Natural Law, Marriage, and the Thought of Karol Wojtyla

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Abstract

This Article examines the loss of the natural law perspective from legal theory and the movement towards liberal theory. The Article continues by analyzing two features of the natural law tradition as described in the philosophical writings of Karol Wojtyla. The first feature concerns marriage and family as the fundamental human community. The second considers marriage as a virtuous relationship. The Article concludes with practical suggestions for the legal profession and legal education with regard to counseling clients about marriage.

KEYWORDS: natural law, marriage, divorce, Karol Wojtyla
NATURAL LAW, MARRIAGE, AND THE THOUGHT OF KAROL WOJTYLA

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INTRODUCTION

At the mid-point of the last century, Dean Roscoe Pound wrote that the legal profession constituted “a learned art as a common calling in the spirit of public service.” Yet, contrary to this wonderfully noble appreciation of our profession, lawyers may sometimes take an unreflective and mechanistic approach when counseling a client who is considering a divorce. Over the last five decades, the national divorce rate has risen to approximately fifty percent. Recent significant statistical evidence indicates that the culture of divorce has left neither divorced spouses nor their children in a more advantageous situation. The natural law tradition has long perceived a nexus between the general well being of society and the health of marriage and family life. In the natural law

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1. ROSECOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).


3. WAITE & GALLAGHER, supra note 2, at 188 citing BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997 tbl. 145 (117th ed. 1997) (noting statistical indications that during the last years of the twentieth century the national divorce rate has leveled-off and may be declining slightly).

4. JUDITH S. WALLERSTEIN ET AL, THE UNEXPECTED LEGACY OF DIVORCE, A 25 YEAR LANDMARK STUDY 294-316 (2000) (concluding that a twenty-five year longitudinal study showed that the “divorce culture” yields long term negative consequences for individuals, families and society). See also WAITE & GALLAGHER, supra note 2, at 188 (indicating that married persons, who have never been divorced tend to be physically emotionally, and financially better off than divorced persons. This distinction is also true of the progeny of both groups).

5. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 86-87 (1980) (identifying marriage and family as a fundamental good for society); JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986) (“Monogamy . . . cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public’s atti-
tradition, if marriage is understood as a private, inner experience rather than an objective social reality, the social foundation is destabilized.\(^6\) This essay suggests that natural law affords a more complete and balanced understanding of marriage and family life than the present mainstream perspective, which has its roots in liberal theory.\(^7\)

It is far beyond the modest aims of this essay to provide a complete historical and philosophical analysis of the natural law tradition on marriage or of the developments that have led to the demise in the United States of that tradition.\(^8\) Rather, I shall discuss the loss of the natural law perspective from legal theory. Following this prolegomenon, I shall attempt to sketch in broad strokes two features of the tradition, especially as retrieved in the philosophical writings of Karol Wojtyla.\(^9\) The first concerns marriage and family as the fundamental human community, and the second considers marriage as a virtuous relationship. The two features are contrasted with certain aspects of the understanding of

\(^6\) Waite & Gallagher, supra note 2, at 10 (claiming that marriage is viewed “as an inner emotion rather than an outer reality”).

\(^7\) Mary Ann Glendon, Abortion and Divorce in Western Law, American Failures, European Challenges 115-16 (1987) (describing the influence of liberalism on the rights language of family law). Liberalism has liberty as its “principal value.” These liberties include: civil, fiscal, political, personal, and domestic liberties. Robert Song, Christianity and Liberal Society 46 (1997). See also Mary Ann Glendon, The Transformation of Family Law, State, Law, and Family in the United States and Western Europe 63-81 (1989) (describing the philosophical change in divorce law during the last decades of the twentieth century).

\(^8\) For a discussion of natural law in general, see Ioannes Paulus Pp. II, “Litterae Encyclicae Veritatis Splendor (Die 6 m. augustis a. 1993),” 85 Acta Apostolica Sedis (“AAS”) 1133-1228 (1993) (discussing natural law). To affirm the existence of the natural law of marriage follows from reflection on human nature, as these universal and transcendent principles are said to be “written and engraved in the heart of each and every man.” Veritatis Splendor, 44. For a discussion of the role of natural-law principles in jurisprudence, see generally Finnis, supra note 5. See also Lloyd L. Weinreb, Natural Law and Justice 224-265 (1987). Nonetheless, the role of natural law is far from settled in contemporary American jurisprudence. The chief objection to the theory seems to be that “[e]ither the allegedly universal ends are too few and abstract to give content to the idea of the good, or they are too numerous and concrete to be truly universal.” Roberto Mangabeira Unger, Knowledge & Politics 241 (1975). See also John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 48-54 (1980) (examining natural law).

\(^9\) Karol Wojtyla, Person and Community (Theresa Sandok trans., 1993); Wojtyla, supra note 5; Karol Wojtyla, The Acting Person (Andrew Potocki trans., 1979).
marriage derived from liberal theory. The essay concludes with practical suggestions for the legal profession and legal education with regard to counseling clients about marriage.

At the outset, it must be mentioned that this essay is not intended to propose that divorce be eliminated from the law of the state. To be sure, it would probably be impossible to return our present pluralistic society to a time when divorce was not an option. Yet the culture of divorce and its consequences for individuals and society indicate that perhaps the legal profession ought to pause and reflect about the impact of the current state of affairs. In contrast to an approach in which the lawyer unreflectively views facilitating a divorce as a mechanistic procedure, the natural law alternative suggests, when counseling clients, lawyers might benefit by appreciating the profundity of the marital relationship. Such an appreciation would be beneficial in maintaining a balanced perspective on what is at stake for individuals, spouses, children, and society as a whole.

10. Given its roots in medieval canon law, the original common law did not recognize divorce in the modern sense of that term, which indisputably dissolves marriage and carries with it the right of the parties to marry other persons. Rather, it permitted only separation, that is divorce a mensa et thoro (literally from table and bed—a soft form of divorce which is a separation of the parties by law, rather than a dissolution of the marriage). John Witte, Jr., From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition 159-161 (1997). During the nineteenth century in the United States, the development of divorce jurisdiction tended to imitate the English system of parliamentary or legislative divorce. Maynard v. Hill, 125 U.S. 190 (1888) (upholding the competence of a territorial legislature to dissolve a marriage through a special act). Gradually, the device of legislative divorce ceded to judicial jurisdiction with rather limited grounds upon which a suit for divorce might be brought. For example, in New York State the law permitted divorce only to be granted on the ground of adultery. Brady v. Brady, 64 N.Y.S.2d 891, 893 (1985) ("Prior to 1966 amendments to the Domestic Relations Law, the sole ground for divorce in this State was adultery.") Since a legislative reform in 1966, New York's approach has permitted an action for divorce on any one of four fault grounds and two so-called "no-fault" grounds. N.Y. Dom. Rel. Law § 170 (McKinney 2001).


12. See, e.g., Robin Fretwell Wilson, Children At Risk: The Sexual Exploitation of Female Children After Divorce, 86 Cornell L. Rev. 251, 262 (noting that the risk of sexual abuse of female children escalates following divorce).
I. THE DEMISE OF THE TRADITION

During the renaissance of law from the eleventh to the thirteenth centuries, the medieval canonists integrated various aspects of religious and secular thought to create a natural law theory of marriage.\footnote{13. Harold Berman, Law and Revolution, The Formation of the Western Legal Tradition 225-230 (1983); Witte, supra note 10, at 22-25 (discussing the “sacrament of marriage model”).} The theory held that marriage was a permanent association between a man and women intended to nourish the bond of conjugal love and to enable the procreation and education of children.\footnote{14. Witte, supra note 10, at 25.} Among the principal effects of the new legal theory were greater equality for the wife; a focus on the mutual and free consent of the spouses as necessary to the validity of marriage; and the possibility of permanent separation from bed and board in cases of adultery, desertion or protracted ill treatment.\footnote{15. Berman, supra note 13, at 228-29; Witte, supra note 10, at 160-61.} Although the theory was consistent with the Christian view of marriage, it was thought to stand independent of revelation; it viewed marriage as an association derived from nature for the good of individuals and especially for society.\footnote{16. Berman, supra note 13, at 228; Witte, supra note 10, at 25.}

A sea change in the understanding of law itself during the eighteenth century belied the general concept of the natural law as well as its position on marriage. A foundational principle of the common law recognized that there existed a superior body of law by the test of which all positive law\footnote{17. George Whitecross Paton, Jurisprudence 6 (G. W. Patton & David P. Derham eds., 4th ed. 1972) (defining positive law as a “general rule of conduct laid down by a political superior to a political inferior”).} was to be judged. In application this meant, for example, that although the sovereign might be above the positive law, he or she was bound by the natural law.\footnote{18. See generally Weinreb, supra note 8, at 15-126 (discussing the development of natural law theory through history); see also John Locke, Second Treatise of Government, in An Essay Concerning the True Original, Extent, and End of Civil Government §135 (Peter Laslett ed., 1988) (“The rules that they make for other men’s actions must, as well as their own and other men’s actions be conformable to the law of nature.”).} Blackstone wrote that the common law was “founded in principles that are permanent, uniform and universal... which every man has implanted in him.”\footnote{19. 4 William Blackstone, Commentaries 846 (1769). After proclaiming that natural law is a higher law than the common law, Blackstone claimed that Parliament is omnipotent, and it would seem to follow that an act of the Legislature could over-
from, or at least consistent with, the natural law, was widely accepted in the Colonies at the time of the American Revolution. It was of particular importance in matters of equity, when a chancellor’s decision rested on reason and conscience. In *Wightman v. Wightman*, the famed Chancellor James Kent declared a marriage invalid on the ground of the lack of proper mental capacity of one of the parties:

That such a marriage is criminal and void by the Law of Nature, is a point universally conceded. And, by the Law of Nature, I understand those fit and just rules of conduct which the Creator has prescribed to Man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared by Divine Revelation.

Kent’s reasoning reflected the classical notion of natural law as a set a reciprocal rights and responsibilities inherent in the nature of each human being and ordered by divine intention to advance the common good. The classical tradition, however, was gradually yielding to a new theory of individual rights.

An increasing secularization characterized the approach to legal and political questions during the “golden century of human reason.” The Protestant Reformation had led to a growing call for...
religious freedom as a matter of individual conscience. Although Thomas Hobbes and John Locke acknowledged the validity of natural law, they considered the human being as a free individual who entered the social contract. Additionally, the new economic theories of thinkers such as Adam Smith favored individual liberty to pursue private gain. These various influences gave rise to a theory of law that focused on the rights and powers of the individual.

The eighteenth century view of law was in harmony with the liberal theory. Government was by the consent of individuals, who entered a "pactum subiectionis rather than a pactum unionis." The era witnessed a gradual shift away from the traditional conception of the common law as a fixed and determinate body of rules reflecting ancient custom and divinely designed principles. Supreme Court Justice James Wilson delivered a series of lectures in 1791, in which he "acknowledged the obligations derived from natural law," but "reduced them to private questions of conscience." Justice Wilson's view reflected the predominant conception of law that held that it was the voluntary consent of individual men, instead of the authority of some higher law, which formed the obligatory basis of statutes, custom, and even the natural law itself. The view was consistent with the theory of John Austin, who held that the state creates the law. It marked the waning of the medieval and common-law conception that the sovereign had power over the positive law, but was bound by the higher principles of natural justice. Statutory law passed by the legislature increasingly was

27. David G. Ritchie, Natural Rights: A Criticism of Some Political and Ethical Conceptions 228 (1894).
28. Paton, supra note 17, at 108.
30. Horwitz, supra note 29, at 19.
31. John Austin, Lectures on Jurisprudence, or the Philosophy of Positive Law at 267 (Robert Campbell ed., 5th ed. 1885). Commenting on Austin's concept of law, Hans Kelsen stated: "[I]t can be said that the state creates the law, but this means only that the law regulates its own creation." Hans Kelsen, The Pure Theory of Law and Analytical Jurisprudence, 55 Harv. L. Rev. 44, 65 (1941). Kelsen defined law as "the social technique which consists in bringing about the desired conduct of men through the threat of a measure of coercion which is to be applied in every case of contrary conduct." Hans Kelsen, General Theory of Law and State 19 (Anders Wedberg trans., 1961). Hence, for Kelsen, the state and the law are the same, since the state is only the legal order viewed from another direction.
viewed as supreme, as it was thought best to reflect the consent of the people. No longer would judges understand their role as the guardians and interpreters of a higher, transcendent, and immutable corpus of law. Nor would they continue to understand the common law as primarily derived from these higher principles in order to furnish justice in individual cases.\(^\text{32}\)

The transformed view of law led to the prospect that traditional legal structures, such as the institution of marriage, would be eviscerated of the claim to an objective moral value.\(^\text{33}\) Marriage could no longer claim a legitimacy based upon its status as a permanent institution derived from human nature, which transcended cultures and history.\(^\text{34}\) To the contrary, the existential human situation at any given historical and cultural manifestation might give rise to law that regulated human sexuality and procreation in a variety of ways.\(^\text{35}\) In addition to, or theoretically even to the exclusion of, lasting monogamous relationships between males and females, the law might recognize as privileged any number of possibilities such as cohabitation, polygamy, homosexual unions, or some other type of arrangement.\(^\text{36}\) The demise of the natural law tradition as affording the moral predicate for legal structures led to the relativity of value. It reduced marriage to merely a social convention, which two individuals elect based upon respective subjective preferences.

### II. Marriage and Family As Fundamental Community

In contrast to a focus on marriage as a mere social convention reflective of subjective preference, the natural law tradition consid-

\(^{32}\) Horwitz, *supra* note 29, at 30. Rather, they began to function “as equally responsible with legislation for governing society and promoting socially desirable conduct.” *Id.* The new view would ultimately lead to Holmes’ realism that “[t]he life of the law has not been its logic: it has been experience.” Oliver Wendel Holmes, Jr., *The Common Law* 1 (1951).

\(^{33}\) See Unger, *supra* note 8, at 63 (criticizing liberal political theory on account of its “inability to arrive at a coherent understanding of the relations between rules and values in social life”).

\(^{34}\) See generally Witte, *supra* note 10, at 202-219 (describing the transformation of Anglo-American marriage law from the nineteenth century to the present day).

\(^{35}\) See e.g., Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”)

\(^{36}\) See Richard A. Posner, *Sex and Reason* 435-42 (1992) (arguing on the basis of economic analysis for societal attitudes and laws that respect a “liberal” approach to sexuality); Witte, *supra* note 10, at 215. *But see* Robert P. George, In *Defense of Natural Law* 139-160 (1999) (arguing that the state should only recognize marriages between mature persons of the opposite sexes who have the capacity to “consummate marriage as a one-flesh communion”).
ers marriage and family to constitute the most fundamental form of human community.\textsuperscript{37} This natural community flows from the unity of the person as body and spirit and the complementarity of the sexes.\textsuperscript{38} From a teleological perspective, the tradition identifies two inseparable ends of marriage.\textsuperscript{39} First, conjugal love, or what Wojtyla describes as the sensual and spiritual intimacy of the spouses in marriage, demands a profound justification.\textsuperscript{40} The depth of this community requires commitment on the part of the spouses to a lasting and exclusive fidelity to each other.\textsuperscript{41} According to Wojtyla, this special form of love elicits from the participant the total gift of self.\textsuperscript{42} It yields a kind of human friendship that prospers in the midst of the joys and sufferings of everyday life.

The second good commences with openness to the procreation of children.\textsuperscript{43} As conjugal love flows from the complementarity of

\begin{itemize}
  \item \textsuperscript{37} See \textsc{Aristotle}, \textit{Nicomachean Ethics}, bk. 8, ch. 12, 1162a (Richard McKeon ed. 1941) ("Between man and wife friendship seems to exist by nature; for man is naturally inclined to form couples—even more than to form cities, inasmuch as the household is earlier and more necessary than the city."); \textsc{Wojtyla}, \textit{supra} note 9, at 315-327 (discussing the "divine plan" for the family).
  \item \textsuperscript{38} See generally Wojtyla, \textit{supra} note 5, at 81 (explaining the need of men and women for each other in order that each may be completed).
  \item \textsuperscript{39} \textsc{Thomas Aquinas}, \textit{Summa Theologica}, III, Supp., q.41 a.1, p. 2711 (The Fathers of the English Dominican Province trans., Benzinger Brothers, 1947) (1273) [hereinafter \textit{Summa Theologica}]. Thomistic thought describes two goods of marriage:
    \begin{quote}
      "First, in relation to the principal end of matrimony, namely the good of the offspring. . . . Secondly, in relation to the secondary end of matrimony, which is the mutual services which married persons render one another in household matters . . . For just as natural reason dictates that men should live together, since one is not self-sufficient in all things concerning life, for which reason man is described as being naturally inclined to political society . . . Wherefore nature inculcates that society of man and woman which consists in marriage."
    \end{quote}
  \item \textsuperscript{40} \textsc{Wojtyla}, \textit{supra} note 5, at 222 (noting that Thomistic thought emphasized the primacy of procreation over the \textit{mutuum adiutorium}, which is referred to here as "conjugal" love). Neither the teaching of Vatican II, see Sacrosanctum Concilium Oecumenicum Vaticanum II, "Constitutio pastoralis de ecclesia in mundo huius temporis, \textit{Gaudium et Spes}," 51 (Die 7 m. decembris a. 1965), 58 AAS 1025 (1966), nor of Paul VI, see Paulus PP VI, "Litterae Encyclicae \textit{Humane Vitae}" 12 (Die 25 m. iullius a. 1968), 60 AAS 481-503, posited a hierarchy of the ends, but the later emphasized the inseparable connection between the ends. \textit{See also} \textsc{Wojtyla}, \textit{supra} note 9, at 302; \textit{cf.} \textsc{John T. Noonan, Jr.}, \textit{Contraception, A History of its Treatment By the Catholic Theologians and Canonists} (1965) (suggesting, prior to \textit{Humane Vitae}, that not every act of sexual intercourse need be open to procreation).
    \item \textsuperscript{41} \textsc{Wojtyla}, \textit{supra} note 5, at 211-216.
    \item \textsuperscript{42} \textit{Id.} at 125-26.
    \item \textsuperscript{43} \textsc{Aristotle}, \textit{supra} note 37, bk. 8, ch. 12, 1162a; \textsc{Summa Theologica}, \textit{supra} note 39, III, Supp., q.42, a.4, p. 2717; \textsc{Wojtyla}, \textit{supra} note 5, at 224-36.
\end{itemize}
the sexes, procreation follows from the social nature of the human person.\textsuperscript{44} The bestowal of humanity upon those to whom the parents have given life fills the fundamental community with meaning and purpose. In describing this good, Wojtyla notes that from the moment of conception, the child presents him or herself for acceptance and participation in the community.\textsuperscript{45} Deeply aware that the child belongs to them, the parents offer acceptance, care, and education to the child.\textsuperscript{46} As the child discovers his or her humanity, the family unit develops and matures as a kind of organic and spiritual community.\textsuperscript{47} Together with siblings, the child and parents form, what Wojtyla identifies as, a community of human persons.\textsuperscript{48} The characteristic traits of this fundamental community might be said to include acceptance, participation, education, commitment and fulfillment.

The reduction of the marriage to subjective experience stands in contrast to the natural law tradition in which marriage constitutes an objective value.\textsuperscript{49} The primacy of individual experience over the objectivity of the fundamental human community has philosophical roots in classical liberal political theory.\textsuperscript{50} As with the natural law tradition, it is far beyond the modest scope of this essay to trace the development and influences of liberal theory.\textsuperscript{51} Let it suffice that generally liberal theory emphasizes autonomy, individualism, subjectivity, and the relativity of moral value.\textsuperscript{52} The

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\bibitem{44} Aristotlet, \textit{supra} note 37, bk. 8, ch. 14, 1154a.
\bibitem{45} See Wojtyla, \textit{supra} note 9, at 333.
\bibitem{46} \textit{Id.} at 332-35.
\bibitem{47} \textit{Id.} at 333.
\bibitem{48} \textit{Id.} at 332-33.
\bibitem{49} See \textit{Summa Theologica}, \textit{supra} note 39, III, Supp., q.41, a.1, p. 2711.
\bibitem{50} E.g., Drucilla Cornell, \textit{Fatherhood and its Discontents: Men, Patriarchy and Freedom}, in \textit{Lost Fathers: The Politics of Fatherlessness in America} 199 (Cynthia R. Daniels ed., 1998) (arguing that the law of the state ought not to "privilege or impose one form of family structure or sexuality over another").
\bibitem{52} Liberal theory's emphasis on individualism seems evident in three well-known twentieth-century cases concerning marriage, procreation and privacy. In \textit{Griswold v. Connecticut}, the United States Supreme Court delineated a right of individual privacy based on the Due Process Clauses of the Fifth and Fourteenth amendments. Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965). Appealing to the "sacredness" of marriage, the Court struck down a state statute criminalizing the use of contraceptives, describing the statute as "repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 485. The privacy right protecting the distribution and use of contraceptives was extended to non-married individuals in \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972). This legal reasoning then supplied the justification for the right of a
seventeenth century philosopher Thomas Hobbes expressed this understanding in its pristine form when he propagated the myth of Leviathan: the human being in the state of nature as an isolated, self-interested creature of fear and desire, engaged in a perpetual state of war with everyone else, and driven into political society only for the sake of self preservation.\textsuperscript{53} When applied to marriage and family, this image of the autonomous individual is precisely what gives rise to the primacy of subjective experience over the organic and spiritual reality of the community of persons that is the family.\textsuperscript{54}

The family interacts with the larger society by affording the primary experience of participation in community.\textsuperscript{55} For the large amount of good that it admittedly accomplishes in regulating business and rendering government benefits, the liberal state is incapable of supplying, and perhaps even militates against, a sense of solidarity and community.\textsuperscript{56} Attempting to retrieve the natural law tradition, Wojtyla recalls that marriage and the family comprise the primary community.\textsuperscript{57} In this regard, Wojtyla's position distin-

\textsuperscript{53} HOBBES, supra note 25 at 82-84. See also Locke, supra note 18, §§ 143-44, at 364-65 (the individual consents to a "social contract" pursuant to which the freedom of the state of nature is surrendered in order to procure societal protection of the "natural rights" of life, liberty, and property). \textit{Cf.} JEAN JACQUES Rousseau, \textit{The Social Contract and Discourses}, 4 (G.D.H. Cole trans., 1950) (maintaining that the family was the only "natural society").

\textsuperscript{54} WOJTYLA, supra note 9, at 319.

\textsuperscript{55} WOJTYLA, supra note 5, at 217 ("The family is in itself a small society, and the existence of all large societies – nation, state, Church – depends on it.").

\textsuperscript{56} MAX WEBER, \textit{The Protestant Ethic and the Spirit of Capitalism} 17-28 (Talcott Parsons trans., 1948). \textit{See also} R. JACKSON WILSON, \textit{In Quest of Community: Social Philosophy in the United States} 1860-1920 (1968) (criticizing liberal political theory on the ground that it fosters an impersonal and bureaucratic state, which encourages individual competition to the detriment of societal interests); WOJTYLA, supra note 9, at 276-279 (suggesting that participation in authentic communities, as opposed to the modern society, gives rise to words such as "brother," "sister," and "kinship"). The reason, according to the author, is that authentic communities such as family, church and other subsidiary structures in society permit the individual person to experience "participation" rather than "alienation." \textit{Id.} at 279.

\textsuperscript{57} WOJTYLA, supra note 5, at 217-18.

For although marriage in the natural course of things leads to the existence of a family, and although the possibility that it will do so must always be kept open, marriage itself is not as a result absorbed by and lost in the family. It retains its distinct existence as an institution whose inner structure is different from that of the family. The family has the structure of a society . . . .
guishes “individualism” from “personalism.” Individualism denotes that the human person acts primarily to advance self-interest. In contrast, personalism refers to the constitution of the human person through acting in solidarity with others. Personalism posits the human person as created not for self-interest but for self-transcendence. This leads to a second distinction, that between alienation and participation. Membership in society ought not to be identified with that participation through which the human person experiences fulfillment. Such participation is only possible in those subsidiary structures that facilitate the formation of genuine community. The family is nature’s primary structure to facilitate personalism and participation.

Wojtyla also draws attention to the semantic difference between the terms “society” and “community,” as reflective of the difference between associational relationships and relationships that entail a deeper level of personal commitment and fulfillment. In Catholic thought, subsidiary structures are considered a necessary condition for the creation of community. Moreover, it is recog-

Marriage does not possess the structure of a society, but an inter-personal structure: it is a union and a communion of two persons.

Id. 58. Wojtyla, supra note 5, at 271-80.
59. See Wojtyla, supra note 9, at 284-292; see also Veritatis Splendor, supra note 8, at 51 (“This universality does not ignore the individuality of human beings, nor is it opposed to the absolute uniqueness of each person. On the contrary, it embraces at its root each of the person’s free acts, which are meant to bear witness to the universality of the true good.”).

60. Wojtyla, supra note 9, at 296-99; Wojtyla, supra note 9, at 204-06.
61. The Catholic concept of the common good thus holds that “[c]ollaboration in the development of the whole person and of every human being is in fact a duty of all towards all.” Thus, the common good with its goal of authentic personal development mitigates against excessive individualism. “Progressioni totius hominis et omnis hominis cooperari est officium omnium hominum erga omnes . . .” Ioannes Paulus Pp. II, Litterae Encylcae Solicitudo Reti Socialis, 32 (Die 30 m. decembris a. 1987), 80 AAS 545 (1988) (emphasis in original).

62. Wojtyla, supra note 9, at 277-279.
63. A constitutive element of the Catholic understanding of natural law has been the concept of the common good. The common good has been defined as “the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment.” The Pastoral Constitution on the Church in the World of Today defines the common good as “summam eorum vitae socialis conditionum quae tum coetibus, tum singulis membris permittunt ut propriam perfectionem plenius atque expeditius consequantur.” Gaudium et Spes, supra note 40, at 26. It seems important to point out that the meaning of the common good in the Catholic tradition is not merely the good of the community. In contrast to an excessive focus on the community or the individual, the Catholic position assumes a “genuinely personalistic structure of human existence in a community.” Id. at 282 (emphasis in original).
nized that the human person, as a social being, gravitates for authentic fulfillment to such subsidiary structures. A significant subsidiary structure is that fundamental community of marriage in which the members recognize a source of meaning and value. Here, personalism, participation, and solidarity flourish. The natural law tradition holds that the special form of spousal love and the gift of new human life, which flows from it, constitute an objective reality upon which the larger society depends for its stability and well being.

III. MARRIAGE AS VIRTUOUS

The predominance of subjective experience also mitigates the natural law tradition that marriage is a virtuous relationship. In Wojtyla’s words, the contemporary view “proclaims the primacy of experience over virtue.” However, pursuant to the tradition, the spouses’ commitment to the two ends of marriage—conjugal love and procreation—is virtuous. In Wojtyla’s analysis, the human person finds fulfillment when the inner subjective elements of the person are brought into conformity with the objective and virtuous social reality through the person’s free act of the will. When the human person apprehends the natural goods of marriage in the intellect, the person understands that the basis for marriage is more than a subjective inner experience. Rather, marriage exists as an outer objective social reality that represents virtue for the spouses, their children, and the larger society. The moral life “calls for that creativity and originality typical of the person, the source and cause of his own deliberate acts.” When the human person exercises free will to enter into and to sustain this fundamental community, the person acts in accord with natural virtue.

64. Pope Pius XI formulated what has become the classic statement of the principle of subsidiarity. Pius PP. XI, “Litterae Encyclicae Quadragesimo Anno (Die 15 m. maii a. 1931),” 23 AAS 177-228 (1931).
65. FINNIS, supra note 5, at 398-410 (discussing Thomas Aquinas’ treatment of natural law and marriage in SUMMA THEOLOGICA, supra note 41.)
66. SUMMA THEOLOGICA, supra note 39, at III, Supp., q.41, a.1, p. 2711; see also WOJTYLA, supra note 5, at 197 (“Virtue can only come from spiritual strength.”).
67. WOJTYLA, supra note 5, at 119.
68. SUMMA THEOLOGICA, supra note 39, III, Supp., q. 41, a. 1, p. 2711. (“[T]hat is said to be natural to which nature inclines, although it comes to pass through the intervention of the free-will; thus acts of virtue and the virtues themselves are called natural; and in this way matrimony is natural. . . .”) (emphasis omitted).
69. WOJTYLA, supra note 5, at 119.
70. Id. at 217.
71. Veritatis Splendor, supra note 8, at 40.
Liberal theory’s emphasis on the autonomous individual results in a definition of freedom as the absence of government constraint. Consequently, law is viewed as a constraint placed on individual freedom. The fact that the state law requires a judicial judgment to dissolve a valid marriage places a burden on the freedom of the individual, who is not able to terminate the marriage at will by subjective choice. Pursuant to liberal theory, when such a restriction is justified by societal need, the burden must be the minimum necessary in order to produce the underlying purpose of the restriction. The natural law tradition, in contrast, understands law not so much as a burden but as an “enabling condition” of freedom. The tradition posits no necessary opposition between freedom and law. As already discussed, it understands marriage as a state of life entered into by free choice, which offers the spouses a deeper meaning. The meaning is located in the two ends of the conjugal love and new human life. To abide by this law based on human nature yields a deeper freedom than that which is available to the autonomous individual who acts principally to protect self-interest.

The primacy of subjective experience also results in the relativity of truth. In liberal theory, freedom involves a subjective interpretation of truth. Each person is free to choose his or her own moral rules. In contrast, the natural law tradition recognizes the truth of marriage not as a matter of speculative knowledge, but instead on the basis of “practical truth.” Practical truth is a truth on which the meaning of one’s life is subject. In other words, the day-to-day lived reality and the whole of one’s life would be impoverished radically in the absence of this truth. Marriage is such a practical truth as it shapes the destiny of the spouses. This is a truth that involves contemplation in the intellect, commitment in...
the will, and expression with the body. 79 To live in accord with the natural law requires a love for the true good. In living out their marital vows, the spouses love not only each other as autonomous individuals but the organic and spiritual reality that is created by their union.

Wojtyla’s analysis retrieves this more profound understanding of marriage. The analysis starts with an appreciation of the value of the human person as “its own master” endowed with free will. 80 The experience of marital love, according to Wojtyla:

[F]orcibly detaches the person, so to speak, from its natural inviolability and inalienability. It makes the person want to do just that—surrender itself to another, to the one it loves. The person no longer wishes to be its own exclusive property, but instead to become the property of that other. This means the renunciation of its autonomy and its inalienability. Love proceeds by way of this renunciation, guided by the profound conviction that it does not diminish or impoverish, but quite the contrary, enlarges and enriches the existence of the person. 81

This paradoxical aspect of marital love flows from the “work of the will,” in which the mutual love of the spouses entices acts of self-sacrifice for each other and the family as a whole. 82 Wojtyla contrasts this profound “love that is gift of self” with “the superficial view of sex.” 83 The superficial view involves “mutual sexual exploitation” in which the woman gives her body to a man. 84 Instead, the profound love of the spouses in marriage demands the reciprocity of mutual surrender of both persons. When this love exists, “the sensual and emotional experiences which are so vividly present in the consciousness” of marital union constitute the “outward gauge” of the self-giving of the persons. 85 The natural law tradition recognizes that the self-gift of the spouses to each other as well as the sacrifices made by the parents for children constitute marriage and family life as virtuous.

**CONCLUSION**

Prompted by the high rate of divorce that now characterizes American society, this essay has attempted to retrieve certain as-
pects of the natural law tradition about the meaning and purposes of marriage. The tradition understands the ends of marriage as the conjugal union of the spouses and the procreation and education of children. It sees marriage as a natural and virtuous relationship that elicits the gift of self from each of the spouses. It recognizes that natural goods of marriage lead to the family unity, which is the fundamental community of society. In light of the tradition, I offer two practical suggestions related to the issue of counseling clients who are thinking about divorce.

First, the attorney needs to understand his or her role as a “counselor-at-law.” Certainly, the role of the attorney is not to serve as a therapist, minister, or social worker. The attorney should realize, nonetheless, that a client who is faced with the possibility of divorce may be in a somewhat confused and vulnerable state of mind. It may well be the case that referral to a religious and/or psychological counselor represents an important part of the process leading to an informed decision about the legal status of the client’s marriage and family. The law of many states contemplates a “cooling-off” period in which to view the situation in as balanced a way as possible under the circumstances of the case. The legislative intent of such laws is not to create a culture of divorce, but to facilitate reconciliation and keep families together when possible. In accord with these considerations, the natural law tradition affords the attorney a historical background and perspective from which to counsel the client about legal options.

Second, law schools might consider including the natural law perspective in courses that deal with domestic relations and family law. It is not a matter of imposing a certain value system upon law students. The natural law understanding of marriage is of sig-

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86. Kenneth Kressel et. al., *A Provisional Typology of Lawyer Attitudes Towards Divorce Practice; Gladiators, Advocates, Counselors and Journeymen, in Readings in Family Law* 123 (Frederica K. Lombard ed., 1990) (distinguishing between family law attorneys either as counselors, who prefer a psychological and interpersonal approach, or advocates, who aim for the correct tactics to achieve victory for the client).

87. See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 Md. L. Rev. 213, 213 (1991) (noting a distinction between lawyers who focus on the client’s autonomy in reaching decisions and those who adopt a more paternalistic view in guiding the client’s decision-making process).


89. E.g., Sinha v. Sinha, 526 A.2d 765, 767-68 (1987) (finding that the goal of reconciliation that underlies the divorce law justifies the separation period of three years prior to a unilateral divorce).

significant importance to academic discussion of the family, if for no other reason than that the tradition has played such a central historical role in defining the institution of marriage in our society. It seems questionable that a student would complete a course about family law that culminates in the degree of Doctor of Law (Juris Doctor) and have never heard about the role of natural law in the historical development of the subject matter. The numerous law schools that have a Catholic tradition should be especially concerned to present the natural law tradition, as it has been an important component of the Catholic intellectual heritage.

In this brief overview of the tradition, I have drawn heavily on the philosophical writings of Karol Wojtyla. Consistent with the natural law tradition, Wojtyla’s writings are primarily philosophical and are usually not appeals to the revelation of a specific religious tradition. In our pluralistic society, this kind of philosophical thinking affords hope in the face of skepticism about the possibilities for common agreement on the nature and ends of marriage. The fact that Wojtyla emerged as the Successor to the Apostle Peter in the Catholic community should only enhance the importance of his pre-papal philosophical thought to the ongoing discussion about marriage in a society in which broken marriages have become all too common place.