

# Natural Law and Evolutionary Conservatism: Comments on Janet Radcliffe Richards

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## I.

What role should appeals to human nature play in debates about social institutions such as marriage? James Fitzjames Stephen thinks that what is natural is, in some sense, morally good. Janet Radcliffe Richards disagrees, arguing that Stephen's view is a relic of an antiquated metaphysics that ought to have perished in the wake of a Darwinian understanding of the world.<sup>1</sup>

I am not willing to defend Stephen's position on this debate as such. And I certainly would not wish to defend his more concrete views on marriage and the sexes. But I think that Radcliffe Richards neglects a more reasonable way of developing a conservative, natural law position which, while perhaps not clearly articulated by Stephen himself, is similar enough in both methodology and output to warrant our attention. This form of conservatism, partially articulated by Edmund Burke, Friedrich Hayek, and many others in between, involves viewing social and political institutions as themselves the continually developing products

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1. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 212–13 (Univ. of Chi. Press 1991)(1874); Janet Radcliffe Richards, *Metaphysics for the Marriage Debate*, 42 SAN DIEGO L. REV. 1125 (2005).

of a kind of Darwinian evolution.<sup>2</sup> To view them in this light is not to view them as morally sacrosanct. But it is to view them as having at least a kind of *prima facie* moral authority. It is, however, a moral authority which derives from epistemological considerations, rather than metaphysical ones. What is natural is morally authoritative, on this view, not because it bears the imprint of a divine creator, nor because it contains the unchangeable essence of a natural order, but rather because the process by which it has emerged is the product of a collective wisdom and experience that far outreaches our own.

## II.

Stephen appealed to the alleged natural inferiority of women to justify their subordinate role in marriage.<sup>3</sup> In response, many contemporary defenders of women's rights have denied the relevancy of appeals to nature at all. Differences between the sexes, they say, are not natural, but socially constructed. By nature, the sexes are equal, and therefore social institutions such as marriage should reflect this equality.

Radcliffe Richards finds this argument troubling. Specifically, she is concerned about a premise which seems to be common to both conservatives such as Stephen and their feminist opponents—that *if* something is natural, it is good, and our social institutions ought not attempt to subvert it.<sup>4</sup> This idea, says Radcliffe Richards, may have made sense on the Aristotelean or Christian worldview, but it no longer does in a post-Darwinian age.<sup>5</sup> We now know that organisms do not evolve to fulfill any grand cosmic purpose. There is nothing morally virtuous about conformity to nature as such. Nature, in Radcliffe Richards' words, often leaves us with a "moral mess," and it is our job to clean up that mess as best we can.<sup>6</sup>

But this does not mean that appeals to nature are of no value to moral argument. On the contrary, to know what we have to clean up, we have to know what nature *is*. Appeals to human nature are thus of the highest relevance in political argument, for it is only with an accurate understanding of that nature that we can come to understand the objective function served by social institutions such as marriage, and only then that we can begin to shape our purposeless world to serve *our* purposes. Our nature may be fixed, but our social and political institutions are not. And since there is nothing morally authoritative in nature as such, we ought to

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2. F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 167 (1979).

3. STEPHEN, *supra* note 1.

4. Radcliffe Richards, *supra* note 1, at 1129–30.

5. *Id.* at 1139–40.

6. *Id.* at 1142.

change our institutions so as to remedy or compensate for nature's moral defects whenever we can.

### III.

On its face, then, the disagreement between Radcliffe Richards and Stephen really does look like a metaphysical one. Stephen holds that the natural is normative and ought to be preserved and protected, while Radcliffe Richards holds that something's being natural has no bearing at all on its moral desirability.<sup>7</sup> But a conservative like Stephen can hold that nature is normative without holding that it is *intrinsically* normative. A more reasonable position, I think, is to hold that nature is normative because it imposes constraints upon our ability to shape our world. When it comes to human social institutions, what is "natural" is what has been widely and regularly practiced for a significant amount of time. And there's good reason to think that anything that has *that* sort of pedigree has done a pretty good job of serving human purposes. The fact that a social institution has been "selected" by an evolutionary process is evidence (albeit defeasible evidence) of its "fitness."

There is, furthermore, at least some reason to assume that institutions which emerge from such an evolutionary process do a better job than any alternative institution we could come up with. As Radcliffe Richards points out, the task of institutional evaluation is one which requires more than merely looking at the results produced by an institution. It requires looking at the *difference* between the results that institution produces and the results that alternative institutions would produce. Knowledge of the nature of an institution thus requires knowledge of various sorts of counterfactuals—counterfactuals about what would happen under the current institution if people made choices other than the ones they actually made, and counterfactuals about what would happen under other institutional arrangements.

But knowledge of this sort of counterfactual is very hard to come by, especially when we consider major institutional reform. Early twentieth-century Bolsheviks had very little idea what the results would be of their early experiments with the complete abolition of all market mechanisms.<sup>8</sup>

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7. STEPHEN, *supra* note 1, at 192; Radcliffe Richards, *supra* note 1, at 1139.

8. That this must be so is shown partially by the fact that key actors at the time of the revolution made incompatible predictions regarding its ultimate end. For a detailed examination of some of the conflicting visions of the Bolshevik revolutionaries, see generally RICHARD PIPES, A CONCISE HISTORY OF THE RUSSIAN REVOLUTION (1995).

Economists today have a great deal of difficulty predicting the results of the ongoing process of globalization.<sup>9</sup> And we have very little idea what the results would be of abolishing the institution of marriage in a country like the contemporary United States.

Thus, we are in a poor position to know what alternative institutional arrangements would be better or worse for our purposes. But this is only half of our epistemological quandary. Not only do we not know which alternative institutions are good or bad, we do not even know what makes our own institutions good. The selection process at work in the evolution of social institutions is largely opaque to us, in just the same way that the selection process in biological evolution is. It can be obvious from surveying a given ecosystem that one species has achieved a high degree of adaptive success. But discovering what it is about that organism which led to its success is a difficult endeavor. In the same way, we can tell by looking at a society which institutions have succeeded, but it is far more difficult for us to see *why* they have succeeded. The dominance of monogamous marriage in the West is evident to anyone who opens their eyes. But whether this dominance is due to the social stability it promotes, or the fact that it makes the individuals that partake in it happy, or its economic effects, is a matter about which the most highly trained social scientists vehemently disagree. Nevertheless, the fact that we cannot see the justification for the institution is poor reason to think that there is none.

A recent theatrical dramatization of the life of Alfred Kinsey illustrates almost exactly this point.<sup>10</sup> Kinsey, famous for his research on sexual behavior in the mid-twentieth century, is portrayed in the film as a brilliant scientist—a man of reason leading a revolution against the dogmas of tradition. His scientific work was shown to upset what everybody “knew to be true” about sex, and he applied his findings to his personal life. Since he could find no reason why marriages should be monogamous, Kinsey decided to have an affair with his male graduate student. In one pivotal scene, he calmly and unashamedly reveals his actions to his wife who, in what is a surprise to Kinsey but to no one in the audience, takes the news rather badly. Through tears, she explains to her husband the obvious point: his actions hurt her feelings. Kinsey might not have realized that they would do so but, she explains, the customary constraints on marital fidelity are there for a reason, even if Kinsey—brilliant scientist that he is—can’t see what that reason is.<sup>11</sup>

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9. For conflicting views of the future of globalization, see JAGDISH N. BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (2004) and JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).

10. *KINSEY* (Fox Searchlight Pictures 2004).

11. *Id.*

Friedrich Hayek puts the point in the following way: “[S]ince we owe the order of our society to a tradition of rules which we only imperfectly understand, *all progress must be based on tradition*. We must build on tradition and can only tinker with its products.”<sup>12</sup>

Hayek’s position is a conservative one—it seeks to conserve tradition, or that which is “naturally” done. But it is a conservatism based not on any peculiar metaphysical assumptions, but rather on a kind of epistemological humility. It is thus a conservatism which bridges the gap between the natural law and post-Darwinian worldviews discussed by Radcliffe Richards.<sup>13</sup> It shares with her the belief that the proper standard for evaluating social institutions is their ability to serve human purposes. There is nothing *intrinsically* moral about that which is natural. But this is not to say that something’s being natural is of no moral importance at all. Its importance lies precisely in its ability to serve human purposes. We might not know *how* it serves our purposes, and we might fancy that some radical alternative institution would serve our purposes better. But we would do well, the conservative argues, to be wary of our own ability to evaluate such matters correctly. The process by which our institutions have evolved reflect a degree of wisdom and experience which far outreaches our own—it reflects the conscious and unconscious decisions of all those who came before us. Paradoxically, then, we will better achieve our purposes by not attempting to consciously and deliberately mold our institutions to serve them. We would do better to view our own rationality with modesty, and to put our confidence in the wisdom of tradition.

#### IV.

This is not the place to engage in a full evaluation of the conservative position I have just sketched. My point was simply to show that the difference between conservatives like Stephen and liberals like Radcliffe Richards is not necessarily as great as she perceives. They are divided not necessarily by fundamentally different views of the nature of the universe, but by more mundane empirical questions regarding the extent of our ability to consciously design institutions to serve our purposes, and by sometimes subtly differing moral views regarding what sort of purposes we want those institutions to serve. That the gap is not

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12. HAYEK, *supra* note 2, at 167.

13. *See* Radcliffe Richards, *supra* note 1, at 1139.

unbridgeable is, I should think, welcome news for parties on both sides of it.

Still, it is worth making a few points about the merits of the position I have just described, even though I cannot hope to settle the debate here. The first point to note is that the moral significance of an institution's having emerged from a process of cultural evolution depends crucially on what the selection mechanism of that evolutionary process is. Why do some institutions survive and others fail? One plausible supposition is that some institutions succeed because they contribute to a peaceful, stable society. If this is the selection mechanism at work, then the fact that an institution is evolutionary successful is good evidence indeed of its moral virtue. A peaceful, stable society is a morally good thing, so any institution which emerges from a process that tends to produce institutions conducive to such ends has at least something going for it, morally speaking.

Of course, the fact that it has something going for it does not show that it is morally unassailable. An institution can promote a peaceful, stable society while at the same time promoting inequality, oppression, and other forms of injustice. If the injustices it produces are significant enough, this might be enough to outweigh whatever virtues the selection mechanism tends to yield, and we might then have a strong moral case for institutional reform.

Furthermore, we might be incorrect in assuming that the selection mechanism produces *any* virtues whatsoever. Perhaps institutions survive because they support the interests of the powerful. The fact that an institution has emerged from *this* kind of selection process, if it tells us anything at all about the moral virtue of the institution, tells us that it is morally *bad*.

The fact that something is natural, then, in the sense of having demonstrated fitness in some evolutionary process, does not *automatically* give us reason to morally endorse it. Whether it does depends on the exact nature of the selection mechanism employed by that evolutionary process. And it is far from clear what selection mechanism, or mechanisms, are at work in institutional evolution as we find it in the world today.

The second important point to consider regarding this variety of conservatism is related: Hayekian conservatism counsels a certain kind of epistemological humility.<sup>14</sup> But just how humble ought we really to be? We do, after all, have a large and growing amount of knowledge about the ways that social institutions work. We know, for instance, that lightly-regulated capitalism tends to be a productive form of social organization, but that it also runs the risk of producing morally

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14. HAYEK, *supra* note 2.

unacceptable economic inequalities. Moreover, we can understand, at least in the general outlines, the selection mechanisms at work in various forms of institutional evolution. We know that in a rigidly hierarchical, authoritarian form of social organization, institutions *will* tend to be selected on the basis of how well they serve the interests of the powerful. And we know that in a democracy, this problem is less worrisome, but is replaced by problems of a different, but well-documented sort.

So where does this leave us? We don't know everything, but neither are we completely ignorant. Should we be humble in our approach to institutional reform? If so, what does this mean? That we should make only small changes? Along what dimensions should the "size" of a change be measured? And if the evolutionary process by which our current institutions emerged was a process involving both the individual and collective choices of past generations, is it really even *possible* for us to "subvert" that process? Isn't anything we do just a continuation of it? What would it mean, on this account, for us to act un-naturally?

It is possible to develop a sophisticated version of conservatism that does bridge the gap between the natural law and post-Darwinian views of the universe. But developing such an account requires answering hard questions such as these, and this is a task on which there remains much work to be done.

