

# *Don Browning's Christian Humanism*

with Don Browning, "Reviving Christian Humanism: Science and Religion"; Terry D. Cooper, "Psychology, Religion, and Critical Hermeneutics: Don Browning as a 'Horizon Analyst'"; Wesley J. Wildman, "The Artful Humanism of Don Browning"; Don S. Browning and John Witte, Jr., "Christianity's Mixed Contributions to Children's Rights"; and Don S. Browning, "A Natural Law Theory of Marriage"

## A NATURAL LAW THEORY OF MARRIAGE\*

by Don S. Browning

*Abstract.* For the past two decades, I have been developing an integrative Christian marriage theory, based in part on a grounding concept of natural law and an overarching theory of covenant. The natural law part of this theory starts with an account of the natural facts, conditions, interests, needs, and qualities of human life, interaction, and generation—what I call the “premorale” goods or realities of life. It then identifies the natural inclinations of humans to form enduring and exclusive monogamous marriages and to preserve these units as the central site for intimacy, procreation, and nurture of children. In this paper, I first summarize this natural law theory of marriage and then compare it to the formulations of other modern Christian thinkers. I also defend this theory against various modern critics of natural law—in part by reinterpreting some traditional natural law teachings that in my view have been misunderstood, in part by looking at the interesting convergences between the insights into sex, marriage, and family life offered by contemporary Christian theological ethicists and by evolutionary biologists and biological anthropologists.

*Keywords:* Larry Arnhart; Karl Barth; Emil Brunner; children; family; marriage; natural inclination; natural law; premorale goods; Paul Ricoeur

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### THE EARLY EXAMPLE OF EMIL BRUNNER

Let us start with the integrative Christian theory of marriage of early twentieth-century Swiss theologian, Emil Brunner. Brunner was a

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theologian working out of the Reformed or Calvinist tradition. He taught in Switzerland during and after the seismic cultural convulsions of World War II. He serves as a late modern exemplar of both the Protestant use of covenant theology and the Catholic use of natural law, a combination that can be found in earlier Protestant sources such as John Calvin, Johannes Althusius, and John Milton (Witte 2007).

Brunner starts his theology of the spheres of society by distinguishing three kinds of human interests stemming from what he calls the “psychophysical nature” of human beings. They are the human needs for (1) sex, intimacy, and offspring; (2) acquisition and economic well-being; and (3) safety and control over the contingencies of life. In Brunner’s view, these interests are fostered and fulfilled by different spheres of society: sex and procreation by marriage and the family; acquisition and economic well-being by labor and the market; and safety and control by the state and its laws. These three kinds of human interests are “pre-moral”—that is, they are morally relevant but not morally definitive. Brunner believed that these interests, and the respective spheres of society that satisfy and normatively organize them, can be known and analyzed by human reason (Brunner 1957, 335). These interests, the goods toward which they are oriented, and the reason that identifies them all together constitute, according to Brunner, the baseline of natural law. In acknowledging this, he was siding with those branches of Protestantism that retained some appreciation for the classical and Christian natural law tradition.

By taking this step, however, Brunner also came into conflict with the more strictly revelational or divine command way of grounding normative human institutions and practices—including marriage—found in the work of his immensely influential contemporary Reformed theologian, Karl Barth. In fact, their disagreements led to a famous debate between them about natural law, natural theology, and natural rights. Brunner was a theologian who took seriously the commands and covenants of God and tended, as did Barth, to see them less as prohibitions and more as liberating permissions, promises, and gifts of love (Brunner & Barth 2002). Brunner believed that, from a Christian perspective, each of these three spheres of society should be guided by covenant faithfulness to God, even though each also gains some normative content from one of the respective needs or interests apprehended by reason. Brunner saw these divinely inspired and liberating commands, gifts, permissions, and covenants as guiding and fulfilling the natural God-given sexual, acquisitive, and security interests of humans.

Brunner held that these three forms of communal life could be understood in certain ways independently of faith. He wrote: “These forms of community . . . are all independent of faith, and of the love which flows from faith.” But then he continued: “This does not mean that their significance and their true nature can be rightly known outside the sphere of faith.” These natural impulses toward the different spheres of

communal life “conceal within themselves the Divine orders of creation”—God’s intention for the future fulfillment of all humans. Furthermore, these natural forms of community constitute something like divine training schools for higher and more fulfilling forms of life that God wills in creation. Brunner believed that, from the perspective of human reason, these spheres function to articulate and meet human needs; from the perspective of faith, they are gifts of God in spite of the fact that they are changing, broken, and sinful (Brunner & Barth 2002, 333–37).

Karl Barth believed that Brunner had sold out to an inadequate Roman Catholic theory of natural law. Barth called Brunner’s idea of orders of creation a “horizontal” ethic that had lost contact with a transcendent revelation. He once said this about Brunner’s formulation: “But we cannot help feeling that at the root of his conception of ‘order’ there lies something akin to the familiar notion of *lex naturae* which is immanent in reality and inscribed upon the heart of man, so that it is directly known to him.” (Barth 1961, III/4, 20)

Barth, I am convinced, was wrong in his interpretation of Brunner. Brunner says that reason can discern the human interests motivating the spheres or orders of creation, including the order of family and marriage. But he also believed that human reason alone cannot fully normatively define and properly actualize these interests. As a Christian theologian, Brunner was not functioning as a philosophical foundationalist in asserting that reason can grasp knowledge of these interests and spheres. That is, he was not first emptying his mind of the witness of the Christian tradition and then using reason to build up, from some empirical or rational ground floor, the normative role of marital monogamy in a one-flesh union of father, mother, and child. Rather, he was using reason in a “distanctiated” way, as we will soon see that Paul Ricoeur does in his critical hermeneutics (Ricoeur 1981, 59–62). Reason may be able to gain a certain degree of “distance,” in contrast to pure objectivity, from its shaping by a normative tradition. Because of this, it may thereby discern some of the rhythms of our natural human sexuality and other natural needs that then anticipate and incline us toward covenanted life-long monogamy. Furthermore, forms of “distanctiated” social-scientific reason and empirical observation may help us see the beneficial consequences—the goods, so to speak—that flow from this covenantal relation.

On the issue of marriage, Brunner occupies a conceptual space somewhere between Thomas Aquinas on the Catholic side and Karl Barth on the Protestant side. The natural interests of sex and procreation (especially when the factor of long-term human infant dependency is added) anticipate and are fulfilled in the monogamous relation between husband and wife willed by God in creation. Yes, Brunner, as did Aquinas, acknowledged that there are natural polygamous impulses in humans, especially men. Yes, there is the reality of infidelity and divorce. But there

is also an inclination toward monogamy in the very nature of human sexuality and procreation, as ambiguous and easily disrupted as it may be.

Brunner emphasized the importance of parental recognition for the rise of monogamy—tracking the arguments of Aquinas and others, and anticipating today’s evolutionary psychologists in so doing. This is the parent’s recognition that this child is mine, someone I brought into the world, and indeed someone who is literally part of my very being (Browning, Miller-McLemore, Couture, Lyon, & Franklin 2000, 113–24). But Brunner conceived this recognition as a three-way recognition, a point very important, in my view. *It entailed a mutual recognition between father, mother, and child.* Historical natural law theorists and modern evolutionary scientists both agree that the mother’s recognition that the child is hers comes more easily than the father’s; the father’s recognition of this fact is more contingent, situational, and a matter of probability. But they also agree that most human males recognize and care for their offspring more often than other mammalian males do, which says much about what is unique about the human species.

Brunner added something, however, that is often left out of public discourse today—especially in a time when anonymous donor fathers and transient sexual relationships have left a growing number of children who do not know who their parents of conception actually are (Marquardt, Glenn, & Clarke 2010). Brunner highlights the importance of the child’s recognition that this woman and this man are responsible for my existence. These two people brought me, as a child, into the world and *I, the child know this, or may someday learn it, or at minimum be capable of recognizing this; knowing this truth is not just a right and capacity enjoyed by the parents. It is a capacity and therefore a right of the child.* The trinity of recognitions of this bio-existential reality throws mother, father, and child together in irrevocable ways. Brunner writes:

Since I, the father, as well as the mother and the child, know irrevocably that this fact is irrevocable, then we three persons are bound together in a way in which no other three persons have ever been bound together, in an unparalleled and indissoluble relation. . . . This trinity of being we call the human structure of existence. (Brunner 1957, 346)

This structure of existence is uniquely human not only because it is a biological reality but also because it is known—recognized—to be so by all three members of the one-flesh union.

In short, Brunner believes that nature itself at the human level both anticipates and is completed by God’s intention as revealed in creation that husband, wife, and child become “one flesh.” Jesus himself, in his commentary on Genesis 2:24, advances the idea that this one-flesh union should be lifelong. Remember the words recorded in Matthew 19:6 (NRSV): “So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate.” We do not need to harden these

strictures into a totalistic antidivorce stance to realize that this passage is the culmination of the Christian ideal of marriage as revealed in the story of creation and affirmed by Jesus at the beginning of his ministry.

Brunner acknowledges that there is a fourth social sphere besides the family, market, and state—the sphere of religion, which for him is mainly exemplified by the church in both its empirical and ideal forms. The sphere of the church, from his perspective, is not directly derived from a psychophysical interest but addresses, helps guide, and tries to realize the true and integrated purposes of the other three basic interests. From Brunner's Reformed theological perspective, each of these spheres deserves a high degree of autonomy from the other spheres in pursuing its unique functions, developing its logics, and refining its specific strategies. On the other hand, from a theological perspective, each of these spheres should complete its moral goals within the structure of God's covenantal fidelity, gifts, and demands. According to Brunner, religion in general and Christianity in particular has much to do with promoting the true ends of the various spheres of society and the human interests they serve, not through direct command and control, but through moral and spiritual influence (Brunner 1957, 552–54).

Brunner, echoing in part the Dutch theologian and statesmen, Abraham Kuyper, believed that the social spheres should respect each other's special functions, resist interfering and undermining other spheres, yet also support the other spheres of society in accomplishing their unique goals. As Kuyper phrased it: each social sphere has its own "sovereignty" (Witte 2007, 321–30). For instance, the market should help the family supply its economic needs, but should not disturb or distort the family's intimacy, or its procreative and nurturance goals. Government should not own or completely control either family or market even though it should assist each to fulfill its special tasks. The church should not directly control family, market, or government although it should remind them of their higher moral, social, and covenantal obligations. The technical rationality and structural differentiation characteristic of modern societies are challenges to social theories holding that it is a major task of religion to help social spheres maintain their unique goals without undermining them in the process. This is why in such societies any moral or legal theory urging an integrated view of marriage and family must be as multidimensional as possible (Browning 2003).

Roman Catholic subsidiarity theory has a different way of talking about much the same vision of society that we find in Protestant covenantal thinkers like Brunner and Kuyper. The Roman Catholic Church advanced this theory at the turn of the twentieth century when the legal and social control of society by the church had been long gone but threatened to be replaced by either the socialist state or the capitalist market. Roman Catholic subsidiarity theory, informed as it was by Aristotelian

and Thomistic theories of the importance of the premoral goods of the natural family and kin altruism, was designed to keep both government and market from controlling and thereby undermining the integrity of the increasingly embattled domestic sphere. The doctrine of “subsidiarity” insisted that neither the market (through excessive work demands and commercialization) nor the state (through its paternalism and control) should undermine the marriage-based family nor undercut the church’s special protection and nurturance of this institution (Hittinger 2003). In both Protestant and Catholic formulations, the state and market had specialized functions, but they had to constrain themselves and cooperate in preserving and enhancing a pluralistic society. Much of this Brunner absorbed and distilled in his understanding of the place of the family in church, state, market, and society.

#### PREMORAL GOODS AND THE NATURAL LAW CONFIGURATION OF MARRIAGE

Part of what attracts me to Brunner’s work is that he offers a sophisticated theory of natural law rooted in a sophisticated theory of the premoral goods of life. A covenant theory of marriage and society that uses natural law needs a theory of premoral goods as well, and Brunner’s work further illustrates that. His theory of marriage has three layers of argument—an understanding of premoral goods or interests that humans have, a theory of natural law that inclines humans toward certain sexual, marital, and familial habits that are naturally expedient, and a theory of covenant that stabilizes and organizes these natural inclinations for the good of each person and the common good of society.

The starting point for a natural law theory of marriage, I have said, is a theory of the premoral good. It is now time to make this claim in more detail. When moral philosophy and theology use the concepts of premoral or nonmoral goods, they are speaking of the countless ways we refer to the various goods of life that are not directly moral goods. I follow positions on the nature of premoral good found in the neo-Thomistic moral theologian Louis Janssens and the nearly identical concept of the nonmoral good developed by the distinguished American moral philosopher William Frankena (Browning 2006, 190–220).

Here’s how the concept works. If someone says “this water is good,” she is not saying it is morally good. She is making a premoral judgment; she is saying it is clean, has a nice refreshing taste, and is likely healthy to drink. If she is a mother interested in her children’s health and then claims that the mayor and the commissioner of sanitation *should* provide clean water for her offspring, she is making a moral judgment. And if she says that these authorities should provide clean water *equally* for everyone—not just the elite, the wealthy, or not even just for her own family—she is making a moral statement about justice or fairness. But notice, although water is

not directly a moral good, *it is a premoral good*. People never know what moral statements about justice actually mean unless they know that these statements are about the distribution of something premorally good for human beings—something like water, but which is itself not directly a moral good. Water does not have a will and cannot itself act, either morally or immorally. We never say, “Water is moral.” But we do say that “Mary is a moral person.”

The distinction between premoral and fully moral judgments runs throughout our everyday moral and legal discourse whether we are talking about water or whether we are talking about Brunner’s psychophysical goods of sex and procreation, economic well-being, or security and order. Even Brunner’s three psychophysical interests or goods are not moral goods because it is entirely possible to pursue and attain them in totally ruthless and immoral ways. In fact, in covenant theology, it was precisely the purpose of the covenant organization of the spheres of family, market, and state to bring moral order to the pursuit of these premoral interests or goods. Arriving at an analysis of the reality and centrality of these goods and interests was, according to Brunner, the *function of natural law*. It was the task of covenant and its overall narrative about the purposes of life to give moral organization to these interests both internally to specific persons and externally in relation to the spheres of society.

The Western tradition has long had a sophisticated theory of the premoral goods of human sexuality, pairing, and reproduction, which it wove into what I call the “natural law configuration” of marriage—the steady and thickening line of arguments about the necessary natural connections between sex, marriage, family, and children. This argument, started with Aristotle and the later Plato, proceeded through the Stoics and various Church Fathers, got expanded by Aquinas and the medieval canonists, was embroidered by the Protestant Reformers and Spanish Counterreformers, was cast in increasingly secular natural law terms by Enlightenment philosophers in England, France, America, and Scotland, and from there was woven deeply into Anglo-American family law (Browning & Witte forthcoming, chaps. 3–9). I think that much of this natural law argument about sex, marriage, and family life is still pertinent and useful today.

As traditionally formulated, this natural law argument starts with the premoral reality that most humans are social creatures; that they have sexual capacities and desires; that they reproduce by sexual pairing; that their children are born fragile and helpless and utterly dependent on their parents for many years; and that natural ties between humans both induce them to help each other but repel them from sex with each other. These are simple facts and natural realities about human sexuality, reproduction, development, and bonding—neither moral nor immoral, but premoral.

Natural law theorists over the centuries have woven these premoral goods into an argument about how and why humans are naturally inclined

to center, if not confine, their sexual and procreational activities within marriage. The heart of the argument is that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and thus joint parental investment in dependent children. If men and women could have random sex with anyone, men would not only exploit women mercilessly to gratify their sexual drives, but they would also ignore their children, since they would have no certainty of their paternity. If men did not invest in the care of their children, many of those children would suffer or die, particularly as infants, when their mothers were weakened from childbirth and lack of sleep and least capable of carrying for all her children and herself as well. Thus, the natural law inclines rational humans to center if not confine their sex to marriage for the long-term good of their children and of the human species, even though humans still have perennial and sometimes indiscriminate sexual urges. The natural law further inclines a mother to bond deeply with her child during pregnancy and nursing and to nourish and protect it until it has grown. And the natural law inclines fathers to attach to a child that he knows is his own, that looks like him, that is an extension and creation of his being or substance, and that can carry on his name, work, property, and legacy.

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

This argument presupposes that husbands and wives work hard to remain in open and active communication with each other, and especially that they maintain active and healthy sex lives—even when, indeed especially when, procreation is not or is no longer possible. Robust sexual communication within marriage is essential for couples to deepen their marital love and to keep them in their own beds, rather than testing their neighbor's. And marital sex sometimes is even more important when the marital home is (newly) empty, and husbands and wives depend more centrally on each other (not on their children) for emotional confirmation and fulfillment.

This natural law configuration of marriage drew on complex and evolving ideas concerning human infant dependency, parental bonding, parental certainty, paternal investment, kin altruism, incest revulsion,



exogamous (nonincestuous) marriage, and the natural rights and duties of husband and wives, parents and children. But, particularly in its early modern and modern formulations, the argument started with two basic brute realities that every moral and legal system of sex, marriage, and family life must address: that human children need concerted help from their parents for a very long time and that human adults crave regular sex with another a good deal of the time.

Rather than simply pretend that children can thrive equally well with wet nurses and orphanages, with random bottle holders and busy daycare centers, the natural law configuration emphasizes the vital organic bonds between father, mother, and child—what Brunner called the “trinitarian” one-flesh union. Rather than simply pretend that every sexual act must be informed by procreative intent in order to pass moral muster, the more liberal natural law configuration emphasizes that sex and intimacy between married couples is an essential good in its own right, regardless of procreative intent, capacity, or result. The rigid procreative perfectionism and narrow reduction of sex to intercourse featured in some modern Christian sexual ethics and natural law theories, in my view, misrepresents a good deal of the teaching of the natural law tradition (Bamforth & Richard 2008; Browning 2006, 207–10).

I believe that this basic understanding of the nature of sex, marriage, and family life remains a reality, a set of natural boundaries and conditions that any modern system of law, ethics, and morality has to work with. I believe further that the way the traditional natural law theory worked out its system of rights and duties, permissions, and restrictions provides us with a valuable foundation for an integrative theory of marriage.

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

many valuable uses for paternity tests, contraceptives, and ART in modern society, notably for married couples as well. But these modern scientific advances do not, in my view, undercut the core logic of the natural law configuration of marriage.

Also to be sure, the modern welfare state now supplies nonmarital children, single mothers, abandoned spouses, and aged parents with vast new resources traditionally supplied principally by their own natural kin, sometimes supplemented by the church's diaconal and charitable services. These social welfare programs, too, are valuable advances that promote social justice and greater happiness for all. But the availability of social welfare relief does not cancel the ongoing value of stable marital households and natural family networks. The modern welfare state remains an expensive and risky modern experiment, and it is not clear to us that this is a sustainable long-term solution even for the affluent West, let alone for underdeveloped or developing countries. Moreover, even in America today, those who depend exclusively on social welfare, Medicare, and social security often face bitter financial and emotional hardship, and endless bureaucratic wrangling as they seek to secure basic food, health care, and job stability. Better social welfare systems are in place in Europe today. But these, too, depend on high median wealth in the population, all of which can disappear quickly as the examples of Iceland, Ireland, Greece, and Spain—let alone recent cash-strapped American states—has recently reminded the world. The social welfare state is better seen as a supplement to, not a substitute for, the intergenerational care and nurture provided by a stable family structure.

Even as fully developed, this natural law configuration of marriage remains wobbly and unstable. It provides humans only with natural inclinations not preordained behaviors. It channels humans toward naturally expedient acts, but it is not self-executing. Even well-meaning folks stray on occasion from the naturally licit path of sexuality, and some stray all the time. The natural law needs the support of other norms, narratives, and institutions to be fully effective in governing human lives. At minimum, it needs the positive laws of the state to teach these basic norms of sex, marriage, and family life to the community, to encourage and facilitate citizens to live in accordance with them, to deter and punish citizens when they deviate, and to rehabilitate and redirect them to healthier relationships consistent with the norms of natural and civil liberty. It needs the support of other stable institutions besides the state (churches, schools, charities, hospitals, and others) and other stable professionals besides lawyers (preachers, teachers, doctors, mentors, counselors, therapists, and others) to teach, encourage, and implement these natural law norms. And more fully still, this natural law of sex, marriage, and family life needs deeper models and exemplars of love and faithfulness, trust and sacrifice, commitment and community to give its norms more content

and coherence, which traditional theologies of covenant and sacrament uniquely offer.

I do not have time or space here to analyze these corollary institutions and broader narratives centered on the idea of a marital covenant. I would, instead, like to turn to the volley of modern criticisms that have been trained on the natural law theory in general, and as applied to sex, marriage, and family life. I will use my responses to these criticisms to nuance my understanding of the natural law of marriage in light of modern scientific and philosophical advances, and to describe more fully the methods by which to discern its contents and contours.

### MODERN CRITICISMS OF NATURAL LAW THEORY

Three major charges are filed against natural law thinking today. First, many critics complain that natural law theory is “foundationalist”—in the philosophical and epistemological sense of that term. They mean by this that natural law theory aspires to ground moral and legal arguments on irrefutable first principles of reason or on objective empirical data and thereby fails to understand how history, socialization, culture, and inherited linguistic traditions shape our sense of right and wrong, virtues and values. From my perspective, the foundationalist critique would be justified if it were a true representation of how natural law thinking functioned in the Western tradition of marriage. But for the most part, it is not accurate in its description of how natural law worked, at least in many strains of Christian thinking about sex, marriage, and family life.

Second, critics of natural law say that it sees both morality and reality as static and unchanging, which is inconsistent with modern views of the world as dynamic, evolving, and constantly changing. This criticism is partially true; many of the presentations of natural law in the past did view it as unchanging and therefore universal. I will argue, however, that the better models of natural law viewed it as unchanging only at certain abstract levels and that at more concrete levels, both nature and the selective pressures of certain situations injected an element of variability into natural law, often through the concept of natural equity.

Third, several critics, even those favorable to certain forms of natural law, argue that official Roman Catholic natural law teachings are far too act oriented. The Catholic magisterium has read the laws of nature as dictating the specific form that concrete actions should take, especially in the sexual and procreative spheres of life: each act of sexual intercourse between a married couple should be open to life, to conception and the eventual birth of a child, and those acts even within marriage that deviate from this norm are immoral. I agree with this criticism, but also think that the magisterium has adopted a much narrower understanding of the natural law tradition even as it functioned within historical Roman Catholic theology.

*Niebuhr and Ricoeur.* But before I say more about each of these three criticisms, let me turn to the insights of American theologian, Reinhold Niebuhr, and French philosopher Paul Ricoeur, who offer perceptive interpretations of the main strands of natural law thinking, especially as it has been carried by Christian theology and jurisprudence. They have both influenced my thinking, and I want to show how their views help me answer these three sets of criticisms of natural law theory.

Niebuhr both relativizes and humbles natural law, yet still retains it. He claims that there are relatively stable, even though flexible, premoral rhythms of human nature that moral thought and action must respect and stay within. Examples would be the binary nature of the male-female differentiation and the pattern of human parental attachment and investment in their children, both of which in Niebuhr's reading of history and the human sciences should be interpreted as simultaneously flexible yet discernible. Furthermore, Niebuhr believed that there is a role in morality for natural reason's capacity to grasp abstractly the conditions of justice between individuals and nations (*ius gentium*). He was skeptical, however, about abstract reason's capacity to remain uncorrupted by self-serving egotism (sin), especially in the split second between ideal thought and the temptations of concrete action. Nonetheless, Niebuhr believed that natural law—as fragile as it is amidst the contingencies of history and culture—can still have a stabilizing effect on moral and legal thinking and provide important “relative” principles and values that help to avoid absolute relativism (Niebuhr 1964, 197, 253–56).

Paul Ricoeur says much the same thing. Law, for Ricoeur, grows out of our natural desires and needs, which over time give rise to relatively settled patterns of values that in turn get codified into institutions and moral principles and finally get formulated into settled legal formulations. The rise of law from these natural needs is an historical process that we inherit from complex traditions that precede us. *The regularities of nature that prompt basic desires are at the beginning of this long historical process and get shaped into law through the filters of accumulated valuations, institutional developments, and priorities flowing from narrative construals of meaning of life.* The end products of this natural and historical process carry important moral codes, principles, and covenants that are mixtures of natural desire, reason, and religio-cultural refinement. Of course, these codes, principles, and covenants also can become distorted by greed, special interests, governmental manipulation, and tyranny. But this is how Ricoeur envisions natural law; he believes that appeals to the regularities of nature and the refinements of natural reason get mixed with the stories we tell about the meaning of life to play a role in shaping morality and law. Ricoeur believes natural law, when abstracted or “distanced” from this historical process, can function “as a concept of protestation” (Ricoeur 1978, 188). It can function as a restriction, limitation, and critique of the

arbitrary judgments of legal positivism, domination by the state, or the heavy hand of convention and custom when they disregard our central natural tendencies. Nature gives us a flexible but bounded ballpark within which our moral and legal aspirations must play. Hence, both morality and law must begin with the accomplishments of history and use natural law for protest, limitation, critique, and refinement.

*The foundationalist complaint.* Both Niebuhr and Ricoeur seem to agree—and I agree with them—that foundationalist approaches to natural law are wrong. Such approaches repress traditions—along with their metaphors, wider narratives, and gradually accumulated codes and covenants of morality and law—and attempt to move directly from nature and reason to moral norms and legal formulations, forgetting the accomplishments of the past.

I would reject traditional natural law theories if they really worked that way. But the reality is that natural law never functioned that way in Aristotle, the Stoics, the Bible, Augustine, Aquinas, Calvin, Althusius, Grotius, Locke, and various Enlightenment philosophers. In these traditional sources, appeals to nature (its premoral tendencies and goods) as well as reason always functioned within a larger history of events, stories, and norms. More focused natural law arguments refined and mediated between conflicting normative formulations generated by the give and take of historical forces, accumulated experience, and distortions of power whether in politics, war, or greed.

Niebuhr and Ricoeur properly saw this. So does contemporary Catholic natural law theologian Jean Porter. Her powerful and extensive writings on natural law demonstrate how it functions within the context of historical narrative. In the case of Christianity, she says, appeals to nature and reason are made within the context of theological assumptions about the “goodness of creation.” The appeal to the narrative of creation, she shows, was also true for Aquinas and other medieval scholastic thinkers who did so much to refine and implant natural law thinking into Western theology, ethics, and law. Because creation as a whole, as depicted by Genesis 1 and 2, was made by a good God, all natural or premoral needs and impulses were thought to be ontologically good before the eyes of God. In fact, in contrast to certain Gnostic interpretations of nature, the scholastics were far more faithful to Genesis in seeing all prerational inclinations of nature—even our sexual inclinations—as good, not in the fully moral sense but in the premoral sense of potentially giving rise to and supporting more rationally justified moral values and principles (Porter 1999, 201–14).

Of course, the medieval scholastics and many natural law theorists after them were united in seeing sex outside of marriage as morally evil. They were also united in holding that the natural impulses to sexual union must, overall, go hand-in-hand with the natural impulses to procreate,

continue the human race, care for and raise children, and provide for the interrelatedness of the cycle of the generations through enduring expressions of kin altruism. In other words, natural law in the scholastics held an integrated view of sexuality that brought together sexual desire, procreation, childcare, and the mutual reinforcements of the generations within the institutional boundaries of marriage. *In fact, it integrated several distinguishable needs into a reinforcing whole* (Browning et al. 1997, 335–43). But this did not mean that every single act of sexual intercourse had to intentionally integrate these values; it meant that this integration was the overall purpose of the institution and covenant or sacrament of marriage.

#### THE COMPLAINT THAT NATURAL LAW IS STATIC

The second complaint about natural law is that it is static and pretends to be unchanging and therefore universal. This criticism accepts the modern view that nature, life, and reality are constantly changing either under the impact of evolutionary variation (as the natural sciences teach) or the contingencies of history (as poststructuralism proposes). Both these perspectives now dominate the humanities. From either perspective, natural law can look completely passé. But a careful reading of the tradition reveals that it understood the natural law to be more flexible than this caricature imagines.

At certain abstract and general levels, the natural law tradition may justifiably claim unchanging universality. For instance, consider the thin moral reason view of natural law found in Kant. Kant's categorical imperative—that I should never “act in such a way that I could not also will that my maxim should be a universal law”—claims, as it says, universality and unchangeability (Kant 1959, 18). But many commentators who complain about Kant's claim also admit that the imperative has partial validity for both morality and law. The problem, they might say, is that the imperative stands alone in Kant's formulation; it is disconnected from the premoral goods of natural desire as well as the pressures of history that would qualify what universality might mean in particular circumstances.

The charge of false universality and abstractness can apply as well to the Golden Rule in Matthew 7:12 (“Do unto others as you would have done unto you”) or the New Testament principle of neighbor love in Matthew 19:19 (“You shall love your neighbor as yourself”)—and their common identification as central principles of both the natural and revealed law. It is generally recognized that variations of these two principles show up in all the world religions and are in this sense universal. And the analogies between them and Kant's categorical imperative are obvious. The same criticisms of Kant are often aimed at these principles; they are said to be abstract and hence indeterminate as to what exactly they mean for the moral organization of premoral values in specific social situations. It should be

noticed that natural law in this more abstract Kantian sense is widespread in contemporary marriage and family law theory, many of them influenced by neo-Kantians like John Rawls and Susan Okin. And in various ways, all of them shortchange the premoral levels of moral and legal thinking that are more adequately captured by robust forms of natural law that take nature itself seriously.

*Jean Porter and species-limited natural law.* In modern intellectual circles, it is generally not respectable to view the totality of human life in rigidly universal or teleological terms—any view that believes life moves toward fixed ends governable by universal rules. Evolutionary theory tells us that species evolve. But though that is doubtless true, there are good reasons to believe that the concept of “a species” is relevant to ethics—especially ethics modeled after natural law. As long as a particular species exists, it must live within a range of inherited traits adapted to its likely average expectable environment. This observation prompts Jean Porter to ask: “But is this not the kind of teleological language that has been ruled out by Darwinian biology?” Her answer is no, not really. She writes:

As Ernst Mayr points out, in order to answer such a question it is necessary to distinguish among different senses of teleology as applied to biological processes. If biological tendency is interpreted in a way that implies that the process of evolution is itself intrinsically directed toward some ultimate goal (such as ourselves), or else that specific features of living creatures are the direct products of conscious design, then this idea is ruled out by Darwinian biology. However, if an appeal to teleology is meant to indicate that individual living beings characteristically act in certain ways that can best be interpreted as goal-directed behavior, then in that sense the idea of teleology is fundamental to biological science. (Porter 1999, 217; Mayr 1988, 38–66)

This line of reasoning suggests that biology supports the idea that there are species with specifiable traits and that these traits shape their goals and behavioral boundaries. Building on the work of biologist and philosopher Rowland Stout, Porter claims that we can adequately account for the possession of the characteristic traits of biological species only through an appeal to the purposes that those traits serve within a given kind of environment for the species considered as a class. This does not imply conscious design, as Stout insists, but it does imply that when we speak of the purpose of a trait or tendency in the human species, we are referring to something that has an objective existence prior to our choice in the matter (Porter 1999, 218; Stout 1966, 99–111).

When Mayr uses the phrase “goal directed” or Stout the word “trait,” they mean them in the premoral sense, and not the fully moral sense. But Porter uses their ideas to suggest that natural law’s analysis of a species’ central tendencies does illuminate the premoral and prerational dimensions

of what at the human level should be taken into account by morality and the law.

*Mary Midgley and living in nature's ballpark.* Porter's views can be supported by the philosophical reflections on the moral and legal relevance of sociobiology and evolutionary psychology offered by the British moral philosopher Mary Midgley in her *Beast and Man: The Roots of Human Nature* (1978). Midgley does not set out to save or reconstruct natural law theory, but her work has implications for this task. In contrast to more static views of nature so widespread in some older formulations of natural law, Midgley writes that the central biological tendencies of the human species now being uncovered by these scientific disciplines, "must be accepted, and the right line of human conduct must lie somewhere within the range that they allow. . . . These general motives are innate, but are wide. Guidance within their limits comes from balancing their various possible expressions with one's other motives, in light of a proper system of priorities" (Midgley 1978, 81–82).

Much of Midgley's argument has to do with confronting what evolutionary psychology tells us about the conflict between kin altruism and other natural tendencies toward individual survival, reactive aggression, and safety. Midgley clearly gives moral priority to kin altruism—as did many natural law theorists of the family from Aristotle to the Enlightenment. But she does not ignore the other human tendencies. I believe that such a view of natural law constitutes crucial but limited naturalistic boundaries for moral and legal theory; it should function within a larger hermeneutic that provides the "system of priorities" for which she calls.

*Larry Arnhart, Aristotle, and evolutionary psychology.* The views of Porter and Midgley are similar, but not identical with the natural law views of political scientist Larry Arnhart. Arnhart sees a straight line of highly analogous natural law thinking from Aristotle, Ulpian, and Aquinas to contemporary sociobiology and evolutionary thinking. All of them hold that our biological human nature provides certain preliminary indices of our basic—or what I call our premoral—human goods that are relevant to normative morality and law but, at the same time, are not completely sufficient in themselves as moral indicators (Arnhart 1998). Arnhart writes:

A Darwinian view of human nature can support the natural law reasoning of Thomas Aquinas (1225–1274). The biological character of natural moral law is suggested by the famous statement by Ulpian (d. 228 A.D.), an ancient Roman jurist: "Natural right is that which nature has taught all animals." (Here the term "natural right [*ius naturale*] is interchangeable with "natural law" [*lex naturalis*].) To illustrate the natural inclinations that human beings share with other animals, Ulpian referred to the sexual union of male and female and the parental care of



offspring as animal propensities that sustain human marriage and family life in conformance of natural law. (Arnhart 2001, 1–2)

This quotation illustrates the wisdom of Porter's limitation of natural law to specific species. All mammals have strong tendencies to reproduce offspring, but they differ in their childcare patterns, with only a few (gibbons, elephants, and humans) involving males in the long-term care of infants and children (Daly & Wilson 1978, 142, 201). Aquinas already knew that species differ on male investment in their progeny. Aquinas believed that for the human species the natural basis for male investment has to do partially with the lengthy period of dependency of slowly developing human infants; it is so slow and long and it places such a burden on the mother that she requires the assistance of her male consort. In saying this, Aquinas anticipated a view widely held today in much of evolutionary psychology, neuroscience, anthropology, and positive psychology (Browning et al. 1997, 113–24). But there were additional reasons for male investment according to Aquinas. One was the human male's intuitive and cognitive capacities to recognize that a child was actually his and therefore a continuation of his own bodily substance—a substance that the father can identify with and care for as he does his own body. In making these implicit qualifications to Ulpian's over-generalized formulation of the continuity between humans and animals, Aquinas both preserved some of this Roman jurist's Aristotelian and Stoic insights while at the same time perceptively anticipating modern scientific views for the grounds of human, especially male, investment in offspring and how this is carried into and stabilized by the institution of marriage. Aquinas's insights became axiomatic for many later Catholic, Protestant, and Enlightenment thinkers from the sixteenth to twentieth centuries who wrote similarly of kin altruism and paternal investment in children but without the benefits of modern evolutionary biology and psychology (Browning and Witte forthcoming).

Arnhart grounds natural law and rights in human nature. Human nature—more specifically the structure of human needs and desires—gives rise to natural rights, and humans have a natural and lawful justification to pursue and satisfy them. These needs and desires are rooted in human biology. “According to the ancient Greek notion of ‘natural right,’ which appears in Aristotle's writings, human beings, like all natural beings, have natural ends, so that whatever fulfills those natural ends is naturally good or right for them.” Although all natural beings have natural ends, even here Aristotle seems to hold a species-specific view of natural law and rights. Furthermore, although Aristotle and Darwin held very different worldviews, Arnhart believes that modern evolutionary biology projects a similar view of human nature to the one held by Aristotle. It is a view that sees self-preservation, self-protection, sociality, parental bonding

with offspring, conjugal attachment between mothers and fathers, group attachments, and aspirations for status as pervasive natural and boundary-setting tendencies in human beings (Arnhart 1998, 3–6).

Arnhart, however, is a philosophical foundationalist in his approach to natural law and rights in ways not consistent with my position. He starts with human nature as depicted by science and draws normative conclusions from his empirical studies—a *prima facie* case of moving from “is to ought.” For both Aristotle and Darwin, according to Arnhart, the bonding of natural parents with their children and the conjugal bonding of husband and wife are two of the most fundamental clusters of human needs and thus of natural rights. Arnhart spends entire chapters on each of these two types of bonding. Nonetheless, Arnhart is enough of an Aristotelian to finally admit that these natural desires also must be guided by habits, customs, and traditions of practice. He eventually acknowledges that balancing these desires and needs within ourselves and with those of other people is the task of Aristotelian *phronesis* or prudence (Arnhart 1998, 46). Prudence is not an abstract universal principle such as Kant’s categorical imperative. It is, according to Aristotle and Arnhart, a delicate judgment.

I would say, however, that even though prudence is rooted in human nature it also needs the guidance of culture, narrative, and inherited practices. It needs the additional experience and wisdom of a tested tradition to help it prioritize the natural premoral tendencies and goods that conflict within individuals and between individuals and other people. Arnhart believes that the natural desires of human beings constitute a general universal norm for morality and politics, but he also admits that there are no universal concrete rules for what should be done in particular circumstances. Guidelines in concrete circumstances, I believe, would require the supplements of culture and narrative, including the contributions of religious narratives about covenant.

*Paul Ricoeur and natural law.* It is appropriate to reintroduce to this discussion of the second criticism of natural law’s alleged static qualities Paul Ricoeur’s critical hermeneutical approach to natural law and rights. Ricoeur’s approach would not completely exclude Arnhart’s grounding of human rights in biological tendencies, but it would significantly recontextualize this approach. Ricoeur, as we have seen, bases natural law and rights more on tradition. Ricoeur is a nonfoundationalist. A person’s moral understandings, even his view of human rights, are for Ricoeur mainly mediated by various historical and religious traditions even though they build on and refine basic human needs and desires. Furthermore, these traditions always convey a surrounding narrative—a narrative expressed through metaphors, symbols, and myths that define

the origins and destiny of life and suggest the contours of the ultimate context of experience (Ricoeur 1967; 1981; 1988).

But both Ricoeur and Arnhart have an appreciation for the role of practices, habits, and customs in human life; their difference is found in what they do with these practices in their reflection on natural law and natural rights. Arnhart starts with our biological desires and needs and ends with how they must be selectively shaped by habits and cultural learning. *Ricoeur starts with our practices, habits, and tradition-mediated customs and narratives and then examines what they reveal about your desires and needs, especially those that are more central and deserving of enhancement* (Ricoeur 1987, 100–03).

This view has implications for the grounds of natural law and rights within marriages and families and well beyond. Human rights are discovered in the classic practices of a religio-cultural tradition, but even then they are clarified by interpreting that tradition as a whole. Ricoeur calls this the “long detour” in discovering basic human rights (Ricoeur 1981, 17–19). Ricoeur would be sympathetic, up to a point, with Arnhart’s effort to ground human rights in human needs and desires. There is even some evidence he would be sympathetic with the centrality that Arnhart gives to conjugal bonding and parenthood (Changeux & Ricoeur 2000, 192, 225). But he arrives at his understanding of desire and need from a completely different angle (Ricoeur 1978, 176–80; 1987, 100–04). According to Ricoeur’s critical hermeneutic perspective, humans know their desires and needs through linguistically interpreted practices that define and establish acceptable ways to satisfy them. In contrast to Arnhart’s foundationalist view, Ricoeur insists that we do not experience our desires as brute forces bubbling directly into consciousness from our bodily appetites. We experience these needs but always as interpreted by linguistic traditions mediated by parents, other people, and institutions. The desires and needs are there, but their voices are muted and construed by linguistic traditions. This is where the institutionally mediated metaphors of covenant and sacrament come into the picture by helping us further define our sexual and parenting desires.

This does not mean that Ricoeur would not honor the contributions of science for clarifying the weight of different claims about human rights. Hence, Ricoeur can find a place for Arnhart’s perspective, but only as a “diagnostic” contribution, not as a foundationalist beginning point (Ricoeur 1966, 12–13, 87–88; 1970, 436–37). What does this mean? It means that the long history of a narrative tradition—and possibly many traditions—is the principal source of our interpretation of needs and desires and the claims they make on behalf of natural law and human rights. A natural science—be it biology, human ecology, or psychology—can for Ricoeur only provide additional explanations and diagnostic insights into our first-order linguistically encoded and tradition-saturated

experience—what Hans-Georg Gadamer (1982, 267) calls our “effective history”—and what it implies for which desires can justifiably claim the status of publicly acceptable human rights. For example, when our innate reactive hostility knocks on the door of consciousness, our inherited traditions generally say “no” except in dire circumstances of self-defense. To our sexual and procreative needs, we are taught by these traditions to say “yes,” but under the conditions of certain institutional arrangements such as marriage.

*Bernard Chapais and the witness of primatology.* I conclude this discussion of the complaint that natural law is static with new insights from the fields of primatology and social anthropology—especially the work of Bernard Chapais. His contributions both confirm and advance the refinements to natural law theory by Porter, Midgley, and Arnhart. They also support and deepen insights from the Western tradition about the centrality of kin altruism, biparentality, paternal recognition and care of offspring, and pair bonding for what they mean for marriage and indeed for what they mean for being human. And they have implications for the reconstruction of natural law. Chapais’s work at once supports Porter’s emphasis on species-specific characteristics, Midgley’s emphasis on morality staying within the central tendencies of a species, and Arnhart’s belief that the combined insights of Aristotelian-Thomism plus modern evolutionary psychology can yield a list of these central human tendencies and needs.

Chapais’s work restores to anthropology the importance of kinship as an analytic and comparative category. Kinship was central to British anthropology and the closely related work of French anthropologist Claude Lévi-Strauss. But in recent decades anthropologists, such as University of Chicago scholar David Schneider, have argued that kinship is a thoroughly cultural reality and has no grounds in biology or human nature (Schneider 1980; 1995; Schneider & Cottrell 1975). This view has dominated anthropology and cultural studies for the last thirty years, and it has undermined the crucial role that kin altruism played in the natural law tradition.

In his *Primeval Kinship: How Pair-Bonding Gave Birth to Human Society* (2008), Chapais promotes two central theses, both of which refute Schneider’s attempt to undercut the reality of human kinship. First, he argues that humans are unique in their consolidation of biparentality and the mutual recognition of fathers and their offspring. He writes: “The evolution of long-term breeding bonds (pair bonds) in the course of evolution transformed a promiscuously mating group into a group composed of biparental families (whether monogamous or polygamous). From that time on, children were in a position to recognize their fathers, and the fathers their children.” Second, he builds on, yet qualifies, Claude

Lèvi-Strauss's thesis that the human species is also uniquely characterized by incest avoidance and exogamous marriage. These characteristics, plus biparentality, point to what both Lèvi-Strauss and Chapais call the "deep structure" of human societies. Echoing Lèvi-Strauss, Chapais says, "reciprocal exogamy" was a universal structure of human society, one that embodied primitive social organization, and marked the "transition from nature to culture." But whereas Lèvi-Strauss saw this as residing in the deep cognitive capacities of the human mind, Chapais shows it was a product of human evolutionary history with prehuman building blocks that led to their consolidation in humans (Chapais 2008, 10, 194).

But how did this evolution come about from uterine kinship or later male kinship in our primate ancestors based on multiple male-female relationships to still later stable pair bonding, exogamous marriage, and biparentality at the human level? The story is long and complicated. I give a brief summary not to assert that Chapais's rendition is definitive but to point to a significant new intellectual turn that brings kinship and kin altruism back to the center of the social anthropology (thereby supplementing evolutionary psychology) after a period when the idea was dominant that kinship and marriage had no biological basis, were strictly social constructions, and provided no insight into the deep structure of human existence. Chapais's perspective has had a favorable critical reception (Stone 2008, 557–62) and strengthens the natural law implications of thinkers such as Midgley, Arnhart, and Porter.

The story goes like this. Chapais starts with the work of anthropologist Robin Fox who provided an evolutionary-biological basis to Lèvi-Strauss's cognitive structuralism. The "exogamy configuration"—Chapais's summary concept for the deep structure of human existence—is made up of multiple building blocks. There was a time when humans split off from their chimpanzee and bonobo relatives, carried with them some of the blocks visible in these species, and then built on yet developed innovations to these blocks. For example, before this split, a building block of kinship recognition was visible in prehuman species in the form of uterine kinship—sibling recognition of those born of the same mother. Then this elementary form of kinship was supplemented by agnate-defined kinship when males of some species began exchanging mates with other male-dominated groups, partially to develop peaceful alliances with their competitors. Females changed residences and began to form early signs of pair bonding and biparentality (Chapais 2008, 35–39, 43–47, 190–94, 203–04).

These blocks constituted crucial features of what Chapais calls the "exogamy configuration" at the human level—a constellation made of "stable kin groups, enduring breeding bonds between particular males and females, a dual-phase system of residence patterns (premarital and

postmarital), incest avoidance among co-residential close kin, kinship bonds that extend beyond the local group, lifetime bonds between brothers and sisters . . . , recognition of in-laws, and matrimonial exchange (exchange of spouses between groups).” Implicit in this list are the ideas of biparentality (recognition and care of offspring by both father and mother) and kin altruism (preferential treatment of offspring by both mother and father). According to Chapais, this set of evolutionary building blocks is present here and there in predecessors to humans such as apes, chimpanzees, and bonobos. But they *all come together and are integrated into a unified whole at the human level*. When integrated into a reinforcing whole, Chapais argues that they constitute the key to the deep structure of human society that developed after humans split from their closely related primate and hominid relatives. Pair bonding, biparentality, and long-term coresidency of male and female in support of their dependent offspring were especially important building blocks of rudimentary forms of the marital relationship. Males began caring for their offspring (or at least showing them preferential treatment), partially to consolidate their relationship to the mother and partially because their own developing cognitive capacities led them to discern the dependent infant was likely their own, looked and smelled similar to them, and was part of their own substance (Chapais 2008, 12, 158–63).

Notice the similarities between Chapais’s view of the evolution of human paternal involvement in childcare and the reasons for paternal care for offspring advanced by Aristotle and Aquinas and early modern natural law theorists—all working long before Darwin’s evolutionary framework provided new explanatory insights. Long-term paternal care of offspring is a unique feature of the human species that distinguishes it from its male primate predecessors even though it built on and transformed that which preceded it. Chapais acknowledges that biparentality may be disguised in some human societies where women appear to raise their children and not reside with the males who fathered them. But, according to Chapais, the preferential treatment of offspring by their father and the recognition by the child of their father are present anyway and unique to humans; they are universal at the human level although sometimes obscure. They are features that generally have been embodied in more advanced societies in stable polygamy for the wealthy few and stable monogamous marriage for the vast majority (Chapais 2008, 159).

Chapais does not address the history of natural law and its various arguments. But he extends and deepens arguments about the role at the level of the human species of kinship, human infant dependency, biparentality, and pair bonding that we have seen in sundry traditional expositions of the natural law configuration, and in the recent work of Midgley, Arnhart, Porter, contemporary evolutionary psychology, primatology, and social anthropology. Such consolidations of these various building blocks are

not inevitable in light of human plastic motivational and evolutionary proclivities, but they do constitute the central tendencies of our species, which as Midgley argued, it is wise to stay within. The emerging scientific picture of the evolution of these tendencies into stable features of *homo sapiens* was, as we have amply seen, roughly anticipated by significant numbers of earlier philosophical, legal, and religious proponents of natural law.

*Complaint that natural law is act oriented.* The third main criticism against natural law theories of sex, marriage, and the family is that they exaggerate the moral importance of each sexual act—rather than evaluating sexual acts within an overall life trajectory as to whether they as a whole contribute to marital commitment and generativity. This charge is mainly directed against Roman Catholic natural law sexual ethics as developed in later nineteenth- and early twentieth-century social teachings, especially their mandate that each marital sexual act should be open to the possibility of new life. The advent of new birth control methods and their subsequent prohibition by a series of Roman Catholic encyclicals, especially *Humanae vitae* (1968), further helped to shape this act-oriented interpretation of marital intercourse. It was considered an immoral infraction of the natural law to willfully interfere with the natural link between a sexual act and the possibility of the birth of new life. These Catholic documents sometimes acknowledged that sexual pleasure contributed to intimacy and the unitive values of marital sex. But even then only insofar as the values of pleasure and intimacy do not usurp openness to new life in every act of marital sex. The Catholic Church's position not only governed sexual exchange between the church's own married couples. Because of the universal claims of a certain construal of natural law upon which it was advanced, the argument was seen to apply equally to the general public. It therefore was thought ideally to define the nature and purpose of marriage for everyone.

*Robert George.* The distinguished Roman Catholic legal philosopher, Robert George, influenced by *Humanae vitae* and the new natural law movement headed by Germain Grisez (1983, 1993) and John Finnis (1983), gives particularly forceful expression to this view when he writes:

Marriage, considered not as a mere legal convention or cultural artifact, but, rather as a one-flesh communion of persons that is consummated and actualized by acts that are reproductive in type, whether or not they are reproductive in effect, or are motivated, even in part, by a desire to conceive a child, is an intrinsic good, and precisely as such, provides more than a merely instrumental reason for choice and action. . . . Marriage, precisely as such a relationship, is naturally ordered to the

good of procreation (and is, indeed, uniquely apt for the nurturing and education of children) as well as to the good of spousal unity. (George 2006, 151)

Notice George's emphasis on acts—specific individual acts that are *reproductive in type* if not in specific intent. I believe, however, that the emphasis on specific acts as being the defining characteristic of marriage diverts attention from the overall trajectory of a marriage. The overall purpose of a marriage might indeed be marked by a one-flesh union of body and spirit and may well be open to the possibility of new life, but not necessarily in each and every marital act. For instance, there might be a place for a judicious use of birth control—say in times of poverty, or where one partner has a communicable disease, or when the couple has a high risk of producing a severely deformed child who will suffer miserably and not survive long. This does not eliminate an overall sense of the one-flesh union and the openness to new life. But the official Catholic view, to the consternation of many Catholic couples and of much of the wider public, does preclude the use of contraception that might appear to inhibit sexual intercourse as a reproductive-type act. For this reason, act-oriented views of the natural law tradition are deeply troubling to many Catholic and non-Catholic intellectuals and laypersons. If the natural law tradition implies such restrictions, they want nothing of it—and neither do I.

*Lisa Sowle Cahill.* A telling response to such act-oriented interpretations of natural law has been advanced by Roman Catholic moral theologian Lisa Sowle Cahill. She writes:

A problem with current official Roman Catholic ethical analysis of sex is that it truncates the meaning of reproduction by using the procreative structure of bodily sex acts to ascertain whether the value of parenthood is represented in a relation of intimacy. It ties the interpersonal and moral value of sex to the structure of separate acts. Sexual pleasure and its integration with intimacy is largely ignored. . . . Deficient moral behavior or inadequate moral analysis can result from truncation or division of the pleasurable, intimate, and procreative meanings. Human sexual experience is complex and complete when all three bodily dimensions of sex are developed through the three levels (bodily, personal, social) and integrated to relationships over time. (Cahill 1996, 112–13)

Note two key points in Cahill's words. First, she emphasizes the importance of integrating the bodily, personal, and social rather than concentrating mainly on the function and supposed natural purpose of specific bodily acts. Second, she emphasizes the importance of this integration "over time" rather than stressing the specific sexual act itself. From my perspective, she advances both a thoroughly natural law argument as well as one liberated from an overly narrow act-oriented perspective.



*Jean Porter.* In a slightly different way, Jean Porter comes to a similar conclusion. She does this by showing that an act-centered ethic of sexuality was not a preoccupation of medieval scholastics. She writes:

Official Catholic teaching on the use of contraceptives, as definitively stated in the 1968 encyclical *Humanae vitae*, is based on an appeal to the structure of the sexual act and its inherent orientation toward procreation, as this is revealed by rational analysis prior to theological interpretation (HV para 16). However, the scholastics do not typically argue in this way. Rather, they focus on the proper purposes of sexuality and marriage as these are revealed through theological reflection, and then they judge particular kinds of acts to be unnatural because they are not in accordance with these overall purposes. (Porter 1999, 197)

Notice Porter's accent on an analysis of the "overall purposes" of sexuality, a point very similar to Cahill's stress on the integration of bodily, personal, and social "over time." Natural law does not need to focus narrowly on the structure of specific sexual acts; it can, and generally did, ground itself in an account of the overall integration of the interpersonal and sexual relationship of a couple over time. This analysis included not only their unique dynamics, but the reality and selfhood of any offspring that might come forth from their union. The child too is part of this one-flesh union, as Brunner so forcefully argued, and its bodily, personal, and social reality must be included in the rational natural law analysis.

#### SUMMARY AND CONCLUSIONS

In this paper, I have tried to defend a theory of marriage that builds on the insights of natural law theory. My starting point is the premoral realities that humans are social and sexual creatures; that humans reproduce by sexual pairing; that human sexual capacities and needs are perennial not seasonal; that human infants are born utterly dependent on their parents' care; that mothers bond with their children through pregnancy and nursing; that fathers will bond with their children when they are assured of their paternity; that mothers, fathers, and children bond with each other when integrated as a group; and that humans are repelled by incest but deeply attached in nonsexual ways to their siblings and relatives, and even their more extended natural kin. These qualities of kin altruism, pair bonding, incest revulsion, exogamous union, childhood dependence, parental recognition, and paternal attachment are the natural realities of human life. They are also, in some formulations, the elementary building blocks of human evolution. Together they form, what Bernard Chapais called, the "deep structure" of the human species.

How we come to discover and understand these premoral realities of human nature, interaction, and reproduction has long been a contested issue in the tradition, and that remains true today. I have rehearsed various methodological strategies and examples—from empirical and

experimental investigations, to comparative cultural and sociological analysis, to philosophical speculation and construction. I am most attracted to the methodology of Paul Ricoeur, who recognizes the presence of these natural instincts, inclinations, and intuitions in human lives, but shows how each culture variously orders, prioritizes, and acts on them based on experience, reason, tradition, and an ontology that comprehends the full complexity of human experience. However they are discovered, defined, and defended, I believe that these basic realities of human nature, interaction, and generation must form the foundation of any integrative theory, ethic, and law of marriage and the family. A normative system that defies these natural realities will not long work in practice, however cogent it might be in theory.

Historically and today, various Christian writers have woven these pre-moral natural qualities of humans into natural law arguments about the proper ordering and organization of sex, marriage, and family lives. On the one hand, they used natural law arguments to single out various sexual activities that defied or damaged human nature and the natural rights of men, women, and children: fornication, adultery, concubinage, prostitution, incest, rape, polygamy, desertion, child abuse, wife abuse, no-fault divorce, and more. On the other hand, they used natural law arguments to channel and encourage men and women to follow their natural instincts toward exclusive and monogamous unions, mutual comfort, care, and protection of each other, healthy and regular sex and other forms of communication, mutual investment in the care, nurture, and education of their children, intergenerational care for their natural kin, and presumptive provision for their dependents even upon divorce or death.

These natural law arguments of sex, marriage, and family, too, have long been pressed on various grounds, and defended with various rationales. In early iterations, these natural law arguments were sometimes combined with arguments from the Bible and cast in static universal terms. More recent Christian natural law theorists, however, have defended natural law arguments on more empirical, scientific, and evolutionary terms and recognized the inherent plasticity and necessary adaptability of some of its provisions. In some Catholic iterations today, these natural law arguments proceed with a rigid moral perfectionism and narrow analytical casuistry that some view as complex rationalizations for predetermined dogmatic stands on sex, marriage, and family life. Most Christian natural law theorists, both Catholic and non-Catholic, and both historical and contemporary, have adopted a far more flexible and holistic theory of natural law and the goods and goals of marriage.

It must be said that the natural law configuration of sex, marriage, and family, while foundational to any integrative theory of marriage, cannot operate alone in a complex modern society, because it is not self-executing.

The natural law needs other institutions and practices, other ideas and narratives to stabilize, channel, and direct it. Law and theology, state and church—holding out contracts and covenants of marriage respectively—are among these essential resources. But that is an argument for another—and much longer—article.

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