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## CHRISTIANITY'S MIXED CONTRIBUTIONS TO CHILDREN'S RIGHTS: TRADITIONAL TEACHINGS, MODERN DOUBTS

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### Abstract

*The United States is the only nation, besides Somalia, not to ratify the 1989 United Nations Convention on Human Rights. This is ironic, given the leading role that American lawyers and diplomats played in creating the Convention. The leading opponents to ratification, it turns out, are conservative Christians who object to the idea of children's rights altogether, or at least to international human rights protection of the child, and see these rights as a liberal threat to parental rights to nurture, educate, and discipline their own children. We argue, however, that many of these modern objections to children's rights are misplaced, and fail to appreciate the classical and Christian roots of children's rights and parental duties in the Western tradition. We call upon churches and states alike to embrace children's rights more fully, and to offer at least qualified acceptance of the UN Convention.*

**Keywords:** Children's Rights; UN Declaration on the Rights of the Child; Aristotle; Thomas Aquinas; John Locke; Johannes Morsink; Christian Critique of Rights; International Human Rights; Child Development; Parental Rights

### Introduction

The United Nations Convention on the Rights of the Child (CRC) is a landmark in the modern international protection of children's rights. Adopted by the United Nations General Assembly in 1989, its 54 articles and two Optional Protocols set out a lengthy catalogue of rights for children. The CRC bans all

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discrimination against children, including on grounds of their birth status. It provides children with rights to life, to a name, to a social identity, to the care and nurture of both parents; to education, healthcare, recreation, rest, and play; to freedom of association, expression, thought, conscience, and religion; and to freedom from neglect or negligent treatment, from physical and sexual abuse, from cruel and inhumane treatment, and from compulsory military service. The CRC adds special protections for children who are refugeeed, displaced, orphaned, kidnapped, enslaved, or addicted; for children involuntarily separated from their parents, families, and home communities; for children with disabilities; and for children drawn into a state's legal system.

The CRC is not the first modern international statement on children's rights, though it is the most comprehensive. It builds in part on provisions in the 1924 Geneva Declarations of the Rights of the Child and the 1959 Declaration of the Rights of the Child. It incorporates and imputes directly to children a number of the rights provisions already set out in the 1948 Universal Declaration of Human Rights and elaborated in the twin 1966 covenants on civil, political, economic, social and cultural rights. And it reflects and confirms a series of other international laws and treaties that facilitate international adoption, immigration, and education, and that prohibit child labor, pornography, prostitution, trafficking, soldiering, and more.<sup>3</sup>

While not legally binding or self-executing, the CRC highlights the growing global awareness that children – the most voiceless, voteless, and vulnerable human beings on earth – are deserving of “special care and assistance” (preamble). In the course of the twentieth century, political and cultural leaders around the world became increasingly dismayed by the savagery visited on children first by the Industrial Revolution, the Great Depression, and two world wars, then by waves of civil warfare, crushing poverty, malnutrition, inadequate schools, untreated disease, and horrible cruelty and crime. Many nations thus established firm new constitutional and statutory safeguards to protect and support children – and instituted ambitious new education, health care, and social welfare programs for children. In that context, it was no surprise that almost every nation in the world has ratified the CRC. Only two nations have held out: Somalia, which has no government, and the United States, which has never brought the issue to a Senate ratification vote.<sup>4</sup>

The American opposition to CRC ratification has long puzzled observers. After all, American human rights lawyers and NGOs were among the principal architects of this instrument, and have been among the most forceful advocates

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<sup>3</sup> For a good summary, see David M. Smolin, “Overcoming Objections to the Convention on the Rights of the Child,” *Emory International Law Review* 20 (2006): 81, 85-90. For a detailed comparative study, see Cynthia Price Cohen, *Jurisprudence on the Rights of the Child*, 4 vols. (Ardsley, NY: Transnational Publishers, 2005).

<sup>4</sup> Jonathan Todres et al., eds., *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions And Implications of U.S. Ratification*, ed. (Amsterdam: Hotei Publishing, 2006).

for children's rights at home and abroad. Both Presidents Reagan and Bush and their conservative Republican administrations were critical in marshalling international support for the instrument, persuading even reluctant countries like Russia, China, Egypt, and Saudi Arabia to sign on. But the United States to date has not done so. When President Clinton pressed the Senate for ratification, he faced such angry and widespread opposition that he eventually backed down. President Obama's tepid statements to date encouraging ratification have been rebuffed with comparable vitriol.

The principal source of opposition to CRC ratification comes from the so-called religious right in America – particularly politically conservative Christians, mostly Evangelicals, but also some Catholics and Orthodox. There are a few other groups, not associated with the religious or political right, who have joined in the opposition to the CRC. And there a number of conservative Christians and political conservatives who favor children's rights. But it is largely the self-defined religious right -- represented in Congress by the Republican Party and now the Tea Party, and in think tanks and lobbying groups like the Family Research Council and the Heritage Foundation – that has consistently and persistently blocked ratification.<sup>5</sup>

In this Article, we review and evaluate the main arguments against the CRC that conservative American Christians in particular have marshaled. While we take their objections seriously, we think that, on balance, the CRC is worthy of ratification, especially if it is read in light of the pro-family ethic that informs the CRC and many earlier human rights instruments. More fundamentally, we think that the CRC captures some of the very best traditional Western legal and theological teachings on marriage, family, and children, which we retrieve and reconstruct in the later sections of this chapter.

### **EVALUATING AMERICAN CHRISTIANS' COMPLAINTS ABOUT THE CRC**

No serious American Christian critic of the CRC that we have found objects to its basic premise that every child has the "right to life" and "the right from birth to a name" and "the right to know and be cared for by his or her parents" (art. 7). No one objects to a child receiving food, shelter, bodily protection, education, health care, or social welfare or receiving protection from exploitation or abuse. Few Christian critics defend traditional illegitimacy laws – still maintained in parts of the Muslim world -- that visited the sins of the fathers and mothers upon their children who were born out of wedlock. Few defend patriarchal family laws – still maintained in parts of the developing world -- that render children the exclusive property and prerogative of the paterfamilias, and leave states with little recourse in the event of parental neglect, abuse, or worse.

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<sup>5</sup> For sources and analysis of this opposition, see T. Jeremy Gunn, "The Religious Right and the Opposition to U.S. Ratification of the Rights of the Child," *Emory International Law Review* 20 (2005); 111-128.

Three main arguments against the CRC recur most frequently among American Christian critics. We distill these below and answer them briefly. Most of these arguments, we conclude, are political arguments that are sometimes dressed up a bit in Christian theology. Each of these arguments, we further conclude, are hard to sustain on their own terms or in light of the teachings of the Christian tradition.<sup>6</sup>

### **No Children's Rights**

Some critics of the CRC are opposed to the idea of children's rights altogether. The hard version of this argument says that rights are exclusively reserved to adults, and that children have no rights until they become adults. Just as responsibilities to the state (like paying taxes or serving in the military) or to other private parties (like making contracts or paying tort damages) do not begin until a child becomes an adult, so rights against the state or any other party cannot be claimed until children are emancipated. A child has public and private rights only vicariously through his or her parents or guardians.

This argument fails to recognize that many of the CRC's provisions are simply confirmations of "natural" rights – rights rooted in human nature – that do not depend on a child's age, on the agency of its parents, or on the legal formulations of the state. Basic rights to life and identity, to nurture and care, to humanitarian aid, to freedom from abuse, exploitation, cruelty, and the like are natural rights that every human being can and must claim – even, if necessary, against abusive parents. Moreover, a number of the CRC provisions confirm the child's natural rights to his or her parents and family – "that a child will not be separated from his or her parents" (art. 9.1), that the child has a "right to maintain ... personal relations and direct contact with both parents" (art. 10.2), and that in the event of separation, the child has the "right to family reunification" or to "adoption" into a new family (art. 5, 10.1, 21). These natural rights claims of children are the reciprocals of the natural duties of parents -- or of the state standing in *loco parentis*. The notion that a child has rights only vicariously through his or her parents gets the relationship exactly backwards.

A softer version of this argument against children's rights is that the CRC does not take adequate account of different stages of child development and the needs and interests that attach to each. Too many of the CRC rights, the argument goes, are simply adult rights imputed indiscriminately onto a child who has too little capacity to discharge them. It makes no sense to give a toddler the same rights as a teenager, a first grader the same rights as a high schooler. Yet,

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<sup>6</sup> See the vast literature cited and discussed in *ibid.*; Martin Guggenheim, *What's Wrong with Children's Rights* (Cambridge, MA: Harvard University Press, 2005); Martha A. Fineman and Karen Worthington, eds., *What is Right for Children?: The Competing Paradigms of Religion and Human Rights* (Burlington, VT: Ashgate, 2009); Barbara Bennett Woodhouse, *Hidden in Plain Sight: Competing Paradigm: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate* (Princeton, NJ: Princeton University Press, 2008).

the CRC makes too little differentiation of the rights claims that are commensurate with the child's developmental stage.

This argument has a bit of force. The CRC does include some provisions that take into account "the age and maturity of the child" (art. 12.1), the "evolving capacities of the child" (art. 14), and stages in "the child's physical, mental, spiritual, moral and social development" (art. 27). For example, the right to health care is understood to be both "pre-natal" and "post-natal" (art. 24.2(d)). The right to education is to be administered to ensure the "development of the child's personality, talents and mental and physical abilities to their fullest potential" (art. 28.1, 29.1(a)). The child's rights to "rest and leisure, to engage in play and recreational activities" must be protected in a way "appropriate to the age of the child" (art. 31.1). But most of the other rights listed in the CRC are stated in categorical terms. In some cases, this is because the rights are absolute and perennial. Think of the CRC provisions on the child's right to life, rights to be free from neglect, abuse, exploitation, and cruelty, rights to humanitarian aid and poor relief in cases of force majeure. These rights claims are always available to all children regardless of their age or capacity. But other CRC provisions on the child's rights of expression, privacy, or adoption, or rights to maintain direct contact with both parents would have benefited from a caveat about the child's age, capacity, and stage of development.<sup>7</sup> A number of countries that have ratified the CRC have included such caveats among their "reservations, declarations, and understandings" in ratifying the instrument. This is a relatively easy fix that allows for acceptance of the CRC despite its imperfections.

### **No International Children's Rights**

Some critics of the CRC are opposed to the idea of *international* children's rights – rather than to children's rights per se. Particularly in America, with its federalist system of government, family law, including children's rights, has always been state law, not federal law, and has mostly been statutory law, not constitutional law. These critics already oppose federal statutes and federal court cases about children and families because they encroach on the Tenth Amendment power of the fifty individual states. For them, the involvement of an international body is an even graver threat to local family jurisdiction. Some critics, not conversant with the apparatus and application of international human rights in the United States, portend apocalyptic scenarios of parents being summoned before a world court for spanking or grounding their unruly child. Others, who know how international human rights instruments operate in America, worry that Congress will use CRC ratification as a ground for passing federal laws on children's rights that will preempt existing state family laws.

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<sup>7</sup> On child development theories, see Don S. Browning, *Equality and the Family: A Fundamental Practical Theology of Children, Mothers, and Fathers in Modern Societies* (Grand Rapids, MI: Wm. B. Eerdmans, 2007).

This argument for “American exceptionalism”<sup>8</sup> from international human rights norms is hard to sustain in our modern transparent political world. For better or worse, human rights norms are now a major currency of international relations. Americans were not only among the principal architects of these norms in the aftermath of World War II. But America now uses these norms to judge the performance and calibrate its relations with all other nation states. It strains credibility for America to refuse to submit to the same universal human rights norms to which it holds all others. And it strains credulity for America to refuse to ratify this relatively mild children’s rights convention -- especially when it can stipulate “reservations, understandings, and declarations” that would allow the CRC to sit comfortably with existing American state laws.

A softer version of this argument criticizes the international social, economic, and cultural rights that are guaranteed by the CRC. Modern international human rights instruments protect both “freedom rights” (speech, press, religion, and the like) and “welfare rights” (education, poor relief, health care, and more). Some critics claim that freedom rights are the only real human rights that states must respect. “Welfare rights” are mere aspirations that states may choose to fulfill to the degree they can and in the way they prefer (and not at the insistence of a needy claimant or a public interest litigant). Animating this criticism is a half century of cold war logic that juxtaposed the “real” freedom rights of the West with the “false” welfare rights of the Soviet bloc.

It is hard to sustain this logic now that the cold war is over. The reality is that both American law and international law have long recognized that freedom rights and welfare rights are essentially interdependent. Freedom rights are useful only if a party’s basic welfare rights to food, shelter, health care, education, and security are adequately protected. The rights to worship, speech, or association mean little to someone clubbed in their cribs, starving in the street, or dying from a treatable disease. President Roosevelt already highlighted the interdependency of these rights in his famous “four freedoms” speech—freedom of religion and speech, and freedom from fear and want – that helped inaugurate the modern human rights revolution. Especially children, who are born and remain fragile and dependent for many years, need the special provisions and protections afforded by welfare rights. Both American and international agencies that cater to children have long operated with this understanding. To insist, as some critics do, that all these protections and provisions for children are not rights principally enforceable by courts but “entitlements” principally served by legislatures is to engage in linguistic hairsplitting with too little legal payoff.<sup>9</sup>

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<sup>8</sup> Johan D. van der Vyver, “American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness,” *Emory Law Journal* 50 (2001): 775; Robert F. Drinan, *The Mobilization of Shame: A World View of Human Rights* (New Haven, CT: Yale University Press, 2001), esp. 45ff.

<sup>9</sup> See Barbara Bennett Woodhouse, “Religion and Children’s Rights,” in *Religion and Human Rights: An Introduction*, ed. John Witte, Jr. and M. Christian Green (New York/Oxford: Oxford University Press, 2011), ch. 18.

## **Endangering Parental and Religious Rights**

The most vocal set of critics oppose the CRC because it endangers the natural rights of parents to raise their children in accordance with their own (religious) convictions. Most critics zero in on the CRC's freedom rights of the child: the "right to form his or his own views" and "the right to express those views freely" (art. 12); the right to "freedom of expression" including the "right to seek, receive, and impart information of all kinds" (art. 13); the right to "freedom of thought, conscience, and religion" (art. 14); the right to "freedom of association" and "freedom of peaceful assembly" (art. 15); the right to "his or her privacy, family, or correspondence" and freedom from "unlawful attacks on his or her honour or reputation" (art. 16); and the right to "mass media" and "access to information and material ... aimed at the promotion of his or her social, spiritual, and moral well-being" (art. 17). While the child's Article 12 and 14 rights to form religious and other views are conditioned by "the evolving capacities of the child," the other freedom rights are stated categorically. Critics worry that these freedom rights of children will restrict the rights of parents to help shape the conscience, religion, and opinions of their children; to guide them in establishing friends, relations, and associations; and to monitor them in their use of privacy, media, and access to information. What if a child wants to go his or her own way, resists parental limits and instruction, and calls in these freedom rights against parents?

Other critics point to Article 29 that requires that a child's education be directed to "the development of respect for human rights and fundamental freedoms," "for the natural environment," and for "understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national, and religious groups, and person of indigenous origin." For some critics, no political body has power to dictate such a transparently liberal educational agenda to any parents. What if a parent or a religious school teaches that Christianity is superior to other faiths; that husbands must have headship over their wives; that humans are called to "subdue the earth" rather than respect it; that certain cultural traditions must be avoided rather than befriended; or that human rights are simply liberal "nonsense upon stilts" in Jeremy Bentham's pungent words? Does all that violate a child's Article 29 rights, leaving a child or an interested third party free to sue parents or religious schools?

Finally, critics point to Articles 19 and 37 which prohibit "physical violence," "degrading treatment," or "arbitrary deprivation of liberty" of children. They further encourage states to establish "social programmes to provide necessary support for the child" and grant the child "the right to prompt access to legal access ... before a court." Critics worry that such provisions might keep parents from spanking, grounding, and other conventional forms of parental discipline that they feel religiously compelled to administer in application of Proverbs 13:24: "Spare the rod, spoil the child." Don't these provisions

inevitably create clashes between the rights claims of children and parents, who normally cannot sue each other or testify against each other at domestic law?<sup>10</sup>

Some of the freedom and education rights of children in Articles 12-17 and 29, abstractly stated, are too sweeping in our view, and do require qualified ratification and prudential application. Many countries have entered “reservations, understandings, and declarations” to that effect. The protections against physical mistreatment of the child in Article 19 and 37 are directed against serious violations inflicted by third parties; only the most severe corporal discipline by parents or guardians could trigger remedies. It seems incongruous at best to insist on a religious and parental right to beat one’s child so severely. Such action is already viewed as a form of assault and battery in most modern legal systems, and the CRC is simply reflecting those commonplaces. And in general it must be said that every modern Western family law system involves prudential and equitable balancing of competing interests of parents and children, which are categorically stated in statutes and then harmonized in practice.

### **Pro-Family Human Rights**

More fundamentally, it must be said that the CRC seeks to balance the rights of children and parents and to preserve a strong pro-family ethic. The CRC preamble states clearly that “the child should grow up in a family environment.” Article 3.2 orders that “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her.” Article 5 offers an even stronger statement of parental rights: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom.” Article 7 assures the child’s “right to know and be cared for by his or her parents” and the “right to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” Article 9 provides that “States Parties shall ensure that a child shall not be separated from his or her parents against their will,” except where the parents prove guilty of chronic and persistent “abuse or neglect of the child.” And even in such cases, “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”

These pro-family provisions in the CRC echo earlier international human rights instruments that link children’s rights and parents’ rights, and focus on the rights of the family more than on the rights of individual parties within the family. Already the 1948 Universal Declaration of Human Rights (UDHR) firmly established the priority of family rights and responsibilities when it stated in

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<sup>10</sup> See good summaries of these arguments in Symposium, “What’s Wrong with Rights for Children?” *Emory International Law Review* 20 (2006): 1-239.

Article 16.3: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” This statement was repeated in several subsequent human rights statements. Among them are the influential 1966 International Covenant on Civil and Political Rights and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, both of which add that states must “have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions.” The 1966 International Covenant on Economic, Social and Cultural Rights provides further: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.” “Special protection should be accorded to mothers during a reasonable period before and after childbirth.” “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law.”<sup>11</sup>

Underlying these statements is an important, but often neglected Christian integrative theory of marriage and the family that helped influence the original drafters of the 1948 Universal Declaration of Human Rights (UDHR). Charles Malik, the highly influential Christian philosopher and a member of the UDHR drafting committee, was the source of this emphasis on the family as the “natural and fundamental group unit of society.” Originally, he hoped to insert these additional sentences into the UDHR: “The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society.”<sup>12</sup> Malik believed that the words “natural” and “endowed by the Creator” assured that the marriage-based family would be seen as endowed by its own “inalienable rights” and not viewed as a human invention subject to the caprice of either State or current public opinion. In this formulation, he preserved several important ideas -- the priority of the rights of natural parents, the importance of marriage-based parenthood, the prima facie rights of children to be raised by their natural parents, and a larger narrative about God’s good creation that sanctioned and stabilized these values.

Two of these values were lost in the final formulation of the UDHR. They were the importance of marriage-based parenthood and reference to the

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<sup>11</sup> See ICCPR Article 18.1, 23.1; UN Declaration on Religious Intolerance, Art. 6; see also ICESCR, art. 10.

<sup>12</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 254. See further Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

religious narrative historically used to support this institution. Those additional provisions would have helped to blunt the criticisms by Christians and others that modern human rights can cater to sexual libertinism. But Malik was able to retain the emphasis on the “family as the natural and fundamental group unit of society,” and this phrase influenced later statements about both parental duties and children’s rights, including those in the CRC. The statement makes it clear that the state must protect the family itself as well as the respective rights of children and parents. It also implied that the state did not create the family and the rights of parents and children; the family has preexisting rights resident in its very nature. That emphasis of the CRC and its predecessors should help mollify Christian critics who regard the CRC, as an assault on traditional religious beliefs about sex, marriage and family life.

### **THE ROOTS OF CHILDREN’S RIGHTS IN THE WESTERN (CHRISTIAN) TRADITION**

Not only are pro-family values reflected in the modern human rights instruments – albeit not so fully as they might have been. But these modern statements on the rights of the family are rooted, in part, in deep classical and Christian sources of the West. Charles Malik reflected this tradition in proposing his language for the Universal Declaration of Human Rights: “The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society.” This was not just a statement about the rights of parents to control their children. It was also a statement about the rights of children to be born into a society that, in principle, protected their right to be cared for and raised by their natural parents if possible. Against the background of World War II where children were separated from their parents by arbitrary state actions -- or even today when children are born through artificial insemination or in vitro fertilization with no knowledge of their donor parents<sup>13</sup> -- this statement is all the more arresting.

#### **Aristotle and the Priority of the Natural Family**

The tradition that Malik was invoking started with the ancient Greek philosopher Aristotle, who offered considerable insight into what evolutionary psychologists today call “kin altruism.” This is our tendency to invest ourselves more fully in those persons with whom we are biologically related. In his *Politics*, Aristotle wrote that humans “have a natural desire to leave behind them an image of themselves.”<sup>14</sup> With that insight, he rejected Plato’s idea in *The Republic* that civic health would be improved if competing nepotistic families were undermined by removing children from their procreating parents and raising them in anonymity by state-appointed nurses. Plato hypothesized that if no one knew who their children or parents were, then all preferential treatment would end, and

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<sup>13</sup> Elizabeth Marquardt, Norval Glenn, and Karen Clark, *My Daddy’s Name is Donor: A New Study of Adults Conceived Through Sperm Donation* (New York: Institute for American Values, 2010).

<sup>14</sup> Aristotle, *Politics* in *The Basic Works of Aristotle* (New York: Random House, 1941), bk. I, ii.

pure justice would emerge.<sup>15</sup> This vision of the relation of an omnipotent parental state, which was echoed in early Soviet communism and in Nazi Aryan experiments, sends shivers through modern-day American Christians among many others. A few extreme critics argue – wrongly -- that the CRC is promoting this kind of arrangement with its emphasis on the role of the state in protecting children.

Aristotle, however, believed that this kind of Platonic experiment would fail. He believed that, in a state that separated natural parents and children, love would become too “watery,” too diluted. The natural energy that fueled parental care and sacrificial devotion to their children would be lost. Furthermore, violence would grow because the inhibiting factor of consanguinity would be removed. From the perspective of the developing child, Aristotle believed that the family is more fundamental than the state, and prior to the state in social development.<sup>16</sup>

These cardinal Aristotelian insights about the ontological priority of the natural family came to prevail in the Western tradition. The later Roman Stoics and Roman jurists called the marital household “the foundation of the republic,” “the private font of public virtue.” The Church Fathers and medieval Catholics called it “the domestic church,” “the seedbed of the city,” “the force that welds society together.” Early modern Protestants called the family a “little church,” a “little state,” a “little seminary,” the “first school” of love and justice, charity and discipline for children. American common lawyers called the marital household a natural if not a spiritual estate, a useful if not an essential association, a pillar if not the foundation of a civilized society. These ideas about the primal and essential place of the family in society remain at the heart of modern theories of social pluralism, sphere sovereignty, and subsidiarity, and they are reflected in part in the CRC and other international human rights instruments.<sup>17</sup>

### **Aquinas and the Medieval Children’s Rights**

Writing in the mid-thirteenth century, the Catholic philosopher, Thomas Aquinas extended Aristotle’s teaching that humans are “family animals” before they are “political animals” and that humans have a natural inclination to produce and bond with “copies of themselves.” Aquinas also built on the extensive observations of his teacher, Albert the Great, about the different organization and reproductive patterns of animals.<sup>18</sup> Aquinas first observed that humans are unique among other animals in producing utterly fragile and helpless infants who depend on their parents’ support for a very long time.

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<sup>15</sup> Plato, *The Republic* (New York: Basic Books, 1968), Bk.V, par. 459-462. Plato abandoned this view in his later *Laws*.

<sup>16</sup> Aristotle, *Politics*, bk. I.ii; bk. II.iv.

<sup>17</sup> See detailed sources in John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2011).

<sup>18</sup> See Albertus Magnus, *Questions Concerning Aristotle’s On Animals*, trans. Iven M. Resnick and Kenneth F. Kitchell, Jr. (Washington, DC: Catholic University of America Press, 2008), esp. bks. 5, 9, 10, 15. 67

[T]here are animals whose offspring are able to seek food immediately after birth, or are sufficiently fed by their mother; and in these there is no tie between male and female; whereas in those whose offspring needs the support of both parents, although for a short time, there is a certain tie, as may be seen in certain birds. In man, however, since the child needs the parent's care for a long time, there is a very great tie between male and female, to which ties even generic nature inclines.<sup>19</sup>

“Among some animals where the female is able to take care of the upbringing of offspring, male and female do not remain together for any time after the act of generation.” This is the case with horses, cattle, and other herding animals, where newborns quickly become independent, sometimes after a brief nursing period. “But in the case of animals of which the female is not able to provide for upbringing of children, the male and female do stay together after the act of generation as long as is necessary for the upbringing and instruction of the offspring.” In these latter cases, this inclination to stay and help with the feeding, protection, and teaching of the offspring is “naturally implanted in the male.” Think of birds, said Aquinas: they pair for the entire mating season and cooperate in building their nests, in brooding their eggs, and in feeding, protecting, and teaching their fledglings until they finally can take flight.<sup>20</sup>

Human beings push this natural reproduction through pair bonding strategies much further, Aquinas continued, not only because their children remain dependent for so much longer but also because these children place heavy and shifting demands on their parents as they slowly mature. This requires the effort of both parents, assisted by their kin networks. “The female in the human species is not at all able to take care of the upbringing of offspring by herself, since the needs of human life demand many things which cannot be provided by one person alone. Therefore it is appropriate to human nature to remain together with a woman after the generative act, and not leave her immediately to have such relations with another woman, as is the practice of fornicators.” For this reason, human males and females are naturally inclined to remain together for the sake of their dependent human infant.<sup>21</sup>

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<sup>19</sup> Thomas Aquinas, *Scriptum super Libros Sententiarum Petri Lombardiensis*; the section of this commentary on Lombard's discussion of marriage are translated and reprinted in his *Summa Theologiae: Complete English Edition in Five Volumes*, trans. Fathers of the English Dominican Province, 5 vols. (New York: Benziger Bros., 1947-48), vol. 5, qq. 41–68 [hereafter Aquinas, S.T. Supp.]. The quote in q. 41, art. 1.

<sup>20</sup> Thomas Aquinas, *Summa Contra Gentiles*, trans. Vernon J. Bourke, 4 vols. (Notre Dame: University of Notre Dame Press, 1975) [hereafter Aquinas, SCG], III-II.122.6; 124.3.

<sup>21</sup> Aquinas, SCG, 122.6; 124.3.

A man will remain with the mother and care for the child, however, only if he is certain that he is the father, Aquinas continued. A woman will know that a child is hers because she carries it to term for nine months, and then nurses the child thereafter. A man will know that a child is his, only if he is sure that his wife has been sexually faithful to him alone. Only with an exclusive monogamous relationship can a man be sure that if wife becomes pregnant that he is the father. And only then will a man be likely to join his wife in care for their child. “Man naturally desires to know his offspring,” Aquinas wrote; “and this knowledge would be completely destroyed if there were several males for one female. Therefore that one female is for one male is a consequence of a natural instinct.”<sup>22</sup>

Aquinas recognized that paternal certainty alone was often not enough to bind a man to his wife and child. For most men by nature crave sex as much and as often as they crave food. But a rational man will be induced to care for his child and bond with its mother because of his natural instinct for self-preservation. Once a rational man is certain of his paternity, he will realize that his child is literally an extension and continuation of himself, a part and product of his own body and being (his genes we would say today). He will then care for the infant like it is his own body. And once he begins this parental process, his attachment to that child will deepen, and he will be naturally inclined to remain with the child and its mother. These insights about the natural reproductive strategies of humans by enduring pair bonding, which Aquinas described in his own pre-scientific terms, are commonly echoed today by various evolutionary biologists, biological anthropologists, and primatologists.<sup>23</sup>

To these two arguments from the nature of human reproduction and attachment, Aquinas added a theological argument that helped to stabilize and solidify the relations and responsibilities of parents and children. Christians teach that an infant is not just a bundle of craving appetites and insatiable needs, nor just a convenient, controllable conduit through which to pass the family name, property, and business. An infant is also a child of God, made in the image of God and embodying the goodness of God on earth. Christian parents thus care for their infants not just because these children are continuations of their own bodily substance and earthly achievements. They also care for their children because God has given them the remarkable privilege of being agents and exemplars of God’s creation and parentage of children.<sup>24</sup>

The Bible underscores this, Aquinas pointed out. In the creation story, God says: “Let us make man in our own image, after our own likeness.” But

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<sup>22</sup> Aquinas, SCG, 124.1; see also Aquinas S.T. Supp. q. 41, art. 1.

<sup>23</sup> Bernard Chapais, *Primeval Kinship: How Pair-Bonding Gave Birth to Human Society* (Cambridge, Mass.: Harvard University Press, 2008), 10. See also Peter B. Gray and Kermyt G. Anderson, *Fatherhood: Evolution and Human Paternal Behavior* (Cambridge, Mass.: Harvard University Press, 2010); Melvin A. Konner, *The Evolution of Childhood: Relations, Emotions, Mind* (Cambridge, Mass.: Harvard University Press, 2010).

<sup>24</sup> Aquinas, S.T. II, q. 26, q. 26, a.3.

having created the first man and the first woman, God then delegates to them and to all who come after them, the task of producing new humans: “Be fruitful and multiply and fill the earth.”<sup>25</sup> In his Sermon on the Mount, Jesus describes parental care for children as an image of God’s perfect care for humanity: “What man of you, if his son asks him for bread, will give him a stone? Or if he asks for a fish, will give him a serpent. If you then, who are evil, know how to give good gifts to your children, how much more will your Father in heaven give good things to those who ask him! So whatever you wish that men would do to you, do so to them; for this is the law and the prophets.”<sup>26</sup>

These and other biblical passages elevate and integrate Christian marriage and parentage, Aquinas argued. For Christians, marriage is not just a natural coupling for the sake of procreating children. It is also an enduring symbol, an embodiment of the mysterious sacrificial union of Christ and the church. Similarly, parentage is not just a natural inclination and duty, aimed to perpetuate the human species. It is also a Christian privilege and responsibility designed to participate in the creation of God, to exemplify God’s love for his children, and to teach each generation of children anew the essence of the Golden Rule – “do unto others, as you would have them do to you.”<sup>27</sup>

Much more could be said about Aquinas’s teachings on children, parenting, and marriage, and those of many other medieval theologians and jurists who added much to the discussion.<sup>28</sup> What’s important to note here is that these Christian ideas about the nature of parents and children provided the foundation for a rich new law of children’s rights in the West. The natural and religious rights and duties of a parent to a child, as Aquinas and other theologians had described them, became the template for a whole series of affirmative rights that a child could claim at medieval canon law and civil law. Included in medieval law were the child’s right to life and the means to sustain life, the right to care, nurture, and education, the later right to contract marriage or to enter into a religious life, and the right to support and inheritance from their natural parents. Illegitimate children furthermore had special rights to oblation or legitimation. Poor children had special rights to relief and shelter. Abused children had special rights to sanctuary and foster care. Abandoned or orphaned children had special rights to adoption and to foundling houses and orphanages. All these rights and more were real “children’s rights” in the later Middle Ages that both church and state courts helped to enforce. Courts often added special

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<sup>25</sup> Genesis 1:26-28.

<sup>26</sup> Matthew 7: 9-11.

<sup>27</sup> Aquinas, *SCG*, III, ii, p. 116.

<sup>28</sup> Don S. Browning, et al., *From Culture Wars to Common Ground: Religion and the American Family Debate*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2000), 113-24; Stephen J. Pope, *Human Evolution and Christian Ethics* (Cambridge: Cambridge University Press, 2007), 297-319.

procedural and evidentiary rights to help them balance the oft competing claims of parents and children.<sup>29</sup>

Contrary to the assumptions of many modern Christian critics, children's rights were not an invention of modern liberalism, let alone of the 1989 UN Children's Rights Convention. Children's rights were already staples of the medieval Catholic world, which early modern Protestant and Catholic polities alike absorbed easily into the new state family law systems born after the Reformation.<sup>30</sup> These medieval and early modern children's rights were the concrete complements to the rights and duties of parents as well as of the church and state authorities who stood behind or if needed in place of the parents (in *loco parentis*). To be sure, these early formulations were not a complete statement of children's rights, judged by modern standards. Nor were they free from religious conditions and restrictions that many would find unacceptable today. But many of the core children's rights set out in the CRC and other modern instruments were already in place 750 years ago, animated by overt Christian teachings.

### **Enlightenment Philosophy and Common Law Children's Rights**

Later Enlightenment liberals and common law jurists found these classical and Christian teachings convincing – despite their rejection of much Christian theology and despite the constitutional disestablishment of religion. The great seventeenth-century English philosopher, John Locke, for example, described marriage as “the first society” that had to be formed as humans proceeded from the state of nature endowed with their natural rights. The marriage of a man and woman, he said, was “necessary not only to unite their care and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.” For Locke, men and women had a natural right to enter into a marital contract. But their children had a natural right to survival, support, protection and education. This imposed on their parents the natural duty to remain in their marriage once contracted, at least until their children were emancipated:

For the end of conjunction between male and female, being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is

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<sup>29</sup> See detailed sources and discussion in Charles J. Reid, Jr., “The Rights of Children in Medieval Canon Law,” in *The Vocation of the Child*, ed. Patrick M. Brennan (Grand Rapids, MI: Wm. B. Eerdmans, 2008), 243-65; id., *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Grand Rapids, MI: Wm. B. Eerdmans, 2004). See also detailed sources in John Witte, Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge: Cambridge University Press, 2009), 49-134.

<sup>30</sup> See John Witte, Jr., *Law and Protestantism; The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002); John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage and Family in John Calvin's Geneva*, 2 vols. (Grand Rapids, MI: Wm. B. Eerdmans, 2005, 2012).

necessary to the nourishment and support of the young ones, who are to be sustained by those that got them, till they are able to shift and provide for themselves.... [W]hereby the father, who is bound to take care for those he hath begot, is under an obligation to continue in conjugal society with the same woman longer than other creatures, whose young being able to subsist of themselves, before the time of procreation returns again, the conjugal bond dissolves of it self, and they are at liberty.<sup>31</sup>

Similarly, the eighteenth-century Scottish philosopher, David Hume, for all of his skepticism about traditional theology and morality, thought Aquinas and the medieval jurists were exactly right in their description of the natural rights and duties of parents and children. “The long and helpless infancy requires the combination of parents for the subsistence of their young; and that combination requires the virtue of chastity and fidelity to the marriage bed.” These natural conditions counsel not only for marriage but also against “voluntary divorce,” said Hume, despite our natural rights of contract and association. Hume agreed with Protestants that divorce was sometimes the better of two evils – especially where one party was guilty of adultery, severe cruelty to children, or malicious desertion of the family. But, outside of such narrow circumstances, he said, “nature has made divorce the doom of all mortals.” For with no-fault divorce, the children suffer and become “miserable.” Shuffled from home to home, consigned to the care of strangers and step-parents “instead of the fond attention and concern of a parent,” the inconveniences and encumbrances of their lives just multiply as the divorces of their parents and stepparents multiply. “This is no way to protect the essential rights of children,” Hume concluded.<sup>32</sup>

William Blackstone, the leading common lawyer of the eighteenth century, argued similarly:

[T]he establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children: for that ascertains and makes known the person who is bound to fulfill this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way – shame, remorse, the constraint

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<sup>31</sup> John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), II.2, II.77-86.

<sup>32</sup> David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* [1777], 2d ed., ed. L.A. Selby-Bigge (Oxford: Clarendon Press, 1902, 2d impr., 1963), 206-07; David Hume, *Essays Moral, Political, and Literary*, rev. ed., ed. Eugene F. Miller (Indianapolis: Liberty Fund, 1987), Essay XIX “On Polygamy and Divorces”, pp. 182-87.

of her sex, and the rigor of laws – that stifle her inclinations to perform this duty.

“The duty of parents to provide for the maintenance of their children is a principle of natural law,” Blackstone went on, “laid on them not only by nature herself, but by their own proper act, in bringing them into the world.” And again: “The main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong.”

Much like the medieval lawyers half a millennium before him, Blackstone set out in detail the reciprocal rights and duties that the law imposes upon parents and children. Nature has “implant[ed] in the breast of every parent” an “insuperable degree of affection” for their child once they are “certain the child is theirs,” Blackstone wrote. The common law confirms and channels this natural affection and attachment by declaring that each child born into a family is the presumptive child of those parents, by requiring parents to maintain, protect, and educate those children, and by protecting the parents’ rights to discharge these parental duties against undue interference by state, church, or private parties. These “natural duties” of parents are the correlatives of the “natural rights” of their children, Blackstone further argued. Children have “a natural right to receive the support, education, and care” of their parents, and parents must respect their children’s rights. These duties continue even after divorce (through child support) and even after the parents die (through testamentary obligations their children).<sup>33</sup> These early teachings of Blackstone on the necessary interdependence of the rights of parents and children have long been axiomatic in the common law tradition on both sides of the Atlantic. English Parliamentary acts and American state statutes from the eighteenth century to our day are filled with detailed recitations of the duties of parents, the rights of children, and the collective rights of the family.

## CONCLUSIONS

Modern-day Christians would do well to view children’s rights as both a natural and a spiritual good. They are a natural good in that they reflect and respect the unique natural reproductive strategies that humans have been given or developed. The rights of children are in no small part the reciprocals of the duties of their parents. The duties of the parents, in turn, cannot be discharged unless and until they have the rights to discharge them. And these twin sets of rights and duties are best discharged in a stable and enduring family structure, which lies at the foundation of organized society and state. Those insights go

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<sup>33</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Oxford University Press, 1765), I.15.1, 1.16.1-3. This quote is largely a paraphrase of Montesquieu, *Spirit of the Laws*, 23.2.

back at least to Aristotle and Aquinas, and the legal protections of children's rights that reflect these insights go back nearly eight centuries.

Children's rights are also a spiritual good in that they reflect and respect some of the Bible's most cherished teachings. The Bible describes procreation and parenthood as acts that are divinely significant and symbolic. Procreation of children is in part an act of co-creation with God. Parenting of children is in part an echo and expression of God's special care for all humanity. The Bible is teeming with passages that call us to love, nurture, protect, teach, and cherish our children, and Jesus reserves a special place in hell for those who would harm or mislead a child.<sup>34</sup> Children's rights, we believe, are simply a mirror image of these teachings about the centrality of procreation, parentage, and protection of children. They translate into modern terms obligations that are at the core of our identity and practice, as humans and as Christians.

Modern-day Christians would thus do well to join other religious traditions in confirming and celebrating the greater protection and internationalization of children's rights today.<sup>35</sup> After all, the Western (Christian) tradition did not invent children's rights or the attendant rights of parents and families. The West simply discovered these rights, as the natural corollaries and consequences of the human reproductive process. It remains a fair question whether the 1989 UN Convention on the Rights of the Child is a proper statement of children's rights. And it remains a fair question how, why, when, by whom, and against whom children's rights are vindicated in local legal systems. The CRC does overreach in some of its children's rights statements, and it does not always take sufficient account of a child's age, capacity, and stage of development. The CRC also could have done more to emphasize the priority of the natural family, though this value is celebrated in the CRC and other international human rights instruments. But, on balance and with qualifications, we think it the CRC is an eminently valuable contribution to the protection of all children – the most voiceless, voteless, and vulnerable amongst us.

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<sup>34</sup> See Marcia J. Bunge, et al, eds., *The Child in the Bible* (Grand Rapids, MI: Wm. B. Eerdmans, 2008); see also Marcia J. Bunge, ed., *The Child in Christian Thought* (Grand Rapids, MI: Wm. B. Eerdmans, 2001).

<sup>35</sup> See Don S. Browning and Marcia J. Bunge, eds., *Children and Childhood in World Religions: Primary Sources and Texts* (Rutgers, NJ: Rutgers University Press, 2009); Don S. Browning, M. Christian Green, and John Witte, Jr., eds., *Sex, Marriage and Family in the World Religions* (New York: Columbia University Press, 2006).