

Introduction

Should liberals ground their liberalism in classical natural law? Should those who take their orientation from natural law theory necessarily be liberals?

Many liberals and natural law theorists will regard each other as distinctly unlikely (and uncomfortable) bedfellows. They will feel, in fact, that if they wake up and find themselves in bed with each other, it must have been the result of some improbable Shakespearean plot in which one's expected bedfellow has been switched and the difference has not been noticed until the following morning.

The proponents of natural law, tracing their roots to Thomas Aquinas, and in many ways back beyond him to the classical Greek natural right tradition, maintain that it is possible for human beings to recognize a wide range of objective human goods. They believe these goods provide a necessary framework for political life, for understanding and pursuing the common good. Liberals, tracing their roots through John Stuart Mill back to John Locke, and in certain ways further back to Thomas Hobbes, are more skeptical of the possibility of agreement on what is good for human beings, and would limit the object of political life to defending the rights of individuals to pursue their own ideas of the good. Natural law theorists defend "regulating morality," while liberals generally oppose it. Can there be fundamental agreement between such apparently distinct traditions of thought?

I want to argue that the relationship between liberalism and natural law is – or at least can be – more like the ordinary relationship between other kinds of bedfellows: namely, good spouses. In a good marriage, there is underlying agreement on fundamental matters, combined with

some genuine complementarity – that is, differences – that may cause tensions but that also contribute to their mutual personal improvement. Often it takes years to see that the differences and tensions are not just a source of difficulty but an opportunity for growth. That has certainly been the case with the rocky relationship between liberalism and natural law.

It is interesting to play with this analogy (although in the end, like most analogies, it has its definite limits). Not the least of the difficulties is that the stories of the relationship of natural law and liberalism vary so greatly, depending on whether the story describes continental, English, or American liberalism. The story line I follow focuses on Anglo-American liberalism: born and developing in England, but eventually coming to have its center of gravity in America, more democratic and more free of the vestiges of pre-liberal social structures.

Natural law and liberalism were, after all, originally “married,” in the classical liberal political philosophy of John Locke. From the beginning, there were problems with the marriage. Perhaps the brash young man had married the daughter of an old and declining family only to buttress his own reputation, and the young woman had been misled by the young man’s veneer of respectability. Perhaps, too, the young lady was too tied to her old family ways, and insufficiently open to some of the new ideas and practices of her consort. The partners increasingly believed that their apparent similarities were superficial and that, in fact, they didn’t have much in common. Although they had used the same words (especially “natural law”), they had meant different things by them. Their growing recognition of their differences led to bitterness and recrimination, terrible fights, irreconcilable differences, separation, and a bitter divorce.

Only after many years did the former partners – spurred in part by a growing realization of their own defects – take another, deeper look at each other and recall the genuine good in the other person that had been lost sight of amidst the fighting. As their feelings toward each other softened, to their own surprise it seemed possible that reconciliation might be possible, and the marriage once again consummated.

The happy ending to this story, however, requires that both parties come to the realization of their compatibility and even their need for each other. But the achievement of that happy ending is more than a little doubtful. The process by which natural law has come to appreciate the strengths of liberalism, in recent times, has moved at a much more rapid pace than liberalism’s recognition of its need for natural law. And, in fact, liberalism today seems intent on “going it alone,” without the need for

any support outside its own commitment to autonomy, which entails the permanent revisability of all personal commitments.

For years it has been said that there is a “crisis of liberalism,” but it is really an *intellectual* crisis of *contemporary* liberalism. Liberalism, understood broadly, is generally triumphant around the world, in the wake of the collapse of communism, and for good reasons. Those reasons were brought home with particular force on September 11, 2001. Liberal democracy offers people a measure of freedom, prosperity, and well-being that no other form of government seems able to provide as consistently. Whatever the faults of liberalism – and liberal democracy, like every other form of government, has its own characteristic weaknesses – it is by far the best game in town, and we should want to preserve and strengthen it. But preserving and strengthening it may mean moderating it, and the vice of contemporary liberalism is to place such a great emphasis on the chief animating principles of liberalism, liberty and equality, that insufficient attention is paid to other human goods, including truth, family, and piety.

The way to deal with the crisis of contemporary liberalism is to embrace what I will call natural law liberalism. The principles of natural law philosophy provide a more solid foundation for liberalism and moderate its more problematic tendencies. They secure the strengths of liberalism while mitigating its defects. Above all, they provide a ground for liberalism that rests on a confidence that human beings can and do know the truth about the human good (in its great variety of forms) rather than a skepticism about such knowledge or a despair that human beings can ever agree on it. It grounds liberalism positively in the truth about the human person rather than negatively in various forms of agnosticism, about man as much as God.

This natural law liberalism cannot be billed simply as a “return” to some past form of liberalism, one that was still influenced by medieval natural law before that influence became attenuated in the course of time. Contemporary natural law thinkers have to confront the plain fact that liberalism arose precisely as a reaction *against* a society in which natural law thinking seemed dominant. For much of the last four centuries, classical natural law and liberalism have been perceived (by people on both sides) as opponents, or even deadly enemies.

This perception is wrong, for several reasons. First, some of what passed as “natural law principles” in pre-liberal societies was not in fact an essential part of natural law philosophy, but merely one particular application of it, and even, in some cases, an actual distortion of it.

(The failure to protect a sufficiently broad form of religious liberty was especially notable.) Second, while it is true that liberalism was a reaction against a society in which natural law principles played a role, it is also true that from the beginning liberalism retained important elements of natural law thought.

Natural law liberalism, then, depends on moderating both traditions. Classic natural law has to be separated from its original historical, political, and social context, purified of elements that are inconsistent with its most important principles, and adapted to modern circumstances. In this process, the fundamental harmony between natural law and reasonable forms of liberty and equality will become apparent.

Liberalism has to be freed of its insensitivity to the fact of the deep influence of the “regime” – including liberal democratic political communities – on the formation of people’s ideals and character: their thoughts, desires, attitudes. Moreover, certain perennial substantive tendencies of liberalism, which tend to be exacerbated in contemporary liberalism, have to be overcome: the tendency of toleration to evolve into forms of skepticism and relativism (at least about the human good) and principled religious indifferentism, and the tendency of equality and freedom to evolve into an egoistic individualism that undermines the family and commitment to human goods beyond consumeristic well-being.

Another way to say this is that liberalism must be moderated so that when it shapes its citizens – as it inevitably will, even in its milder way¹ – it does so in ways that are more fully compatible with important intellectual and moral goods: with reason and faith, and with the moral virtues that regulate the passions and promote individual and social well-being. Natural law, without disturbing its convictions that there is a truth, that human beings can know it, and that their well-being lies in finding and living in accord with it, has to be so formulated as to recognize, in ways that its historical representatives have sometimes failed to do, the intrinsic importance – the necessity – of human freedom and the limits of coercion and law.

The goal of this book is to make a modest start at developing a fuller statement of natural law liberalism. My first task will be to identify key inadequacies of contemporary liberalism, which provides us with an incentive to look more closely at natural law liberalism as an alternative.

¹ On the shaping power of liberal regimes, see Martin Diamond “Ethics and Politics: The American Way” in *The Moral Foundations of the American Republic*, R. Horwitz, Ed. (Charlottesville, VA: University Press of Virginia, 1977), pp. 39–72, especially pp. 62–68.

Introduction

5

To this end, in the first part of the book I examine contemporary liberal doctrines of public reason and reciprocity and autonomy.

The inability of these major theorists to establish plausible cases for the doctrines of liberal public reason and liberal autonomy should induce us to look elsewhere, to some source other than contemporary liberalism, for an adequate ground for our public philosophy. In the second part of the book, I try to develop a basic notion of “natural law liberalism” as that more adequate alternative. I show why it is plausible to believe that, despite the appearances of history, liberalism and natural law are not only compatible, but mutually reinforcing. Liberals should ground their liberalism in natural law philosophy, and natural law thinkers should be liberals (albeit “moderate” liberals, unlike most representatives of contemporary liberalism).

In the final substantive chapter, I present an example of how natural law liberalism “cashes out” – what its distinctive approach would be – by examining the topic of religious liberty. I argue that its approach is different from classical natural law, in that it embraces a broader and more robust form of religious liberty (including the right to proselytize), and also different from contemporary liberal theory, in its refusal to celebrate religious diversity as a good in itself, because of its commitment to pursue religious truth.

A brief conclusion outlines what a natural law liberal public philosophy would look like. In a future work, I hope to develop natural law liberalism further, by developing its substantive content (and contrasting it with contemporary liberalism) on a variety of important issues: the foundations of human dignity, religious truth, freedom of thought and discussion, marriage, family, and sexuality, property and economic life, and political life.

The conclusion of my analysis of liberalism is that it greatly benefits precisely from elements derived from natural law that contemporary liberals most wish to eliminate on the grounds that those elements are inconsistent with the principles of liberalism. If we want to have a healthy liberalism – and my argument is that Americans, including those oriented toward natural law (despite historical tensions between liberalism and classical natural law), should want precisely that, as should others around the world – we need to attend to the fundamental compatibility between and reciprocal support of liberalism and natural law. We need a natural law liberalism.

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PART I

CONTEMPORARY LIBERALISM

I

Contemporary Liberal Exclusionism I

John Rawls's Antiperfectionist Liberalism

The best-known version of liberalism today – indeed, the version that is often equated with liberalism simply – is John Rawls's antiperfectionist liberalism, developed in *A Theory of Justice* (1971) and *Political Liberalism* (1992).¹ Rawls's theory of "justice as fairness" was a response to the perceived inadequacies of the previously dominant utilitarian theory, especially the insecurity of rights and instability of politics in a utilitarian system. In its final form, Rawls's philosophy claimed to be, not a neo-Kantian comprehensive liberalism – a specific "comprehensive" theological/philosophical position – but rather a "political liberalism" that was "neutral" with respect to fundamental comprehensive views. In the final analysis, however, it appears that Rawls was unable to vindicate this claim. Political liberalism is a form of comprehensive liberalism in the name of which a significant range of comprehensive views – especially traditional religious and moral views – are excluded from political life.

In this chapter, I begin with a summary of Rawls's political liberalism, which tries to identify what it seeks to achieve, and then explain why I think it is unsuccessful.²

¹ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); and *Political Liberalism* (New York: Columbia University Press, 1993).

² My summary of Rawls relies heavily on Michael Pakaluk's excellent exposition of Rawls in *Liberalism at the Crossroads*, C. Wolfe and J. Hittinger, Eds. (Lanham, MD: Rowman and Littlefield, 1994).

RAWLS'S POLITICAL LIBERALISM

Rawls begins with conceptions he considers implicit in our political culture. The first is that of citizens as free and equal persons, who have a capacity to understand and act on principles regulating a scheme of social cooperation and a capacity to develop, revise, and pursue rationally a conception of the good. The second conception is that of society as a fair system of cooperation among free and equal citizens, an idea which is developed to arrive at a "political" conception of justice, which applies only to the broadest social framework of the nation and the way that persons relate to one another politically within that basic structure. This political conception seeks to avoid philosophical controversies, in order to advance its strictly practical task of securing fair terms of social cooperation. (Partisans of different comprehensive philosophical, moral, and religious views will find fuller justifications within their own theories, providing Rawls's theory of justice with an "overlapping consensus.")

The fair terms of social cooperation turn out to be two principles of justice: first, "each person has an equal right to a fully adequate scheme of equal liberties, which scheme is compatible with a similar scheme of liberties for all" (including freedom of thought and conscience, political liberties, freedom of association, liberty and integrity of the person, and the rule of law) and, second, "social and economic inequalities must satisfy two conditions, (i) they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and (ii) they are to be to the greatest benefit of the least advantaged members of society."

The justice of these principles is arrived at by a certain procedure, namely, a thought experiment of putting citizens in an "original position," behind a "veil of ignorance" (not knowing their status in society or their conceptions of the good). These citizens are to choose principles of justice, in light of their recognition of certain primary goods (basic rights and liberties, freedom of movement and occupation, power and prerogatives of office, income and wealth, and the social bases of self-respect). Given a choice between justice as fairness and utilitarianism, Rawls says that people in the original position will choose the former, on the basis of the "maximin" rule: where there is uncertainty about a choice, but one knows that the worst outcome of one choice is satisfactory while the worst outcome for the other is unsatisfactory, it makes sense to select the alternative that results in the best worst case. People in the original position, not knowing their status and their conceptions of the good, will choose justice as fairness over utilitarianism, where the

John Rawls's Antiperfectionist Liberalism

II

worst-case scenario is very great: loss of one's liberties as part of a social calculus.

Rawls says, in *Political Liberalism*, that *A Theory of Justice* did not sufficiently distinguish between moral and political philosophy: "a moral doctrine of justice general in scope is not distinguished from a strictly political conception of justice."³ In his revised work, the distinction between comprehensive philosophical and moral doctrines, on one hand, and political conceptions becomes fundamental. Justice as fairness is held to embody certain (partial) conceptions of the good, but Rawls denies that it entails any comprehensive conception of the good. At the same time, he does not describe it as "neutral," recognizing that it tends to foster some ways of life (e.g., those that value tolerance, civility, a sense of fairness, the ability to compromise), while undermining others (e.g., those based on intolerance).

*Political Liberalism*⁴ and later articles⁵ develop at some length the concept of "public reason":

when constitutional essentials and questions of basic justice are at stake, citizens are to be ready to justify to one another their political actions by reference to the public political conception of justice, and so by conceptions and principles, values and ideals that they sincerely believe other citizens may reasonably be expected to endorse. The thought is that citizens, finding themselves living together in political society, and exercising the coercive power of government over one another, should, at least on fundamental political questions, justify their opinions and deeds by reference to what they may suppose others could accept consistent with their freedom and equality.⁶

That is, citizens ought to appeal to public reason rather than simply to their own comprehensive views. Moreover, "[w]e add to this that in making these justifications, we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."⁷ Rawls grants that arguments based on comprehensive views can be introduced into public discourse, but only on condition that other arguments,

³ *Political Liberalism*, p. xv.

⁴ Part Two of *Political Liberalism* discusses "Three Main Ideas" of which two – the idea of an overlapping consensus and the priority of right over good – were discussed extensively in *A Theory of Justice*. Public reason is the third main idea.

⁵ Especially "The Idea of Public Reason," In *Rawls, Political Liberalism*, expanded edition (New York: Columbia University Press, 2005).

⁶ From "The Idea of Public Reason: Further Considerations" (manuscript on file with the author).

⁷ *Political Liberalism*, p. 224.

acceptable to those with different reasonable comprehensive views, are used as well.

In his later work, Rawls was pursuing a new goal (beyond replacing utilitarianism as the foundation for liberalism). He wanted to answer the question: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"

Why *this* question? We must look at Rawls's thumbnail sketch of European political philosophy (in the preface to *Political Liberalism*) to discover why. Rawls argues that the problems of political philosophy in the modern world derive from the special nature of democratic political culture, due to the historical context of modern politics. The ancient world experienced no tension between religion and politics because Greek religion was a civic religion rather than a religion of salvation with a class of priests dispensing necessary means of grace and with ideas of immortality and eternal salvation. The Greek civic religion contained no alternative idea of the highest good to be set against the Homeric epics at the core of Greek politics (the ideal way of life of the early Greek warrior class). Greek philosophy rejected the Homeric ideals and "had to work out for itself ideas of the highest good for human life, ideas acceptable to the citizens of the different society of fifth-century B.C. Athens." Moral philosophy was "the exercise of free, disciplined reason alone," not based on religion, "as civic religion was neither a guide nor rival to it."⁸

All this was changed by the arrival of Christianity. Medieval Christianity was quite different from ancient civic religion. It was authoritarian, salvationist, creedal, priestly and sacramental, and expansionist. This medieval world gave way eventually to a modern world shaped by three historical developments. First, the Reformation fragmented the religious unity of the Middle Ages and led to religious pluralism, which in turn led to other kinds of pluralism. Second, the modern state, with its central administration, came into existence, initially ruled by monarchs with great powers. Third, the early seventeenth century saw the emergence of modern science (Copernican astronomy, Newtonian physics, calculus).

The ancient world never knew "the clash between salvationist, creedal, and expansionist religions" that arose only with the Reformation. The Reformers were like those they attacked, in that they were dogmatic and

⁸ *Political Liberalism*, p. xxii.