

THE NATURE OF FAMILY IN SEVENTEENTH-CENTURY LIBERAL PROTESTANT THOUGHT: HUGO GROTIUS AND JOHN SELDEN

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Our contemporary debates about the nature of sex, marriage, and family life are not new. A half millennium ago, the Protestant Reformation set off a comparably tumultuous sexual revolution that bitterly divided the Catholic and Protestant worlds. Over the next century, jurists and theologians used various natural law theories to develop a common foundation for Western family law. In this Essay, I sample the writings of Dutch jurist Hugo Grotius (1583–1645) and English jurist John Selden (1584–1654)—two leading Protestant natural law theorists whose seminal writings helped to shape the Continental civil law and the Anglo-American common-law traditions respectively. These two scholarly giants knew and respected each other, but they differed in their approach to natural law and its applications to family law and other legal questions. Grotius based his theory of natural law on rational self-evidence—the rational inferences that can be drawn from human intuition and inclinations, common experiences and customs, and the nature of human sexuality and interaction. Selden based his theory of natural law on primeval divine commands, whose principles and precepts were worked out by great legal traditions with enlightened leadership, most notably by the Jewish tradition. Despite these different starting points and accents, both Grotius and Selden embraced a good number of traditional teachings on sex, marriage, and family life, albeit with nontraditional methods and rationales.

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I. INTRODUCTION

Harry D. Krause was one of the great jurists who helped guide American family law through the sexual and divorce revolution of the last half century. He helped to reform and integrate the diverse and shifting family law systems of the fifty American states with his early work on the Uniform Parentage Act, Uniform Adoption Committee, and Uniform Putative Fathers Act, and his more recent work on the American Law Institute ("ALI") Principles of the Law of Family Dissolution.¹ He created new channels of conversation and cooperation between historical and contemporary Anglo-American common law and European civil law systems of family norms and procedures.² He was a pioneer in the protection of children's rights, particularly the rights of nonmarital children under both state statutory law and federal constitutional law.³ While he supported sexual and marital freedom,⁴ his concern for children as third-party victims of casual sex and divorce also made him a zealous advocate for holding fathers accountable for the care and support of children born within and beyond marriage and for providing more accessible and

1. For biographical details, see *Harry D. Krause*, UNIV. ILL. COLL. L., <https://www.law.illinois.edu/faculty/profile/harrykrause> (last visited Aug. 28, 2017).

2. See, e.g., 4 HARRY D. KRAUSE, ET AL., INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY (1976); 6 HARRY D. KRAUSE, ET AL., INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CREATION OF RELATIONSHIPS OF KINSHIP (1976); Harry D. Krause, *Comparative Family Law: Past Traditions, Future Battle Trends—and Vice-Versa*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1099–1129 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Harry D. Krause, *The Right to Privacy in Germany: Pointers for American Legislation?* DUKE L.J. 483–530 (1965); Harry D. Krause & David D. Meyer, *What Family for the 21st Century?* 50 AM. J. COMP. L. 101–20 (2002).

3. HARRY D. KRAUSE, CHILD LAW: PARENTS, CHILD, AND STATE (1992); HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477–506 (1967); Harry D. Krause *Bastards Abroad: Foreign Approaches to Illegitimacy*, 15 AM. J. COMP. L. 726–51 (1966); Harry D. Krause, *The Non-Marital Child: New Conceptions for the Law of Unlawfulness*, 1 FAM. L. Q. 1–20 (1967).

4. See, e.g., Harry D. Krause, *Marriage and Cohabitation—Public and Private Ordering of Intimate Relationships*, in BALANCING INTERESTS: LIBER AMICORUM PETER HAY ZUM 70, GEBURTSTAG 257–263 (Hans-Erich Rasmussen ed., 2005); Harry D. Krause, *U.S. American Law on Same-Sex Marriage, Formal and Informal Same-Sex and Heterosexual Cohabitation Arrangements, and Same-Sex Relationships*, in DIE RECHTSSTELLUNG GLEICHGESCHLECHTLICHER LEBENSGEMEINSCHAFTEN 197–273 (Jürgen Basedow et al. eds., 2000).

streamlined forms of adoption.⁵ His classic texts on family law⁶ have been standard sources for generations of students and standard citations for scholars, advocates, and judges alike. In September, 2016, I was honored to receive the Harry Krause Lifetime Achievement Award in Family Law, and this Essay is a tribute to Professor Krause's work.

The late twentieth-century revolution of family law, which occupied Professor Krause, was only the latest in a series of revolutions of Western family law going back to antiquity. In the fifth and sixth centuries, the massive systems of classical Roman family law and Christian sexual ethics came together in a powerful new legal synthesis. In the twelfth and thirteenth centuries, the medieval church claimed jurisdiction over family law, creating a sophisticated new canon law of marriage that was enforced by church courts throughout Western Christendom. In the sixteenth century, the Protestant Reformers denounced the Catholic Church's canon law of marriage and shifted family law back to the secular authorities with more liberal marital formation and dissolution rules based on the Bible. In the later eighteenth and nineteenth centuries, Enlightenment reformers rejected Christianity's continued influence on sex, marriage, and family life, and pressed for greater sexual liberty and new rights for women and children, laying some of the groundwork for the more expansive modern sexual revolution of our day.

In this Essay, I would like to explore some of the legal syntheses of family law created in the aftermath of the sixteenth-century Protestant Reformation.⁷ Sex, marriage, and family life were hotly contested issues of that day and some of the first institutions to be reformed. Scores of Protestant theologians 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. Virtually every city and territory on the European continent that converted to the Protestant cause in the first half of the sixteenth century had new family 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

5. See HARRY D. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* (1981); Harry D. Krause, *The Revolution in Family Law: Forcing Fathers to be Responsible: A Review of the Progress Made in Child Support, Paternity, Illegitimacy, and Child Welfare*, 5 *FAM. ADVOC.* 12–46 (1982).

6. HARRY D. KRAUSE, *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* (7th ed. 2003); HARRY D. KRAUSE & DAVID D. MEYER, *FAMILY LAW IN A NUTSHELL* (5th ed. 2007); 1 HARRY D. KRAUSE, *FAMILY LAW: SOCIETY AND FAMILY* (1992); 2 HARRY D. KRAUSE, *FAMILY LAW: COHABITATION, MARRIAGE, AND DIVORCE* (1992).

7. What follows draws, in part, from JOHN WITTE, JR., *THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* (2015) [hereinafter "POLYGAMY"]; JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (2d ed. 2011) [hereinafter "FSC"] (collecting sources); JOHN WITTE, JR., *THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED* (2008); CHRISTIANITY AND FAMILY LAW: AN INTRODUCTION (John Witte, Jr. & Gary S. Hauk eds., 2017).

break with Rome and the parliamentary move toward a new common law of the family.⁸

The Protestant reformation of family law was directed against the prevailing Catholic sacramental theology and canon law of marriage that had dominated the West for the prior half millennium.⁹ The medieval Catholic Church's jurisdiction over marriage and family life 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 as the reformers understood them and also ignored the reality that most humans needed the remedial gift of marriage, whatever their vocation. The church's intricate regulations of sexual feelings and practices, even within marriage, were seen as a gratuitous insult to God's blessing 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 divorce and remarriage stood in considerable tension with the Protestant understanding of the natural and biblical right and duty of each fit adult to marry and remarry.

Sixteenth-century Protestant political leaders rapidly translated this Protestant critique of canon law into new civil law reforms. Taken together, the new state family laws of early modern Protestant lands (1) shifted principal marital jurisdiction from the church to the state; (2) abolished monasteries and cloisters; (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.¹⁰

These new state family law norms, which would dominate Western Protestant lands for the next two centuries, became a permanent point of confessional conflict between Catholics and Protestants—particularly after the Catholic Council of Trent declared its anathemas on these Protestant reforms in the 1563 *Tametsi* decree.¹¹ 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

8. See FSC, *supra* note 7, at 113–286.

9. *Id.* at 53–112.

10. *Id.* at 113–286.

11. See H.J. SCHROEDER, CANONS AND DECREES OF THE COUNCIL OF TRENT 180 (1941).

formation and dissolution rules.¹² Calvinists propounded a covenantal model of marriage, with stricter formation and dissolution rules and with church and state sharing jurisdiction.¹³ Anglicans, despite the early movements for reform, ultimately settled during Elizabeth's reign on most of the medieval canon laws of sex, marriage, and family life, including the use of church courts in administering most of its family laws.¹⁴ 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.

In the early seventeenth century and thereafter, a number of jurists and philosophers 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. 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 persons. Some developed a practical, prudential, and even utilitarian logic of what worked best for husbands/wives and parents/children to exercise and enjoy their natural rights and duties in the household. More traditional Christian theologians of the day often decried these efforts, especially as some of these natural law accounts of the family became even more rationalistic. But most natural law theorists of the family saw their efforts as a complement to, even a confirmation of, the work of the theologians.¹⁵

Part of this early modern natural law theory was an ecumenical 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 and natural core of marriage and family life developed by classical writers, with neo-classical

12. See FSC, *supra* note 7, at 136–58.

13. *Id.* at 166–82.

14. *Id.* at 227–54.

15. On early modern Protestant natural law and the controversies it occasioned within some Protestant circles, see generally CHRISTENTUM, SÄKULARISATION UND MODERNES RECHT (Luigi Lombardi Vallauri & Gerhard Dilcher eds., 1981); CHRISTOPH STROHM, CALVINISMUS UND RECHT: WELTANSCHAULICHE-KONFESSIONALE ASPEKTE IM WERK REFORMIERTER JURISTEN IN DER FRÜHEN NEUZEIT (2008); DAVID VANDRUNEN, NATURAL LAW AND THE TWO KINGDOMS: A STUDY IN THE DEVELOPMENT OF REFORMED SOCIAL THOUGHT (2010).

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.

In this Essay, I sample the writings of Dutch jurist Hugo Grotius (1583–1645) and English jurist John Selden (1584–1654)—two leading Protestant natural law theorists whose seminal writings helped to shape the continental civil law and the Anglo-American common-law traditions respectively. These two scholarly giants knew and respected each other, but they differed in their approach to natural law and its applications to family law and other legal questions. Grotius based his theory of natural law on rational self-evidence—the rational inferences that can be drawn from human intuition and inclinations, common experiences and customs, and the nature of human sexuality and interaction. Selden based his theory of natural law on primeval divine commands whose principles and precepts were worked out by great legal traditions with enlightened leadership, most notably by the Jewish tradition. Despite these different starting points and accents, both Grotius and Selden embraced a good number of traditional teachings on sex, marriage, and family life, albeit with nontraditional methods and rationales.

II. HUGO GROTIUS AND THE SELF-EVIDENT NATURAL LAW OF SEX, MARRIAGE, AND FAMILY

Hugo Grotius pressed for a strong, rationally based natural law account of family life as part of his broader theory of international law. Among legal historians, Grotius is famous for being “the father of international law” and praised for his path-breaking writings on the laws of war and peace and on the laws of prize and the sea.¹⁶ Among church historians, Grotius is infamous for defending his fellow Dutchman, Jacob Arminius, against charges of “Pelagianism,” an act that earned Grotius a prison sentence for heresy.¹⁷ Many legal historians forget, however, 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. Indeed, some historians now call Vitoria, rather than Grotius, the fa-

16. See 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis W. Kelsey et al. trans., 1995) (1625) [hereinafter Grotius, *LAW OF WAR AND PEACE*]. For an alternative translation, see HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck & Knud Haakonssen eds., Jean Barbeyrac, trans., 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. 2006) (1604), and HUGO GROTIUS, *THE FREE SEA* (David Armitage & Knud Haakonssen eds., Richard Hakluyt trans., 2004) (1609) [hereinafter Grotius, *FREE SEA*].

17. See J.P. HEERING, *HUGO GROTIUS AS APOLOGIST FOR THE CHRISTIAN RELIGION: A STUDY OF HIS WORK DE VERITATE RELIGIONIS CHRISTIANAE* (1640) 4 (Robert J. Bast et al. eds., J.C. Grayson trans. 2004).

ther of international law.¹⁸ 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 Arminian free-will thinking. 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.¹⁹ Drawing on diverse Catholic, Protestant, and classical 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.²⁰

Crafting a compelling theory of marriage and family law 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.²¹ Following Aristotle, Grotius described marriage as the seedbed of government; the first natural association; and the first school of morality, virtue, and citizenship.²² Structuring the institution of marriage properly, therefore, was essential to creating the stable national communities upon which international legal harmony depended. Grotius also regarded marriage as a “natural right” of all men and women, echoing Francisco de Vitoria. 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.²³ He regarded celibacy as an option for those few persons with unique abilities or disabilities, but he thought it “repugnant to the nature of most men” and women.²⁴

Both in his legal and theological writings, Grotius used and respected biblical norms and conventional Christian principles of marriage. He cited repeatedly to axiomatic biblical texts like Genesis 1 and 2, Matthew 19, 1 Corinthians 7, and Ephesians 5, and he further glossed such texts in his New Testament commentaries. He pored over the Mosaic laws of

18. See JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* (1934). For a good sampling, see generally ANTONIO TRUYOL SERRA, *THE PRINCIPLES OF POLITICAL AND INTERNATIONAL LAW IN THE WORK OF FRANCISCO DE VITORIA* (1946).

19. See HUGO GROTIUS, *DE IMPERIO SUMMARUM POTESTATUM CIRCA SACRA* (repr. ed. 1970); HUGO GROTIUS, *THE TRUTH OF THE CHRISTIAN RELIGION* (Maria Rosa Antognazza ed.; John Clarke, trans.) (2012); HUGO GROTIUS, *EXPLICATIO TRIUM UTILISSIMORUM LOCORUM N. TESTAMENTI* (1640); HUGO GROTIUS, *OPERA OMNIA THEOLOGICA* (1679). For an alternative translation of *ON THE TRUTH OF CHRISTIANITY*, see also HUGO GROTIUS, *ON THE TRUTH OF CHRISTIANITY* (Spencer Madan trans., 1782) [hereinafter Grotius, Truth].

20. Among many studies, see recently HEERING, *supra* note 17; FLORIAN MÜHLEGGGER, *HUGO GROTIUS: EIN CHRISTLICHER HUMANIST IN POLITISCHER VERANTWORTUNG* (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 THOMASIVS (1655–1728) (1971).

21. Grotius, Truth, *supra* note 19, at 108.

22. See ARISTOTLE, *THE POLITICS OF ARISTOTLE* xi, 7, 1, 8, 3 (Ernest Barker, trans. & ed. 1968); ARISTOTLE, *THE ETHICS OF ARISTOTLE* 225–26 (J.A.K. Thomson, trans. & ed. 1953).

23. See Grotius, *RIGHTS OF WAR AND PEACE*, *supra* note 16, at 2:513–14.

24. Grotius, Truth, *supra* note 19, at 108–11; Grotius, *RIGHTS OF WAR AND PEACE*, *supra* note 16, at 2:204.

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.²⁵ “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 obligation 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.”²⁶

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 (in)famously impious hypothesis: 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.”²⁷ He set the challenge further by defining natural law as a set of principles and rules that were self-evident to any rational person:

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 law²⁸

Grotius concluded that when deliberated rationally, without the aid of the Bible or divine authorities, natural law confirms many traditional Christian teachings of sex, marriage, and family, but not all such teachings, and not always very clearly. Grotius insisted that the Bible does not prescribe or proscribe anything “which is not agreeable to natural decorum.”²⁹ But he also held that the “laws of [Christ] do not oblige us” to moral conduct that far supersedes “what the law of nature already require[s] of [us].”³⁰ Those who believe that Scripture and nature command exactly the same conduct, however, are fooling themselves, Grotius observed. They will be “strangely embarrassed” when they try “to prove, that certain things which are forbid[den] by the Gospel, as concubinage, divorce, [and] polygamy, are likewise condemned by the law of nature.”³¹ While “[r]eason itself informs us that it is more decent to refrain” from

25. See GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 16, 2:508–21. For a full list of Grotius’s sources, see GROTIUS, LAW OF WAR AND PEACE, *supra* note 16, at 889–930.

26. GROTIUS, TRUTH, *supra* note 19, at 327–29; see GROTIUS, RIGHTS OF WAR AND PEACE, at 2:508–21.

27. See GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 16, at 1:13.

28. *Id.* at 1:38–39 (footnote omitted).

29. GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 16, at 1:195.

30. *Id.*

31. *Id.* (emphasis omitted) (footnote omitted).

such deviations from faithful monogamous marriage, natural law does not necessarily prohibit them outright; that usually requires religious sanction and command.³²

With these distinctions in mind, Grotius began to sort through what features of traditional Christian marriage and family life “nature seem[s] to require” and what features are required only according to the Gospel.³³ 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.³⁴ “[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.”³⁵ The “heathens,” for example, 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”³⁶

Grotius even compared common patterns in the animal kingdom with the common customs of advanced civilizations to demonstrate what he thought was natural human behavior. For example, he condemned “[t]he promiscuous enjoyment of all women in common,” which some ancient peoples practiced and which even Plato had commended in his *Republic*.³⁷ Such practices would reduce the state to “one common brothel,” Grotius concluded.³⁸ “[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.³⁹ “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.”⁴⁰ 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.”⁴¹ 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,” and “a full participation and mutual connection both of soul and body.”⁴²

The superior advantage of this institution, in respect to the proper education of children, is a truth as obvious as undeniable. Monoga-

32. *See id.* at 1:185–89, 195–97.

33. *Id.* at 2:514.

34. *See id.* at 2:514–15.

35. GROTIUS, TRUTH, *supra* note 19, at 221–22.

36. *Id.*

37. *Id.* at 109.

38. *Id.*

39. *Id.*

40. *Id.* at 109–10.

41. GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 16, at 2:235.

42. GROTIUS, TRUTH, *supra* note 19, at 110–11.

my 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.⁴³

Genesis 1 and 2 further confirm this natural preference for monogamous marriages, said Grotius, because “God gave to one [m]an one [w]oman only, it sufficiently appears what is best” for the marriages of the human race.⁴⁴

Grotius’s argument for monogamy was a textbook restatement of the natural configuration of marriage expounded by Thomas Aquinas in the thirteenth century and by later neo-scholastics like Francisco de Vitoria in the sixteenth. This argument started with several basic realities about human nature and sexual reproduction. First, unlike most other animals, humans crave sex all the time, especially when they are young and most fertile.⁴⁵ They do not 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.⁴⁶ 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. Third, however, most fathers will bond and help with a child only if they are certain of their paternity.⁴⁷ Put a baby cradle on a public walk, medieval and modern Western experimenters have shown, and most women will stop out of natural empathy. Most men will walk by, unless they are unusually charitable.⁴⁸ Once assured of their paternity, however, most men will bond deeply with their children, help with their care and support, and search for 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 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.⁴⁹ Given the lower risks and costs to them, men have historically been more prone to extramarital sex than

43. *Id.* at 111.

44. GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 16, at 2:520.

45. See HENRY HOME & LORD KAMES, 2 SKETCHES OF THE HISTORY OF MAN 265 (James A. Harris ed., Liberty Fund 2007) (1788); see also John Witte, Jr., *The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment*, 64 EMORY L.J. 591, 643–45 (2015) [hereinafter *Surprising Defense*].

46. See *id.* at 624–25.

47. *Id.*

48. See POLYGAMY, *supra* note 7, at 192.

49. *Id.*

women, exploiting prostitutes, concubines, and servant girls in so doing and yielding a perennial underclass of “bastards” who have fared poorly in most cultures.

Given these four factors, the traditional argument went, rational human beings and societies have learned, often by cruel and hard experience, to develop enduring and exclusive sexual relationships, eventually 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.⁵⁰

Later Protestant natural law writers took this argument as the starting point for their theories of marriage and the family. Commenting on Grotius, for example, the prolific Lutheran jurist, 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.”⁵¹ If natural law had not channeled this strong male sex drive toward marriage, and men were permitted to have random sex like a buck “in heat,” they would do nothing to help the mothers and children who need them. “[W]hat man would offer his support unless he were sure he was the father” of a mother’s child?⁵² “[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?”⁵³ Sex only within monogamous marriage was a natural necessity for successful human reproduction, Pufendorf concluded, later crediting Grotius for this insight.⁵⁴

While monogamy might be 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.⁵⁵ 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 for-

50. See the repeated exposition of this argument from the thirteenth to the nineteenth centuries in *Surprising Defense*, *supra* note 45, at 591–676.

51. 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 845 (C.H. Oldfather & W.A. Oldfather, trans., 1934) [hereinafter PUFENDORF, *DE JURE NATURAE*]; SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE* x–xii (Andrew Tooke, trans., Ian Hunter & David Saunders eds. 2003) [hereinafter PUFENDORF, *THE WHOLE DUTY*]; JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 61 (Thomas Nugent, trans., 2006).

52. PUFENDORF, *DE JURE NATURAE*, *supra* note 51, at 2:845; *see also* SAMUEL PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* 37 (repr. ed., W.A. Oldfather, trans. 1964).

53. PUFENDORF, *DE JURE NATURAE*, *supra* note 51, at 845.

54. *Id.* at 888; PUFENDORF, *THE WHOLE DUTY*, *supra* note 51, at 174–76.

55. *Surprising Defense*, *supra* note 45, at 626.

bade them.⁵⁶ A number of advanced civilizations, like Muslims, are polygamous, and they are strong. Grotius thought 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.⁵⁷ While this argument convinced Pufendorf and other writers like Christian Thomasius (1655–1728) in the next century,⁵⁸ several eighteenth-century and nineteenth-century writers marshaled a strong natural law case against polygamy.⁵⁹

Grotius further wrestled with what he called a "difficult, if not impossible" question: whether the natural law outlaws incest, consisting of sex with or marriage to a party related by blood or marriage.⁶⁰ 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.⁶¹ 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.⁶² Even "dumb animals," who operate only instinctually and "naturally," simply avoid sexual relations between parents and children, brothers and sisters—no matter how desperate their urge to mate.⁶³ They are by nature repelled by such sexual connections.⁶⁴ Among humans, reason translates this natural "repugnance" to sex with close relatives into stronger terms of moral "abhorrence" as well. Unless they suffer from a "bad Education," or have lost their minds, most people have an automatic and visceral "revulsion" against such close sexual unions, Grotius wrote.⁶⁵ They see such sexual interactions as "contrary to the law of nature"—not only impure and immodest but an outright "crime" and corruption of their rational human nature.⁶⁶

Moreover, such close relations confuse natural family roles.⁶⁷ 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

56. See GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 16, at 514–26.

57. See GROTIUS, TRUTH, *supra* note 19, at 64, 189 (noting polygamy among Muslims, Greeks, and Latins, and praising Christianity over Islam).

58. See POLYGAMY, *supra* note 7, at 259–60.

59. See *id.* at 363–88 (discussing the Enlightenment natural law and Anglo-American common law case against polygamy).

60. GROTIUS, LAW OF WAR AND PEACE, *supra* note 16, at 2:239. These next four paragraphs are drawn from Witte, *The Nature of Family, the Family of Nature*, *supra* note 45, at 627–31.

61. See JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 14, 36, 63, 88 (1987).

62. See GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 16, at 2:530.

63. *Id.*

64. *Id.* at 2:241.

65. *Id.* at 2:240–41.

66. *Id.*

67. See generally Frans B.M. de Waal & Amy S. Pollick, *The Biology of Family Values: Reproductive Strategies of our Fellow Primates*, in FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE 34, 45–47 (Steven M. Tipton & John Witte Jr. eds., 2005) (examining potential biological and social reasons for incest avoidance).

child, who must always remain subordinate to the parent, become that parent's spouse, or even her head, through marriage? Moreover, 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."⁶⁸ Sex or marriage between close relatives is contrary to human nature and contrary to the laws of nature that govern humans.⁶⁹ This insight anticipated an "inhibitory mechanism" that modern scientists call the revulsion reflex against incest, which humans evidently share with other higher primates.⁷⁰

Most civilizations known to the West, Grotius showed, used similar logic to extend the category of incest to ban sexual and marital relations with other near relatives by blood or marriage, even if "those prohibitions do not come from the pure law of nature" alone.⁷¹ While brute animals couple with more distant relatives, rational humans do not. The multiple 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. 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.⁷² Incest prohibitions and aversions are so commonplace among men, Grotius concluded, that "there must have been some [l]aw that prohibited them" either "given by [God] . . . to all [m]ankind" or "derived from an invincible [i]mpression of the [l]ight of [n]ature."⁷³

Grotius's natural law argument against incest became a standard among later 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.⁷⁴ Others added utilitarian arguments about bettering the breed of humankind by mixing bloodlines and about enlarging friendships in the world by alliances formed by marriages between unrelated parties.⁷⁵ Most writers agreed with later English judge, Richard Cumberland (1631–1718), who said that "all the [l]aws in Scripture against [*i*]ncest are not [absolute], but in a degree and measure, greater or lesser, [l]aws of [n]ature, or [b]ranches of the [l]aw of [n]ature . . . [for] doing otherwise is ordinarily in the [n]ature of the [t]hing an [*i*]ncongruity."⁷⁶

68. GROTIUS, *LAW OF WAR AND PEACE*, *supra* note 16, at 243.

69. *See, e.g., id.* at 239–41 (declaring that, according to natural law, marriage between parents and children is unlawful and void).

70. *See* Waal & Pollick, *supra* note 67, at 45–47.

71. *See* GROTIUS, *LAW OF WAR AND PEACE*, *supra* note 16, at 242.

72. *See* GROTIUS, *FREE SEA*, *supra* note 16, at 105; GROTIUS, *LAW OF WAR AND PEACE*, *supra* note 16, at 239–41; GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 16, at 529–31.

73. GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 16, at 531–33.

74. *See* RICHARD CUMBERLAND, *A TREATISE OF THE LAWS OF NATURE* 854–55 (John Maxwell ed., Jon Parkin trans., 2005) (1672); *see also* 5 ADAM SMITH, *Lectures on Jurisprudence*, in *THE WORKS AND CORRESPONDENCE OF ADAM SMITH* 163–69 (R.L. Meek et al. eds., Liberty Fund Inc., Glasgow ed. 1982) (1978).

75. *See* GROTIUS, *RIGHTS OF WAR AND PEACE*, *supra* note 16, at 527.

76. CUMBERLAND, *supra* note 74, at 855.

But most later jurists and moralists also agreed with influential French philosopher, Baron Montesquieu (1689–1755), an avid student of Grotius, 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.”⁷⁷ It is equally delicate to know where to draw the line between state laws of marriage and family and the religious laws of the church. 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 reprove in others.”⁷⁸ 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 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.⁷⁹

Defining more clearly the point at which the natural laws of marriage and family start and stop was one challenge Grotius left for later writers. Defining more fully what else nature teaches about many other features of traditional marriage and family not fully treated by Grotius was a further challenge. A large number of early modern Christian and post-Christian writers from the mid-seventeenth to mid-nineteenth centuries took up these challenges in developing a natural law of marriage and family life, often as part of a broader theory of natural law and the law of nations (*ius gentium*).⁸⁰ One of them was John Selden.

III. JOHN SELDEN AND THE NEO-HEBRAIC NATURAL LAW THEORY OF THE FAMILY

While Hugo Grotius sought to bridge the confessional divides of his day by appealing to a post-Christian and self-evident natural law known by reason, his English contemporary John Selden sought to retrieve a pre-Christian natural law informed by ancient Jewish texts. Selden was an eminent legal historian who wrote voluminously on the history of the English common-law tradition viewed in deep comparative perspective.⁸¹ Writing in the midst of the English Revolution against royal autocracy, he was an ardent defender of Parliamentary law-making and was twice

77. 2 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 69 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

78. *Id.* at 67.

79. *Id.* at 27–80 (working out his theory of law and religion and the disestablishment of religion).

80. For a preliminary study with detailed sources, see generally Witte, *supra* note 7; see also BRENT WATERS, *THE FAMILY IN CHRISTIAN SOCIAL AND POLITICAL THOUGHT* (2008); SCOTT YENOR, *FAMILY POLITICS: THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT* (2011).

81. See generally Harold J. Berman and John Witte, Jr., *The Integrative Christian Jurisprudence of John Selden*, in *GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY* (Mark Hill & R.H. Helmholz eds., 2017).

imprisoned by the Crown for advocating the natural and constitutional rights and liberties of all Englishmen. Selden was also an original natural law philosopher who drew classical, biblical, Jewish, Christian, and other sources into an arresting account of the nature of law, which he applied to sex, marriage, and family questions.⁸²

Selden rejected Grotius's "impious hypothesis" that natural law could exist even if God did not. For Selden, natural law was based ultimately on divine commands, not on human customs, contracts, or conventions, nor on rational inclinations, intuitions, or instincts.

I cannot fancy to myself what the law of nature means, but the law of God. How should I know I ought not to steal, I ought not to commit adultery, unless someone has told me so? Surely, 'tis because I have been told so. 'Tis not because I think I ought not to do them, nor because you think I ought not; if so, our minds might change; whence then comes the restraint? From a higher power; nothing else can bind: I cannot bind myself, for I may untie myself again; nor an equal cannot bind me, for we may untie one another: It must be a superior power, even God almighty.⁸³

In his 1640 title, *On Natural Law and the Law of Nations*, he wrote that "the Author and Most Holy Name, who created nature at the time the human race was created, established the notion that the human race must be instructed, administered, and ordered."⁸⁴ And in his major work on the natural law of sex, marriage, and family life, called *The Hebrew Wife*, he wrote: "[w]hat we call Natural Law is simply what the Author of Nature himself by his most sacred will . . . ordained and impressed at creation upon the human heart and has been a law that has been regularly and continuously observed as immutable by all posterity."⁸⁵

All other laws, Selden called "civil laws," "human laws," or "positive laws." He included in this category the Mosaic laws of the Bible and the later legislation of ancient Israelite judges and kings, as well as the priestly, prophetic, and rabbinic interpretations of the Jewish people. He called all these "the civil law of the ancient Hebrews."⁸⁶ "God at the first gave laws to all mankind," he wrote, "but afterwards he gave peculiar laws to the Jews, which they were only to observe."⁸⁷ "Just as we have the common law for all England," which only we observe, so they had their Jewish law, which only they observed.⁸⁸ Selden rejected the conventional Christian division of Mosaic laws into "ceremonial laws" that were binding only on Jews, "juridical laws" that were useful prototypes for all peo-

82. For detailed sources and discussion see *id.*

83. JOHN SELDEN, *TABLE TALK* (Edward Arber ed., 1868; repr. ed. 1972) [hereafter TT].

84. JOANNIS SELDENI, *De Jure Naturali et Gentium, Juxta Disciplinam Ebraeorum Libri Septem* [hereafter SELDENI, *De Jure Naturali*], in 1 JOHN SELDEN, *OPERA OMNIA TAM EDITA QUAM INEDITA* 64 (David Wilkins ed., 1726) [hereinafter *OPERA OMNIA*].

85. JOHN SELDEN ON JEWISH MARRIAGE LAW: *THE UXOR HEBRAICA* 33 (Jonathan R. Ziskind trans., 1991) [hereafter SELDEN, *UXOR HEBRAICA*].

86. *Id.* at 22.

87. TT, *supra* note 83, at 2033.

88. *Id.*

ples, and “moral laws” like the Decalogue that were universally binding on all humanity. In his view, all Jewish law set out in the Mosaic law was just that—Jewish law, not Christian law and certainly not English law.⁸⁹

There was a fine line, however, between the “natural law” that God commanded for all people and the “civil law” that God commanded only for his chosen people of Israel. Selden drew that line between the natural laws that God gave to Adam and Noah, and the civil laws that God gave to Moses at Sinai, which later Jewish authorities expounded and expanded.⁹⁰ Following the medieval Jewish sage, Moses Maimonides (1135–1204), Selden called this pre-Mosaic natural law, the “Noahide law,” which he distilled into seven divine commands: (1) not to commit idolatry; (2) not to blaspheme; (3) to establish courts of justice; (4) not to kill unjustly; (5) not to have illicit sex; (6) not to steal; and (7) not to eat flesh from a living animal.⁹¹ All seven of these natural law principles can be seen in the Book of Genesis that describes the interactions between God and various ancient patriarchs, said Selden. These biblical stories had parallels in other ancient literature about the origins of law and humanity, which Selden set out in detail.⁹² These were the seven universal natural laws that governed all human beings: they stood as the font of all human laws that flowed from them.⁹³

In Selden’s view, these principles of natural law, and the rational faculty to discern them, had been “given to the human race at its very creation[.]”⁹⁴ The natural law was thus “revealed and made manifest” to “every man whose mind was not depraved, who was not corrupted, and who intuited rightly and diligently enough.”⁹⁵ “Once ‘illuminated by the aid of the *intellectus agens*, a human mind or intellect . . . is informed of these commands which are to be observed by decree of the father of nature.”⁹⁶ For Selden this “*intellectus agens*” was either God himself, in whose image each person is created, or an “ultimate intelligence” that serves as the “agent” (*agens*) of God—perhaps an angel or the Holy Spirit. But what gave this natural law binding authority for humans was that it was commanded by God for the governance of all persons and peoples.⁹⁷

Some peoples proved better than others at discerning and building on this natural law. The ancient Romans were clearly one such enlightened people, and their 1,200 years of laws in the Republic and Empire

89. SELDEN, *UXOR HEBRAICA*, *supra* note 85, at 58.

90. *Id.* at 11–12.

91. *Id.* at 12.

92. *Genesis* 9:4.

93. SELDEN, *De Syndreis*, in *OPERA OMNIA*, *supra* note 84, at 758.

94. SELDEN, *De Jure Naturali*, *supra* note 84, at I.9.

95. *Id.* with discussion in JASON P. ROSENBLATT, *TORAH AND LAW IN PARADISE LOST* 128 (1994).

96. SELDEN, *De Jure Naturali*, *supra* note 84, at I.9; J.P. Sommerville, *John Selden, The Law of Nature, and the Origins of Government*, 27 *HISTORICAL JOURNAL* 437, 440–41 (1984).

97. *Id.* at 441; see TOOMER, *supra* note 93, at 502–04; see generally Johann P. Somerville, *Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory*, in *RHETORIC AND LAW IN EARLY MODERN EUROPE* 318 (Victoria Kahn and Lorna Hutson eds., 2001).

were a powerful expression of what Selden called a “limited form of natural law” and were still a source of inspiration and instruction, especially for the European civil law tradition.⁹⁸ From the ancient Britons and Anglo-Saxons sprang the great English common-law tradition, another powerful expression of “a limited form of natural law.”⁹⁹ To these familiar legal sources, Selden added a third: the Jewish legal tradition, which had been largely neglected in the world of Christendom.¹⁰⁰ Jewish law was even more ancient and enduring than the civil law or the common law, Selden argued, and it was promulgated for a people who were the ancestors of all modern-day Christians, whether Catholic, Protestant, or Orthodox, and whether common lawyers or civilians. Moreover, Jewish law had the added value of being rooted in divine legislation recorded in the Bible and illustrated by the stories of God’s chosen people before and after the giving of the law at Mount Sinai. That makes these biblical laws and their rabbinic interpretations eminently “useful for ascertaining the content and meaning of the natural law” of God.¹⁰¹

This was especially true in the realm of sex, marriage, and family life where Jewish law was comprehensive and was built on strong biblical foundations. God’s primeval commands to Adam and Eve were to join together “in one flesh” and “to be fruitful and multiply.”¹⁰² God repeated these commands to Noah, adding prohibitions on “illicit sex.”¹⁰³ These were the first laws of the Torah, said Selden, and the Jewish tradition had built on them an elaborate family law system that has persisted for over two millennia.¹⁰⁴ On the strength of these biblical commands, Jewish law forbade certain forms of sexual and marital relations, particularly incest, rape, adultery, homosexual sodomy, sex during menstruation, Onanism (*coitus interruptus*), and bestiality. Bestiality defied the differences between species that God separated; after all, God had created Eve because Adam could not find “a helper fit for him” among the animals. Homosexuality confused the species that God had differentiated: “male and female God had created them,” calling them and not other humans to join “two in one flesh.”¹⁰⁵ Sex during menstruation and Onanism were both fruitless, defying the primal command to “be fruitful and multiply.”¹⁰⁶ Rape, incest, and adultery all constituted not only “illicit sex” but

98. See generally IOANNIS SELDENI AD FLETAM DISSERTATIO (David Ogg, trans. and ed., 1925); with original in 2 OPERA OMNIA, *supra* note 84, at 1034.

99. See generally JOANNIS SELDENI, *Analecta Anglobrittannica*, in 2 OPERA OMNIA, *supra* note 84, at 861; JOANNIS SELDENI, *Illustrations to Poly-Olbion*, in 3 OPERA OMNIA, *supra* note 84, at 1728.

100. JOANNIS SELDENI, *Of the Jewes in England*, in 3 OPERA OMNIA, *supra* note 84, at 1459, 1459–62.

101. Jonathan R. Ziskind, *Introduction* to SELDEN, *UXOR HEBRAICA*, *supra* note 85, at 1, 10–13; see also SELDEN, *De Jure Naturali*, *supra* note 84, at 68.

102. *Genesis* 2:24, 1:28.

103. See SELDEN, *UXOR HEBRAICA*, *supra* note 85, at 12.

104. See *id.*

105. *Genesis* 2:24.

106. *Genesis* 1:28.

also “theft” of another’s fiancée or spouse, parent or family member—violations of two of the seven Noahide precepts.¹⁰⁷

Jewish law encouraged marriage for all fit persons in order to produce children who were then raised to know and teach God’s law in the next generation. These laws further permitted marriage to priests, albeit with special restrictions to protect the priestly office.¹⁰⁸ These laws required a rapist to marry his victim or pay a dowry in compensation for violating her and required a brother (*levir*) to marry the widow of his deceased brother, if she would have him.¹⁰⁹ They set out in detail the contractual duties of husband and wife to each other and their children: the wife yielded control of her property to her husband, in exchange for his providing her with sex, food, clothing, dowry, medicine, protection, and ransom if she was abducted. He was also to provide her with a home and inheritance upon his death and support for their children until they were married.¹¹⁰ The Jewish legal tradition also developed elaborate rules and procedures for betrothals, weddings, initiation, divorce for cause, separation on specified grounds (such as lack of virginity), and remarriage after divorce or death of one’s spouse. And it made special provision for widows, orphans, sojourners, debtors, servants, slaves, the poor, and others.¹¹¹

These Jewish laws of sex, marriage, and family life were every bit as comprehensive and sophisticated as the more familiar Roman law, Selden argued, and they had several provisions that were more humane and just.¹¹² Both Roman law and Jewish law presumed marriage to be a monogamous union of a man and a woman (though Jewish law allowed for polygamy in cases of seduction, enslavement, poverty, famine, infertility, or premature death of one’s married brother).¹¹³ Both Roman law and Jewish law emphasized the importance of procreation and nurture of heritable children, and developed elaborate inheritance rules to support the next generation (with Jewish law expanding the rights of widows and other children besides the first son, including the children of a prior marriage).¹¹⁴ Both laws punished adultery and other sexual offenses that betrayed marriage and its fundamental purposes (though Jewish law went further in restricting sexual immorality and providing restitution for taking a woman’s virginity before marriage).¹¹⁵ Both laws prohibited incestuous unions of blood and family relatives as well as mixed marriages between parties from different classes and cultures (with Judaism

107. See generally TOOMER, *supra* note 93, at 502–05, 548–62; SELDEN, *UXOR HEBRAICA*, *supra* note 85, at 37–78, 93–95.

108. *Id.*

109. See generally SELDEN, *UXOR HEBRAICA*, *supra* note 85, at 95–139, 163–176.

110. See generally *id.* at 295–333.

111. See generally *id.* at 143–508.

112. See generally *id.* at 143–284.

113. See *id.* at 206–12.

114. See generally *id.* at 143–284.

115. See generally *id.* at 287–508.

prohibiting interreligious unions as well).¹¹⁶ Both laws envisioned a two-step marital process, first a betrothal and then a wedding, which featured the exchange of marital rings, gifts, dowry, and other property transactions negotiated by the families or guardians of the newly engaged man and woman.¹¹⁷ Both laws envisioned an elaborate wedding ceremony on nonholy days, with special involvement by other family and community members in witnessing the mutual vows of the couple, their sharing of food and drink, and their receiving priestly blessings.¹¹⁸ Both laws granted only husbands the right to unilateral divorce, but gave both parties the valuable right to remarriage thereafter—though Jewish law imposed special obligations on the father to support the children of his first marriage during and after his lifetime. Both laws obligated members of the extended family to care for their kin. And both Roman law and Jewish law privileged men in the laws of sexuality, courtship, marriage, divorce, and inheritance; in the allowance for prostitution and concubinage; and in the adulation of the family patriarch and first-born son.¹¹⁹

Selden also identified parallels in the sex, marriage, and family norms of ancient Greek, Islamic, and other ancient legal cultures—especially concerning rules of betrothal, weddings, and divorce. Like some of his descriptions of Jewish law, some of these comparisons with other legal systems were forced, fanciful, and based on selective data.¹²⁰ But his main concern was to show: (1) that great legal traditions with enlightened leadership have independently developed comparable laws of sex, marriage, and family on the strength of universal natural law principles, and (2) that the Jewish legal tradition offered a number of ingenious and humane interpretations of God's natural law commands for this vital sphere of life.¹²¹

Selden vacillated between description of these ancient legal systems and prescription of some of their teachings for the modern Christian West, especially for his own beloved English common law. He wrote: “[w]ith the birth of Christianity, which is like a reformed Judaism from which Christianity originated, there is no doubt but that one may see [continuity of] the Hebrew customs and rituals of betrothal and marriage,” such as marital property and family inheritance, spousal and parental roles and rights, sexual relations and limitations, and divorce and remarriage.¹²² Selden devoted many pages of his *Hebrew Wife* to describing church and state laws of sex, marriage, and family in Christendom, showing both their continuity and discontinuity with ancient Jewish, Roman, and other laws. Christianized Roman law, Germanic laws, Byzantine laws, Russian and Slavic laws, medieval canon law, civil law, and

116. See generally *id.* at 34–65.

117. See generally *id.* at 287–508.

118. See generally *id.*

119. See generally *id.*

120. See TOOMER, *supra* note 93, at 559–62, 691.

121. See generally SELDEN, *UXOR HEBRAICA*, *supra* note 85.

122. *Id.* at bk. 2, ch. 24, pg. 222–23.

common law, and the sundry laws of Catholic and Protestant lands after the Reformation and Counter-Reformation all came in for elaborate description and comparison to these earlier legal systems.¹²³

While these many pages of prose revealed Selden's "cumbrous" and pedantic habit of piling up endless masses of legal sources,¹²⁴ they also seemed to be tacit calls for reform of prevailing English family laws. For example, prevailing English law, echoing medieval canon law, allowed for clandestine (licensed) marriages without the involvement of parents, peers, or priests, and without any public or church ceremony. Jewish and other ancient laws, in contrast, made marital formation a broader family and community event, with parental consent, peer witness, civil registration, and religious consecration and elaborate wedding rituals. Selden seemed to imply that English law should perhaps do the same—thus anticipating the reforms of Lord Harwicke's Act a century later.¹²⁵ English law in 1604 made polygamy a capital offense punishable by the royal courts. Ancient Jewish law, however, allowed for limited polygamy in cases of real necessity, while providing vetoes or compensation to the first wife or wives. Perhaps English courts should be more lenient in cases of real necessity or unintentional double marriages, Selden seemed to intimate.¹²⁶ English law left properly married couples to their own devices and desires thereafter, intruding only in the event of chronic abuse or upon the death of one spouse, but allowing husbands to control and discipline their wives, even inflicting corporal punishment. Ancient Jewish law, building on the Bible, went much further, relieving newly wedded males from all civil and military provisions for a year to start building their new home and family, and ordering husbands to provide their wives with clothing, protection, support, sex, medical help, ransom, and dower. Perhaps a biblical commonwealth like England could do more to support married couples, especially wives, was the evident point.¹²⁷ English law prohibited divorce and remarriage even for adultery, except by passage of a rare private bill in Parliament. Ancient Jewish and Roman law had allowed divorce for various serious faults, and entitled both parties to remarry. Moreover, Jesus had allowed for divorce on grounds of "*porneia*"—a much broader term than simple adultery, in Selden's view, but more akin to the traditional Jewish ground of "uncleanness" or "impropriety." A more liberal law of divorce and remarriage seemed at once biblical and natural, necessary and humane.¹²⁸ English laws of inheritance were strongly geared to preserving aristocratic lands and privileging the

123. See generally *id.* 1–508 (citing to laws from various cultures throughout).

124. See Harold D. Hazeltine, *Selden as Legal Historian: A Comment in Criticism and Appreciation*, 24 HARV. L. REV. 105, 117 (1910); SIR JOHN BAKER, *John Selden and English Legal History*, in COLLECTED PAPERS ON ENGLISH LEGAL HISTORY, VOL. II 755, 765 (2013).

125. See SELDEN, *UXOR HEBRAICA*, *supra* note 85, at bk. 2, chs. 1–3, 12–24; SELDEN, *De Jure Naturali*, *supra* note 84, at bk. 5, ch. 5.

126. See SELDEN, *UXOR HEBRAICA*, *supra* note 85, at bk. 1, chs. 8–10; SELDEN, *De Jure Naturali*, *supra* note 84, at bk. 5, ch. 6.

127. See SELDEN, *UXOR HEBRAICA*, *supra* note 85, at bk. 3, chs. 3–9.

128. *Id.* at bk. 3, ch. 23; SELDEN, *De Jure Naturali*, *supra* note 84, at bk. 5, ch. 7.

eldest son, sometimes at great cost to his siblings—especially his sisters who did not marry. Ancient Jewish laws had primogeniture, too, but made ample provision for other sons, sometimes daughters, too, as well as orphans, bastards, sojourners, and the poor. Maybe English law should do more of the same.¹²⁹

These and other laws of domestic life were topics of bitter dispute in Selden's day, with scholars like John Milton, John Lilburne, Gerrard Winstanley, and various Leveller and Radical pamphleteers strongly pushing for such legal reforms during the tumultuous Interregnum from 1642–1660 and the efforts to build a “biblical commonwealth” in England. Selden seemed to be sympathetic with at least some of these efforts. But, quite in contrast with his earlier strident efforts to protect the “natural rights and liberties of all Englishmen,” which twice landed him in prison, he proceeded cautiously in his later efforts at family law reform.¹³⁰ He offered erudite demonstrations of what “humane alternatives” the biblical and Jewish traditions had to offer, but he penned only masterful understatements about their contemporary relevance. How he ended his 331 folio-page book on *The Hebrew Wife* was typical:

Enough on these matters. Let me add only this much: if what has been pointed out is correctly reflected upon, it is not hard to ascertain what has to be decided with respect to the several important questions that were wont to be controverted and discussed regarding the law of marriage and divorce, both human and divine.¹³¹

Selden often insisted that, as a legal historian, his task was only “[t]o know and to teach those things which are true” based on the full record of authenticated sources.¹³² It was “summarily to relate, not to discuss opinions [or] to give a verdict of what he relates.”¹³³ “I search not what indefinitely ought to be, but what was with us in England.”¹³⁴ “I take pleasure in going back to Studies of Antiquity, and in looking behind me to our Grand-Sires better times.”¹³⁵

But that was only the first step. Selden also warned against idle antiquarianism—or, as he put it, “the too studious affectation of bare and sterile antiquity, which is nothing else but to be exceeding[ly] busy about nothing.”¹³⁶ The real job of the legal historian, he insisted, is to harvest “the fruitful and precious” and “useful part” of this history “which gives necessary light to the present, in matter of state, law, history, and understanding of good authors.”¹³⁷ “Light to the practice and doubts of the pre-

129. SELDEN, *UXOR HEBRAICA*, *supra* note 85, at bk. 2, chs. 9–11; JOHN SELDEN, *De successioneibus in bona defuncti*, in *OPERA OMNIA*, *supra* note 84, at i–xviii, 1–200; *see* TOOMER, *supra* note 93, at 2:447–89 on the changes in multiple editions.

130. *See* Toomer, *supra* note 93, at 2:492–93, 643–91.

131. SELDEN, *UXOR HEBRAICA*, *supra* note 85, at bk. 3, ch. 33.

132. *See* Hazeltine, *supra* note 124, at 111.

133. JOHN SELDEN, *The Duello*, in 3 *OPERA OMNIA*, *supra* note 84, at 572.

134. *Id.* at III.2:1362.

135. John Selden, *The English Janus*, in *TRACTS WRITTEN BY JOHN SELDEN* (R. Wescot ed., 1683; repr. ed., 2006).

136. JOHN SELDEN, *The History of Tythes*, in 3 *OPERA OMNIA*, *supra* note 84, at 1067.

137. *Id.*

sent.”¹³⁸ “Light, that is clear and necessary.”¹³⁹ Certainly, in the realm of the family, Selden thought that Jewish law provided ample light that was “fruitful, precious, and useful”—not only to reform current English laws, but even more to discern what the laws of God and nature demanded for persons of all times and places.

IV. SUMMARY AND CONCLUSIONS

Grotius and Selden were but two of scores of Protestant jurists in the seventeenth century who wrote on sex, marriage, and family life. But they were among the most preeminent scholars of the civil law and common law traditions. While they respected each other and agreed on many points, these two legal giants clashed more than once on fundamental questions of law, politics, and society. Particularly well known is their celebrated debate over the law of the sea and its possessions. Grotius defended the “open sea” (*Mare Liberum*) and the natural rights of passage and fishing even in territorial waters.¹⁴⁰ Selden defended the “closed sea” (*Mare Clausum*) and the natural rights of the state to impose licenses and taxes on navigation and harvesting in territorial waters.¹⁴¹ They each grounded their arguments in classical Roman law and the *ius commune* tradition. What tipped the scales for Selden was his reading of biblical law and its rabbinical interpretations, which favored property claims in both land and adjacent waters.¹⁴²

Grotius and Selden differed on their approach to natural law as well and some of its applications to sex, marriage, and family questions. Grotius based his theory of natural law on rational self-evidence, the rational inferences that can be drawn from human intuition, common experiences, and the nature of human sexuality and interaction. Selden based his theory of natural law on primeval divine commands, whose principles and precepts were worked out by great legal traditions with enlightened leadership, most notably the ancient Jewish traditions of Torah and Talmud. Despite these different starting points, both Grotius and Selden embraced the classic Western teaching that the marital household was the foundation of the polis, and provided essential public goods to church, state, and society. Both believed that marriage further served the private goods of mutual comfort of men and women, their mutual procreation and nurture of children, and their mutual protection from sin and temptation. Both thought that clergy and laity alike should marry

138. *Id.* at 1069.

139. *Id.*

140. HUGO GROTIUS, *MARE LIBERUM* 8 (Ralph Van Deman Magoffin trans., James Brown Scott ed., New York, Oxford Univ. Press 1916).

141. See TOOMER, *supra* note 93 at 395–433.

142. JOHN SELDEN, *MARE CLAUSUM*, bk. 1, ch. 6. (interpreting Genesis 1:29; 10:19; Numbers 34; Deuteronomy 34:2; Job 38:10–11; Psalms 72:8, 89:25, 95:4–5, 115:16; Proverbs 8:29; Ezekiel 26:16, 27:9, 34, 28:2; Isaiah 23:4; I Esdras 4:2; II Esdras 7:3–4). See further Jonathan Ziskind, *International Law and Ancient Sources: Grotius and Selden*, 35 *REV. POL.* 537, 555–58 (1973); TIMOTHY BROOK, *MR. SELDEN’S MAP OF CHINA* 32, 36–39 (2013).

unless they had the rare gift of continence or lacked the fitness or capacity to fulfill their marital duties. Both thought that marriages should proceed first with a formal engagement, then with a wedding day, and that valid marriages required parental consent, peer witnesses, civil registration, and priestly consecration. Both thought that divorce should be allowed on proven grounds of adultery, malicious desertion, or other serious fault, with remarriage allowed at least to the innocent party and ongoing support for the children imposed on both spouses, including making testamentary provisions for the spouse and children after death.

Rather than adducing biblical texts, theological doctrines, or spiritual laws as their highest authorities, however, both Grotius and Selden offered a natural law account of these main features of sex, marriage, and family life. Grotius believed that biblical laws and natural laws on the family coincided on many points, but that the Bible imposed stricter sexual morality. Polygyny, concubinage, and no-fault divorce were all readily permissible under the natural law, Grotius thought. It took “the law of Christ” to render such behavior sinful, even reprehensible. Selden saw less divergence between biblical law and natural law. Polygyny and concubinage were well known in the Old Testament, he pointed out, and those practices might find an equitable place in a Christian commonwealth as they had in traditional Jewish law. Divorce for “uncleanness” and remarriage were commonplace in the Old Testament and in the ancient Jewish, Greek, and Roman worlds, and these norms were little changed by Christ’s teaching on “*porneia*.” It was the medieval canon law of the Catholic Church that had prohibited these practices,¹⁴³ and the Protestant world might well wish to revisit such questions.

Selden saw further convergence between biblical and natural laws in the prohibition on other sexual sins and crimes. Building on the Talmud and Maimonides, Selden argued that bestiality defied the differences between species that God had separated. Homosexual sodomy confused the genders that God had differentiated. Sex during menstruation and *coitus interruptus* were both fruitless exercises that defied the primal natural and biblical command to “be fruitful and multiply.” Rape, incest, and adultery all intruded on relationships and rights that properly belonged to another fiancée or spouse, parent or family member. Selden also saw further convergence in the natural laws of human self-preservation and the biblical laws of charity towards one’s neighbor—particularly widows, orphans, bastards, sojourners, debtors, servants, slaves, the poor, and others, all of whom deserved special protection and provision according to the natural laws of God and their interpretation in the Jewish tradition.

143. For Selden’s criticisms of medieval canon law, especially papal legislation, see sources in Berman & Witte, *supra* note 81, at 144–146.

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