

## 9. The state of nature, the family, and the state

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### 1. Introduction

Early modern political philosophers such as Hobbes, Locke, and Rousseau are best known for their social contract theories and often discussed together with new versions of social contract theory developed in the twentieth century by John Rawls or David Gauthier. From this perspective, the state of nature is understood as a hypothetical situation prior to the establishment of society, i.e., a situation in which men are free and equal. Combined with a theory of human nature and motivation, the state of nature serves as a methodological device for demonstrating why men ought to submit to political authority and how the latter has to be conceived in order to be legitimate. In contemporary reconstructions of social contract theory, the phrase ‘man’ is usually taken as a generic term and thus regarded as substitutable with ‘human being’, or ‘individual’. Before feminist histories of political philosophy were developed in the second half of the twentieth century, differences of sex, or gender, and the status of women in social contract theories were generally neglected<sup>1</sup>. This is all the more surprising if we consider that in political theory from Antiquity up to the sixteenth century and Bodin’s *Six Books of the Commonwealth* (1576) the family, and the role of the wife and mother within it, has been considered as a precursor and constituent of the political order.<sup>2</sup> This leads quite naturally to questions such as: what is the place of the family in early modern social contract theories? How was the latter conceived as social institution? Is it natural or artificial? What is the difference, if there is any, between patriarchal and political power?

This chapter aims to explore how early modern social contract theorists accounted for the family and what place they accorded to the latter in regard to the state of nature and to the civil society, or state. I will mainly focus on Samuel Pufendorf and John Locke, who dealt extensively with the family, but also draw on comparisons with Hobbes’ and Rousseau’s more cursory remarks

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<sup>1</sup> See Gordon Schochet, “Models of Politics and the Place of Women in Locke’s Political Thought,” in *Feminist Interpretations of John Locke*, ed. Nancy J. Hirschmann and Kirstie M. McClure (University Park, PA: The Pennsylvania State University, 2007), pp. 131-53, here pp. 132-3. A pioneering study bringing this to the fore is Carole Pateman, *The Sexual Contract* (Stanford University Press, 1988).

<sup>2</sup> See *ibid.*, and Nancy J. Hirschmann, “Hobbes on the Family,” in *The Oxford Handbook of Hobbes*, ed. A. P. Martinich and Kinch Hoehstra (Oxford University Press, 2016), pp. 242-63, here p. 243.

on the subject. One plausible way for assessing the place of the family in social contract theories relies on the ambiguity of the very concept of the state of nature, which could be conceived – albeit more or less explicitly – as a theoretical construct or as description of a situation that existed in reality before states were founded. In his *De officio hominis et civis*, Pufendorf explained this distinction in the following way:

It would be a fiction if we supposed that in the beginning there existed a multitude of men without any dependence on each other, as in the myth of the brothers of Cadmus, or if we imagined that the whole human race was so widely scattered that every man governed himself separately, and the only bond between them was likeness of nature. But the natural state which actually exists shows each man joined with a number of other men in a particular association, though having nothing in common with all the rest except the quality of being human and having no duty to them on any other ground. This is the condition [...] that now exists between different states (...) and between citizens of different countries [...], and which formerly obtained between heads of separate families.<sup>3</sup>

What Pufendorf affirms here, and what early modern contract theorists presuppose (explicitly or tacitly) is that before states were founded, the state of nature obtained between heads of different families. As we will see below, the family is a complex social unit which comprises the society between husband and wife, or matrimony, the society between father (or parents) and children, or paternal society, and the society between master and servant, or slave, the *societas herilis*.<sup>4</sup> These three societies are united under the will of the *paterfamilias*, or head of the family, who in his various roles as husband, father, and master exercises power over his wife, his children, and his servants or slaves. This raises the question how social contract theorists justify authority within the family, since they also maintain that conceived as a fiction or theoretical construction, the state of nature is a state of freedom and equality, where no one is subjected to the authority of any other, and that for this reason authority of one over the other needs to be justified. This question will be examined in the first part of this chapter.

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<sup>3</sup> I quote from the English translation: Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, ed. James Tully, transl. Michael Silverthorne (Cambridge University Press, 1991), (book) II, (chapter) 1, (§) 6, p. 116.

<sup>4</sup> The expression ‘societas herilis’ figures in the original Latin version of Pufendorf’s *De jure naturae et gentium* (1672), VI, 3, 4.

The second part of the chapter will deal with yet another question regarding the relationship between the fictitious and the realist conception of the state of nature: if in reality the state of nature obtains between the heads of independent families, this implies that only the latter participate in the social contract by which the state is founded.<sup>5</sup> Since the social contract serves as a hypothetical construction for showing how political power can be justified, one has to ask how states were, or might have been founded in reality. The dichotomy between the fictitious and the real foundation of the state has been theorized by Hobbes, who draws a clear distinction between the commonwealth by institution, founded by a contract of every one with every one, and the commonwealth by acquisition, or natural commonwealth, which rests on force or physical strength. In this latter case, sovereign power is acquired either by generation (i.e., by extension of the power of the *paterfamilias* to his adult sons and their own families) or by conquest.<sup>6</sup> This dichotomy is also at work, albeit less clearly visible, in Pufendorf's and Locke's account of the transition from the family to the state.

The guiding question of this study is how the fictitious and the realist conceptions of the state of nature are intertwined with each other in early modern accounts of the family and the state. Although important in itself and also a worthy object of research, I will rather leave to one side the question of sociability. This question is closely linked with the realist or empirical conception of the state of nature. From this point of view, the family is a kind of small society which precedes the state and is constitutive of it, and it can as such function as a test case for examining whether humans are by nature sociable beings. If we recall that in Aristotle's political theory the social nature of man unfolds gradually, from the family to the village and to the city, one could ask how the social contract theorists deal with the bonds of affection between spouses as well as parents and children, how they distinguish the ties between family members from those between citizens in a state, and how they position themselves in regard to Aristotle's hypothesis that man is a social animal. It is well known that Hobbes radically rejects this hypothesis,<sup>7</sup> while Pufendorf develops,

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<sup>5</sup> Pufendorf explicitly acknowledges this in a chapter where he criticizes Hobbes for making 'subject' and 'citizen' equivalent terms. He argues instead that only the fathers of families, by whose pacts a state was first formed, are 'citizens', while the wills of women, boys, and slaves are included in the will of the father. Samuel Pufendorf, *De jure naturae et gentium*, vol. 2, The Translation of the Edition of 1688 by C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, 1934), VII, 2, 20, p. 995.

<sup>6</sup> Thomas Hobbes, *On the Citizen*, ed. and transl. Richard Tuck and Michael Silverthorne (Cambridge University Press, 1998), VIII, 1, pp. 102-3. Here and in what follows, I will mainly refer to this work, where Hobbes brings out most clearly the difference between these two kinds of commonwealth. On sovereignty by acquisition in the *Leviathan* see Benjamin Straumann's chapter in this volume.

<sup>7</sup> See for instance *ibid.*, V, 4-5, pp. 70-2; see also Thomas Hobbes, *Leviathan*, part 2, XVII, pp. 117-21.

for example, a much more nuanced position when he argues that he presumes in men a love of society, but that this does by no means imply that they are led by nature to civil society.<sup>8</sup> The focus on the empirical or realist conception of the state of nature would also allow to inquire about the continuities between early modern social contract theories and conjectural histories developed by Scottish philosophers later in the eighteenth century. These philosophers reject the idea of a social contract and therefore account for the origin and the legitimacy of the state in a new manner, which is however reminiscent of the empirical study of the origin of the state in social contract theories.<sup>9</sup> In the present study, I will leave these interrogations to one side and focus instead on the question how a selected number of social contract theorists accounted for the legitimacy of the exercise of power within the family and how they thought this power differs from the sovereign power of the state.

## 2. *The state of nature and the family*

As we will see below, Hobbes deals with the family in the context of the commonwealth by acquisition. He develops a rather rudimentary theory of the family, which clearly serves, and is subordinated to his overall political argument according to which the sovereign power in the commonwealth is absolute and unlimited, whether the latter is instituted or acquired.<sup>10</sup> In contradistinction, Pufendorf developed the first full-blown theory of the family, which was partly resumed by Locke, albeit with a special emphasis on paternal authority in the context of his critique

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<sup>8</sup> Pufendorf, *De jure*, VII, 1, 1-5, pp. 949-58, here p. 952.

<sup>9</sup> These questions are investigated in Justine Roulin's doctoral dissertation *Autorité, sociabilité et passions: La philosophie de la famille de Thomas Hobbes à John Millar* (Diss. Lausanne, 2019). I wish to express my gratitude to Justine Roulin. The continuing discussions we had on the theories of the family from Hobbes to the Scottish enlightenment were of great help for making up my own mind on the questions I deal with in this chapter. A pioneering study on natural law and eighteenth-century British philosophy with a chapter on the family and the question of polygamy is Colin Heydt, *Moral Philosophy in Eighteenth-Century Britain: God, Self, and Other* (Cambridge University Press, 2018). The continuities between the empirical conception of the state of nature and modern social thought has been explored in regard to Locke by Barry Hindess, "Locke's State of Nature," *History of the Human Sciences* 20/3 (2007), pp. 1-20. The critical response to Hobbes by Shaftesbury, Mandeville, and Hutcheson is discussed by Paul Sagar, *The Opinion of Mankind: Sociability and the Theory of the State from Hobbes to Smith* (Princeton University Press, 2018). For the state of nature and sociability in Pufendorf, see David Singh Grewal's chapter in this book.

<sup>10</sup> Hobbes' conception of the family has found more attention than the theories of Pufendorf, Locke, or Rousseau. See Hirschman, "Hobbes on the Family"; Paul Sagar, "Of Mushrooms and Method: History and the Family in Hobbes's Science of Politics," *European Journal of Political Theory* 14/1 (2015), pp. 98-117; idem, *The Opinion of Mankind*, pp. 67-81; Theodore Christov, *Before Anarchy: Hobbes and His Critics in Modern International Thought* (Cambridge University Press, 2015). On the place of women see Nancy J. Hirschmann, Joane H. Wright (eds.), *Feminist Interpretations of Thomas Hobbes* (University Park, PA: The Pennsylvania State University, 2012).

of Filmer's patriarchal political theory. This explains why I will begin by accounting for Pufendorf's and Locke's theory of the family before I will get to Hobbes in section 3 below.

Social contract theories famously rely on the idea that in the state of nature human beings are free and equal, and are therefore in their own right and power, and not subject to the authority of any other person.<sup>11</sup> In contradistinction to Hobbes, Pufendorf and Locke maintain that men are free to order their actions according to their own judgment and discretion only within the limits of natural law, which is given to them by God. As Locke famously put it, the state of liberty is not a state of license.<sup>12</sup> Both authors argue that men are obliged by natural law to preserve themselves. Regarding their relationship to others, Pufendorf holds that the law of nature imposes on men three kinds of duties, i.e. the duty not to harm others, the duty to treat each other as equals, and the duty to promote the well-being of others.<sup>13</sup> Locke places special emphasis on the duty not 'to harm another in his Life, Health, Liberty, or Possessions'.<sup>14</sup>

As a state of liberty and equality, the state of nature is however rather a theoretical construction or a fiction than a state existing in reality. As we have seen above, Pufendorf explains that in reality the state of nature first subsists between heads of separate families. Once states have been founded, it designates the condition between different states, and between citizens of different states. This description of the state of nature as a reality has important consequences in regard to the function Pufendorf assigns to the fiction of a natural state of liberty and equality: he refers to this latter condition not only to justify the institution of the civil society (*via* a sequence of pacts and an intermediary decree), but also of the family. He conceives of the latter as an 'association' (*collegium*) composed of three simple 'societies' (*societas*), which are united under the rule of the *paterfamilias*.<sup>15</sup> Referring to the theoretical state of nature, Pufendorf thus examines on what condition authority in the domestic sphere of the family is legitimate.

In contradistinction to Pufendorf, Locke limits himself to illustrate the state of nature as a reality by pointing to the condition of governors of independent communities. He also mentions the case of promises and bargains between two men, for example 'between a *Swiss* and an *Indian*,

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<sup>11</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 1, 8, p. 117. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge University Press, 1988), II, 2, 4, p. 269.

<sup>12</sup> *Ibid.*, II, 2, 6, p. 270.

<sup>13</sup> Pufendorf, *De jure*, III, 3, pp. 346-78. See also Simone Zurbuchen, "Dignity and Equality in Pufendorf's Natural Law Theory," in *Philosophy, Rights and Natural Law: Essays in Honour of Knud Haakonssen*, ed. Ian Hunter and Richard Whatmore (Edinburgh University Press, 2019), pp. 147-168, here pp. 149-51.

<sup>14</sup> Locke, *Two Treatises*, II, 2, 7, p. 271.

<sup>15</sup> Pufendorf, *De jure*, VI, 1, 1, pp. 839-40 (definition of the family); VI, 2, 6, pp. 917-919 (head of family).

in the Woods of *America*'.<sup>16</sup> It would thus seem that while Pufendorf opposes the theoretical state of nature first to the condition of men in the family, and then in the civil society, Locke limits himself to opposing it to the latter. On the other hand, he considers the family – just like Pufendorf – as a kind of society in which the subordinated societies between husband and wife, parents and children, and master and servant, or slave, are 'united under the Domestick rule' of the *paterfamilias*, or 'master of a family'.<sup>17</sup> And Locke leaves no doubt that the *paterfamilias* in his various functions as husband, father, and master, has power over the different members of the family, which are thus not free and equal in relation to him. How does Locke then justify the power the master exercises in the domestic sphere of the family if he does that at all? Does he consider the family as conventional or as natural society? This question seems all the more salient if we recall that Rousseau, whose theory of the family is heavily indebted to Locke, claims at the outset of the *Social contract* that the family is the only natural society.<sup>18</sup>

### 2.1. *The society between husband and wife, or matrimony*

Pufendorf introduces matrimony as 'the first example of social life and at the same time the seed-bed of the human race'.<sup>19</sup> For constituting this first society, the partners commit themselves by agreement, without however being at liberty to choose the end of matrimony. Indeed, the latter is defined by God, who by creating the human race would have aimed at preserving human life and assuring procreation. To this end, he endowed both sexes 'with a burning attraction to each other', not for the procurement of idle pleasure, but for rendering the commerce between the married persons sweet and agreeable and to make them easily accept the natural functions of which depends the perpetuation of the human race (the incommunities of pregnancy and the troubles of

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<sup>16</sup> Locke, *Two Treatises*, II, 2, 14-5, pp. 276-8. For a more complete analysis of Locke's account of the state of nature see Hindess, "Locke's State of Nature", and A. John Simmons, "Locke's State of Nature," *Political Theory* 17/3 (1989), pp. 449-70.

<sup>17</sup> Locke, *Two Treatises*, II, 7, 86, p. 323.

<sup>18</sup> Jean-Jacques Rousseau, *The Social Contract*, I, 2. See also Simone Zurbuchen, "La famille, une société naturelle?" *Rousseau Studies* (2018), pp. 129-53. For a broader account of Rousseau's theory of the family see Friederike Kuster, *Rousseau – die Konstitution des Privaten* (Berlin: Akademie Verlag, 2005).

<sup>19</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 2, 1, p. 120. On the conception of marriage in natural law theories see Sabine Doyé, "Das Eherecht der deutschen Frühaufklärung im Spiegel des neuzeitlichen Naturrechts: Hugo Grotius, Samuel Pufendorf, Christian Thomasius, Christian Wolff," in *Geschlechterordnung und Staat: Legitimationsfiguren der politischen Theorie (1600-1850)*, ed. Marion Heinz, Sabine Doyé (Berlin: Akademie Verlag, 2012), pp. 57-117; John Witte, Jr., "The Nature of the Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment," *Emory Law Journal* 64/3 (2015), pp. 596-676; Alfred Dufour, *Le mariage dans l'Ecole allemande du droit naturel moderne au XVIIIe siècle* (Paris: Librairie générale de Droit et de Jurisprudence, 1972).

education).<sup>20</sup> Marriage having been arranged by God in this way, the duties incumbent on the partners derive from its end.

When dealing with the partners' commitment to marriage according to natural law, Pufendorf first recalls 'that by nature all individuals have equal rights, and no one enjoys authority over another, unless it has been secured by an act of himself or of the other'. This would imply that although ordinarily 'the male surpasses the female in strength of body and mind', this superiority alone does not confer any authority to the former over the latter. Consequently, if a man has any right over his woman, the latter depends on her consent (note: I omit just war).<sup>21</sup> Marriage thus has to be founded by a contract, and it can be either simple and irregular, or perfect and regular. In the former case, which Pufendorf considers to be legitimate according to natural law, the partners agree 'to give each other the service of their bodies' for a certain time, without securing a right of one over the other, and without committing themselves to cohabit. The time for conceiving having passed, marriage ends and the children born from this union will be under the power of the mother, 'if the pact set forth that she is seeking offspring for herself and not for her husband'. The marriage he calls 'irregular' allows Pufendorf to take into account, for example, the mode of living of the Amazons.<sup>22</sup>

Pufendorf is however mainly interested in regular marriage. In this case, the agreement consists of a number of articles which testify to an asymmetry between the sexes and serve to legitimate the submission of the women to the man, albeit exclusively concerning the affairs of marriage and the family. The first article stipulates that the woman 'should solemnly promise to the man that she will not grant the use of her body to anyone except him'. Normally, the man would then promise the same to her. Pufendorf justifies this temporal sequence and thus the asymmetry between the sexes by arguing that it 'is most appropriate to the character of both sexes that the contract should be initiated by the man', and since the latter is interested in having children of his own instead of illegitimate ones, the woman has to promise fidelity first.<sup>23</sup>

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<sup>20</sup> *Ibid.*, II, 2, 2, p. 120.

<sup>21</sup> Pufendorf, *De jure*, VI, 1, 9, pp. 853-4. I omit here the possibility that the right of a man over his woman might also be founded on a just war.

<sup>22</sup> *Ibid.*, VI, 1, 9, pp. 854-5.

<sup>23</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 2, 4, p. 121; *De jure*, VI, 1, 10, pp. 855-6. On Pufendorf's conception of male superiority in marriage see Susanne Sreedhar, "Pufendorf on Patriarchy," *History of Philosophy Quarterly* 31/3 (2014), pp. 209-27.

The second article consists in the promise of the wife to live with her husband without interruption ‘and to make the closest association of their lives together and to form one family’.<sup>24</sup> In order to justify this further promise, Pufendorf points to the great joy for couples to live together and also to the interest of the husband to be sure of his wife’s fidelity. The third article transforms the initial asymmetry between the sexes into the subordination of the wife to the husband. Pufendorf argues that the woman ‘should be liable to the direction of her husband’, since ‘it is particularly in keeping with the natural condition of both sexes not only that the man’s position should be superior but also that the husband should be the head of the family which he has established’.<sup>25</sup> Pufendorf thus refers to the natural condition of the sexes in order to justify the authority of the husband to decide where they live. As a consequence, the wife is not allowed to travel or to spend the night outside their home without her husband’s agreement.<sup>26</sup> Pufendorf also stresses, however, that the authority of the husband is limited: it includes neither the right of life and death, nor the right to severe punishment, or ‘the full power of any or all of the wife’s property’, except when this is established by agreement or, once the state has been founded, by the civil laws.<sup>27</sup>

Locke’s conception of marriage is in many regards akin to Pufendorf’s. Like his predecessor, he considers marriage as the first society, which is founded ‘by Compact between man and woman’, and ordered by the law of nature in regard to its ends, i.e., procreation and mutual support and assistance.<sup>28</sup> Since Locke also acknowledges that men and women are by nature free and equal, the authority of the husband over his wife he aims to establish requires justification. He observes that husband and wife have different understandings and wills, and since he deems it necessary that the last determination of the will has to be attributed to the one or the other, he concludes that the determination, or rule, ‘naturally falls to the Man’s share, as the abler and the stronger’.<sup>29</sup> In a manner reminiscent of Pufendorf, Locke immediately adds that the power of the husband only concerns the couples’ common interest and property, and leaves the wife ‘in the full and free possession of what by Contract is her peculiar Right’, and if the latter allows it, she can even have the liberty to divorce, on condition however that the children are out of

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<sup>24</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 2, 4, p. 121.

<sup>25</sup> *Ibid.*; *De jure*, VI, 1, 11, p. 860.

<sup>26</sup> Pufendorf, *De jure*; VI, 1, 10, p. 856

<sup>27</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 2, 4, pp. 121-2; *De jure*, VI, 1, 11, pp. 860-1.

<sup>28</sup> Locke, *Two Treatises*, II, 7, 78, p. 319 and II, 7, 83, pp. 321-2.

<sup>29</sup> *Ibid.*, II, 7, 82, p. 321.



dependency for support on the parents' help.<sup>30</sup> Given that Locke has nothing to say about the home and the oath of fidelity, his conception of marriage looks slightly more egalitarian than Pufendorf's.

## 2.2. *The society between parents and children, or the paternal society*

Pufendorf and Locke both acknowledge that mother and father alike contribute to the generation of their children, and that they share in the duty to care about and educate them. Nevertheless, they use the expression 'paternal power' for designating the authority of the parents over their children. This is consistent with their account of the superiority of the father over the mother. Thus, Pufendorf maintains that the authority of the father over the children 'normally' surpasses the authority of the mother. He concedes however that when a child was conceived outside marriage, 'it will belong primarily to the mother', and that a couple who lives in the natural state may agree 'that it is the mother's right, not the father's, that prevails'. In states which 'have certainly been formed by men, not women', the father's right would however prevail.<sup>31</sup> In regard to the justification of paternal power, it is interesting to observe that Pufendorf also refers, in this context, to the consent of the dominated. While acknowledging that in practice the parents' authority is established when the latter acknowledge the child, feed and educate it, he argues that tacit consent of the child is also required. This consent is hypothetical, since an infant is not yet able to express his rational agreement:

One may rightly assume that if the infant had had the use of reason at the time of birth, and had been able to perceive that he could not survive without his parents' care and the government implied by that care, he would gladly have agreed to it, and stipulated in return that they give him a good upbringing.<sup>32</sup>

The tacit consent of the child is important, since it allows Pufendorf to define the limits of the parents' authority over the child and to show that despite their natural superiority and the 'most tender affection for them', which is implanted in them by nature, the parents can wrong the child when they do not acknowledge that the latter 'shares the same human condition' as they themselves.<sup>33</sup> Hence, Pufendorf points out that the parents do not have the right to abort the child

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<sup>30</sup> Ibid., II, 7, 80, p. 320.

<sup>31</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 3, 3, pp. 124-5.

<sup>32</sup> Ibid., II, 3, 2, p. 124.

<sup>33</sup> Ibid.; *De jure* VI, 2, 4, pp. 914-5.

in the mother's womb or to abandon and kill the new-born; nor do they have the right of life and death for wrongdoing.<sup>34</sup> The parents' authority over the children is thus limited, but suffices for allowing them to fulfill the duty imposed on them by natural law to care for their children and to bring them up properly 'so that they may turn out to be good members of human society'.<sup>35</sup>

As is well known, Locke deals extensively with the nature of paternal power in the context of his critique of Filmer's theory of patriarchy.<sup>36</sup> I only highlight one aspect of this critique here, namely Locke's interest in proving that acknowledging the authority parents have over their children does not challenge the basic assumption according to which men are by nature free and equal. Faithful to his definition of liberty in the state of nature, which is distinct from license, he maintains that liberty has to be conceived within the bounds of the law of nature, which is imposed on men by God, their creator. Because children are unable to know the law of nature, they need to be directed by their parents, who are obligated by the law of nature 'to preserve, nourish, and educate' their children. The power of the parents over their children originates in this obligation.<sup>37</sup> When he stresses that beginning from Adam and Eve, all the parents were obligated to care for their children 'not as their own Workmanship, but the Workmanship of their own Maker, the Almighty, to whom they were to be accountable for them',<sup>38</sup> Locke leaves no doubt that generation is not at the basis of the moral relationship (of direction and obedience) between parents and children.

By deriving the obligation of the parents to preserve and educate their children from the law of nature, Locke is in line with Pufendorf, who also maintains that this duty is imposed on them by natural law.<sup>39</sup> However, whereas Pufendorf finds paternal power *also* on the tacit consent of the child, Locke derives this power *exclusively* from the obligation imposed on the parents by God. Indeed, it seems that Locke considers the origin of paternal authority to be natural rather than conventional when he points to the helplessness and the defects of the imperfect state

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<sup>34</sup> Pufendorf, *De jure*, I, 1, 7, pp. 7-8.

<sup>35</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 3, 2, p. 124; II, 3, 4, p. 125.

<sup>36</sup> See Gordon Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (Oxford: Blackwell, 1975); Melissa A. Butler, "Early Liberal Roots of Feminism: John Locke's Attack on Patriarchy," in *Feminist Interpretations of John Locke*, 91-130; Kristin A. Kelly, "Private Family, Private Individual: John Locke's Distinction Between Paternal and Political Power," *Social Theory and Practice* 28/3 (2002), pp. 361-80.

<sup>37</sup> Locke, *Two Treatises*, II, 6, 56-58, pp. 305-6.

<sup>38</sup> *Ibid.*, II, 6, 56, p. 305.

<sup>39</sup> Pufendorf, *De jure*, VI, 2, 4, p. 914.

of the child, which the parents have to supply.<sup>40</sup> He also mentions the tenderness and affection for their offspring God would have implanted in man's nature, and he considers this affection as a 'strong byass of Nature', preventing thereby that the parents abuse their power and that they exercise it only for the best of the children.<sup>41</sup> The impression that Locke considers paternal power to be natural rather than conventional is further strengthened by the sharp contrast he draws between the parents' authority over the children under age, and the power the father may continue to exercise over his adult sons. As we will see in more detail in section 3 below, the latter needs to be established by contract in order to be legitimate. Likewise, Locke argues that while a child 'is under his Fathers Tuition and Authority, till he come to Age of Discretion', he is not born a subject of a country or government. Indeed, in relation to the government his father is a subject to, the son is in the state of nature and has to be considered as free until he, once he is an adult man, consents to subject himself to a government.<sup>42</sup> In contradistinction, Pufendorf argued that women, boys and slaves are indirectly subjected to the state by being included in the head of the family's will.<sup>43</sup>

Locke's account of paternal power proved to be especially influential, since Rousseau referred to it in his writings in order to establish, as he contended in the *Social contract*, that the family (which he reduces there to the society between father and child) is the only natural society, and justified as such.<sup>44</sup>

### 2.3. *The society between master and servant, or slave*

In keeping with their basic assumption that in the fictitious state of nature human beings are free and equal, early modern social contracts theorists criticized Aristotle's doctrine of natural slavery. This does not imply, however, that they rejected slavery altogether. Quite to the contrary, they developed new arguments for justifying the power of the master over the slave (*servus*), and thereby also introduced new conceptual distinctions allowing them to discriminate between 'servitude', which rests on mutual agreement, and 'slavery', which rests on force.<sup>45</sup>

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<sup>40</sup> Locke, *Two Tratises*, II, 6, 56, p. 305.

<sup>41</sup> *Ibid.*, II, 6, 67, p. 312.

<sup>42</sup> *Ibid.*, II, 8, 116-118, p. 345-7.

<sup>43</sup> See note 5 above.

<sup>44</sup> Rousseau, *The Social Contract*, I, 2. See Zurbuchen, "La famille, une société naturelle?," pp. 134-6.

<sup>45</sup> The distinction between 'slave' and 'servant', which both translate the Latin 'servus', is a complicated question, since one needs to refer to various modern translations of Grotius and Pufendorf. See on that issue Zurbuchen, "Dignity and Equality", pp. 155-6. On theories of slavery see Bernd Franke, *Sklaverei und Unfreiheit im Naturrecht des 17. Jahrhunderts* (Hildesheim: Olms, 2009); on slavery in Grotius, John W. Cairns, "Stoicism, Slavery, and Law," *Grotiana* 22/23 (2001/2002), pp. 197-231; idem, "The Definition of Slavery in Eighteenth-Century Thinking:

In a manner reminiscent of Grotius, Pufendorf accounts for two kinds of slavery, which he assigns to different historical periods. He thereby conflates the fictional and the realist conception of the state of nature with one another, by showing at the same time how slavery may have been instituted in history and on what condition it appears legitimate. Since he does not refer to slavery in the New World, it is difficult to tell to what kind of social reality he refers in his own time, except in regard to the domestic servant or wage-earner hired for a limited period of time. The first kind of slavery he mentions is founded on a voluntary pact. Pufendorf points to the first ages of humanity and surmises that persons lacking intelligence and being unable to preserve themselves ‘probably offered themselves of their own free will’ to serve as slaves in order to escape poverty.<sup>46</sup> They committed themselves to serve their master in perpetuity in exchange of food and necessities of life.<sup>47</sup> While observing that this kind of slavery had been abolished by many peoples in his own time, and that the latter would have their household tasks accomplished by temporary wage-earners, Pufendorf still deals with perpetual slavery in order to show that even in this case natural law imposes limits on the power of the master, who must not treat the slave inhumanely or sell him without his consent, on the ground that the latter would have voluntarily chosen his master.<sup>48</sup>

The second kind of slavery originates in war. Pufendorf observes that at a time when wars became more frequent, ‘peoples adopted the custom that prisoners in war in return for their lives be taken into servitude together with any offspring they might subsequently have’.<sup>49</sup> When dealing with this kind of slavery, Pufendorf takes issue with Hobbes’ account of slavery in the *De cive*, where the latter introduces a terminological distinction between ‘slave’ and ‘servant’. According to Hobbes, the prisoner of war whom the victor saves his life is a ‘slave’ as long as he is in chains or in the workhouse and thus subject by force. In contradistinction, the captive who for saving his life promises the victor to serve him and to obey his commands, is called ‘servant’. In this latter case, the power of the master rests on a contract by virtue of which the vanquished obtains his life

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Not the True Roman Slavery,” in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (Oxford University Press, 2012), pp. 61-84. On Locke and slavery (and mainly the question whether Locke justified slavery in the new world, a question I leave to one side here), James Tully, “Rediscovering America: the ‘Two Treatises’ and aboriginal rights,” in idem, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge University Press, 1993), pp. 137-76; James Farr, “Locke, Natural Law, and New World Slavery,” *Political Theory* 36/4 (2008), pp. 495-522; William Uzgalis, “Racism, Slavery, and Indian Lands,” in *The Oxford Handbook on Philosophy and Race*, ed. Naomi Zack (New York: Oxford University Press, 2017), pp. 21-30.

<sup>46</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 4, 1, p. 129.

<sup>47</sup> Ibid., see also II, 4, 3, pp. 129-30.

<sup>48</sup> Ibid., II, 4, 3, p. 130.

<sup>49</sup> Ibid., II, 4, 1, p. 129.

in exchange of the service and submission he promises to the master. Hobbes insists that by his promise the servant commits himself absolutely and without any restriction to everything the master might command.<sup>50</sup> Pufendorf approves of Hobbes' distinctions but asserts at the same time that Hobbes was mistaken when considering the power of the master over the servant to be absolute and unrestricted.<sup>51</sup> Hence, Pufendorf argues that from the moment a contract has been passed between the victor and the vanquished and the latter is associated to the master's household as servant, the state of war that had subsisted between them ends, and that for this reason 'it is a wrong on the part of the master [...] either to fail to provide him with the necessities of life or to be harsh to him without reason, much less to put him to death, unless he has committed a capital crime'.<sup>52</sup> Pufendorf thus insists, against Hobbes, that once a contract has been concluded, the power of the master over the servant is limited, and that the former has to fulfill the duties he owes the latter in virtue of the contract between them. Pufendorf objects to the common idea that the servant would be owned by the master like a thing and that the latter 'might be transferred to whomever [h]e pleased, just like [his] other property, and be put up for sale in the manner of merchandise', and he observes:

[S]ince humanity bids us never to forget that a slave is in any case a man, we should by no means treat him like other property, which we may use, abuse and destroy at our pleasure.<sup>53</sup>

Despite this critical remark on ownership of slaves, Pufendorf confirms that 'the offspring of slave parents is itself of servile status, and belongs, as a piece of property, to the owner of the mother', and he faithfully reports by which arguments this practice is defended.<sup>54</sup>

Pufendorf's theory of servitude remains highly ambiguous. His remarks on the perpetual servitude of the poor as well as his account of servitude founded on the law of war testify to his difficulty to reconcile traditional forms of power in the domestic sphere with the assumption that human beings are by nature free and equal. By insisting on the contractual origin of servitude and on the limits natural law defines in regard to the exercise of power within the domestic sphere of

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<sup>50</sup> Thomas Hobbes, *On the Citizen*, ed. and transl. by Richard Tuck and Michael Silverthorne (Cambridge University Press: 2017), VIII, 1-5, pp. 102-4. In this work, Hobbes uses the French word 'serviteur', in the *Leviathan* the English word 'servant'.

<sup>51</sup> Pufendorf, *De jure*, VI, 3, 6, p. 938.

<sup>52</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 4, 4, p. 130.

<sup>53</sup> *Ibid.*, II, 4, 5, p. 130. On the emancipatory potential of this argument see Sarah Winter's chapter in this volume, especially her remarks on Granville Sharp's antislavery arguments.

<sup>54</sup> *Ibid.*, II, 4, 6, p. 131.

the household, Pufendorf nevertheless paved the way for a more thoroughgoing critique of domination within the family.

Indeed, Locke introduced a new argument for denouncing the contractual foundation of perpetual servitude, which Pufendorf still subscribed to. When he takes issue with the first kind of slavery – which is founded on voluntary agreement and which we now better call ‘servitude’ –, Locke argues that a man can never ‘*enslave himself* to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, if he pleases’, on the ground that a man cannot freely dispose of his own life, which he received from God, his creator.<sup>55</sup> What can be founded by compact is ‘servitude’, not ‘slavery’, and according to Locke servitude is necessarily limited in time. The master has only temporary power over the servant, and the master’s authority is limited to what is agreed in the contract.<sup>56</sup> Unlike Pufendorf, who still justified perpetual servitude, Locke considers the status of temporary wage-earners as the only legitimate form of servitude.

In the above presentation of Pufendorf’s account of the second kind of slavery, which originates in war, I deliberately highlighted the critical stance he adopts against Hobbes’ contention that the master retains absolute power over the slave even if the latter has promised to serve the master in exchange of his life and is then called ‘servant’. It needs to be added however, that Pufendorf agrees with Hobbes that ‘not every captive in war whose life is spared is understood to have entered into a pact with the victor’ and that it is quite possible that the death is but postponed, and the captives held in prisons, workhouses, or chains. In this case, the master reserves for himself the ‘license of war’ and can therefore ‘take his life, whenever he pleases, on the plea of a state of war’.<sup>57</sup> In like manner, Locke argues that the state of war between the victor and the vanquished may continue to exist, and he explicitly acknowledges that not only ‘servants’ but also ‘slaves’, who are ‘by the Right of Nature subjected to the Absolute Dominion and Arbitrary Power of their Masters’ may be part of the family and as such be under the domestic rule of the *paterfamilias*. Since the slaves have forfeited their liberties and their estates together with their lives, they would neither be capable of any property nor become part of civil society.<sup>58</sup>

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<sup>55</sup> Locke, *Two Treatises*, II, 4, 23, p. 284.

<sup>56</sup> *Ibid.*, II, 7, 85, p. 322. On Grotius’ distinction between various kinds of *servitus* see Emile Simpson’s chapter in this volume.

<sup>57</sup> Pufendorf, *De jure*, VI, III, 6, p. 938.

<sup>58</sup> Locke, *Two Treatises*, II, 7, 85, pp. 322-3.

Locke acknowledges yet another origin of slavery, namely just punishment, which is closely linked with the ‘strange doctrine’<sup>59</sup> that in the state of nature everyone has the executive power of the law of nature:

Indeed having, by his fault, forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it, may (when he has him in his Power) delay to take it, and may make use of him to his own Service, and he does him no injury by it. For, whenever he finds the hardship of his Slavery out-weigh the value of his Life, ‘tis in his Power, by resisting the Will of his Master, to draw on himself the Death he desires.<sup>60</sup>

It is clear that this kind of slavery can only obtain while independent families exist in the state of nature. For by founding states, the heads of families renounce the right to punish those who transgress the law of nature.<sup>61</sup> In Locke’s view, capital punishment and enslavement are justified in the state of nature if a man puts himself in a state of war against another one, by attempting to take him away his freedom and to subject him to his absolute power.<sup>62</sup> Moreover, a thief who intends to take away one’s money or whatever he pleases likewise puts himself in a state of war against the victim, simply by the use of force without right, which makes the latter suppose that the thief might take him away everything else, if he were in his power.<sup>63</sup>

In the literature on Locke’s theory of slavery, much attention has been paid to the question whether Locke intended this theory to justify slavery in the New World, or whether it could at least be used to this effect.<sup>64</sup> This question is of course very important, but not our concern here. To conclude this overview, I rather wish to stress that despite the ambiguities that characterize Pufendorf’s and Locke’s justifications of servitude, and slavery, their references to the fictitious natural state of freedom and equality also contained the potential for challenging the most extreme form of power within the family. As we have already seen, Pufendorf exploited Hobbes’ distinction between the slave and the servant with the intention to point to the limits of the master’s authority over the servant. Locke went further and contested that any kind of perpetual slavery could be founded by contract. Rousseau presented a more subtle and polemical version of the same critique at the beginning of the *Social Contract*, and he also developed a powerful argument for

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<sup>59</sup> Ibid., II, 2, 13, p. 275.

<sup>60</sup> Ibid., II, 4, 23, p. 284.

<sup>61</sup> Ibid., II, 9, 128, p. 352.

<sup>62</sup> Ibid., II, 3, 17, p. 279.

<sup>63</sup> Ibid., II, 3, 18, pp. 279-80.

<sup>64</sup> See note 45 above.

criticizing slavery founded on the law of war.<sup>65</sup> Quite paradoxically, Rousseau refrained however from deploying the emancipatory potential of the contractual argument in regard to the authority of the husband over his wife. Indeed, by declaring the latter to be natural, as opposed to conventional, he confirmed the legitimacy of the subordination of women to men in the private domain of the family.<sup>66</sup>

### 3. *From the family to the state*

As we have seen above, Pufendorf and Locke both consider the family as a complex unit that consists of three different societies where the man exercises power as a husband over his wife, as father over his children, and as master over the slave. In addition, they also deal with the power the *paterfamilias*, or head of the household, exercises as such, over the household.

Neither Pufendorf nor Locke deal with this power in a separate chapter, they rather consider it when they point to the limitations of the power a father has over his children, or the master over the servant. They also account for the power of the *paterfamilias* when they turn to the realist conception of the state of nature and ask themselves how states were founded, or may have been founded, in history.<sup>67</sup> In this context, the crucial question they address is whether and to what extent the family in the state of nature is, or resembles, a state.

What is at stake here can best be evidenced when we first look at Hobbes' account of the power within the domestic sphere of the family, which he subordinates to the question of the origin of the state, or commonwealth.<sup>68</sup> Thus, in the *De cive* he first deals with the commonwealth *by institution*,<sup>69</sup> which is founded in a reciprocal agreement of every one with every one, and then proceeds to examine the commonwealth *by acquisition*, or *natural* commonwealth, in which the right of dominion (*dominium*) is acquired 'by natural force or strength'.<sup>70</sup> In this context, Hobbes famously asserts that dominion over the person of another in the family is the same as in the commonwealth:

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<sup>65</sup> Rousseau, *The Social Contract*, I, 1, 4.

<sup>66</sup> See Zurbuchen, "La famille, une société naturelle?"

<sup>67</sup> Locke (*Two Treatises*, II, 8, 101, p. 334) explicitly acknowledges that history gives us but little account of how men actually lived in the state of nature.

<sup>68</sup> In what follows, I only refer to the *De cive*, because in this work Hobbes brings out most clearly the difference between the commonwealth by institution and by acquisition. For a more complete account of this theme see Sagar, "Of mushrooms and method"; Christov, *Before Anarchy*, chap. 3, pp. 67-103.

<sup>69</sup> *Civitas institutiva*, translated as 'commonwealth by design' in the translation I refer to.

<sup>70</sup> Hobbes, *On the Citizen*, 8, 1, p. 102.



The most important things to know here are the ways by which the right of *Dominion* (*Dominium*) is acquired over men's *persons*. Where such a right has been acquired, there is a kind of *little kingdom*. For to be a *King* is simply to have *Dominion* over many *persons*, and thus a *kingdom* is a *large family*, and a *family* is a *little kingdom*.<sup>71</sup>

Hobbes then distinguishes between two ways of acquiring (as opposed to instituting) the right to dominion. The first way 'is, on being captured or defeated in war or losing hope in one's own strength, one makes (to avoid death) a promise to the victor or the stronger party, to *serve* him, i.e. to do all he shall command'. In virtue of the promise, the vanquished owes the victor service and obedience 'simply and without restriction', and he is then called 'slave' (*servus*), and the one to whom he is bound a 'master' (*dominus*).<sup>72</sup> Hobbes then introduces the distinction between the 'servant' and the 'slave' we have already dealt with above: the vanquished who agrees to serve the master in exchange for his life, is bound by his promise and owes the latter obedience. In contradistinction to the 'slave' held in chains or workhouses, he is called 'servant'. Hobbes insists however, that dominion over the 'servant' does in no way differ from dominion over the 'slave': the master owns him 'like any other thing, animate and inanimate', and may sell the dominion at his own will.<sup>73</sup>

The important point here is that in the chapter on the acquisition of the right of dominion by war, Hobbes explicitly identifies the right of dominion in the family with the same right in the commonwealth. His demonstration that dominion of the master over the servant is unlimited, and that therefore the master cannot do him wrong, clearly aims at showing that the sovereign power in a commonwealth by acquisition is unrestricted and that the sovereign can do no wrong to his subjects because 'whatever he does, is done with their consent'.<sup>74</sup>

The second way of acquiring dominion Hobbes examines relies on a comparison between the dominion of the father over his children and the sovereign power in the commonwealth. In this context, he first discusses at some length the foundation of the dominion over children, which in his view originally belongs to the mother and then passes from the mother to the father in various ways, for example by contract when the mother agrees that the children ought to belong to the

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid., pp. 102-3.

<sup>73</sup> Ibid., 8, 2-4, pp. 103-4.

<sup>74</sup> Ibid., 8, 7, p. 104.

father,<sup>75</sup> or when the mother is captured in war.<sup>76</sup> Hobbes' surprisingly egalitarian account of the rights of the woman and the mother in the state of nature is very interesting. It has found much attention in the feminist literature, and is still subject to controversies.<sup>77</sup> I do not deal with these rights here, but turn directly to Hobbes' comparison between paternal power in the family and sovereign power in what he calls a 'patrimonial Kingdom'. The first thing to note is that Hobbes likens dominion over children to the dominion of the master over his slaves, for instance when he observes that 'in the state of nature every woman who gives birth becomes both a *mother* and a *Mistress (Domina)*'.<sup>78</sup> At the end of the paragraphs on the relationship between mother and father as well as husband and wife he confirms that originally the mother is the mistress of the children, and the father is their master by derivative right from her, and he concludes from this that '*children* are no less subject to those who look after them and bring them up than *slaves* are to masters, or *subjects* to the holder of *sovereign power* in the commonwealth'.<sup>79</sup> This implies that a parent cannot wrong a child as long as it is under his authority. The only thing children in the family have more than the slaves 'is that they perform more honourable services [...], and enjoy more luxuries'.<sup>80</sup> In consequence, Hobbes also argues that children are released from subjection in the same ways as subjects and slaves; emancipation is the same thing as manumission and disowning is the same as banishment.<sup>81</sup>

Although Hobbes insists that in the state of nature the children belong to the mother, even when she makes with a man a contract to live together, he leaves aside the possibility that any commonwealth, which arises from the family 'by generation',<sup>82</sup> and is called a patrimonial kingdom, might be established by the mothers of the family.<sup>83</sup> This must be the reason why he defines the family without even mentioning the wife or the mother: '*The father of the family, the children and the slaves, united in one civil person by virtue of paternal power is called a FAMILY.*'<sup>84</sup> The difference between the family and the commonwealth is one of degree only.

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<sup>75</sup> Ibid., 9, 6-7, pp. 109-10.

<sup>76</sup> Ibid., 9, 5, p. 109.

<sup>77</sup> See Hirschmann, Wright (eds.), *Feminist Interpretations of Thomas Hobbes*; Hirschmann, "Hobbes on the Family".

<sup>78</sup> Hobbes, *On the Citizen*, 9, 3, p. 108.

<sup>79</sup> Ibid., 9, 7, p. 110.

<sup>80</sup> Ibid., 9, 9, p. 111.

<sup>81</sup> Ibid., 9, 8, p. 110.

<sup>82</sup> Ibid., 8, 1, p. 103.

<sup>83</sup> Ibid., 9, 6, p. 110.

<sup>84</sup> Ibid., 9, 10, p. 112.

When the former grows so big that it has a good chance of defending itself against an aggressor, it is called a ‘patrimonial kingdom’,<sup>85</sup> which in contradistinction to a commonwealth by institution is acquired by force but has exactly the same right of government as the latter. This is why Hobbes can claim that the kingdom is a large family, and the family a little kingdom.

It is useful to keep in mind Hobbes’ theory of the commonwealth by acquisition when we now turn to the way in which Pufendorf and Locke account for the transition from the family to the state. Their comparisons between the family and the state rely on the power they assign to the head of the family in the state of nature, which clearly differs from the power the latter exercises as father over the children. Indeed, when dealing with paternal power in *De officio*, Pufendorf emphasizes the distinction ‘between the authority the father has as such and the authority and the power he has as the head of his household (*caput familiae*)’<sup>86</sup> – a power he exercises either in the state of nature or once he has submitted to the state. In the former case, Pufendorf argues, the heads of households ‘had exercised in their homes a kind of princely authority’ and the children who remained in their household had ‘a duty to regard their father’s authority as supreme’.<sup>87</sup> He thus assumes that in the state of nature fathers, as heads of the family, had the power of life and death over their adult children, to be exercised in cases of wrongdoing. In order not to confound paternal power with the power of the *paterfamilias*, it needs to be stressed that the latter has the power of life and death only over the sons who, once they are adult, remain a part of the father’s household, and this requires their tacit consent.<sup>88</sup> In the *De iure*, Pufendorf presents a more nuanced account of the analogy between family and state than in the *De officio*. He asserts in the former work that ‘distinct families have somewhat of the form of states’ and that ‘their heads bear some analogy to royal sovereignty’. It would however be wrong, he argues, to call families states, like Hobbes, because the ends of families and states are different, and ‘many parts of royal sovereignty do not fall upon families’. In addition to the right of life and death, to be exercised in the case of crimes, the heads of families would also have ‘the right of arms and of concluding treaties’.<sup>89</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 3, 4, p. 125.

<sup>87</sup> Ibid., II, 3, 7, p. 126.

<sup>88</sup> Pufendorf, *De jure*, VI, 2, 10, p. 923.

<sup>89</sup> Ibid., pp. 922-3. In his contribution to this volume David Singh Grewal points out that family relationships no less than commercial ties rest on man’s natural sociability, formed through the maturation of self-love, and differ in this regard from the state. On self-love and sociability in Pufendorf’s natural law theory see also Heikki Haara, *Pufendorf’s Theory of Sociability: Passions, Habits and Social Order* (Cham, Springer Nature, 2018), pp. 80-5.

While Pufendorf admits that in the state of nature the power of the *paterfamilias* bears some analogy to princely sovereignty, Locke seems to suggest otherwise in the paragraphs he devotes to the family. When he considers the ‘Master of a Family’ with all his subordinated relations ‘united under the Domestick Rule of a Family’, he affirms that despite its resemblance ‘with a little Common-wealth’, the family differs from the state in its constitution, power, and end. In comparison with the power of a monarch, the power of the *paterfamilias* would be very distinct, and ‘differently limited [...], both as to time and extent’, for excepting the slave (who is no necessary part of a family as such), he ‘has no Legislative Power over Life and Death’ over any of the family members.<sup>90</sup> While Locke stresses here that the family differs from a political society, which originates in a voluntary union of free men,<sup>91</sup> he admits in another context, where he deals with the historical origin of government, that the family, when it was numerous enough to subsist by itself, was indeed in many places the first political society, or commonwealth, with a monarchical government.<sup>92</sup>

These are the well-known paragraphs in the *Second Treatise*, where Locke makes extended concessions to patriarchalism,<sup>93</sup> without giving up, however, his opposition to Filmer. Like Pufendorf, Locke likens the power of the head of the family to political power by considering the relationship between the former and his children ‘when they were Men, and out of their Pupilage’, and this required that the adult sons consented to remain in their father’s family, to submit to his punishment and to give him the power to execute his sentence against any transgressor of the law of nature, ‘and so in effect make him the Law-maker, and Governour over all, that remained in Conjunction with his family’.<sup>94</sup> In Locke’s view, the father was the fittest to be trusted, since he already secured the property and interest of his children while they were under age, and the custom of obeying him made it easy for them to submit to his power. Yet another possible origin of the commonwealth Locke mentions in the same context is that several families may have met and set up the ablest to rule over them well.<sup>95</sup> He further insists that at a time when people lacked instruction about the forms of government and were not yet experienced with the inconveniences of absolute power, such a frame of government was most obvious and simple, and well suited to

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<sup>90</sup> Locke, *Two Treatises*, II, 7, 86, p. 323.

<sup>91</sup> *Ibid.*, II, 8, 102, p. 335.

<sup>92</sup> *Ibid.*, II, 8, 105-6, pp. 336-8.

<sup>93</sup> *Ibid.*, II, 8, 105, p. 336, Laslett’s note.

<sup>94</sup> *Ibid.*, II, 8, 105-6, pp. 336-7.

<sup>95</sup> *Ibid.*, II, 8, 105, p. 336; see also II, 8, 110, pp. 341-2.

the way of living ‘in the beginning of things’, where the adult sons were ‘more in need of defense against foreign Invasions and Injuries, than of a multiplicity of laws.’<sup>96</sup> For proving this, he points to the kings of the Indians in America as well as to the first kings of Israel, who were ‘little more than *Generals of their Armies*’ and had ‘but a very moderate Sovereignty’ in time of peace.<sup>97</sup>

While Locke seems not to exclude that in some instances – he mentions the examples of Venice and Rome<sup>98</sup> – the heads of independent families united into a political society by a compact of every one with every one and by giving up their power to the majority of the community,<sup>99</sup> his major hypothetical narrative relies on the monarchy as first form of government. He illustrates this origin of the government by pointing to the peoples of America, who were out of reach of the Empires of Peru and Mexico and thus owned their own natural freedom.<sup>100</sup> He thereby strikes a difficult balance between two arguments he wishes to reject. On one hand, he insists against Filmer that the power even of the first kings rested on consent, and that they did not rule over the extended family in virtue of their paternal authority. This would become evident when considering the reason people had for continuing this form of government:

‘Yet it is plain that the reason, that continued the Form of *Government in a single Person*, was not any Regard, or Respect to Paternal Authority; since all petty Monarchies, that is, almost all Monarchies, near their Original, have been commonly, at least upon occasion, Elective.’<sup>101</sup>

On the other hand, Locke also aims at demonstrating that the power of the first rulers was not arbitrary, even though it was put into one man’s hand ‘without any express Limitation or Restraint’.<sup>102</sup> Quite to the contrary, no one was entrusted with the rule ‘but for the publick Good and Safety, and to those Ends in the Infancies of Commonwealths those who had it, commonly used it’. Locke continues this argument by asserting that ‘without such nursing Fathers tender and carefull of the publick weale’, all governments would have perished.<sup>103</sup> By this move, he likens the authority of the first princes to the authority of the father, while he attempted to distinguish these kinds of authority as neatly as possible in the context of the argument against Filmer. By way

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<sup>96</sup> Ibid., II, 8, 107, pp. 338-9.

<sup>97</sup> Ibid., II, 8, 108, p. 339.

<sup>98</sup> Ibid., II, 8, 102, p. 335.

<sup>99</sup> Ibid., II, 8, 99, p. 333.

<sup>100</sup> Ibid., II, 8, 105, p. 337; see also II, 8, 108, pp. 339-40.

<sup>101</sup> Ibid., II, 8, 106, p. 338.

<sup>102</sup> Ibid., II, 8, 110, p. 342; see also 107, p. 338.

<sup>103</sup> Ibid., II, 8, 110, p. 342.

of conclusion, Locke points to the end of the Golden Age and the corruption of men's minds, which made it necessary for them to find out ways for preventing the abuses of power,<sup>104</sup> and this conclusion builds a bridge to his normative account of political society and government, and the well-known theory of the social contract.

In his commentary to the paragraph where Locke turns to the origin of the commonwealth, Peter Laslett observes that his argument is close to Tyrrell 'and perhaps even closer to Pufendorf'.<sup>105</sup> If we recall how Pufendorf accounts for the power the *paterfamilias* exercises over his adult sons, who remain in their father's family by their own consent, this remark seems indeed to be well warranted. It is however interesting to observe that Pufendorf's conjectures about the origin of states differ remarkably from those of Locke. More often than Locke – who also frequently mentions, as we have seen, the peoples in America – Pufendorf refers to the Bible when discussing the origin of the human race and of the first states.<sup>106</sup> This is for example the case in the chapter on the motives leading men to the establishment of states, where he rejects Jonhann Friedrich Hornius' argument that the state 'is a work of nature which is produced by natural order and consequence'.<sup>107</sup> It is wrong to imagine, Pufendorf maintains, that the state is a kind of increased family, which emerged by extension from the first pair, which was 'bound in conjugal love', and to which their children were united 'in the same most tender affection'. On the other hand, he also regards it as 'fabulous' that 'a great number of men were congregated at the beginning, then scattered in woods and desert places, and finally collected into states'.<sup>108</sup> In his view, it is indeed more plausible to assume, and in line with the Holy Scriptures, that several sons of one father, when they were able to entertain a family, went out to establish their own homes, especially in the early periods when 'living was gotten almost entirely from agriculture and grazing alone'.<sup>109</sup> It was only when the wiser heads of families recognized that the disadvantages affecting separate families could be removed, that the latter 'gathered into the same group and formed a state' by deciding 'to combine their families by a pact and sovereignty'.<sup>110</sup> Pufendorf then goes on to show at great length that the motive for forming states was not want, but fear, and that the

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<sup>104</sup> Ibid., II, 8, 111, p. 343.

<sup>105</sup> Ibid., II, 8, 105, p. 336, note.

<sup>106</sup> On this issue see Francesca Iurlaro's chapter in this volume.

<sup>107</sup> Pufendorf, *De jure*, VII, 1, 5, p. 956.

<sup>108</sup> Ibid., p. 957.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid., p. 958.

principal reason of men to leave their natural liberty was to defend themselves ‘against the evils which threaten man from his fellow man’.<sup>111</sup>

In order to find out how Pufendorf conceived of the form of the first states, one needs to turn to his scattered remarks on this topic in the chapter on the forms of the commonwealth (*respublica*), which he calls ‘regular’ instead of ‘simple’, as this was traditionally the case, and where sovereignty ‘without division and opposition, is exercised by one will in all parts of a state’.<sup>112</sup> Having confirmed that there are only three forms of regular state, namely democracy, aristocracy, and monarchy, Pufendorf first deals with democracy, not because it would surpass the other forms ‘but because that was certainly the oldest form among nations’.<sup>113</sup> He does not provide historical evidence for this argument, he rather refers to reason and to the hypothetical situation of a free family father who voluntarily gathered with others like him into a state. In his view, it is not to be presumed that such a father ‘could in a moment, as it were, so forget his former status, in which he used to dispose at his own pleasure all matters touching his safety, as to be willing to submit himself all at once to the judgment of one man on common affairs, with which also his own safety was involved’. This is the main reason why Pufendorf holds Aristotle’s opinion about the antiquity of kingship to be wrong.<sup>114</sup> While he admits that ancient history often mentions kings, he contends that the latter would equally show that the majority of them ‘enjoyed more the authority of persuasion than the power of command’. He concludes from this that ‘in general, nations lived under a popular regimen and in liberty, until little by little that enormous mass of petty states was reduced, usually by force and warfare, into a few large ones.’<sup>115</sup>

It is interesting to observe that Pufendorf also examines the hypothesis (which he ascribes to anonymous authors) that the most ancient kind of sovereignty among men might have been a ‘paternal kind’, which was mild at the outset and then developed into the right of life and death, and was transmitted to the eldest son by a right of primogeniture, so that ‘the heads of families gradually developed into petty kings’. Pufendorf rejects this hypothesis and thereby confirms the argument we have already encountered above: the eldest son could not have had regal sovereignty

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<sup>111</sup> Ibid., VII, 1, 6, p. 959.

<sup>112</sup> Ibid., VI, 5, 2-3, p. 1024.

<sup>113</sup> Ibid., VI, 5, 4, p. 1025.

<sup>114</sup> Ibid., p. 1026.

<sup>115</sup> Ibid.

over his brothers without their consent, and ‘those oldest men who passed under the name of kings were usually but the principal and eminent magistrates in democratic groups’.<sup>116</sup>

Unlike Locke, who deals at some length with the origin of commonwealths and is also concerned about the historical evidence for his conjectures, Pufendorf proves to be mainly interested in showing that various hypotheses about the oldest form of government cannot be used for invalidating his theory of the contractual origin of the state. This becomes clear when we recall that in his view the pact by which citizens subject themselves to the sovereign presupposes a pact by which individual men (or in reality heads of independent families) unite into one body, and then decide by majority vote to whom the supreme sovereignty will be entrusted, or about the form of the commonwealth.<sup>117</sup> According to Pufendorf, any commonwealth Hobbes calls ‘commonwealth by institution’, and which can be a democracy, an aristocracy, or a monarchy, thus passes, as it were, through an early democratic stage. This is the reason, I suggest, why he aims at showing that democracy was the oldest form of the commonwealth among nations. And this hypothetical account of the origin of the state is of course consistent with the fictitious or theoretical conception of the state of nature, in which men are free and equal and not subject to the authority of any other.<sup>118</sup>

It is beyond the scope of this chapter to further investigate why Pufendorf held monarchy (in the sense of a ‘regular’ state) to be the best form of government. To conclude, let me however point out a major difference between Hobbes’ and Pufendorf’s comparisons between the power of the *paterfamilias* and sovereignty in the state. As we have seen above, Hobbes claims that the paternal power of the father in the family and the sovereign power in the commonwealth are of like nature, in order to justify the ‘patrimonial kingdom’, which – like any kind of commonwealth by acquisition – rests on natural force or strength and not on consent. Since Pufendorf holds that the enlarged family – where the adult sons remain subjected to the power of the *paterfamilias*, which may then be transmitted to the oldest of the sons by right of primogeniture – is necessarily founded on consent, and therefore limited, it would seem impossible for him to justify a ‘patrimonial kingdom’. It thus comes as a surprise that he still deals with this kind of commonwealth. He explains that a monarchy is called the patrimony of a king, when the latter

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<sup>116</sup> Ibid.

<sup>117</sup> Pufendorf, *On the Duty of Man and Citizen*, II, 6, pp. 135-8.

<sup>118</sup> On the latter see David Singh Grewal’s chapter in this volume.



‘possesses in plenary dominion’ what he holds, ‘no matter how he obtained it’.<sup>119</sup> Originally, patrimony of a father would have been understood to have to do with things the owner could use and misuse at his pleasure, but at later times slaves (but not wives and children) were included in the patrimony since they were classed as things (Pufendorf refers here to the *Digest*). Pufendorf adopts however a critical stance against the very concept of a patrimonial kingdom when he observes that ‘later the ambition of rulers began to list among their chief possessions sovereignty over men’ and deplors that many of them got accustomed ‘to misusing the property of their subjects to the satisfaction of their lusts’.<sup>120</sup>

Pufendorf returns to the question of patrimony when he deals with the power of the sovereign over the property of his citizens. He admits that when the holder of supreme sovereignty was the first to acquire dominion over things embraced in the bounds of his state, the latter would hold over all property in the state the same power ‘as every father of a family possesses over his own patrimony’, and in this case ‘citizens will hold their property by no other right than that by which slaves in ancient Rome held their trifling possessions, and so their possession is merely precarious, revocable at the pleasure of the king whenever he so pleases’.<sup>121</sup> Pufendorf stresses however that these last remarks only apply to subjects of a state he just described, and not to citizens of a state where the holder of sovereignty ‘is summoned to sovereignty by the free will of men who already had possession of all their property’,<sup>122</sup> and he explicitly criticizes Hobbes, who falsely maintained in *De cive* that just like sons had propriety of goods granted them by their fathers, citizens had no propriety in which the ruler had no right. Again, Pufendorf expresses his disregard for the patrimonial kingdom when he points to examples such as the Pharaohs in Egypt, or the kingdom of Congo, and points to the observations Bernier made on the realm of the Great Mogul,

to the effect that this absolute dominion of princes in that realm and in other oriental empires is the reason why those lands, otherwise so favoured, are daily sinking lower in ignorance, barbarity and poverty, or at least do not enjoy the prosperity seen in most kingdoms of Europe, where the princes encroach more sparingly upon the dominion of

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<sup>119</sup> Ibid., VII, 6, 16, p. 1080.

<sup>120</sup> Ibid., p. 1081.

<sup>121</sup> Ibid., VIII, 5, 1, p. 1274.

<sup>122</sup> Ibid.

citizens, and where the latter can have something which they call their own even in opposition to the prince'.<sup>123</sup>

#### 4. Conclusion

This chapter aimed at exploring how the family was conceived in early modern social contract theories, first in regard to the state of nature, and then in regard to the civil society, or state. Despite the fact that feminist historians of political thought devoted an important number of studies to the place of women in these theories and that theories of slavery and servitude have found much attention, especially in connection with slavery in the New World, the family has rarely been studied in its own right, i.e. as a complex society that comprises the society between husband and wife, parents and children, and master and servant, or slave. Quite paradoxically, Hobbes' theory of the family, which is less elaborate than that of many of his successors, has recently found the most attention.<sup>124</sup> In section 2 above, I have presented an overview of Pufendorf's and Locke's theories of the family, with a specific interest in the question how they conceived and justified the power of the husband over his wife, of the parents over their children, and of the master over his servant, or slave. There would be much more to say about each of these small societies, especially regarding marriage. Indeed, like other social contract theorists, Pufendorf and Locke deal in this context at some length with questions related to divorce, polygamy, and incest, for example.<sup>125</sup> For reasons of coherence and of space, these topics have been left to one side, and I also refrained from raising the question of the origins of these theories of the family, because this would require a study in its own right. May it suffice to say here that Aristotle's theory of the family, who played a major role up to Bodin, remained certainly important. His concept of the *oikos* does however not appear in the social contract theories we have studied here,<sup>126</sup> most likely because Hobbes, Pufendorf and Locke refer to the Roman law figure of the *paterfamilias*, under whose rule the three simple societies are united.

As we have seen in section 3, the power of the head of the family, which differs from the authority he has as husband, father, and master, plays a key role in regard to the analogy between

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<sup>123</sup> Ibid., p. 1275. This is a reference to François Bernier, *Histoire de la dernière révolution des Etats du grand Mogol* (Paris: Claude Barbin, 1671).

<sup>124</sup> See note 10 above.

<sup>125</sup> On polygamy see Heydt, *Moral Philosophy in Eighteenth-Century Britain*, chap. 9, pp. 203-27.

<sup>126</sup> Rousseau refers to the *oikos* in the *Discourse on Political Economy*.

the family and the state. With the exception of Hobbes, who clearly puts his theory of power in the domestic realm of the family in the service of his overall argument about sovereignty in the state, our authors strike a difficult balance between an account of the origin of the commonwealth apt at confirming their normative theory of the state, and a conjectural narrative coherent with the sources they refer to (the Bible, reports about people in America, etc.). As we have seen, these narratives are remarkably different in Pufendorf and Locke, although they both argue, the first in opposition mainly to Hobbes, the second in opposition to Filmer, that the power of the paterfamilias is not the same as sovereignty in the state, and that despite some resemblances, the family is not a little kingdom.

By way of conclusion, let me come back to the various notions of the state of nature I have highlighted in this paper. There is first the well-known theoretical-conceptual notion, according to which men are by nature free and equal and not subject to any other. The social contract theorists' account of the family clearly shows that in this context 'man' is indeed a generic term and substitutable with expressions like 'human being' or 'individual'. As I suggested at the very beginning of this chapter, the state of nature as a 'fiction' needs to be carefully distinguished from the state of nature as a 'reality' in order to understand how our authors hold the basic assumption of men's freedom and equality to be compatible with the existence of independent families before states were founded. In the last section of the chapter we have finally seen that the 'realist' notion of the state of nature needs further to be divided into a conjectural and a historical account of the origin of commonwealths. As Locke asserts very clearly, the historical record needs to be completed by hypothetical reasoning to the extent that 'Government is every where antecedent to Records, and Letters seldome come in amongst a People, till a long continuation of Civil Society has, by other more necessary Arts provided for their Safety, Ease, and Plenty'.<sup>127</sup> If we acknowledge the duality of the realist notion of the state of nature, the social contract theorists' account of the family and of the origin of commonwealths can as well be considered as a kind of blueprint of the conjectural histories that were later developed in the eighteenth century, on one hand by Rousseau in the *Second Discourse*, and on the other by the Scottish philosophers, who partly responded to the latter.

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<sup>127</sup> Locke, *Two Treatises*, II, 8, 101, p. 334.

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