

Hugo Grotius and the Natural Law of Marriage: A Case Study of Harmonizing Confessional Differences in Early Modern Europe

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In a series of writings spanning more than four decades, Professor R. H. Helmholz has brought to brilliant light and life the deep legal learning of the *ius commune* in medieval and early modern times. His methodology is legendary. He offers probing case studies of early court records,¹ incisive analysis of the development of sundry legal doctrines,² arresting profiles

1. See, e.g., R. H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge, 1974); idem, *Select Cases on Defamation to 1600*, Selden Society 101 (1985).

2. See, e.g., R. H. Helmholz et al., *The Privilege Against Self-Incrimination: Its Origins and Development* (Chicago, 1997); R. H. Helmholz and Reinhard Zimmermann, ed., *Itinera Fiducia: Trust and Treuhand in Historical Perspective* (Berlin, 1998); idem, "Baptism in the Medieval Canon Law," *Rechtsgeschichte* 21 (2013), 118; idem, "Judicial Review and the Law of Nature," *Ohio Northern University Law Review* 39 (2013), 417; "The Law of Slavery and the European *Ius Commune*," in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (Oxford, 2012), 17; idem, "Religion and Succession in the History of English Law," in *Der Einfluss religiöser Vorstellungen auf die Entwicklung des Erbrechts*, ed. R. Zimmermann (Tübingen, 2012), 103; idem, "Human Rights in the Canon Law," in *Christianity and Human Rights: An Introduction*, ed. John Witte, Jr. and Frank Alexander (Cambridge, 2010), 99; idem, "Scandalum in the Medieval Canon Law and in the English Ecclesiastical Courts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 127, Kan. Abt. 96 (2010), 258; idem, "Children's Rights and the Canon Law: Law and Practice in Later Medieval England," *Jurist* 67 (2007),

of leading jurists and judges,³ close attention to the power and patterns of legal education and learning,⁴ all of which are marshaled into authoritative longer studies of the history of canon law.⁵ The main themes and aims of his

39; idem, "Marriage Agreements in Medieval England," in *To Have and To Hold: Marrying and its Documentation in Western Christendom, 400–1600*, ed. Philip L. Reynolds and John Witte, Jr. (Cambridge, 2007), 260; idem, "Der *Usus modernus Pandectarum* und die Ursprünge des eigenhändigen Testaments in England," *Zeitschrift für Europäisches Privatrecht* 4 (1995), 769; idem, "Excommunication in Twelfth Century England," *Journal of Law and Religion* 11 (1994), 235; idem, "The Origin of Holographic Wills in English Law," *Journal of Legal History* 15 (1994), 97; idem, "Contracts and the Canon Law," in *Towards a General Law of Contract*, ed. John Barton (Berlin, 1990), 49; idem, "Damages in Actions for Slander at Common Law," *Law Quarterly Review* 103 (1987), 624; idem, "Usury and the Medieval English Church Courts," *Speculum* 61 (1986), 364; idem, "Early Enforcement of Uses," *Columbia Law Review* 79 (1979), 1503; idem, "Roman Law of Guardianship in England, 1300–1600," *Tulane Law Review* 52 (1978), 223; idem, "Support Orders, Church Courts, and the Rule of *Filius Nullius*: A Reassessment of the Common Law," *Virginia Law Review* 63 (1977), 431; idem, "Abjuration *sub pena nubendi*," *The Jurist* 32 (1972), 80; idem, "Canonical Defamation in Medieval England," *American Journal of Legal History* 15 (1971), 255.

3. See, e.g., R. H. Helmholz, *Three Civilian Notebooks, 1580–1640*, Selden Society 127 (2011); idem, "Sir Daniel Dun (c. 1545–1617)," *Ecclesiastical Law Journal* 16 (2014), 205; idem, "Richard Zouche (1590–1661)," *Ecclesiastical Law Journal* 15 (2013), 204; idem, "Roger, Bishop of Worcester (c. 1134–1179)," *Ecclesiastical Law Journal* 15 (2013), 75; idem, "Natural Law and the Trial of Thomas More," in *Thomas More's Trial by Jury*, ed. H. A. Kelly (Woodbridge, 2011), 53; idem, "Alberico Gentili e il Rinascimento. La formazione giuridica in Inghilterra," in *Alberico Gentili: Atti dei convegni nel quarto centenario della morte* (Milan, 2010), 311; idem, "Thomas More and the Canon Law," in *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. Wolfgang Müller and Mary Sommar, (Washington, D.C., 2006), 375; idem, "Christopher St German and the Law of Custom," *University of Chicago Law Review* 70 (2003), 129; idem, "Richard Hooker and the European *ius commune*," *Ecclesiastical Law Journal* 6 (2001), 4; idem, "Brian Simpson in the United States," in *Human Rights and Legal History: Essays in Honour of Brian Simpson* (Oxford, 2000); "Harold Berman's Accomplishment as a Legal Historian," *Emory Law Journal* 42 (1993), 475.

4. R. H. Helmholz, "University Education and English Ecclesiastical Lawyers 1400–1650," *Ecclesiastical Law Journal* 13 (2011), 132; idem, "The Education of English Proctors, 1600–1640," in *Learning the Law: Teaching and the Transmission of Law in England 1150–1900*, ed. Jonathan Bush and Alain Wijffels (London 1999); idem, "Ethical Standards for Advocates and Proctors in Theory and Practice," in *Proceedings of the Fourth International Congress of Medieval Canon Law*, ed. S. Kuttner (Vatican City, 1976), 283.

5. See, e.g., R. H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford, 2004); idem, *The Spirit of the Classical Canon Law* (Athens, Ga., 1996).

work are equally legendary: Helmholtz has documented and demonstrated better than anyone the remarkable doctrinal and procedural continuities across common law, civil law, and canon law,⁶ the many sturdy bridges between the legal teachings and cultures of England and the Continent,⁷ and the enduring resilience of the late medieval canon law even in early modern Protestant lands on both sides of the Atlantic.⁸ For anyone interested in seeing the interdisciplinary, ecumenical, and transnational power of law

6. See, e.g., R. H. Helmholtz, "Scandalum in the Medieval Canon Law and in the English Ecclesiastical Courts"; idem, "Citations and the Construction of Procedural law in the *Ius Commune*," in *The Creation of the Ius Commune: From Casus to Regula*, ed. J. W. Cairns and Paul du Plessis (Edinburgh 2010), 247; idem, "The *Ratio decidendi* in England—Evidence from the Civilian Tradition," in *Ratio Decidendi: Guiding Principles of Judicial Decisions*, ed. W. Hamilton Bryson and Serge Dauchy (Berlin, 2006), 73; idem, "The *Ius Commune* and Sanctuary for Insolvent Debtors in England," in *Panta Rei: Studi dedicati a Manlio Bellomo*, ed. Orazio Condorelli (Rome, 2004), 2.581; idem, "Canonical 'Juries' in Medieval England," in *Ins Wasser geworfen und Ozeane durchquert: Festschrift für Knut Wolfgang Nörr*, ed. Mario Ascheri et al. (Köln, 2003); idem, "The *litis contestatio*: Its Survival in the Medieval *ius commune* and Beyond," in *Lex et Romanitas: Essays for Alan Watson*, ed. Michael Hoefflich (Berkeley, 2000); idem, "Scandinavian Law and English Law: An Historical Sketch and a Present Opportunity," in *Family, Marriage and Property Devolution in the Middle Ages*, ed. Lars Ivan Hansen (Tromsø, 2000), 17; idem, "Magna Carta and the *ius commune*," *University of Chicago Law Review* 66 (1999), 297; idem, "Spanish and English Ecclesiastical Courts (1300–1500)," *Studia Gratiana* 28 (1998), 415; idem, "The Learned Laws in 'Pollock and Maitland,'" *Proceedings of the British Academy* 89 (1996), 145; idem, "The Transmission of Legal Institutions: English Law, Roman Law, and Handwritten Wills," *Syracuse Journal of International Law & Commerce* 20 (1994), 147; idem, "Use of the Civil Law in Post-Revolutionary American Jurisprudence," *Tulane Law Review* 66 (1992), 1649; idem, "The English Law of Wills and the *ius commune*," in *Marriage, Property and Succession*, ed. Lloyd Bonfield (Berlin, 1992), 309; idem, "Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250–1640," *Cardozo Law Review* 12 (1991), 707; idem, "Continental Law and Common Law: Historical Strangers or Companions?" *Duke Law Journal* (1990), 1207; idem, "Support Orders, Church Courts, and the Rule of *Filius Nullius*: A Reassessment of the Common Law."

7. R. H. Helmholtz and Vito Pierviovanni, ed., *Relations Between the Ius Commune and English Law* (Genoa, 2009); R. H. Helmholtz, *La Magna Carta del 1215: Alle origine del costituzionalismo inglese ed europeo*, trans. Dolores Freda (Rome, 2012); idem, *The Ius Commune in England: Four Studies* (Oxford, 2001); idem, *Canon Law and the Law of England* (London, 1987).

8. R. H. Helmholtz, *Roman Canon Law in Reformation England* (Cambridge, 1990); idem, *Canon Law and English Common Law* (London, 1987); idem, ed., *Canon Law in Protestant Lands* (Berlin, 1992).

in the West, Helmholz's work is indispensable. This is comparative legal history, and law and religion scholarship, at its very best.

One important source of this legal connectivity and continuity across time, space, and legal cultures in the West, Helmholz has shown, was the Bible. From the fourth to the eighteenth century, Christianity was the established religion of the West, and a common commitment to basic biblical teachings usually transcended tribal, feudal, political, economic, and linguistic differences. The Bible was no comprehensive legal textbook of course, but it provided a number of the legal and moral posts, even foundations, on which the Western legal tradition was built.⁹ A second important source of legal connectivity and continuity was the Roman law. This vast legal system—developed over 1200 years and distilled in Justinian's sixth-century *Corpus Iuris Civilis*—was the anchor text for Western jurists after it was rediscovered in the later eleventh century. The Continental civil law tradition was most obviously dependent on the Roman law, but Helmholz has shown the ample uses of Roman law by the canonists and common lawyers as well, forming a growing *ius commune* for the West.¹⁰ A third important source was the teaching of natural law, natural rights, and natural justice. All these terms were variously defined in the Western legal tradition, but the common starting point was the idea of a "law written on the hearts of all men" and known through reason, conscience, intuition, custom, and more. Western jurists and judges alike, Helmholz shows, made ready use of these natural sources in constructing their legal systems and doctrines, in crafting their statutes and consilia, and in resolving hard cases of law and equity that came before them.¹¹

9. Though this theme is notable in his work, see notably R. H. Helmholz, "The Bible in the Service of the Canon Law," *Chicago-Kent Law Review* 70 (1995), 1557.

10. See sources in notes 7 and 8.

11. See R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, Mass., 2015 [forthcoming]); For earlier work, see R. H. Helmholz, "Natural Law and Religion: Evidence from the Case Law," in *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations*, ed. Wim Decock et al. (Göttingen, 2014), 91; idem, "Natural Law and the Trial of Thomas More"; "Natural Law and Human Rights in English Law: From Bracton to Blackstone," *Ave Maria Law Review* 3 (2005), 1; idem, "Natural Human Rights: The Perspective of the *Ius Commune*," *Catholic University Law Review* 52 (2003), 301; idem, "Bonham's Case, the Law of Nature, and Judicial Review," *Journal of Legal Analysis* 1 (2009), 324.

In this article—dedicated to Professor Helmholz in admiration, appreciation, and affection—I would like to illustrate the use of natural law theory to build toward a universal law of marriage and the family in post-Reformation Europe. Marriage and marital jurisdiction were heated topics of controversy in the sixteenth-century Reformation era, and a source of sharp confessional differences between and among Catholics and Protestants in early modern times. One of the important contributions of seventeenth- and eighteenth-century natural law theorists was to show the natural foundations and common norms of sex, marriage and family life that Catholics and Protestants—and even Christians and non-Christians—shared with each other, and with the earlier civilizations of the West. Many seventeenth-century natural law theorists pressed this argument of continuity and connectivity. One of the earliest and most effective was the Dutch jurist and theologian, Hugo Grotius, who will be my main focus.

I choose this topic because it illustrates the power of Helmholz's insights into legal continuity and connectivity in the Western legal tradition. I also choose it because marriage and family life have long been important topics for Helmholz—indeed the subject of his first article and his first book.¹² Marriage, he has shown, was among the classic *res mixta* of the West, alongside education and charity on which he has also written at length.¹³ Marriage is an institution with spiritual and temporal dimensions and with overlapping jurisdictional claims of church and state. It's a topic where the Bible, Roman law, and natural law all have had important insights. And it's a topic where civil law, canon law, and common law alike have developed important overlapping insights.

In what follows, I first show some of the sharp confessional differences over sex, marriage, and family life that emerged during the Reformation era. I then show how Grotius was in the vanguard of early modern jurists who used natural law theory to create a common framework of sex, mar-

12. Helmholz, *Marriage Litigation*; R. H. Helmholz, "Bastardy Litigation in Medieval England," *American Journal of Legal History* 13 (1969), 360.

13. R. H. Helmholz, "The Law of Charity and the English Ecclesiastical Courts," in *Foundations of Medieval Ecclesiastical History: Studies Presented to David Smith*, ed. Philippa Hoskin et al. (Woodbridge 2005), 111.

riage, and family norms that transcended the strained religious, political, and national divisions of his day.

MARRIAGE AND CONFESSIONALIZATION IN THE REFORMATION ERA

Sex, marriage, and family life were one of the hotly contested issues of the sixteenth-century Protestant Reformation and one of the first institutions to be reformed. The leading Protestant theologians of the sixteenth century—Martin Luther (1483–1546) and Philip Melanchthon (1497–1560), John Calvin (1509–1564) and Martin Bucer (1491–1551), Thomas Cranmer (1489–1556) and Heinrich Bullinger (1504–1575)—all prepared lengthy tracts on the subject in their first years of reform. Scores of leading jurists took up legal questions of marriage in their *consilia* and commentaries, often working under the direct inspiration of Protestant theology and theologians. Virtually every city and territory on the Continent that converted to the Protestant cause in the first half of the sixteenth century had new marriage laws on the books within a decade after accepting the Reformation. And, in England, it was Henry VIII’s “great marriage affair” with Catherine that prompted the English break with Rome.

The Protestant reformers’ early preoccupation with marriage was partly driven by their reaction to the prevailing Catholic sacramental theology and canon law of marriage that had dominated the West for the prior half millennium. The medieval Catholic Church’s jurisdiction over marriage was, for the reformers, a particularly flagrant example of the church’s usurpation of the state’s authority. The Catholic sacramental concept of marriage on which the church predicated its jurisdiction was, for the reformers, a self-serving theological fiction. The canonical prohibition on marriage of clergy and monastics ignored the Bible’s teachings on sexual sin and the Christian vocation as the reformers understood them. The church’s intricate regulations of sexual feelings and practices, even within marriage, were seen a gratuitous insult to God’s remedial gift of marital love for Christian believers and an unnecessary intrusion on private life and Christian conscience. The canon law’s long roll of impediments to engagement and marriage together with its prohibitions against complete divorce and remarriage stood in considerable tension with the Protestant under-

standing of the natural and biblical right and duty of each fit adult to marry and remarry.

Many Protestant theological leaders acted on this critique of the Catholic canon law tradition. Most of these early Protestant clergy were ex-priests or ex-monastics who had forsaken their orders and vows, and married shortly thereafter. New Protestant converts followed their examples by marrying, divorcing, and remarrying in open contempt of canon law rules. As Catholic Church courts and their secular counterparts began punishing these canon law offenses with growing severity, Protestant theologians and jurists rose to the defense of their coreligionists—producing a welter of new writings that denounced traditional norms and pronounced a new Protestant gospel of sex, marriage, and family life.

Protestant political leaders rapidly translated this new gospel into new civil laws. Taken together, these new Protestant marriage laws (1) shifted marital jurisdiction from the church to the state; (2) abolished monasteries and convents; (3) commended, if not commanded, the marriage of clergy; (4) rejected the sacramentality of marriage and the religious tests and spiritual impediments traditionally imposed on Christian unions; (5) banned secret or private marriages and required the participation of parents, peers, priests, and political officials in the process of marriage formation; (6) sharply curtailed the number of impediments to engagements and marriages that abridged the right to marry or remarry; and (7) introduced fault-based complete divorce with a subsequent right for divorcees to remarry.¹⁴

These new family norms became a permanent point of confessional conflict between Catholics and Protestants—particularly after the Council of Trent declared its anathemas on these Protestant reforms in the decree *Tametsi* of 1563.¹⁵ But confessional differences over family norms were also dividing Protestants by this point. Lutherans propounded a social model of marriage that gave principal marital jurisdiction to the state and allowed for quite liberal marital formation and dissolution rules. Calvinists propounded a covenantal model of marriage, with strict formation and dis-

14. See detailed primary and secondary sources in my *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed. (Louisville, Ky., 2012).

15. Reprinted in H. J. Schroeder, *Councils and Decrees of the Council of Trent* (St. Louis, 1941), 180 ff.

solution rules, and with church and state sharing jurisdiction. Anglicans, despite the early promise of reform, ultimately returned to much of the medieval canon law of sex, marriage, and family life, including the use of church courts in administering its family laws. In the early modern period, when Anglicans, Lutherans, Calvinists, and Catholics were slaughtering and slandering each other with a vengeance, these differences over marriage and family life and its governance were sharp flashpoints of confessional contestation.¹⁶

In the seventeenth century and thereafter, a number of theologians and jurists sought to bridge these confessional differences by building a common natural law account of the main features of marriage and family life that prevailed in all Christian and sometimes non-Christian communities alike. These natural law theorists used various methods to make their case. Some drew increasingly sophisticated inferences from pair-bonding patterns and reproductive strategies among animals, building on Aristotelian-Thomistic insights. Some uncovered the common forms and norms of marriage that were shared by Jews and Christians, sometimes even by “pagans,” “heathens,” and “exotic” religions from Asia, Africa, and the Americas—all of which they took as evidence of a common natural law at work in the hearts and consciences of all men. Some developed a practical, prudential, and even utilitarian logic of what worked best for husbands and wives, parents and children to exercise and enjoy their natural rights and duties in the household. Orthodox theologians often decried these efforts, especially as some of their philosophical brethren moved toward ever more exclusive rationalist formulations. But most natural law theorists on marriage saw their efforts as a complement to, even a confirmation of, the work of the theologians.¹⁷

16. See *From Sacrament to Contract*, chapters 5–7 which set out these three Protestant models of marriage.

17. See generally on early modern Protestant natural law, and the controversies it occasioned within some Protestant circles, Luigi Lombardi Vallauri and Gerhard Dilcher, eds., *Christentum, Säkularisation, und modernes Recht*, 2 vols. (Baden-Baden, 1981); Christoph Strohm, *Calvinismus und Recht: Weltanschauliche-konfessionale im Werk reformierter Juristen in der frühen Neuzeit* (Tübingen, 2008); David VanDrunen, *Natural Law and the Two Kingdoms: A Study in the Development of Reformed Social Thought* (Grand Rapids, Mich., 2010).

Part of this early modern natural law theory was its own alternative theological exercise—to show the existence of a common natural theology of marriage that Protestants shared with Catholics and that Christians shared with the many other religions being discovered in the new age of world trade, mission, and colonization. Part of it was a philosophical exercise—to prove the existence, if not the truth, of traditional marital forms and norms, much like others sought to prove the existence of God against the growing ranks of skeptics and atheists. Part of it was an historical exercise—to retrieve and reconstruct some of the rational core of marriage and family life developed by classical writers, neo-classical and reception of Roman law movements being highly fashionable in the day. And part of this was a jurisprudential exercise—to create a common law of marriage that would form part of a universal law of nations that could transcend, if not pacify, the many European nations that had become locked in bloody religious warfare.

HUGO GROTIUS AND THE NATURAL LAWS OF MARRIAGE AND THE FAMILY

In light of this last point, it is not so surprising that it was Hugo Grotius (1583–1645), the so-called “father of international law,” who was among the first to press for a strong natural law of marriage and family life as part of his broader theory of international law. Among legal historians, Grotius is famous for his path-breaking 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 modern international law.¹⁸ Among church historians, Grotius is infamous for defending his fellow Dutchman, Jacob Arminius, against charges of “Pelagianism,” an act which won him a prison sentence for heresy. 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

18. Hugo Grotius, *De Jure Belli ac Pacis*, trans. Francis W. Kelsey (Oxford, 1925), with alternative translation as idem, *The Rights of War and Peace*, trans. Jean Barbeyrac, ed. Richard Tuck (Indianapolis, 2005); idem, *Commentary on the Law of Prize and Booty*, trans. and ed. Martine Julia van Ittersum (Indianapolis, 2006); idem, *The Free Sea*, trans. Richard Hakluyt, ed. David Armitage (Indianapolis, 2004).

from such Catholic luminaries as Francisco Vitoria who wrote in the century before him. Indeed, a number of historians now call Vitoria, rather than Grotius, the father of international law.¹⁹ What is forgotten by some church historians is that Grotius was a rather distinguished 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.²⁰ Drawing on diverse Catholic, Protestant, and classical sources, and using the tools of theology, jurisprudence, and natural philosophy alike, Grotius set upon a life-long quest for religious and political peace.²¹

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. 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. 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 the views of Vitoria and other jurists in Salamanca. Even slaves and captives should be granted this right, Grotius insisted contrary to

19. James Brown Scott, *The Spanish Origins of International Law, I, Francisco de Vitoria and his Law of Nations* (Oxford, 1934). For a good sampling see Antonio Truyol Serra, ed., *The Principles of Political and International Law in the Work of Francisco de Vitoria* (Madrid, 1946).

20. See Hugo Grotius, *Opera omnia theologica*, 3 vols. (London, 1679); idem, *Explicatio trium utilissimorum locurum N. Testamenti* (Amsterdam, 1640); idem, *De imperio summarum potestatum circa sacra*, 4th ed. (The Hague, 1661); idem, *De veritate religionis Christianae* (Oxford, 1662), translated as *Hugo Grotius on the Truth of Christianity*, trans. Spencer Madan (London, 1782).

21. Among many studies, see recently with ample bibliographies, Florian Mühlegger, *Hugo Grotius, ein christlicher Humanist in politischer Verantwortung* (Berlin, 2007); J. P. Heering, *Hugo Grotius as Apologist for the Christian Religion* (Leiden, 2004). 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)" (Ph.D. Diss., Frankfurt am Main, 1971).

civil law precedents, given that marriage is “the most natural association” known to mankind. He regarded celibacy as an option for those few with unique abilities or disabilities, but thought that celibacy was “repugnant to the nature of most men” and women and that its mandatory imposition on the clergy was a source of “grave sin.”²²

Both in his legal and in his theological writings, Grotius showed full command of and respect for biblical norms and conventional Christian principles of sex, marriage and family life. He adverted repeatedly to the axial biblical texts on marriage in Genesis 1 and 2, Matthew 19, I Corinthians 7, and Ephesians 5, some of which he further glossed in his New Testament commentaries. He pored over the Mosaic laws of marriage and the Pauline household codes. He cited frequently to the marital writings of Augustine, Aquinas, Vitoria, and hundreds of other classical and Christian authorities. “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 “bearing an equal part in all the duties of the marital estate.”²³

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. That was in part the challenge he set for himself by uttering his “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.”²⁴ 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,

22. Grotius, *Truth*, 108–09; Grotius, *War and Peace*, 2.4.21, 2.5.8

23. Grotius, *Truth*, 327–29; Grotius, *Explicatio trium utilissimorum locurum N. Testamenti*, ad loc. Matt. 19:1–9, Ephesians 5:32; and distillation of his fuller theological views in the lengthy notes by Jean Barbeyrac in Grotius, *War and Peace*, 2.5.9, n. 7 and repeated citations to Scripture and Christian authorities in *ibid.*, 2.5.1–23. A full list of his sources is in Grotius, *De Jure Belli ac Pacis*, 889–930.

24. Grotius, *De Jure Belli ac Pacis*, Prolegomena, 11.

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.²⁵

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.” But he further insisted that the “laws of Christ do oblige us” to conduct that goes well beyond “what the law of nature already requires of us.” Those who believe that Scripture and nature command exactly the same conduct are fooling themselves, Grotius observed. They will be “strangely embarrassed” when they try “to prove that certain things which are forbidden by the Gospel, such as concubinage, divorce, and polygamy are likewise condemned by the natural law.” While “reason itself informs us that it is 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.²⁶

With these distinctions in mind, Grotius began to sort through what features of traditional Christian marriage “are necessary to marriage according to the law of nature” and what are required “only according to the Gospel.”²⁷ 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. “The instances are numerous,” he wrote,

25. *Ibid.*, 1.1.10.

26. Grotius, *War and Peace*, 1.2.2–3, 1.2.6.

27. *Ibid.*, 2.5.9.

Wherein heathens are observed to have inculcated, severally, the very same principles and duties which are collectively enjoined by our [Christian] religion: they teach us, for example, 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.²⁸

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 “the promiscuous enjoyment of all women in common,” which some ancients and “savage” peoples practiced and which even Plato had commended in his *Republic*. Such practices would reduce the state to “a common brothel,” Grotius concluded. “Even some 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. “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 the parental affections.” 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.” 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 connection both of body and soul.”

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

28. Grotius, *Truth*, 221–22.

family; and all those dissensions avoided which a diversity of mothers must create among the children.

Genesis 1 and 2 further confirms 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.²⁹

Grotius’s argument for monogamy was a textbook restatement of the natural law configuration of marriage expounded by Thomas Aquinas and the Spanish neo-Thomists. In his *Summa Contra Gentiles*—a tract that used natural law and natural observation to try to prove truths of Christianity to Jews, Muslims, and other peoples (“*Gentiles*”)—Thomas had argued as follows: First, unlike most other animals, humans crave sex all the time, especially when they are young and most fertile. They don’t have a short rutting or mating season, followed by a long period of sexual quietude. Second, unlike most other animals, human babies are born weak, fragile, and utterly dependent for many years. They are not ready to run, swim, or fly away upon birth or shortly thereafter. They need food, shelter, clothing, and education. Most human mothers have a hard time caring fully for their children on their own, especially if they already have several others. They need help, especially from the fathers and his kin networks. Third, most fathers will bond and help with a child only if they are certain of their paternity. Put a baby cradle on a road, and most women will stop out of natural empathy. Most men will walk by, unless they are unusually charitable. Once assured of their paternity, however, most men will bond deeply with their children, help with their care and support, and defend them at great sacrifice. For they will see their children as a continuation and extension of themselves, of their name, property, and teachings, of their own bodies and beings—of their genes, we now say. Fourth, unlike virtually all other animals, humans have the freedom and the capacity to engage in species-destructive behavior in pursuit of their own sexual gratification. Given the lower risks and costs to them, men have historically been more prone to extramarital sex than women, exploiting prostitutes, concubines, and servant girls in so doing and yielding a perennial underclass of “bastards” who have rarely fared well in any culture. Given these four factors, said Thomas,

29. Ibid., 109–11; Grotius, *War and Peace*, 2.5.8–10.

nature has strongly inclined rational human persons to develop enduring and exclusive sexual relationships, called marriages, as the best form and forum of sexual bonding and reproductive success. Faithful and healthy monogamous marriages are designed to provide for the sexual needs and desires of a husband and wife. They ensure that both fathers and mothers are certain that a baby born to them is theirs. They ensure that husband and wife will together care for, nurture, and educate their children until they mature. And they deter both spouses from destructive sexual behavior outside the home.³⁰

Grotius accepted this argument, and repeated it several times to condemn extramarital sex, adultery, prostitution, and unilateral divorce without cause, all of which violated this basic natural configuration of enduring and exclusive marriage. But while monogamy is the naturally preferred form of marriage and forum for sex, he continued, he could not say that polygamy was automatically rendered “void by the law of nature only.” 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. A number of advanced civilizations like Muslims are polygamous, and they are strong. Grotius thought that polygamy was a “reprehensible” exploitation of women and an indulgence of a man’s “brutal appetite.” And he praised the institution of monogamous marriage taught by Christianity. But he concluded that it takes “the law of Christ” to “condemn polygamy outright.”³¹ Some Protestant writers like Samuel von Pufendorf and Chris-

30. See Thomas Aquinas, *Summa Contra Gentiles*, trans. Vernon J. Bourke, 4 vols. (Notre Dame, 1975), III-II.122–124. See also *Summa Theologica: Complete English Edition in Five Volumes*, trans. Fathers of the English Dominican Province (New York, 1947–48), vol. 5, qq. 41, 65–67. Grotius knew this argument largely through reading Francisco de Vitoria, “Relectio de matrimonio,” in idem, *Relectiones theologicae XII* (Louvain, 1557), with modern Spanish-Latin version *Relecciones Teológicas del Maestro Fray Francisco de Vitoria*, ed. Luis G. Alonso Geton (Madrid, 1933), 1:420–452, 2:439–504. See also Francisco de Vitoria, *Comentarios a la Secunda Secundae de santo Tomás*, ed. Vincente B. de Heredi (Salamanca, 1932–1952), excerpted in Francisco de Vitoria, “On Law: Lectures on ST I-II, 90–105,” in idem, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge, 1991), 153–204; Francisco de Vitoria, *Commentariorum ac disputationum in tertiam partem Divi Thomae* (Mogvntiae, 1599); See discussion in Gerhard Otte, *Das Privatrecht bei Francisco de Vitoria* (Cologne, 1964), 23–40, 121–32.

31. Grotius, *Truth*, 109–10, 328; Grotius, *War and Peace*, 2.5.9–10.

tian Thomasius agreed with Grotius, but later Protestants developed powerful natural law and natural rights arguments against polygamy, which they used to support the continued criminalization of polygamy by both civil law and common law authorities.³²

Grotius had less trouble condemning polyandry—one woman with multiple husbands—as contrary to natural law. 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.” “In 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.” In human marriages, too, “the authority is not equal; the husband is the head of the wife in all 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 home.”³³

The gist of Grotius’s argument was that polyandry was unnatural because the natural law gives a man exclusive dominion over his wife’s person, property, and contracts—what common lawyers call the doctrine of “coverture,” but now cast in natural law terms. 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. Thomas Aquinas had rejected polyandry as unnatural and unjust, especially to children. Later Protestant writers, beginning with John Locke, rejected Grotius’s argument about polyandry, instead condemning this practice with more egalitarian natural law rationales.³⁴

32. See detailed sources in my *Why Two in One Flesh? The Western Case for Monogamy over Polygamy* (Oxford, 2015), chapter 10.

33. Grotius, *War and Peace*, 2.5.8, 2.5.11.

34. *Ibid.*, 2.5.5

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. 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. There is a strong natural law argument against incest, too, said Grotius, which supports at least some of these traditional legal prohibitions. It’s the argument from “natural revulsion.” “Brute animals,” who operate by “natural instinct” alone, simply avoid sexual relations between parents and children, brothers and sisters—no matter how desperate their urge to mate. They are by nature repelled by such sexual connections. Among humans, reason translates this natural “aversion” to sex with close relatives into stronger terms of “moral abhorrence” as well. “Unless they have been corrupted by an evil education,” or are simply “crazy,” Grotius wrote, most people have an automatic and visceral “revulsion” against such close sexual unions. They see them as “contrary to human nature”—not only “impure” and “immodest” but an outright “corruption” and “defilement” of their rational nature. Moreover, such close relations confuse natural family roles. How can a father marry his daughter, or a mother her son, when they already have a complete, and life-long 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.” Sex or marriage between close relatives is contrary to human nature and contrary to the laws of nature that govern humans. This insight anticipated what modern scientists call the “revulsion reflex” against incest, which humans evidently share with other higher primates.³⁵

Most civilizations, Grotius showed, used similar logic to extend the category of incest to ban sexual and marital relations with other near rel-

35. Ibid., 2.5.12–14. See Frans B. M. de Waal and Amy S. Pollick, “The Biology of Family Values: Reproductive Strategies of our Fellow Primates,” in *Family Transformed: Religion, Values, and Society in American Life*, ed. Steven M. Tipton and John Witte, Jr. (Washington, D.C., 2005), 34–51.

atives as well, even if “these prohibitions do not come from the pure law of nature” alone. While “brute animals” couple with more distant relatives, “rational humans” do not. The Mosaic layers of consanguinity and affinity that define the crime of incest, Grotius argued, have parallels in many other legal cultures, both before and after the time of Moses. Grotius adduced dozens of Jewish, Greek, Roman, and Christian writers who condemned incest, even if they differed on exactly where to draw the line between distant relatives. Incest prohibitions and aversions are so commonplace among men, Grotius concluded, “it follows that some law of nature” must be driving this—whether “given by God to man in Paradise,” or customarily “insinuated...in the minds of men” over time, or “forbidden by natural reason without a formulated law.”³⁶

Grotius’s natural law argument against incest became a standard among later Protestant natural law theorists. Many of them cited “natural repugnance” and “inherent revulsion” as the strongest indicators that incest of some sort was against the natural law. 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. Most Protestant writers agreed with the eighteenth-century Anglican clergyman and judge, Richard Cumberland, who said that “all the laws in Scripture against incest are not absolutely, 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.”³⁷ But most also agreed with French philosopher, Baron Montesquieu, who wrote that, with incest and other sexual offenses, “it is a thing extremely delicate to fix exactly the point at which the laws of nature stop, and where the civil laws begin.”³⁸

Defining more clearly the point at which the natural laws of marriage start and stop was one challenge Grotius left for later Protestant and Enlightenment natural law theorists. Defining more fully what else nature teaches about many other features of traditional norms of sex, marriage,

36. Grotius, *De Jure Belli ac Pacis*, 2.5.14; idem, *The Free Sea*, 105.

37. Richard Cumberland, *A Treatise on the Laws of Nature*, trans. John Maxwell, ed. Jon Parkin (Indianapolis, 2005), Appendix 2, sect. II, 854–55.

38. Montesquieu, *The Spirit of Laws*, 26.14, in *The Complete Works of Montesquieu* (London, 1777), 2:218.

and family life not treated fully by Grotius was a further challenge. But he helped to unleash a large wave of Protestant natural law writing about sex, marriage, and the family, often as part of broader theories of natural law (*ius naturale*) and the law of nations (*ius gentium*). Among English Protestants, the best and most original such natural law reflections on marriage came from the Puritan legal historian, John Selden, the Anglo-Puritan philosopher and theologian, John Locke, the Anglican philosopher and cleric, William Paley, and the Cambridge jurist, Thomas Rutherforth. Among Lutherans, the most prolific natural law writers on marriage were Samuel von Pufendorf (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 and Christian Thomasius. Among Calvinists, the most interesting writings came from the many Presbyterians associated with the Scottish Enlightenment, most notably Gershon Carmichael, David Fordyce, Frances Hutcheson, Adam Smith, and Henry Home. All these Protestants stood alongside and drew in part on the formidable natural law writings on sex, marriage, and family life developed among early modern Catholics, both before and after the Council of Trent. While early modern Catholic natural law theory on marriage and the family is well known, a solid intellectual history and analysis of the parallel Protestant natural law writings on marriage remains to be written. It will be a large treatise if done comprehensively.

