_203.txt> (emphasis added).

72 Locke, above n 36, 79-80.

murder their children.[73] Locke concurred, stating that the parental right to control a child's upbringing should not 'extend to life and death … over their children …'[74] Such physical abuse and endangerment of children would defeat every purpose of parental authority, and break the law on every person's heart.

Furthermore, Pufendorf recognized that in cases of neglect, parental rights might be forfeited. He wrote:

> If some parents … not only violating the law of nature but also overcoming common affection, are unwilling to nurture their offspring, and cast it forth, they cannot longer claim any right over it, nor can they demand from it longer any office due, as it were, to a parent.[75]

Government cannot give or take away parental powers. Rather, when people relinquish their natural powers by rejecting the Natural Law, which requires the care of offspring, government may fill the power vacuum. Just as Plutarch said that deviant individuals who fail to care for their children do not prove that parental affections do not exist,[76] so also those same parents who forfeit or suspend their parental rights through abuse or neglect do not preclude the existence of parental rights for those who embrace their natural calling.

Parental rights *do* exist insofar as parents remain in harmony with the Natural Law and provide their children with upbringings that will one day equip them to live independently and handle that liberty which is their

---

73 Pufendorf, above n 34, 181. Pufendorf wrote: 'this power is not thought to extend to exercising the right of life and death on occasion of some offense, but merely so far as moderate chastisement.'

74 Locke, above n 36, 79.

75 Pufendorf, above n 30, 246.

76 Plutarch, 'Of the Natural Love or Kindness of Parents to their Children' in Ernest Rhys (ed), *Plutarch's Moral Essays* (Philemon Holland trans) 290, 302.

birthright as human beings. Government cannot add to or take away from the authority required to accomplish this task.

III THE COMMON LAW TRADITIONS: REFLECTING NATURAL LAW AND DIVINE LAW

The common law, reflecting the natural and Divine Law traditions, included protection for parental rights. It embodies a rich history of precedent applying theoretical concepts to practical government. Influential people in the United Kingdom used it to check the powers of rulers and promote human rights for centuries before it was written down.[77] When Sir William Blackstone finally put it on paper, a series of watershed events unfolded. According to Stacey, '[t]he *Commentaries* made the law accessible to ... colonial people who lacked the resources necessary for institutional legal education and apprenticeship.'[78] When King George III denied the American colonies (who were then part of England) the liberties laid out in Blackstone's *Commentaries*, it incited the Americans to break away[79] and set up an independent government based upon English common law in order to secure the same liberty in the colonies that Englishmen enjoyed.[80] Additionally, around 80 nations, including Australia, New Zealand, Ireland, and India, which looked to England for influence or were once a part of England, later birthed

---

77 Robert D Stacey, *Sir William Blackstone and the Common Law: Blackstone's Legacy to America* (ACW Press, 2003) 47.

78 Ibid 95.

79 Ibid 82-4; see especially Table 1, 83-4.

80 Ibid 80.

independent legal systems from the English common law.[81] Thus, the common law checks the powers of the earth; it is not created by them.

Because of the importance of common law in the foundational fabric of so many nations, those desiring to help the world's children via international treaties might benefit from what it has to say about parental responsibilities.[82]The common law 'deemed "the most universal relation in nature ... [to be] that between parent and child."'[83] 'At the common law of England, a parent's right to custody and control of minor children was a sacred right with which courts would not interfere except where by conduct the parent abdicated or forfeited that right.'[84]

At common law, the authority and responsibility to direct the upbringing of children rested with their parents. In particular, parents hold the authority and responsibility over the maintenance, protection, and education of their children.[85] Concurrently, according to the common law,

---

81 Central Intelligence Agency, *Field Listing: Legal System*, The World Factbook <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.

82 Daniel E Witte, 'People v Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right under the Ninth Amendment' [1996] *Brigham Young University Law Review* 183, 190-3.

83 Stacey, above n 77, 190-2.

84 Ibid.

85 For example, in William Blackstone, 'Of Parent and Child' in *The Rights of Persons* 435-6, 439-42, Blackstone wrote:

> [The] duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Pufendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents…
>
> [The] last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Pufendorf very well observes, it is not easy to imagine or allow, that a parent has conferred

'[the] duties of children to [honor and obey] their parents arise from a principle of natural justice and retribution.'[86]

IV EPILOG

Parental liberty to direct and control the upbringing of their children rests upon deeply rooted divine, natural, and common law foundations. These traditions articulate a truth, self-evident to any fit parent: parents are vested with the responsibility and authority to decide matters concerning the raising of their children. This is so, at least in part, because they naturally are best equipped to do so. As an objectivist standard, the principle operates as an effective measure which governing authorities can use to evaluate whether their government action improperly interferes with a citizen-parent's inviolable liberty. It is appropriate, therefore, for contemporary scholars to revisit this deeply rooted liberty as an unalienable limit on the exercise of state power. As government increasingly bestows upon itself ultimate dominion over matters relating to the upbringing of children, the potential for despotic governance logically looms on the jurisprudential horizon.

---

any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself.

86 Ibid. Blackstone wrote:

For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by profitive laws.