THE POSSIBILITY OF RELIGIOUS FREEDOM

At once a universally held human right and a flash point in the political sphere, religious freedom has resisted legal, political and scholarly efforts to define its parameters. Karen Taliaferro explores a different approach to the tensions between the aims of religion and the needs of political communities, arguing that religious freedom is a uniquely difficult human right to uphold because it rests on two competing conceptions of law, human and divine. Drawing on classical natural law, Taliaferro expounds a new theory of religious freedom for the modern world. By examining conceptions of law in Sophocles' *Antigone*, Maimonides' *Guide of the Perplexed*, Ibn Rushd's *Middle Commentary on Aristotle's Rhetoric*, and Tertullian's writings, *The Possibility of Religious Freedom* explains how expanding our notion of law to incorporate natural law can mediate conflicts of human and divine law and provide a solid foundation for religious liberty in modernity's pluralism.

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The Possibility of Religious Freedom

EARLY NATURAL LAW AND THE ABRAHAMIC FAITHS

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To Freya and Zeyneb, memory eternal.

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Preface

This book is a call to reconsider the nature of religious freedom. It is intended as an honest examination of both the unique difficulty of religious liberty as well as the resources we have for protecting it in the twenty-first century. It makes two claims: first, that religious freedom presents a philosophical and legal problem because it requires the arbitration of two sets of law and obligation, human and divine. Secondly, it claims that expanding our conception of law to incorporate not only human and divine but also natural law provides the best available basis for religious freedom, with implications for justice and other human rights more generally. Barring natural law, as Thomas Hobbes rightly observed, either human law or divine law must have ultimate authority, neither of which is feasible or even perhaps desirable in late modernity. Both secular liberal and religious attempts to protect religious freedom end in an endless *agōn* between human law and divine law, a struggle made all the more vicious by the heightened pluralism and globalization of our current moment. Rather, making use of natural law as a mediator between human law and divine law represents the best path forward in late modernity.

CLARIFYING TERMS: REASON, LATE MODERNITY AND NATURAL LAW

This is a book about religious freedom, but it is equally a book about natural law. One of the few traits that virtually all theories of natural law share is a commitment to the accessibility of moral truths through reason, often juxtaposed with "revelation" or "religion." This commitment, however, means little without some explication of the term "reason." In this book, I employ the term in a sense that hearkens to Socratic and other earlier understandings of reason as something humanity shares with the gods. I discuss this in more detail in Chapter 1, but such use of reason is not to be conflated with a typically modern understanding of reason as purely immanent, which I term "rationality" or "rationalism" to distinguish it from its more transcendent ancestor. This earlier version of reason can only superficially be contrasted with revelation and

religion, because reason is in fact bound up in much of religion and revelation. For example, the Johannine assertion that "the Word [*logos*] became flesh," or the status of *ijtihād* (effort in legal reasoning) as a source of Islamic law, intertwines reason as in some way revelatory of God Himself – however limited and prone to flaw it may be.

"Modernity," likewise, is a fraught term.[1] To clarify the context I am addressing in this book, I adopt the term "late modern" from Stephen K. White. White describes our current era as one in which the comforts of moral foundations that modernity and its concomitant rationalism originally offered, as well as the "unmitigated liberation from modern commitments" that postmodernism promised, are no longer tenable as theoretical and ethical starting points. Rather, he offers what he terms a "late-modern ethos," which he describes as follows:

> An individual with such an ethos will take seriously many of the insights that animate postmodernists; but whichever of these insights she is moved to embrace, she also knows they do not offer any truth that is capable of automatically trumping the foundationalist's convictions. Alternatively, my late-modern individual might be committed to some variant of theism; but if she is, she must also admit that there can be other ways of spiritually animating one's life that cannot summarily be dismissed as nihilistic.[2]

This late modern citizen, then, has at her disposal both modern rationalism and postmodern skepticism; she thus finds herself wary of legal positivism but hesitant to adopt a view of law that requires a deity or divine law – or, at least, she cannot reasonably expect broad consensus on such a view. As Charles Taylor writes in *A Secular Age*, "faith, even for the staunchest believer, is one human possibility among others … Belief in God is no longer axiomatic. There are alternatives."[3] The general idea is that the pre-modern era was one in which divine law was generally accepted; the modern era jettisoned it in favor of rationalism, romanticism, and pragmatism,[4] each of which yields a concept of law as purely human in origin (legal positivism); and the postmodern era called into question whether these resources – God, rationality, sentimentality, or the pragmatic tools of consensus and cooperation – were anything but masks of power. The late modern citizen carries this cognitive and metaphysical baggage with her, yet – I suggest – finds herself yearning for some measure of order and justice nonetheless. Nowhere is this

[1] On this topic, see Owen Anderson's very useful exploration of the epistemological developments in modernity, including its Enlightened, Romantic, and Pragmatist variations, and Postmodernity in "The Postmodern challenge" in *The Natural Moral Law: The Good after Modernity* (New York: Cambridge University Press, 2012), 29–45.

[2] See Stephen K. White, *The Ethos of a Late-Modern Citizen* (Cambridge, MA: Harvard University Press, 2009), 3.

[3] Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007), 3.

[4] Here I am borrowing loosely from Anderson in dividing modernity into Enlightened, Romantic, and Pragmatist stages. See *Natural Moral Law*, 33.

more difficult to come by than in the realm of religion, as it is here that one must confront the question, "Is there more to this world than what we see?" Hence, this is a story about religious freedom in late modernity.

Perhaps the most important clarification of all is that of "natural law." There is no shortage of understandings of the term, but I am interested specifically in the role that natural law can play as a mediator between human and divine law. I discuss my adoption of Robert Sokolowski's definition of natural law as "the ontological priority of ends over purposes"[5] in Chapter 1, but a few prefatory remarks are in order. First, this definition is formal rather than substantive; that is, such a definition tells us how to derive rules or laws rather than what those rules or laws are. This is essential. Natural law theories, along with the natural right tradition, lay claim to principles of morality that are "discernible by reason and universally acknowledged," as Strauss described natural right, and indeed, the type of natural law theory I am describing would yield such insights.[6] Nevertheless, for this book's purposes this understanding reaches both too far and not far enough. It goes too far because – and this is the postmodern insight – once one attempts to articulate any such universal principles, one often finds such disagreement that the principles might as well not exist. As Jacques Maritain recounted from a colleague in the drafting of the Universal Declaration of Human Rights, "We agree about the rights, but on the condition that no one asks us why."[7] Expecting universal *agreement* on moral principles (such as those on which human rights may be grounded), in this sense, goes too far. But for the same reason, this understanding of natural law (or natural right) doesn't go far enough, for it does not give us an idea of how we might access those universal principles. Sokolowski's definition, on the other hand, gives us a path of discernment: we are to discern the end, or *telos*, of a given entity, then direct action toward that end, universally for that entity.

A common objection to this definition is that teleology is unworkable in modernity, or perhaps that it is a vestige of Aristotelian physics that were discarded centuries ago. I deal with these objections in the book, so I will only say here that as difficult or controversial as teleology may be, it is perhaps late modernity's last best hope for a workable way around the conflict of divine and human law – and perhaps for law and justice in the public sphere more generally. In addition, recurring to teleology may not prove as

[5] Robert Sokolowski, "What is natural law?", *The Thomist* 68 (2004), 522, citing Francis Slade in conversation, but also Francis Slade, "On the ontological priority of ends and its relevance to the narrative arts," in Alice Ramos, ed., *Beauty, Art, and the Polis* (Washington, DC: The Catholic University of America Press, 2000), 58–69.

[6] See Leo Strauss, *Natural Right and History* (Chicago, IL: University of Chicago Press, 1953).

[7] Charles Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), 21, quoting Jacques Maritain, "Introduction," in UNESCO, *Human Rights: Comments and Interpretations* (London: Allan Wingate, 1949), 9, 10 (emphasis in original).

implausible as its critics have suggested; recent years have seen scholars in both philosophy and science calling into question the materialist assumptions underlying modern scientific rejections of Aristotelian teleology.[8]

LIBERALISM

The reader may ask whether I am providing a fair treatment of liberalism's possibilities for dealing with the complexities of law and religion I discuss in this book. On one level, of course, the answer must be a firm "no," for a book that aims both to set forth a novel theory of religious freedom – indeed of law itself – as well as analyze classic works of Greek, Jewish, Christian, and Islamic traditions cannot add a thorough treatment of liberalism to its task list. Nevertheless, liberalism has done as much work as any philosophical foundation in grounding religious freedom, and one can reasonably make the accusation that I have selected on the dependent variable in choosing not Locke or Madison but rather Hobbes to illustrate the insufficiency of liberalism as a foundation for religious freedom. To this I must plead guilty as charged. Hobbes, of course, is not a representative of the liberal tradition but its foil, the gadfly who demands proof that liberalism's freedom will not end in a return to the violence of the religious wars that were the backdrop of his *Leviathan*.

There is a defense for this move, however. My criticism is not aimed at liberalism *qua* liberalism; rather, my charge is that as otherwise excellent a political theory as liberalism may be, it simply does not have the philosophical resources, by its very nature, to deal with competing obligations of human law and divine law – largely because liberalism arose in part to address this very problem. To the earlier view that "there are two powers . . . by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power,"[9] liberalism, helped along by the Peace of Westphalia's *cuius regio eius religio* (whose realm, his religion), made human law the decisive one. It then eventually did away with ruling and established religion altogether, substituting in their places self-government and the separation of church and state. No form of liberalism, whether Lockean, Madisonian, or Rawlsian, has altered this development.

Again, none of this is in itself a critique of liberalism; indeed, attacking liberalism as such would risk cutting off the branch on which religious liberty has sat for centuries. What I am suggesting, however, is that liberalism *by itself* is inadequate to address the problem of religious liberty, which is the problem of competing laws. As

[8] See especially Thomas Nagel, *Mind and Cosmos: Why the Materialist Neo-Darwinian Conception of Nature Is almost Certainly False* (New York: Oxford University Press, 2012) and William M. R. Simpson, Robert C. Koons, and Nicholas J. Teh, eds., *Neo-Aristotelian Perspectives on Contemporary Science* (New York: Routledge, 2018).

[9] Pope Gelasius' letter to Emperor Anastasius, 494 CE, trans. J. H. Robinson, www.fordham.edu/halsall/source/gelasius1.asp.

I explain in the next chapter, this is a problem that is greatly exacerbated by late modern pluralism, as well as globalization. Importantly, what I am proposing in this book – a return to a conception of law as human, divine, *and natural* – could well take root within a liberal society. Christopher Wolfe's excellent *Natural Law Liberalism* is devoted to fleshing out such a conception of liberalism, and my own work should be understood as complementary, not antagonistic, to his.[10]

This book's project, then, is both timeless and timely: it recognizes the perennial struggle of human beings to confront divine obligations while negotiating human society, but it also sees in our present moment an urgent need to restore metaphysical and teleological moorings to our political, social, and moral debates. It is a book on religious freedom, but it is also a book on a way forward out of the agonistic, often rancorous and combative, battle of wills that twenty-first-century politics has become – the way, that is, of natural law.

[10] See Christopher Wolfe, *Natural Law Liberalism* (New York and Cambridge, UK: Cambridge University Press, 2006).

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