

Christianity, Natural Law and the So-called Liberal State

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According to the Book of Genesis, “God said, ‘Let us make man in our image, after our likeness.’ So God created man in his own image, in the image of God created he him; male and female created he them.” (Gen. 1:26–7) Here, my former colleague Jeremy Waldron has said, is “a doctrine [that]is enormously attractive for those of us who are open to the idea of religious foundations for human rights.”¹ What is special about man is that he is created in the image of God.

Waldron noted that “[m]any object to the political use of any deep doctrine of this kind. For some, this is a special case of a Rawlsian commitment to standards of public reason generally.”² He quotes Rawls: “In discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious or philosophical doctrines” but only to “plain truths now widely accepted, and available, to citizens generally.”³ I will come back to this objection later. Rawls’ claim is particularly important for present purposes since he has said the most about what other people can and cannot say in the public forum.

Waldron’s own difficulty is with “the further question of what work [this doctrine] can do.”⁴ Why does it matter? He quoted Anthony Appiah who said, “[w]e do not have to agree that we are created in the image of God ... to agree that we do not want to be tortured by government officials.”⁵

Towards the end of his article Waldron noted that “[c]onsistently, for almost the whole of the Christian era *imago Dei* [the image of God] has been associated with man’s capacity for practical reason...”⁶ He quoted Thomas Aquinas: “man is united to God by his reason or mind, in which is God’s image.”⁷ I think if he had pursued this point further he could have answered his question.

When Aquinas spoke of “reason or mind,” he was speaking of our ability to know what is true and false and what is good and evil. Theoretical reason enables us to discriminate between truth and falsehood. Practical reason enables us to discriminate between good and evil. Our

¹ Jeremy Waldron, “The Image of God: Rights, Reason, and Order,” (2010) *New York University Public Law and Legal Theory Working Papers*. Paper 246, 216 at 216.

² *Ibid.* 218.

³ John Rawls, *Political Liberalism* (New York, 1993), 224–5, quoted in Waldron, “Image of God” 218.

⁴ Waldron, “Image of God” 216

⁵ K. Anthony Appiah, “Grounding Human Rights,” in Michael Ignatieff , Anthony Appiah & Amy Gutmann, eds., *Human Rights as Politics and Idolatry* (Princeton, 2003), 101 at 106, quoted in Waldron, “Image of God” 218.

⁶ Waldron, “Image of God” 227

⁷ *Summa theologiae* II-I Q. 100 a. 3.

ability to discriminate between good and evil is not only the foundation of human rights. It is the foundation of moral choice. If Appiah believes, not only that we do not want to be tortured by government officials, but that it would be wrong of them to do so, then he must believe in a capacity for moral choice. He can then behave just as if he were created in the image of the God he may not believe in. We can discuss what is right and wrong with him even if he believes there is nothing in the universe except matter and matter in motion. We can leave it him to ponder how, in such universe, there could be right and wrong, and human beings able to tell the difference.

From my Catholic perspective, the idea that human beings have such an ability does not raise theological difficulties. It resolves them. If human beings were unable to tell right from wrong, they could not sin, any more than an animal. Nevertheless, there are limits to what our natural abilities enable us to do. We will sin, we need forgiveness, and even if we did not, we can no more enter the kingdom of heaven by the exercise of our natural abilities than we can fly or breathe underwater.

Whether there are difficulties from another person's religious perspective is for that person to say. I doubt if there would be for a Jew who accepted the basic teachings of Moses Maimonides or a Muslim who accepted those of Al-Farabi. Waldron noted that there might be difficulties from a Protestant perspective.

"[T]here are questions about what *imago Dei* means in the light of [the] doctrine of the fall into sin. What is the relation between *imago Dei* and our fallen sinful nature? ... What can human rights theory do with Calvin's doctrine that the image of God in us is now but a 'relic' or Martin Luther's teaching that since the Fall we are more 'like' the devil than 'like' or 'in the image of' God?"⁸

At the time of the American revolution, however, New Englanders with a Calvinist background did a good deal to further the cause of human rights. John Witte has discussed how early in the Reformation, some Lutherans faced this difficulty and resolved it. He describes the view of Johannes Eisermann (ca. 1485-1558), a student of Luther's disciple Philip Melanthon.

"Despite the fall into sin ... God has allowed all people to retain a glimmer of those 'inborn sparks' of honesty, virtue, and community with which they were created: an innate knowledge of a natural law of love of God, neighbor, and self, and a natural sense of equity by which these laws must be applied. These natural norms were 'not entirely quenched' by sin, Eisermann insisted. They were 'preserved in human reason.' They could be quickly extinguished and forgotten through depraved and debased living. But they could also be ignited to give greater light if they were subject to 'careful study.'" ⁹

⁸ Waldon, "Image of God" 219

⁹ John Witte. *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge, 2002), 144.

According to Eisermann, throughout history, “God has always lifted up wise men” who have undertaken the “careful study” of these “inborn sparks” of natural law. “Led by these wise men, the Egyptians, Greeks, Romans, and other ancient peoples of the West all saw that ‘man is by nature sociable and aspires to society and community of life, in order to curb vice and to embrace virtue, to help others, and to find a way to help himself and his community.’”¹⁰

The Protestant writer Hugo Grotius described the foundation of the natural law in virtually the same words in his book *On the Law of War and Peace*,¹¹ a book he wrote as the Thirty Years’ War broke out in Europe. In later life, he wrote about theology, hoping to pull Catholics and Protestants together. In this book, his task was different. It was to identify principles of right and wrong on which human beings could agree, whatever their differences in matters of religion. He did not believe that these principles were a lowest common denominator or an overlapping consensus among religious beliefs. He believed, like Aquinas, and like other Protestants, that the human beings by their nature had the capacity to tell the difference between right and wrong.¹²

If so, such principles should matter, not only to those who are committed to religious traditions, but to those who are not. Those who are not would still be committed as human beings to the task of living a good life rather than a bad one. They should be interested in what the religious traditions have to say on the subject, even if they regard these traditions as reflecting human wisdom rather than divine inspiration.

There is a limit, however, to what people who are committed to religious traditions can say to those who are not. The limit is not set by John Rawls’ ideas about what is appropriate in the “public forum.” It is set by what will be helpful to others. It is set by what others are able to know about how to live although they do not believe in God. As Russell Moore has said,

“[T]he Bible is exactly what makes some religious conservatives nervous about the Evangelicals, and our Catholic allies and others are correct that a collection of agenda items with attached biblical proof texts is not a persuasive case to the outside world. Richard John Neuhaus rightly denounced the ‘theonomic’ temptation that seeks to impose biblical standards on a society outside of covenant with God. As a Baptist, I heartily agree.”¹³

In a passage that has shocked many religious people, Grotius said that there would be a natural law *etiamsi daremus*, even if we were to grant, that there is no God, although, he added, to say so would be the utmost wickedness.¹⁴ Grotius was not original. Catholic authors had said the

¹⁰ *Ibid.*

¹¹ Hugo Grotius, *De iure belli ac pacis libri tres* (Amsterdam, 1646), *Prolegomena* nos. 6-9.

¹² See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), 121-25, 130-31.

¹³ Russell D. Moore, “2016 Erasmus Lecture,” *First Things*, Jan. 2017.

¹⁴ Grotius, *De iure belli ac pacis*, *Prolegomena* no.11.

same.¹⁵ The reason statement may seem shocking it that it proposes something impossible: without God, there would be nothing: no creation, no man, and no law. So let us put the question differently: Can a person who does not believe in God tell right from wrong, or as Grotius would put it, know the fundamental principles of natural law? If so, there is common ground for discussion. We can, as fellow citizens, share responsibility for deciding what best promotes the common good. If not, I do not see, politically, how civic life society would be possible. Moreover, I do not see, theologically, how we could still say that all of us are created in the image of God.

Those who have difficulty pursuing the project of Grotius in the modern world are not likely to be those who are committed to a religious tradition. They are likely to be those, like Rawls, who are committed to liberal political thought. According to George Santayana, it is characteristic of the liberal tradition to deny that human nature can be the source of norms of conduct.

“[T]he liberal view implies a certain view of the relation of man in the universe. It implies that the ultimate environment, divine or natural, is either chaotic in itself or undiscoverable by human science, and that human nature, too, is either radically various or only determinable in a few essentials, round which individual variations play *ad libitum*. For this reason, no normal religion, science art or way of happiness can be prescribed. These remain always open, even in their foundations, for each man to arrange for himself.”¹⁶

If there is no human ability to distinguish right and wrong, then, it would seem, right and wrong depend on preference or what “each man” happens “to arrange for himself.” It then becomes difficult to say that anything is truly right or wrong for society as a whole. Perhaps at the root of the conflict between those with religious convictions and those who champion the so-called liberal state is not that a disagreement over the existence of God. Perhaps it is a disagreement over the existence of man, as traditionally conceived.

One reason liberal political theory takes the position described by Santayana is a fear for human liberty. Another characteristic of liberal theory, as John Gray noted, is that “liberty is accorded priority over other political goods or values.”¹⁷ According to Waldron, that is why liberals are uneasy about the traditional association of “*imago Dei* [the image of God] ... with man’s capacity for practical reason...”¹⁸

“The position that we resemble God in the sheer ability to reason and understand – with or without regard to the ethical good – is rejected by most theorists of

¹⁵ See Anton-Hermann Chroust, “Hugo Grotius and the Scholastic Natural Law Tradition,” *The New Scholasticism* 17 (1943), 114-16; Michel Villey, *La Formation de la pensée juridique moderne* (4th ed., Paris, 1975), 346-47, 611-13.

¹⁶ George Santayana, “Liberalism and Culture,” in *Soliloquies in England and Later Soliloquies* (Ann Arbor, 1967), 174.

¹⁷ John Gray, *Liberalisms: Essays in Political Philosophy* (London, 1989), 140

¹⁸ Waldron, “Image of God” 227.

imago Dei. So this conception is going to sit uncomfortably with any understanding of human rights that privileges the free decision of the subject simply on account of that decision's representing an exercise of will. ... It will, in other words, favor an objective rather than a subjective conception of human rights.”¹⁹

That is an objection to which I will return.

Another reason that liberal political theorists are uneasy is that they often misconceive what it would mean for there to be a natural law. They imagine the natural law in one of two ways. Some imagine it as a sort of theocratic positivism. God’s commands are the natural law, and there is no way for us to know what they are unless God has told us. We have seen that this was not the traditional conception. To be a human being is to have the capacity to tell right from wrong.

Others imagine the natural law on the model of mathematics. They imagine it to be a set of propositions about how one should act that are as unchanging as those of mathematics and are known in the same way, by logical demonstration. It is not surprising that many people think of natural law in this way. It was envisioned in just that way by the rationalist philosophers of the 18th century. With the rise of rationalist philosophy, the traditional conception of natural law was crowded out. The new conception was then discredited by philosophers such as David Hume. It is not surprising that people today reject it. They should.

For the rationalists, the principles of natural law were derived from concepts that were as immutable as those of mathematics. They owed this idea to the Jesuit philosopher Francesco Suárez who wrote in the early 17th century. Concepts such as human nature or justice could be defined in the same way as concepts such as triangle or square. In any possible world that God might have created, they would be the same. He could not have created a world in which a triangle had more or less than three sides or a square more or less than four. He could not have created a world in which human beings would have a different nature than in this one or in which justice would not have the same meaning. If He had created nothing at all, these concepts would still in a certain sense exist. They would exist as possible beings.²⁰

In the 18th century, rationalists such as Gottfried Wilhelm Leibniz and Christian Wolff combined this metaphysics of concepts with the method of Descartes (as it happens, another Catholic writer). According to Descartes, the proper method for seeking truth is to doubt everything that can be doubted. One can then begin with propositions that are indubitably true and arrive by logical deduction at conclusions that are true as well. One’s conclusions will have the same certainty as those in mathematics.

For the rationalists, then, the principles of natural law follow deductively from the definitions of concepts such as human nature and justice. “The way” is then “open,” Leibniz

¹⁹ *Ibid.* 228.

²⁰ See James Gordley, *The Jurists A Critical History* (Oxford 2013), 166-77.

said, for undecided cases in law to be determined by universal principles (*rationes*).”²¹ The principles cover every case that could arise. They are certain and invariable. On a given set of fact, there can be only one right answer as to how the natural law should apply, just, as given the length of the radius of a circle, there can be only one right answer as to the length of its circumference.²² Leibniz ideal, he said, is that “when there are disputes among persons, we can simply say: Let us calculate, without further ado, and see who is right.”

When natural law is so conceived, it is rightly regarded as a threat to human freedom. For every moral question, there is one right answer. To act rightly is to follow rules we had no hand in making. For that reason, Roberto Unger, the founder of the Critical Legal Studies movement, claimed that we must reject the entire natural law tradition from Aristotle onward. It rests, he said, on a “doctrine of intelligible essences” that “denies any significance to choice other than the passive or rejection of moral truths.”²³ It is revealing that in a footnote the author he cited as epitomizing that tradition was Christian Wolff.²⁴ He was right to reject Wolff’s rationalism. He was not right to identify it with the tradition that stretches from Aristotle through Aquinas to writers such as Grotius.

In fairness to Unger, the same mistake has been made by many others. Suárez cast a long shadow. Germain Grisez and John Finnis have criticized his influence on later thinkers who conceived of the natural law in Suárezian terms.²⁵ By that conception, as Grisez has said, the precepts of the natural law are “negative” and “minimal.”²⁶ The natural law is more concerned with “issuing a few prohibitions than at directing people’s lives toward growth and flourishing.”²⁷ It prohibits actions that are incompatible with living rightly. But living rightly is not a matter of following invariable rules. Moreover, for those who take this approach, the natural law is static. They fail to recognize that, “although essential human nature does not change, in the course of human history new possibilities do open up and humankind acquires powers to act in new, more complex ways.”²⁸

In all these respects, the rationalists broke with the traditional conception of natural law. Aquinas conceived of the world in the same way as Aristotle. Eternal principles do not exist of themselves any more than Platonic Ideas. God exists, and so do the things in the world around us: human beings, other animals, plants, and the elements of the inorganic world. The natural law exists but in the human mind, in somewhat the same way that a nesting instinct exists in the

²¹ Gottfried Wilhelm Leibniz, *Nova methodus discendae docendaeque iurisprudentia* in Leibniz, *Philosophische Schriften Erster Band 1663-1672*, ed. Akademie der Wissenschaften der DDR (Berlin, 1990), II, § 11.

²² Gordley, *Jurists* 177-81,

²³ Roberto Mangabeira Unger, *Knowledge and Politics* (New York, 1975), 77.

²⁴ *Ibid.* 31 n. 1 (“For the development of this view [the doctrine of intelligible essences] see Christian Wolff, *Philosophia Prima* § 143....”).

²⁵ Germain Grisez, *Christian Moral Principles* (1997), 104; John Finnis, *Natural Law and Natural Rights* (Oxford, 1980), 45.

²⁶ Grisez, *Christian Moral Principles* 105

²⁷ *Ibid.* 105-06.

²⁸ *Ibid.* 106.

mind of the bird. If there were no birds, there would be no nesting instinct. If there were no human beings, there would be no natural law. Until the bird actually begins to build a nest, the instinct to do so only exists as a capacity within the bird to build a nest when the occasion arises. Until a human being faces the question of how to act in a given situation, the natural law exists only as a capacity to choose the right action when he considers what to do.

The bird acts by instinct. A human being can act by reason. Aquinas, following Aristotle, distinguished theoretical from practical reason. Theoretical reason enables one to proceed from principles concerning what is true to conclusions that necessarily follow from them. Practical reason which enables one to proceed from principles concerning what is good to conclusions about how best to act in the situation with which one is confronted. Aristotle never used the term “natural law.” Aquinas defined it in terms of practical reason.²⁹ “Law is a dictate of practical reason.”³⁰

Theoretical reasoning proceeds from first principles as to what is true, and practical reasoning from first principles as to what is good. The truth of first principles cannot be established from higher principles. If it could, they would not be first principles. We know without proof, when we reason about what is true, that there is a difference between truth and falsehood, between reality and illusion. We know without proof, for example, the law of non-contradiction: a proposition cannot be both true and false. If a person were to deny the law of non-contradiction, Aristotle said, there would be no way to answer him provided he does not affirm the truth of anything. But as soon as he does he must concede the truth of the law of non-contradiction or else the statement he affirmed would also be false.³¹

Similarly with practical reason. We know without proof, when we reason about what is good, that there is a difference between good and evil, between right and wrong. We know without proof, for example, that knowledge is better than ignorance and that it is better to help others than to hurt them. The same response could be made to one who denies that there is any difference between good and evil. He cannot be answered provided he will not grant that any action is better or worse than any another. But as soon as he concedes that anything is good, for example, for example, that knowledge is better than ignorance, that it is better to help others than to harm them, or that it is good not to be tortured by government officials, then he must concede that good and evil are not the same.

Aristotle used the word *nous* – insight or intuition – to refer to our capacity to know the first principles of theoretical reason. Aquinas used the word *synderesis* to refer to our capacity to know the first principles of practical reason.³² “Conscience” is “the actual application of

²⁹ *Summa theologiae* I-II Q. 94 a. 2 ad 2.

³⁰ *Ibid.* Q. 91, a. 3, citing Q. 90, a. 1 ad 2.

³¹ *Metaphysics* IV.4 1005^b-1006^a.

³² *Summa theologiae* I Q. 79 a. 12. He did not take that word from Aristotle who, indeed, said little about the way we know the first principles of practical reason. For a convincing argument that Aristotle regarded the first principles of practical reason as known in the same way as those of theoretical reason, “by some kind of intellectual intuition,” see John M. Cooper, *Reason and Human Good in Aristotle* (Indianapolis, 1986), 65.

knowledge to what we do” based ultimately on these first principles.” although “sometimes the name conscience is given to *synderesis*’ since it is the first principle of our knowledge of how to act.³³

A cardinal difference between theoretical and practical reason, according to Aristotle and Aquinas, concerns the way in which these first principles are applied. Theoretical reason can reach its conclusions with certainty. Practical reason cannot. One cannot doubt the first principles of practical reason. But to apply them, one must ask whether these principles are served in the situation that one is confronting. Sometimes the circumstances do not matter. Some actions are always wrong. Avarice, which is the pursuit of wealth for its own sake, rather than for the good it can do for oneself or others, is always wrong. Sometimes the circumstances do matter. It is good to be generous, but, Aristotle said, generosity is not simply a matter of giving wealth away but giving it to the right amount to the right person at the right time. To act rightly requires a judgment of practical reason as to how to act under the circumstances.

There may be no limit to the circumstances that matter. According to Aquinas, “actions are in singular matters.”³⁴ “An infinite number of singulars cannot be comprehended by human reason.”³⁵ In deciding how to act, a person must take the circumstances into account as best he can. Consequently, unlike theoretical reason, practical reason cannot reach its conclusions with certainty.

In such situations, according to Aquinas, practical reason must be aided by several kindred virtues that limit the circumstances one takes into account. “Memory” and “experience” which are parts of practical reason, suggest “what is true in the majority of cases.”³⁶ A person can seek advice from experienced people, and, indeed, “stands in great need of being taught by others especially old folk....”³⁷ In doing so, he employs the related virtue of *eubolia*, which is the seeking of counsel. Another virtue, *sinessis*, enables him to apply “common rules” which have been devised for similar situations. Nevertheless, he needs still another virtue, *gnome*, to make exceptions to the common rules and to “judge ... according to higher principles.” *Gnome* is necessary because “it happens sometimes that something has to be done which is not covered by the common rules of actions.”³⁸ In any event, one does not proceed by deduction. Nor can one be certain, as the rationalists thought, that what one is doing is right.

Moreover, there may be no one right choice for a person to make even after he has taken account all of the circumstances that matter. Natural law, as traditionally conceived, thus assigned a role to human freedom that the rationalist version did not. As we have seen, for the rationalists, there was only one right answer to a moral question. For Leibniz, the freedom of God was as limited as that of human beings. There was only one right choice for God when he

³³ *Ibid.* I Q. 79 a.13.

³⁴ *Ibid.* II-II Q. 47, a. 3.

³⁵ *Ibid.* II-II Q.47, a. 3, ad 2.

³⁶ *Ibid.* II-II Q. 49, a. 1.

³⁷ *Ibid.* II-II Q. 49, a. 3.

³⁸ *Ibid.*II-II Q. 51, a. 4.

made the world. One could rank order the goodness of all the worlds he might have made. God had to create the best of all possible worlds.

For Aquinas, practical reason requires that one weigh the good and evil that may follow from a certain action against each other. But there may still be no one best choice. There is no best of all possible worlds that God had to create.³⁹ One cannot rank order worlds in terms of the goodness. Yet it matters that God created the one He did. It matters which of many possible beautiful buildings an architect chooses to have built even though one cannot rank order their beauty. There is no one good way to live one's life although there many bad ones. Yet it matters very much which good life one chooses to live. If there were no good or evil, there would be no good ways to live one's live, and no bad ones either. One's choices would not matter.

This traditional conception of the natural law is so different from that of the rationalists that one wonders how the rationalist version could displace it without a major confrontation between two such contrary points of view. Yet that is what happened. From the standpoint of the rationalists, reason was rationalism. They wrote as though there were no prior intellectual position to answer. Wolff claimed that "among the scholastics" Suárez "most profoundly meditated matters of metaphysics."⁴⁰ According to Wolff, Suárez' conception of being was also that of Aquinas.⁴¹ The position of Aquinas dropped off the radar screen. As Gilson said, "Suárezianism ... consumed Thomism."⁴²

David Hume then took moral philosophy down a path it has never retraced. He discredited rationalism by showing that there is no way to begin with timeless concepts and, by logical deduction, arrive at principles to govern our actions. At the most, this procedure could tell us only about the relationship among concepts, and their relationship could not be a motive for human action. The motive for a human action must be a feeling. Therefore virtue was a feeling of a particular kind. "To have a sense of virtue, is nothing but to *feel* a satisfaction of a particular kind...."⁴³ "An action, or sentiment, or character is virtuous or vicious ... because its view causes a pleasure or uneasiness of a particular kind."⁴⁴ "In feeling that [an action] pleases after such a particular manner, we in effect feel that it is virtuous."⁴⁵ "We do not infer a character to be virtuous, because it pleases: But in feeling that it pleases after such a particular manner, we in effect feel that it is virtuous."⁴⁶

Hume developed a psychological account of why we should have such feelings. The account does not explain why it is good that we should have the feelings that we do. "Good" is a

³⁹*Ibid.* I, Q. 19, aa. 3, 10.

⁴⁰ Christian Wolff, *Philosophia prima sive ontologia* (Johannes Ecole, ed., Helesheim, 1962), § 169.

⁴¹ *Ibid.*

⁴² Etienne Gilson, *Being and Some Philosophers* (Toronto, 1952), 118.

⁴³ David Hume, *A Treatise of Human Nature* (L.A. Selby-Bigge, ed., Oxford, 1888), 3.1.2.3, 471.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

feeling we have that his account is meant to explain. His psychology is non-normative. As Richard Hardin said,

“Hume’s account does not tell us what is right or wrong, good or bad. It explains moral views; it does not justify them or even argue for them beyond fitting them to the actual psychology of people. Hume has no moral theory, only a theory of the psychology of our moral views. A purely psychological theory cannot be satisfactory for anyone who seeks ‘true’ moral positions.”⁴⁷

At that point, Hume had ended up just where an exponent of traditional moral theory would expect. A person who denies the law of non-contradiction cannot say of any statement that it is true. A person who denies that human beings have any knowledge of the good cannot say that anything is genuinely good. One would expect later philosophers either to reject Hume’s viewpoint or to give up trying to explain what is genuinely good. Moral theory would be over, and we would be left with the psychology of individuals or of cultures.

But later moral philosophers neither rejected Hume’s viewpoint nor gave up writing about what is right and wrong. Two prominent examples are Bentham and Kant. Jeremy Bentham said that when he read the work of Hume, “[I] felt as if scales had fallen from my eyes.”⁴⁸ Immanuel Kant said that Hume aroused him from his dogmatic slumber. (It was Christian Wolff who had sung him to sleep.) For Bentham, as for Hume, human motivation was a matter of feelings which Hume called feelings of satisfaction or dissatisfaction. Bentham called them pleasure and pain. He defined happiness in terms of pleasure and pain. He defined right and wrong in terms of happiness; “it is the greatest happiness of the greatest number that is the measure of right and wrong.”⁴⁹ For Kant, to pursue happiness is seek pleasure (*Lust*) and avoid displeasure (*Unlust*).⁵⁰ They then drew diametrically opposed conclusions. Bentham said, “it is the greatest happiness of the greatest number that is the measure of right and wrong.”⁵¹ Kant said that the pursuit of happiness cannot be the motivation of a moral action. An action is not moral because it is pleasurable. Therefore it must be performed for no other reason than that it is the performance of a moral duty. Duty must be defined without regard to feelings. According to Kant, it requires that one act according to the categorical imperative: “I ought never to act otherwise than in such a manner that I could also will that my maxim should become a universal law.”⁵²

It is remarkable how much influence their philosophies have retained since there are few genuine utilitarians or Kantians left. Few people believe that all that matters, morally, is how

⁴⁷ Richard Hardin, *David Hume: Moral and Political Theorist* (Oxford, 2007), ch. 2.

⁴⁸ Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* (J.H. Burns & H.L.A. Hart, eds., 1977), 440n.

⁴⁹ Jeremy Bentham, *A Fragment on Government* (London, 1776), Preface, 2nd par.

⁵⁰ Immanuel Kant, *Kritik der praktischen Vernunft* in *Kant’s gesammelte Schriften*, Königlich Preussischen Akademie der Wissenschaft ed. 5 (Berlin, 1913), 1 at 25.

⁵¹ Bentham, *Fragment on Government* Preface, 2nd par.

⁵² Immanuel Kant, *Grundlegung der Metaphysik der Sitten*, in *Kant’s gesammelte Schriften*, Königlich Preussischen Akademie der Wissenschaft ed., 4 (Berlin, 1911), 385 at 492.

much pleasure one receives from an action. Few believe that to be moral an action must be performed solely for the sake of duty, still less, that it is possible to begin with the concept of moral duty or the categorical imperative and arrive at rules that prescribe one's duties. One reason that their influence has lingered is that these seem to be the two possible ways to escape from a Humean world. In that world, human beings are motivated by feelings of satisfaction and dissatisfaction, and these feelings are psychological phenomena. One can try to escape by giving a moral significance to those feelings, and say it is good that people do what satisfies them. Or one can deny that feelings have moral significance and try to define duty without regard to them.

Another reason that the influence of these philosophies endures is that watered down versions of them seem to explain why, in Gray's words, "liberty" is to be "accorded priority over other political goods or values,"⁵³ as liberal theory says it should. In a watered down version of utilitarianism, freedom to choose matters, not, as Bentham thought, because pleasure is what ultimately matters, and each person is the best judge of what he finds pleasurable. Rather, freedom matters because some choices are more worthwhile and each person must decide which are more worthwhile for himself. In a watered down version of Kantianism, freedom matters, but not because one is truly free when he chooses according to moral duty as determined by the categorical imperative. The categorical imperative is taken to mean that each person's decisions about his moral duties are entitled to equal respect. The difficulty is that it is hard to explain, in utilitarian terms, what would make a choice worthwhile if not the pleasure it affords, or, in Kantian terms, what would make a decision as to moral duty worthy of respect if there is no standard like the categorical imperative on which moral duties are based.

In the last half century, there has been a renewed interest in liberal political theory. Some of the leading theorists have tried to resolve the difficulty just described in a new way that strongly resembles an old way. Freedom matters because the choices that people make matter. They matter because people choose according to their own sense of what is good and evil, right and wrong, worthwhile or worthless. For people to regard their own choices as important, they, at least, must believe that these judgments are not purely subjective. They, at least, must believe that they are able to distinguish actions that are good, right and worthwhile from those that are not.

An illustration is Ronald Dworkin. He explains the value of freedom in terms of human dignity. Human dignity requires that no one interfere with another's ability to live his life with self-respect and authenticity. To have self-respect, "one must believe that what one does has objective value."⁵⁴ You must "value your life as objectively important."⁵⁵ You must believe that "there is a right and wrong way for you to live."⁵⁶ That premise allows Dworkin to ask:

"Do you value your life as objectively important in virtue of something special about your life, so that it would be perfectly consistent for you to not to treat other

⁵³ John Gray, *Liberalisms: Essays in Political Philosophy* (London, 1989), 140

⁵⁴ Dworkin, *Justice for Hedgehogs* (Cambridge, Mass., 2013), 255.

⁵⁵ *Ibid.* 207

⁵⁶ *Ibid.*

human beings as having the same kind of importance? Or do you value your life in that way because you think all human life is objectively important?”⁵⁷

Suppose that person responds that all human life is objectively important. It would then be inconsistent, according to Dworkin, for a person to interfere with another’s ability to live his life with self-respect and authenticity. He drew that conclusion from the premise that each person believes that not only he but all human beings can “objectively” tell right from wrong.

Another example is Joseph Raz. He presented a “defense of the traditional belief in the value of freedom” which, he acknowledged, “is based on a radical departure from historically central liberal doctrines.”⁵⁸ According to Raz, people “engage in what they do because they believe it to be a valuable, worthwhile activity.”⁵⁹ That is a matter about which they may be right or wrong.⁶⁰ “To the extent that their valuation is misguided it affects the success of their life.”⁶¹ “A person who spends all his time gambling has, other things being equal, less successful a life, even if he is a successful gambler, than a live stock farmer busily minding his farm.”⁶² Consequently, the value of these goals is not due entirely to the fact that they are chosen. “People adopt and pursue goals because they believe in their independent value, that is, their value is believed to be at least in part independent of the fact that they were chosen and are pursued.”⁶³ Such goals have an “impersonal value” which is “their value judged independently of the fact that this agent does or can engage in them.”⁶⁴ “[A] person’s well-being depends on the value of his goals and pursuits.”⁶⁵ How does one prove that such goals have an independent value? Raz answers that “pervasive and unshakeable features of human practical thought need no justification,” according to Raz, “though they call for an explanation.”⁶⁶ We have come very close to the older idea that there are first though indemonstrable principles of practical reason.

Raz defends the value of freedom by explaining the value of autonomous choice. Autonomy “presupposes choices involving trade-offs, which require relinquishing one good for the sake of another.”⁶⁷ Such choices are between alternatives that Raz calls “incommensurable,” meaning that, although both alternatives are valuable, neither can be said to be better than the other. The reason is not that they are equal in value but that there is no way to rank their value. That does not make the choice unimportant. As Raz notes, the choice between a career in law and a career as

⁵⁷ *Ibid.* 255.

⁵⁸. Joseph Raz, *The Morality of Freedom* (Oxford, 1986),17.

⁵⁹*Ibid.* 298-99.

⁶⁰”[T]he satisfaction of goals based on false reasons does not contribute to one’s well-being. . . .”

Ibid. 302.

⁶¹*Ibid.*

⁶²*Ibid.*

⁶³*Ibid.* 308.

⁶⁴*Ibid.* 299. Such goals are pursued for reasons that are believed to be “impersonal” which “means that they are judged inasmuch as they are reasons to all, regardless of their desires or goals.” *Id.* 299 n. 1.

⁶⁵*Id.* 298.

⁶⁶. Raz, *Morality of Freedom* 289-90. See *ibid.* 344.

⁶⁷Raz, *Morality of Freedom* 398.

a clarinetist may be incommensurable but nevertheless it may be “the most momentous choice one may ever face.”⁶⁸ That, as we have seen, is the kind of freedom that Aquinas ascribed both to God and to human beings. There is no one right answer as to what world to create or which of many good lives to live. Freedom is not, as the rationalists thought, a matter of following eternal rules that govern every moral choice that could arise.

For Dworkin and Raz, then, for freedom to matter, choices must matter. For a person to believe that his choices do matter, he must believe that he is not choosing arbitrarily. He must believe that some choices are wrong, others are right, and that he and other human beings can tell the difference.

Another example, and an important one for present purposes, is John Rawls. His premise is that every human being has a “capacity for a conception of the good.”⁶⁹ A “conception of the good” is “a conception of the ends and purposes worthy of our devoted pursuit.”⁷⁰ According to Rawls, a political theorist such as himself cannot say whether any conception of the good is correct. Nevertheless, a free human being, endowed with the capacity to form a conception of the good, cannot be neutral. To adhere to a determinate conception of the good is to “take the step beyond recognizing the reasonableness of a doctrine and affirm our belief in it.”⁷¹

From this premise, Rawls reached the surprising conclusion that not only religious views but any view based on a “determinate conception of the good” should be kept out of “the public forum.” According to Rawls, because human beings have a “capacity for a conception of the good, they “have at any given time a determinate conception of the good that they try to achieve.”⁷² A “determinate conception of the good” “expresses a scheme of final ends and attachments” and “a comprehensive doctrine in light of which those elements are interpreted.”⁷³ In a free society, people will arrive at different determinate conceptions of the good. Consequently, they will “remain profoundly divided by reasonable religious, philosophical and moral doctrines”⁷⁴ They are able to agree on the principles of a just political order despite their differences because, as “reasonable persons,” they “will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own.”⁷⁵ He then moved quickly from explaining what people should not repress to explaining what they should not say. “[T]he fact that we affirm a particular religious, philosophical, or moral comprehensive doctrine with its associated conception of the good is not a reason for us to propose, or to expect others to accept, a conception of justice that favors those of that persuasion.”⁷⁶ Therefore, in public discourse, no one should advance arguments which depend on his own comprehensive view which others may not share.

⁶⁸*Ibid.* 332.

⁶⁹Rawls, *Political Liberalism* 18-19.

⁷⁰*Ibid.* 104.

⁷¹*Ibid.* 60.

⁷²*Ibid.* 19.

⁷³*Ibid.* 108.

⁷⁴*Ibid.* 4.

⁷⁵*Ibid.* 60.

⁷⁶*Ibid.* 24.

Traditional natural law theorists would have agreed that all human beings begin with a conception of the good. Aquinas called this natural ability to know the fundamental principles of right and wrong *synderesis*. These principles are then applied to concrete situations by using practical reason. What I find baffling about Rawls is that human capacity to form a conception of the good of which he speaks looks much like *synderesis*. His explanation of how people elaborate that concept to form “determinate conceptions of the good” looks much like practical reason. Yet instead of concluding that citizens should discuss their difference, he claimed that they should not mention them, not if they are based on a “determinate conception of the good.”

Of course, I may be misunderstanding Rawls. Does he believe that the initial conceptions of the good, which all human beings are capable of forming, are much the same? I think so. His reasons why people disagree do not concern a difference in their initial conceptions but in the ways that these conception are elaborated. Suppose, however, Rawls were to maintain that the conceptions of the good with which people begin might be so different that one person would not recognize what the other values as at all good. Suppose a person could not see the value of knowledge as opposed to ignorance and regarded other people as his natural enemies, the way a lion regards a gazelle. I would not respect that person’s concept of the good. I would not recognize it as a concept of the good.

The differences arise, according to Rawls, when people elaborate these conceptions of the good to form “determinate conceptions of the good.” To do so they must assume what Rawls calls “the burdens of judgment.” Although their conclusions differ, they deal with these burdens in a similar way.

Rawls asks, “why should free institutions lead to reasonable pluralism...? Why does not our conscientious attempt to reason with one another lead to reasonable agreement?”⁷⁷

“One explanation is this. Let’s say that reasonable disagreement is disagreement between reasonable persons: that is, between persons who have realized their two moral powers to a degree sufficient to be fully cooperating members of society. Given their moral powers, they share a common human reason, similar powers of thought and judgment: they can draw conclusions, weigh evidence, and balance competing considerations.

The idea of reasonable disagreement involves an account of the sources, or causes, of disagreement between reasonable persons so defined. These sources I refer to as the burdens of judgment. The account of these burdens must be such that it is fully compatible with, and does not impugn, the reasonableness of those who disagree. What, then, goes wrong? an explanation of the right kind is that the sources of reasonable disagreement – the burdens of judgment – among reasonable persons are the many hazards involved in the correct (and

⁷⁷Ibid. 55.

conscientious) exercise of our powers of reason and judgment in the ordinary course of political life.”⁷⁸

He then gives a list, “not complete,” of “the more obvious sources” of reasonable disagreement. They are: (a) “[t]he evidence ... is confusing and complex”; (b) we may “agree fully about the kind of considerations that are relevant” but “disagree about their weight”; (c) “our concepts ... are vague and subject to hard cases”; (d) “the way we assess evidence and weigh moral and political values is shaped by our total experience”; (e) “Often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment”; (f) “any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized.”

It is important to Rawls that people arrive at different views by a process that all can understand and respect. The process he described for assuming the “burdens of judgment” is indeed one that we can understand and respect. It is much like what traditional natural law theorists described as the operation of practical reason. Every item on Rawls’ list is one that Aquinas would say calls for the exercise of practical reason: evaluating evidence and assigning weight to different values in light of his experience, taking into account the normative considerations on both sides of an issue, and recognizing that some selection must be made from the full range of moral and political values that might be realized.

These are factors that explain why reasonable people will differ, and sometimes differ profoundly. They do not justify excluding anyone’s views from public discourse. Free political debate should be a discussion of how evidence should be evaluated and which goals are most worth achieving. They are just the sort of issues that should be raised in the public forum. They are also, in Aquinas’ terminology, issues of how to apply the general principles of natural law to decide how to act in the situation one is confronting. For Aquinas, as for Aristotle, practical reasoning does not reach its conclusions with certainty. Of course reasonable people will differ. There is no reason to conclude, as Rawls did, that the fundamental problem of political theory is how they can share a stable society. A fundamental problem of political theory is whose view should prevail if, after discussion, they still disagree. There are various answers. For example, they might vote.

Rawls’ examples of differences that cannot be resolved in the public forum actually have little to do with his description of how people deal with “the burdens of judgment.” One is differences between religious groups such as Catholics, Protestants, Jews and Muslims. These groups disagree about how God has spoken to us. They did not arrive at their convictions by beginning with a conception of good and elaborating it. His other example is the differences between adherents of different philosophical systems such as utilitarianism and Kantianism. Their differences, however, concern what is meant by “good,” not how similar conceptions of the good are to be elaborated. For Bentham, the good is the greatest happiness of the greatest number, with happiness defined in terms of pleasure. For Kant, it is a good will, which is one that is determined, not by inclination, but by the categorical imperative.

⁷⁸Ibid. 55-56.

These differences do not arise on account of the burdens of judgment. Nor are they the differences that now divide us politically. We learned to tolerate and de-politicize religious differences long before Rawls explained what we must believe in order to do so. The philosophical differences to which Rawls continually referred are not divisive in the way that religious differences once were. We are not afraid that utilitarians will overthrow the government as Puritans once did, or that the cities will be paralyzed by mobs Kantians protesting in the streets, or that either group will pack the Supreme Court, let alone start a conflict like the Thirty Years War. Philosophies such as Marxism are politically divisive but, for Rawls, they do not count as reasonable comprehensive views because, in his view, they are not reasonable.

One reason Rawls' views are popular may be that they inhibit direct discussion of what is good or evil, right or wrong, better or worse. People with religious convictions nearly all believe that such questions matter. Consequently they feel shut out of the discussion of what matters. One does not have to have religious convictions, however, to believe that there is a difference between right and wrong, and that people have some ability to tell the difference. Why then do proponents of liberal political theory such as Rawls, not only avoid discussing what is right and wrong, but tell others that they are not do so in the public forum?

Here, I have suggested two reasons. One is that when Hume demolished the rationalist version of natural law, right and wrong became a matter of feelings to be explained by human psychology and corresponding to nothing else. Bentham and Kant were unable to escape from Hume's world. Liberal political theorists are still writing under Hume's shadow. And yet, the shadow seems to be lifting. Dworkin, Raz and Rawls are returning to the premise that , we can tell good from evil. If so, we should form our views carefully and then discuss them.

The other reason is that liberal theorists wish to protect liberty. Yet they are realizing that the freedom to choose cannot be worthwhile if no choice is truly better than any other. We have mentioned two characteristics of liberal political theory. One, according to Gray, is the value placed on liberty. The other, according to Santayana, is the distrust of human nature as as a source of knowledge about right and wrong.

For the sake of liberty, they may have to give up that distrust. We will then have a discussion which everyone can join, and in which those with religious traditions concerned with the difference between good and evil will have much to contribute. They not only can participate. They should, and their contribution should be welcomed by others.