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Introduction

Religious liberty protects the quest for true religion. It facilitates the free creation of communities of solidarity, fraternity, and charity, or what we may call ‘right relationship’, seeking the truth about God and instantiating this in manifold contexts. This claim, developed in this book, is a response to a question: why should we care about religious liberty? What purpose does it serve within a just political community? In recent years, many commentators have argued that religious liberty fundamentally concerns personal autonomy. This fits with the state’s wider duty to promote equal concern and respect between different conceptions of the good or claims of authenticity. Courts have often followed in similar vein. Such a view both challenges treating religious liberty with any special concern, and questions the public role and life of religious traditions more generally. The Muslim woman’s headscarf or a Christian’s cross may be indistinguishable from other curtailed autonomy interests in the workplace. A community adopting a crucifix in civic contexts disrespects its non-conforming citizens. The religious organisation refusing to hire persons who do not adhere to its religious beliefs is suspiciously limiting the self-determination or autonomy interests of members of the public. Religion, according to this liberal egalitarian account of religious liberty and political authority, is both abstracted and perceived as a threat. Paradoxically, it becomes a capacious category of personal autonomy or authenticity, seemingly expanding to a general liberty for all persons, but at the same time it is increasingly subjected to state interests, especially when it runs contrary to the egalitarian ethos. Religion is both flattened out and contained in aid of a vision, ultimately, of ethical individualism.

Of course, religious communities still benefit from broad liberties. Churches, temples, and mosques continue to preach, worship, and pray. They continue to have some capacity to hire consistent with a religious ethos. Different communities can still largely uphold (or change) their doctrines according to their own internal authority structures, and they continue to operate consistent with religious laws. Religious individuals receive protections afforded by non-discrimination norms. Unlike in other countries, religious communities in the United Kingdom (the focus of this book, alongside European jurisprudence) are generally free from violent persecution. Religious communities remain part of public discourse and life – from schools and charitable provision through to the twenty-six most senior bishops of the Church of England sitting in the House of Lords. In practice, the political community arguably still values flourishing and free religious communities. Nevertheless, the ground may in some respects be shifting. Julian Rivers has noted that, at law, there are changes: a decreasing respect for religion as a ground of conscientious action, less deference to religious law, and a diminishing scope for religious traditions to offer public services consistent with their own ethos.¹ As part of this shift, religious groups are expected to reform. Jürgen Habermas is explicit: the ‘consciousness of the faithful’ must be ‘modernised’ to accept ‘the individualistic and egalitarian nature of the laws of the secular community’.² Put another way, religious groups and individuals are increasingly subjected to a single, universal standard that is seen to reflect the equal rights of individuals.

This book provides an alternative. It articulates a justification for religious liberty, answering why it is integral to a just political community. In doing so, I hope to point towards reasons for affording greater accommodation of religious beliefs and practices within the general law, and for the liberty of groups to contribute to public life without being subjected to the reforming impulse. This alternative entails an act of *ressourcement* – retrieving a longer tradition of reflection on religion and politics or civil and spiritual authority that stretches back to the pre-modern in order to recapitulate an understanding of religious liberty. To put it at its simplest, I return to St Augustine rather than begin, as so many do, with John Locke. In part this retrieval entails translating

¹ Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 371 at 396.

² Jürgen Habermas, ‘Intolerance and Discrimination’ (2003) 1 *International Journal of Constitutional Law* 2 at 6.

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pre-modern writers for the contemporary setting. It must grapple with the presence of plural traditions, as well as the valuable modern emphasis on both the dignity of the person and equality between persons. I do not propose a simplistic attempt to wind back the clock, as though that were possible. However, I suggest that a longer history of reflection and practice regarding religion and politics sustains an on-going commitment to religious liberty. I frame religious liberty as serving a quest to discern and pursue shared ends or the common good. I argue that religion – seeking what Augustine called true religion – is at the heart of this quest. It entails the desire for right relationship: ordering our lives towards God and then, in light of this epiphany, ordering our life together. These are, of course, claims shaped by Christian thought. Nevertheless, I argue that such a quest is not monolithic but rather is pursued through multiple communities, each exercising authority. Pluralism and shared ends are not opposed to one another.

This reflection on a longer tradition of religion and politics is not done to refine the regnant liberal discourse's understanding of religious liberty – quite the opposite. The argument that I develop fits within an emerging post-liberal outlook. In an important article written in 2009, Steven Smith argued that religious liberty discourse was exhibiting signs of both decadence and exhaustion.³ He was reflecting on shifts away from a jurisdictional understanding of church and state towards a general vision of 'fairness' to all conceptions of the good as the basis of religious liberty. As theorists adopted this latter view, religious liberty was losing its distinct meaning. But these signs – of decadence and exhaustion – are not limited to religious liberty discourse. That discourse can only be understood within a larger political imaginary. By this I mean an understanding of how individuals and groups relate to each other and the whole, the ends or purpose of political community, and the relationship this has to the cosmos and the transcendent. It is an understanding that gives rise to a narrative – the expectations persons have in relation to one another, and how they see themselves in the world as purposed (or not).⁴ Liberalism forms the larger imaginary for contemporary religious liberty discourse. But it is arguably liberalism itself that is paradoxically showing signs of both decadence and exhaustion.

³ Steven D. Smith, 'Discourse in the Dusk: The Twilight of Religious Freedom?' (2009) 122 *Harvard Law Review* 1869 at 1872.

⁴ Echoing Charles Taylor's description of a social imaginary: Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press, 2007), p. 171.

Challenging the liberal egalitarian account of religious liberty consequently fits within a wider emerging challenge to liberalism itself, but this is also necessarily so. Our understanding of the purpose that religious liberty serves cannot be divorced from a political imaginary. Any alternative must be developed as an alternative vision of our life together, one that captures something of our deepest commitments and shared practices. This entails both politics and theology, including a challenge to the dominant frame of secularisation. Unpacking these will help situate this book.

I.1 A POLITICAL VISION: POST-LIBERAL ASSOCIATION

Criticising liberalism is not new.⁵ However, recent critics have pointed to an emerging set of crises in which the fruition of liberalism's own core ideas is undermining goods in our democratic life.⁶ Alienation is a common theme. Democratic participation and membership of civil society organisations has declined. Much of the working class (and increasingly a large part of the middle-class, as well as immigrant communities given the role of a servant class) feel removed from, if not opposed to, the halls of power. Often this can be mapped geographically. Such alienation is not simply because of a lack of direct representation, however. Nor is it because those in power fail to fulfil a promise that their economic prosperity will trickle down, although growing inequality is at issue.⁷ Rather, it arguably also has arisen because of the very ends a liberal democratic order is understood to be pursuing, and how these ends disembody persons and the political community from shared ends or a valued tradition.⁸

⁵ See, e.g., Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); and Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Gerald Duckworth, 1988).

⁶ See John Milbank and Adrian Pabst, *The Politics of Virtue: Post-Liberalism and the Human Future* (London: Rowman & Littlefield, 2016), p. 58: 'liberalism more and more produces the war of all against all that was its own mistaken presupposition ... [I]ts self-swallowing is no partial crisis, susceptible to a new adjustment, but is rather a metacrisis, which cannot be transcended, whether for good or ill, in a purely liberal way.'

⁷ See, e.g., Ganesh Sitaraman, 'Economic Inequality and Constitutional Democracy', in Mark A. Graber, Sanford Levinson, and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018), p. 533 (discussing the growing gap between the ultra-rich and the rest, the control corporations have over the lives of individuals, the undermining of unions, and the subsequent lack of control citizens have over basic economic policy).

⁸ Echoing Karl Polyani, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed. (Boston, MA: Beacon Press, 2001), pp. 48–60.

Rule is for the sake of promoting the rights and interests of individuals, but this can take the form of privileging versions of negative liberty in aid of autonomy. John Milbank and Adrian Pabst point to a unity between the conventional ‘right’ in politics and the conventional ‘left’ on this account – what they call the ‘two liberalisms’.⁹ On the right, state power is used to further contract and property rights in the name of market freedom. On the left, state power is used to further sexual and cultural autonomy in the name of individual self-determination. Both liberalisms pursue liberation or emancipation from things seen as restrictive – limits on economic transactions or liberty-constraints within religious traditions, for example. Both are in tension with an older understanding of freedom as discerning and pursuing human flourishing, which includes forming the virtues needed to overcome degrading or anti-human inclinations. Politics, occupying its own ‘sphere’, is meant to be neutral as to different conceptions of the good. It is a sphere for realising different instances of personal autonomy or for pursuing subjective rights. In itself, this arguably fosters a free market in ethics, or a consumerist logic agnostic to substantive ends. To urge such a substantive end – like virtue and human flourishing, or maintaining a tradition through public symbols and acts – is, some argue, ruled out either because it does not meet a legitimacy requirement of ‘public reason’ or because it denies civil membership to those who disagree. As Steven Smith notes, for others this does ‘violence to many of our deepest convictions’; a community’s traditions are rejected as shaping the life of a political community.¹⁰ But it also does not clearly lead to just relations between people.

Pabst, drawing from Alexis de Toqueville, argues that such public agnosticism as to ends may be experienced as ‘voluntary servitude’.¹¹ People are said to be free to pursue their own conception of the good, and yet this freedom is manifested in apparent consent to oligarchic pressures. On the one hand, persons are corralled as demographics by a professional class attempting to capture a majority or market share as ‘the will of the people’.¹² On the other hand, they are treated as abstract identities to be used by large corporate interests, themselves having an

⁹ Milbank and Pabst, *The Politics of Virtue*, pp. 13–15.

¹⁰ Steven D. Smith, *The Disenchantment of Secular Discourse* (Cambridge, MA: Harvard University Press, 2010), p. 39.

¹¹ Adrian Pabst, *The Demons of Liberal Democracy* (Cambridge: Polity, 2019), p. 7, quoting Alexis de Tocqueville, *Democracy in America*, G. Lawrence (trans.) (New York, NY: Doubleday, 1969), vol. 1, p. 650.

¹² In *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York, NY: Columbia University Press, 2011), pp. 13–15, Paul Kahn argues that the claims of

increasingly homogenising effect (as with the monopolies of social media). Economics now concerns a separate ‘sphere’ of market transactions, in which persons are treated as abstract commodities. They are removed from a shared interest in craftsmanship, talent, and risk, and instead treated as labour used for the end of profits that they will never see.

Some seem to benefit from this emphasis on abstract or negative freedom, and the corollary of free markets. A class of now placeless persons, untethered from the constraints of neighbours and communities, embraces such freedom to further economic gain and obtain different consumable experiences.¹³ Meanwhile, there is rising material inequality and a pervading sense of loneliness in society.¹⁴

The very logic of a liberal outlook increasingly calls into question associational life. Pre-modern writers often understood society as a series of interlocking units, from families through to cities, each with an independent authority arising from its purposes. However, in our modern outlook, individuals are the fundamental unit of society. Associations – at all levels – arise through contract. Society itself exists to further an individual’s natural rights. And this individualistic focus demands a strong state. Faced both with the possible anarchy of individual interests and the constraints imposed on individuals by different groups claiming authority, the state is tasked with protecting and furthering liberty. This can mean that a strong surveillance society is consistent with the ends of liberty, but it also means associations are increasingly subjected to state-based norms. In this book I discuss a key dynamic in contemporary religious liberty discourse: a universal law is applied against all groups in order to advance conceptions of individual self-determination. Liberalism appears to give rise to a paradox. The supposed heterogeneity or even anarchy of individuals pursuing their conceptions of the good (itself arguably undermined by increasing corporate conformity) requires the homogenising acts of the state, in the name of liberty.¹⁵ For this reason,

courts and executives to sovereignty rest on the claim to speak with the voice of the popular sovereign.

¹³ See Patrick Deneen, *Why Liberalism Failed* (New Haven, CT: Yale University Press, 2018), ch. 6 ‘The New Aristocracy’.

¹⁴ In 2018, Prime Minister Theresa May launched a Government loneliness strategy, noting that up to one-fifth of all UK adults feel lonely most or all of the time. See Prime Minister’s Office, ‘PM launches Government’s first loneliness strategy’ (15 October 2018) www.gov.uk/government/news/pm-launches-governments-first-loneliness-strategy.

¹⁵ Alasdair MacIntyre writes of our oscillation between creating space for individual freedom, seen often as arbitrary choices of individual sovereigns, and collectivist

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Patrick Deneen has forcefully argued that liberalism is failing, not because it has fallen short of its goals but because it is succeeding.¹⁶ In fostering the ultimacy of individual freedom, it increasingly eliminates claims of conscience (all are now treated equally), challenges the very pluralism that liberal theorists have claimed is foundational (in the name of universal individualism), and undermines multiple sites of self-rule (by locating authority between the individual and the state). Liberalism is, in other words, both decadent and increasingly exhausted.

Deneen notes how this state of affairs is likely to lead to demagogic leaders, who while promising an alternative continue to alienate people from any strong sense of self-rule.¹⁷ But there is another alternative that a number of theorists and practitioners are developing – a post-liberal vision that resists both the liberal status quo and the autocrat. Politics within this post-liberal vision concerns discerning what it means to form a just community pursuing the common good. This entails authority exercised at different levels and encouraging different communal endeavours. Families are to be supported as primary sites for cultivating virtue. Community ties are to be encouraged, in different ways: for example, through local festivity; community organising, in which diverse groups organise for shared ends;¹⁸ and regional approaches to finance and investment.¹⁹ Universities should be relatively autonomous and served by academic guilds preserving the good of education, understood as at least including cultivating virtues for the end of contemplation.²⁰ Religious organisations should be understood not as delegates providing state services or as the result of contracting individuals, but as groups exercising their own authority and co-constituting the public sphere through a life of worship, charitable care, hospitals, education, and service to the community. Against the paradigm of disembedded free markets (supplemented by state welfarism), marketplaces should serve the ends of a more just community, one typified by solidarity or reciprocity in which goods and

control exercised by a bureaucratic sovereign to stop the anarchy of self-interest. Alasdair MacIntyre, *After Virtue*, 3rd ed. (London: Gerald Duckworth, 2007), p. 35.

¹⁶ Deneen, *Why Liberalism Failed*.

¹⁷ Ibid., p. 178. See also Pabst, *The Demons of Liberal Democracy*, ch. 3 on the rise of demagoguery.

¹⁸ See Luke Bretherton, *Resurrecting Democracy: Faith, Citizenship, and the Politics of a Common Life* (New York, NY: Cambridge University Press, 2015), Part I on community organising.

¹⁹ See *ibid.*, pp. 246–8.

²⁰ Milbank and Pabst, *The Politics of Virtue*, ch. 8 ‘Culture as Formation’.

talents are exchanged as forms of gift.²¹ They should not simply aim for just wages – although this is critical and typified in campaigns for a living wage – but also for forms of mutualism, sharing in both the risk and the rewards of economic activity. Creativity should be emphasised – a Romantic sense of one's personality or genius contributing to production, as a gift, against the alienation of labour from the good produced. Guilds should foster a shared commitment to virtuous enterprise and competition based on the creativity of the good produced and its relationship to the community's need or character.

The exact details of what this post-liberal politics looks like may differ between protagonists. It is a vision that has arguably been developed most, as a political movement, under the banner of Blue Labour, although its ideas can be found elsewhere and are drawn from wider traditions of civil economy thinking, guild or Christian socialism, Catholic social teaching, and much Anglican thought.²² However, several themes are constant: a renewed understanding of freedom as not simply the absence of restraint, but as cultivating the virtues necessary to overcome debilitating passions or dysfunction in order to pursue right relationships or human flourishing; acknowledging tradition both as providing a grammar for continuing argument and as something that most people care about;²³ following from this, a certain conservatism that seeks to conserve those things that make community possible and enjoyable (common spaces, environmental care, the family, dignity of work and wage, customs and communal or festive practices); a radical claim to distributism or reorienting economic practice towards mutual gift exchange; encouraging diverse forms of association, reflecting a person's natural inclination and desire for community; and treating authority as diffuse. Writers appeal to notions of subsidiarity, localism, federal structures, and national and international authorities, all at the service of different communities or the primacy of society. And this affects how the state's role is understood. As Rowan Williams writes, the state should be 'nourishing what is already nourishing, in the primary communities that make up society'.²⁴

²¹ See Bretherton, *Resurrecting Democracy*, pp. 264–73.

²² See Ian Geary and Adrian Pabst (eds.), *Blue Labour: Forging a New Politics* (London: IB Tauris, 2015).

²³ My use of 'tradition' tends to echo MacIntyre's use: 'an historically extended, socially embodied argument' over, in part, practices aiming for perfection of character. MacIntyre, *After Virtue*, p. 222.

²⁴ Rowan Williams, 'Preface', in Ian Geary and Adrian Pabst (eds.), *Blue Labour: Forging a New Politics* (London: IB Tauris, 2015), pp. ix, x.

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Throughout these themes, and in reconceiving the state's role, there is an emphasis on the common good. Politics serves a quest to live well, or to form a communion or discern right relationships with each other, however contested this may be. It concerns encouraging the virtues needed to live a life together. In this book, I develop an account of religious liberty framed by this quest and shaped by these themes.

This is not completely at odds with some central concerns of the liberal tradition. The use of 'post' in post-liberalism has a dual meaning. It points to an argument as to what comes after liberalism. This entails emphasising pre-modern strands of thought that have continued in different forms to this day, in opposition to modern understandings of the secular state and religious liberty. But in doing so, the concerns that liberalism raises are not rejected. The liberal tradition has emphasised the individual's conscience or else autonomy, equality between persons, and the need in some way to recognise pluralism. At its best, this has focused on freeing persons and their creativity from real oppression. Each of these remains a concern and value within a post-liberal vision, but each may nevertheless be re-characterised.²⁵ In this way, 'post' also points to a continuing interrogation of issues raised by liberal thought, as well as the possibility of overlapping arguments as between liberal and post-liberal accounts, reflecting what may at times be shared practical concerns.

At the same time, although this vision competes with what may be seen as a regnant liberal political imaginary, it is arguably not removed from the practices and traditions of the political community. Part of its persuasiveness lies in the claim that it best secures our understanding of the goods we pursue together and what a flourishing community needs in the face of alienating and atomising trends, or that, as with the focus of this book, a post-liberal vision grounds a still remaining sense of why religious liberty may matter. I appeal to what scholars of liberalism would call a comprehensive vision of the common good, albeit one that is open to debate. In itself, this is arguably not unusual. As a sense of crisis brews in different liberal democracies, others have equally pointed to the need for a 'noisy argument' over human flourishing or 'what is the right thing to do'.²⁶ But such an argument potentially points to a transcendent horizon,

²⁵ This is the subject of Chapter 6. Deneen similarly argues that '[l]iberalism's most basic appeal was not its rejection of the past but its reliance upon basic concepts that were foundational to the Western political identity.' Deneen, *Why Liberalism Failed*, p. 185.

²⁶ Madeleine Bunting, 'Introduction', in *Citizen Ethics in a Time of Crisis* (Citizen Ethics Network, 2010), www.barrowcadbury.org.uk/wp-content/uploads/2012/07/Citizens-Ethics.pdf, pp. 4, 5–6.

securing a sense that a good way to live can be found or that a created order shapes what it means to be a person. This raises the possibility of theological claims.

1.2 A THEOLOGICAL VISION: BEYOND SECULARISATION

This book contributes to what Williams calls a ‘theology of law’, or else to what Zachary Calo calls ‘theological jurisprudence’.²⁷ On this approach, the goal is not simply to superimpose theology onto legal discourse to describe a discrete community interest or else provide an external lens. Rather, a theological jurisprudence both examines how theology is already ‘inside’ legal debates and offers an understanding of the good served by our legal traditions.²⁸

Of course, many scholars object to this kind of project. They appeal to an apparent requirement of public or secular reason, central to versions of liberalism. In short, the claim is that in a context of inevitable pluralism, in which reasonable persons pursue different conceptions of the good, the exercise of political power is only legitimate when its justification rests on reasons that are acceptable to other reasonable citizens, otherwise such citizens are not respected as free and equal.²⁹ Religious reasons are especially suspect. They are, proponents of this reasons benchmark requirement claim, simply incapable of being acceptable to all reasonable people. This is especially true because religious thought is often characterised as inscrutable fideistic revelation or voluntarist divine commands.³⁰ Consequently, the religious must translate their arguments

²⁷ Rowan Williams, ‘Civil and Religious Law in England: A Religious Perspective’ (2008) 10 *Ecclesiastical Law Journal* 262 at 272; Zachary R. Calo, ‘Faithful Presence and Theological Jurisprudence: A Response to James Davison Hunter’ (2013) 39 *Pepperdine Law Review* 5.

²⁸ See also Oliver O’Donovan, *The Ways of Judgment* (Grand Rapids, MI: William B. Eerdmans Publishing, 2005), p. xiii: ‘Western civilization finds itself the heir of political institutions and traditions which it values without any clear idea why, or to what extent, it values them.’

²⁹ See John Rawls, *Political Liberalism*, expanded ed. (New York, NY: Columbia University Press, 2005), p. 217; John Rawls, ‘The Idea of Public Reason Revisited’, in John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 129, 136–7; and Martha Nussbaum, ‘Rawls’s *Political Liberalism*. A Reassessment’ (2011) 24 *Ratio Juris* 1.

³⁰ Habermas often slips into fears of ‘the dogmatic authority of an inviolable core of infallible truths of revelation’. See the discussion in Nigel Biggar, *Behaving in Public: How to Do Christian Ethics* (Grand Rapids, MI: William B. Eerdmans Publishing, 2011), pp. 51–3. Ronald Dworkin equally tends to write of religion as a ‘rule-book’ or set of