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## The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment

John Witte Jr.  
*Emory University School of Law*

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# THE NATURE OF FAMILY, THE FAMILY OF NATURE: THE SURPRISING LIBERAL DEFENSE OF THE TRADITIONAL FAMILY IN THE ENLIGHTENMENT

*John Witte, Jr.\**

## ABSTRACT

*This Article shows that many Enlightenment liberals defended traditional family values and warned against the dangers of sexual libertinism and marital breakdown. While they rejected many traditional teachings in their construction of modern liberalism, Enlightenment liberals held firmly to classical and Christian teachings that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and joint parental investment in children who are born vulnerable and dependent on their parents' mutual care. Stable marital households, furthermore, are the best way to ensure that men and women are treated with equal dignity and respect, and that husbands and wives, and parents and children, provide each other with mutual support, protection, and edification throughout their lifetimes. The positive law of the state must not only support the marital family but also outlaw polygamy, fornication, adultery, and "light divorce" that violate the other spouse's natural rights as well as desertion, abuse, neglect, and disinheritance that violate their children's natural rights to support, protection, and education from their parents. This argument about the natural norms and laws of sex, marriage, and family life, was adumbrated by Aristotle, elaborated by Thomas Aquinas, and then extended by scores of later theologians, philosophers, and jurists. Many of the great architects of Western liberalism embraced these traditional teachings and defended them with arguments from nature, reason, custom, fairness, prudence, utility, pragmatism, and common sense. Their arguments echoed loudly in sundry Anglo-American common law texts, statutes, and cases until the twentieth century, and they remain instructive even for our post-modern politics and families.*

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\* Director of the Center for the Study of Law and Religion; Alonzo L. McDonald Distinguished Professor; and Robert W. Woodruff Professor of Law, Emory University. I am deeply grateful to Elliott Foote, Andy Mayo, and Justin Latterell for their excellent research assistance, Amy Wheeler for her expert administrative help, and Elizabeth Christian and Kelly Parker Cobb for their fine library services.

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## INTRODUCTION

For better or worse, we are in the midst of a family law revolution that is upending millennium-long laws and customs of the West.<sup>1</sup> A century ago, American law defined marriage as an exclusive and enduring monogamous union between a man and a woman with the freedom and capacity to marry each other.<sup>2</sup> Marriage was considered to be the heart of the family and household, and it was designed for the mutual love and support of husband and wife, their mutual protection from sexual temptation, and their mutual procreation, nurture, and education of children. The law required that engagements be formal and that marriages be contracted with parental consent and witnesses and with a suitable waiting period, sometimes accompanied by the publication of banns. It required marriage licenses and registration and solemnization before civil authorities, religious authorities, or both. It prohibited marriages between couples with various blood and kin ties identified in the Mosaic and Roman law. It discouraged marriage where one party was impotent or had a contagious disease that precluded sex and procreation or physically endangered the other spouse. Couples who sought to divorce had to publicize their intentions, to petition a court, to show adequate cause or fault, and to make provision for the dependent spouse and children. Criminal laws outlawed fornication, adultery, prostitution, sodomy, polygamy, incest, contraception, abortion, and other perceived sexual offenses. Tort laws held third parties liable for seduction, enticement, loss of consortium, or alienation of the affections of one's spouse. Many of these legal rules had millennium-long roots in the civil law, canon law, and common law traditions of the West, with several rules going deeper still into ancient Greek and Roman laws.<sup>3</sup>

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<sup>1</sup> This Article is part and product of ongoing work on the history of law, religion, and family. It draws in part from JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (2d ed. 2012) [hereinafter WITTE, *FROM SACRAMENT*]; JOHN WITTE, JR., *GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* (2006) [hereinafter WITTE, *GOD'S JOUST*]; JOHN WITTE, JR., *THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED* (2009) [hereinafter WITTE, *SINS*]; and JOHN WITTE, JR., *WHY TWO IN ONE FLESH: THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* (forthcoming 2015) [hereinafter WITTE, *POLYGAMY*]. ©John Witte, Jr.

<sup>2</sup> For the propositions of this paragraph, see the detailed sources in WITTE, *FROM SACRAMENT*, *supra* note 1, at 287–324; WITTE, *GOD'S JOUST*, *supra* note 1, at 295–449. For a compilation of relevant American statutes and cases, broken down by legal topic, see CHESTER G. VERNIER, *AMERICAN FAMILY LAWS*. For an overview of English common law developments, see *A CENTURY OF FAMILY LAW, 1857–1957* (R.H. Graveson & F.R. Crane eds., 1957). For authoritative summaries of prevailing American family law at the turn of the twentieth century, see sources cited *infra* notes 575–80.

<sup>3</sup> See sources in WITTE, *FROM SACRAMENT*, *supra* note 1, at 17–112; WITTE, *SINS* *supra* note 1, 11–104; *TO HAVE AND TO HOLD: MARRYING AND ITS DOCUMENTATION IN WESTERN CHRISTENDOM, 400–1600* (Philip

Today, much of this traditional family law has fallen or been pushed aside in favor of new cultural and constitutional norms of sexual liberty, privacy, and autonomy.<sup>4</sup> Marriage is viewed increasingly at law and at large today as a private contract to be formed, maintained, and dissolved as the parties see fit. Requirements of parental consent and witnesses to the formation of engagement and marital contracts have largely disappeared. Mandatory waiting periods between engagement and marriage have also largely disappeared. Unilateral no-fault divorce statutes have reduced the divorce proceeding to an expensive formality in most states. Payments of alimony and other forms of post-marital support to dependent spouses and children have given way to lump-sum property exchanges providing a clean break for parties to remarry. Court-supervised property settlements between divorcing spouses have largely given way to privately negotiated or mediated settlements often confirmed with little scrutiny by courts. Many states now offer off-the-rack models of straight and same-sex marriage, civil union, and domestic partnership with shrinking functional distinctions between them. Privacy laws protect all manner of other voluntary sexual conduct and relationships among adults, and rapidly growing portions of the population are no longer bothering with formal marriage, especially those with fewer means and less education. Free speech laws protect all manner of sexual expression, short of obscenity and child pornography. The classic sex crimes of incest, prostitution, and polygamy remain on the books, but they are now the subjects of emerging cultural and constitutional battles.<sup>5</sup> The formal legal categories of marriage and family also

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L. Reynolds & John Witte, Jr. eds., 2007). The best single volume overview remains JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987).

<sup>4</sup> For the propositions of this paragraph, see the detailed sources in WITTE, *FROM SACRAMENT*, *supra* note 1, at 331–59; FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE (Steven M. Tipton & John Witte, Jr. eds., 2005). For good overviews of current Anglo-American family law from different perspectives, see ANN LAQUER ESTIN, *DOMESTIC RELATIONS: A CONTEMPORARY APPROACH* (2013); WHAT IS PARENTHOOD: CONTEMPORARY DEBATES ABOUT THE FAMILY (Linda C. McClain & Dan Cere eds., 2013); AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002); RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006). For a series of excellent annual social science studies of the changing patterns of marriage and family in the United States, see *Marriage*, INST. ON AM. VALUES, <http://www.americanvalues.org/marriage> (last visited Feb. 7, 2015); *Research and Analysis on Health of Marriage and Family in America*, NAT'L MARRIAGE PROJECT, <http://nationalmarriageproject.org> (last visited Feb. 7, 2015).

<sup>5</sup> See, e.g., ANGELA CAMPBELL, *SISTER WIVES, SURROGATES AND SEX WORKERS: OUTLAWS BY CHOICE?* (2013); Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family."* 119 HARV. L. REV. 2464 (2006). For further sources, see MARK GOLDFEDER, *LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW* (forthcoming 2015); WITTE, *POLYGAMY*, *supra* note 1.

still remain on the books, but leading scholars are now pressing for their “disestablishment,” if not outright “abolition.”<sup>6</sup>

These exponential changes in modern Anglo-American family laws have been, in no small part, valiant efforts to bring greater freedom and equality to American public and private life and to purge the law of its many centuries of patriarchy, paternalism, and plain prudishness. They are also basic legal adaptations to the exponential changes that have occurred in the culture and condition of modern families: the stunning advances in reproductive and medical technology; the exposure to vastly different perceptions of sexuality, kinship, and family structure born of globalization; the growing relaxation and diversification of norms and habits of sexual expression now greatly enhanced by the internet and other media; the explosion of international and domestic norms of human rights and freedom; and the implosion of the Ozzie and Harriet family born of new economic and professional demands on wives, husbands, and children, and much more.<sup>7</sup>

But all these changes in the culture and law of the family have introduced a number of striking new separations in the sexual field—separations between marriage and sex, between marriage and childbirth, between marriage and child rearing, between childbirth and parenting, between sex and physical contact (with the advent of the virtual world), and between childbirth, sexual intercourse, and biological filiation (with the introduction of IVF technology, surrogacy, and sperm banks).<sup>8</sup> Historically, the Western legal tradition promoted the integration of marriage, sexual intercourse, childbirth, and child rearing within a sturdy family framework to best satisfy the natural rights and needs of men, women, and children alike.<sup>9</sup> Not so much now. As Chief Rabbi Jonathan Sacks of the United Kingdom has written, the world of sex has become “a value-free zone.”<sup>10</sup>

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<sup>6</sup> See the collection of perspectives in ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* (2012); MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); and Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 *YALE L.J.* 1236 (2010).

<sup>7</sup> See sources cited *supra* note 3; see also DON S. BROWNING, *MARRIAGE AND MODERNIZATION: HOW GLOBALIZATION THREATENS MARRIAGE AND WHAT TO DO ABOUT IT* (2003).

<sup>8</sup> DON S. BROWNING, *Family Law and Christian Jurisprudence*, in *CHRISTIANITY AND LAW: AN INTRODUCTION* 163, 165–68 (John Witte, Jr. & Frank S. Alexander eds., 2008). See more fully BROWNING, *supra* note 7, at 1–29, 211–44.

<sup>9</sup> See WITTE, *FROM SACRAMENT*, *supra* note 1, 53–287; see also BROWNING, *supra* note 7, at 55–128.

<sup>10</sup> JONATHAN SACKS, *THE HOME WE BUILD TOGETHER: RECREATING SOCIETY* 210 (2007).

Whatever happens between two consenting adults in private is, most people now believe, entirely a matter for them. The law may not intervene; neither may social sanction. It is simply not other people's business.

Together with a whole series of other changes, the result has been that what marriage brought together has now split apart. There has been a divorce between sex and love, love and marriage, marriage and reproduction, reproduction and education and nurture. Sex is for pleasure. Love is a feeling, not a commitment. Marriage is now deeply unfashionable. Nurture has been outsourced to specialized child carers. Education is the responsibility of the state. And the consequences of failure are delegated to social workers.<sup>11</sup>

It is no surprise to hear a distinguished rabbi—or a distinguished bishop, imam, or priest—lament some of the excesses of the modern sexual revolution, though there are plenty of religious leaders who champion these modern reforms.<sup>12</sup> It is also no surprise to hear conservative scholars, judges, commentators, and policy makers note with alarm the formidable psychological, social, and economic costs of the modern sexual revolution. Indeed, these critics have converted their energies into a new “marriage movement” in America over the past two decades, seeking to counter some of the perceived excesses and dangers of the modern sexual revolution.<sup>13</sup>

It will come as more of a surprise, at least for some readers,<sup>14</sup> to hear strong historical liberals issue stern warnings about the dangers of many of the very family law reforms that America and other Western lands have been making. But strong warnings are just what we hear in the writings of a long series of

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<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., GENE ROBINSON, *GOD BELIEVES IN LOVE: STRAIGHT TALK ABOUT GAY MARRIAGE* (2012).

<sup>13</sup> The Institute for American Values and the National Marriage Project are current leaders of this movement. See *supra* note 4. The late Don Browning at the University of Chicago led a major series of ground-breaking projects on “Religion, Culture, and Family” in the 1990s and early 2000s, which he compiled into a summary volume. See DON S. BROWNING ET AL., *FROM CULTURE WARS TO COMMON GROUND: RELIGION AND THE AMERICAN FAMILY DEBATE* (2d ed. 2000).

<sup>14</sup> It was a surprise to me at least and forced me to correct the too narrow and too negative view of Enlightenment theories of marriage in my first edition of *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997), where I presented John Stuart Mill as the representative voice of Enlightenment liberalism. *Id.* at 200–02. On fuller and deeper reading since then, I now realize that Mill's teachings on sex, marriage, and family are, in fact, a rather liberal anomaly of liberalism before the twentieth century. I regret this mischaracterization and offer this Article as a partial corrective to my youthful ignorance. For better analysis of the development of liberal thought on the family from the seventeenth to the nineteenth centuries, see BRENT WATERS, *THE FAMILY IN CHRISTIAN SOCIAL AND POLITICAL THOUGHT* (2007); and SCOTT YENOR, *FAMILY POLITICS: THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT* (2011).

leading Enlightenment liberals in continental Europe, England, Scotland, and America.<sup>15</sup> For all of their antiestablishment and sometimes antireligious crusades on so many fronts, these Enlightenment liberals supported the traditional natural configuration of sex, marriage, and family life and the traditional body of family laws that accompanied it. The honor roll of such Enlightenment writers included Hugo Grotius, Samuel von Pufendorf, Jean Barbeyrac, John Locke, Mary Wollstonecraft, Baron Montesquieu, François Voltaire, David Hume, Henry Home, Francis Hutcheson, Adam Smith, Jeremy Bentham, William Blackstone, William Paley, Thomas Jefferson, Joseph Story, James Kent, and scores of other philosophers and jurists writing from roughly 1600 to 1900. Most of these figures were sharp critics of Christian establishments and sometimes of Christian theology altogether—although a number of them still identified themselves as Christians. Many of them were free thinkers who regularly rattled and rankled the intellectual and legal status quo. Many of them were major architects of modern liberalism, and its signature teachings of personal liberty, human rights, social equality, democratic government, constitutional order, and rule of law. Nonetheless, almost all of these Enlightenment liberals embraced most of the traditional forms and norms of sex, marriage, and family life. And they called for the continued integration of marriage, sexual intercourse, childbirth, and child rearing within the family as the best way to protect the personal liberty and natural rights of men, women, and children and to cultivate the health, safety, and welfare of the community. Rather than citing the Bible and theology, however, or simply relying on earlier classical and Christian arguments to support their theory and law of the family, these Enlightenment writers offered a whole series of interesting arguments from human nature, natural law, natural rights, and natural fairness as well as arguments from utility, economics, comparative anthropology, evolutionary biology, and plain common sense.

Their basic argument was that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and joint parental investment in children who are born vulnerable and utterly dependent on their

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<sup>15</sup> I am using the term “Enlightenment liberal(ism)” rather conventionally to describe the series of intellectual movements from the mid-sixteenth century to the mid-nineteenth century in continental Europe, England, Scotland, and America that helped bring legal, political, and social transformation, in part on the strength of new ideas of rationalism, contractualism, individualism, pluralism, and more. Among many accounts, see for example, ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* (Fritz C.A. Koelln & James P. Pettegrove trans., 1951); PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION* (1966); ARTHUR HERMAN, *THE SCOTTISH ENLIGHTENMENT: THE SCOTS’ INVENTION OF THE MODERN WORLD* (2001); HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976).



parents' mutual care.<sup>16</sup> Exclusive and enduring monogamous marriages, furthermore, are the best way to ensure that men and women are treated with equal dignity and respect, and that husbands and wives, and parents and children, provide each other with mutual support, protection, and edification throughout their lifetimes.<sup>17</sup> The positive law of the state must not only support such marriages, the argument continued; it must also outlaw polygamy, fornication, adultery, and easy divorce that violate the other spouse's natural rights as well as desertion, abuse, neglect, and disinheritance that violate their children's natural rights to support, protection, and education.

This argument about the most natural and expedient configuration of marriage and the family norms drew on complex and evolving ideas concerning human infant dependency, parental bonding, paternal certainty and investment, and the natural rights and duties of husband and wives, and parents and children. But it started with three brute realities about human nature and sexual reproduction that every family law system had to address: that human adults crave sex a good deal of the time, that human children need help for a very long time, and that human beings, unlike all other animals, are capable of self-destructive and species-destructive sexual behavior that society needs somehow to deter in the interests of private and public health, safety, and welfare.

The basic outline of this argument about the natural configuration of marriage and the family was sketched already half a millennium before the Enlightenment by the brilliant Dominican friar, Thomas Aquinas. Aquinas' argument, in turn, became a staple of the thought of neo-Thomist Dominican scholars gathered at the University of Salamanca in Spain, notably Francisco Vitoria who was a major source of inspiration and instruction for later Enlightenment writers. Early Enlightenment figures, like Hugo Grotius and John Locke, took these (neo-)Thomistic arguments about marriage and the family as the starting point for their more expansive liberal theory of the family that generations of later Enlightenment philosophers and jurists echoed and elaborated. Their views, in turn, penetrated deeply into the Anglo-American common laws of the eighteenth and nineteenth centuries, courtesy especially of William Blackstone and Joseph Story, who were avid readers of the Enlightenment philosophers. This Article tells that story and then returns in the Conclusions to some of the implications of that story for our day.

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<sup>16</sup> See *infra* Part V.A (discussing Henry Home).

<sup>17</sup> See WITTE, FROM SACRAMENT, *supra* note 1, at 279–81 (discussing John Locke).

## I. THE NATURE OF MARRIAGE AND THE FAMILY IN CLASSICAL AND CHRISTIAN THOUGHT

### A. Background

It was a commonplace of the Western tradition to speak of the “nature” of marriage and the family—its natural form and function, its natural goods and goals, its natural rights and duties that attach to husband and wife, and parent and child. The Greek philosopher Aristotle (384–321 B.C.E.), for example, viewed monogamous marriage as the natural foundation of the polis.<sup>18</sup> He envisioned humans as political or communal animals who form states and other associations “for the purpose of attaining some good.”<sup>19</sup> “[E]very state is composed of households,” Aristotle wrote famously in his *Politics*.<sup>20</sup> Every household, in turn, is composed of a “pairing of those who cannot exist without one another. Male and female must unite for the reproduction of the species—not from deliberate intention, but from the natural impulse . . . to leave behind them something of the same nature as themselves.”<sup>21</sup>

Aristotle extended this view in his *Ethics*, now emphasizing the natural inclinations and goods of dyadic marriage beyond its political and social expediency:

The love between husband and wife is evidently a natural feeling, for nature has made man even more of a pairing than a political animal in so far as the family is an older and more fundamental thing than the state, and the instinct to form communities is less widespread among animals than the habit of procreation. Among the generality of animals male and female come together for this sole purpose [of procreation]. But human beings cohabit not only to get children but to provide whatever is necessary to a fully lived life. From the outset the partners perform distinct duties, the man having one set, the woman another. So by pooling their individual contributions [into a common stock] they help each other out. Accordingly there is general agreement that conjugal affection combines the useful with the pleasant. But it may also embody a moral ideal, when husband and wife are virtuous persons. For man and woman have each their own special excellence, and this may be a source of pleasure to both.

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<sup>18</sup> See ARISTOTLE, *THE POLITICS OF ARISTOTLE*, at xi, 7 (Ernest Barker ed. & trans., Oxford Univ. Press reprinted ed. 1972) (c. 384 B.C.E.).

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 3.

Children too, it is agreed, are a bond between the parents—which explains why childless unions are more likely to be dissolved. The children do not belong to one parent more than the other, and it is the joint ownership of something valuable that keeps people from separating.<sup>22</sup>

The Roman Stoics repeated and glossed these classical Greek views about monogamous marriage, even while many of them celebrated celibacy as the higher ideal for philosophers seeking quiet contemplation. For example, Musonius Rufus (born c. 30 C.E.) described marriage in robust companionate terms that prefigured the familiar language of the Western marriage liturgy:

The husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals. But in marriage there must be above all perfect companionship and mutual love of husband and wife, both in health and in sickness and under all conditions, since it was with desire for this as well as for having children that both entered upon marriage.<sup>23</sup>

Musonius further insisted that sexual intercourse is “justified only when it occurs in marriage and is indulged in for the purpose of begetting children.”<sup>24</sup> He praised those lawgivers who “consider[] the increase of the homes of the citizens [through procreation] the most fortunate thing for the cities and the decrease of them [through infanticide] the most shameful thing.”<sup>25</sup> Indeed, he wrote, “whoever destroys human marriage destroys the home, the city, and the whole human race.”<sup>26</sup>

The Roman law jurists reflected these views as well. Marriage was a prominent public concern for Rome from the beginning, and marriage was

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<sup>22</sup> ARISTOTLE, *THE ETHICS OF ARISTOTLE* 225–26 (J.A.K. Thomson ed. & trans., Urwin Bros. Ltd. 1953) (c. 350 B.C.E.). The interpolation “into a common stock” is an alternative translation that appears in several other translations of this passage.

<sup>23</sup> MUSONIUS RUFUS, *WHAT IS THE CHIEF END OF MARRIAGE* (c. 100), *reprinted in* CORA E. LUTZ, *MUSONIUS RUFUS: THE ROMAN SOCRATES* 89, 89 (Cora E. Lutz trans., 1947).

<sup>24</sup> *Id.* at 87.

<sup>25</sup> *Id.* at 97.

<sup>26</sup> *Id.* at 93; *see also* Roy B. Ward, *Musonius and Paul on Marriage*, 36 *NEW TESTAMENT STUD.* 281 (1990).

considered “an honourable and desirable condition . . . that ensured the continuation of the human race and provided a sort of communal immortality” for Rome itself and for the extended families that made it up.<sup>27</sup> A number of Roman jurists had “a sentimental ideal” of marriage “focused on a standard of companionate (but not necessarily equal) marriage and a delight in children as individuals and as symbols of home comforts” and perpetuators of the family name, property, and household.<sup>28</sup> Unlike the philosophers who focused on the functions and ethics of marriage, the Roman jurists focused on the form of marriage and the formalities that attended its proper creation, maintenance, and dissolution. They also focused on the critical relationships between parents and children, especially surrounding family property and inheritance.<sup>29</sup> All these dense legal rules presupposed a basic natural law of the family. “The law of nature is the law instilled by nature in all creatures,” Emperor Justinian put it in summary. “It is not merely for mankind but for all creatures of the sky, earth and sea. From it comes [the union] between male and female, which we call marriage; also the bearing and bringing up of children.”<sup>30</sup> In the mid-third century, the Roman jurist Modestinus wrote that under the natural law a “lawful marriage” is “the union of a man and a woman, a partnership for life involving divine as well as human law.”<sup>31</sup> His teacher Ulpian called marriage an inseparable communion and a sacred and enduring union to be voluntarily contracted for the sake of “marital affection” and the propagation of offspring.<sup>32</sup>

The Western Christian tradition inherited and used these Graeco-Roman teachings on the nature of marriage and family. To be sure, the marital household was more than a natural institution for Christians; for them, it was also a contractual, economic, social, and spiritual association, whether

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<sup>27</sup> JUDITH EVANS GRUBBS, *LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE'S MARRIAGE LEGISLATION* 64 (1995).

<sup>28</sup> Suzanne Dixon, *The Sentimental Ideal of the Roman Family*, in *MARRIAGE, DIVORCE, AND CHILDREN IN ANCIENT ROME* 99, 111 (Beryl Rawson ed., 1991); see also SUZANNE DIXON, *THE ROMAN FAMILY* (1992).

<sup>29</sup> For a good illustration of rules and cases, see BRUCE W. FRIER & THOMAS A.J. MCGINN, *A CASEBOOK ON ROMAN FAMILY LAW* (2004).

<sup>30</sup> JUSTINIAN'S INSTITUTES 36–37 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987) (c. 533) (rendering “*conjugatio*” as “intercourse” rather than “union”); see THE INSTITUTES OF GAIUS 19 (W.M. Gordon & O.F. Robinson trans., Cornell Univ. Press 1988) (c. 161) (“But the law which natural reason makes for all mankind is applied in the same way everywhere. It is called ‘the law of all peoples’ because it is common to every nation.”); see also *id.* at 13–26 (describing the various civil laws of marriage and family life in Rome and their consonance with this law of nations).

<sup>31</sup> 2 THE DIGEST OF JUSTINIAN 657–58 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985) (c. 530).

<sup>32</sup> *Id.* at 658, 707–10, 731–33; 3 *id.* at 182–200; JUSTINIAN'S INSTITUTES, *supra* note 30, at 43.

sacramental or covenantal.<sup>33</sup> But, at its foundation, marriage and the family was first and foremost a natural institution. Already in Paradise, Christians argued, God had brought the first man and the first woman together as “two in one flesh” and commanded them to “be fruitful and multiply.”<sup>34</sup> God had created them as social creatures, naturally inclined and attracted to each other. God had given them the physical capacity to join together and to beget children. God had commanded them to love, help, and nurture each other and to inculcate in each other and in their children the love of God, neighbor, and self. These duties and qualities of marriage, the Christian tradition taught, continued after the fall into sin. After the fall, however, marriages also became a remedy for lust, a balm to incontinence. Rather than allowing sinful persons to burn with lust, God provided the remedy of marriage for parties to direct their natural drives and passions to the service and love of the spouse, the child, and the broader community.<sup>35</sup>

Like the Greeks and Romans, early Christian writers emphasized the public and private goods of marriage and the family.<sup>36</sup> The leading Western Church Father, St. Augustine (354–430), called marriage a “holy and true fellowship” and “friendship”<sup>37</sup> and the marital household the “seedbed” of the city,<sup>38</sup> the “the first natural bond of human society.”<sup>39</sup> He quoted his famous Greek contemporary, St. John Chrysostom (345–407) about the political and social utility of the family: “The love of husband and wife is the force that welds society together. . . . Because when harmony prevails, the children are raised well, the household is kept in order, and neighbors and relatives praise the result. Great benefits, both for families and states, are thus produced.”<sup>40</sup> Marriage also brought with it the goods of fidelity, children, and stability to the couple and their children.<sup>41</sup> As a contract of fidelity, marriage gave husband and wife an equal power over the other’s body, an equal right to demand that

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<sup>33</sup> See WITTE, FROM SACRAMENT, *supra* note 1, at 2–4.

<sup>34</sup> *Genesis* 1:27–28, 2:23–24; *Matthew* 19:5; 1 *Corinthians* 6:16; *Ephesians* 5:31 (Revised Standard).

<sup>35</sup> See sources and discussion in WITTE, FROM SACRAMENT, *supra* note 1, at 31–75.

<sup>36</sup> See overview in John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001).

<sup>37</sup> AUGUSTINE, ON THE GOOD OF MARRIAGE (c. 401), *reprinted in* 3 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 397, 403 (Philip Schaff ed., Peter Holmes et al. trans., reprt. ed. 1975).

<sup>38</sup> AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS 667 (R.W. Dyson ed. & trans., Cambridge Univ. Press 1998) (c. 426).

<sup>39</sup> AUGUSTINE, *supra* note 37, at 399.

<sup>40</sup> JOHN CHRYSOSTOM, HOMILY 20 ON EPHESIANS 5:22–33 (c. 386), *reprinted in* ST. JOHN CHRYSOSTOM ON MARRIAGE AND FAMILY LIFE 43, 44 (Catharine Roth & David Anderson trans., 1986).

<sup>41</sup> *See id.*

the other spouse avoid adultery, and an equal claim to the “service, in a certain measure, of sustaining each other’s weakness, for the avoidance of illicit intercourse.”<sup>42</sup> As a created, natural means of procreation, Christian marriage rendered sexual intercourse licit, a proper means and manner of fulfilling God’s command to “be fruitful and multiply.”<sup>43</sup> As a kind of “sacramental bond,” marriage was a source and symbol of permanent union and household stability between Christians.<sup>44</sup>

Also like the Greeks and Romans, Christians taught that marriage is subject to the laws of nature. For them, natural law was not only, as the Roman jurists had put it, the law that “nature has taught to all animals,” which gave them natural inclinations to protect, preserve, and perpetuate themselves through procreation.<sup>45</sup> Natural law was also what twelfth-century canonist Gratian called the “natural instinct[s]” or “intuitions” that are unique to humans and the “common” customs and conventions that have emerged among humans over time.<sup>46</sup> These distinctly human qualities of natural law, Christians taught, are known through reason and conscience, and often confirmed, illustrated, and sometimes enhanced by the Bible. Natural law, in this fuller human sense, helped to channel fit persons’ natural drive and determination to marry when they reach the age of puberty; to conceive children and nurture and educate them until adulthood; and to remain bonded to their kin who are by nature inclined to serve and support each other, especially in times of need, frailty, and old age.<sup>47</sup> The natural law prescribed heterosexual, lifelong unions between a couple, featuring mutual support and faithfulness.<sup>48</sup> It proscribed incest, bestiality, buggery, sodomy, pederasty, masturbation, contraception, abortion, and other unnatural and non-procreative sexual activities and relations.<sup>49</sup>

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<sup>42</sup> AUGUSTINE, *THE GOOD OF MARRIAGE* (c. 401), *reprinted in SAINT AUGUSTINE: TREATISES ON MARRIAGE AND OTHER SUBJECTS* 3, 16–17 (Roy J. Deferrari ed., Charles T. Wilcox et al. trans., 1955).

<sup>43</sup> *Id.* at 10.

<sup>44</sup> AUGUSTINE, *ON MARRIAGE AND CONCUPISCENCE* (c. 401), *reprinted in 5 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH*, *supra* note 37, at 263, 268.

<sup>45</sup> JUSTINIAN’S *INSTITUTES*, *supra* note 30, at 45–47; *THE DIGEST OF JUSTINIAN*, *supra* note 31, at 1; *see also* GRATIAN, *THE TREATISE ON LAWS (DECRETUM DD. 1–20) WITH THE ORDINARY GLOSS* (c. 1472), *reprinted in 2 STUDIES IN MEDIEVAL AND EARLY MODERN CANON LAW* 6–7 (Augustine Thompson & James Gordley, trans., 1993) (providing translation).

<sup>46</sup> GRATIAN, *supra* note 45, at 6–7.

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See sample texts in* RUDOLF WEIGAND, *DIE NATURRECHTSLEHRE DUR LEGISTEN UND DEKRETISTEN VON IRNERIUS BIS ACCURSIVS UND VON GRATIAN BIS JOHANNES TEUTONICUS [THE NATURAL LAW TEACHINGS OF THE CIVILIANS AND DECRETISTS FROM IRNERIUS TO JOHN TEUTONICUS]* 283–98 (1967). For additional

### B. *Thomas Aquinas*

Dominican friar, Thomas Aquinas (1225–1274), drew an important distinction between the primary and secondary precepts of the natural law.<sup>50</sup> Primary natural law precepts, he said, deal with activities that are primal, inescapable; one cannot help but obey them.<sup>51</sup> For example, each person must eat, drink, and sleep to survive.<sup>52</sup> Secondary natural law precepts guide activities consistent with these primary precepts, but which “vary according to the various conditions of persons, times, and other circumstances.”<sup>53</sup> These activities are not “binding in all cases, but only in the majority.”<sup>54</sup> Primary precepts command that everyone must eat, drink, and sleep, or they die.<sup>55</sup> Secondary precepts help determine the appropriate amounts of food, drink, and sleep for each person in different circumstances.<sup>56</sup>

The natural law of procreation is similar, Aquinas argued, but its secondary precepts are more complex. Primary natural law precepts command that the human race must procreate.<sup>57</sup> If no one has children, the human race will die out. Secondary natural law precepts, however, teach that not every person needs to procreate.<sup>58</sup> Some individuals are called to a life of chastity and virginity.<sup>59</sup> Others are called to marriage, and they produce children in substitution for those who do not.<sup>60</sup> In addition, secondary precepts teach that some ways of procreating are more naturally just, healthy, and beneficial than

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detailed sources, see BRUNDAGE, *supra* note 3; and PHILIP LYNDON REYNOLDS, MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MEDIEVAL PERIODS (1994).

<sup>50</sup> 5 THOMAS AQUINAS: SUMMA THEOLOGICA 2796–97 (Fathers of the English Dominican Province trans., Thomas Moore Publ’g 1948) (c. 1274) [hereinafter AQUINAS, ST]; see also JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 1 (1998). For later uses of these distinctions, building on Aquinas, see FRANCISCO SUAREZ, DE LEGIBUS, AC DEO LEGISLATORE [A TREATISE ON LAWS AND GOD THE LAWGIVER] (1612), reprinted in 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ 3, 303–07 (Gwladys L. Williams et al. trans., 1944); see also THOMAS SANCHEZ, DE SANCTO MATRIMONII SACRAMENTO DISPUTATIONUN TOMI TRES [COMMENTARY ON THE HOLY SACRAMENT OF MARRIAGE IN THREE VOLUMES] bk. 7, fols. 265r–269v (Heredes, Martinii Nutii et Ioannem Meurism 1617).

<sup>51</sup> AQUINAS, ST, *supra* note 50, at 2795–97.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2798.

<sup>54</sup> *Id.*

<sup>55</sup> See PHILIP L. REYNOLDS, FOOD AND THE BODY: SOME PECULIAR QUESTIONS IN HIGH MEDIEVAL THEOLOGY 4 (1999).

<sup>56</sup> *Id.*

<sup>57</sup> 5 AQUINAS, ST, *supra* note 50, at 2795–97.

<sup>58</sup> See *id.* at 2798.

<sup>59</sup> See *id.* at 2700 (explaining how perfection consists of a “contemplative life”).

<sup>60</sup> *Id.* at 2699–700.

others.<sup>61</sup> After all, children can be produced by rape, fornication, prostitution, concubinage, incest, polygamy, and monogamy alike.<sup>62</sup> Secondary precepts, moreover, teach that procreation means not just conceiving a child but nurturing, educating, and preparing him or her for independent life.<sup>63</sup> Animals choose among these various methods of procreation and nurture by following their natural instincts of attraction and revulsion.<sup>64</sup> Humans follow these same natural instincts, too, but they also use their reason and conscience to form norms and habits of moral behavior in response.<sup>65</sup> Those who attend properly to the natural law understand that polygamy, incest, rape, fornication, prostitution, and concubinage are inferior modes of procreation, for they cause disproportionate harm to women and children.<sup>66</sup> Exclusive and enduring monogamous marriages accord better with the secondary precepts of natural law.<sup>67</sup>

Aquinas elaborated on this argument in his *Summa Contra Gentiles*, a sophisticated work of apologetics designed in part to present the teachings of Christianity to Muslims, Jews, and other foreign “peoples” (*gentiles*) of the day.<sup>68</sup> Here he analyzed what he considered to be the deep natural construction of all human marriages, not just Christian marriages, as ideally monogamous, exclusive, and indissoluble unions.<sup>69</sup>

Aquinas built his account in part on the extensive observations of the reproductive strategies of various animals just published by his teacher, Albert the Great (c. 1193–1280).<sup>70</sup> He also built on Aristotle’s teaching that humans are marital animals before they are political animals, and that most men and women have a natural attraction to each other and have a natural inclination to produce “something of the same nature as themselves” as an act of

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<sup>61</sup> *Id.* at 2798.

<sup>62</sup> *See id.* at 2766–816.

<sup>63</sup> *Id.* at 2699–700.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2795–96.

<sup>66</sup> *Id.* at 2795–98.

<sup>67</sup> *Id.*

<sup>68</sup> ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, bk. III, pt. II (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975) (c. 1260) [hereinafter *AQUINAS, SCG*]. I am grateful to the late Professor Don S. Browning for alerting me to these texts. For his analysis of these materials, see BROWNING ET AL., *supra* note 13, at 113–24.

<sup>69</sup> *AQUINAS, SCG, supra* note 68, at 120–21, 142–52.

<sup>70</sup> *See, e.g.*, ALBERT THE GREAT, *QUESTIONS CONCERNING ARISTOTLE’S ON ANIMALS* 185–202, 225–65, 302–36, 439–72 (Irven M. Resnick & Kenneth F. Kitchell, Jr. trans., Catholic Univ. Press of Am. 2008) (c. 1258). I am grateful to Professor Philip L. Reynolds for bringing this text to my attention.



self-preservation and perpetuation.<sup>71</sup> But Aquinas added several new insights into the unique strategies of human reproduction through enduring pair bonding, rather than through random or multiple sexual associations.

Aquinas first observed that humans are unique among other animals in producing utterly fragile and helpless infants.<sup>72</sup> Unlike other young animals, human babies cannot soon run, fly, or swim away.<sup>73</sup> They need nurture, protection, food, shelter, and education for a number of years—ideally from both their mother and father and their respective kin networks.<sup>74</sup>

[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 parents' care for a long time, there is a very great tie between male and female, to which tie even the generic nature inclines.<sup>75</sup>

“[A]mong 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,” Aquinas continued.<sup>76</sup> This is the case with cats, dogs, cattle, and other herding animals, where newborns quickly become independent after a brief nursing period.<sup>77</sup> “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.”<sup>78</sup> 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.”<sup>79</sup> Birds are a good example: 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 take flight on their own.<sup>80</sup>

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<sup>71</sup> See *supra* text accompanying notes 18–22.

<sup>72</sup> 5 AQUINAS, ST, *supra* note 50, at 2699–700.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2700.

<sup>76</sup> AQUINAS, SCG, *supra* note 68, at 144.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 144–45, 151.

Human beings push this pair-bonding pattern of reproduction much further, Aquinas continued, not only because their tiny children remain dependent for so much longer but also because these children place heavy and shifting demands on their parents as they slowly mature.<sup>81</sup> Except in rare cases, this requires the effort of both parents and the kin structures they each represent.<sup>82</sup>

[T]he 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.<sup>83</sup>

For this reason, human males and females are naturally inclined to remain together and to remain faithful to each other for the sake of their dependent child(ren).

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.<sup>84</sup> A woman will usually know that a child is hers because she carries it to term and then nurses the child thereafter.<sup>85</sup> A man will know that a child is his only if he is sure that his wife has been sexually faithful to him alone.<sup>86</sup> Only with an exclusive monogamous relationship can a man be sure that if his wife becomes pregnant that he is the father.<sup>87</sup> And only then will a man be likely to join his wife in care for their child.<sup>88</sup> “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>89</sup>

Aquinas recognized that paternal certainty alone was often not enough to bind a man to his wife and child. He believed that human males, like other

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<sup>81</sup> *Id.* at 144–45.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 150–51.

<sup>85</sup> *Id.*; see also 5 AQUINAS, ST, *supra* note 50, at 2699 (“Now a child cannot be brought up and instructed unless it have certain and definite parents, and this would not be the case unless there were a tie between the man and a definite woman, and it is in this that matrimony consists.”).

<sup>86</sup> AQUINAS, SCG, *supra* note 68, at 150–51.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 151; 5 AQUINAS, ST, *supra* note 50, at 2724–25 (explaining the marriage goods).

male animals, craved sex with many females much more than they craved permanent attachment to one woman.<sup>90</sup> But a rational man, he insisted, can be induced to care for his children and cleave to his wife because of his natural instinct for self-preservation.<sup>91</sup> Once a man realizes that a given child is literally an extension of himself, a part and product of his own body and being, “flesh of my flesh, bone of my bone,” he will care for the infant as he is inclined to care for his own body.<sup>92</sup> And once he begins this parental process, his attachment to that child will settle and deepen, and he will remain with the child and its mother.<sup>93</sup> He will come to enjoy the interaction with and growth of his child, and he will also enjoy the sexual intimacy and domestic support of his wife as the family remains together.<sup>94</sup>

Both faithful and indissoluble marriage, Aquinas concluded, provides the context for this parental-lifelong investment in children.<sup>95</sup> Faithful and exclusive marriage provides paternal certainty—ensuring a man that he is investing in his own children, not those with whom he has no biological tie.<sup>96</sup> Indissoluble and enduring marriage also provides parental investment—ensuring children of the support of their parents for their many years of maturation.<sup>97</sup> These children will later reciprocate when their parents grow old and fragile and enter into their own second childhood, becoming needy and dependent anew.

To these two arguments from the nature of human reproduction and parental attachment, Aquinas added a third argument from natural justice and fairness to show that monogamy was superior to polygamy in humans—an important issue for a work of apologetics that sought to appeal to Jews and Muslims of his day, some of whom practiced polygamy.<sup>98</sup> Aquinas rejected polyandry (one female with multiple males) because it was naturally unjust to

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<sup>90</sup> AQUINAS, SCG, *supra* note 68, at 150–51; 5 AQUINAS, ST, *supra* note 50, at 2724–25, 2795.

<sup>91</sup> 5 AQUINAS, ST, *supra* note 50, at 2725–26; *see* 3 *id.* at 1293–96 (describing a father’s love for his child as “love for himself”).

<sup>92</sup> AQUINAS, SCG, *supra* note 68, at 147–48; *see also* Genesis 2:23.

<sup>93</sup> AQUINAS, SCG, *supra* note 68, at 147–48.

<sup>94</sup> *Id.*; *see also* 5 AQUINAS, ST, *supra* note 50, at 2725–26 (explaining how offspring are a “good” of marriage).

<sup>95</sup> AQUINAS, SCG, *supra* note 68, at 147–50.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *See* details in WITTE, POLYGAMY, *supra* note 1 (assessing in chapter 1 the transition from polygamy to monogamy in ancient Judaism, and in chapter 4 the medieval case for monogamy over polygamy).

children.<sup>99</sup> If a woman had sex with several husbands, he argued, it removed the likelihood that the children born to that woman would clearly belong to any one husband.<sup>100</sup> This would undermine paternal certainty and consequent paternal investment in their children's care.<sup>101</sup> The children would suffer from neglect, and the wife would be overburdened trying to care for them and trying to tend to her multiple husbands and their rampant sexual needs at once.<sup>102</sup>

Aquinas rejected polygyny (one male with multiple females) because it was naturally unjust to wives.<sup>103</sup> Polygyny did not necessarily erode paternal certainty, Aquinas allowed.<sup>104</sup> So long as his multiple wives were faithful to him alone, a man could be assured of being the father of children born in his household.<sup>105</sup> But this required a man to pen up his wives like cattle, isolating them from other roving males even when his own energies to tend to them were already dissipated over the several women and children gathered in his household.<sup>106</sup> While locked up at home, the wives were reduced to servants, and set in perennial competition with each other and with rival children for resources and access to their shared husband.<sup>107</sup> This is not marriage, "but, instead, a sort of slavery," said Aquinas.<sup>108</sup> It betrayed the fundamental requirements of fidelity and mutuality between husband and wife, the undivided and undiluted love and friendship that become a proper marriage.<sup>109</sup> True marital faith and "friendship consists in an equality" that should never be divided, Aquinas wrote.<sup>110</sup> It requires not only forgoing sexual intercourse with another and honoring the reasonable sexual advances of one's spouse.<sup>111</sup> It also requires the commitment to be indissolubly united with one's spouse in body and mind; to be willing to share fully and equally in the person, property,

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<sup>99</sup> AQUINAS, SCG, *supra* note 68, at 147–48, 151–52. *See generally* 5 AQUINAS, ST, *supra* note 50, at 2794–97 (discussing whether it is within the natural law to have several wives).

<sup>100</sup> AQUINAS, SCG, *supra* note 68, at 147–48, 151–52.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 150–52; 5 AQUINAS, ST, *supra* note 50, at 2794–801.

<sup>104</sup> 5 AQUINAS, ST, *supra* note 50, at 2794–801.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2794–98.

<sup>108</sup> AQUINAS, SCG, *supra* note 68, at 148, 152.

<sup>109</sup> *See id.*

<sup>110</sup> *See id.* at 152; 5 AQUINAS, ST, *supra* note 50, at 2795–96.

<sup>111</sup> AQUINAS, SCG, *supra* note 68, at 152.

lineage, and reputation—indeed, in the “entire life”—of one’s spouse.<sup>112</sup> It is to be and bear with each other in youth and in old age, in sickness and in health, in prosperity and in adversity. Polygyny undercuts all of those fundamental goods of marriage.

So, if it is not lawful for the wife to have several husbands, since this is contrary to the certainty as to offspring, it would not be lawful, on the other hand, for a man to have several wives, for the friendship of husband and wife would not be free, but somewhat servile. And this argument is corroborated by experience, for among husbands having plural wives the wives have a status like that of servants.<sup>113</sup>

Natural law and natural justice thus teach monogamy.

Aquinas’ concern for natural justice and fairness to women and children also framed his arguments against divorce and remarriage—which he regarded as a form of “successive polygamy” or “digamy,” as the Christian tradition had called it.<sup>114</sup> His real concern was with “voluntary divorce”—unilateral, no-fault divorce as we would call it today.<sup>115</sup> This option was especially unjust to wives, Aquinas said, for they would be left vulnerable to their husband’s decisions to divorce them when they became barren or lost their youthful beauty.<sup>116</sup> If they had the right to divorce, many men, given their proclivity to wander sexually, would not be encouraged to develop the comfortable habits of monogamous fidelity to wife and child that the natural structure of monogamy encourages.<sup>117</sup> Many women would be discarded in middle age, without support either from their husbands, who would likely go on to other women, or from their fathers, who would likely be dead at that point. The notion that a woman could have her own career to support herself, beyond that of the cloister or church guild, was simply not within the medieval imagination. This made divorce naturally wrong, said Aquinas: “So, if any

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<sup>112</sup> *Id.* at 147; 4 AQUINAS, ST, *supra* note 50, at 2171–72; 5 *id.* at 2710–11 (calling matrimony a joining of the bodies and minds of the husband and wife). See further texts and discussion in FINNIS, *supra* note 50, at 143–54.

<sup>113</sup> AQUINAS, SCG, *supra* note 68, at 152.

<sup>114</sup> WITTE, POLYGAMY, *supra* note 1 (assessing in chapter 2 the arguments for monogamy versus polygamy in the early church, and in chapter 4 the medieval case for monogamy over polygamy).

<sup>115</sup> 5 AQUINAS, ST, *supra* note 50, at 2806–11; AQUINAS, SCG, *supra* note 68, at 147–50. St. Thomas added an argument against divorce that rankles modern egalitarian sensibilities: “the female needs the male, not merely for the sake of generation, as in the case of other animals, but also for the sake of government, since the male is both more perfect in reasoning and stronger in powers.” AQUINAS, SCG, *supra* note 68, at 147–48.

<sup>116</sup> AQUINAS, SCG, *supra* note 68, at 147–48.

<sup>117</sup> *Id.* at 147–50.

man took a woman in the time of her youth, when beauty and fecundity were hers, and then sent her away after she had reached an advanced age, he would damage that woman, contrary to natural equity” or natural justice.<sup>118</sup>

Removing divorce as an option for properly married couples not only provided security for wives but also fostered “good behavior” in the marital household, said Aquinas.<sup>119</sup> The husband and wife will eventually be less prone to adultery, knowing that they will have to live either alone or with their spouse and that their adulterous lover will remain forever forbidden to them, even after the death of their spouse.<sup>120</sup> The marital couple will be more inclined to fix “the sources of disagreements” so as to reach “a more solid affection” for each other and their relatives, making life together more agreeable.<sup>121</sup> And they “will be more solicitous in their care for domestic possessions when they keep in mind that they will remain continually in possession of these same things.”<sup>122</sup>

Voluntary divorce was also naturally unjust to children, Aquinas continued, for it squandered their inheritance and impeded their ability to take care of their parents when those parents most needed help at the end of their lives.<sup>123</sup>

By the intention of nature, marriage is directed to the rearing of the offspring, not merely for a time, but throughout its whole life. Hence it is of natural law that parents should lay up for their children, and that children should be their parents’ heirs. Therefore, since the offspring is the common good of husband and wife, the dictate of the natural law requires the latter to live together for ever inseparably: and so the indissolubility of marriage is of natural law.<sup>124</sup>

This combination of natural arguments for monogamy and against polygamy in various forms would become a staple for the Western legal tradition. The core of the argument was focused on the natural needs and tendencies of men, women, and children, and the premium placed on stable monogamous marriage as the proper site for sexual exchange, mutual adult dependency, and the procreation and nurture of long dependent children. The

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<sup>118</sup> *Id.* at 147–48.

<sup>119</sup> *Id.* at 149.

<sup>120</sup> BRUNDAGE, *supra* note 3, at 39–40, 172.

<sup>121</sup> AQUINAS, SCG, *supra* note 68, at 149–50.

<sup>122</sup> *Id.*

<sup>123</sup> 5 AQUINAS, ST, *supra* note 50, at 2806–07.

<sup>124</sup> *Id.* (citing 2 *Corinthians* 12:14).

core of the natural justice argument was focused on the injustice and harm done to women and children by the multiplication or replacement of spouses.

To these natural arguments Aquinas and others added deep and complex theological arguments about the sacramental nature of marriage that helped to stabilize and solidify these intra-family relations and responsibilities.<sup>125</sup> This strengthened his case for the exclusive and indissoluble monogamous marriages of Christians. But even stripped of its theological overlay and left to stand alone, Aquinas' arguments from nature were powerful. They were also enduring. Many later jurists and philosophers—Catholics, Protestants, and Enlightenment liberals alike—built on these early arguments to defend faithful monogamous marriages.<sup>126</sup> And today, a number of anthropologists and evolutionary scientists have shown that enduring pair-bonding is the most expedient means for human reproduction, given the realities of long and demanding human infant dependency and the perennial sex drives of humans. Indeed, human reproduction by enduring pair-bonding is described by modern evolutionary scientists like Bernard Chapais as the “deep structure” of survival that the human species has evolved.<sup>127</sup> In his own premodern way, Aquinas saw this already 750 years ago. Yes, he called it the human nature that God has created, rather than a reproductive survival strategy that the human species has evolved. But the conclusion was the same: exclusive and enduring marriages and families are the best means of human reproduction and social flourishing.

Aquinas' insights into the natural foundations of marriage and the family were not only prescient of modern scientific teachings. They also helped form the foundation for an emerging medieval law of natural rights for children and their parents.<sup>128</sup> The rights of the parents to marriage and procreation were

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<sup>125</sup> *Id.* at 2699–706. See the new detailed study of PHILIP L. REYNOLDS, *HOW MARRIAGE BECAME ONE OF THE SACRAMENTS: THE SACRAMENTAL THEOLOGY OF MARRIAGE FROM ITS MEDIEVAL ORIGINS TO THE COUNCIL OF TRENT* (forthcoming).

<sup>126</sup> See WITTE, *POLYGAMY*, *supra* note 1 (assessing in chapters 5–9 polygamous experiments in early Protestantism, the Calvinist case against polygamy, the English case against polygamy, the early modern liberal case for polygamy, and the enlightenment case against polygamy).

<sup>127</sup> BERNARD CHAPAIS, *PRIMEVAL KINSHIP: HOW PAIR-BONDING GAVE BIRTH TO HUMAN SOCIETY* 10 (2008); see also PETER B. GRAY & KERMYT G. ANDERSON, *FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR* 21–22 (2010); MELVIN A. KONNER, *THE EVOLUTION OF CHILDHOOD: RELATIONSHIPS, EMOTIONS, MIND* 325–28 (2010). However, the topic remains controversial. See, e.g., *HUMAN REPRODUCTIVE BEHAVIOR: A DARWINIAN PERSPECTIVE* (Laura L. Betzig et al. eds., 1988); *MIND THE GAP: TRACING THE ORIGINS OF HUMAN UNIVERSALS* (Peter M. Kappeler & Joan B. Silk eds., 2010).

<sup>128</sup> On medieval rights talk, see BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150–1625* (1997), and R.H. Helmholz, *Human Rights in the Canon Law, in* CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 99 (John Witte, Jr. & Frank S. Alexander eds., 2010).

based on their natural duties “to be fruitful and multiply” by licit conjunctions of “two in one flesh.”<sup>129</sup> Their rights of parentage were further based on the child’s natural duty to “[h]onor your father and mother”<sup>130</sup> and the community’s duty to “let the children come” to receive their love, support, and nurture.<sup>131</sup> The rights of children, in turn, were the correlatives of the duties that parents owed to their children. As Jesus had put it in the Sermon on the Mount,

[W]hat 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>132</sup>

It was biblical texts like these, together with the naturalist arguments of Aquinas and others just outlined, that inspired medieval jurists to develop especially the law of children’s rights.<sup>133</sup> By the fourteenth and fifteenth centuries, canon law and civil law texts alike spoke about a child’s right to life and the means to sustain life; the right to care, protection, nurture, and education; the later right to emancipation from the home and the right to contract marriage, enter a profession, or join the clergy or monastery; and the right to support and eventual inheritance from their natural or adoptive parents.<sup>134</sup> Furthermore, illegitimate children had special rights to oblation in a

<sup>129</sup> *Genesis* 1:28, 2:24; *Matthew* 19:5; 1 *Corinthians* 6:16; *Ephesians* 5:31 (Revised Standard).

<sup>130</sup> *Exodus* 20:12.

<sup>131</sup> *Matthew* 19:14 (Revised Standard). These issues have received in-depth discussion. See Patrick McKinley Brennan, *Children Play with God: A Contemporary Thomistic Understanding of the Child*, in *THE VOCATION OF THE CHILD* 189 (Patrick McKinley Brennan ed., 2008); Anthony J. Kelley, *Hope for Unbaptized Infants: Holy Innocents After All?*, in *THE VOCATION OF THE CHILD*, *supra*, at 215; Charles J. Reid, Jr., *The Rights of Children in Medieval Canon Law*, in *THE VOCATION OF THE CHILD*, *supra*, at 245; Philip L. Reynolds, *Thomas Aquinas and the Paradigms of Childhood*, in *THE VOCATION OF THE CHILD*, *supra*, at 154; see also Judith M. Gundry, *Children in the Gospel of Mark, with Special Attention to Jesus’ Blessing of the Children (Mark 10:13-16) and the Purpose of Mark*, in *THE CHILD IN THE BIBLE* 143, 148–49 (Marcia J. Bunge et al. eds., 2008); Marianne Meye Thompson, *Children in the Gospel of John*, in *THE CHILD IN THE BIBLE*, *supra*, at 195; Keith J. White, “*He Placed a Little Child in the Midst*”: *Jesus, the Kingdom, and Children*, in *THE CHILD IN THE BIBLE*, *supra*, at 353, 364–65.

<sup>132</sup> *Matthew* 7:9–12 (Revised Standard); see also 3 AQUINAS, ST, *supra* note 50, at 1293–96.

<sup>133</sup> See detailed sources and discussion in CHARLES J. REID, JR., *POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW* 92, 153–210 (2004); WITTE, SINS, *supra* note 1, at 49–134; R.H. Helmholz, *Children’s Rights and the Canon Law: Law and Practice in Later Medieval England*, 67 *JURIST* 39 (2007); R.H. Helmholz, *And Were There Children’s Rights in Early Modern England? The Canon Law and ‘Intra-family Violence’ in England, 1400–1640*, 1 *INT’L J. CHILD. RTS.* 23 (1993); and Reid, Jr., *supra* note 131, at 243.

<sup>134</sup> WITTE, SINS, *supra* note 1, at 49–134.



monastery or legitimation by their natural or adoptive parents.<sup>135</sup> Poor children had special rights to relief and shelter.<sup>136</sup> Abused children had special rights to sanctuary and foster care.<sup>137</sup> Abandoned or orphaned children had special rights to foundling houses and orphanages.<sup>138</sup> All these were real and actionable “subjective” rights for children that medieval church courts and state courts helped to enforce.<sup>139</sup>

### C. *Francisco Vitoria*

In the sixteenth century, these Thomistic ideas about the natural law, natural rights, and natural justice of sex, marriage, and family life were expanded and systematized by a series of Spanish jurists, philosophers, and theologians. Most of them, like Aquinas, were members of the Dominican Order, and most of them were gathered at the University of Salamanca, one of the great intellectual centers of early modern Spain.<sup>140</sup> To illustrate, let us focus on the work of one early titan of this Spanish school, Francisco de Vitoria (c. 1492–1546). Vitoria is most famous today for his remarkable defense of the rights of the American Indians against colonial authority.<sup>141</sup> He is also known for his treatises on the powers of church and state, on the power of the papacy and of councils within the church, and on the international laws of war and peace.<sup>142</sup> In his own day, Vitoria was most famous for his lectures and commentaries on the work of Thomas Aquinas. He commented on Aquinas’ *Summa Theologica* as well as Aquinas’ commentaries on Peter Lombard’s discussion of marriage in his *Book of Sentences*.<sup>143</sup> Vitoria also

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<sup>135</sup> *Id.* at 98–99.

<sup>136</sup> *Id.* at 98–103.

<sup>137</sup> *Id.* at 126–27.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 122–34.

<sup>140</sup> ANNABEL S. BRETT, LIBERTY, RIGHT, AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT 1, 123 (1997); Rudolf Schüber, *Moral Self-Ownership and Ius Possessionis in Late Scholastics*, in TRANSFORMATIONS IN MEDIEVAL AND EARLY-MODERN RIGHTS DISCOURSE 149, 154–57 (Virpi Mäkinen & Petter Korman eds., 2006); TIERNEY, *supra* note 128, at 207–315.

<sup>141</sup> FRANCISCUS DE VICTORIA DE INDIS ET DE JURE BELLII RELECTIONES [REFLECTIONS ON THE INDIANS AND THE LAW OF WAR BY FRANCISCO VITORIA] (Ernest Nys ed., Carnegie Inst. of Washington 1917) (1557) [hereinafter VITORIA, REFLECTIONS].

<sup>142</sup> *Id.*

<sup>143</sup> FRANCISCO DE VITORIA, COMENTARIOS A LA SECUNDA SECUNDAE DE SANTO TOMÁS [COMMENTARIES ON PART II-II OF SAINT THOMAS] (Vicente Beltrán de Heredia ed., Salamanca 1935) (c. 1536) [hereinafter VITORIA, COMMENTARIES]. These Commentaries are excerpted in FRANCISCO DE VITORIA POLITICAL WRITINGS 341–51 (Anthony Pagden & Jeremy Lawrance eds., 1991) [hereinafter VITORIA, POLITICAL WRITINGS]. Vitoria’s analysis on marriage is also reflected in FRANCISCO DE VITORIA, DE JUSTITIA ET FORTITUDINE [ON JUSTICE AND STRENGTH] (Vicente Beltrán de Heredia ed., Salamanca 1935) (c. 1536), and

lectured at length on marriage in his own courses, and some of his students' lecture notes were published posthumously as a pithy *Summa on Marriage*, which remained in print for two centuries after his death.<sup>144</sup>

In a number of these works, Vitoria elaborated a sophisticated natural law theory, including a natural law of marriage and family life, building on the insights of Aquinas, Aristotle, and various medieval canon lawyers. Natural law, he wrote, is both what is reasonable and what is commonly accepted.<sup>145</sup> Nature and custom—the law of nature (*ius naturale*) and the laws of nations (*ius gentium*)—often coincide.<sup>146</sup> Christians can thus look for confirmation of the contents of the natural law not only in the pages of Scripture but also in the practices of all peoples, even those who operate without Scripture.<sup>147</sup> So, when Vitoria was asked whether the law of nature gives parents the right to raise their own children, he cited not only the familiar passages on parental authority in the Bible but also various examples of this rule and practice in ancient and modern sources and concluded that “no one could really hold the idea that a father is not bound to bring up his children. The fact that everyone agrees is evidence in itself” that such a practice is in accord with the natural law.<sup>148</sup> Natural law can also be discerned simply by the way things most naturally and commonly operate. “That is natural which in itself belongs to anything, as, for instance, the capacity to laugh and to think is natural to man. . . . Similarly with the natural law: it is that which is properly and of itself right.”<sup>149</sup>

A thought or practice is naturally right either because it is naturally permissible or naturally necessary, said Vitoria.<sup>150</sup> Christians know that God as

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FRANCISCO SUAREZ, COMMENTARIORUM AC DISPUTATIONUM IN TERTIAM PARTEM DIVI THOMAE [COMMENTARY AND DISPUTATION ON THE THIRD PART OF SAINT THOMAS] (Moguntia, Sumptibus Arnold Mylii 1590). Many of Vitoria's writings were compiled after his death, both from (partial) manuscripts that he left and from student notes on his lectures.

<sup>144</sup> FRANCISCO DE VITORIA, *Relectio de Matrimonio* [*Reflections on Marriage*], in RELECTIONES THEOLOGICAE XII [THEOLOGICAL REFLECTIONS 12] (Louvain, Apud Iacobum Boyerium 1557). For a modern Spanish–Latin version, see I RELECCIONES TEOLÓGICAS DEL MAESTRO FRAY FRANCISCO DE VITORIA [THEOLOGICAL REFLECTIONS OF THE PROFESSOR BROTHER FRANCISCO DE VITORIA] 420–52 (Luis G. Alonso Getino ed., Imprenta La Rafa 1934) (1557) [hereinafter THEOLOGICAL REFLECTIONS], and 2 *id.* 439–504. For further discussion, see GERHARD OTTE, DAS PRIVATRECHT BEI FRANCISCO DE VITORIA [THE PRIVATE LAW IN FRANCISCO DE VITORIA] 23–40, 121–32 (1964).

<sup>145</sup> VITORIA, POLITICAL WRITINGS, *supra* note 143, at xiv–xv, 169–72.

<sup>146</sup> *See id.* at 281.

<sup>147</sup> BERNICE HAMILTON, POLITICAL THOUGHT IN SIXTEENTH-CENTURY SPAIN 12 (1963).

<sup>148</sup> *Id.* (quoting Vitoria's Commentaries on St. Thomas in DE JUSTITIA, *supra* note 143).

<sup>149</sup> *Id.* (alterations in original) (quoting Vitoria's Commentaries on St. Thomas in DE JUSTITIA, *supra* note 143); *see also* texts in VITORIA, POLITICAL WRITINGS, *supra* note 143, at 169–72.

<sup>150</sup> HAMILTON, *supra* note 147, at 12.

the creator of this natural law created things to operate by nature in a given predictable way.<sup>151</sup> Unless and until God changes the way things naturally are (say, through a miracle or an act of force majeure), the patterns and behaviors observed in nature are necessarily products and consequences of the natural law.<sup>152</sup>

For instance, it is necessary for a man to breathe and have two eyes and two feet and for the sun to rise tomorrow; but God could arrange things differently . . . . Natural law, therefore, is said to be necessary because nature cannot reverse the state of things without a divine mandate.<sup>153</sup>

So it is without the natural law of marriage and the family, said Vitoria.<sup>154</sup> “[W]ithout a divine mandate reversing the whole order of nature, the Ten Commandments cannot be other than they are, that is, we ought to worship God, honor our parents,” not commit adultery, and not covet our neighbor’s wife or household.<sup>155</sup> God can change these natural laws, but humans are naturally bound to observe them unless and until God changes them.<sup>156</sup>

In his *Summa on Marriage*, Vitoria focused on the natural law of marriage and family life.<sup>157</sup> He offered a crisp recitation of Aquinas’ arguments about the natural configuration of marriage and then expounded on the natural rights of spouses, parents, and children.<sup>158</sup> God, Vitoria wrote, created marriage as an “indissoluble and exclusive” union between a fit man and a fit woman who are capable of marriage to each other and not impeded by sundry blood or family ties.<sup>159</sup> Once these “two have become one flesh in accordance with the law of God,” Vitoria wrote, only “God can rent them asunder” because only God can change the natural laws of marriage that bind the united couple.<sup>160</sup> God created marriage with two main ends, Vitoria wrote.<sup>161</sup> The “first and most important end is the procreation and education of children” and preparation for them to

<sup>151</sup> *Id.* at 12–13.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* (quoting Vitoria’s Commentaries on St. Thomas in DE JUSTITIA, *supra* note 143).

<sup>154</sup> *Id.* at 13 (quoting Vitoria’s Commentaries on St. Thomas in DE JUSTITIA, *supra* note 143).

<sup>155</sup> *Id.* (quoting Vitoria’s Commentaries on St. Thomas in DE JUSTITIA, *supra* note 143).

<sup>156</sup> *Id.*

<sup>157</sup> 2 THEOLOGICAL REFLECTIONS, *supra* note 144, at 442–63. I am grateful to my former student Chris Boussard for preparing a preliminary translation of this Spanish text.

<sup>158</sup> *Id.* at 442–45.

<sup>159</sup> *Id.* at 442–59.

<sup>160</sup> *Id.* at 445–49.

<sup>161</sup> *Id.* at 442–45.

live a natural, rational, and virtuous life.<sup>162</sup> “The second end of marriage is the mutual fidelity and service of husband and wife to each other.”<sup>163</sup> These two ends of marriage are interrelated, said Vitoria, and they are tied to the “natural design” of marriage as an exclusive and indissoluble union of a husband and wife joined together in “one-flesh.”<sup>164</sup> “Man is an infirm animal,” and if his sinful nature were not constrained by natural laws, “all men would want to mate with all women.”<sup>165</sup> Such lawless behavior would quickly put men in a perennial and violent sexual competition with each other and with all women.<sup>166</sup> Men would be having sex even with their mothers, sisters, and relatives, and raping and ravishing women at will.<sup>167</sup> Women who could not defend themselves would be reduced to prostitutes or at best concubines.<sup>168</sup> And children born of such “hot frenzy” would suffer miserably.<sup>169</sup> “Uncertain of their offspring,” men would not invest in care for any child or its mother, especially when other sexual outlets were freely at hand.<sup>170</sup> Exhausted by sexual predation, pregnancy, and then the needs of their infants, “women would not have the strength” to provide fully for their child without the father present; no other family members would be at hand to fill in, since such a natural kin network would not be known.<sup>171</sup>

Because of these proclivities, the natural law induces men and women to marry unless they are naturally gifted with continence; to support and be faithful to each other in all things including in their sex lives; and to work together to nurture, protect, and educate their children until they are mature.<sup>172</sup> Faithful and exclusive marriage is “a natural necessity” given our human nature, Vitoria wrote.<sup>173</sup> Operating under the same natural law, Christians and non-Christians alike have thus developed marriage as the mandated institution for responsible sex and child rearing.<sup>174</sup> And they have learned, often by hard and cruel experience, to outlaw fornication, adultery, prostitution, and

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 445–49.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 442–59.

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

concubinage—all of which come at the cost of paternal certainty and joint investment in their children and with the consequences of harm, deprivation, and sometimes death of these children.<sup>175</sup> The Bible’s repeated injunctions against sexual sin and for marital fidelity and parental care are simply echoes of this natural law shared by all civilized peoples.<sup>176</sup>

These natural duties governing sex, marriage, and family life give rise to natural rights within the family, Vitoria insisted, which can and should be reflected in and guaranteed by the positive laws of church and state alike.<sup>177</sup> First, each person has a “natural right” to enter into a marriage only of his or her choice.<sup>178</sup> No one can be coerced, tricked, or otherwise misled into a marriage.<sup>179</sup> And if they are, they must be given the unqualified right to seek its annulment.<sup>180</sup> No pope, prince, or parent can harm or impede this natural right.<sup>181</sup> “God only can compel” a couple to marry.<sup>182</sup> We have examples of that in the Bible: for example when God compelled Hosea to marry Gomer, the prostitute (or, Vitoria could have added, when God told Joseph to marry Mary, his betrothed, despite her seeming infidelity).<sup>183</sup> But God generally gets involved in marriages only by secretly moving the hearts of a man and woman to cultivate true “mutual love and concordance of mind” for and with each other.<sup>184</sup> Second, husband and wife each have a “natural right” to support, protection, and sex from the other—the “conjugal right” as St. Paul had called it in 1 *Corinthians* 7, echoing Mosaic and natural law precedents.<sup>185</sup> Given the natural obligations each spouse has to remain bound to the other, each has the natural right to have the most essential duties and qualities of their marriage enforced. This includes not only sexual intercourse but physical, economic, and social support and protection.<sup>186</sup> Third, fathers and mothers both have a “natural right” and a natural duty to raise, nurture, and educate their children without interference by another, save in the event of abuse or abandonment of

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<sup>175</sup> *See id.*

<sup>176</sup> *See id.* at 442–46.

<sup>177</sup> *See* VITORIA, POLITICAL WRITINGS, *supra* note 143, at 159–60.

<sup>178</sup> *See* 2 THEOLOGICAL REFLECTIONS, *supra* note 144, at 442–49.

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See id.*

<sup>182</sup> *See id.* at 449.

<sup>183</sup> *See id.* at 447–49 (referencing the biblical stories in *Hosea* 1:2); *see also* *Matthew* 1:18–25.

<sup>184</sup> *See* 2 THEOLOGICAL REFLECTIONS, *supra* note 144, at 449.

<sup>185</sup> *Id.* at 442.

<sup>186</sup> *See id.* at 442–49.

the child.<sup>187</sup> This natural right of parentage was so universal to humans that even slaves and pagans should enjoy it, Vitoria argued in his tract on *The Rights of the Indians*.<sup>188</sup> And fourth, children have a natural right to be raised and nurtured by their natural parents, those most inclined by nature to care for them.<sup>189</sup>

Vitoria went on to argue that even the children of the purported “heathens” of newly discovered colonial Latin America could not be coerced into baptism or forced to receive Christian instruction contrary to their parents’ wishes.<sup>190</sup> This was a contested issue in his day in Spain, as it had been during the crusades and pogroms of the Middle Ages when some authorities condoned forcible baptisms and removal of Jewish, Muslim, and pagan children from their families to be raised in cloisters or Christian homes.<sup>191</sup> Part of Vitoria’s objection to such forced spiritual exercises echoed Aquinas’ reservation about coercing false faith: “Since in the majority of cases, pagans cannot be coerced without scandal or grave spiritual danger, St. Thomas replies quite simply that they must not be coerced . . . . So it must be concluded that by natural law infidels cannot be forced to accept the faith.”<sup>192</sup> A further part of Vitoria’s objection was that such practices violated the rights of the parents.<sup>193</sup> “For the children would be taken away from them: but those children have as yet no rights of their own; they live by their parents’ rights, for the natural law gives parents the power to direct their children’s lives.”<sup>194</sup>

Even if they are slaves in body infidels are not slaves in spiritual matters, and so without the consent even of those who are slaves, it is not lawful to ensure the salvation of their children. Otherwise it would be lawful for the king even to baptize the children of free men, for in the matter of religion one man is no more a slave than another.<sup>195</sup>

Vitoria’s views would become a standard line of argument about the natural law and natural rights of marriage and parentage—not only in Catholic circles but also in later Protestant and Enlightenment circles.

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<sup>187</sup> *See id.*

<sup>188</sup> *See* VITORIA, REFLECTIONS, *supra* note 141, at 131.

<sup>189</sup> *See id.*

<sup>190</sup> *See id.* at 145.

<sup>191</sup> *See, e.g.*, VARIETIES OF RELIGIOUS CONVERSION IN THE MIDDLE AGES (James Muldoon ed., 1997).

<sup>192</sup> HAMILTON, *supra* note 147, at 114–16 (quoting from VITORIA, COMMENTARIES, *supra* note 143).

<sup>193</sup> *Id.* at 117.

<sup>194</sup> *Id.* (quoting from VITORIA, COMMENTARIES, *supra* note 143).

<sup>195</sup> *Id.* (quoting from VITORIA, COMMENTARIES, *supra* note 143).

## II. HUGO GROTIUS AND THE EARLY MODERN NATURAL LAW ON SEX AND MARRIAGE

An important conduit through which these (neo-)Thomist ideas of sex, marriage, and family life poured into the broader Western legal tradition were the writings of the eminent Dutch jurist and theologian Hugo Grotius (1583–1645).<sup>196</sup> Among legal historians, Grotius is prized as the father of international law, famous for his pathbreaking writings on the laws of war and peace and on the laws of prize and the sea, which became so critical to the development of both public and private international law.<sup>197</sup> Among church historians, Grotius is infamous for defending his fellow Dutchman, Jacob Arminius, against charges of “pelagianism,” an act that won him a prison sentence for heresy.<sup>198</sup> What is forgotten by some legal historians is that Grotius was also an avid student of the neo-Thomist writings of the Spanish school of Salamanca and that he drew (with ample attribution) many of his cardinal legal ideas directly from Francisco Vitoria and others.<sup>199</sup> Indeed, some historians now call Vitoria, rather than Grotius, the father of international law.<sup>200</sup> What is forgotten by some church historians is that Grotius was a distinguished Protestant theologian in his own right and not just an amateur layman seduced by free-will liberals. Grotius wrote several commentaries on the New Testament, a learned tract on church–state relations and ecclesiastical law, several pamphlets of Christian devotion, and a richly textured work of Christian apologetics.<sup>201</sup> Drawing on diverse Catholic, Protestant, and classical

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<sup>196</sup> See JAMES BROWN SCOTT, *THE SPANISH ORIGINS OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* (1934).

<sup>197</sup> See HUGO GROTIUS, *DE JURE BELLI AC PACIS* [THE LAW OF WAR AND PEACE] (Francis W. Kelsey et al. trans., William S. Hein & Co. 1995) (1625) [hereinafter GROTIUS, LAW OF WAR AND PEACE]. For an alternative translation, see HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck ed., Jean Barbeyrac trans., Liberty Fund 2005) (1625) [hereinafter GROTIUS, RIGHTS OF WAR AND PEACE]. For additional discussion of these and related topics, see HUGO GROTIUS, *COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (Martine Julia van Ittersum ed. & trans., Liberty Fund 2006) (1604), and HUGO GROTIUS, *THE FREE SEA* (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004) (1609) [hereinafter GROTIUS, FREE SEA].

<sup>198</sup> See J.P. HEERING, *HUGO GROTIUS AS APOLOGIST FOR THE CHRISTIAN RELIGION: A STUDY OF HIS WORK DE VERITATE RELIGIONIS CHRISTIANAE* (1640), at 6 (Robert J. Bast et al. eds., J.C. Grayson trans., 2004). Pelagianism reflects the beliefs and teachings promoted by Pelagius and his followers, which stressed the essential goodness of human nature, the freedom of the human will, and that denied the doctrine of original sin.

<sup>199</sup> See SCOTT, *supra* note 196, at 3.

<sup>200</sup> *Id.* at 3, 160. For a good sampling, see generally ANTONIO TRUYOL SERRA, *THE PRINCIPLES OF POLITICAL AND INTERNATIONAL LAW IN THE WORK OF FRANCISCO DE VITORIA* (1946).

<sup>201</sup> See HUGO GROTIUS, *DE IMPERIO SUMMARUM POTESTATUM CIRCA SACRA* [ON THE RULE OF THE SOVEREIGN IN RELIGIOUS MATTERS] (Harm-Jan Van Dam trans., Brill 2001) (1661); HUGO GROTIUS, *DE*

sources, and using the tools of theology, jurisprudence, and natural philosophy alike, Grotius set upon a lifelong quest for religious and political peace in Europe, which in his day was being devastated by religious warfare.<sup>202</sup>

Crafting a common legal understanding of marriage was an important part of this effort. “The union of the sexes, whereby the human species is continued, is a subject well worthy of the highest legal consideration,” Grotius wrote.<sup>203</sup> For, as Aristotle taught us, marriage is the seedbed of the republic; the first natural association; and the first school of morality, virtue, and good citizenship.<sup>204</sup> To get this institution right was essential to creating coherent national communities, which needed internal stability before they could work toward any kind of international legal harmony. Grotius also regarded marriage as a “natural right” of all men and women, echoing Vitoria’s view.<sup>205</sup> Even slaves and captives should be granted this right, Grotius insisted contrary to civil law precedents, given that marriage is “[t]he most natural Association” known to mankind.<sup>206</sup> He regarded celibacy as an option for those few with unique abilities or disabilities but thought it “repugnant to the nature of most men” and women.<sup>207</sup>

Both in his legal and theological writings, Grotius showed full command of and respect for biblical norms and conventional Christian principles of marriage. He adverted repeatedly to the axial biblical texts of *Genesis* 1 and 2, *Matthew* 19, 1 *Corinthians* 7, and *Ephesians* 5, some of which he further

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VERITATE RELIGIONIS CHRISTIANA [ON THE TRUTH OF THE CHRISTIAN RELIGION] (Oxford, William Hall 1662); HUGO GROTIUS, EXPLICATIO TRIUM UTILISSIMORUM LOCURUM N. TESTAMENTI [EXPLANATION OF THE THREE MOST USEFUL LOCI IN THE NEW TESTAMENT] (Amsterdam, Apud Joh. & Cornelium Blaeu 1640); HUGO GROTIUS, OPERA OMNIA THEOLOGICA [COMPLETE THEOLOGICAL WORKS] (London, Mosem Pitt 1679). For an alternative translation of ON THE TRUTH OF CHRISTIANITY, see also HUGO GROTIUS, ON THE TRUTH OF CHRISTIANITY (Spencer Madan trans., London, J. Dodsley 1782) [hereinafter GROTIUS, TRUTH].

<sup>202</sup> Among many studies recently with ample bibliographies, see generally HEERING, *supra* note 198; FLORIAN MÜHLEGGGER, HUGO GROTIUS: EIN CHRISTLICHER HUMANIST IN POLITISCHER VERANTWORTUNG [HUGO GROTIUS: A CHRISTIAN HUMANIST IN POLITICAL RESPONSIBILITY] (2007). On his theory of marriage, which is understudied, see HUBERT RINKENS, DIE EHE UND DIE AUFFASSUNG VON DER NATUR DES MENSCHEN IM NATURRECHT BEI HUGO GROTIUS (1583–1648), SAMUEL PUFENDORF (1632–1694), UND CHRISTIAN THOMASIUS (1655–1728) [MARRIAGE AND THE VIEW OF NATURE OF THE PEOPLE IN THE NATURAL LAW AMONG HUGO GROTIUS (1583–1648), SAMUEL PUFENDORF (1632–1694), AND CHRISTIAN THOMASIUS (1655–1728)] (1971).

<sup>203</sup> GROTIUS, TRUTH, *supra* note 201, at 108.

<sup>204</sup> See *supra* notes 18–22.

<sup>205</sup> See 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 197, at 513–14.

<sup>206</sup> See *id.*

<sup>207</sup> GROTIUS, TRUTH, *supra* note 201, at 108–10; 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 204.



glossed in his New Testament commentaries.<sup>208</sup> He pored over the Mosaic laws of marriage and the Pauline household codes.<sup>209</sup> He cited frequently to the marital writings of Augustine, Aquinas, Vitoria, and hundreds of other classical and Christian authorities.<sup>210</sup> “Christianity [is] by far the most excellent of all possible religious systems,” he wrote proudly, in no small part because “Christians are commanded to preserve indissoluble the sacred obligations of the marriage vow, by mutual concessions, and mutual forbearance” of husband and wife, each “bear[ing] an equal part in all the duties of the married state.”<sup>211</sup>

But to build his natural law framework, Grotius was more interested in what the law of nature itself could teach us about sex, marriage, and family life independent of biblical norms and divine revelation.<sup>212</sup> That was in part the challenge he set for himself by uttering his (in)famously impious hypothesis: that natural law would exist even if “we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.”<sup>213</sup> It was the further challenge he set by his definition of natural law whose contents and commandments were to be rationally self-evident:

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.

The acts in regard to which such a dictate exists are, in themselves, either obligatory or not permissible, and so it is understood that necessarily they are enjoined or forbidden by God. In this characteristic the law of nature differs not only from human law, but also from volitional divine law . . . .<sup>214</sup>

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<sup>208</sup> See 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 197, at 508–22.

<sup>209</sup> See *id.*

<sup>210</sup> See *id.* For a full list of Grotius’s sources, see 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 889–930.

<sup>211</sup> GROTIUS, TRUTH, *supra* note 201, at 327–29; see 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 197, at 508–15, 516–20 n.7 (providing a distillation of Grotius’s fuller theological views in the lengthy notes in Jean Barbeyrac’s translation as well as repeated citations to Scripture and Christian authorities).

<sup>212</sup> See 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 13.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 38–39 (footnote omitted).

When deliberated purely rationally, without the aid of the Bible or divine authorities, Grotius concluded, natural law confirms a number of traditional Christian teachings of sex, marriage, and family, but not all of them and not altogether clearly. Grotius insisted that the Bible does not prescribe or proscribe anything “which is not agreeable to natural Decorum.”<sup>215</sup> But he further insisted that the “Laws of [Christ] do not oblige us” to conduct that goes well beyond “what the Law of Nature already require[s] of [us].”<sup>216</sup> Those who believe that Scripture and nature command exactly the same conduct are fooling themselves, Grotius observed.<sup>217</sup> They will be “strangely embarrassed” when they try “to prove, that certain [t]hings which are forbid[den] by the Gospel, as *Concubinage*, *Divorce*, [and] *Polygamy*, are likewise condemned by the Law of Nature.”<sup>218</sup> While “[r]eason itself informs us that it is more Decent to refrain” from such deviations from faithful monogamous marriage, natural law does not necessarily prohibit them outright; that usually requires religious sanction and command.<sup>219</sup>

With these distinctions in mind, Grotius began to sort through what features of traditional Christian marriage “Nature seem[s] to require” and what features are required only according to the Gospel.<sup>220</sup> He sometimes was content simply to show the overlaps between Christian and “heathen” marital practices, evidently thinking this was proof enough of the natural qualities of these practices.<sup>221</sup> “[T]he instances are numerous,” he wrote, “wherein heathens are observed to have inculcated, severally, the very same principles and duties, which are collectively enjoined by our [Christian] religion.”<sup>222</sup> The heathens, he explained, teach that “the intentional adulterer is guilty of the actual sin of adultery; . . . that a man should be the husband of one wife; that the marriage-covenant should be inviolable.”<sup>223</sup>

Grotius sometimes combined the common patterns of animals with the common customs of advanced civilizations to demonstrate what he thought was natural. For example, he condemned “[t]he promiscuous enjoyment of all women in common,” which some ancient peoples practiced and which even

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<sup>215</sup> See 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 197, at 195.

<sup>216</sup> *Id.*

<sup>217</sup> See *id.*

<sup>218</sup> *Id.* (footnote omitted).

<sup>219</sup> *Id.* at 185–89, 195–97.

<sup>220</sup> See 2 *id.* at 514–15.

<sup>221</sup> See *id.*

<sup>222</sup> GROTIUS, TRUTH, *supra* note 201, at 221–22.

<sup>223</sup> *Id.*

Plato had commended in his *Republic*.<sup>224</sup> Such practices would reduce the state to “one common brothel,” Grotius concluded.<sup>225</sup> “[S]ome even of the brute animals” observe natural law far better, for they “are seen to observe a sort of conjugal obligation” at least in their production of offspring.<sup>226</sup> “Far more just and reasonable it is, therefore, that man, the most excellent and most distinguished of all animals, should not be suffered to derive his origin from casual and uncertain parents, to the total extinction of those mutual ties, the filial and parental affections.”<sup>227</sup> Observing the natural law, humans have thus learned to ensure the certainty of the bond between parents and children by tying procreation to enduring monogamous marriages so “that confusion of offspring may not arise.”<sup>228</sup> And because of the long period of human infantile dependency, humans have further learned to treat monogamous marriage as a “real friendship,” “a perpetual and indissoluble union,” “a full participation and mutual connect[ion] both of soul and body.”<sup>229</sup>

The superior advantage of this institution, in respect to the proper education of children, is a truth as obvious as undeniable. Monogamy was even the established custom of some particular Pagan nations; among the Germans, for example, and the Romans: and herein the Christians also follow their example, on a principle of justice, in repaying, on the part of the husband, the entire and undivided affection of the wife; while, at the same time, the regulations of domestic economy may be better preserved under one *head* and *mistress* of the family; and all those dissensions avoided which a diversity of mothers must create among the children.<sup>230</sup>

*Genesis* 1 and 2 further confirm this natural preference for monogamous marriage, said Grotius, because “God gave to one Man one Woman only, it sufficiently appears what is best” for the marriages of the human race.<sup>231</sup>

Grotius’s argument for monogamy, albeit cryptic, was a textbook restatement of the natural configuration of marriage expounded by Aquinas

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<sup>224</sup> *Id.* at 109; see also PLATO, *THE REPUBLIC* (c. 380 B.C.E.), reprinted in *THE REPUBLIC AND OTHER WORKS* 147–48 (Benjamin Jowett trans., 1973) (espousing utility in the idea that the wives and children of “the guardians” of society be “in common”).

<sup>225</sup> GROTIUS, *TRUTH*, *supra* note 201, at 109.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 109–10.

<sup>228</sup> See 2 GROTIUS, *LAW OF WAR AND PEACE*, *supra* note 197, at 235.

<sup>229</sup> GROTIUS, *TRUTH*, *supra* note 201, at 110–11.

<sup>230</sup> *Id.* at 111.

<sup>231</sup> 2 GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 197, at 520.

and Vitoria.<sup>232</sup> The gist of the argument, as he saw it, was that enduring and exclusive monogamous marriages were essential to ensuring parental certainty for their children.<sup>233</sup> And parental certainty, particularly for the father, was essential so that parents would bond with their children who are born helpless and remain utterly dependent upon their parents for survival for many years.<sup>234</sup> Later Enlightenment writers took this argument as the starting point for their theories of marriage and the family. Commenting on Grotius, for example, the prolific German and Swedish jurist and historian, Samuel von Pufendorf (1632–1694), wrote that the reality of lengthy infant dependence gave humans a strong natural inclination toward exclusive and enduring marriages and a strong natural abhorrence to sex outside of marriage—even though “man is an animal always ready for the deed of love.”<sup>235</sup> If natural law had not channeled this strong male sex drive toward marriage, and men were permitted to have random sex like “a cow [] in heat,” they would do nothing to help the mothers and children who need them.<sup>236</sup> “[W]hat man would offer his support unless he were sure he was the father” of her child?<sup>237</sup> “[W]hat man would undertake the care of any but his own offspring, whom it is not easy to pick out when such free license prevails?”<sup>238</sup> Sex only within monogamous marriage was a natural

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<sup>232</sup> See *supra* Part I.B–C.

<sup>233</sup> See 2 SAMUEL VON PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* [ON THE LAW OF NATURE AND NATIONS IN EIGHT BOOKS] 840, 842–44 (C.H. Oldfather & W.A. Oldfather trans., Oceana Publ’ns Inc. reprint. ed. 1964) (1688) [hereinafter PUFENDORF, *DE JURE NATURAE*]; see also *id.* at 839–909; 2 SAMUEL VON PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* [ON ELEMENTARY UNIVERSAL JURISPRUDENCE IN TWO BOOKS] 37–38, 275–76 (William Abbott Oldfather trans., Oceana Publ’ns Inc. reprint. ed. 1964) (1680) [hereinafter PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE*]; SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE* 174–84 (Ian Hunter & David Saunders eds., Andrew Tooke trans., Liberty Fund 2003) (1673) [hereinafter PUFENDORF, *WHOLE DUTY*]. For further discussion of Pufendorf’s analysis, see ERIK WOLF, *GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE* [GREAT LEGAL THINKERS IN GERMAN RELIGIOUS HISTORY] 311–70 (4th ed. 1963). For the popularization of Pufendorf’s views, as well as those of Grotius, see JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 61 (Petter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1763). For a general overview of these ideas and perspectives, see LEONARD KRIEGER, *THE POLITICS OF DISCRETION: PUFENDORF AND THE ACCEPTANCE OF NATURAL LAW* (1965). Pufendorf’s and Burlamaqui’s works were often cited by the American founders and early nineteenth-century judges and jurists. See *infra* notes 350–51, 520, 531 and accompanying text.

<sup>234</sup> See PUFENDORF, *WHOLE DUTY*, *supra* note 233, at 179; see also BURLAMAQUI, *supra* note 233, at 61 (explaining infant dependency concern).

<sup>235</sup> See 2 PUFENDORF, *DE JURE NATURAE*, *supra* note 233, at 845; see also BURLAMAQUI, *supra* note 233, at 61; PUFENDORF, *WHOLE DUTY*, *supra* note 233, at x–xii.

<sup>236</sup> 2 PUFENDORF, *DE JURE NATURAE*, *supra* note 233, at 845.

<sup>237</sup> *Id.*; see also PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE*, *supra* note 233, at 37.

<sup>238</sup> 2 PUFENDORF, *DE JURE NATURAE*, *supra* note 233, at 845.

necessity for mankind and a natural duty for each man, Pufendorf concluded, later crediting Grotius for this insight.<sup>239</sup>

While monogamy is the naturally preferred form of marriage and forum for sex, Grotius continued, he could not say that polygamy was automatically rendered void by the law of nature alone.<sup>240</sup> After all, a number of animals, from chickens and cattle to lions and wolves, are polygamous and fare quite well. A number of successful biblical patriarchs and kings were polygamous, and no Old Testament law explicitly forbade them.<sup>241</sup> A number of advanced civilizations like Muslims are polygamous, and they are strong.<sup>242</sup> Grotius thought that polygamy was a reprehensible exploitation of women and an indulgence of a man's "brutal appetite,"<sup>243</sup> and he praised the institution of monogamous marriage taught by Christianity.<sup>244</sup> But he concluded that it takes "the law of Christ" to condemn polygamy outright.<sup>245</sup> While this argument convinced Pufendorf and other writers like Christian Thomasius and Baron Montesquieu in the next century,<sup>246</sup> several eighteenth-century and nineteenth-century writers marshaled a strong natural law case against polygamy, as we shall see in a moment.

Grotius had less trouble condemning polyandry—one woman with multiple husbands—as contrary to natural law.<sup>247</sup> But he did so with a heavy-handed patriarchal argument that went beyond even the patriarchal conventions of his day. A marriage "contracted with a Woman, who already has a Husband, is void by the Law of Nature, unless her first Husband has divorced her; for till then his Property in her continues."<sup>248</sup> "[I]n its natural State," Grotius explained, a marriage "puts the Woman, as it were, under the immediate Inspection and Guard of the Man: For we see, even among some Beasts, such a Sort of Society exists between the Male and Female."<sup>249</sup> In human marriages, too, "the Authority is not equal; the Husband is the Head of the Wife in all

<sup>239</sup> See *id.* at 839–909; PUFENDORF, *WHOLE DUTY*, *supra* note 233, at 174–76.

<sup>240</sup> See 2 GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 197, at 514–26.

<sup>241</sup> See *id.* at 514–15; GROTIUS, *TRUTH*, *supra* note 201, at 110.

<sup>242</sup> See GROTIUS, *TRUTH*, *supra* note 201, at 321, 325, 328 (noting Muslim polygamy and their use of martial power to spread their religion).

<sup>243</sup> *Id.* at 328.

<sup>244</sup> See *id.* (praising Christianity over Islam).

<sup>245</sup> *Id.* at 110; see also 2 GROTIUS, *LAW OF WAR AND PEACE*, *supra* note 197, at 235, 239.

<sup>246</sup> See sources and discussion in WITTE, *POLYGAMY*, *supra* note 1 (assessing in chapter 9 the enlightenment liberal case against polygamy).

<sup>247</sup> See 2 GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 197, at 526.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 514.

conjugal and family Affairs; for the Wife becomes Part of the Husband's Family, and it is but reasonable, that the Husband should have the Rule and Disposal of his own House."<sup>250</sup> The gist of this argument was that polygyny was unnatural because the natural law gives a man exclusive dominion over his wife's person, property, and contracts—the common law doctrine of “coverture” now cast in general natural law terms.<sup>251</sup> This argument not only contradicted Grotius's starting premise that men and women have an equal and natural right to marry but it also made little sense. Men by nature share property and power all the time—else no civilization could ever emerge from the state of nature. Moreover, bees, ants, and other animals sometimes operate successfully with matriarchies: why should they count any less than a herd of cattle in describing the contents of natural law, especially since the orderliness of beehives served Grotius's later arguments about the natural legal order. Later Enlightenment writers, beginning with John Locke, as we will see in a moment, rejected Grotius's argument about polygyny, instead condemning this practice with more egalitarian natural law rationales.<sup>252</sup> They also rejected Grotius's further argument that the natural law permits fathers to sell, enslave, or lease their children.<sup>253</sup> For most later Enlightenment writers, these arguments were just a thin natural law *apologia* for the traditional unlimited power of the paterfamilias at Roman law that had since been limited by civil law reforms.

Grotius was considerably more nuanced and convincing in his treatment of what he called a “difficult, if not impossible” question: whether the natural law outlaws incest—sex with or marriage to a party related by blood or family ties.<sup>254</sup> Biblical law and Roman law firmly outlawed incest, and both Catholics and Protestants wrote endlessly on this topic in their discussions of the impediments of consanguinity and affinity.<sup>255</sup> There is a strong natural law argument against incest, too, said Grotius which supports at least some of these traditional legal prohibitions. It is the argument from natural revulsion.<sup>256</sup> Even “dumb animals,” who operate only instinctually and “naturally,” simply avoid

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<sup>250</sup> *Id.*

<sup>251</sup> *See id.* On common law coverture, especially respecting control of property, see for example MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986); MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND, 1850–1895*, at 103–30 (1989).

<sup>252</sup> *See infra* Part III.

<sup>253</sup> *See* 2 GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 197, at 511–12.

<sup>254</sup> 2 GROTIUS, *LAW OF WAR AND PEACE*, *supra* note 197, at 239.

<sup>255</sup> *See* BRUNDAGE, *supra* note 3, at 14, 36, 63, 88.

<sup>256</sup> *See* 2 GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 197, at 530.

sexual relations between parents and children, brothers and sisters—no matter how desperate their urge to mate.<sup>257</sup> They are by nature repelled by such sexual connections.<sup>258</sup> Among humans, reason translates this natural “aversion” to sex with close relatives into stronger terms of moral abhorrence as well.<sup>259</sup> Unless they have “been corrupted by evil education,” or are simply crazy, most people have an automatic and visceral “revulsion” against such close sexual unions, Grotius wrote.<sup>260</sup> They see them as “contrary to the law of nature”—not only impure and immodest but an outright “crime” and corruption of their rational nature.<sup>261</sup> Moreover, such close relations confuse natural family roles.<sup>262</sup> How can a father marry his daughter, or a mother her son, when they already have a complete, and lifelong relationship of parent and child? How can a child, who must always remain subordinate to the parent, become that parent’s spouse, or even her head, through marriage? Also, to allow parents and children and brothers and sisters who daily share the same household to have sex together will “pave the way to unchastity and adultery, if such loves could be cemented in marriage.”<sup>263</sup> Sex or marriage between close relatives is contrary to human nature and contrary to the laws of nature that govern humans.<sup>264</sup> This insight anticipated an “inhibitory mechanism” that modern scientists call the revulsion reflex against incest, which humans evidently share with other higher primates.<sup>265</sup>

Most civilizations, Grotius showed, used similar logic to extend the category of incest to ban sexual and marital relations with other near relatives as well, even if “those prohibitions do not come from the pure law of nature” alone.<sup>266</sup> While brute animals couple with more distant relatives, rational humans do not.<sup>267</sup> The three layers of consanguinity and affinity set out in the Mosaic law have parallels in many other legal cultures, both before and after the time of Moses.<sup>268</sup> Grotius adduced dozens of Jewish, Greek, Roman, and

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<sup>257</sup> See 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 241.

<sup>258</sup> See *id.*

<sup>259</sup> See Frans B. M. de Waal & Amy S. Pollick, *The Biology of Family Values: Reproductive Strategies of Our Fellow Primates*, in FAMILY TRANSFORMED, *supra* note 4, at 34, 45–46.

<sup>260</sup> 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 241.

<sup>261</sup> *Id.* at 240.

<sup>262</sup> See de Waal & Pollick, *supra* note 259, at 45–47 (explaining how sibling roles discourage sexual attraction).

<sup>263</sup> 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 243.

<sup>264</sup> See *id.* at 239–41.

<sup>265</sup> See de Waal & Pollick, *supra* note 259, at 45–47.

<sup>266</sup> See 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 242.

<sup>267</sup> See 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 197, at 529.

<sup>268</sup> See *id.* at 529–31.

Christian writers who condemned incest, even if they differed on exactly where to draw the line between distant relatives.<sup>269</sup> Incest prohibitions and aversions are so commonplace among men, Grotius concluded that “there must have been some Law that prohibited them” either “given by [God] . . . to all Mankind” or “derived from an invincible Impression of the Light of Nature.”<sup>270</sup>

Grotius’s natural law argument against incest became a standard among Western jurists and moralists. Many of them cited natural repugnance and inherent revulsion as the strongest indicators that incest of some sort was against the natural law.<sup>271</sup> Others added utilitarian arguments about bettering the breed of mankind by mixing blood lines and about enlarging friendships in the world by alliances formed by marriages between unrelated parties.<sup>272</sup> Most Enlightenment writers agreed with the English judge, Richard Cumberland (1631–1718), who said that “all the Laws in Scripture against *Incest* are, not [absolute], but in a degree and measure, greater or lesser, Laws of Nature, or Branches of the Law of Nature . . . [for] doing otherwise is ordinarily in the Nature of the Thing an Incongruity.”<sup>273</sup> But most also agreed with influential French philosopher, Baron Montesquieu (1689–1755), who wrote that, with incest as with other marriage and family norms, “it is a thing extremely delicate to fix exactly the point at which the laws of nature stop and where the civil laws begin.”<sup>274</sup> For the reality is that “[i]t has happened in all ages and countries, that religion has been blended with marriages. When certain things have been considered as impure or unlawful, and [have] nevertheless become necessary, they were obliged to call in religion to legitimate in the one case, and to prove in others.”<sup>275</sup> But in this day of contested religious claims, Montesquieu continued, the critical question is whether there are alternative norms and auxiliary expedients, besides religion, that can channel nature or

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<sup>269</sup> See *id.*; 2 GROTIUS, LAW OF WAR AND PEACE, *supra* note 197, at 239–41; GROTIUS, FREE SEA, *supra* note 197, at 105.

<sup>270</sup> 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 197, at 531–33.

<sup>271</sup> See RICHARD CUMBERLAND, A TREATISE ON THE LAWS OF NATURE 854–55 (Jon Parkin ed., John Maxwell trans., Liberty Fund 2005) (1671); WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY (Liberty Fund 2002) (1785); ADAM SMITH, LECTURES ON JURISPRUDENCE (1763), *reprinted in* 5 THE GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH 163–69 (R.L. Meek et al. eds., photo. reprint 1982) (1978).

<sup>272</sup> See SMITH, *supra* note 271, at 163–69.

<sup>273</sup> CUMBERLAND, *supra* note 271, at 855.

<sup>274</sup> 2 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 69 (Thomas Nugent trans., Hafner Publ’g Co. 1949) (1748).

<sup>275</sup> *Id.* at 67.



school natural inclinations in the direction of exclusive and enduring monogamous marriages between unrelated men and women with the fitness and capacity to marry each other.<sup>276</sup>

Defining more clearly the point at which the natural laws of marriage and family start and stop was one challenge Grotius left for later Enlightenment writers. Defining more fully what else nature teaches about many other features of traditional marriage and family not treated fully by Grotius was a further challenge. A large number of Enlightenment writers took up these challenges in developing a natural law of marriage, often as part of a broader theory of natural law and the law of nations (*ius gentium*). Hundreds of writings on point have survived from the seventeenth through nineteenth centuries. Among English writers, the best and most original such reflections on the nature of marriage and the family came from political philosopher John Locke,<sup>277</sup> the utilitarian philosopher William Paley,<sup>278</sup> the early feminist philosopher Mary Wollstonecraft,<sup>279</sup> and the Cambridge jurist Thomas Rutherford.<sup>280</sup> Among Germans, the most prolific natural law writer on marriage was Samuel von Pufendorf<sup>281</sup> (whose work together with that of Grotius was popularized in Europe and America by the Genevan jurist Jean Jacques Burlamaqui) as well as the German jurists Johannes Wolfgang Textor<sup>282</sup> and Christian Thomasius.<sup>283</sup> Among Scottish Enlightenment figures, the most influential writings were by Gershom Carmichael,<sup>284</sup> David

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<sup>276</sup> See *id.* at 27–80 (working out his theory of law and religion and the disestablishment of religion).

<sup>277</sup> See *infra* Part III.A.

<sup>278</sup> See *infra* Part V.

<sup>279</sup> See *infra* Part III.B.

<sup>280</sup> See generally THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 162–86, 386–95 (Baltimore, William & Joseph Neal 2d ed. 1832, photo. reprint 2004) (1754) (assessing marriage and the effect of civil law on marriage).

<sup>281</sup> See *supra* notes 233–39.

<sup>282</sup> See JOHANN WOLFGANG TEXTOR, SYNOPSIS OF THE LAW OF NATIONS 13–25 (James Brown Scott ed., John Pawley Bate trans., Carnegie Inst. of Washington 1916) (1680). On Burlamaqui, see *supra* notes 233–39.

<sup>283</sup> See CHRISTIAN THOMASIVS, INSTITUTES OF DIVINE JURISPRUDENCE WITH SELECTIONS FROM FOUNDATIONS OF THE LAW OF NATURE AND NATIONS (Thomas Ahert ed. & trans., Liberty Fund 2011) (1688, 1705, respectively).

<sup>284</sup> See, e.g., NATURAL RIGHTS ON THE THRESHOLD OF THE ENLIGHTENMENT: THE WRITINGS OF GERSHOM CARMICHAEL 128–37 (James Moore & Michael Silverstone eds., Michael Silverstone trans., 2002).

Fordyce,<sup>285</sup> John Millar,<sup>286</sup> Francis Hutcheson,<sup>287</sup> Adam Smith,<sup>288</sup> and Henry Home.<sup>289</sup> A solid intellectual history and analysis of all these early modern Enlightenment writings on marriage and the family remains to be written: it will be a large treatise if done comprehensively. Let's just sample a few of these writings to show the power, creativity, and comprehensiveness of these arguments about the nature of marriage and the family, and then show how they were woven into the Anglo-American common law of marriage in the later eighteenth and nineteenth centuries.

### III. JOHN LOCKE, MARY WOLLSTONECRAFT, AND THE EMERGING LIBERAL NATURAL LAW OF MARRIAGE

#### A. *John Locke*

In his famous *Two Treatises of Government*, John Locke (1632–1704), pressed a natural law and natural rights argument for marriage and family life that was cast in more liberal and egalitarian terms than that of Grotius.<sup>290</sup> Locke, in fact, designed his theory of marriage to refute the patriarchal theories of his fellow Englishman, Robert Filmer.<sup>291</sup> In his *Patriarcha* (c. 1638), Filmer argued that God had created the patriarchal domestic commonwealth, headed by the paterfamilias, as the source of the hierarchical political commonwealth headed by the king.<sup>292</sup> God had created Adam and Eve as founders not only of the first marriage and family but also of the first state and society.<sup>293</sup> Adam was the first husband but also the first ruler.<sup>294</sup> Eve was the first wife but also the first subject.<sup>295</sup> Together with their children, they comprised at once a

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<sup>285</sup> See DAVID FORDYCE, *THE ELEMENTS OF MORAL PHILOSOPHY IN THREE BOOKS WITH A BRIEF ACCOUNT OF THE NATURE, PROGRESS, AND ORIGIN OF PHILOSOPHY* 81–88 (Thomas Kennedy ed., Liberty Fund 2003) (1754).

<sup>286</sup> See JOHN MILLAR, *THE ORIGIN OF THE DISTINCTION OF RANKS: OR, AN INQUIRY INTO THE CIRCUMSTANCES WHICH GIVE RISE TO THE INFLUENCE AND AUTHORITY, IN THE DIFFERENT MEMBERS OF SOCIETY* 47–66, 109–39 (Aaron Garrett ed., Liberty Fund 2006) (1771).

<sup>287</sup> See *infra* notes 436–44.

<sup>288</sup> See SMITH, *supra* note 271, at 141–71.

<sup>289</sup> See *infra* Part IV.A.

<sup>290</sup> See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 162–69 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1689).

<sup>291</sup> See *PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER* (Peter Laslett ed., 1949).

<sup>292</sup> See *id.* at 57–58.

<sup>293</sup> See *id.*

<sup>294</sup> See *id.*

<sup>295</sup> See *id.*

domestic and a political commonwealth.<sup>296</sup> All persons thereafter were, by birth, subject to the highest male head, descended from Adam.<sup>297</sup>

Locke responded to Filmer first by flatly denying any natural or necessary connection between the political and domestic commonwealths, between the authority of the paterfamilias and that of the magistrate.<sup>298</sup> “[T]he Power of a *Magistrate* over a Subject,” he wrote, “may be distinguished from that of a *Father* over his Children, a *Master* over his Servant, a *Husband* over his Wife, and a *Lord* over his Slave.”<sup>299</sup> The “little Common-wealth” of the family is “very far from” the great commonwealth in England “in its Constitution, Power and End.”<sup>300</sup> “[T]he *Master of the Family* has a very distinct and differently limited *Power*, both as to time and extent, over those several Persons that are in it; . . . he has no Legislative Power of Life and Death over any of them, and none too but what a *Mistress of a Family* may have as well as he.”<sup>301</sup>

Locke responded next by denying Filmer’s patriarchal interpretation of the creation story in Genesis. God did not create Adam and Eve as ruler and subject, but as husband and wife, said Locke.<sup>302</sup> Adam and Eve were created equal before God: “Male and female created he them.”<sup>303</sup> Each had natural rights to use the bounties of Paradise.<sup>304</sup> Each had natural duties to each other and to God.<sup>305</sup> After the fall into sin, God expelled Adam and Eve from Paradise.<sup>306</sup> He increased man’s labor in his use of creation.<sup>307</sup> He increased woman’s labor in the bearing of children.<sup>308</sup> He said to Eve: “thy desire *shall be* to thy husband, and he shall rule over thee.”<sup>309</sup> These words, which Locke noted Filmer had called “the *Original Grant of Government*” were “not spoken to *Adam*, neither indeed was there any Grant in them made to *Adam*, but a

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<sup>296</sup> *See id.*

<sup>297</sup> *See id.*

<sup>298</sup> *See* LOCKE, *supra* note 290, at 286.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 341.

<sup>301</sup> *Id.*

<sup>302</sup> *See id.* at 189–94.

<sup>303</sup> *Id.*; *see also* Genesis 5:2 (King James).

<sup>304</sup> LOCKE, *supra* note 290, at 189–94.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 190.

<sup>307</sup> *Id.* at 189–94, 319.

<sup>308</sup> *Id.* at 189–94.

<sup>309</sup> *Id.* at 191; Genesis 3:16 (King James) (emphasis added).

Punishment laid upon *Eve*.<sup>310</sup> These words do not abrogate the natural equality, rights, and duties with which God created Adam and Eve, and all persons after them.<sup>311</sup> They do not render all wives eternally subject to their husbands.<sup>312</sup> And they certainly do not, as Filmer insisted, give “a Father or a Prince . . . an Absolute, Arbitrary, Unlimited and Unlimitable Power, over the Lives, Liberties, and Estates of his Children and Subjects.”<sup>313</sup>

Men and women were born free and equal in the state of nature, Locke argued.<sup>314</sup> But “[God] having made Man such a Creature, that, in his own Judgment, it was not good for him to be alone, put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into *Society*.”<sup>315</sup> “The *first Society*” to be formed after the state of nature “was between Man and Wife, which gave beginning to that between Parents and Children.”<sup>316</sup> This “*Conjugal Society*,” like every other society

is made by a voluntary Compact between Man and Woman: and tho’ it consist chiefly in such a Communion and Right in one anothers Bodies, as is necessary to its chief End, Procreation; yet it draws with it mutual Support, and Assistance, and Communion of Interest too, as necessary not only to unite their Care, and Affection, but also necessary to their common Off-spring, who have a Right to be nourished and maintained by them, till they are able to provide for themselves.<sup>317</sup>

Marriage has no necessary form or function beyond this “chief End” of procreation, Locke argued against traditional understandings.<sup>318</sup> Couples were free to contract about the rest of the relationship as they deemed fit:

*Conjugal Society*, might be varied and regulated by that Contract, which unites Man and Wife in that Society, as far as may consist with Procreation and the bringing up of Children till they could shift for

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<sup>310</sup> LOCKE, *supra* note 290, at 191.

<sup>311</sup> *Id.* at 192–93.

<sup>312</sup> *Id.* at 192.

<sup>313</sup> *Id.* at 166.

<sup>314</sup> *Id.* at 287, 339; see also JOHN LOCKE, *ESSAYS ON THE LAW OF NATURE* (W. von Leyden ed., Oxford Univ. Press 1954) (1676).

<sup>315</sup> LOCKE, *supra* note 290, at 336.

<sup>316</sup> *Id.* at 337.

<sup>317</sup> *Id.*

<sup>318</sup> See *id.*

themselves; nothing being necessary to any Society, that is not necessary to the ends for which it is made.<sup>319</sup>

Locke thus grounded marriage and the family in a set of natural rights and duties. It was a natural right for a man and woman to enter into a marital contract. It was a natural duty for them to render procreation an essential condition of whatever marital contract they entered. It was a natural condition of children to be born helpless and thus a natural right for them to be nurtured, educated, and raised to maturity by the parents who conceived them. This triggered the natural duty of their parents to remain together in marriage in order to raise their children. Locke advanced an argument about the role of long-term infant dependency in marriage formation that was strikingly similar to one put forth by Thomas Aquinas:

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 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>320</sup>

The logical end of Locke's argument was that childless couples, or couples whose children were of age and on their own, should be free to divorce, unless they had found some other "Communion of Interest" to sustain their marriage.<sup>321</sup> Locke dithered on the question of divorce. It was not essential to his argument to speak definitively on the subject, and he knew the dangers of loose literary speculation on it given the heated English politics of his day. In his private diary, he wrote quite brashly: "He that is already married may marry another woman with his left hand. . . . The ties, duration, and conditions of the left hand marriage shall be no other than what is expressed in the contract of marriage between the parties'."<sup>322</sup> In his *Two Treatises* and other

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<sup>319</sup> *Id.* at 340.

<sup>320</sup> *Id.* at 337–38.

<sup>321</sup> *See id.* at 337.

<sup>322</sup> *Id.* at 339 n.7 (alteration in original). The term "left-hand marriage" was a term of art in medieval and early modern law to describe the so-called "morganatic relationship" between a nobleman and a common woman, whose disparate social status precluded marriage. This was viewed as an exclusive and permanent

publications, however, he only flirted with the doctrine of divorce and remarriage, suggesting delicately that the matter be left to private contractual calculation.<sup>323</sup>

Another logical end of Locke's argument was that polygamy was a violation of the natural rights of wives and children and a violation of the natural equality of husband and wife within the marital estate. Locke did not say this clearly either, though the arguments for polygamy were pressing in his day.<sup>324</sup> He said obliquely that polygamy was not a proper "moral relation" because it compromised a man's "readiness to acknowledge and return kindness received," including presumably from his wife and children.<sup>325</sup> He suggested that polygamy, like other forms of promiscuity, was a "sin."<sup>326</sup> He said more explicitly that a guarantee of liberty of conscience and religious toleration did not prevent the state from punishing "the Dishonesty and Debauchery of Mens lives"—which, for Locke, included "arbitrary Divorce, Polygamy, Concubinage, simple Fornication," adultery, and incest.<sup>327</sup> These sexual "immoralities," said Locke, cannot "be exempt from the magistrate's power of punishing" them just because their proponents happen to call them "articles of faith, or ways of worship."<sup>328</sup> Polygamy, like incest, adultery, and the like are simply wrong, said Locke, and must be prohibited without exception, religious liberty notwithstanding.<sup>329</sup> This echoed Locke's earlier statement that polygamy and divorce are not so much matters of religion or conscience but "things either of indifference or doubt"<sup>330</sup>—the "adiaphora" or unessentials of the faith. A magistrate may limit or prohibit these activities to protect "the welfare and safety of his people" and to avoid the "greater

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union, sometimes blessed by the church. The women were supported during the relationship and gained truncated inheritance rights. Children born of these unions were considered legitimate, and received support during their father's lifetimes, but could not inherit from him. It's not clear whether Locke is referring to this kind of arrangement alongside a monogamous marriage.

<sup>323</sup> See *id.*

<sup>324</sup> For additional detailed sources, see WITTE, POLYGAMY, *supra* note 1 (assessing in chapter 9 Locke's natural rights arguments against polygamy).

<sup>325</sup> JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1689), *reprinted in* 2 THE WORKS OF JOHN LOCKE: IN TEN VOLUMES 1, 96–97 (London, C. Baldwin 1823).

<sup>326</sup> See LOCKE, *supra* note 314, at 171.

<sup>327</sup> JOHN LOCKE, A THIRD LETTER CONCERNING TOLERATION (1692), *excerpted in* JOHN LOCKE: A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 69, 84 (Mark Goldie ed., 2010) (emphasis omitted).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> JOHN LOCKE, AN ESSAY CONCERNING TOLERATION (1667), *reprinted in* JOHN LOCKE: A LETTER CONCERNING TOLERATION AND OTHER WRITINGS, *supra* note 327, at 105, 110–11.

inconveniences than advantages to the community” that these activities occasion.<sup>331</sup>

[A] toleration of men in all that which they pretend out of conscience they cannot submit to, will wholly take away all the civil laws and all the magistrate’s power, and so there will be no law, nor government, if you deny the magistrate’s authority in indifferent things, over which it is acknowledged on all hands that he has jurisdiction.<sup>332</sup>

This was an early statement of an important argument about the proper and necessary limits of religious freedom and human rights claims to practice polygamy. This argument for such limitations would grow in the Western legal tradition, especially in nineteenth-century America, to reject the claims of religious polygamists who claimed religious freedom exemptions from general criminal laws prohibiting polygamy.<sup>333</sup> Locke saw this religious freedom argument for polygamy exemptions looming already in the later seventeenth century, and he cut it off cleanly.

A final logical end of Locke’s argument was that church and state had little role to play within marriage and the family. The church was a voluntary assembly of like-minded believers who could enjoy only those powers that its members had collectively delegated to it.<sup>334</sup> No man has power over another’s marriage, and thus the church had no delegated power over marriage that it can ever exercise.<sup>335</sup> The state likewise was a voluntary assembly, formed by a governmental contract among like-minded parties who agreed to become citizens.<sup>336</sup> The state was formed after marriage and the family, and was ultimately subordinate to it in priority and right.<sup>337</sup> The private marriage contract—that preceded any public government or private church contract—sets the basic terms of the agreement between husband and wife, parent and child, in accordance with the laws and rights of nature.<sup>338</sup> The church could intervene only at the invitation of the parties.<sup>339</sup> The state could intervene only

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<sup>331</sup> *Id.* at 111.

<sup>332</sup> *Id.*

<sup>333</sup> See sources and discussion in WITTE, POLYGAMY, *supra* note 1 (assessing in chapter 10 the American case against polygamy). For a sixth-century Roman law exemption for Jewish polygamists, see *id.* (assessing this issue in chapter 1).

<sup>334</sup> See LOCKE, *supra* note 327, at 84.

<sup>335</sup> See *id.*

<sup>336</sup> See *id.*

<sup>337</sup> See LOCKE, *supra* note 290, at 339–40.

<sup>338</sup> See *id.*

<sup>339</sup> See *id.*

to enforce these contractual rights and duties, and only to vindicate the natural rights and duties of each party within the household.<sup>340</sup>

For all the ends of *Marriage* being to be obtained under Politick Government, as well as in the state of Nature, the Civil Magistrate doth not abridge the Right, or Power of either naturally necessary to those ends, *viz.* Procreation and mutual Support and Assistance whilst they are together; but only decides any Controversie that may arise between Man and Wife about them.<sup>341</sup>

Locke did not press this idea of private marital contracts to revolutionary conclusions. He was a man of pious Puritan upbringing, and he held to traditional biblical teachings throughout his life, even though he later shed some of the more rigorous Anglo-Puritan conventions of his youth.<sup>342</sup> His famous *Letters on Toleration* and *The Reasonableness of Christianity* were tracts of deep Christian conviction.<sup>343</sup> In each of these writings, Locke called on church and state to end their unhealthy alliances, to soften their belligerent dogmatism, and to return to the simple moral truths of the Bible.<sup>344</sup> In each of these tracts, as well as in a series of glosses on the books of the New Testament, he insisted on coating his doctrine of natural rights and duties with a number of classic Christian teachings.<sup>345</sup> These included the biblical injunctions to heterosexuality, monogamy, procreation, nurture and education of children, respect for the conjugal debt, and maintenance of healthy marital sex lives.<sup>346</sup> They also included biblical prohibitions on fornication, adultery, lust, prostitution, polygamy, “causeless divorce,” and more.<sup>347</sup> Like Grotius,

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<sup>340</sup> See *id.*

<sup>341</sup> *Id.*

<sup>342</sup> See JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT* (2002).

<sup>343</sup> JOHN LOCKE, *THE REASONABLENESS OF CHRISTIANITY* (1695), reprinted in 6 *THE WORKS OF JOHN LOCKE IN NINE VOLUMES* 1, 11–15, 140–43 (London, Rivington 12th ed. 1824) [hereinafter LOCKE, *THE REASONABLENESS OF CHRISTIANITY*]; JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (1690), reprinted in JOHN LOCKE: *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS*, *supra* note 327, at 1; LOCKE, *supra* note 327.

<sup>344</sup> See JOHN LOCKE, *A PARAPHRASE AND NOTES ON ST. PAUL'S FIRST EPISTLE TO THE CORINTHIANS* (1718), reprinted in 7 *THE WORKS OF JOHN LOCKE IN NINE VOLUMES*, *supra* note 343, at 77, 118–23 [hereinafter LOCKE, *FIRST EPISTLE TO THE CORINTHIANS*]; JOHN LOCKE, *A PARAPHRASE AND NOTES ON ST. PAUL'S EPISTLE TO THE EPHESIANS* (1707), reprinted in *id.* at 429, 488–95 [hereinafter LOCKE, *EPISTLE TO THE EPHESIANS*]; LOCKE, *THE REASONABLENESS OF CHRISTIANITY*, *supra* note 343; LOCKE, *supra* note 314.

<sup>345</sup> See LOCKE, *THE REASONABLENESS OF CHRISTIANITY*, *supra* note 343, at 140; see also LOCKE, *supra* note 314, at 109–21.

<sup>346</sup> See LOCKE, *FIRST EPISTLE TO THE CORINTHIANS*, *supra* note 344, at 118–23; LOCKE, *EPISTLE TO THE EPHESIANS*, *supra* note 344, at 488–95.

<sup>347</sup> See *supra* note 344; see also LOCKE, *supra* note 314, at 171.



Locke thought ultimately that natural and biblical teachings on sex, marriage, and family life largely converged, even though the Bible was more demanding. “[H]e that shall collect all the moral rules of the philosophers, and compare them with those contained in the New Testament,” he wrote, “will find them to come short of the morality delivered by our Saviour, and taught by his apostles” that the “law of morality Jesus Christ hath given us in the New Testament . . . [is] a full and sufficient rule for our direction, and conformable to that of reason.”<sup>348</sup>

Locke’s writings had a monumental impact on later Enlightenment philosophers and jurists. In France, Baron Montesquieu, Jean-Jacques Rousseau, Marquis de Condorcet, François Voltaire, and many others cited and quoted Locke’s writings with reverence, including notably his discussions of marriage and the family.<sup>349</sup> Montesquieu, in particular, echoed and elaborated Locke’s marital theories at length in his *Spirit of the Laws*, an anchor text for law, politics, and philosophy on both sides of the Atlantic for the next two centuries.<sup>350</sup> In America, John Adams, James Madison, Thomas Jefferson, and many others took Locke’s marital and broader political theories as axiomatic, and wove them (and Montesquieu’s elaboration of them) into their political writings and into the family laws of the young American republic.<sup>351</sup> And, in England especially, Locke’s writings were the anchor text for a century of brilliant advances in legal, political, and social philosophy, albeit with ever greater focus on reason and nature instead of Scripture and tradition.<sup>352</sup> Particularly influential was Locke’s image of the marital contract as the first contract that humans formed as they proceeded from the state of nature in order to form a society dedicated to the preservation of their natural rights and liberties.

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<sup>348</sup> LOCKE, THE REASONABLENESS OF CHRISTIANITY, *supra* note 343, at 140–43.

<sup>349</sup> See CASSIRER, *supra* note 15; GAY, *supra* note 15.

<sup>350</sup> 1 MONTESQUIEU, *supra* note 274, at 127–37; 2 *id.* at 83–93, 206–08, 213–20. On Montesquieu’s and Locke’s influence in early America, see DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 140–43 (1988) (showing that Montesquieu was second only to the Bible in being the most frequently cited authority in all American legal and political writing from 1760–1805; Blackstone and Locke came in third and fourth respectively).

<sup>351</sup> See MAY, *supra* note 15, at 307–36.

<sup>352</sup> See, e.g., FREDERICK C. BEISER, THE SOVEREIGNTY OF REASON: THE DEFENSE OF RATIONALITY IN THE EARLY ENGLISH ENLIGHTENMENT (1996); PETER HARRISON, ‘RELIGION’ AND THE RELIGIONS IN THE ENGLISH ENLIGHTENMENT (1990); ROY PORTER, THE CREATION OF THE MODERN WORLD: THE UNTOLD STORY OF THE BRITISH ENLIGHTENMENT (2000).

### B. *Mary Wollstonecraft*

To illustrate, let me just focus on one influential example, the work of early feminist critic and educator Mary Wollstonecraft (1759–1797). In her famous *Vindication of the Rights of Woman*, Wollstonecraft pushed Locke’s premises further in support of the natural rights of women within and beyond the home.<sup>353</sup> Notwithstanding Locke’s efforts, Wollstonecraft argued, traditional patriarchal ideas continue to perpetuate the idea that “woman must be inferior to man, and made for him.”<sup>354</sup> It treats a woman as a mere pretty, demur, and passive “toy of man,” to be shaken and rattled “whenever, dismissing reason, he chooses to be amused,” though inevitably he will grow tired of this one toy, especially when it becomes worn or damaged, and he will acquire another and then another either at the same time or seriatim after divorce.<sup>355</sup> It measures a woman’s value and virtue in society merely by her physical beauty, by her fecundity, by her capacity to bear and raise children.<sup>356</sup> It says to a woman that her main vocation in life is this: to “procreate and rot.”<sup>357</sup>

Wollstonecraft took sharp aim at the common law system of her day, which still perpetuated traditional patriarchal forms where husbands ruled their wives without check or restriction and confined them to procreation and menial household duties. “The *divine right* of husbands, like the divine right of kings, may, it is to be hoped, in this enlightened age, be contested without danger,” she wrote.<sup>358</sup> We cannot be seduced by “the same arguments that tyrannic[al] kings and venal ministers have used, and fallaciously assert that woman ought to be subjected because she has always been so.”<sup>359</sup> Custom is not nature, and the long habit of penning and domesticating women in a “gilt[ed] cage,” does not make it right.<sup>360</sup> Men have their “natural freedom,” rights, and dignity.<sup>361</sup> Women do too. “It is time to effect a revolution in female manners—time to restore to them their lost dignity—and make them, as a part of the human species, labour by reforming themselves to reform the world.”<sup>362</sup>

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<sup>353</sup> See MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* (1792), reprinted in *OXFORD WORLD’S CLASSICS: A VINDICATION OF THE RIGHTS OF WOMAN AND A VINDICATION OF THE RIGHTS OF MEN* 63 (Janet Todd ed., 2d reprint ed. 2008).

<sup>354</sup> *Id.* at 141.

<sup>355</sup> *Id.* at 100.

<sup>356</sup> See *id.* at 133.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 108.

<sup>359</sup> *Id.* at 112.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* 112–13.

<sup>362</sup> *Id.* at 113.

The reform of the world that Wollstonecraft had in mind was for men and women to be treated equally in private and public life and, given the education and opportunity, to develop their minds and capacities to fit their native talents. Men might be stronger in body on average, and women might have more capacity and thus responsibility in the production and nursing of infant children, Wollstonecraft allowed.<sup>363</sup> And that might suggest different roles within the public and private spheres for a time and different training to prepare for the unique vocation of motherhood.<sup>364</sup> “But I still insist, not only the virtue, but the *knowledge* of the two sexes should be the same in nature,” Wollstonecraft argued, “and that women, considered not only as moral, but rational creatures, . . . [should] acquire human virtues . . . by the *same* means as men, instead of being educated like a fanciful kind of *half* being.”<sup>365</sup> She added, “Liberty is the mother of virtue, and if women be, by their very constitution, slaves, and not allowed to breathe the sharp invigorating air of freedom, they must ever languish like exotics, and be reckoned beautiful flaws in nature.”<sup>366</sup>

If a woman is given the freedom and education to develop her full capacity of reason, virtue, and character, Wollstonecraft insisted, the marriage and family life that she chooses to enter will be so much better.<sup>367</sup> The marriage will be a union of “equal moral beings,” a “dyadic perfectionist friendship”<sup>368</sup> between partners who can sustain and support each other throughout a lifetime. A properly educated woman will make a true friend and partner to her husband, and not just a sexual plaything while they are newlyweds, a useful mother as children grow up, but then a dispensable burden to her husband when beauty, sex, and children are no longer the priority.<sup>369</sup> She will also make a much better mother, teacher, and role model for their children, preparing them properly to rise to their full potential and contribution:

Contending for the rights of woman, my main argument is built on this simple principle, that if she be not prepared by education to become the companion of man, she will stop the progress of knowledge and virtue; for truth must be common to all, or it will be

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<sup>363</sup> See *id.* at 106.

<sup>364</sup> See *id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 103.

<sup>367</sup> See *id.* at 106–07.

<sup>368</sup> This phrase is from EILEEN HUNT BOTTING, *WOLLSTONECRAFT, MILL AND WOMEN’S HUMAN RIGHTS* (forthcoming 2016).

<sup>369</sup> See WOLLSTONECRAFT, *supra* note 353, at 143–49.

inefficacious with respect to its influence on general practice. And how can woman be expected to co-operate unless she know why she ought to be virtuous? unless freedom strengthen her reason till she comprehend her duty, and see in what manner it is connected with her real good? If children are to be educated to understand the true principle of patriotism, their mother must be a patriot; and the love of mankind, from which an orderly train of virtues spring, can only be produced by considering the moral and civil interest of mankind; but the education and situation of woman, at present, shuts her out from such investigations.<sup>370</sup>

#### IV. HENRY HOME AND SCOTTISH ENLIGHTENMENT TEACHINGS ON SEX, MARRIAGE, AND FAMILY

A number of Scottish Enlightenment philosophers also endorsed Locke's views, but they also pushed beyond him in developing their natural law theories of sex, marriage, and family life. They accepted Locke's theories of egalitarian monogamy and of the natural rights and duties within the household between husband and wife, parent and child. But these Scottish writers worked hard to show the deeper natural foundations of exclusive and enduring monogamous marriages and the need for liberal societies to maintain most traditional sex crimes.

##### A. *Henry Home*

The writings of Henry Home (1696–1782), known as Lord Kames of Scotland, were particularly perceptive.<sup>371</sup> A leading man of letters and a leading justice of Scotland's highest court, Home was a friend of Francis Hutcheson, David Hume, Thomas Reid, Adam Smith, and other such Scottish luminaries.<sup>372</sup> He wrote extensively on law and politics, religion and morality, history and economy, art and industry.<sup>373</sup> He was best known for his brilliant defense of natural law, principally on empirical and rational grounds.<sup>374</sup> Home sought to prove the realities of virtue, duty, justice, liberty, freedom, and other natural moral principles, and the necessity for rational humans to create

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<sup>370</sup> *Id.* at 66 (emphasis added).

<sup>371</sup> See HENRY HOME, *ESSAYS ON THE PRINCIPLES OF MORALITY AND NATURAL RELIGION* 46–55, 66–95 (Mary Catherine Moran ed., Liberty Fund 2005) (1779).

<sup>372</sup> For more information about the life and work of Home, see generally WILLIAM C. LEHMANN, *HENRY HOME, LORD KAMES, AND THE SCOTTISH ENLIGHTENMENT: A STUDY IN NATIONAL CHARACTER AND IN THE HISTORY OF IDEAS* (1971); IAN SIMPSON ROSS, *LORD KAMES AND THE SCOTLAND OF HIS DAY* (1972).

<sup>373</sup> See HOME, *supra* note 371.

<sup>374</sup> See *id.* at 55–61.

various offices, laws, and institutions to support and protect them.<sup>375</sup> While his rationalist methodology and naturalist theology rankled the orthodox Christian theologians of his day, Home wanted to give his natural law argument a more universal and enduring cogency. A devout and lifelong Protestant, he believed in the truth of Scripture and the will of God.<sup>376</sup> But he wanted to win over even skeptics and atheists to his legal and moral arguments and to give enduring “authority to promises and covenants” that helped create society and its institutions.<sup>377</sup>

Among many other institutions and “covenants,” Home defended monogamous marriage as a necessity of nature, and he denounced polygamy as a “vice against [human] nature.”<sup>378</sup> Home recognized, of course, that polygamy was commonplace among some animals, drawing sundry examples from the work of French Jesuit naturalist Buffon.<sup>379</sup> He also recognized that polygamy had been practiced in early Western history and was still known in some Islamic and Asiatic cultures in his day.<sup>380</sup> But, Home insisted, polygamy exists only “where women are treated as inferior beings,” and where “men of wealth transgress every rule of temperance” by buying their wives like slaves and by adopting the “savage manners” of animals.<sup>381</sup> Among horses, cattle, and other grazing animals, he argued, polygamy is natural.<sup>382</sup> One superior male breeds with all females, and the mothers take care of their own young who grow quickly independent.<sup>383</sup> For these animals, monogamous “pairing would be of no use: the female feeds herself and her young at the same instant; and nothing is left for the male to do.”<sup>384</sup> But other animals, such as nesting birds, “whose young require the nursing care of both parents, are directed by nature to pair” and to remain paired till their young “are sufficiently vigorous to provide for themselves.”<sup>385</sup>

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<sup>375</sup> *See id.*

<sup>376</sup> *See id.* at 66–67.

<sup>377</sup> *See id.* at 46.

<sup>378</sup> *See* 1 HENRY HOME, SKETCHES OF THE HISTORY OF MAN: CONSIDERABLY ENLARGED BY THE LATEST ADDITIONS AND CORRECTIONS OF THE AUTHOR 204 (James A. Harris ed., Liberty Fund 2007) (1788) [hereinafter HOME, SKETCHES].

<sup>379</sup> *Id.* at 306–12.

<sup>380</sup> *Id.* at 204, 261.

<sup>381</sup> *Id.* at 243, 271.

<sup>382</sup> *Id.* at 306–12.

<sup>383</sup> *Id.* at 263.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

Humans are the latter sort of creature, said Home, for whom pairing and parenting are indispensable.<sup>386</sup> Humans are thus inclined by nature toward enduring monogamous pairing of parents—indeed, more so than any other creature given the long fragility and helplessness of their offspring.<sup>387</sup> Home expanded on the natural configuration of marriage and the importance of human childhood dependency developed by Aquinas and Vitoria, and he added new insights as well from the science of cultural development (anthropology as we now call it):

Man is an animal of long life, and is proportionally slow in growing to maturity: he is a helpless being before the age of fifteen or sixteen; and there may be in a family ten or twelve children of different births, before the eldest can shift for itself. Now in the original state of hunting and fishing, which are laborious occupations, and not always successful, a woman, suckling her infant, is not able to provide food even for herself, far less for ten or twelve voracious children. . . . [P]airing, is so necessary to the human race, that it must be natural and instinctive. . . . Brute animals which do not pair, have grass and other food in plenty, enabling the female to feed her young without needing any assistance from the male. But where the young require the nursing care of both parents, pairing is a law of nature.<sup>388</sup>

Not only is the pairing of male and female a law of nature, Home continued, but “[m]atrimony is instituted by nature” to overcome humans’ greatest natural handicap to effective procreation and preservation as a species—their perpetual desire for sex, especially among the young, at exactly the time when they are most fertile.<sup>389</sup> Unlike most animals, whose sexual appetites are confined to short rutting seasons, Home wrote, humans have a constant sexual appetite, which, by nature, “demands gratification, after short intervals.”<sup>390</sup> If men and women just had random sex with anyone—“like the hart in rutting time”—the human race would devolve into a “savage state” of nature and soon die out.<sup>391</sup> Men would make perennial and “promiscuous use of women” and not commit themselves to the care of these women or their children.<sup>392</sup> “[W]omen would in effect be common prostitutes.”<sup>393</sup> Few women

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<sup>386</sup> *Id.* at 263–64.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.* at 268–69.

<sup>390</sup> *Id.* at 265.

<sup>391</sup> *Id.* at 264.

<sup>392</sup> *Id.* at 265.

<sup>393</sup> *Id.*

would have the ability on their own “to provide food for a family of children,” and most would avoid having children or would abandon them if they did.<sup>394</sup> Marriage is nature’s safeguard against such proclivities, said Home, and “frequent enjoyment” of marital sex and intimacy “endears a pair to each other,” making them want only each other all the more.<sup>395</sup> “Sweet is the society of a pair fitted for each other, in whom are collected the affections of husband, wife, lover, friend, the tenderest affections of human nature.”<sup>396</sup>

The God of nature has [thus] enforced conjugal society, not only by making it agreeable, but by the principle of chastity inherent in our nature. To animals that have no instinct for pairing, chastity is utterly unknown; and to them it would be useless. The mare, the cow, the ewe, the she-goat, receive the male without ceremony, and admit the first that comes in the way without distinction. Neither have tame fowl any notion of chastity: they pair not; and the female gets no food from the male, even during incubation. But chastity and mutual fidelity are . . . essential to the human race; enforced by the principle of chastity, a branch of the moral sense. Chastity is essential even to the continuation of the human race. As the carnal appetite is always alive, the sexes would wallow in pleasure, and be soon rendered unfit for procreation, were it not for the restraint of chastity.<sup>397</sup>

Polygamy violates this natural design and strategy for successful procreation through enduring marital cohabitation, Home argued.<sup>398</sup> First, monogamy is better suited to the roughly equal numbers of men and women in the world.<sup>399</sup> “All men are by nature equal in rank: no man is privileged above another to have a wife; and therefore polygamy is contradictory” to the natural order and to the natural right of each fit adult to marry.<sup>400</sup> Monogamous pairing is most “clearly the voice of nature.”<sup>401</sup> It is echoed in “sacred scripture” in its injunction that two—not three or four—shall become “one flesh” in

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<sup>394</sup> *Id.* at 264–65.

<sup>395</sup> *Id.* at 267.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 268–69. Later, Home condemned mandatory celibacy and abstinence within marriage as “ridiculous self-denial,” an “impudent disregard of moral principles,” and the “grossest of all deviations, not only from sound morality, but from pure religion” and natural law. *See* HOME, 3 SKETCHES, *supra* note 378, at 888–91.

<sup>398</sup> *See* HOME, 1 SKETCHES, *supra* note 378, at 265–67.

<sup>399</sup> *Id.* at 266.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

marriage.<sup>402</sup> If God and nature had intended to condone polygamy, there would be many more females than males.<sup>403</sup>

Second, monogamy “is much better calculated for continuing the race, than the union of one man with many women.”<sup>404</sup> One man cannot possibly provide food, care, and nurture to the many children born of his many wives.<sup>405</sup> Their wives are not able to provide easily for their young when they are weakened from child labor and birth, needed for nursing, or distracted by the many needs of multiple children.<sup>406</sup> Some of their children will be neglected, some will grow up impoverished, malnourished, or undereducated, some will inevitably die.<sup>407</sup> “How much better chance for life have infants who are distributed more equally in different families.”<sup>408</sup>

Third, monogamy is better suited for women.<sup>409</sup> Men and women are by nature equal, Home argued at length, building on the egalitarian themes of Locke, among others.<sup>410</sup> Monogamous marriage is naturally designed to respect this natural gender equality, even while recognizing the different roles that a husband and wife play in the procreation and nurture of their children.<sup>411</sup> Thus marriage works best when a husband and wife have “reciprocal and equal” affection as true “companion[s]” in life, who enjoy each other and their children with “endear[ment]” and “constancy.”<sup>412</sup> Polygamy, by contrast, is simply a patriarchal fraud.<sup>413</sup> Each wife is reduced to a servant, “a mere instrument of pleasure and propagation” for her husband.<sup>414</sup> Each wife is reduced to competing for the attention and affection of her husband, particularly if she has small children and needs help in their care.<sup>415</sup> One wife and her children will inevitably be singled out for special favor, denigrating the others further and exacerbating the tensions within the household, which cause

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402 *Id.*

403 *Id.*

404 *Id.*

405 *Id.*

406 *Id.* at 267; 2 *id.* at 483–84.

407 1 *id.* at 266.

408 *Id.*

409 *See id.* at 261, 267–68, 287–311.

410 *See id.* at 287–89.

411 *See id.* at 287–311.

412 *Id.* at 267.

413 *See id.* at 266–67.

414 *Id.* at 267.

415 *See id.*



the children to suffer, too.<sup>416</sup> Packs of wolves might thrive this way, but rational humans cannot.<sup>417</sup> Combining natural instinct with rational reflection, humans have discovered that monogamy is the “foundation for a matrimonial covenant” between two equal adults.<sup>418</sup>

Fourth, monogamy is better designed to promote the fidelity and chastity humans need to procreate effectively as a species.<sup>419</sup> It induces husband and wife to remain faithful to each other and to their children, come what may.<sup>420</sup> Polygamy, by contrast, is simply a forum and a catalyst for adultery and lust.<sup>421</sup> If a husband is allowed to satisfy his lust for a second woman whom he can add as a wife, his “one act of incontinence” will lead “to others without end.”<sup>422</sup> Soon enough, he will lust after yet another wife and still another—even the wife of another man, as the biblical story of King David’s lust for Bathsheba tragically illustrates.<sup>423</sup> The husband’s bed-hopping, in turn, will “alienat[e] [the] affection[s]” of his first wife, who will embark on her own bed-hopping.<sup>424</sup> Such “unlawful love” will only trigger more and more rivalries among husbands, wives, and lovers in which all will suffer.<sup>425</sup> Moreover, by sharing another man’s bed, the wife might well require her husband “to maintain and educate children who are not his own.”<sup>426</sup> This most men will not do unless they are uncommonly smitten or charitable.<sup>427</sup> Polygamy simply does not work, Home concluded.<sup>428</sup> “Matrimony between a single pair, for mutual comfort, and for procreating children, implies the strictest mutual fidelity.”<sup>429</sup>

Even children understand that faithful monogamous marriage is “an appointment of nature,” Home concluded.<sup>430</sup> As infants they bond with both their mothers and fathers and when they grow older they work to keep the couple together.<sup>431</sup> “If undisguised nature show[s] itself any where, it is in

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<sup>416</sup> *See id.*

<sup>417</sup> *See id.* at 267–68, 308.

<sup>418</sup> *Id.* at 287.

<sup>419</sup> *Id.* at 204, 270, 287–89.

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 287.

<sup>422</sup> *Id.* at 204.

<sup>423</sup> *Id.* at 129.

<sup>424</sup> *Id.* at 288.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 288–89.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 267.

<sup>429</sup> *Id.* at 288.

<sup>430</sup> *Id.* at 264–66.

<sup>431</sup> *Id.*

children,” Home wrote.<sup>432</sup> “They often hear, it is true, people talking of matrimony;” Home continued, “but they also hear of logical, metaphysical, and commercial matters, without understanding a syllable. Whence then their notion of marriage but from nature? Marriage is a compound idea, which no instruction could bring within the comprehension of a child, did not nature cooperate.”<sup>433</sup> From the mouths of babes come profound truths about our most basic institution.<sup>434</sup> We hear in these words of Home the echoes of a children’s right point of view that Locke had introduced and later theorists would expand: the natural right of the child to be born in a society whose customs, institutions, and laws protect their inclination, need, and right to be raised by their parents of conception unless illness, accident, or death of a parent intervenes.<sup>435</sup>

*B. Francis Hutcheson and David Hume*

Home’s argument for monogamy and against polygamy was typical of the arguments from nature, reason, and experience that the Scottish Enlightenment mustered in favor of traditional forms and norms of marriage. Some of these writers supplemented these with arguments from Scripture and Christian tradition, but most, like Home, sought to prove their case on rational and empirical grounds so much as possible. For example, the great Scottish philosopher of common sense, Francis Hutcheson (1694–1746), who proved so influential in America through the instruction of Princeton University President John Witherspoon,<sup>436</sup> grounded his argument for the natural law of monogamy, fidelity, and exclusivity again on the natural needs of mothers and children:

Now as the mothers are quite insufficient alone for this necessary and laborious task, which nature also has plainly enjoined on both the parents by implanting in both that strong parental affection; both parents are bound to concur in it, with joint labor, and united cares for a great share of their lives: and this can never be tolerable to them unless they are previously united in love and stable friendship: as new children also must be coming into life, prolonging this joint

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<sup>432</sup> *Id.* at 265.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> See *id.* at 265, 306 (discussing how animal pairings facilitate child rearing).

<sup>436</sup> See, e.g., JOHN WITHERSPOON, LECTURES ON MORAL PHILOSOPHY (Jack Scott ed., ann. ed., Univ. of Del. Press 1982) (c. 1800–1801) (providing discussion largely derivative of Hutcheson’s lectures of the same name); see also 7 THE WORKS OF THE REV. JOHN WITHERSPOON, LATE PRESIDENT OF THE COLLEGE AT PRINCETON, NEW JERSEY (H. Rondel Rumburg ed., Sprinkle Publ’ns 2001) (1802) (including similar lectures on marriage).

charge. To engage mankind more cheerfully in this laborious service nature has implanted vehement affections between the sexes; excited not so much by views of brutal pleasure[,] . . . as by some appearances of virtues, displayed in their behavior, and even by their very form and countenances. These strong impulses plainly sh[o]w it to be the intention of nature that human offspring should be propagated only by parents first united in stable friendship, and in a firm covenant about perpetual cohabitation and joint care of their common children. For all true friendship aims at perpetuity: there's no friendship in a bond only for a fixed term of years, or in one depending upon certain events which the utmost fidelity of the parties cannot ensure.<sup>437</sup>

“[N]ature has [thus] strongly recommended” that for humans all sex and procreation occur within a “proper covenant about a friendly society for life,” Hutcheson continued.<sup>438</sup> “The chief articles in this covenant are” mutual fidelity of husband and wife to each other.<sup>439</sup> A wandering wife causes the “greatest injury” to her husband by bringing adulterine children into the home who dilute his property and distract him from “that tender affection which is naturally due only to his own [children].”<sup>440</sup> A wandering husband causes great injury to his wife and children by allowing his affections and fortunes to be squandered on prostitutes, mistresses, and lovers.<sup>441</sup> Other articles of the natural marital covenant, Hutcheson wrote, include “a perpetual union of interests and pursuits” between husband and wife, a mutual commitment to “the right education of their common children,” and a mutual agreement to forgo separation and divorce.<sup>442</sup> It is against reason and human nature, Hutcheson wrote, “to divorce or separate from a faithful and affectionate consort for any causes which include no moral turpitude; such as barrenness, or infirmity of body; or any mournful accident which no mortal could prevent.”<sup>443</sup> Divorce should be allowed only in cases of adultery, “obstinate desertion,

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<sup>437</sup> FRANCIS HUTCHESON, *PHILOSOPHIAE MORALIS INSTITUTIO COMPENDIARIA WITH A SHORT INTRODUCTION TO MORAL PHILOSOPHY* 218 (Luigi Turco ed., Liberty Fund 2007) (1747).

<sup>438</sup> *Id.* at 220.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at 220–21.

<sup>442</sup> *Id.* at 221.

<sup>443</sup> *Id.* at 221–22.

capital enmity, or hatred and such gross outrages as take away all hopes of any friendly society for the future or a safe and agreeable life together.”<sup>444</sup>

Similarly, the famous Scottish philosopher, David Hume (1711–1776), for all his skepticism about traditional Christian morality, thought traditional legal and moral norms of sex, marriage, and family life to be both natural and useful. Hume summarized the natural configuration of marriage crisply: “The long and helpless infancy requires the combination of parents for the subsistence of their young; and that combination requires the virtue of chastity or fidelity to the marriage bed.”<sup>445</sup> Hume used many of the same arguments that Home had mustered against polygamy. This “odious” institution denied the natural equality of the sexes.<sup>446</sup> It fostered “[t]he bad education of children.”<sup>447</sup> It led to “jealousy” and competition among wives, and more.<sup>448</sup> Moreover, said Hume, polygamy forced a man, distracted by his other wives and children, to confine his other wives to the home—by physically threatening, binding, or even laming them; by isolating them from society; or by keeping them so poor and weak they could not leave.<sup>449</sup> All this is a form of “Barbarism,” with “frightful effects” that defy all nature and reason.<sup>450</sup>

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<sup>444</sup> *Id.* at 224; see also FRANCIS HUTCHESON, LOGIC, METAPHYSICS, AND THE NATURAL SOCIABILITY OF MANKIND 206–07 (James Moore & Michael Silverthorne eds., Liberty Fund 2006) (1730) (on Hutcheson’s more general theories of association and institutions).

<sup>445</sup> DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 206–07 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1902) (1777); see also DAVID HUME, ESSAYS: MORAL, POLITICAL, AND LITERARY (Eugene F. Miller ed., Liberty Fund rev. ed. 1987) (1777) [hereinafter HUME, ESSAYS].

<sup>446</sup> HUME, ESSAYS, *supra* note 445, at 182, 185.

<sup>447</sup> *Id.* at 185.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 186–87.

<sup>450</sup> *Id.* at 185. Drawing on Hume, Adam Smith wrote similarly that

polygamy was on many accounts much inferior to monogamy of every sort. With regard to the wives it produces the greatest misery, as jealousy of every sort, discord, and enmity must inevitably attend it. The children also must be greatly neglected in every shape and lead but a very wretched life. The servants must all be slaves and entirely under the power of their master. With regard to the [polygamous] man himself, to whose happiness or rather pleasure the good of all the rest seems to be sacrificed, he also has no great enjoyment. He is racked by the most tormenting jealousy and has little enjoyment from the affections of his family or the intercourse of other men. It is detrimental[] also to population, and besides it is very hurtful to the liberty of the people.

SMITH, *supra* note 271, at 159. For additional details of Smith’s arguments, see generally *id.* at 150–73, 442–49.

Hume offered similar natural and utilitarian arguments against voluntary divorce.<sup>451</sup> Many in Hume's day argued for divorce as a natural expression of the freedom of contract and a natural compensation for having no recourse to polygamy despite a man's natural drive to multiple partners.<sup>452</sup> "The heart of man delights in liberty," their argument went; "[t]he very image of constraint is grievous to it."<sup>453</sup> Hume would have none of this. To be sure, he recognized that divorce was sometimes the better of two evils—especially where one party was guilty of adultery, severe cruelty, or malicious desertion, and especially when no children were involved.<sup>454</sup> But, outside of such narrow circumstances, he said, "nature has made [] divorce" without real cause the "doom [of] all mortals."<sup>455</sup>

First, with voluntary divorce, the children suffer and become "miserable."<sup>456</sup> Shuffled from home to home, consigned to the care of strangers and stepparents "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.<sup>457</sup> Second, when voluntary divorce is foreclosed, couples by nature become disinclined to wander and instead form "a calm and sedate affection, conducted by reason and cemented by habit; springing from long acquaintance and mutual obligations, without jealousies or fears."<sup>458</sup> "We need not, therefore, be afraid of drawing the marriage-knot, which chiefly subsists by friendship, the closest possible."<sup>459</sup> Third, "nothing is more dangerous than to unite two persons so closely in all their interests and concerns, as man and wife, without rendering the union entire and total."<sup>460</sup> "The least possibility of a separate interest must be the source of endless quarrels and suspicions."<sup>461</sup> Nature, justice and prudence alike require their continued consortium.<sup>462</sup>

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<sup>451</sup> HUME, *ESSAYS*, *supra* note 445, at 187–90.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* at 187.

<sup>454</sup> *Id.* at 187–90.

<sup>455</sup> *Id.* at 188.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> *Id.* at 189.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.* at 187 (implying that voluntary divorces are not the norm).

## V. WILLIAM PALEY AND THE UTILITARIANS

The natural law writings of Cambridge philosopher, William Paley (1743–1805) provide a good illustration of how these natural law arguments could be pressed into a more utilitarian and natural rights direction.<sup>463</sup> Paley was known in his day as a “theological utilitarian[.]”<sup>464</sup> He sought to define those natural principles and practices of social life that most conduce to human happiness—in this life and in the next.<sup>465</sup> Those principles and practices, he said, could be variously sought in Scripture and tradition, divine law and natural law, morality and casuistry—all of which, for Paley, contributed and came to “the same thing; namely, *that science which teaches men their duty and the reasons of it.*”<sup>466</sup>

Marriage is among the natural duties and rights of men and women, Paley wrote, for it provides a variety of public and private goods.<sup>467</sup> His list of marital goods was a nice distillation of traditional arguments:

1. The private comfort of individuals, especially of the female sex . . . .
2. The production of the greatest number of healthy children, their better education, and the making of due provision for their settlement in life.
3. The peace of human society, in cutting off a principal source of contention, by assigning one [woman] to one man, and protecting his exclusive right by sanctions of morality and law.
4. The better government of society, by distributing the community into separate families, and appointing over each the authority of a master of a family, which has more actual influence than all civil authority put together.
5. The same end, in the additional security which the state receives for the good behaviour of its citizens, from the solicitude they feel for the welfare of their children, and from their being confined to permanent habitations.
6. The encouragement of industry.<sup>468</sup>

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<sup>463</sup> PALEY, *supra* note 271, at 1–25.

<sup>464</sup> See D.L. LEMAHIEU, *THE MIND OF WILLIAM PALEY: A PHILOSOPHER AND HIS AGE 15* (1976).

<sup>465</sup> See PALEY, *supra* note 271, at 1–25.

<sup>466</sup> *Id.* at 1.

<sup>467</sup> *Id.* at 167–68.

<sup>468</sup> *Id.*

Paley worked systematically through the respective “natural rights” and “duties” of husband and wife, and parent and child.<sup>469</sup> In marriage, a husband promises “to love, comfort, honour, and keep, his wife,” and a wife promises “to obey, serve, love, honour, and keep, her husband; in every variety of health, fortune, and condition.”<sup>470</sup> Both parties further stipulate “to forsake all others, and to keep only unto one another, so long as they both shall live.”<sup>471</sup> In a word, said Paley, each spouse promises to do all that is necessary to “consult and promote each other’s happiness.”<sup>472</sup> These are not only Scriptural and traditional duties of marriage. They are natural duties, as can be seen in the marital contracts of all manner of cultures, which Paley adduced in ample number.<sup>473</sup> These natural duties, in turn, give the other spouse a natural right to enforce them in cases of adultery, “desertion, neglect, prodigality, drunkenness, peevishness, penuriousness, jealousy, or any levity of conduct which administers occasion of jealousy.”<sup>474</sup> What St. Paul called the mutual “conjugal rights” of husband and wife are simply one way of formulating the natural rights that husband and wives enjoy the world over.<sup>475</sup>

If the couple is blessed with children, the parents have a natural right and “duty” to provide for the child’s “maintenance, education, and a reasonable provision for the child’s happiness in respect of outward condition.”<sup>476</sup> Parents’ rights to care for their children “result from their duties” to their children, said Paley.<sup>477</sup>

If it be the duty of a parent to educate his children, to form them for a life of usefulness and virtue, to provide for them situations needful for their subsistence and suited to their circumstances, and to prepare them for those situations; he has a right to such authority, and in support of that authority to exercise such discipline as may be necessary for these purposes. The law of nature acknowledges no other foundation of a parent’s right over his children, besides his duty towards them. (I speak now of such rights as may be enforced by

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<sup>469</sup> *Id.* at 51, 193–216.

<sup>470</sup> *Id.* at 194 (internal quotation marks omitted).

<sup>471</sup> *Id.* (internal quotation marks omitted).

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* at 194–96.

<sup>474</sup> *Id.* at 196.

<sup>475</sup> 1 *Corinthians* 7:3–5 (Revised Standard).

<sup>476</sup> See PALEY, *supra* note 271, at 199 (emphasis omitted).

<sup>477</sup> *Id.* at 210.

coercion.) This relation confers no property in their persons, or natural dominion over them, as is commonly supposed.<sup>478</sup>

But “[a] parent has, in no case, a right to destroy his child’s happiness,” Paley went on, and those that do will suffer punishment, if not lose custody of their child.<sup>479</sup> Moreover, while parents have a right to encourage and train their children to a given vocation and to give their consent to their children’s marriages, “[p]arents have no right to urge their children upon marriages to which they are averse.”<sup>480</sup> Children, in turn, have a natural right to receive the support, education, and care of their parents.<sup>481</sup> They also have a natural duty to love, honor, and obey their parents even when they become adults, and to care for their parents when they become old, frail, and dependent.<sup>482</sup>

Paley worked systematically through the various traditional sex crimes that deviated from these private and public goods of marriage, and the natural rights and duties of the household—now marshaling natural, rational, and utilitarian arguments against them.<sup>483</sup> His arguments against incest, polygamy, and polygyny differed little from those of the other natural law theorists whom we have sampled. More original were his combinations of natural law and utilitarian arguments against fornication, prostitution, adultery, and easy divorce.

Paley opposed fornication—sex or cohabitation without marriage—mostly because it “discourages marriage” and diminishes the private and public goods it offers “by abating the chief temptation to it. The male part of the species will not undertake the encumbrance, expense, and restraint of married life, if they can gratify their passions at a cheaper price; and they will undertake anything rather than not gratify them.”<sup>484</sup> Paley recognized that he was appealing to general utility, but he thought an absolute ban on fornication was the only way to avoid the slippery slope to utter sexual libertinism.<sup>485</sup> “The libertine may not be conscious that these irregularities hinder his own marriage, . . . much less does he perceive how *his* indulgences can hinder other men from marrying.”<sup>486</sup> “[B]ut,” Paley explained, “what will he say would be the consequence, if the

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<sup>478</sup> *Id.*

<sup>479</sup> *Id.* at 213.

<sup>480</sup> *Id.* at 215.

<sup>481</sup> *Id.* at 199.

<sup>482</sup> *Id.* at 212–16.

<sup>483</sup> *Id.* at 168–86.

<sup>484</sup> *Id.* at 169.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*



same licentiousness were universal? [O]r what should hinder its becoming universal, if it be innocent or allowable in him?"<sup>487</sup>

Fornication furthermore leads to prostitution, Paley went on, with its accompanying degradation of women, erosion of morals, transmission of disease, production of unwanted and uncared for children, and further irregularities and pathos.<sup>488</sup> Fornication also leads naturally to a tradition of concubinage—the “kept mistress[,]” who can be dismissed at the man’s pleasure, or retained “in a state of humiliation and dependence inconsistent with the rights which marriage would confer upon her” and her children.<sup>489</sup> No small wonder that the Bible condemned fornication, prostitution, concubinage, and other such “cohabitation without marriage” in no uncertain terms, said Paley, with ample demonstration.<sup>490</sup> But, again, in these injunctions the Bible is simply reflecting the natural order and moral sense of mankind:

Laying aside the injunctions of Scripture, the plain account of the question seems to be this: It is immoral, because it is pernicious, that men and women should cohabit, without undertaking certain irrevocable obligations, and mutually conferring certain civil rights; if, therefore, the law has annexed these rights and obligations to certain forms, so that they cannot be secured or undertaken by any other means, which is the case here (for, whatever the parties may promise to each other, nothing but the marriage-ceremony can make their promise irrevocable), it becomes in the same degree immoral, that men and women should cohabit without the interposition of these forms.<sup>491</sup>

Adultery is even worse than fornication, said Paley, because it not only insults the goods of marriage in the abstract,<sup>492</sup> it injures an actual marriage, leaving the innocent spouse as well as their children as victims.<sup>493</sup> For the betrayed spouse, adultery is “a wound in his [or her] sensibility and affections, the most painful and incurable that human nature knows.”<sup>494</sup> For the children it brings shame and unhappiness as the vice is inevitably detected and discussed.<sup>495</sup> For the adulterer or adulteress, it is a form of “perjury” that

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487 *Id.*

488 *Id.*

489 *Id.* at 171–72 (emphasis omitted).

490 *Id.*

491 *Id.* at 173.

492 *Id.* at 176–80.

493 *Id.* at 176.

494 *Id.*

495 *Id.*

violates their marital vow and covenant.<sup>496</sup> For all parties in the household, adultery will often provoke retaliation and imitation—another slippery slope to the erosion of marriage and the unleashing of sexual libertinism and seduction.<sup>497</sup> Both nature and Scripture thus rain down anathemas against it.<sup>498</sup>

Paley opposed frivolous or voluntary divorce as well, using arguments from the “law of nature” and “general utility.”<sup>499</sup> Like many other Protestants, he thought that divorce and remarriage of the innocent spouse was both natural and necessary in cases of adultery, malicious desertion, habitual intemperance, cruelty, and serious crime—although he recognized that the “Scriptures seem to have drawn the obligation tighter than the law of nature left it,” and that separation from bed and board might be considered an option for some Christians who wish to live strictly in accordance with the Bible.<sup>500</sup> But Paley was against voluntary divorces or separations for “inferior causes” or by “mutual consent,” grounding his opposition in arguments from nature and utility.<sup>501</sup> Such “inferior,” or lighter, divorces were obviously against natural law if the couple had dependent children, Paley thought.<sup>502</sup>

[I]t is manifestly inconsistent with the [natural] duty which the parents owe to their children; which duty can never be so well fulfilled as by their cohabitation and united care. It is also incompatible with the right which the mother possesses, as well as the father, to the gratitude of her children and the comfort of their society; of both which she is almost necessarily deprived, by her dismiss[al] from her husband’s family.<sup>503</sup>

Unilateral divorces for lighter causes, or for no cause at all, are not so obviously against natural law for childless couples, Paley argued, but they are still “[in]expedient” enough to prohibit.<sup>504</sup> The worry is, again, the mixed signaling of such a regime and the gradual slide down the slippery slope toward “libertinism.”<sup>505</sup> If such easy divorces are available, especially on a unilateral basis, each spouse will be tempted to begin pursuing his or her own

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<sup>496</sup> *Id.* at 177.

<sup>497</sup> *Id.* at 177–78.

<sup>498</sup> *Id.* at 178–80.

<sup>499</sup> *Id.* at 186–87.

<sup>500</sup> *Id.* at 190.

<sup>501</sup> *Id.* at 189–90.

<sup>502</sup> *Id.* at 190.

<sup>503</sup> *Id.* at 186.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 189–91.

separate interests rather than a common marital interest once the heat of their new love has begun to cool.<sup>506</sup> Each will begin hoarding their own money, developing their own friendships, and living more and more independently from the other.<sup>507</sup> “This would beget peculation on one side, and mistrust on the other; evils which at present very little disturb the confidence of married life” but eventually will destroy it from within.<sup>508</sup> The availability of easy divorce will discourage spouses to reconcile their conflicts or “take pains to give up what offends, and [practice] what may gratify the other.”<sup>509</sup> They will have less incentive to work hard to “make the best of their bargain” or “promot[e] the pleasure of the other.”<sup>510</sup>

Limiting divorce to cases of serious fault will stop this inevitable downward spiral in a marriage, Paley believed.<sup>511</sup> Forcing couples to stay together for better or worse, “though at first extorted by necessity, become in time easy and mutual; and, though less endearing than assiduities which take their rise from affection, generally procure to the married pair a repose and satisfaction sufficient for their happiness.”<sup>512</sup> The availability of easy divorce, by contrast, will heighten the natural temptation of each spouse, especially the husband, to succumb to “new objects of desire.”<sup>513</sup> However much in love they were with their wives on their wedding day, and however hard they try, men are naturally inclined to wander after “the invitations of novelty” unless they are permanently constrained to remain faithful to their wives even as their wives lose their youthful vigor and figure.<sup>514</sup> Thus

constituted as mankind are, and injured as the repudiated wife generally must be, it is necessary to add a stability to the condition of married women, more secure than the continuance of their husbands’ affection; and to supply to both sides, by a sense of duty and of obligation, what satiety has impaired of passion and of personal attachment. Upon the whole, the power of divorce is evidently and greatly to the disadvantage of the woman: and the only question appears to be, whether the real and permanent happiness of one half

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<sup>506</sup> *Id.* at 187–89.

<sup>507</sup> *Id.* at 187–88.

<sup>508</sup> *Id.*

<sup>509</sup> *Id.* at 188.

<sup>510</sup> *Id.*

<sup>511</sup> *Id.* at 190–91.

<sup>512</sup> *Id.* at 188.

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

of the species should be surrendered to the caprice and voluptuousness of the other?<sup>515</sup>

Paley's natural law and theological utilitarian arguments in favor of traditional understandings of sex, marriage, and family life would find enduring provenance among many utilitarians into the nineteenth century. The most famous of these utilitarians, Jeremy Bentham (1748–1832), endorsed most of these same propositions that Paley had set forth, even though Bentham famously eschewed the natural law and natural rights language that had so inspired Paley's theory of marriage.<sup>516</sup> Bentham thought most traditional sex, marriage, and family norms could be rationalized on utilitarian principles alone.<sup>517</sup>

## VI. COMMON LAW FORMULATIONS OF THE NATURE OF MARRIAGE

Grotius, Pufendorf, Locke, Home, Hutcheson, Hume, and Paley led scores of other writers from the seventeenth to the nineteenth centuries who defended traditional Western norms of sex, marriage, and family using this surfeit of arguments from nature, reason, custom, fairness, prudence, utility, pragmatism, and common sense. Some of these natural law theorists were inspired, no doubt, by their personal Christian faith, others by a conservative desire to maintain the status quo. But most of these writers pressed their principal arguments on non-biblical grounds. And they were sometimes sharply critical of the Bible—denouncing St. Paul's preferences for celibacy, the Mosaic provisions on unilateral male divorce, and the many tales of polygamy, concubinage, and prostitution among the ancient biblical patriarchs and kings. Moreover, most of these writers jettisoned many other features of the Western tradition that, in their judgment, defied reason, fairness, and utility—including, notably, the establishment of Christianity by law and the political privileging of the church over other associations. Their natural law theory of the family

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<sup>515</sup> *Id.* at 189.

<sup>516</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), reprinted in 1 THE WORKS OF JEREMY BENTHAM 1, 119–21, (John Bowring ed., London, Simpkin, Marshall & Co. 1843); JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE (1802), reprinted in *id.* at 297, 348–57; JEREMY BENTHAM, ANARCHICAL FALLACIES (c. 1796), reprinted in 2 *id.* at 489, 499, 531–32; JEREMY BENTHAM, A MANUAL OF POLITICAL ECONOMY (c. 1793–1795), reprinted in 3 *id.* at 31, 73; JEREMY BENTHAM, A GENERAL VIEW OF A COMPLETE CODE OF LAWS (n.d.), reprinted in *id.* at 155, 202–03; JEREMY BENTHAM, AN INTRODUCTORY VIEW OF THE RATIONALE OF EVIDENCE; FOR THE USE OF NON-LAWYERS AS WELL AS LAWYERS (1812), reprinted in 6 *id.* at 1, 63, 508, 522; 7 *id.* at 579–81.

<sup>517</sup> See Mary Sokol, *Jeremy Bentham on Love and Marriage: A Utilitarian Proposal for Short-Term Marriage*, 30 J. LEGAL HIST. 1 (2009).

was not just a rationalist *apologia* for traditional Christian family values or a naturalist smokescreen for personal religious beliefs. They defended traditional family norms not out of confessional faith but out of rational proof, not just because they uncritically believed in them but because they worked.

It was precisely this rational, utilitarian, and even pragmatic defense of the natural configuration of marriage and family life that made it so appealing to modern English and American jurists as they sought to create a common law of marriage that no longer depended on ecclesiastical law, church courts, or theological arguments. Particularly in America, the disestablishment of religion mandated by the federal and state constitutions made direct appeals to the Bible and to Christian theology an insufficient ground by itself for cogent legal arguments concerning marriage.<sup>518</sup> Even in England, which retained its Anglican establishment, many common lawyers were equally eager to cast their argument in the natural and utilitarian terms of the Enlightenment, rather than the biblical and theological terms of the tradition. It was one thing to say that “Christianity is part of the common law,” as Anglo-American lawyers had long said.<sup>519</sup> It was quite another thing to say that the common law is part of Christianity. That would simply not do. The Enlightenment philosophical defense of sex, marriage, and family norms was thus attractive to the common lawyers.

For example, William Blackstone (1723–1780), the leading English common lawyer of the eighteenth century, adverted regularly to these natural

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<sup>518</sup> See sources in JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 57–63, 71–108 (3d ed. 2011).

<sup>519</sup> See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 552–54 (Boston, Little, Brown, & Co. 3d ed. 1874). Cooley wrote:

It is frequently said that Christianity is a part of the law of the land. In a certain sense and for certain purposes this is true. The best features of the common law, and especially those which regard the family and social relations; which compel the parent to support the child, the husband to support the wife; which make the marriage-tie permanent and forbid polygamy,—if not derived from, have at least been improved and strengthened by the prevailing religion and the teachings of its sacred Book. But the law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of these precepts, though we may admit their continual and universal obligation, we must nevertheless recognize as being incapable of enforcement by human laws. . . . [C]hristianity is not a part of the law of the land in any sense which entitles the courts to take notice of and base their judgments upon it, except so far as they can find that its precepts and principles have been incorporated in and made a component part of the positive law of the State.

*Id.* at 552; see also Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 27 (1998).

law writings in his influential *Commentaries on the Law of England*.<sup>520</sup> Citing Grotius, Pufendorf, Montesquieu, and others, Blackstone argued that exclusive and enduring monogamous marriages were the best way to ensure paternal certainty and joint parental investment in children who are born vulnerable and utterly dependent on their parents' mutual care:

Montesquieu has a very just observation upon this head: that the 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 fulfil 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 of her sex, and the rigour of laws, that stifle her inclinations to perform this duty; and, besides, she generally wants ability.<sup>521</sup>

“[T]he duty of parents to provide for the *maintenance* of their children is a principle of natural law,” Blackstone continued.<sup>522</sup> It is “an obligation, says Puffendorf [sic], laid on them not only by nature herself, but by their own proper act, in bringing them into the world.”<sup>523</sup> “The main end and design of marriage” he concluded, 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.”<sup>524</sup>

Much like his fellow Englishmen, William Paley and John Locke, Blackstone set out in detail the reciprocal rights and duties that the natural law imposes upon parents and children.<sup>525</sup> God and nature have “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.<sup>526</sup> The common law confirms and channels this natural affection by requiring parents to maintain, protect, and educate their children, and by protecting their rights to discharge these parental duties against undue interference by others.<sup>527</sup> These “natural dut[ies]” of parents are the correlatives of the natural rights of their children

<sup>520</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*432–59.

<sup>521</sup> *Id.* at \*447. This quote is largely a paraphrase of Montesquieu’s writings discussed previously. See *supra* notes 274–76 and accompanying text.

<sup>522</sup> 1 BLACKSTONE, *supra* note 520, at \*447.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at \*455.

<sup>525</sup> See *supra* Part IV.A, V.

<sup>526</sup> 1 BLACKSTONE, *supra* note 520, at \*447.

<sup>527</sup> *Id.* at \*446–50.

Blackstone further argued, quoting Grotius.<sup>528</sup> Once they become adults, children acquire reciprocal natural duties toward their parents:

The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws.<sup>529</sup>

While Blackstone's views had an enduring influence on the English common law of marriage, the formulations of United States Supreme Court Justice Joseph Story (1779–1845) were foundational for American law.<sup>530</sup> Like Blackstone, Story was a student of European natural law theories of marriage, and he drew heavily on Scottish, English, and continental European Enlightenment writers in formulating his views.<sup>531</sup> Story was also a deep student of comparative legal history and conflict of laws, and he studied his writings with all manner of ancient, medieval, and early modern sources on the origin, nature, and purpose of marriage.

Marriage is treated by all civilized nations as a peculiar and favored contract. It is in its origin a contract of natural law. . . . It is the parent, and not the child of society; *principium urbis et quasi seminarium reipublicae* [the source of the city, a sort of seminary of the republic]. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; for it is a great mistake to suppose, that because it is the one, therefore it may not likewise be the other.<sup>532</sup>

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<sup>528</sup> See *id.* at \*447 (“By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they bestowed shall be supported and presented, And thus the children will have the perfect right of receiving maintenance from their parents.”); see also *id.* at \*452 (“The power of the parents over their children is derived from . . . their duty . . .”).

<sup>529</sup> *Id.* at \*453.

<sup>530</sup> See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 100–18 (Boston, Hilliard Gray & Co. 1834).

<sup>531</sup> *Id.* at 100–92.

<sup>532</sup> *Id.* at 100.

Marriage is thus a civil contract dependent in its essence on the mutual consent of a man and a woman with the freedom and capacity to marry each other. But marriage is more than “a mere contract,” Story insisted, for it also has natural, religious, and social dimensions, all of which the positive law of the state must take into account.<sup>533</sup> The state’s positive law of marriage must reflect the natural law teaching that marriage is a monogamous union presumptively for life; that marriage channels the strong human sex drive toward marital sex which serves to deepen the mutual love between husband and wife; and that marriage provides a stable and lifelong system of support, protection, and edification for husbands and wives, and parents and children.<sup>534</sup> The positive law of the state must also reflect the teachings of nature—sometimes alone and sometimes with “religion superadded”—that civilized societies outlaw the practices of polygamy, incest, fornication, adultery, and light divorce that all violate the other spouse’s natural rights, as well as the acts of desertion, abuse, neglect, and disinheritance that violate their children’s natural rights.<sup>535</sup> “A heathen nation might justify polygamy, or incest, contracts of moral turpitude, or exercises of despotic cruelty over persons, which would be repugnant to the first principles of Christian duty.”<sup>536</sup> But not so here, Story insisted. Normally, America will honor a contract made in a foreign country on the traditional conflict of laws principle that “if [it is] valid there, it is valid every where.”<sup>537</sup> But “[t]he most prominent, if not the only known exceptions to this rule, are those respecting polygamy and incest,” since they are “repugnant to” the public policy of a civilized nation.<sup>538</sup>

It is just because marriage has all of these natural goods and qualities embedded within it that it is more than “mere contract,” Story went on.<sup>539</sup> While all fit adults have the natural right and liberty to enter into a valid marriage contract, the form, function, and limits of this marriage contract are not subject to private bargain but preset by nature and society.<sup>540</sup> In almost all civilizations and legal systems, “marriage is a contract *sui generis*, and differing . . . from all other contracts”—indeed, a unique form of covenant.<sup>541</sup>

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<sup>533</sup> *Id.* at 168 (“Marriage is not treated as a mere contract between parties . . .”).

<sup>534</sup> *Id.* at 108–99.

<sup>535</sup> *Id.* at 100–12.

<sup>536</sup> *Id.* at 26.

<sup>537</sup> *Id.* at 104.

<sup>538</sup> *Id.* at 104–05. Story wrote further, “Christianity is understood to prohibit polygamy and incest; and therefore no Christian country would recognise polygamy, or incestuous marriages.” *Id.* at 104.

<sup>539</sup> *Id.* at 168.

<sup>540</sup> *Id.* at 101–02.

<sup>541</sup> *Id.* at 101.



Story quoted at length from a Scottish case that distilled the views of Home, Hutcheson, Hume, and others:

The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium* [part of the common law of nations], and the foundation of it, like that of all other contracts, rests on the consent of parties. But it differs from other contracts in this, that the rights, obligations, or duties, arising from it, are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control, by any declaration of their will. It confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges, thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract.

No wonder that the rights, duties, and obligations, arising from so important a contract, should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country. . . . [M]any of the rights, duties, and obligations, arising from it, are so important to the best interests of morality and good government, that the parties have no control over them; but they are regulated and enforced by the public law . . . .<sup>542</sup>

This was a common argument among Anglo-American common lawyers in the nineteenth and early twentieth centuries. Not only did they draw on the same Scottish, English, and continental European writers to defend the natural law configuration of marriage and the natural law prohibition on various sex crimes. They also, like Story, treated marriage as a multidimensional institution that discharged multiple goods for husbands and wives, parents and children, and society and the state alike.

Chancellor James Kent (1763–1847) of New York, for example, one of the great early systematizers of American law alongside Story, lifted up the civil, natural, and religious dimensions of marriage in his 1826 *Commentaries on American Law*:

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<sup>542</sup> *Id.* at 101–03 (internal quotation marks omitted).

The primary and most important of the domestic relations, is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has [had] a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage, a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.<sup>543</sup>

Citing Pufendorf, Paley, and various Scottish writers, Kent then worked systematically and at some length through their by now familiar arguments for exclusive and enduring monogamous marriage and family life, and against incest, polygamy, extramarital sex, and easy divorce.<sup>544</sup>

A couple of generations later, Leonard Shelford (1795–1864), an English common law authority often used in America, combined the early modern natural theories of marriage of his day with those of the classical Roman lawyers.<sup>545</sup> Shelford started with the Stoic formulation of Modestinus that marriage is “the union of a man and a woman, a partnership for life involving divine as well as human law.”<sup>546</sup> The Romans were largely content to make such categorical statements about marriage, Shelford pointed out, without theoretically elaborating them.<sup>547</sup> But the Western tradition has, since Roman times, come to understand that monogamous, lifelong marriages are naturally designed to foster the good of the couple and their children, the church and the state, and the society and its morals at once.<sup>548</sup> After quoting several English and Scottish authorities, Shelford wrote:

From various learned authors it may be inferred that marriage is, according to the primitive law of God and Nature, for the mutual help of husband and wife—the propagation of the human race—the educating and instructing of their children in the fear and love of God, and training them to be useful members of society. It is a solemn contract, whereby a man and a woman, for their mutual benefit, and the procreation of children, engage to live in a kind and affectionate manner . . . Besides the procreation and education of

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<sup>543</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 75 (New York, O. Halsted 2d ed. 1832).

<sup>544</sup> *Id.* at 75–188.

<sup>545</sup> See LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW OF MARRIAGE AND DIVORCE AND REGISTRATION AS ALTERED BY THE RECENT STATUTES 1–5 (London, S. Sweet 1841).

<sup>546</sup> See *id.* at 1 (quoting same in Latin).

<sup>547</sup> *Id.* at 1–5.

<sup>548</sup> *Id.* at 2–3.

children, marriage has for its object the mutual society, help, and comfort that the one ought to have of the other, both in prosperity and adversity. Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society.<sup>549</sup>

All this is “confirmed and enforced by the Holy Scriptures,” Shelford added, citing the famous passages in *Genesis* 2, *Matthew* 19, and *Ephesians* 5.<sup>550</sup> But the state is not heavily involved in the regulation of marriage because it wants to establish biblical truths, Shelford continued, but rather to preserve the public and private goods of marriage.<sup>551</sup> “[N]otwithstanding the origin and divine institution of marriage, human legislatures have very properly assumed the power of regulating the exercise of the right of marriage, on account of its leading to relations, duties, and consequences, materially affecting the welfare and peace of society.” Because of this, “[i]t has been the policy of legislatures, proceeding on the ground that marriage is the origin of all relations, and consequently the first element of all social duties, to preserve the sacred nature of this contract.”<sup>552</sup>

A couple of generations later, distinguished American jurist W.C. Rodgers opened his oft-reprinted treatise on the law of domestic relations with a veritable homily on marriage that made use of arguments based both on nature and what he called the “Divine plan.”<sup>553</sup> Notice the ease with which he sets out the basic argument for the natural configuration of marriage and family life:

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<sup>549</sup> *Id.* For an elaboration of this argument, see FREDERIC R. COUDERT, MARRIAGE AND DIVORCE LAWS IN EUROPE: A STUDY IN COMPARATIVE LEGISLATION 1–15 (New York, Livingston Middleditch Co. 1893), who, also starting with Modestinus’s definition of marriage, shows the continuity of marital norms across classical Roman law, medieval civil law and canon law, and early modern civil law and common law. See also CHARLES FRANKLIN THWING & CARRIE F. BUTLER THWING, THE FAMILY: AN HISTORICAL AND SOCIAL STUDY 3–6 (Lee & Shepard Co. rev. ed. 1913) (1886).

<sup>550</sup> SHELFORD, *supra* note 545, at 4.

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*; see also FRANK H. KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE 73–75 (2d ed. 1923). “Marriage is universal; it is founded on the law of nature.” *Id.* at 73. He noted that some “claim that marriage is of divine origin, others that it is the natural outgrowth of society. While the law does not expressly recognize its religious character it does recognize it as the most important of domestic relations and in most countries it has had the sanction of religion superadded.” *Id.* at 75. “[But marriage is] at law treated as a contract creating a status, and not in any controlling sense as a sacrament.” *Id.* at 73–74.

<sup>553</sup> W.C. RODGERS, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 2 (Chicago, T.H. Flood & Co. 1899).

In a sense, it is a consummation of the Divine command to “multiply and replenish the earth.” It is the state of existence ordained by the Creator, who has fashioned man and woman expressly for the society and enjoyment incident to mutual companionship. This Divine plan is supported and prompted by the natural instinct, as it were, on the part of both for the society of each other. It is the highest state of existence in the most polished condition of man. All living creatures are made male and female; but it is for man only to live in a state of matrimony, and for him alone to guard and perpetuate marriage as practiced and sanctioned by all civilized people from the earliest times. The lower animals know nothing of the state, and it only exists imperfectly in savage life. All writers . . . proclaim it the only stable substructure of our social, civil and religious institutions. Religion, government, morals, progress, enlightened learning and domestic happiness must all fall into most certain and inevitable decay when the married state ceases to be recognized or respected. Accordingly, we have in this state of man and woman the most essential foundation of religion, social purity and domestic happiness.<sup>554</sup>

This thick multidimensional understanding of marriage informed many judicial opinions of the nineteenth century as well. Marriage law treatises at the turn of the twentieth century devoted many pages to citations to and quotations from state and lower federal cases that made the same point that marriage, while rooted in contract, was a multidimensional institution that served public and private goods at once. Such views occasionally reached the United States Supreme Court, too, which spoke repeatedly of marriage as “more than a [mere] contract”<sup>555</sup> and “a sacred obligation.”<sup>556</sup> In *Murphy v. Ramsey*, for example, one of a series of Supreme Court cases upholding anti-polygamy laws against Mormon religious freedom arguments, Justice Matthews declared for the Court:

For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the

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<sup>554</sup> *Id.*

<sup>555</sup> *Maynard v. Hill*, 125 U.S. 190, 213 (1888).

<sup>556</sup> *Davis v. Beason*, 133 U.S. 333, 343 (1890); *Reynolds v. United States*, 98 U.S. 145, 165 (1878); *see also Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (referring to marriage as a “holy estate”).

source of all beneficent progress in social and political improvement.<sup>557</sup>

The Court argued similarly in *Maynard v. Hill*, a case upholding a new state law on divorce and holding that marriage is not a “contract” for purposes of interpreting the prohibition in Article I, Section 10 of the United States Constitution: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”<sup>558</sup> After rehearsing at length various authorities of the day, Justice Field declared for the Court:

[W]hilst marriage is often termed . . . a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>559</sup>

Following Protestant conventions of the day, Anglo-American jurists and judges in the nineteenth and early twentieth centuries frequently used the term “covenant” to distill this common notion that marriage is a contract, but something more than “a mere contract.”<sup>560</sup> Cases and treatises of the day regularly spoke of “the marriage covenant,” “the covenant of marriage,” the covenantal “duties” of marriage, “the most solemn and binding character” of a marriage covenant, the “sanction,” “natural relationship,” “natural union,” and “indissoluble bond of the marriage” covenant.<sup>561</sup> Such terminology

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<sup>557</sup> 114 U.S. at 45.

<sup>558</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>559</sup> 125 U.S. at 210–11.

<sup>560</sup> See, e.g., THEODORE D. WOOLSEY, ESSAY ON DIVORCE AND DIVORCE LEGISLATION 96, 196–97, 217, 235, 256 (New York, Charles Scribner & Co. 1869).

<sup>561</sup> See *Morehouse v. Morehouse*, 39 A. 516, 519 (Conn. 1898); *Woodward v. Shaw*, 18 Me. 304, 308 (1841); *Little v. Gibson*, 39 N.H. 505 (1859); *Hickle v. Hickle*, 3 Ohio Cir. Dec. 552 (1892); H. HENSLEY HENSON, MARRIAGE AND DIVORCE 12, 51, 59 (1910); JOHN WILLIAMS MORRIS, OBSERVATIONS ON THE MARRIAGE LAWS 150, 159–63, 194, 277, 320, 338 (London, J. Hatchard 1815); EDWIN H. WOODRUFF, A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS 240 (1905).

underscored that the marital agreement had special qualities that went beyond the mutual consent and mutual promises of the couple.

In the nineteenth century, Anglo-American common lawyers also came to use the term “*status*” as something of a synonym for the term “covenant.”<sup>562</sup> “Status” was a term that English legal historian Sir Henry Sumner Maine (1822–1888) had made famous in his provocative theory that the law of Victorian England altogether was moving “*from Status to Contract*.”<sup>563</sup> Many American jurists accepted the concept of marriage as a “status,” without buying Maine’s broader argument that marriage law was moving from “status to contract.”<sup>564</sup> Perhaps that movement could be seen in other areas of law where private contract was on the rise, American jurists argued, but the opposite was true in the law of marriage.

Joel Bishop (1814–1901), a leading American family law jurist, put it thus:

[Marriage is] a civil status, existing in one man and one woman, legally united for life, for those civil and social purposes which are founded in the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal laws of every laws of every civilized country, and into the general law of nations. . . . [M]arriage may be said to proceed from a civil contract between one man and one woman, of the needful physical and civil capacity. While the contract remains executory, that is, an agreement to marry, it differs in no essential particulars from other civil contracts . . . . But when it becomes executed in what the law recognizes as a valid marriage, its nature as a contract is merged in the higher nature of the status.<sup>565</sup>

The state law of matrimony, Bishop continued, fixes the terms of the marriage contract in accordance with the dictates of nature, morality, and society.<sup>566</sup> Parties are free to accept or reject these basic terms, but they cannot rescind, condition, or modify them if they wish to enter a valid marriage.<sup>567</sup> And, once they marry, their status of being married is presumptively permanent and

<sup>562</sup> HENRY SUMNER MAINE, *ANCIENT LAW* 164–65 (Henry Holt & Co. 4th ed. 1906) (1861).

<sup>563</sup> *Id.* at 165.

<sup>564</sup> For studies of Maine’s variant influence on Anglo-American legal and political thought, see R.C.J. COCKS, *SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE* (1988); PAUL VINOGRADOFF, *THE TEACHING OF SIR HENRY MAINE* (1904); and Mark Francis, *H.S. Maine: Victorian Evolution and Political Theory*, 19 *HIST. EUR. IDEAS* 753 (1994).

<sup>565</sup> JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS* 25 (Boston, Little, Brown, & Co. 2d ed. 1856).

<sup>566</sup> JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS* 27–28 (Boston, Little, Brown, & Co. 1852).

<sup>567</sup> *Id.*

exclusive and carries with it built-in obligations of support and care for spouse, child, and other loved ones that continue even after death.<sup>568</sup> Marital parties cannot dissolve this union on their own *ipse dixit*, nor simply walk away from their obligations with impunity.<sup>569</sup> The voluntarily assumed legal status of being a husband, wife, father, or mother is something that stays with them, even if they separate or divorce.<sup>570</sup> The law still expects them to support and cooperate with each other in the care of their children and sometimes to support each other through payment of alimony.<sup>571</sup> And, even after death, the marital status of the decedent creates testamentary presumptions in favor of the surviving spouse, children, and natural kin.<sup>572</sup>

American jurist, James Schouler (1839–1920), put it succinctly in his authoritative 1921 treatise on domestic relations:

This [marital] contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound they are bound forever. Mutual consent, as in all contracts, brings them together; but mutual consent cannot part them.<sup>573</sup>

By the early twentieth century, this idea that marriage was a special civil status, defined by law, but entered into by voluntary contract, became the preferred common law formula.<sup>574</sup> Jurists and judges of the day used the term “marriage as status” as a short-hand formula to signify several features of marriage at once: (1) that marriage was a multidimensional institution, at once a contractual, natural, social, moral, economic, and religious in origin and orientation; (2) that marriage was both a private institution rooted in the consent of the parties, and a public institution directed to the goods of the

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<sup>568</sup> *Id.*

<sup>569</sup> *Id.* at 472.

<sup>570</sup> *Id.* at 32.

<sup>571</sup> *Id.* at 526.

<sup>572</sup> See JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS 272 (Boston, Little, Brown, & Co. 6th rev. ed. 1881).

<sup>573</sup> 2 JAMES SCHOULER & ARTHUR W. BLAKEMORE, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS § 1073, at 1346 (6th ed. 1921).

<sup>574</sup> See, e.g., EPAPHRODITUS PECK, THE LAW OF PERSONS OR DOMESTIC RELATIONS 3–4 (1913); RODGERS, *supra* note 553, at 2–5; WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 4–7 (St. Paul, West Publ'g Co. 1896).

couple, their children, and the broader communities of which they were a part; (3) that marriage was predetermined in its form, permanent in its obligations, and preclusive of any other sexual or marital relation; and (4) that marriage defined a person's status and standing in society, and vested them with the special rights and duties that became that status.<sup>575</sup>

"The doctrine that marriage is a *status* is modern," wrote the distinguished American jurist William Nelson in 1895.<sup>576</sup> By calling marriage a "status," the American common law had settled on a halfway step between the traditional notion that "marriage was a sacrament to be solemnized by a religious ceremony of the church regardless of the faith of the parties" and the modern notion that marriage was merely a private "*civil contract*" in which the public has no interest.<sup>577</sup> Marriage was a contract, but it was also more than a contract, Nelson insisted.<sup>578</sup> Marriage was not a sacrament, but it did embrace some of the same qualities of faithfulness, exclusivity, and permanence that typified sacramental and covenantal marriages since the time of Augustine.<sup>579</sup>

Religious communities could add requirements to the "civil status" of marriage for their own voluntary faithful to abide, Nelson and others continued, but not subtract from them. They could, for example, prohibit interreligious marriages or divorce and remarriage, as Catholics do. They could insist on various forms of premarital preparation and liturgical celebration, as some Protestants do. They could even insist on detailed prenuptial contracts about property and inheritance, as some Jews do. But all these enhancements have to be consistent with the core forms and norms of marriage prescribed by state law and rooted in common human nature and natural law. Religious communities have no right, for example, to permit polygamy among their members, as Mormons and Muslims sometimes do. They have no business forcing couples to marry sight unseen, as some Indian Hindus and Native American Indians do. Nor do they have the right to endanger the health and

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<sup>575</sup> See TIFFANY, *supra* note 574, at 4–7. For modern expositions on the continued importance of status in American family law, see MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* (2000), and MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* (1999).

<sup>576</sup> 1 WILLIAM T. NELSON, *A TREATISE ON THE LAW OF DIVORCE AND ANNULMENT OF MARRIAGE* 5 (Chicago, Callaghan & Co. 1895).

<sup>577</sup> *Id.* at 5; *see also id.* at 5–8 (discussing how the term "status" resulted from a conflict of opinion surrounding the sacramental definition of marriage); JOSEPH R. LONG, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* 3–10 (3d ed. 1923).

<sup>578</sup> NELSON, *supra* note 576, at 5–8.

<sup>579</sup> *Id.* at 5.



happiness of their children through hard labor, severe corporal discipline, faith healing, or comparable intrusions on the natural rights of the child. Religious communities can add to natural and positive laws governing the core civil status of marriage and family life. But they may not subtract or detract from them, even in the name of religious freedom.<sup>580</sup>

#### SUMMARY AND CONCLUSIONS

The story of this Article will surprise some readers. Some will be surprised that pre-Enlightenment Christian writers developed elaborate natural law and natural rights theories of sex, marriage, and family life, independently of the Bible, and sometimes in sharp critique of particular biblical teachings and practices. The common assumption is that Christian theories of marriage and family life were spiritual through and through and thus happily dispensable in our post-modern, post-establishment of religion era. Some will be surprised that several of the famous philosophers associated with the Western Enlightenment embraced traditional Christian teachings about sex, marriage, and family, and then worked hard to prove and improve this inheritance with elaborate arguments from nature, reason, custom, fairness, and utility. The common assumption is that the Western Enlightenment had denounced the Western Christian tradition for privileging church over state, Scripture over reason, men over women, chastity over sex, procreation *über alles*. And some readers will be surprised that the Anglo-American common lawyers of the nineteenth and early twentieth centuries drew directly on this rich natural law theory in devising the idea of marriage as a valuable status that deserves to be privileged and in denouncing incest, polygamy, adultery, fornication, and easy divorce as dangerous deviations from natural and social order. The common assumption is that Anglo-American lawyers by this time were legal positivists who had no room for such speculative natural law inquiries; hadn't Oliver Wendell Holmes finally and fully dismissed natural law as a "brooding omnipresence in the sky" with no earthly value or legal validity?<sup>581</sup>

The reality, however, is that from roughly 1600 to 1900, the Western legal tradition—and in particular the Anglo-American common law tradition that has been our focus—embraced and enhanced the natural law configuration of marriage and family life that had been adumbrated by Aristotle, elaborated by

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<sup>580</sup> See CHARLES CAVERNO, TREATISE ON DIVORCE 22–24 (Madison, Midland Publ'g Co. 1889); see also A.P. RICHARD, MARRIAGE AND DIVORCE (Chicago, Rand McNally & Co. 1889).

<sup>581</sup> See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

Thomas Aquinas and Francisco Vitoria, and then appropriated and expanded by Enlightenment liberals and jurists. The heart of the argument is that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and essential joint parental investment in fragile and dependent children. If men and women could have random sex with anyone, men would not only exploit women mercilessly to gratify their sexual drives but they would also ignore their children since they would have no certainty of their paternity. If men did not invest in the care of their children, many of those children would suffer or die, particularly as infants, when their mothers were weakened from childbirth and lack of sleep and least capable of caring for all her children and herself as well. Thus, the natural law inclines the human species to center their sexual and procreative activities within the marital household. It further inclines a mother to bond deeply with her child during pregnancy and nursing, and to nourish and protect the child until it has grown. And it inclines a father to bond with a child that he knows is his own, that looks like him, that is an extension and creation of his being, substance, or genes, and that can carry on his name, work, property, and legacy.

The natural law tradition presupposed that husbands and wives had to work hard to maintain active and healthy sex lives—even when, indeed especially when, procreation was not or was no longer possible. Robust sexual communication within marriage is essential for couples to deepen their marital love and to remain in their own marital beds, rather than testing their neighbor's. And marital sex sometimes is even more important when the marital home is (newly) empty and husbands and wives depend more centrally on each other (not on their children) for emotional confirmation and fulfillment. Not every sexual act within the marital bed needs to be procreative, the tradition taught. Sexual intimacy between married couples is an essential good in its own right, regardless of procreative intent, capacity, or result. The rigid procreative perfectionism and narrow reduction of sexual intimacy to intercourse alone, featured in some modern Christian theories of natural law, do not reflect the many traditional natural law teachings that marital sex is a good, gift, and blessing in its own right.

This natural law tradition emphasized that parents and children have reciprocal natural rights and natural duties vis-à-vis each other. Rather than simply pretending that children can thrive equally well with wet nurses and orphanages, with random bottle-holders and community care-takers, the natural law tradition emphasized the vital organic bonds between mother, father, and child. It stipulated that the man and woman who produce a child

should have the prima facie right and duty to care for that child. And it emphasized that children have the correlative right to be raised, if possible, by the parents who procreate them—or in some cases, those who adopt them. This teaching about the rights and duties of parents and children is not only a feature of classical, Christian, and Enlightenment natural law theories, but it has been reasserted in the Universal Declaration of Human Rights and many of its successor documents, including the United Nations Convention on the Rights of the Child.<sup>582</sup>

The natural law tradition also emphasized that exclusive and enduring monogamous marriages are the best way to ensure that men and women are treated with the equal dignity and respect, and that husbands and wives, and parents and children, provide each other with mutual support and protection throughout their lifetimes. If husbands can just walk away from their wives once they have produced children, if wives can just walk away from their husbands if they become injured or impotent, if children can just abandon their families once they have been emancipated, or if parents can just ignore their emancipated children even when they have great need, too many parties are left vulnerable and dependent on the charity of others. The natural law thus inclines humans to remain bonded to their marriages and families, and to care for their natural kin throughout their lives, even at ample personal sacrifice.

Finally, the natural law tradition discouraged many other types of sexual activities and interactions that jeopardized the stability and support of the marital household. Polygamy was out because it fractures marital trust and troth, harms wives and children, privileges patriarchy and sexual slavery, and foments male lust and adultery. Polyandry was out because it creates paternal uncertainty and catalyzes male rivalry to the ultimate detriment of the children. Incest was out because it overrides the instincts of natural revulsion, it weakens bloodlines, and it deters the creation of new kinship networks. Prostitution and fornication were out because they often exploit women, foster libertinism, deter marriage, and produce dependent bastards. Adultery was out for some of the same reasons, but even more because it shatters marital fidelity and trust, diffuses family resources and parental energy, and risks sexual disease and physical retaliation of the betrayed spouse. Easy divorce was out because it erodes marital fidelity and investment, jeopardizes long-term spousal support and care, and squanders family property on which children eventually depend

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<sup>582</sup> See John Witte, Jr. & Don S. Browning, *Christianity's Mixed Contributions to Children's Rights: Traditional Teachings, Modern Doubts*, 61 EMORY L.J. 991 (2012).

to care for their elderly parents. By the turn of the twentieth century, similar natural law and natural rights arguments were being used to begin to stamp out the discrimination that the common law still retained against spinsters, wives, and illegitimate children.

Even the most robust natural law theorists, however, whether traditional Christians or post-Christian Enlightenment liberals, understood that the natural law of sex, marriage, and family could not do it all. For the natural law is not and cannot be self-executing. The natural law might well incline humans to behave in certain ways in their sex, marriage, and family lives, and many humans in fact generally follow these inclinations without much further prompting. But given our human natures—and the Jekylls and Hydes that perilously vie within each of us—natural inclinations, by themselves, are pretty wobbly, and can produce only a shaky normative framework. The reality is that a good number of folks stray on occasion from what might be considered to be the naturally licit and socially expedient sexual path for the human species. And some folks stray all the time, harming themselves and many others along the way. The natural law thus also needs the positive law of the state for stability—to teach these basic norms of sex, marriage, and family life to the community, to encourage and facilitate citizens to live in accordance with them, to nudge and incentivize sexual and marital behavior that caters to private and public goods, and to redirect and rehabilitate those citizens who wander too far. The nineteenth-century American common law notion of marriage and the household as a good and desirable “status” that the state should support captures this insight that natural law and positive law must work together to create fair and stable sex, marriage, and family lives for citizens.

Natural law not only needs the positive laws of the state to teach and enforce its norms on sex, marriage, and family life. It also needs broader communities and narratives to stabilize, deepen, and improve these norms. It depends on deeper models and exemplars of love and faithfulness, trust and sacrifice, commitment and community to give its teachings content and coherence. It depends on other stable institutions besides the state (churches, synagogues, schools, charities, hospitals, neighborhoods, and others) and other stable professionals besides lawyers (preachers, teachers, doctors, mentors, counselors, therapists, and others). The marital household is a multidimensional institution, and it depends upon multiple value systems and multiple institutions to be fully stable and functional.

Historically, pre-Christian Greeks and Romans, Catholic and Protestant theologians and jurists, and post-Christian liberal philosophers and common lawyers alike supported this integrated framework of sex, marriage, and family life, all drawing in part on common arguments about human nature, natural law, and natural rights. Enlightenment liberals, in particular—for all their post-Christian, and sometimes anti-Christian zeal—supported the traditional marital family as the most natural, expedient, and desirable form and forum of domestic life. Enlightenment liberals warned against the dangers of condoning “sexual libertinism” and allowing society to slide into a sexual state of nature without much law. They warned against the destruction of the marital household, for that would spell the “doom of all mortals.”<sup>583</sup> But what both liberals and traditionalists long tried to integrate, modern society has increasingly come to separate. In the past two generations, the West has seen ever greater separations between marriage and sex; between marriage and childbirth; between marriage and child rearing; between childbirth and parenting; between sex and physical contact (with the advent of the virtual world); and between childbirth, sexual intercourse, and biological filiation (with the introduction of IVF technology, surrogacy, and sperm banks).<sup>584</sup>

I stand firmly in support of modern liberty and deplore much of the patriarchy, paternalism, and plain prudishness of the past. I stand firmly in support of modern equality and applaud the great advances made of late on behalf of the rights of women, children, gays and lesbians, and many others who long faced chronic discrimination, deprivation, and exploitation. But I also stand firmly in support of the traditional marital household as a natural and necessary institution for the cultivation and preservation of the very ordered liberty and social stability that seems to be eroding today. And I believe that the natural law configuration of sex, marriage, and family life still provides enduring wisdom and instruction for a post-Christian and postmodern Western culture that remains dedicated to the liberty and equality of its citizens.

Even if we now reject “natural law” today as old-fashioned, statist, essentialist, artificial, or out of touch with evolutionary or political realities, the basic facts of human nature and human sexuality have not changed. We humans still have perennial sex drives, especially when we are younger and

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<sup>583</sup> See *supra* note 455 and accompanying text.

<sup>584</sup> See WITTE, FROM SACRAMENT, *supra* note 1, 53–287; see also BROWNING, MARRIAGE AND MODERNIZATION, *supra* note 7, at 55–128.

more fertile. We are still social creatures who crave stable intimate relationships over time. We still produce fragile babies who remain deeply dependent on their parents and other adults for a very long time. We still find that most women bond with children much more readily than do men—unless they know they are the fathers.

To be sure, some of the scientific assumptions at work in traditional natural law teachings about the marital household have changed. Genetic testing has made paternity easier to establish. Contraceptives have made extramarital sex safer to pursue. And artificial reproductive technology has made single reproduction a greater possibility. But these scientific advances are by no means universally available, nor are they foolproof when available. And while they can enhance the sexual experiences and activities of humans, these scientific advances do not alter the core logic at work in the natural law configuration of marriage. Confining sex to marriage was important in earlier times to ensure paternal certainty, but the point of having paternal certainty was to ensure that a man could and would invest in the care of his child and its mother, ideally in a stable marital household. Using contraceptives certainly widens the opportunities for safe and secret extramarital sex, but it does not meet the traditional concern that rampant promiscuity often leads to sexual exploitation of women and unhealthy sexual libertinism among men. Having artificial reproductive technology (ART) available certainly enhances the chances of having a child on one's own or with one's spouse, but when a mother has drawn from an anonymous sperm bank or a frozen embryo collection, her child's long-term concerns for its origin and identity remain unmet. There are many valuable uses for paternity tests, contraceptives, and ART in modern society, notably among married couples whose lives can be greatly enhanced by them. But these modern scientific advances do not, in my view, undercut the core logic of the natural configuration of marriage.

Also, to be sure, the modern welfare state now supplies nonmarital children, single mothers, abandoned spouses, and aged parents with vast new resources traditionally supplied principally by their own natural kin and natural family networks. These, too, are valuable advances that promote social justice and greater happiness for all. But the availability of social welfare relief does not cancel the ongoing value of stable marital households and natural family networks. The modern welfare state remains an expensive and risky modern experiment: it's less than a century old, and it's not clear that this is a sustainable long term solution even for the affluent West, let alone for underdeveloped or developing countries. Moreover, even in America today,

while state funding is still amply at hand, those who depend exclusively on social welfare, Medicare, social security, and other entitlements often face bitter financial and emotional hardship, and endless bureaucratic wrangling as they seek to secure basic food, health care, and job stability. Better social welfare systems are in place in Europe today. But these, too, depend on high median wealth in the population, all of which can disappear quickly, as we just saw during the Great Recession and our (grand)parents saw in the Great Depression. The modern social welfare state should be seen as a supplement to, not a substitute for, the intergenerational care and nurture provided by stable families and natural kin structures.

The real challenge today is to find ways of harmonizing the wisdom of the classical, Christian, and liberal traditions with the realities, conditions, and needs of the postmodern family. We cannot wax nostalgic about a prior golden age of marriage and the family, nor can we wax myopic about modern ideals of liberty, privacy, and autonomy. We cannot be blind to the patriarchy, paternalism, and plain prudishness of the past, nor can we be blind to the massive social, psychological, and spiritual costs of the modern sexual revolution. Participants in the conversation on marriage must seek to understand both traditional morals and contemporary mores on their own terms and in their own context—without deprecating or privileging either form or norm. Traditionalists must heed the maxim of Jaroslav Pelikan that “[t]radition is the living faith of the dead; traditionalism is the dead faith of the living.”<sup>585</sup> Wooden antiquarianism, a dogmatic indifference to the changing needs of marriages and families, is not apt. Modernists must heed the instruction of Harold Berman that “we must walk into the future with an eye on the past.”<sup>586</sup> Chronological snobbery, a calculated disregard for the wisdom of the past, also is not apt. I have tried to retrieve some of this past wisdom in this Article. In later articles and books, I hope to reconstruct this wisdom in a way that is useful for the law and culture of the twenty-first century family.

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<sup>585</sup> JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 65 (1984).

<sup>586</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF WESTERN LEGAL TRADITION*, at v, vii (1983).