A Theological Defence of Burkean Conservatism and a Critique of Contractarian Liberalism

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For those who gave their tomorrow for our today

‘Greater love hath no man than this, that a man lay down his life for his friends’

– John 15:13 KJV

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Abstract

In this thesis I have provided a critique of the stream of contractarian liberalism which finds its source in the work of John Locke, tracing its influence through the French Revolution and into our own era in the work of the contemporary liberal theorist John Rawls. I have drawn particular attention to the substantive and methodological assumptions which unify these three instantiations of the contractarian tradition. I have challenged this stream of liberalism by offering an exposition of the thought of Edmund Burke. During the course of the thesis I have looked at the central themes which characterised Burke's thought, drawing particular attention to Burke's understanding of the British constitution, common law and his regard for the institutional church. Secondly, I have analysed the theological content of Burke's political thought, demonstrating that Burke's political thought emerged from his Christian faith and his concomitant belief in the natural law. I have argued that, as a result, there is a profound consonance between the central principles of the Christian faith and the conservative tradition which followed Burke. In the course of this argument I have defended the natural law school of Burkean scholarship and presented a clear link between Burke and the thought of Thomas Aquinas. Thirdly, I have unearthed some of the theological convictions which were historically resident in the British legal tradition that informed Burke's thought and I have shown how these assumptions run counter to the central ideas of the contractarian tradition. I have concluded by arguing that there are specifiable aspects of contractarian liberalism which should be treated with suspicion by Christians.

Long Abstract

In my thesis I have sought to achieve three central aims. Firstly, I have provided a critique of a particular stream of liberalism which finds its source in the work of John Locke, tracing its influence through the French revolution and into our own era in the work of the contemporary liberal John Rawls. I have brought this stream of liberalism into conversation with the thought of Edmund Burke and shown how Burke's ideas offer a serious political and theological challenge to some of the central ideas of the contractarian tradition. Secondly, I have offered a theological defence of a particular approach to politics which might broadly be termed Burkean conservatism. I have shown that Burke's political thought emerged from his Christian faith and his belief in the natural law, arguing that, as a result, there is a profound consonance between the central principles of conservatism and the Christian faith. In the course of this argument I have defended the natural law school of Burkean scholarship and presented a clear link between Burke and the thought of Thomas Aquinas. Equally, I have made the case that at the heart of the contractarian liberal tradition lie notions which are hard to reconcile with the central doctrines of the Christian faith. Thirdly, I have unearthed some of the theological convictions which were historically resident in the British legal tradition that informed Burke's thought. This thesis then is predominantly a conceptual theological critique of contractarianism and not an exhaustive account of the intellectual history of a tradition. I have however endeavoured to give the contractarian tradition a sympathetic hearing by offering three of the most influential and compelling accounts of contractarian thought and providing a historical and intellectual context in each instance. Additionally, I have attempted to be alive to the differences between the distinct instantiations of the contractarian tradition.

The need for this thesis arises due to several significant lacunae in the theological literature. Firstly, there has been little scholarship to establish a credible source for Burke's alleged commitment to a

Thomistic understanding of the natural law. The natural law school of Burke scholarship which was prominent in the 1950's and 60's has been somewhat marginalised, partly due to a lack of work demonstrating a credible link between Burke and Aquinas. To address this lacuna I have offered a substantial exposition of Aquinas' influence upon the common law tradition and provided an intellectual genealogy which gives the reader good reason to believe that Burke was influenced by a Thomistic conception of the natural law. The second lacuna I have addressed concerns John Locke and the natural law. Prominent academics such as John Dunn and Jeremy Waldron have argued that Locke's *Second Treatise* is grounded in a belief in the natural law without, I have argued, paying sufficient attention to the significant ways in which he broke with premodern conceptions of the natural law. In the second chapter I have argued that Locke's understanding of the natural law was deeply informed by his early modern context and that, at times, he followed Hobbes in reducing the natural law to anthropological axioms derived from the observation of nature. I have looked in some detail at the effect Locke's thought had upon British and French radicalism in the eighteenth century and show that such contractarian thought was opposed by figures, like Burke, who were significantly influenced by the common law tradition. There is currently very little work in Burkean scholarship that pays serious attention to the influence of the common law tradition upon Burke's opposition of the contractarians. Equally, there is very little work on the idea that Burke conceived of himself as an opponent of Locke. The third lacuna which I have addressed concerns contemporary theological critiques of liberalism. While there has been a substantial amount of theological literature offering a critique of various forms of political liberalism, there has been less attention paid to the methodological approach to politics which has historically been associated with the contractarian tradition. In contrasting Locke and Burke's understanding of reason and the function of the natural law, I hope to have shown the extent to which natural rights proponents such as Locke broke with British political and legal tradition. I also hope to have shown that the

manner in which Burke and Locke conceived of reason in general, and the natural law in particular, had serious implications for their respective approaches to politics. The final lacuna which I have addressed relates to scholarship on Burkean conservatism as a political philosophy. There has been surprisingly little academic literature making the case for Burkean conservatism on theological grounds, moreover there has been even less literature pointing to the self-confessedly theological convictions which animated the leading lights of this tradition. This thesis has sought to make the theological character of the conservative tradition plain and clearly explicate the theological rationale for the central principles of conservatism.

In the introduction I have looked at a judgement made by Lord Justice Laws in 2010. I have held his reasoning up as a textbook illustration of the natural rights contractarian tradition in action. I have clarified precisely what I mean by contractarian liberalism, and given an overview of some of the contemporary theological critiques that have been offered of this form of liberalism. I have then clarified the aims of my thesis before turning to look at Burke and the common law tradition.

In the first chapter I have offered a defence of the view that Edmund Burke was substantially indebted to a Thomistic conception of the natural law. I have looked at Burke's statements regarding his indebtedness to the common law tradition before proceeding to look at the work of John Fortescue, Christopher St. Germain, John Selden and Edward Coke. I hope to have clearly shown that the common law tradition was substantially influenced by Thomas Aquinas' account of the natural law and that Edmund Burke was substantially influenced by Aquinas through the work of the common lawyers. In this section of the thesis we see the central assumptions that underpinned the British legal tradition. I point out that Burke's conservatism emerged from many common law principles which were deeply theological in origin. Having established that Burke's thought was in continuity with a distinctly Christian and indeed Thomistic tradition of legal and

political thought I proceed to an exposition of political liberalism as it emerged in the seventeenth century.

In my second chapter I have focused on a tradition of deductive political thought which emerged in the seventeenth century. I have argued that Locke was a proponent of such thought and that he clearly believed that politics and ethics were an exact science that had the potential to be as precise as Euclidean geometry. I have made the case that this deductive political thought fundamentally altered the pre-modern conception of the natural law. Furthermore I have attempted to show that early modern thinkers such as Locke conceived of the law of nature as the capacity of reason to identify axiomatic truths in nature from which a political system could be rationally deduced. I have proceeded to look in detail at Locke's *Second Treatise* and his *Letter Concerning Toleration*, showing that both are deductive works which emerge from Locke's chosen anthropological axioms (a conception of man as free, equal and a bearer of property rights). I have argued that because Locke's political work was composed of abstract definitions which aimed to be as perfect as Euclidean geometry, the whole system fell apart when it made contact with the real world, and that Locke was aware of this failing.

In the second half of this chapter I have argued that Burke encountered the same deductive thought espoused by Locke in the radical reformers of his own day. I have pointed out that, while the mainstream tradition of Whigs had largely dismissed Locke's radical political conclusions, there was a tradition of natural rights radicalism which clearly identified with Locke. I have gone on to make the case that Burke did not accept the axioms which the Lockean radicals of his own day were seeking to found a society on, but more importantly, he did not accept the deductive methodology of the radicals. I have shown that Burke and others believed such a methodology would upturn the stable institutions and civil liberties which had been hard won by centuries of gradual change.

Chronologically the third chapter is concerned with Burke's own period and his interaction with the French Revolution. I have looked briefly at the intellectual lineage which connected Locke's political thought with the French revolutionaries, identifying a substantive and methodological resemblance between the political philosophy in *The Second Treatise* and *The Declaration of the Rights of Man*. In my analysis of the *Declaration* I have drawn attention to the abstract, deductive approach to politics which the French revolutionaries inherited from the *philosophes*. However, I have noted that, while the same assumptions animate the core of two contractarian works, the atheism of the *philosophes* and, in particular, Rousseau's doctrine of the general will, gave the revolutionary movement a more anti-clerical and corporatist tone than Locke's work.

In the second half of the chapter I have looked in detail at Burke's account of the natural law, showing that Burke's understanding of the natural law and its relation to the constitution, is far more akin to pre-modern thinkers than to Locke's understanding of the natural law. I have argued that Burke rejected the notion that deductive political reason, operating upon a conception of the rights of man, could instate a new form of government which would bring an end to injustice. I have made the case that, in contrast to Rawls, Burke advocated the piecemeal operation of prudence in political matters. I have argued that Burke's understanding of prudence was both religious and deeply tied to his Christian worldview. In this section I have looked in detail at Burke's fear that the contractarian thought of the revolutionaries would seek to destroy the Christian religion precisely because of their rationalism, deductive political thought and their belief in natural rights. I have attempted to show that, contrary to the ideas of Locke, Burke followed Hooker and the common lawyers in the view that the Church was an integral part of the state which unified the nation and provided the people with a moral orientation. Finally I have argued that Burke rejected the notion of a secular society, believing that it was a Christian society which provided the surest possibility for civil concord.

I have then looked at the work of John Rawls, giving a brief overview of Rawls' work and arguing that Rawls offers a striking reformulation of traditional contractarian political thought. In particular I have noted his debt to Immanuel Kant, and his innovative solution to the problem of religious pluralism. Yet, I have also argued that in his foundational anthropological assumptions and methodological approach, Rawls is in direct continuity with previous contractarian thinkers.

In the second half of this chapter I have focused particularly upon Burke's understanding of political authority. I have argued that Burke rejected the notion that sovereignty emerges from the popular will of the people, but instead believed that all authority is from God. I have looked at Burke's consistent rejection of the idea that will ought to take precedence over law. I have gone on to analyse Rawls' constructivist political project, which starts with the original position, exploring the similarities between the original position and Locke's state of nature. I have shown that Rawls falls subject to Burke's critique of contractarianism by arguing that we can rationally select principles of justice and constitutional essentials. Against such a view, I have presented Burke's belief that society is not constructed by man but should be considered a divinely ordained institution subject to the natural law.

I have then identified six intersecting political principles which are recurrent in Burke's thought. I have argued that these principles are deeply consonant with theological beliefs which Burke held. Furthermore, I have argued that it is unlikely that this is a coincidence because these beliefs were a product of his Christian worldview. I have proceeded to explicate the theological roots of these principles and show that Burke and the conservatives who followed him were articulating principles which have also been expressed by Christian theologians, notably in Anglican and Catholic social teaching.

In the final section I have turned to the work of a contemporary theologian, Oliver O'Donovan who I believe adds depth to some of the less comprehensively developed theological themes in Burke's thought and provides a sophisticated theological framework for Burkean conservatives. I have shown how O'Donovan's narrative helps to flesh out the theological rationale of the conservative principles which I have outlined.

After surveying what we have learned about conservatism and contractarian liberalism, I have concluded by arguing that there are specifiable aspects of contractarian liberalism which should be treated with suspicion by Christians. Furthermore, I have argued that Christians have good theological reasons to heed the central principles which constitute Burkean conservatism.

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Introduction

In April 2010 Lord Justice Laws ruled that the Christian counsellor Gary MacFarlane was rightfully sacked by the counselling service *Relate* for refusing to counsel a homosexual couple. MacFarlane argued that due to his strongly held Christian principles he did not feel able to offer counselling to same sex couples. The subsequent statement from Justice Laws is worth quoting at length:

> 22. In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.
>
> 23. The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law: the prohibition of violence and dishonesty. The Judaeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy. And the liturgy and practice of the established Church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be *true*; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in

> the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claims.
>
> 24. The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.
>
> 25. So it is that the law must firmly safeguard the right to hold and express religious be lief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.

In this statement Justice Laws perfectly encapsulates the core premises which define the stream of contractarian liberalism which this thesis will be attending to. One of the characteristic features of this stream of liberalism is that unverifiable faith claims are regarded as subjective and therefore hold no place in the public sphere. Another characteristic, made clear by Justice Laws, is the belief that faith claims *qua* faith claims have no place in the central institutions of government and should not receive any public privilege. It is only to the extent that a particular claim is coherent as a 'social or moral position' which commends itself by reason that it can hold any traction in law. All law must ultimately rest upon objective grounds of right reason and not 'subjective' religious beliefs. It is both 'irrational' as well as 'divisive, capricious and arbitrary' to derive laws from purely religious beliefs. Therefore 'the precepts of any one religion' cannot 'sound any louder in the general law than the precepts of any other'. The state must rationally 'think for itself'. For this tradition of

liberalism, reason and the rights of the individual are paramount. Such rights, enshrined in British law since 1998, must trump considerations of precedent, national character and articles of religious faith.

One might question whether Justice Laws' summary sufficiently accounts for the fact that the Christian religion does indeed occupy a privileged constitutional position in Great Britain. Furthermore, it is worth questioning whether many of Britain's institutions and laws do not in fact emerge from a particular religious tradition, and whether these institutions would be self evidently or 'objectively' reasonable outside of that tradition.[1] From what first premises does such objective reason emerge? Are all religious claims which cannot be empirically verified to be regarded as subjective, irrational or private beliefs? These are important questions in this discussion which shall be engaged with throughout the thesis.

In the following chapter I hope to show that Justice Laws' judgement is deeply at odds with the understanding of the constitutional order articulated by significant figures in the British political and legal traditions. Furthermore we shall see that his account of the British constitution would have been unrecognisable to the leading lawyers of past centuries. Following Justice Laws' judgement, the former Archbishop of Canterbury George Carey reflected:

> As I read those words I realized how different my world view is from that of this learned judge and, at the same time, how ill-informed he was about the Christian tradition – and even less informed about the way that Christian faith is woven into the history, culture, ethics, laws and political life of the United Kingdom.[2]

[1] See Nigel Biggar, 'Why the 'establishment' of the Church of England is Good for a Liberal Society', in Mark Chapman, Judith Maltby, William Whyte (eds.), *The Established Church: Past, Present and Future* (London: T & T Clark, 2011)

[2] George Carey and Andrew Carey, *We Don't do God: The Marginalisation of Public Faith* (Oxford: Monarch Books, 2012) pp. 13-14.

Carey continues:

> I thought back to the Queen's coronation in 1953 where the Queen was presented with a Bible: "To keep your Majesty ever mindful of the Law and the Gospel as the rule for the whole of life and government of Christian princes." Those powerful and precise words were not designed as a commitment binding on the young queen alone; they were intended to signal that what our country stood for was a commitment to Christian values and teaching that stemmed from our foundational document. From 2 June 1953 to 30 April 2010, rather than the UK growing in greatness, we have witnessed a slow decline in moral values and a loss of memory regarding our indebtedness to Christian truth.[3]

The influence of 'political liberalism' has received a substantial amount of critical attention, not least from religious philosophers and theologians. Alasdair MacIntyre's *After Virtue* and *Whose Justice, Which Rationality?* offered a critique of the belief in an objective reason which can act as an impartial arbitrator in public affairs.[4] Stanley Hauerwas, influenced by John Howard Yoder, has argued that the liberal state idolises autonomy by selling us the belief that we have no story except that which we choose. He believes that in the face of a morally vacuous state, Christians need to live out a distinctive social ethic as a witness of the Christian narrative to the world.[5] In *Theology and Social Theory* John Milbank made an argument in a similar vein to Hauerwas, in which he argued that social scientific theories rested on their own, largely fideisitic, theological beliefs.[6] Alongside Catherine Pickstock and Graham Ward he presented a postmodern Augustinianism as a solution.[7] Public figures such as Nazir Ali and Peter Hitchens have voiced concerns that, in assuming religions ought to be privatized, secular liberalism has silenced Christianity in the public sphere and

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[3] Ibid., pp. 14-15.
[4] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Gerald Duckworth & Co., 1988)
[5] Stanley Hauerwas, *After Christendom* (Nashville, TN: Abingdon Press, 2nd Ed. 1999); *Resident Aliens: Life in the Christian Colony* (Nashville TN, Abingdon Press, 1989)
[6] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Oxford: Blackwell, 1990)
[7] John Milbank, Catherine Pickstock and Graham Ward, *Radical Orthodoxy: A New Theology* (London: Routledge, 1999)

opened the door to more malign ideologies in Britain.[8] Carey, Hitchens and Nazir Ali have all detected a forgetting of Britain's Christian heritage. They argue that it has been displaced by a strident secular liberalism which arbitrates upon judicial, political and social questions according to a rule of equality and right.[9] Such commentators fear that despite professing to operate according to what is reasonable, the liberal state actually has a distinctive character which emerges from its view of man and society.

Theologians and philosophers are not the only ones to have noted the phenomenon of Christianity's declining influence in the public sphere and the rise of a natural rights discourse. The sociological reasons for the transition to a more secularised public discourse are complex and disputed. Sociologists have variously cited the waves of mass immigration since the Second World War and the diversity of religions which such migration has brought with it,[10] the trauma of the war itself, the rise of technology and mass media, the differentiation of social institutions,[11] the egocentric consumerism of a capitalist nation,[12] or the conscious advancement of a secular liberal discourse by the liberal intelligentsia of the West.[13] Identifying the sociological causes of the human rights and equality discourse which emerges from contractarian liberalism is beyond the scope of this thesis. Yet, for the purposes of framing the debate within the context of contemporary concerns we might simply note that by broad consensus there has been a substantial shift away from a public Christian discourse in British society.[14] Concomitantly, there has been an increase in a

[8] Peter Hitchens, *The Rage Against God: Why Faith is the Foundation of Civilisation* (London: Continuum, 2010); Michael Nazir-Ali, *Triple Jeopardy for the West* (London: Bloomsbury, 2012)
[9] Nazir-Ali, *Triple Jeopardy*, Ch. 13.
[10] Steve Bruce, *Secularization: In Defence of an Unfashionable Theory* (Oxford: Oxford University Press, 2013)
[11] P. L. Berger, B. Berger, and H. Kellner, *The Homeless Mind: Modernization and Consciousness* (Harmondsworth: Penguin, 1974)
[12] T. Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* (NY: Macmillan, 1967)
[13] Alasdair MacIntrye, *After Virtue: A Study in Moral Theory* (Notre Dame, IN: University of Notre Dame Press, 3rd Edition, 2007)
[14] It should be noted that there is significant dispute amongst sociologists as to whether the decline in public Christian discourse amounts to secularisation.

liberal contractarian discourse centred on natural rights and equality. The Universal Declaration of Human Rights, ratified in 1948 under the influence of liberals such as Franklin D. Roosevelt and drawing upon the Napoleonic Civil law, can perhaps be pinpointed as a transitional moment in the refashioning of European laws and attitudes to the liberal discourse of human rights. Yet it is even more recently that the discourse of human rights and equality has come to effect the legal and political landscape of Great Britain. In 1998 the UK passed the Human Rights Act which incorporated the European Convention on Human Rights (1953) into British law.

With this historical and intellectual context in mind, let us clarify the aims of this thesis. To attempt a critique of 'liberalism' seems an impossibly broad and perhaps even a confused task. As Robert Song points out 'Perhaps to talk of liberalism (in the singular) rather than liberalisms (in the plural) is to have been deceived into deducing an identity of object from an identity of name.'[15] This thesis does not seek to offer a straightforward critique of 'liberalism'. It is partly for this reason that the main theological critique of contractarian liberalism which this thesis shall engage with is that of Oliver O'Donovan, who is rather more optimistic about modernity than MacIntrye, Hauerwas or Milbank. I hope to look at a very particular aspect of liberal political history and that is the contractarian tradition of liberalism. With Song's caution in mind, this thesis shall look in detail at the origins of contractarian liberalism, arguing that the defining characteristic of the tradition is a belief that society should be ordered in accordance to a conception of man as free, equal and a bearer of natural rights. The substantive argument of this thesis does not hinge upon the claim that this discourse is prevalent in contemporary society, but rather I hope to offer a conceptual theological analysis of contractarian liberalism, albeit a conceptual analysis which finds its

[15] Robert Song, *Christianity and Liberal Society*, (Oxford: Oxford University Press, 2006) p. 9.

touchstone in specific historical articulations of this tradition. At each stage I will offer the thought of the eighteenth century Whig Edmund Burke as an interlocutor of this contractarian tradition.

Edmund Burke has been chosen as an interlocutor because he offered an influential critique of the contractarian liberal tradition as it appeared in his own day, both in England and in France. Yet Burke offers more than just a critical voice. Burke asserted the value of a particular approach to politics which, we shall see, involved a defence of ancient customs, the common law and the British constitution. Moreover, Burke offers a defence of Britain's Christian heritage against the prospect of what he termed an 'Atheism by Establishment'.[16] He believed such atheism by establishment to be a logical corollary of the contractarian liberal tradition as he encountered it in his own era. Burke presents us with an alternative account of the state, a theological account which views God as the founder and sustainer of society. It is within this framework that he situates the institutions, customs and habits that have arisen among the British people.

The central aims of this thesis then are fourfold. Firstly, to weigh Burke's account of society from a Christian theological perspective against the vision of man and society offered by the contractarian liberal tradition. Secondly, in light of this analysis, to offer a theological defence of a particular approach to politics which we might broadly term Burkean conservatism. Thirdly to vindicate the claim that Burke himself was such a conservative and in doing so defend the natural law school of Burkean scholarship. Fourthly, to unearth some of the theological convictions which were historically resident in the British legal tradition that informed Burke's thought. This thesis then is predominantly a conceptual theological critique of contractarianism and not an exhaustive account of the intellectual history of a tradition. I will however endeavour to give the contractarian tradition

[16] Edmund Burke, 'Letters on a Regicide Peace', *The Works of The Right Honourable Edmund Burke,* sixteen volumes (London: C. and J. Rivington, 1826-27) Vol. XIII, p. 170.

a sympathetic hearing by offering three of the most influential and compelling accounts of contractarian thought and providing a historical and intellectual context in each instance.

Defining liberalism and conservatism

It is necessary to define at the outset precisely what is meant by the terms 'liberal' and 'conservative' due to the relative ambiguity of the two terms. As Song has pointed out, liberalism is a broad and equivocal term and in one sense many of the champions of conservatism (Burke included) could rightly be called liberals insofar as they were the champions of toleration and progressive attitudes towards various minority groups.[17] When this thesis speaks of liberalism it refers exclusively to the stream of contractarian thought which found its roots in the seventeenth century and found its most influential expression in John Locke's *Second Treatise of Government*. The rudiments of this form of liberalism consist in a conception of man endowed with natural rights, a natural state of equality among men, and a derivative vision of society as contingent upon the consent of individuals who partake in a social contract. Even given this definition the tradition of contractarian thought is not homogenous and in this thesis I will endeavour to be alive to the 'liberalisms' of the contractarian stream. Nevertheless I will maintain that there remains a distinctive family resemblance between the different historical manifestations of the contractarian tradition.

To speak of conservatism is perhaps no less ambiguous. This thesis seeks to engage with the stream of conservatism which finds its roots in the thought of Edmund Burke and can be traced through a long line of thinkers most notably Alexis de Tocqueville, Lord Liverpool, Samuel Coleridge, George

[17] It should be noted that the term 'liberal' wasn't commonly used with political connotations until the 1820's. Though the Scottish historian William Robertson appears to have used it with political intention in the 1760's and Adam Smith was one of the first to use the term with political meaning in *The Wealth of Nations* [1776].

Canning, Robert Peel, Benjamin Disraeli, Lord Salisbury, G.K. Chesterton, Stanley Baldwin, T.S. Eliot, Christopher Dawson, Russell Kirk and Baron Hailsham. It is a stream of conservatism characterised by an awareness of man's fallen nature, a concomitant belief in the importance of inherited wisdom, ancient institutions and the influence of the natural law upon a nation's constitution, an insistence on the necessity of customs, duty, natural affections and most importantly, I shall argue, a faith in God and his divine providence. The claim that this is a historically coherent tradition of thought is, I believe, a defensible position, due to the fact that almost all of these thinkers articulated an intellectual debt to Edmund Burke. During the course of the thesis I will also identify a variety of pre-Burkean figures as proto-conservatives. Nearly all of these figures were individuals to whom Burke himself was intellectually indebted. To this extent we can rightly speak of a stream of conservatism composed of individuals who were intellectually indebted to one another and whose political views emerged from a cluster of common Christian presumptions concerning God and the world. This is not to say that on particular issues of policy these figures did not hold different, and at times widely divergent, views, but nevertheless they are bound together by certain core presumptions. It should be noted that the similarity of their political presumptions is more important to the conceptual analysis of this thesis than the claim that they were 'conservative', or even a historically coherent tradition of thinkers.

Liberalism: methodology and content

Whilst, as we have seen, the substantive claims of contractarian liberalism have been subject to serious theological critique, the methodological approach to politics historically advocated by the contractarian tradition has perhaps received less scrutiny. This thesis seeks to engage with both the methodology and the substantive claims of contractarian liberalism. Both elements of this critique are equally important because, as we shall see, the axiomatic ideas of the contractarian tradition are inextricably bound up with the methodological approach to politics adopted by the tradition. It

is however worth noting the distinction between these conjoined components of the contractarian political project.

In the methodological critique of contractarianism we shall examine a distinctive approach to politics which emerged in the early modern period. I shall argue that this approach to politics has historically sought to conform political institutions and public discourse to abstract doctrines of equality and natural right; Lord Justice Laws' judgement is an example of such reasoning. I shall argue that in this methodological approach, ancient customs, traditional institutions and legal precedents are considered secondary to axiomatic claims of equality and natural right.

A port of entry

Enoch Powell posed a question, in his typically lyrical manner, on St. George's Day 1961. It is a question which provides a fitting port of entry to our discussion:

> Backward travels our gaze, beyond the grenadiers and the philosophers of the 18th century, beyond the pikemen and the preachers of the 17th, back through the brash adventurous days of the first Elizabeth and the hard materialism of the Tudors and there at last we find them, or seem to find them, in many a village church, beneath the tall tracery of a perpendicular East window and the coffered ceiling of the chantry chapel.
>
> From brass and stone, from line and effigy, their eyes look out at us, and we gaze into them, as if we would win some answer from their silence. "Tell us what it is that binds us together; show us the clue that leads through a thousand years; whisper to us the secret of this charmed life of England, that we in our time may know how to hold it fast."
>
> What would they say?

Chapter One

Edmund Burke, the Common Lawyers and the Natural Law

In this thesis I shall claim that Burke was heir to a broadly Thomistic tradition of natural law and this tradition informed much of his critique of the contractarian thought of the revolutionaries. This claim would not go undisputed in contemporary Burke scholarship. I hope to show that in the common law tradition there was a rich heritage of scholastic natural law which was consistently related to political and legal issues. I shall argue that it was this common law tradition more than any other which informed Burke's political opinions and provided, for Burke, a chronicle of the nation's character. Not only does this chapter seek to defend the view that a Thomistic conception of the natural law acted upon Edmund Burke, but we shall also offer an answer to Powell's question by showing that the English legal tradition was premised upon a belief in the sovereignty of the divine law and a created moral order.

Burke and the Natural Law?

As an orator and a man of letters Burke's lack of systematic writing has resulted in a diverse spectrum of interpretations. This history of interpretations is worth recounting in order to establish where the reading of Burke offered in this thesis is situated. In 1857, Henry Buckle's *The History of Civilization in England* depicted Burke as first and foremost a pragmatist and a utilitarian. This trend continued in late Victorian Britain as Burke was portrayed by thinkers such as John Morley as a champion of the British constitution whose political expediency and pragmatism resisted the temptation of bringing normative moral values to bear upon politics.[18] Others in this line of

[18] John Morley, *Edmund Burke: A Historical Study*, (London, 1867)

scholarship include William Lecky and Sir Leslie Stephen.[19] This trend continued into the 20th Century, John MacCunn arguing in 1913 that Burke was a utilitarian like Bentham at heart.[20] Elie Halevy, Henry Ogden, Lois Whitney, John Randall and John Lester all articulated similar positions during the first half of the twentieth century. [21] Peter Stanlis points out that the century of Burke scholarship which portrayed him as a utilitarian was premised on a bifurcation between utility and natural rights, by scholars who 'interpreted Burke's frequent attacks on metaphysical abstract rights as a rejection of belief in moral principles.' [22] In short, those who interpreted Burke as a utilitarian were mistaken as to what it was that Burke was actually rejecting.

In the 1950's and 60's a fresh new revision of Burke rejected this utilitarian understanding, arguing that it fundamentally misunderstood Burke. Thinkers such as Peter Stanlis and Francis Canavan envisaged Burke as a natural law thinker whose thought was underpinned by a Thomistic metaphysics. Such ideas were echoed by Leo Strauss in 1960, who argued that Burke harked back to a premodern tradition of natural law.[23] In 1967, Burleigh Taylor Wilkins offered an account of Burke as a natural law theorist who at times exhibited utilitarian and historical appeals.[24] In a similar vein C. B. Macpherson proposed a synthesis of the two positions, citing Burke's support for the free market as evidence that he was a bourgeois political economist, also arguing that Burke employed 'a Natural Law brought again under the sway of Divine Law and freed of the temporal

[19] Leslie Stephen, *History of English Thought in the Eighteenth Century*, Vol. II (London, 1881)
[20] John MacCunn, *The Political Philosophy of Burke*, (New York, NY: Longmans Green and Company; London: Edward Arnold, 1913)
[21] Elie Halévy, *The Growth of Philosophic Radicalism*, (New York, The Macmillan Company, 1928); Lois Whitney, *Primitivism and the Idea of Progress* (Baltimore: Johns Hopkins Press, 1934); John H. Randall, *The Making of the Modern Mind*, (Boston, MA: Houghton Mifflin, 1940); John A. Lester, 'An Analysis of the Conservative Thought of Edmund Burke', Ph.D. Thesis, Harvard University, 1943. For more on Burke's utilitarian interpreters, see Peter Stanlis, 'The Basis of Burke's Political Conservatism', *Modern Age,* (Summer 1961) pp. 263-265.
[22] Peter Stanlis, 'The Basis of Burke's Political Conservatism', p. 264.
[23] Leo Strauss, *Natural Right and History*, (Chicago IL: University of Chicago Press, 1963)
[24] Burleigh Taylor Wilkins, *The Problem of Burke's Political Philosophy* (Oxford: Oxford University Press, 1967)

equalitarian implications that had been read into it in its seventeenth century transformation', adding that 'The old Natural Law, before Hobbes and Locke had got at it, had upheld hierarchy and subordination as natural and necessary principles of social organization. Burke saw that the old Natural Law was needed again.'[25] The natural law line of Burkean scholarship was heavily influenced by Russell Kirk in the 1960's during a time in which American conservative values were perceived to be threatened by the rising tides of liberalism and socialism. More recently, Joseph Almeida has provided an account of the centrality of natural law in Burke's understanding of the British constitution,[26] while Christopher Insole has provided an analysis of Burke's natural law language. Insole questions a Thomistic Burke, seeing the hand of Cicero at work in Burke's thought, concluding that 'Burke shows that he is closer to the classical sources than he is to the early modern innovators.'[27]

In more recent years the interpretation of Burke as a Thomist natural lawyer has received less attention and has fallen out of favour with Burke scholars in large part because a credible link between Burke and Aquinas has lacked clear explication. In this thesis I will implicitly defend Stanlis and Canavan's reading of Burke, which I believe to be convincing. To be clear, this position does not profess that Burke thought of himself as a Thomist, but rather that his account of the natural law is pre-modern and directly influenced by Thomistic accounts of the natural law. I will attempt to add historical plausibility to this interpretation by showing that legal sources which Burke was certainly familiar with and self-confessedly indebted to, were highly familiar with Aquinas' account of custom, law and society. I will not attempt to marginalise the influence of classical sources such as

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[25] C. B. Macpherson, 'Edmund Burke' in Iain Hampsher-Monk (ed)., *Edmund Burke* (Farnham: Ashgate, 2009) p. 66. See also C. B. Macpherson, *Burke* (Oxford: Oxford University Press, 1988)

[26] Joseph Almeida, 'Constitutionalism in Burke's *Reflections* as Critique of the Enlightenment Ideas of Originative Political Consent and the Social Compact', *The Catholic Social Science Review,* Vol. 17 (2012) pp. 197-219.

[27] Christopher Insole, 'Burke and the Natural Law' in David Dwan and Christopher Insole (eds.), *The Cambridge Companion to Edmund Burke* (Cambridge: Cambridge University Press, 2012) p. 129.

Cicero and Aristotle as such sources were certainly known to Burke and furthermore they also influenced Aquinas and the common lawyers in their respective accounts of the natural law. In this sense, to speak of a Thomistic account of law as if Aquinas' account emerged in a vacuum is, in any case, innacurate. The central contention of this chapter is simply that through the common lawyers Burke would have been familiar with an account of law which was substantially indebted to Thomas Aquinas.

Entering the debate

In a journal article written in 2008 by Christopher Insole we find a helpful point of entry into the ongoing debate regarding Burke's influences. In the article, Insole does not in fact attempt to claim Burke as a Thomist but rather pursues a more modest aim; Insole writes that he is not arguing that 'Burke is a Thomist, in any straightforward way', but rather he provides a qualified account of Burke's understanding of constitutional liberalism, which Insole says 'is compatible with, or even illumined by, the central claims of Thomism'.[28] In the article Thomism is defined as 'a reconstruction, which understands itself to be derived from elements of Aquinas's thought.' Insole provides a thorough summary of the recent academic work which has been undertaken to discern the influences that may have been acting upon Burke. Amongst others, the author notes Hampsher-Monk's account of Anglican scepticism,[29] Clark and Lock's respective accounts of Whig Latitudarianism[30] as well as Armitage's account of classical influences and early modern natural law

[28] Christopher Insole, 'Two Conceptions of Liberalism' in *Journal of Religious Ethics*, Vol. 36. Issue 3, pp. 447-489. p. 452.
[29] Iain Hampsher-Monk, 'Burke and the Religious Sources of Skeptical Conservatism', in J. van der Zande and R. H. Popkin (eds.), *The Skeptical Tradition Around 1800* (Springer, 1998) pp. 235-259.
[30] J. C. D. Clark, 'Religious Affiliation and Dynastic Allegiance in Eighteenth-Century England: Edmund Burke, Thomas Paine and Samuel Johnson', *English Literary History*, Vol. 64, Issue 4, pp. 1029–67; F. P. Lock, *Edmund Burke II, 1784–1797* (Oxford: Oxford University Press, 2006)

thinkers such as Vattel and Grotius.[31] Insole is clear that 'admirab[le]' historical work has been done 'on a number of fronts' to trace the influences upon Burke.[32] Yet, while he lauds such work, he lays down a 'small gauntlet' to historians who would deny any scholastic influence in Burke's thought.[33] Insole notes the significant presumptions we must make if we are to believe that scholastic natural law thought had no significant impact upon Burke. Amongst these are the presumption that Burke was uninfluenced by the extensive presence of Scholastic theology on the Trinity College, Dublin syllabus despite his writing to Shackleton at this time that he was 'deep in metaphysics'. Secondly the presumption that Burke's devout Anglicanism was 'uninformed by the Scholastic influence (some very Thomistic) which runs distinctively through Anglican theologians', many of whom were in his personal library. As we shall see, this is a particularly weighty presumption when we consider that Burke professed to have read such Anglican Divines frequently and claimed to attribute great weight to their thought. Finally, Insole writes that we must presume to attribute no significance to Burke's direct reference in the House of Commons to Thomas Aquinas' caution 'against breaking the law of nature', in which Burke stated that the 'darkness of the twelfth century rose against the light of the eighteenth'.[34] In short, Insole concludes, we must presume 'Burke's heroic ignorance of the scholastic tradition'.[35] When faced with such presumptions it is hard not to agree with Insole that, 'One begins to suspect that the reluctance among historians even to re-open the question about the influence of scholasticism on Burke might be reflective of a wider prejudice in the treatment of early modern thought ... whereby commentators prefer to leap-frog over the medieval/scholastic period, focusing more on ancient classical sources'.[36]

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[31] David Armitage, 'Edmund Burke and Reason of State', *Journal of the History of Ideas*, Vol. 61, Issue 4, pp. 617–34.
[32] Insole, 'Two Conceptions of Liberalism', p. 451.
[33] Ibid., p. 453.
[34] See *Hansard's Parliamentary History*, 21 (London: T. C. Hansard, 1814) p. 719.
[35] Ibid., p. 454.
[36] Ibid.

In this section I wish simply to add another presumption to the list of presumptions we must make if we are indeed to presume Burke's heroic ignorance of the scholastic tradition. This presumption is that the common lawyers, of whom Burke was a serious scholar, exercised no substantial influence upon his political thought. This chapter involves two substantial contentions: firstly that Burke was intimately acquainted with and influenced by the common lawyers. Secondly, that the leading lights of the common law tradition were well acquainted with scholastic, and specifically Thomist, natural law theology, which they explicitly referenced and related to legal and political affairs.

I will begin by looking at Burke's interaction with the common lawyers and assess the importance of their work in his intellectual life. I will then briefly outline which aspects of Aquinas' thought in particular I believe to have been transmitted to Burke through the common lawyers. I will proceed towards an examination of four of the most influential common lawyers, looking in detail at John Fortescue, Christopher St. Germain, Edward Coke and John Selden's work respectively, before offering a conclusion.

Burke and the common lawyers

Before turning to the common lawyers themselves it is important to establish Burke's relationship with the common law tradition. The most well known of Burke's references to the common lawyers is perhaps in the *Reflections* in which he argues that 'Our oldest reformation is that of Magna Carta. You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, to Blackstone, are industrious to prove the pedigree of our liberties.'[37] We need not lean too heavily on one statement, but it is at least significant that in a passage in which Burke seeks to vindicate the fundamental rights of Englishmen and delineate the essence of the British

[37] Burke, 'Reflections on the Revolution in France', *Works*, Vol. V., p. 75.

constitution, it is the common lawyers to whom he turns as the authoritative sentinels of English liberty. The language he uses is plain and frank; in Burke's eyes the common lawyers were 'great men' and an authority to be esteemed. He made a similar claim again in the *Reflections* when expounding upon the fundamental liberties of Englishmen established in the 1688 Bill of Rights. Burke contrasts the 'great lawyers and statesmen' who drew up the Bill of Rights with the 'warm and inexperienced enthusiasts'[38] who were causing trouble in England. Moreover in his *Letter to the Chairman of the Buckinghamshire Meeting*, penned in 1780, Burke wrote 'I am now growing old. I have from my very early youth been conversant in reading and thinking upon the subject of our laws and Constitution, as well as upon those of other times and other countries'.[39] Indeed it was arguably the common law tradition which gave Burke his unshakeable conviction in the importance of conservation, the accommodation of principles to concrete circumstances and his rejection of unfettered individuality. In a passage in the *Reflections* Burke wrote:

> And first of all, the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages, *combining the principles of original justice with the infinite variety of human concerns*, as a heap of old exploded errors, would be no longer studied. Personal self-sufficiency and arrogance (the certain attendants upon all those who have never experienced a wisdom greater than their own) would usurp the tribunal. Of course no certain laws, establishing invariable grounds of hope and fear, would keep the actions of men in a certain course, or direct them to a certain end…thus *the commonwealth itself would, in a few generations, crumble away, be disconnected into the dust and powder of individuality*, and at length dispersed to all the winds of heaven.[40]

[38] Ibid., p. 50.
[39] Edmund Burke, 'A Letter to the Chairman of the Buckinghamshire Meeting, Held at Aylesbury, April 13, 1780, on the Subject of Parliamentary Reform', in Peter J. Stanlis (ed.), *The Best of Burke: Selected Writings and Speeches of Edmund Burke* (Washington D.C.: Regnery, 1963) p. 383.
[40] Burke, 'Reflections on the Revolution in France', pp. 181-183.

We might also note Peter Stanlis' observation that 'Between 1750 and 1765, when he was elected to the House of Commons, [Burke] had acquired a legal erudition as great as anyone in Britain… A decade before his death, he said in Parliament that he "had in the course of his life looked frequently into law books on different subjects"'.[41] In his capacity as editor at Dodsley's *Annual Register*, Burke had to review a variety of works on law and reviewed several more books on law after he stopped working for the *Annual Register.* A significant number of these books were concerned with the history of English and Scottish law. Stanlis notes, by the mid 1770's Burke had 'acquired an encyclopaedic knowledge of civil, criminal, constitutional, and Natural Law', this knowledge of the law being 'most clearly evident in his innumerable quotations and references to the ancient records, charters, legal treatises, statutes, procedures and decisions which comprised the common law of England.' We might also note Stanlis' observation that 'In 1773 [Burke] said in Parliament: "I have studied… God knows: hard have I studied, even to the making dog-ears of almost every statute book in the kingdom... the letter as well as the spirit of the laws, the liberties, and the constitution of this country"'.[42] Burke made similar statements elsewhere, notably stating in the House of Commons 'No man here has a greater veneration than I have for the doctors of the law'.[43] We should also be aware that among the books which Burke had read by the 1760's was Suarez' *Tractatus De Legibus*, which has numerous references to the *Summa Theologica* and specifically Aquinas' treatment of law, as well as regarding Richard Hooker's deeply Thomistic treatment of law in the highest terms. Burke was familiar too with the work of Grotius and Pufendorf, often identified as transitional figures between medieval understandings of the natural law and more modern articulations of natural law thought. In short, Burke was highly erudite in the

[41] Peter Stanlis, 'Edmund Burke's Legal Erudition and Practical Politics: Ireland and the American Revolution', *The Political Science Reviewer*, Vol. 35, Number 1, Fall 2006, p. 67.
[42] Peter Stanlis, *Selected Writings and* Speeches, p. 6.
[43] Burke quoted in ibid., p. 7.

field of legal studies in general and in the common law tradition in particular. Furthermore, there can be little doubt that he held the common lawyers in the utmost esteem.

Not only was Burke steeped in a knowledge of the common law, but he was deeply interested in the sources of the common law. Indeed Burke considered himself sufficiently expert in the laws of England and their origins that by 1757 he had embarked upon a project to compose an essay on a history of the laws of England as part of his *Abridgement of English History*. It is notable that in this incomplete project Burke demonstrated an extensive knowledge of the sources of the common law and he was obviously aware of the influence of continental canon law upon the development of the English common law. In 'An Essay Towards an History of the Laws of England', Burke lists 'three capital sources' of the 'Saxon laws' noting 'The second source' was 'the canons of the church', writing that they 'influenced considerably a people, over whom that order had an almost unbounded authority'[44] before proceeding to state that the canon law 'corrected, mitigated and enriched those rough Northern institutions; and the clergy having once bent the stubborn necks of that people to the yoke of religion, they were the more easily susceptible of other changes introduced under the same sanction'.[45] Significantly he notes that following the Norman Conquest 'English jurisprudence' was 'as from a mighty flood, replenished with a vast body of foreign learning'.[46] Burke was critical of instances of English legal historiography which elevated the purity of the common law to the detriment of actual fact and he was keenly attuned to the fact that the continental legal tradition exercised an influence upon the common lawyers from the time of the Norman Conquest onwards. There is much more that could be said about Burke's passionate pursuit of the common law, yet it is beyond the scope or ambition of this chapter to provide a full

[44] Edmund Burke, 'An Essay Towards an History of the Laws of England' in *The Works of Edmund Burke,* Vol. 5 (Boston, Charles C. Little & James Brown, 1839) p. 726.
[45] Ibid.
[46] Ibid.

account of this interest and Burke's admiration of the common law has been detailed in substantial depth elsewhere.[47] We need simply note that there is ample evidence to suggest that Burke was an avid student and indeed a disciple of the common law tradition. Whether it be Burke's emphasis on organic growth, his adulation for the constitution, his attentiveness to concrete circumstance, his distrust of arbitrary power or the esteem he attributed to time-honoured customs and manners; all had a well established common law heritage.

Burke's affinity for the common law tradition has not gone unnoted in British scholarship. J.G.A Pocock is the most influential commentator to have identified the arguments of the common lawyers in the work of Edmund Burke. Pocock writes, 'There really did exist a habit of conducting political discussion in England "upon the principle of reference to antiquity," upon the assumption that there existed an ancient constitution which was the justification of all rights and was itself justified primarily by its antiquity'.[48] Pocock is correct in arguing that in the common law we find a clearly articulated tradition which precedes Burke in arguing for conservation, the preservation of custom and asserts that the immemorial liberties of Englishmen are secured by the ancient constitution. In happy agreement with the broader argument which follows in this thesis, Pocock notes that 'The public and authorized theory of what had occurred in 1688-89 – that on which the houses of the convention parliament had been able to agree and which was in contained in the public documents of the time – really did base its interpretation on the doctrine of the ancient constitution, more than on the doctrines of contract, natural right and reason propounded by Sidney or Locke.'[49] Pocock makes the point that Burke was explicitly defending the common lawyer's interpretation of historical events. As we shall see it is not hard to identify a deep

[47] Stanlis, *Selected Writings and Speeches*, pp. 4-8.
[48] J.G.A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* (Chicago: University of Chicago Press, 1971) p. 208.
[49] Ibid.

consonance between Burke and the common lawyers in both the substance, method and presuppositions of their argumentation. As we shall see much which is often deemed to be characteristically Burkean, was long ago articulated by common lawyers whose work Burke was well acquainted with.

Whilst Pocock is correct to locate Burke's writings in this tradition his argument is too crude in stating that the tradition believed the constitution to be 'justified primarily by its antiquity'.[50] In *The Cambridge Companion to Edmund Burke* Hampsher-Monk rightly comments in a footnote that Pocock's common law interpretation of Burke 'departs from interpretations of Burke as a neo-Thomist natural law thinker'.[51] It is this curious fact which I wish to draw attention to. The common lawyers whom Burke referenced were not as Pocock would have it mere traditionalists. Whilst Pocock is swift to point out that following the common lawyers 'from Coke to Blackstone' Burke defended the constitution on the basis that it was rooted in ancient laws such as Magna Carta which were themselves rooted in ancient customs,[52] he abrogates the fact that the leading lights of the tradition clearly and consistently link the universally binding and immemorial law of England, established by custom and precedent, to the natural law. When we look at the salient thinkers in the tradition, whom Burke himself referenced, we see that they consider antiquity penultimate to the natural law which informs healthy laws and customs; at the least the immemorial law is conceptually conjoined to what is essentially a Thomistic understanding of the natural law. It would truly be odd, given that in his defence of the constitution Burke explicitly states he is following them if he too was not cognizant of this link. As we will see, if Burke was as indebted to the

[50] Ibid.
[51] Iain Hampsher-Monk, 'Reflections on the Revolution in France', in David Dwan and Christopher Insole, (eds.), *The Cambridge Companion to Edmund Burke* (Cambridge: Cambridge University Press, 2012) p. 207.
[52] Pocock, op cit., p.208.

common law tradition as Pocock has argued, then it is hard to see how he was *not* in some sense a Thomist in his legal thought.

The common lawyers and the natural law

We might speculate that the English system of law which became unified in the twelfth century under King Henry II already had an inherent affinity with scholastic conceptions of the natural law to which it would later be exposed. In his work *Germania*, Tacitus depicts German tribes whose system of government was remarkably egalitarian. Tacitus speaks of elected magistrates and kings that 'have not unlimited or arbitrary power', whilst 'the generals do more by example than by authority'.[53] Whether such Germanic conceptions of a universal, non-voluntarist form of law provided a fertile seedbed for continental conceptions of the natural law, and indeed earlier Anglo-Christian understandings of the divine law, is an interesting speculation, but beyond the scope of this chapter. It is however worth bearing in mind that uniquely in Europe there did exist an English tradition of sovereign subjection to customary law – as we shall see conceptions of a transcendent natural law harmonised well with this tradition of limiting arbitrary power. What is important to our present question is that continental conceptions of the natural law did exercise a substantial influence over the development of the English legal tradition.

In the most influential history of the common law, Pollock and Maitland relate how the continental canon law began affecting the English common law from the middle of the twelfth century.[54] Maitland also convincingly demonstrated the binding influence of papal decretals upon ecclesiatical

[53] Tacitus, *Germania,* found at 'Fordham University Medieval Sourcebook', http://www.fordham.edu/halsall/source/tacitus1.html, (accessed 5th March 2014).
[54] F. Pollock and F. Maitland, *The History of English Law before the time of Edward I* (Cambridge: Cambridge University Press, 2nd edition, 1911) p. 117.

courts in Medieval England, a topic revisited more recently by Charles Donahue.[55] R. H. Helmholz has demonstrated that this influence continued in a mitigated fashion, in Elizabethan and Jacobean England.[56] The historian Ralph Turner writes, 'The Norman Conquest did, of course, bring England into closer contact with the intellectual life of the Continent; and clearly an important aspect of that was the revival of Roman and canon law studies'.[57] The reception of continental thought in the English legal tradition continued in the ensuing centuries and as the legal historian David J. Seipp argues 'It is equally clear that canon law and civil law were the most important sources for introducing new forms of legal thought into the common law',[58] continuing to state that the intellectual debt is clearly present in the works of such common lawyers as John Fortescue and Christopher St Germain.[59] Furthermore he writes that 'common lawyers recommended following the canonists' and civilians' practice in... resorting to natural law (ley de nature) in disputes arising for the first time'.[60] E. F. Jacob notes the enduring influence of continental legal thought from the time of the Norman Conquest onwards, 'while Bracton started from the Roman law of his time, the legal student of the fifteenth century... began with the scholastic philosophy and the canon law.'[61] R.H. Helmholz has shown the influence of the civil law upon Magna Carta and its enduring influence into the age of Coke. Notably he observes that 'the powers of protestant monarchs [were] announced with the same rules Catholic jurists evolved to define the powers of the papacy.'[62] A

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[55] See F. Maitland, *Roman Canon Law in the Church of England: Six* Essays, (London: Methuen, 1898); Charles Donahue, Jr, 'Roman Canon Law in the Medieval English Church: Stubbs v Maitland Re-examined', *Michigan Law Review*, Vol. 72, No. 4, (Mar., 1974) pp. 647-716.

[56] R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press, 2004)

[57] Ralph V. Turner 'Roman law in England before the time of Bracton', *Journal of British Studies,* Vol. 15, No. 1 (Autumn, 1975) pp. 1-25.

[58] David J. Seipp, 'The Reception of Canon Law and Civil Law in the Common Law Courts before 1600', *Oxford Journal of Legal Studies,* Vol. 13, No. 3 (Autumn, 1993) pp. 388-420., p. 419.

[59] Ibid., p. 392.

[60] Ibid., p. 404.

[61] E. F. Jacobs, 'Sir John Fortescue and the Law of Nature', *Bulletin of the John Ryland Library*, Vol. 18, No.2, (July, 1934) p. 8.

[62] R. H. Helmholz, 'Continental Law and Common Law: Historical Strangers or Companions?', *Duke Law Journal*, Vol. 6., (December 1990) pp. 1207-1228., p. 1216.

number of scholars have pointed out that the influence of Thomas Aquinas upon the universities and across the law schools of Europe was substantial.[63] We shall see that the influence of Thomas Aquinas imparted to the English legal tradition an understanding of the natural law which harmonised with notions of a binding and immemorial English law. The historian Ellis Sandoz observes this assimilation in Fortescue's work, writing:

> Fortescue's argument equates the ancient English law as it structures the living constitution of the realm with Justice and divine and natural law, at least as far as grace permits this to be concretely achieved on earth by human laws promulgated and administered by human magistrates. Thus, the historically ancient and the ontologically higher law — eternal, divine, natural — are woven together to compose a single harmonious texture in Fortescue's account of English law.[64]

Let us turn then to Aquinas and subsequently the common lawyers themselves and examine the content of the tradition. The basic contention that I am making is put well by Richard O'Sullivan, 'the law of nature was throughout the creative centuries of the common law a familiar idea and a guiding principle among lawyers and judges, and that it may even be said to be the source and spring of the common law as it was conceived and developed by Bracton and Fortescue and Littleton, and Thomas More and Christopher St. Germain, and Coke and Holt, and even by Blackstone',[65] with the addition that it was a distinctively Thomistic understanding of the natural law which was at work in the common law tradition. We might finally note that despite the fact that Bracton was a significant natural law influence, he has not been included in this chapter as he

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[63] See Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Cambridge: Eerdmanns, 2000) p. 530; W. S. Holdsworth, *Sources and Literature of English Law,* (Oxford: Clarendon Press, 1925); Peter Stein, 'Continental Influences on English Legal Thought, 1600-1900', in idem, *The Character and Influence of the Roman Civil Law: Historical Essays* (London: Hambledon, 1988)

[64] Ellis Sandoz, *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Columbia, MO: University of Missouri Press, 1993) p. 7.

[65] Richard O'Sullivan, K. C., 'Natural Law and Common Law', *Transaction of the Grotius Society,* Vol. 31, (1945). pp. 117-138. p. 119.

was a contemporary of Aquinas and we are primarily concerned with Aquinas' influence on the common law tradition. Yet it is worth noting that even at the time of Aquinas, Bracton was clearly articulating an account of the natural law in the English legal context, which he had most likely received from papal decretals.

Aquinas

It is worth sketching the salient strands of Aquinas' thought which Burke would have found in the common lawyers. Firstly, we should note Aquinas' understanding of creation is grounded within the divine intellect; as such, all creation is teleological and rationally ordered. According to Aquinas, all creatures (as well as the creation more broadly) are directed towards distinctive natural ends ordained by the creator.[66] Human nature then, as God created it, naturally seeks the good. Importantly, human beings, by the innate habit of *synderesis*, have an innate knowledge of the right course of action, which can be acted on according to conscience. Secondly, Aquinas understood the eternal law as emerging from the perfect harmony of the divine intellect and the divine will, as such it is not a product of arbitrary will. As Aquinas put it, 'All law proceeds from the reason and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason'.[67] In earthly affairs this implies that the legitimacy of all power is contingent upon its conformity to the eternal law as revealed in the divine and natural law. Thirdly, Aquinas maintained the capacity for human beings to arrive at a knowledge of the eternal law through practical reason, 'It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law';[68] yet insisted that to the extent that man is both spiritually fallen and epistemically limited in his creatureliness he can only partially attain a

[66] Thomas Aquinas, *Summa Theologica: Prima Secundae Partis*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics, 1981) Q. 90, A. 1.
[67] Ibid., Q. 97, A. 3.
[68] Ibid., Q. 91, A. 2.

true knowledge of the created order. Fourthly, Aquinas was clear that laws are not primarily the domain of speculative reason but they are concerned with 'practical matters, which are the object of the practical reason'.[69] Fifthly, he emphasised the importance of customary law and tradition in the *Summa* and *De Regno,* 'for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom has the force of a law, abolishes law, and is the interpreter of the law' so long as it does not contravene the natural or divine law.[70] Sixthly, Aquinas accorded the divine law as revealed in Holy Scripture a substantial role in informing and judging human laws and customs and human laws were only legitimate to the extent that they were congruent with the eternal law.[71] Finally, Aquinas understood the primary social function of law (and governance) as ordering society towards the common good 'A law, properly speaking, regards first and foremost the order to the common good'.[72]

In the following exposition we should also remember that Aquinas himself was influenced by the great figures of philosophy. The name of Cicero appears in the *Summa* half a dozen times and Aristotle is frequently referenced by Aquinas.[73] Two areas in particular are worthy of note in this regard, firstly, in Aquinas' definition of prudence he references Cicero and makes Cicero's definition of a virtue central to the discussion[74] as one commentator puts it 'the flowering of St. Thomas's thought' on this issue emerges 'from a seed cast by Cicero.'[75] Secondly, we might also note Cicero's influence in Aquinas' understanding of custom, regulated by reason, as a desirable source of law. Besides Aristotle and Cicero, we can discern other voices in Aquinas' work. Notably Seneca and

[69] Ibid., Q. 90, A. 2.
[70] Ibid., Q. 97 A. 2.
[71] Ibid. Q. 91 A. 4.
[72] Ibid., Q. 90 A. 3.
[73] R. K. Rand, *Cicero in the Courtroom of St. Thomas Aquinas* (Milwaukee, WI: Marquette University Press, 1946) p. 4.
[74] Ibid., p. 27
[75] Ibid., p. 28.

Boethius are second only to Cicero in being referenced by Aquinas. [76] We should also be mindful of areas of Aquinas' thought which are not explicitly legal in nature but are inextricably tied to such discussions. Following Aristotle, Aquinas writes (in words echoed by Fortescue, Coke and Burke) that 'man is by nature a social animal', this basic presumption of anthropic sociality is not incidental but integral to the derivative vision of society depicted by Aquinas, the common lawyers and Burke. Additionally, Aquinas' understanding of politics is intimately related to his conception of law. He tells us that, 'It is proper that there be something... that directs toward the common good of the many'.[77] Michael Banner offers a lucid account of such a conception of society, 'For the Thomist tradition, which thinks of society as existing outside the church in virtue of the claims made upon human life by its natural ends, it is the common good that serves to unite its parts. The classical organic image of society thus maintains its naturalistic quality, with a special emphasis, however, on the need for the head to identify the common good and coordinate its pursuit.' [78]

We might conclude this section with two passages from the *Summa.* These passages are selected because they provide a neat insight into some of the central ideas present in Aquinas' work on law and thus help to demonstrate the stark similarities between dominant themes in the thought of Thomas Aquinas and those in the common law tradition. It is surely significant that Fortescue and Germain explicitly reference this exact section of the *Summa* and draw upon Aquinas' work more broadly to articulate motifs which become recurrent in the common law tradition. Indeed, it is not hard to detect Burkean motifs in Aquinas' work retrospectively as he addresses the issue of 'Whether human law should always be changed when something better is possible':

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[76] Ibid., p. 4.
[77] Thomas Aquinas, *De Regno*, trans. Gerald B. Phelan, found at http://dhspriory.org/thomas/DeRegno.htm, (accessed 12th March 2014) Book 1, Ch. 1.
[78] Michael Banner, 'Christianity and Civil Society', in John A. Coleman (ed.), *Christian Political Ethics* (Princeton, NJ: Princeton University Press, 2007) p. 9.

> human law is rightly changed, in so far as such change is conducive to the common weal. But, to a certain extent, the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws, seeing that what is done contrary to general custom, even in slight matters, is looked upon as grave. Consequently, when a law is changed, the binding power of the law is diminished, in so far as custom is abolished. Wherefore human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect. Such compensation may arise either from some very great and every evident benefit conferred by the new enactment; or from the extreme urgency of the case, due to the fact that either the existing law is clearly unjust, or its observance extremely harmful. Wherefore the jurist says that 'in establishing new laws, there should be evidence of the benefit to be derived, before departing from a law which has long been considered just.'[79]

Fortescue

John Fortescue was unarguably one of the most influential figures in the history of the common law tradition. Fortescue's life spanned the fifteenth century. A subject of King Henry VI he was a loyal Lancastrian and Lord Chief Justice of England and Wales, his most notable work was *De laudibus, legum Angliae.* As E.W. Ives writes, 'Fortescue's authority on constitutional law was widely recognized in his own day and increasingly thereafter. This particularly applied to *De laudibus*, of which the first printed edition appeared in 1545–6 and eight further editions were published before the century was out'.[80] It is significant then that Fortescue's work was greatly indebted to the thought of St. Thomas Aquinas. Oliver O'Donovan summarises Fortescue's reception of Aquinas: 'Fortescue's contribution testified to the profound impact of Thomistic thought across the spectrum of the law schools. His pages are replete with references not only to Thomas Aquinas's treatment of law in *Summa Theologiae* and to the discussion of political rule in that portion of *On*

[79] Aquinas, *Summa Theologica: Prima Secundae Partis*, Q. 97. A.2.
[80] E. W. Ives, 'Fortescue, Sir John (*c.*1397–1479)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Oct 2005, http://www.oxforddnb.com/view/article/9944, (accessed 17th December 2013).

the Government of Rulers widely attributed to Ptolemy of Lucca, but also to the later treatise of the same name by Giles of Rome.'[81] Similarly O'Sullivan writes 'In all his writings Fortescue appears as a diligent disciple of St. Thomas Aquinas.'[82]

Fortescue's work is filled with themes which we might, at the risk of being anachronistic, identify as proto-Burkean. Before turning to his major works let us pause to survey the central motifs in his work. For Fortescue the natural law was, 'as St. Thomas says... nothing else than the participation of eternal law in a rational creature'.[83] Like Aquinas, Fortescue considered customs to be an important source of law and is quite clear in identifying, and subjuguating, immemorial customs to the natural law; in a chapter entitled 'As the moon is to the sun so are human laws to the divine law', Fortescue writes 'human customs and constitutions are subject to the rules of the law of nature, and having issued from its boundaries do so partake of its nature, that, if not ratified thereby, such customs and constitutions deserve not to be called laws, but rather corruptions'.[84] Fortescue is unequivocal that the natural law informs and governs the laws of England.[85] Like the common lawyers who follow him he distinguishes three sources of law, custom, statute and the natural law; yet importantly the former two emerge from and are contingent upon the latter, furthermore we shall see statute is treated with a degree of caution by Fortescue and once statutes are created they must have the consent of a multitude.

A belief that a society's growth ought to be slow and organic is clearly present in Fortescue's work. Such organic and consensual growth is a staple theme in the common law tradition which we will

[81] O'Donovan, *Sourcebook*, p. 530.
[82] Richard O'Sullivan, op cit., p. 126.
[83] John Fortescue, 'De Natura Legis Naturae', in *The Works of Sir John Fortescue Knight, Chief Justice of England and Lord Chancellor to King Henry VI.* Vol. i. (London: Chiswick Press, 1869) p. 154.
[84] Ibid., p. 241.
[85] On this point see also E. F. Jacob, op cit., pp. 12-15, for a full elaboration upon the natural law's sovereignty over political and royal rule in Fortescue's work.

see repeated and it is intimately bound to the importance of society's right ordering under the natural law. For Fortescue the cohesive functioning of civil society and its relation to its ruling head are governed by the natural law which is resident in the constitution. O'Donovan tells us that Fortescue 'emphasizes the stable, interdependent, and independent functioning of the civil parts made possible by the persisting structure of law. The impression left by his praise of the English constitution, that it indeed approaches the rule of Christ over his saints, illustrates his prevailing inclination toward the hegemony of the law of nature.'[86] The purpose of all law for Fortescue is clear 'all human laws are, as it were, instruments whereby the Divine law developes its virtues in human actions, and that they stand related to the law of God as the moon to the sun',[87] fitting us for our ultimate end, divine beatitude.

We can see at this early stage a clear articulation of the sovereignty of the natural law, its origin and purpose as well as a clear assertion of the participation of immemorial customs and the English constitution within the natural law. As we trace the lines of Fortescue's argument we should not be surprised to find that Fortescue's arguments are deeply resonant with many of the motifs in the *Reflections,* given that Burke was himself clear that he was simply articulating themes which had a well established pedigree in English law. Fortescue's view of law is captured succinctly by the historian Christopher Brooks:

> According to Fortescue, the grounds of English law were the divine laws which permeate throughout the universe, natural law, and human laws in the form of statute and custom. Divine law and natural law were ideally discovered either by revelation or by a kind of divine light which illuminated the intuitions of man. But, for obvious reasons, man's knowledge of these sources of law was bound to be imperfect. Consequently, although human (or positive) laws were supposed to conform to the higher laws of God and nature,

[86] O'Donovan, *Sourcebook*, p. 532.
[87] Fortescue, 'De Natura' in *The Works of Sir John Fortescue*, p. 243.

> there were inevitably going to be some areas in which such guidance was unclear. In these circumstances, Fortescue thought that the maxims of the human law (in England the maxims of the common law) should be used as the basis for judicial decision-making. However, human laws contrary to the laws of nature were invalid, and, if necessary, there was no reason why human laws should not be amendable in order to bring them into line with the higher laws [88]

With this overview in mind, let us turn to look at two of Fortescue's major works.

Fortescue was exiled to the continent between 1463 and 1471 during which period he published *De laudibus legum Angliae* (A Treatise in Commendation of the laws of England). In the work he follows Aquinas and Aristotle in his metaphor of the body politic which is governed by a head:

> not that a people so met together in society can properly be called a body without a head; for, as in the body natural, the head being cut off, we no longer call it a body, but a trunk; so a community without a head to govern it, cannot in propriety of speech be called a body politic. Wherefore the Philosopher, in the first of his *Politics*, says, "Whensoever a multitude is formed into one body or society, one part must govern, and the rest be governed". Wherefore it is absolutely necessary where a company of men combine and form themselves into a body politic that some one should preside as the governing principle, who in kingdoms goes usually under the name of king. In this order, as out of an embryo, is formed an human body, with one head to govern and control it; so from a confused multitude is formed a regular kingdom, which is a sort of a mystical body, with one person as the head, to guide and govern... The law under which the people is incorporated may be compared to the nerves and sinews of the body natural; for, as by these the whole frame is fitly joined together and compacted, so is the law that ligament, to go back to the truest derivation of the word *lex a ligando*, by which the body politic and all its several members are bound together and united in one entire body. And as the bones and all the other members of the body preserve their functions, and discharge their several offices by the nerves, so do the members of the community by the law. And as the head of

[88] Christopher W. Brooks, 'The Place of Magna Carta and the Ancient Constitution in Sixteenth-Century English Legal Thought' in Ellis Sandoz (ed.), *The Roots of Liberty*, p. 61.

> the body natural cannot change its nerves or sinews, cannot deny to the several parts their proper energy, their due proportion and ailment of blood, neither can a king, who is the head of the body politic, change the laws thereof, nor take from the people what is theirs by right, against their consents.[89]

This metaphor offers a neat summary of how Fortescue perceived the relationship between law and society, the law being the very nerves and sinews of the social body. Fortescue is quite clear that the origin and operation of all legitimate law is divine, telling us that 'the laws which through the Divine occurrence work such good effects' ought to be 'studied with the utmost application'.[90] This recognition grounds Fortescue's conviction that the law in its ultimate origin has a common source and is binding upon all peoples, 'The laws of England, as far as they agree with, and are deduced from the Law of Nature, are neither better nor worse in their decisions than the laws of all other states or kingdoms in similar cases. For, as the *philosopher* says, in the fifth of his *Ethics*, "The Law of Nature is the same and has the same force all the world over"'.[91] Significantly the implication of the natural law for the monarch is that 'justice is the subject of the Royal care'.[92] Fortescue is equally clear that the great end of society is the common good, quoting Cicero, albeit mediated through Augustine, to tell us 'That a people is a body of men joined together in society by a consent of right, by an union of interests, and for promoting the common good'.[93] The law's purpose then is to direct men towards their divinely ordained natural ends, 'since that justice which is taught and acquired by the law, is universal virtue, it follows, *that he who has attained this justice, is made happy by the laws,* consequently has attained the *summum bonum,* or beatitude'.[94]

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[89] John Fortescue*, De Laudibus Legum Angliae* (Cambridge: J. Smith, 1825) pp. 37-38.
[90] Ibid., pp. 12-13.
[91] Ibid., p. 48.
[92] Ibid.
[93] Ibid., p. 37.
[94] Ibid., p. 12.

One of the most enduring distinctions in Fortescue's work is his account of *dominium politicum et regale* or 'political and royal rule' of which Fortescue was clear, 'hath been taught in the doctrine of the said St. Thomas.'[95] It is a highly significant distinction in the history of British politics insofar as it seeks to delimit the arbitrary will of a sovereign and it strikes at the heart of the common law's concern for individual liberty under the natural law. Fortescue expounds upon it at some length in *De natura legis naturae* and in *De dominio regale et politico,* but seeks to give a historical account of such rule in *De Laudibus.* Ives neatly summarises the significance of this distinction to the common law tradition:

> Beyond this analysis of the problems of his own day, Fortescue's importance lies in his writing on the nature of political authority. He distinguished three kinds: regal dominion, political dominion, and a combined form: regal and political dominion. Fortescue took the original distinction from St Thomas Aquinas, who had postulated the third form to accommodate the government of imperial Rome which exhibited both regal and political features. Sir John's originality was to realize that other states fell into that category, including England. Its king ruled by hereditary right, and had full regal authority over his subjects. His duty was that imposed by the law of nature on every king—to do justice. On the other hand he was not absolute. His power derived from the body politic, and the laws he had to administer were only such as he and the people assented to. What is more, that limitation on regality was institutionalized in parliament, and enforcement was by judges sworn to uphold those laws, not the king's will.[96]

We need not look far in Burke's own writings before these themes, so prominent in Fortescue, and persistently reiterated in the common law tradition, are made apparent. Fortescue follows Aquinas in consistently rejecting any notions of legal voluntarism issued by the arbitrary will of a ruler. One such instance appears in *De Laudibus* in which Fortescue finds biblical precedent for this, writing that God told Samuel to show the Israelites that a king would govern according 'to arbitrary will and

[95] Fortescue, 'De Natura', in O'Donovan, *Sourcebook*, p. 533.
[96] Ives, op cit.

pleasure'.[97] In *De Laudibus* Fortescue also follows Aquinas in blurring the boundaries of the civil and the political, the political not being a product of the fall but an aspect of Adam's marriage, an authority which Fortescue describes as natural.[98]

By July 1443 Fortescue had produced one of his most notable publications, *De Natura Legis Naturae* (On the Nature of the Law of Nature) as well as nine other pro-Lancastrian works. In this work, which spans just over 330 pages, Fortescue is concerned with a King's right to rule and in particular he is precluding the possibility of Yorkist rule on the basis of the natural law. This text provides us with an extensive Thomistic account of the natural law in which we can see just how deeply Fortescue was indebted to Aquinas, who is consulted and referenced at every stage of the text. One commentator puts it well (notably this historian also detects Burkean motifs in Fortescue's work):

> The heart of the matter becomes apparent in *Nature...* He is utterly clear on the point that… the good [man] seeks is not exhausted by nature and the things of the world... Rather, man seeks as his ultimate end the inexhaustible Good of the transcendent *summum Bonum,* supernatural Beatitude... Fortescue's horizon of thought, in other words, is thoroughly Christian, classical, biblical, scholastic, and medieval Catholic, with elements of Renaissance humanism tending to modernize the whole... There is a constant mindfulness of human limits, a sort of Burkean sense that the individual is ignorant, the species wise.[99]

Given how concerned Burke was with constitutional precedent and the question of the succession of 1688 it would be deeply surprising if he had not read the seminal work of Fortescue on this precise issue.[100] For Fortescue, as for Burke, it is the constitution grounded in the natural law which

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[97] Fortescue, *De Laudibus*, p. 36.
[98] Ibid.
[99] Ellis Sandoz, *The Politics of Truth and Other Untimely Essays: The Crisis of Civic Consciousness* (Columbia, MI: University of Missouri Press, 1999) p. 98.
[100] Note that John Somers, a leading architect of the 1689 Bill of Rights who Burke explicitly references as an authority in the *Reflections* with regards to the succession of 1688, wrote that the right to petition 'was justify'd by the Law of Nature, the Practice of all States in the World, and… allow'd by the Laws of this Land'.

morally binds the constituent members of society to one another and determines the relations between their appointed offices. The natural law then is seen to be intimately connected with the right ordering of society and Fortescue makes a point of highlighting the presence of the natural law at the very conception of the polity. He tells us that 'we cannot allow the kingly power to have been instituted at the first by any other law than the law of nature since... there was no other law at the time of its institution.'[101]

In *De Natura* the universality of the natural law is assumed. The laws of the English nation are thus necessarily aligned with the law of nations, 'What else then is the *jus gentium* which our laws so highly extol, but those laws of nature's code which all nations observe.'[102] Following Aquinas, reason becomes the bridge between the natural law and the civil customs which accord to the natural law, 'that which natural reason establishes among all men is preserved among all nations… And what is it which natural reason has established among all men but that natural equity which is nature's law?'[103] Fortescue is equally clear that human law which accords to the natural law ought to direct us towards our created ends, 'nations adopted for their own purposes certain laws of nature, which were so convenient for them that without them they could not live rightly.'[104] The discussion is concluded with an assertion of the sovereignty and immutability of the natural law, which is the eternal law made known to man 'the law of nature, which is a perpetual law, and as the canons above-mentioned say, began from the beginning of the rational creation, and varies not with time, but subsists unchangeable'[105]. Fortescue also offers an account of the relationship between justice and the law of nature in a passage which is striking in its resonance with Burke's articulation of the immutable demands of justice. Fortescue tells us of the law's 'emanation from

[101] Fortescue, 'De Natura', in O'Donovan, *Sourcebook*, p. 534.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid., p. 535.

the depths of justice' that they are 'of one quality and accidental essence', pronouncing that 'as the lustre from the light, the heat from the fire, the gushing stream from its spring, so doth the law (jus) of nature come from justice'.[106]

Not only is *De Natura* concerned with legal succession, but it is concerned with the right function of the ruler. Fortescue is clear in the text that English monarchs need 'the consent of the three estates of the realm'[107] if they are to make laws or raise taxes. Judges too are bound by the laws of the land and should not be compelled by the King's arbitrary will. In *De Natura* Fortescue consistently makes a link between unrestrained monarchical rule and the arbitrary (thus illegitimate) use of power. Like Burke he is clear that such arbitrary power should necessarily be circumscribed as we are all born equally subject to a great pre-existent law, 'the kingly power took its origin under and from the *law of nature*, and by it always was and is regulated'.[108] In making these arguments Fortescue makes repeated reference to Thomas Aquinas as an authoritative figure. In short there is a clear motif, recurrent from the outset of the common law tradition, which is utterly opposed to the arbitrary will of a ruler and is unequivocal about the sovereignty of the natural law. It is for this reason that, like Coke after him, custom and the natural law are given precedent over statute; we might even say that there is a tone of caution towards the use of statute. Fortescue is clear that when statutes are made they 'must be calculated for the good of the people: and they must needs be full of wisdom and prudence, since they are the result, not of one man's wisdom only, or an hundred, but such an assembly as the Roman Senate was of old'. This is vividly illustrated when, despite Edward IV's rule being ratified by statute, Fortescue nevertheless opposes him on the basis of the natural law. E. F. Jacobs writes 'that the Law of Nature should have been employed to

[106] Fortescue, 'De Natura' in *The Works of Sir John Fortescue*, p. 231.
[107] Fortescue, 'De Natura' in O'Donovan, *Sourcebook*, p. 534
[108] Ibid., p. 533.

support a title based on an act of the estates shows that the authority of the statute was not thought to be of so fundamental a character as the principles from which all particular statutes were, in the last resort, supposed to be derived.'[109] Repeatedly we hear Fortescue extolling the natural law, identifying its function in regulating society, protecting the liberties of Englishmen and militating against the danger of arbitrary governance.

Fortescue's concern with the arbitrary government of an individual is inextricably tethered to his anthropology. It is unsurprising that we find a Christian anthropology in his work given the context in which he was writing, yet nevertheless there are inevitably different accents and emphases within the canon of Christian anthropologies and once again Fortescue stands aligned with Aquinas.[110]

In his discussion of man in his natural state, Fortescue writes, that 'everyone naturally provides and contrives for his private and particular interest' therefore 'if [human society] were not ruled by some one who would take charge of it, [it] would waste away and perish, more especially since man's nature has been spoilt by sin, by which it has been made prone to go wrong'.[111] In this passage he is highlighting the corruption of man's reason and echoing Aquinas' view that 'when man turned his back on God, he fell under the influence of his sensual impulses' and was subject to 'a deviation from the law of reason.'[112] Furthermore Fortescue argues that without governance men would be subject to 'violence and insults' and that 'men should be continually exposed to the ravages of everyone who should take it in their heads to oppress them'.[113] Such passages are significant insofar as the patriarchs of the common law tradition were consistent in their

[109] Jacobs, op cit., p. 20.
[110] Aquinas, *Summa Theologica: Prima Secundae Partis*, Q. 91 A. 6.
[111] Fortescue, 'De Natura' in O' Donovan, *Sourcebook*, p. 534.
[112] Aquinas, *Summa Theologica: Prima Secundae Partis*, Q. 91 A. 6.
[113] Fortescue, *De Laudibus*, p. 35.

anthropology; man is neither utterly depraved nor is he a noble savage. Crucially if man is to attain his right ends he requires the regulation of stable laws and just government, without which his worst impulses would be aroused. Fortescue's anthropology is well summarised by Burke's statement that 'man is born to be governed by *law'*.[114] If Fortescue was anthropologically aligned with the Christian tradition in general then he was aligned with Aquinas in particular. Man is seen as a created creature ordered towards distinctive natural ends and aided to those ends by human laws partaking in the natural law, Fortescue writes, 'the law of nature can have no other operation than to dispose man to virtue... as St. Thomas says, the highest charge of government... is committed... to make men virtuous'[115] proceeding to write ''whatsoever that be which fulfils man's longing, that assuredly is the ultimate end of human desire, and that is the end which we seek... man hath been fashioned for such an end... St. Thomas in the aforesaid 1st Book, says that beatitude is the ultimate end of desires. Is it not, then, that ultimate end of which we are in search, wherewith the lord fulfils all the longing of man?' concluding with Aquinas that, 'beatitude... consists in the divine vision and that alone'.[116] Whilst this fact is not entirely surprising in the fifteenth century, it is nevertheless significant that these were the basic anthropological assumptions of the lawyers whose work would have been well known to Burke. We should not be surprised then that Burke's own anthropology reacted sharply against the French revolutionaries' sanguine view of man in the state of nature.

It is hard to overstate the impact of Fortescue as a legal and political thinker. Richard Hooker was deeply influenced by Fortescue as was Edward Coke, who opined of Fortescue's treatise *In Commendation of the Laws of England* that it was 'worthy to be written in Letters of Gold for the

[114] Burke, 'Speech in the Impeachment of Warren Hastings', *Works* Vol. XIII, p. 169.
[115] John Fortescue, 'De Natura' in *The Works of Sir John Fortescue*, p. 243.
[116] Ibid., p. 244.

Weight and Worthiness thereof.'[117] To exercise a substantial influence over those two Englishmen alone is enough to shape England's intellectual landscape substantially and as we shall see there is an identifiable lineage between Fortescue and Edmund Burke. Yet Fortescue's influence was far more extensive, 'With the possible exception of Sir Thomas More, Fortescue is the English common lawyer who until the days of Coke and Bratton had most to say of importance to a reading public outside his own profession.'[118] Indeed three hundred years later, in the seventeenth and eighteenth century, the Whigs employed Fortescue's notion of *dominium politicum et regale* in their defence of parliamentary and royal sovereignty[119] and Fortescue was repeatedly referenced by some of the most influential common lawyers and politicians in the succeeding centuries. Sandoz sees a clear lineage running from Fortescue all the way to Burke, 'In the history of liberty through rule of law, then, Fortescue stands in the line of celebrated English political, legal, and constitutional writers running from Henry de Bracton (d. ca. 1268) to Christopher St. Germain (d. 1540) to Richard Hooker through Sir Edward Coke (d. 1634) to Edmund Burke (d. 1797)'.[120] All of these thinkers are united in the conviction that true liberty is found under law (natural and thus constitutional) and as such the arbitrary will of a ruler violates the liberty of subjects.[121] Jacobs similarly makes the point that Fortescue was acting in a well established tradition of natural law reasoning, 'the history of reason and conscience in chancery pleading is a lengthy one... there is nothing particularly original in Fortescue's treatise. The arguments from St. Thomas, the pleading of the parties, and even the appeal to the Law of Nature to decide the matter of succession, are in a good orthodox tradition.'[122]

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[117] Edward Coke, *Coke Report* 8, fol. xiv
[118] Ives, op cit.
[119] Ibid.
[120] Sandoz, *The Politics of Truth*, p. 96.
[121] For Fortescue's account of freedom under the law, see Fortescue, *De Laudibus*, Ch. IV.
[122] Jacob, op cit., p. 20.

We can clearly see the effect Thomas Aquinas exercised upon Fortescue, specifically in regards to relating the natural law to political authority and the laws of the realm. Furthermore Aquinas' understanding of a mixed system of government, customary law and his distinctly Christian anthropology are all clearly evident in Fortescue's thought. Remarkably, at the dawn of a tradition which is still centuries away from Burke we find many of the same motifs that animate Burke's *Reflections.*

Christopher St. Germain

Christopher St. Germain was a preeminent common lawyer in the sixteenth century. In 1528 St. Germain published his *Doctor and Student*, a lengthy dialogue between a Doctor of divinity and a student of the common law (notable in itself perhaps) which begins with the foundations of law and ultimately arrives at questions concerning particular issues of conscience within the common law tradition. Until Blackstone's commentaries in the nineteenth century it was an authoritative textbook for students of the common law. As such it would be highly surprising if Burke was not well acquainted with its content; we can at least say that given it was a primer for law students for well over two centuries it exercised a tremendous influence over the common law tradition. [123]

Germain's intentions were clearly in rooting the common law in the divine law and thus establishing its parity with the canon law, J.H. Baker writes:

> St German set out to refute the notions that equity and conscience were outside or above the law, that because of their association with the law of God they belonged to the spiritual courts, and that therefore the canon law was somehow higher than the law of England. English law, he held, had exactly the same foundations in divine law as the canon law; it

[123] J. H. Baker, 'St German, Christopher (*c.*1460–1540/41)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008, http://www.oxforddnb.com/view/article/24493, (accessed 17th December 2013).

> took due account of conscience and equity; and it was necessary for churchmen and ecclesiastical judges to know its contents in order to be able to act conscientiously.[124]

In his exposition of the law Germain first offers an exposition of the eternal law, then the natural law and the divine law before finally turning to human laws. If these divisions of law seem distinctly Thomistic, it is because they are; Michael Zuckert makes the point well, 'the Doctor and Student of Christopher St. Germain, [is] a sixteenth-century text seeking to investigate "the very grounds of the law of England." The doctor, clearly a student of Thomas Aquinas's Treatise on Laws, lays out "four distinct kinds of law," his typology taken directly from the *Summa* and presented often in Aquinas's very language'[125], E. F. Jacob adds, 'the doctor's definitions are those of a philosophical canonist'.[126]

The dialogue begins with an account of the eternal law:

> therefore as the reason of the wisdom of God (inasmuch as creatures be created by him) is the reason and foresight of all crafts and works that have been or shall be; so the reason of the wisdom of God, moving all things by wisdom made to a good end, obtaineth the name and reason of a law, and that is called the law eternal.
>
> And this law eternal is called the first law: and it is well called the first, for it was before all other laws, and all other laws be derived of it.[127]

In Chapter five he proceeds in his exposition:

> This law eternal no man may know, as it is in itself, but only blessed souls that see God face to face. But Almighty God of his goodness sheweth of it as much to his creatures as is necessary for them, for else God should bind his creatures to a thing impossible; which may in no wise be thought in him. Therefore it is to be understood that three manner of ways

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[124] Ibid.
[125] Michael Zuckert, 'The Fullness of Being: Thomas Aquinas and the Modern Critique of Natural Law', *The Review of Politics*, Vol. 69, No. 1 (Winter, 2007) pp. 28-47. p. 29.
[126] Jacobs, op cit., p. 8.
[127] Christopher St. Germain, *The Dialogue in English, betweene a Doctor of Divinity, and a Student in the Laws of England*, (John More, 1638), Dialogue 1, Ch. 1.

> Almighty God maketh this law eternal known to his creatures reasonable. First, by the light of natural reason; secondly, by heavenly revelation, thirdly, the order of a prince, or any other secondary governor that hath power to bind his subjects to a law.
>
> And when the law eternal or the will of God is known to his creatures reasonable by the light of natural understanding, or by the light of natural reason, that is called the law of reason:
>
> The first ground of the law of England is the law of reason [128]

Like Aquinas, Germain gives an account of the natural law as the rational participation of creatures in the eternal law. Like Fortescue he follows Aquinas in viewing customs as a source of law, with the same caveat that Aquinas offers, namely that they do not conflict with the eternal or natural law and in a move that we shall see repeatedly, the immemorial law of England is identified as a derivative of the natural law.

St. Germain proceeds to elaborate at greater length upon the five grounds of the law of England. Firstly, the natural law as derived from the divine law; secondly, the law of God as revealed in the Christian faith; thirdly customs; fourthly ancient maxims of the realm; fifthly customs arising in specific localities and sixthly, the statutes decreed by the King and the common council, so long as they do not contravene the natural law and the law of God. [129] After differentiating between primary and secondary laws Germain offers an account of the way in which some laws are the product of custom according to reason and thus suited to the particular circumstances of a nation: 'The law of reason secondary particular is the law that is derived of divers customs general and particular, and of divers maxims and statutes ordained in this realm. And it is called the law of reason secondary particular, because the reason in that case is derived of such a law that is only

[128] Ibid., Dialogue 1 Ch. 5.
[129] Ibid., Dialogue 1., Ch. 4.

holden for law in this realm, and in none other realm.'[130] Such passages are clearly influenced by Aquinas' understanding of custom and are recurrent in the tradition.

Like Fortescue, Germain references Aristotle in his assertion that the law ought to direct society towards the common good. Germain proceeds to give an extensive Thomistic account of synderesis, reason and conscience and their relation to one another. Through the character of the Doctor he tells us:

> Sinderesis [sic] is a natural power of the soul, set in the highest part thereof, moving and stirring it to good and abhorring evil. And therefore sinderesis never sinneth nor erreth. And this sinderesis our Lord put in man, to the intent that the order of things should be observed. For after St. Dionyse, the wisdom of God joined the beginning of the second things to the last of the first things: for angel is of a nature to understand without searching of reason, and to that nature man is joined by sinderesis, the which sinderesis may not wholly be extincted neither in man ne yet in damned souls.

He concludes the section by writing 'And therefore sinderesis is called by some men the law of reason, for it ministreth the principles of the law of reason, the which be in every man by nature, in that he is a reasonable creature.[131] It is also significant that in such a seminal text we find such an explicit elaboration of the Thomistic division of reason into theoretical and practical branches and their respective functions. Germain writes that the:

> higher part of reason hath no regard to transitory things or temporal things, but that sometime, as it were by a manner of counsel, she bringeth forth heavenly reasons to order well temporal things. The lower part of reason worketh most to govern well temporal things and she groundeth her reasons much upon laws of man, and upon reason of man, whereby she concludeth that that is to be done that is honest and expedient to the commonwealth, or not to be done, that is not expedient to the commonwealth. And so that reason whereby I know God, and such things as pertain to God, belongeth to, the

[130] Ibid., Dialogue 1., Ch. 5.
[131] Ibid., Dialogue 1., Ch. 13.

> highest part of reason; and the reason whereby I know creatures belongeth to the lower part of reason. And though these two parts, that is to say, the higher part and the lower part, be one in deed and essence, yet they differ by reason of their working, and of their office; as it is of one self eye, that sometime looketh upward, and sometime downward.

As we shall see, Burke's believed that the revolutionaries had misunderstood the right 'office' of theoretical reason. To put it in his own words, 'Pure metaphysical abstraction does not belong to these matters'.[132] Finally, we might note that later on in the discourse St Germain interrogates the laws of the realm with questions from scholastic works such as the *summa angelica* and the *summa rosella*, deeming such theological inquiry to be the litmus test of the competency of the laws.

In summary, the first dialogue is an extensive exposition of Thomas Aquinas' philosophy relating to sovereignty, law, conscience and reason. This text was compulsory reading for over two centuries of common law students and was considered authoritative within the common law tradition.[133] We may also note in passing a contemporary of St. Germain's, namely Sir Thomas More, of whom O'Sullivan writes 'Like his contemporary St. Germain… Sir Thomas More was a close student of the philosophy of the Schoolmen which was current at the Inns of Court and in the Inns of Chancery of those days. As a disciple of Augustine and Aquinas, and the biographer of Pico della Mirandola, Sir Thomas More affirmed his belief in the existence and the operation of the law of nature.'[134] In the work of both of these men we once more see the common law tradition drawing deeply and unabashedly from Thomas Aquinas' account of custom, reason and above all the natural law.

Edward Coke

Edward Coke was born in 1552 and died in 1634; he was notably Chief Justice of the Common Pleas as well as Chief Justiceship of the King's Bench and his influence on the common law tradition can

[132] Burke, 'Appeal from the New to the Old Whigs', *Works*, Vol. XI., p. 97.
[133] See Baker, op cit.
[134] O'Sullivan, op cit., p. 128.

hardly be overstated. His most famous work is his *Institutes of the Lawes of England* which are still referenced in judicial cases to this day. If for no other reason than that Burke himself opined that Coke was 'the great oracle of our law' and was referencing him in his earliest works,[135] his thought is of great significance to the present discussion. As we have noted Coke himself held the work of Fortescue to be of monumental importance to the common law tradition and the evidence of that intellectual debt is apparent in Coke's own work, particularly in his articulation of the relationship between kingly rule and the natural law. Like Fortescue and Germain, Coke 'appeals to all the sources of law with the understanding that the ancient laws of England accord with eternal and natural law no less than with immemorial precedent'.[136]

One of Coke's most notable cases constituted a significant delimitation of the royal prerogative to legislate without the consent of parliament. In *The Case of Proclamations* [1610] Coke judged against the extension of James I's Royal Prerogative, arguing that 'the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament', proceeding to reference Fortescue twice. Coke notably concludes 'that the King hath no prerogative, but that which the law of the land allows him.' In making this ruling Coke explicitly references Fortescue's *De Laudibus* as the authoritative precedent.[137] In such a landmark case it is surely significant that Coke's legal exemplar, John Fortescue, explicitly based his case for the limitation of sovereign authority on Aquinas' preference for a composite state of regal and political dominion owing to the threat of despotism. We can certainly infer that Coke was aware of Aquinas' arguments on this matter and it is reasonable to think that he deemed them to be sound. It is also reasonable to assume that if Coke was as influenced by Fortescue's work as he professed

[135] Burke, 'Reflections on the Revolution in France', p. 75; idem, 'A Vindication of Natural Society', *Works* Vol. I, p. 6.
[136] Ellis Sandoz, *The Roots of Liberty,* p. 14.
[137] Edward Coke, 'Case of Proclamations', found in 'England and Wales High Court (King's Bench Division) Decisions', http://www.bailii.org/ew/cases/EWHC/KB/1610/J22.html, (accessed 13th January 2014).

then he was well aware of Fortescue's debt to Aquinas on the subject of the natural law. It is unsurprising then that when we see Coke utilising natural law discourse, his language is that of Aquinas mediated through Fortescue.

Perhaps the most extensive elaboration of the law of nature's active role in the polity appears in 1608 in the infamous *Calvin's Case*. Coke was concerned to defend the view that Robert Calvin was entitled to own property in England as well as Scotland due to the union of crowns in the person of James I. Coke sought recourse in the natural law in grounding the civil rights of Englishmen and the obligatory duties owed to the monarch. He writes 'That ligeance or obedience of the subject to the Sovereign is due by the law of nature: 2. That this law of nature is part of the laws of England: 3. That the law of nature was before any judicial or municipal law in the world: 4. That the law of nature is immutable, and cannot be changed.' It is notable that each one of these points resonates with the statements which Burke himself made relating to the natural law. In this exposition of the natural law, Coke repeatedly cites Bramhall, St. Germain, Glanville and Fortescue, not to mention Cicero, Aristotle, St. Paul and Moses, notably in the belief that 'The law of nature is that which God at the time of creation infused into his heart, for his preservation and direction; and this is lex æterna, the moral law, called also the law of nature.'[138] *Calvin's Case* involves a sustained exposition and defence of the natural law as a basis of the common law. Importantly in making arguments from the natural law Coke does not believe himself to be doing anything novel, quite to the contrary he insists that he is not and repeatedly tells us that he is following well established precedents in the tradition, referencing Fortescue and others; as Polly Price notes, 'Coke, on the

[138] Edward Coke, 'Calvin's Case', found at 'The Constitution Society', http://www.constitution.org/coke/Calvins_Case-7_Coke_Report_1a_77_ER_377.html, (accessed 20th December 2013).

other hand, relied not on a general jus feudale pre-dating or underlying English common law but on natural law'.[139]

It is interesting that Coke also employs the natural law in *Calvin's Case* in arguing for the invisible relation between subjects of a kingdom, 'Lastly, whosoever at his birth cannot be an alien to the King of England, cannot be an alien to any of his subjects of England: but the plaintiff at his birth could be no alien to the King of England; ergo the plaintiff cannot be an alien to any of the subjects of England'.[140] As the sovereign is head of the body, so the members of the body are related to one another, these fraternal bonds ultimately originating in the natural law. Such an understanding of the relation between the social body and the sovereign is highly similar to the account of sovereign rule detailed by Aquinas in *De Regno,* who writes at length on the issue telling us that the social body 'would disintegrate' without a ruling head to bind it together, the ruler is 'the principal' which 'moves all others', therefore 'a multitude of free men is ordered by the ruler towards the common good of the multitude'[141] making it clear that this truth is revealed by the natural law and the king if he is to be legitimate must operate under the auspices of God's law. As O'Donovan puts it, Aquinas believed in 'the unification of the corporate body by the will of its royal head'.[142] Given that this is one of the key texts which Fortescue references in relation to kingship and the natural law, it is not surprising to see Coke's arguments resonating with Aquinas'. Whether Coke read Aquinas himself on this issue or whether he just read Fortescue is not known. What can be said is that the arguments are distinctly Thomistic and they reference Fortescue who self-confessedly took them from Thomas. The clear emphasis upon custom, social bonds and a hierarchy governed by the natural law is easily found in Burke's writings. Indeed, it is the esteem which Burke attributes to the

[139] Polly J. Price, 'Natural Law and Birthright Citizenship in Calvin's Case (1608)', *Yale Journal of Law and the Humanities,* Vol. 9, Issue 1, Article 2 (2013) pp. 73-143., p. 75.
[140] Coke, 'Calvin's Case'.
[141] Aquinas, *De Regno,* in O'Donovan, *Sourcebook*, p. 331.
[142] Oliver O'Donovan, *Sourcebook*, p. 321.

invisible bonds which unite the separate parts of the whole that caused him to fulminate against the atomistic individualism of the revolutionaries' doctrines.

In *Calvin's Case* we find that the common law of England was not framed simply in the terminology of precedent which harked back to an immemorial age but it was understood to accord to the natural law, and specifically the natural law described by Thomas Aquinas. Polly Price writes:

> Further, according to Coke, Fortescue provided evidence that before there were any municipal laws, English kings had decided cases according to natural equity--more evidence that the law of nature existed before the development of much of what seventeenth-century lawyers considered to be the common or customary law of England. The critical result was that allegiance to the English sovereign, and for a time, acquisition of and rights associated with citizenship in the former American colonies, were considered not to be the subject of municipal or positive law-making... More importantly, Calvin's Case also established by implication the rule of the jus soli itself as a divine institution, ordained by the laws of God and nature.[143]

The point regarding the American colonies is worth remembering in relation to Burke's firm stance on the issue. The rights and duties of Englishmen were indeed detailed by the common law, but these rights and duties carried the authority of the law of nature from whence they derived their legitimacy and as such were not to be denied. Coke states:

> Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature, (for that law only consisted in commanding or prohibiting, without any certain punishment or penalty), yet the very law of nature itself never was nor could be altered or changed. And therefore it is certainly true, that jura naturalia sunt immutabilia.[144]

[143] Price, op cit., p. 116.
[144] Coke, *Calvin's Case*.

Like Fortescue, it was precisely because of the immutable and enduring quality of the natural law that Coke was cautious with regard to legislative pronouncements, which smacked of arbitrary power and legal voluntarism. Notably in *Bonham's Case* Coke seems to have argued for the precedent of common law over statute precisely because the common law was customary and accorded to reason, '[if] an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it.' Given his study of the common lawyers it is unsurprising that Burke was suspicious of radical reform and had 'no very exalted opinion of the virtue of paper government'.[145] Whilst it would be wrong to say that Coke exhibited a prejudice against statute in itself, we can say that if long established custom was associated with the natural law, then statute smacked of arbitrary power, which is exactly why the common lawyers perceived the necessity of wedding statute to popular consent. The allergy to arbitrary power was again dramatically demonstrated in *Peacham's Case* when Coke limited kingly authority, insisting that the king should not be able to influence the impartiality of a jury, endearing himself to neither Sir Francis Bacon nor James I.

Pocock rightly identified the stress on immemorial custom in Coke's thought, quoting a portion of Coke's appeal to the forefathers in the passage in which Coke writes:

> wherein they followed the counsel given in God's book, interroga pristinam generationem (for out of the old fields must come the new corn) et diligenter investiga patrum memoriam, and diligently search out the judgments of our forefathers, and that for divers reasons: first on our own part, Hesterni enim sumus et ignoramus, et vita nostra sicut umbra super terram; for we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is optima regula, qua nulla est verior aut firmior in jure, neminem oportet esse sapientiorem legibus: no man ought to take upon him to be wiser than the laws. Secondly, in respect of our forefathers: ipsi (saith the text)

[145] Burke, 'Speech on Conciliation with America', *Works*, Vol. III, p. 29.

> docebunt te, et loquentur tibi, et ex corde suo preferent eloquentia, they shall teach thee, and tell thee, and shall utter the words of their heart, without all equivocation or mental reservation; they (I say) that cannot be daunted with fear of any power above them, nor be dazzled with the applause of the popular about them, nor fretted with any discontentment (the matter of opposition and contradiction) within them, but shall speak the words of their heart, without all affection or infection whatsoever.[146]

Whilst Pocock is correct that such appeals to antiquity are the very substance of Burke's *Reflections*, he neglects to mention that Coke's eulogy to the wisdom of antiquity is explicitly prefaced by a reference to the precedent of scripture and immediately followed by an explicit statement that all the laws of England are informed by the natural law, the 'law of nature is part of the laws of England' and 'the law of nature was before any judicial or municipal law in the world' concluding, 'the law of nature is immutable and cannot be changed'.[147] Again, we see a great father of the common law synthesising immemorial custom with the operation of the natural law. As O'Sullivan writes, 'In [Coke's] enumeration of the laws in force in England in his time, Coke gives the lex coronae and the lex et consuetudo parliamenti and the lex naturae et communis lex angliae. The law of nature and of the common law are enumerated in one breath and represent in one whole a single combination'.[148]

As we shall see, the similarities with Burke's language in such passages are striking and the fact that in legal thinkers as monumental as Fortescue, Germain, Selden and Coke, Burke consistently saw such references to the immemorial customs of our forefathers coupled with an assertion of the natural law's sovereignty should not be taken lightly. It is worth pausing at this juncture to consider Burke's social contract. In Burke's articulation of the social contract we find a perfect expression of the themes which we find woven throughout the history of the common law, the belief that society

[146] Coke, *Calvin's Case*.
[147] Ibid.
[148] O'Sullivan, op cit., p. 128.

is a corporate body in organic continuity with past generations and crucially the conviction that the ruler and the social body, past and present, are bound together by the natural law. Moreover, Burke tells us that there is a 'moral and physical disposition of things to which man must be obedient by consent or force' he argues that if men refuse this natural order then 'the law is broken, nature is disobeyed, and the rebellious are outlawed, cast forth and exiled, from this world of reason, and order, and peace, and virtue, and fruitful penitence, into the antagonist world of madness, discord, vice, confusion, and unavailing sorrow.'[149]

In the closing lines, Burke's description of those who would reject the dictates of reason found in the natural law sounds overtly Thomistic. In agreement with Fortescue, Selden, Germain and Coke, Burke is perfectly clear that true freedom is found under law in the cultivation of those ends towards which we are naturally ordered. In concluding this section on Coke's understanding of the natural law and its influence on Edmund Burke, it is worth picking up the text of the *Reflections* at the exact point where Burke's description of the social contract ends and questioning to whom Burke is referring, bearing in mind that in the only other such similar reference in the *Reflections* he explicitly names the common lawyers. It is also worth noting that, for all the posthumous acclaim it has brought him, Burke did not regard himself as articulating anything novel in his description of the social contract. Burke writes (italics mine):

> *These, my dear Sir, are, were, and, I think, long will be the sentiments of not the least learned and reflecting part of this kingdom.* They who are included in this description form their opinions on such grounds as such persons ought to form them. The less inquiring receive them from an authority which those whom Providence dooms to live on trust need not be ashamed to rely on. These two sorts of men move in the same direction, though in a different place. They both move with the order of the universe.

[149] Burke, 'Reflections on the Revolution in France', p. 185.

> They all know or feel this great ancient truth: Quod illi principi et praepotenti Deo qui omnem hunc mundum regit, nihil eorum quae quidem fiant in terris acceptius quam concilia et coetus hominum jure sociati quae civitates appellantur. They take this tenet of the head and heart, not from the great name which it immediately bears, nor from the greater from whence it is derived, but from that which alone can give true weight and sanction to any learned opinion, the common nature and common relation of men. Persuaded that all things ought to be done with reference, and referring all to the point of reference to which all should be directed, they think themselves bound, not only as individuals in the sanctuary of the heart or as congregated in that personal capacity, to renew the memory of their high origin and cast, but also in their corporate character to perform their national homage to the institutor and author and protector of civil society; without which civil society man could not by any possibility arrive at the perfection of which his nature is capable, nor even make a remote and faint approach to it. They conceive that He who gave our nature to be perfected by our virtue willed also the necessary means of its perfection. He willed therefore the state — He willed its connection with the source and original archetype of all perfection. They who are convinced of this His will, which is the law of laws and the sovereign of sovereigns, cannot think it reprehensible that this our corporate fealty and homage, that this our recognition of a seigniory paramount, I had almost said this oblation of the state itself as a worthy offering on the high altar of universal praise, should be performed as all public, solemn acts are performed, in buildings, in music, in decoration, in speech, in the dignity of persons, according to the customs of mankind taught by their nature; that is, with modest splendor and unassuming state, with mild majesty and sober pomp...
>
> I assure you I do not aim at singularity. *I give you opinions which have been accepted amongst us, from very early times to this moment, with a continued and general approbation, and which indeed are worked into my mind that I am unable to distinguish what I have learned from others from the results of my own meditation.* [150]

In this passage which can rightly be described as overtly Thomistic, Burke proceeds to assert that the views which he is drawing upon have been accepted since the earliest times, emphasising the

[150] Ibid., pp. 185-188.

long continuity of these opinions and the influence which they wield over his own thought. Given how intimately acquainted with the common law he was, it is hard to believe that Burke is not referencing the long history of english legal thought, within which he expressly believed we can find the liberties of Englishmen and the splendour of the english constitution charted.

John Selden

In 1584, one hundred and four years after Fortescue's death, John Selden was born. Selden was an eminent seventeenth century jurist widely esteemed in England. His importance lies in his widespread influence as a polymath, notably penning several historical works of enduring significance, including the first ever history of English law[151] in which he follows Fortescue (and Aquinas) in stressing the importance of a mixed form of government. It is also a point of interest that in 1616 he published notes on John Fortescue's, *In Praise of the Laws of England.* Given that Burke publicly described Selden as 'a great ornament of the common law'[152] and his great personal interest in English legal history it would be deeply surprising if he was not aware of Selden's landmark contribution to the subject. In Selden's notes on Fortescue's work he writes:

> all laws in general are originally equally antient. All were grounded upon nature… although the law of nature be truly said immutable, yet it is as true, that it is limitable, and limited law of nature is the law now used in every state. All the same may be affirmed of our *British* law… But the divers opinions of interpreters proceeding from the weakness of man's reason, and the several conveniences of divers states, have made those limitations, which the law of Nature has suffered, very different. And hence it is that those customs which have come all out of one fountain, *nature,* thus vary from and cross one another in several commonwealths… This rationally considered, might end that obvious question of those, who would say something against the laws of *England* if they could. 'Tis their trivial

[151] John Selden, *England's Epinomis*, (London: Thomas Basset and Richard Chiswell, 1683)
[152] Edmund Burke, 'Reports from Committee Appointed to Inspect the Lord's Journal' in *The Works of the Right Honorable Edmund Burke Vol. II.* (London: Holdsworth and Ball, 1834) p. 627.

> demand, *When and how began your common laws?* Questionless it is fittest answered by affirming, when and in like kind as the laws of all other states, that is, *When there was first a state in that land, which the common law now governs:* Then were natural laws limited for the conveniency of civil society here, and those limitations have been from thence, increased, altered, interpreted, and brought to what now they are… they are not otherwise than a ship, that by often mending had no piece of first materials, or as the house that's so often repaired, *ut nihil ex pristina materia supersit*, which yet, by the civil law, is to be accounted the same still [153]

Again, we see a highly influential common lawyer assimilating a Thomistic conception of the natural law to the ancient constitution and the English common law. Tuck notes of this passage 'This was in fact already the Burkean theory of English law, and its influence… can be traced directly on to Matthew Hale, Selden's friend and executor, and thence to Blackstone and the mainstream of eighteenth-century English legal thinking.'[154]

Martha A. Ziskind gives a good summary of Selden's understanding of the relationship between the natural law and the common law; she writes that, for Selden 'the English common law began when the English state was first organized. The natural law was then limited, and those limitations were increased, altered, and interpreted, until the common law reached its present form.' [155] In short, Selden's view of law follows Aquinas' view that 'it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to certain particular determinations of the laws. These particular determinations, devised by human reason, are called human laws.'[156] Additionally we clearly see in Selden's work the now familiar

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[153] Selden, *Opera Omnia,*Vol. III*,* cols. 1891-2, quoted in Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979) p. 84.
[154] Richard Tuck, *Natural Rights Theories*, p. 84.
[155] Martha A. Ziskind, 'John Selden: Criticism and Affirmation of the Common Law Tradition' *The American Journal of Legal History*, Vol. 19., No. 1 (Jan., 1975) pp. 22-39. p. 37.
[156] Aquinas, *Summa Theologica: Prima Secundae Partis*,, Q. 91, A. 3.

identification between immemorial law and custom and the natural law. The following passage, penned by Selden, highlights these themes:

> all laws in general are originally equally antient. All were grounded upon nature… although the law of nature be truly said immutable, yet it is as true, that it is limitable, and limited law of nature is the law now used in every state... And hence it is, that those customs which have come all out of one fountain, *nature*, thus vary from and cross one another in several commonwealths... [Thus] were natural laws limited for the conveniency of civil society here, and those limitations have been from thence, increased, altered, interpreted, and brought to what now they are [157]

Such an understanding of the law is elaborated upon more fully in Selden's work *Of the Dominion of the Sea.* In it he was arguing against Grotius' view expressed in *The Free Sea* that the sea was not under the dominion of any nation and as such was international territory. In Selden's work we find a detailed exposition of the natural law and the manner in which it relates to customs and human law. In section II entitled 'What is meant by the word SEA, in the question. Also a division of the Law, in order to the discours [sic]'[158] he offers an account of the natural law which is drawn from Aristotle, Cicero and Thomas Aquinas. Quoting Tertullian, Selden refers to the natural law as 'the Common Law written throughout the whole world, in the very books of nature' proceeding to state, 'or else it is declared and set down in those Divine oracles that have been committed to writing: Both which may properly bee termed the *universal* law of nations, or the *common law* of mankinde'.[159]

Like Fortescue, Coke and Germain, Selden links the right use of reason to the natural law, he tells us that 'a right use of human reason... usually serv's as an index of the natural law'.[160] Selden

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[157] John Selden, *Opera Omnia,* Vol. III, cols. 1891-92, quoted in Ellis Sandoz, *The Roots of Liberty,* p. 14.
[158] John Selden, *Of the Dominion, or, Ownership of the Sea*, trans. Marchamont Nedham (London, William Du Gard, 1652) p. 11.
[159] Selden, *Dominion*, p. 13.
[160] Ibid., p. 42.

distinguishes a permissive aspect of the natural law which is not morally obligatory but nonetheless common to mankind insofar as certain activities are illumined by the right use of reason, offering the examples of buying, selling, enfranchisement and the framing of contracts. This face of the natural law 'must needs bee various and changable [sic]... and therefore subject to Repealings, Qaulifications and daily Alterations'.[161] The obligatory law by contrast derives its authority from the 'autoritie [sic] of the father of nature' and is 'reputed by men to bee unchangeable'.[162] Selden proceeds in his divisions of law as well as offering an extensive account of the law of nations. The account of law elaborated by Selden may not be as overtly indebted to Aquinas as the accounts of Fortescue and Germain, but it is not hard to identify themes in his work that are resonant with Aquinas and it is therefore unsurprising to see that at the end of the exposition he explicitly references the familiar figures of Aristotle, Thomas Aquinas and Cicero as authorities on the law. We might too note a later section of the book which adumbrates an early conception of the law of nations entitled 'that the natural permissive law (whereof any use may bee in the place) is to bee derived out of the customs and constitutions of the more civilised and more noble nations, both antient [sic] and modern'.[163] It is notable in particular in this section, that the law is seen to be 'derived from a right and discreet use of reason'.[164]

The work for which Selden is perhaps best known is the posthumously published 'Table-Talk'.[165] In it we find a chapter dedicated to the natural law, of which Selden states 'I cannot fancy to myself what the law of nature means, but the law of God'[166], proceeding, 'how should I know I ought not to steal, I ought not to commit adultery, unless somebody had told me so?'[167] Selden links this

[161] Ibid., p. 13.
[162] Ibid., p. 13.
[163] Ibid., p. 42.
[164] Ibid., p. 42.
[165] John Selden, *Table Talk,* [1689] (Oxford: Clarendon Press, 1992)
[166] Ibid., p. 101.
[167] Ibid.

natural law to the ties which bind men to each other, intimating a political argument, 'From a higher power, nothing else can bind: I cannot bind myself for I may untie myself again: nor an equal cannot bind me, for we may untie one another: it must be a superior power, even God Almighty.' [168] It is notable that Thomas Aquinas and the schoolmen are explicitly referenced by Selden in the very next section of the text, as Selden advocates the necessity of mastering a knowledge of those that one quotes.[169] Additionally in the section of the book concerned with reason, Selden links reason to the natural law, again citing the schoolmen.[170]

In summary, Selden was a hugely influential intellect whose contribution to the common law's self understanding was seminal. Selden clearly held Fortescue's work in great esteem and follows him in articulating a Thomistic understanding of the natural law, replete with all the recurrent themes which characterise the common law tradition.

The cohesiveness of the tradition

We can clearly see many of the same basic assumptions operating in continuity throughout the common law tradition; it is significant that the common lawyers were not radical innovators, but prided themselves on adhering to precedent, constantly referencing their predecessors. Not only did the common lawyers we have looked at hold the same basic suppositions regarding anthropology, the natural law, the value of precedent and the importance of religion but they also rehearsed the same arguments in particular legal cases relating to such issues as property, sovereign legitimacy, the nature of the constitution, citizenship and the rights of Englishmen. Finally, as I have argued, their understanding of the natural law is remarkably indebted to Aquinas', at times explicitly referencing Aquinas as well as two of his great influences, Aristotle and Cicero. As

[168] Ibid.
[169] Ibid., p. 102.
[170] Ibid., p. 160.

Brooks puts it, 'scholastic Aristotelianism and a fundamental outlook which stressed natural law theory were aspects of English legal thinking which may be said to have been inherited from the medieval past'.[171]

O'Sullivan perhaps offers the most succinct summary of the pervasive influence which Scholastic conceptions of the natural law were to have on the common law tradition:

> It thus appears that over a period of several centuries the greatest minds of the English Bench and Bar affirmed their belief in the existence and the operation of the law of nature as a living and ruling principle of the English law. What then is this natural law in which Stephen Langton and Henry of Bracton and Sir John Fortescue and Thomas Littleton and Christopher St. Germain and Thomas More and Edward Coke (and Hale and Holt and even Blackstone) affirmed their belief? [172]

To answer O'Sullivan's question, we have seen that Aquinas' understanding of custom as a source of law naturally resonated with the early English common lawyers, yet what we consistently see is the leading lights of the tradition synthesising the discourse of immemorial law with that of the natural law. The sanctity and dignity attributed to the common law of the land which was uncovered by reason and was binding upon all men sat happily with a Thomist conception of the natural law. As we have noted Aquinas' influence was not simply restricted to Medieval English legal understandings of the natural law, but rather we see that through lawyers such as Fortescue, Selden and Germain, a broadly Thomistic teleology, anthropology and vision of society was incorporated into the basic presuppositions of the common law tradition and conveyed into the eighteenth century. By virtue of the tradition's high esteem for precedent the assumptions of earlier lawyers exercised a tremendous influence upon their antecedents. As a scholar of this

[171] Christopher W. Brooks, 'The place of Magna Carta and the Ancient Constitution in Sixteenth-Century English Legal Thought', in Ellis Sandoz, *The Roots of Liberty*, p. 82.
[172] O' Sullivan, op cit., p. 130.

tradition and a personal adherent, insofar as his political arguments and idiom demonstrably draw upon precedents within the tradition, Edmund Burke was no exception to this long lineage of common lawyers. Nor was he an exception in English politics. Due to the intimate relation between legislators and the law it is unsurprising that politicians were well acquainted with the English legal tradition and were therefore acquainted with the works on the common law to which we have referred. O'Sullivan comments upon the influence of natural law upon the English political sphere:

> In fact, the principle of an overriding law of nature was for many centuries accepted and followed by Parliament. Until the seventeenth century, one may say that the principle was a commonplace of jurisprudence and familiar to the political and the public mind of England. Thus, in 1468, the Chancellor told the House of Lords: "that justice was ground, well and root of all prosperity, peace and public rule of every realm, whereupon all the laws of the world had been ground and set, which resteth in three; that is to say, the law of God, the law of nature, and positive law." And, as late as 1604, the Speaker of the House of Commons was still "orthodox even if not beyond dispute": "The laws whereby the ark of this government hath ever been steered are of three kinds, first the common law, grounded or drawn from the law of God, the law of reason, and the law of nature, not mutable; the second, the Positive Law, founded, changed, and altered by and through the occasions and policies of times; the third Customs and Usages, practised and allowed with time's approbation without known beginnings.

Unsurprisingly we find that other monumental English figures whose political influence was as great as their legal influence also offer explicit articulations of the natural law. To name a few, Rudolf de Glanvill, Thomas More, John Dodderidge, Matthew Hale, John Holt, John Somers and Lord Mansfield.[173]

[173] Mansfield was personally known to Burke and much admired by him. Burke wrote of Mansfield 'his ideas go to the growing melioration of the law, by making its liberality keep pace with the demands of justice and the actual concerns of the world; not restricting the infinitely diversified occasions of men, and the rules of natural justice, within artificial circumscriptions, but conforming our jurisprudence to the growth of our

Conclusion

To say that Burke's thought was distinctly Thomistic is, on reflection, a far less remarkable claim than some have argued. Two intellectual traditions in which Burke was immersed, namely Anglicanism and the Common law, were deeply indebted to the influence of Thomas Aquinas. In this respect the assertion that Burke's thought was not in some substantial respect Thomistic would be the far more remarkable claim to make. Having reckoned himself capable of writing an essay on the history of the laws of England, being self confessedly indebted in his political thought to the common lawyers and being an Anglican who attributed a substantial weight to the thought of Hooker and the divines, it would truly be remarkable if Burke did not inherit many of the basic categories, lines of argument and conceptual distinctions which these thinkers owed to Thomas Aquinas. Peter Stanlis and Francis Canavan have pointed out what these were and they have been elaborated upon at length in this chapter.

From Burke's understanding of the relationship between natural law and immemorial precedent, to his veneration of ancestral and customary wisdom, his emphasis on civil society, belief in the subjugation of arbitrary power to law, his incessant assertion of the rights of Englishmen, to his anthropological assumptions, his distinction between the functions of speculative and practical reason and his understanding of the social body ordered towards the common good; in all these things he is a true son of the common law tradition. After traversing some of the most prominent peaks of the tradition we find that such themes are not idiosyncratic or anomalous ideas articulated by disparate individuals but they are the recurrent motifs which unify the common law tradition.

commerce and of our empire.' See Edmund Burke in W. N. Welsby, (ed.), *Lives of Eminent English of the Seventeenth and Eighteenth Centuries* (London: W. M'Dowall, 1846) pp. 406-7.

I have demonstrated a clear intellectual genealogy which links Burke's thought to that of Thomas Aquinas. The link between Aquinas, Fortescue, Coke and Burke is evident enough, each of the thinkers explicitly articulating an intellectual debt and a great admiration for the former. Yet we have also seen that a Thomistic understanding of the natural law was diffuse in the common law tradition more broadly, we find the same themes repeated by men who were responsible for decisive contributions to the constitution. The examples I have illustrated simply seek to demonstrate a substantial Thomistic inheritance in the most prominent works of the most prominent thinkers of the common law tradition. The lawyers we have analysed are not minor members of the tradition commenting on idiosyncratic cases, but rather they are seminal thinkers who shaped and informed the tradition providing direct references to the work of Thomas Aquinas. Importantly the cases in which the common lawyers invoke Aquinas are cases which contain issues that were of great interest to Burke. In Burke's language relating to custom, sovereign legitimacy, political authority and the natural law itself, his voice is closely aligned to the tradition in which he himself was an authority. To say that a Thomistic Burke is incredible, seems, at the very least, to be overstating the case.

In the next chapter we shall turn to the origins of the contractarian tradition. We shall see that there are fundamental differences between the political assumptions of contractarians and the common lawyers. We shall also see that it was precisely on the basis of assumptions that Burke had inherited from the common law tradition that he (and notable common lawyers) took such great issue with contractarian thought.

Chapter Two

John Locke and the Roots of Political Liberalism: Politics as Geometry

Having looked at the legal and political ideas in currency in the common law tradition, let us turn to the source of the contractarian tradition which shall be analysed in this thesis, namely John Locke's *Second Treatise* and *Letter Concerning Toleration*. I will begin by outlining the context in which Locke was writing, I will then turn briefly to Locke's work in the *Second Treatise*, looking at his understanding of limited government, property rights and equality. I will discuss Locke's understanding of a state of nature and the appeal to God which Locke employs to ground these concepts. I will argue that Locke's argument is in effect a stunted natural law argument and markedly different from the natural law of pre-modern thinkers such as Aristotle and Aquinas and as such it is quite distinct from the appeals to the law of nature which we have seen in the common law tradition. I shall then turn to Locke's *Letter Concerning Toleration*, laying out its argument in three distinct phases. I shall conclude that Locke follows the rationalist tendency in the early modern period to approach politics as a deductive science.

Locke: context and biographical overview

Locke's context was one of deep social and political tumult. Born amidst the throes of the English Civil War, Locke was raised in a nation charged with religious and political tensions. Only seventeen years of age when Charles I was executed by Parliamentarians, it seems likely that such political tumult would have left an indelible impression upon the young Locke, especially given that his father was a member of Cromwell's army. Locke completed his time at Westminster school and in 1652 proceeded to study at Christ Church, Oxford. Locke shied away from the opportunity to take

holy orders, choosing to study medicine instead.[174] Significantly Locke's earliest writings were of an absolutist tone. In political tracts he argued that there was no room for toleration towards those who dissent from the magistrate, even if they did so out of religious loyalties, this lack of toleration even extended to adiaphora.[175] In short, his early work displays an uncompromising doctrine of civil obedience. Richard Ashcraft notes that whether or not Locke accepted the content of Anglican Royalism 'it is safe to say that he was a *de facto* supporter of the dominant political and intellectual assumptions that structured the social consciousness of the inhabitants of Restoration England.'[176] As we shall see there is an evident shift between this younger Locke and the Locke who penned *A Letter Concerning Toleration* in the 1680's. In 1667, Locke went to London to live with Anthony Ashley Cooper, the man who would later become the Earl of Shaftesbury. Through his acquaintance with Shaftesbury Locke became embroiled in the colonial and political issues of his day; as Ashcraft puts it, 'Locke was a trusted political adviser to one of the shrewdest and most powerful politicians of seventeenth-century England.'[177] Throughout the 1670's, under the influence of Shaftesbury, Locke became increasingly critical of the establishment headed by Charles II. In 1675 a pamphlet entitled 'A Letter from a Person of Quality to His Friend in the Country' appeared, criticising the established ecclesial and political hierarchy and warning of its absolutist aspirations.[178] Whilst impossible to know for sure, it has always been suspected that Locke played a hand in the composition of the letter. At any rate it is notable that Locke left for France soon after the dissemination of the letter and did not return to England until 1678. In 1683, during a period in

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[174] Richard Ashcraft, *Locke's Two Treatises of Government* (Abingdon: Routledge, 2010) pp. 13-14.
[175] See Ingrid Crepell, *Toleration and Identity: Foundations in Early Modern Thought* (Abingdon: Routledge, 2003) p. 97.
[176] Ashcraft, *Locke's Two Treatises*, p. 18.
[177] Ibid., p. 21. It is worth noting the colonial context of Locke, which has been emphasised in an essay by David Armitage, who argues that Locke's involvement in the affairs of the Carolina colonies during the early 1670's was particularly significant in the formation of Locke's concept of property rights and political liberalism. See David Armitage, 'John Locke, Carolina and the Two Treatises of Government', *Political Theory*, Vol. 32, No. 5 (2004) pp. 602-627.
[178] See Ashcraft, *Locke's Two Treatises*, p. 67.

which Locke was embroiled in the issue of toleration, he again left England, temporarily residing in the Netherlands after being implicated in The Rye House Plot, a failed attempt to assassinate Charles II. In 1685 Charles II's illegitimate son Lord Monmouth invaded England in an unsuccessful attempt to depose his Catholic Uncle James II. It was only in 1688, after the Glorious Revolution which instated William of Orange and deposed the Catholic monarch James II that Locke was able to return to his native soil. It was in the aftermath of these great political and religious turbulences that Locke published his *Letter Concerning Toleration* (1689) and his *Two Treatises of Government* (1689).[179] Locke was addressing a society, and indeed a continent, which had endured a century of sectarian strife and was still in the throes of political turbulence.

Deductive thought in the seventeenth century

At the very heart of Burke's critique of contractarian liberalism is contractarianism's rejection of prudential reasoning in ethics and politics in favour of deductive reasoning. Before we turn to Locke's work it is important to look at the intellectual context in which the *Second Treatise* was written. From late 1619 Descartes conceived of elaborating a grand system of thought which extended to medicine, ethics and politics, operating by a method analogous to mathematical reasoning, his system was to be both *a priori* and drawn from axiomatic metaphysical first principles.[180] In England, Thomas Hobbes had embarked upon a similar project. Repeatedly in *Leviathan* [1651] we are told that it is possible to arrive at infallible ethical and political knowledge by means of the same geometrical reasoning which had proved so efficacious in Newtonian physics. In *De Cive* Hobbes informs us that if we can render 'the nature of human Actions as distinctly

[179] These were likely written between 1679-1680. See Peter Laslett, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988)

[180] See René Descartes, *The Method, Meditations, and Selections from the Principles,* trans. John Veitch, (Edinburgh, W. Blackwood & Sons, 6th Ed., 1879) p. 184. See also Louis I. Bredvold, 'The Invention of the Ethical Calculus' in Richard Foster Jones (ed.), *The Seventeenth Century* (Stanford, CA: Stanford University Press, 1951) pp. 165-66. Descartes contemporary Galileo articulates similar themes in *The Assayer* [1623].

knowne, as the nature of Quantity in Geometricall Figures… Mankinde should enjoy such an Immortall peace, that… there would hardly be left any pretence for war'.[181] As one commentator points out 'When ethics and politics are developed by a similar deductive method the whole system necessarily depends on the selection of first principles.'[182] As a materialist Hobbes made motion subject to mathematical laws the bedrock of his philosophy, he believed that as men were subject to these same laws all that was needed was a sufficient knowledge of mankind's appetites and passions and from this we could extrapolate (in a manner analogous to geometry), an ideal model for society.[183]

Hobbes was far from alone in his faith as to the power of deductive reasoning, given the correct first principles. Bredvold writes, 'Such abuses of deductive reasoning vitiate the whole mass of ethical and political speculation left us by the geometrical spirit of the eighteenth century'.[184] The belief that ethics was a distinct branch of scientific enquiry capable of deductive demonstration was advocated by Leibniz, Spinoza and indeed John Locke.

In Locke's *Essay Concerning Human Understanding* he tells us that morality is a 'mixed mode' which is to say that it consists in 'combinations of ideas as the mind puts together of its own choice' which may be 'perfectly and exactly defined'. The implication of morality being 'combinations of several ideas that the mind of man has arbitrarily put together' is that 'men may, if they please, exactly know the ideas that go to each composition, and so both use these words in a certain and undoubted signification'. In turn this allows us to 'perfectly declare, when there is occasion, what they stand for.' Locke argues that this enables us to make our moral discourse 'very clear and distinct. For since the precise signification of the names of mixed modes… they being not of

[181] Thomas Hobbes, *De Cive*, (London: J.C. for R. Royston, 1651) p. 150.
[182] Bredvold, op cit., p. 169.
[183] See Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1991)
[184] Bredvold, op cit, p. 178.

nature's, but man's making, it is a great negligence and perverseness to discourse of moral things with uncertainty and obscurity'. As a result, Locke reaches the conclusion that 'morality is capable of demonstration as well as mathematics' expressing the belief that there is a 'precise real essence' of moral language that can be 'be perfectly known'.[185] In Locke's political work we can see the belief that 'Definitions can make moral discourses clear' it is of great importance that 'in all their moral discourses' people ought 'to define their words when there is occasion: since thereby moral knowledge may be brought to so great clearness and certainty.' Though precise definitions moral words 'may be known certainly, and without leaving any room for any contest about it.' Locke tells us that there is no reason why morality shouldn't be more precise than natural science because moral words 'having no external beings for the archetypes which they are referred to and must correspond with. It is far easier for men to frame in their minds an idea, which shall be the standard to which they will give the name justice; with which pattern so made, all actions that agree shall pass under that denomination'.[186] Indeed, in the *Essay* Locke clearly sketches out the exact argument which he shall make in his *Second Treatise,* on the basis that moral propositions should be as clear as mathematics:

> The idea of a Supreme Being, infinite in power, goodness, and wisdom, whose workmanship we are, and on whom we depend; and the idea of ourselves as understanding rational beings, being such as are clear in us, would, I suppose, if duly considered and pursued, afford such foundations of our duty and rules of action as might place *morality amongst the sciences capable of demonstration*: wherein I doubt not, but from self-evident propositions, by necessary consequences, as incontestable as those in mathematics, the measures of right and wrong might be made out, to any one that will apply himself with the same indifferency and attention to the one as he does to the other of these sciences.[187]

[185] John Locke, *An Essay Concerning Human Understanding*, [1689], ed. Kenneth P. Winkler, (Cambridge: Hackett, 1996) p. 218.
[186] Ibid., p. 219.
[187] Ibid., p. 243.

In the *Essay* we can see the broader rationalist project in which Locke was engaged. From certainly known axioms Locke believed it possible to proceed to moral certainty in ethical and political questions.

We might pause to note the appeal of clear and demonstrable reason to early modern Europeans. It is no coincidence that, following an era in which in large parts of Europe had struggled to achieve civil concord between parties who dogmatically maintained opposing beliefs, pure reason became a wellspring of hope to war weary Europeans. As historians such as Brad Gregory have pointed out it is hard to avoid the conclusion that the chief source of discord between the peoples of early modern Europe lay in a genuine and sincere zeal for religious doctrine. In short the Wars of Religion has been fought by people who 'preferred a world in which truth did battle, come what may, to one swarming with ever proliferating heresies'. Gregory writes of early modern Europeans, 'By adamantly rejecting religious pluralism, they helped make religious pluralism a prerequisite for the stable ordering of society.'[188] Similarly Schneewind notes 'The enormous power that organized religion had over everyone in the seventeenth and eighteenth century Europe made it a matter of the deepest and most urgent importance to settle how much influence Christianity was to have, and how its content was to be determined.'

One important result of this quest for demonstrable moral reason was a shift in the presentation of the natural law. Instead of a law which actively directs creatures towards the natural ends ordained by their creator, impacting their reason, appetites, desires and consciences, natural law came to be construed simply as the capacity of human reason to identify axiomatic ideas in nature. We shall see that the natural law is understood in the *Second Treatise* as the capacity of human reason to identify anthropological facts in the state of nature, this helped to make its claims more palatable,

[188] Brad Gregory, *Salvation at Stake: Christian Martyrdom in Early Modern* Europe (Cambridge, MA: Harvard University Press, 1999) p. 352.

and ostensibly objective, to both sceptics and religious absolutists. Richard Tuck argues that the transition between scholastic and modern understandings of the natural law theories was rooted in a reaction against scepticism:

> Grotius and his successors were responding to a straightforward pre-Humean moral scepticism, which simply pointed to the multiplicity of beliefs and practices around the world, and concluded that there were no common moral beliefs and hence nothing stable upon which to build a universal ethics. Part of their response consisted equally simply in demonstrating that there were actually at least two universal moral beliefs (the right of self-preservation and the ban on wanton injury), and that this minimalist ethics could be used as a basis for a universal moral science. There was therefore a substantial element of descriptive ethical sociology in their works, since that was the battleground chosen by their opponents.[189]

Grotius and Pufendorf are important transitional figures in this debate. Richard Tuck observes that for Grotius the natural law was reduced to man's instinct for self-preservation, 'like Pufendorf later, he argued that we can determine what it is that God wills for mankind, not by consulting Scripture, or what seems intuitively obvious, but by considering what must be done if a man, made as God has made him, is to be preserved from his fellow men.'[190] Tuck concludes that in the period we see a 'continued attempt to integrate the laws of nature into a system based on the principle of self-preservation.'[191]

We shall see that Locke's *Second Treatise* also displays this tendency. In Locke's *Essay Concerning Human Understanding* we are explicitly told that the natural law is not composed of 'innate principles' written on the hearts of men. Rather, it is by reason operating upon empirically observed phenomena that men come to know the natural law. As Locke puts it, 'many men may, by

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[189] Richard Tuck, 'The "modern" theory of natural law', in *The Languages of Political Theory in Early Modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987) p. 112.
[190] Ibid.
[191] Ibid., p. 113.

the same way they come to the knowledge of other things, come to assent to several moral rules, and be convinced of their obligation.'[192] Locke is quite clear that we identify the content of the natural law through rational reflection upon ideas that we have acquired through experience.[193] In the same way that, by experience, we acquire the idea of a triangle and subsequently extrapolate geometrical truths using our reason, we can similarly acquire a conception of man and, using reason, arrive at a knowledge of axiomatic truths regarding man and government. Furthermore, the natural law ceases to be an innate law, Locke telling us that 'There is a great deal of difference between an innate law, and a law of nature; between something imprinted on our minds in their very original, and something that we, being ignorant of, may attain to the knowledge of, by the use and due application of our natural faculties.' Locke believed that both those that 'either affirm an innate law, or deny that there is a law knowable by the light of nature, i.e. without the help of positive revelation' were mistaken and 'forsake the truth'.[194] It is worth noting, as Laslett, points out, that Locke's contemporaries weren't convinced that his account of the law of nature was orthodox. In 1690, Tyrell and 'some thinking men at Oxford', were to find Locke's account of the law of nature troubling. In 1692 Tyrell sent Locke a book he had authored on the natural law with an accompanying note expressing his hope that the work gave 'the world a better account of the Law of Nature, and its obligation than what hath been already performed' in order to refute the doctrines of Hobbes. As Laslett writes 'Tyrell was not satisfied with what had been said on natural law in that work [*Two Treatises of Government*] or in the *Essay on Human Understanding*, and felt that Hobbes had still to be confounded'.[195]

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[192] Locke, *Essay*, p. 18.
[193] Ibid., p. 20.
[194] Ibid.
[195] Peter Laslett, *Two Treatises of Government*, ed. Peter Laslett, (Cambridge: Cambridge University Press, student Ed., 1988) pp. 79-90.

Whilst, as Laslett puts it 'The *Essay* has no room for natural law',[196] the claim that Locke's theory of natural law in the *Two Treatises* broke with traditional conceptions of the natural law is disputed. W. Von Leyden sees Locke wavering between intellectualist and voluntarist accounts of the natural law.[197] Tuck believes Locke's theory to be an extension of a Grotian account of the natural law,[198] while Colman and Laslett have both pointed out the inconsistency and ambiguity in Locke's different accounts of the natural law. [199] Ashcraft sees Locke's account as relatively unoriginal with John Dunn going so far as to say that there is 'an intimate dependence of an extremely high proportion of Locke's arguments for their very intelligibility, let alone plausibility, on a series of theological commitments'.[200] This thesis has been proposed compellingly by Jeremy Waldron in *God, Locke and Equality*. As well as arguing that Locke's political philosophy is based on a pre-political norm of equality which is rooted in the New Testament, Waldron also argues that, 'An awful lot of the *Second Treatise* just *is* a presentation of natural law... roughly demonstrative in form, on issues such as property, punishment and politics.' [201] By contrast Leo Strauss has argued that Locke's conception of the natural law had no ontological grounding beyond the mind observing empirical facts.[202]

In the *Second Treatise* we shall see that Locke's understanding of the natural law is not straightforward. While Waldron has quickly pointed out that it is a theological account, he has perhaps passed over too quickly the fact that it *is* 'demonstrative in form, on issues such as

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[196] Ibid., p. 81
[197] W. von Leyden, *Hobbes and Locke: The Politics of Freedom and Obligation* (London: Macmillan, 1981) pp. 134-136.
[198] Richard Tuck, *Natural Rights Theories,* pp. 172-173.
[199] John Colman, *John Locke's Moral Philosophy* (Edinburgh: Edinburgh University Press, 1983) pp. 30-31; Locke, *Two Treatises*, p. 82.
[200] John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge: Cambridge University Press, 1969) p. ix.
[201] Waldron, op cit., p.95.
[202] Strauss, *Natural Right and History*, p. 202.

property, punishment and politics.'[203] Locke does indeed, at points, offer relatively orthodox descriptions of the natural law as a God-ordained standard of right and wrong in the *Second Treatise*. Yet, as we shall see, this is not Aquinas' natural law which, in its primary precepts, 'can nowise be blotted out from men's hearts.'[204] Unlike Aquinas, who believed that 'The natural is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally',[205] Locke did not believe it was in our minds at all. Locke certainly did not believe it to be actively ordering all creation to its proper ends. Aquinas believed the natural law animated the whole of our human nature, when our nature was ordered as it was created to be ordered, namely in accordance with divine reason. In the *Summa* he writes, 'All the inclinations of any parts whatsoever of human nature, e.g. of the concupiscible and irascible parts, in so far as they are ruled by reason, belong to the natural law'.[206] By contrast, Locke presents the natural law as the capacity of reason to discover axiomatic ideas through the observation of nature. I hope to make the case that a detailed analysis of Locke's thought shows that he is a natural lawyer characteristic of the early modern period, which, as we have seen, makes aspects of his thought quite distinct from the natural lawyers of pre-modernity. I don't dismiss the claim that there are significant Thomistic influences, such as Hooker, who influence Locke's definition of what the natural law is, yet I will argue that features of traditional conceptions of the natural law are notably absent in Locke's thought. As a result, in the *Second Treatise,* Locke incorporates a particular conception of the natural law within a broader demonstrative project of political reasoning.

[203] Waldron, op cit., p.95.
[204] Aquinas, *Summa Theologica: Prima Secundae Partis*, Q. 94, A. 6.
[205] Ibid., Q. 90, A. 4.
[206] Ibid., Q. 94, A. 2.

Selecting axioms

While Descartes, Spinoza, Hobbes, Locke and Leibniz held quite disparate views in other regards, they all agreed upon the principle of a deductive mode of reasoning which could be applied to ethics and politics. What they were not agreed upon were the axioms from which such a demonstrative process of reasoning would proceed. As one commentator points out, 'With a different set of axioms… the geometrical method of deduction could be used equally effectively against Hobbism, as in Cumberland's De Legibus Naturae Disquisito'.[207] Cumberland's *De Legibus* is a good case in point as it exemplifies what we will see clearly in Locke, namely the appropriation of some traditional aspects of natural law, but subjected to a modern methodology. In *De Legibus Naturae Disquisito*, Cumberland tells us that politics and ethics are a science which ought to imitate Euclidean geometry. As a result, Cumberland's account of the natural law does not rely on distinctive theological claims, as much as a particular anthropological account of man. James Tyrell, influenced by Cumberland and Locke, outlined a very similar account of the natural law in *A Brief Disquisition of the Law of* Nature'. Like Locke, Tyrell did not believe moral knowledge to be innate, he distrusted the idea that the natural law could be identified by tradition or common consent and believed in the mathematical demonstrability of ethics, given certain axioms.[208] Perhaps the most extreme instance of this tendency is seen in Spinoza's *Ethics*, in which the scholastic conception of the natural law is completely undermined as he dispenses with any conception of God beyond nature and similarly dispenses with any normative teleological order within nature, leaving the empirically observable, physical laws of nature as God.

[207] Bredvold, op cit., p. 170.
[208] See See Mark Goldie, *The Reception of Locke's Politics*, Vol. 1 (London: Pickering & Chatto, 1999) pp. 128-158.

The most comprehensive analysis of this tendency is provided in Merio Scatolla's essay 'Before and After Natural Law: Models of Natural Law in Ancient and Modern Times'. Scattola locates the shift during the second half of the seventeenth century, with Pufendorf:

> Modern natural law was officially established as an academic teaching in Heidelberg in 1661, when a chair of *ius gentium* was for the first time offered to Samuel Pufendorf. This discipline, which soon spread over the German Empire and Europe, aimed consciously at a philosophical foundation of the law pointing out its rational principles and its structural conncection with a theory of political authority.[209]

Scattola provides a summary of the main changes which occurred during the early modern period. He begins by listing the defining features of the premodern natural law. Amongst other things he notes, the presumption of a universal order of justice, natural law as congruent with the eternal law, natural law as an innate idea engraved upon men's hearts and natural law as corresponding to the Ten Commandments. For our purposes it is most important to note that nearly all premodern understandings of the natural law conceived of a given moral order which was inscribed upon men's hearts, and, as Aquinas argued, impacted upon human conscience. Importantly these principles were not reducible to a rational idea from which a deductive system could be extrapolated. Aquinas is quite clear that the natural law tells us that 'the precepts of the natural law are to the practical reason, what the first principles of demonstrations are to the speculative reason', while ordinarily 'the process of reason is from the common to the proper… The speculative reason, however, is differently situated in this matter, from the practical reason.'[210] He proceeds to argue:

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[209] Merio Scattola, 'Before and After Natural Law: Models of Natural Law in Ancient and Modern Times', in Tim Hochstrasser and Paul Schröder, (eds.), *Early Modern Natural Law Theories: Context and Strategies in the Early Enlightenment* (Boston: Kluwer, 2003) p. 1. Alfred Cobban also provides an account of this topic in Alfred Cobban, *Edmund Burke and the Revolt against the Eighteenth Century: A Study of the Political and Social Thinking of Burke, Wordsworth, Coleridge and Southey* (London: Ruskin House, 1929) Ch.1.
[210] Aquinas, *Summa Theologica: Prima Secundae Partis*, Q. 94, A. 2.

> since the speculative reason is busied chiefly with the necessary things, which cannot be otherwise than they are, its proper conclusions, like the universal principles, contain the truth without fail. The practical reason, on the other hand, is busied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects.[211]

Such an admission clearly rules out the possibility of the type of deductive enquiry into ethics and the right ends of government which, Locke argued, could be conducted with the certainty of Euclidean geometry. Aquinas is explicit about the fact that the practical application of the precepts of the natural law must allow for their application in a world of contingent circumstances and indeed sinfulness:

> As to the proper conclusions of the speculative reason, the truth is the same for all, but is not equally known to all: thus it is true for all that the three angles of a triangle are together equal to two right angles, although it is not known to all. But as to the proper conclusions of the practical reason, neither is the truth or rectitude the same for all, nor, where it is the same, is it equally known by all…[212]

He proceeds to write that 'Consequently we must say that the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge.' Yet importantly he adds that 'as to certain matters of detail, which are conclusions, as it were, of those general principles' we must account for varied circumstances and critically we must account for the fact that our knowledge of the natural law may be 'perverted by passion, or evil habit, or an evil disposition of nature'.[213] As a result the premodern natural law differs from certain modern articulations insofar as:

> [A plurality of principles] cannot be understood as a deductive system in which all rules may be obtained by means of a geometrical reason from a first, absolute principle. This is a

[211] Ibid., Q. 94, A. 4.
[212] Ibid.
[213] Ibid.

> modern idea, which cannot be applied to the natural law of the sixteenth century. The fact that the rules form a whole does not imply a deduction, but only means that there is a rank among the principles, which are plural and cannot be inferred from other statements [214]

We might also note that Aquinas' account of the operation of reason in the human person seems to be somewhat more expansive than Locke's. For Aquinas it is coherent to speak of natural human inclinations being rational, insofar as they partake in divine reason, which orders human beings towards their created ends. When Locke speaks of reason in relation to the natural law, he does not, like Aquinas, argue that 'All the inclinations of any parts whatsoever of human nature… in so far as they are ruled by reason, belong to the natural law,'[215] nor does he follow Aquinas in believing that 'all acts of virtue are prescribed by the natural law' due to the fact that in every man there is 'a natural inclination to act according to reason: and this is to act according to virtue'.[216] Rather, for Locke, who believed that the inclination to virtue was acquired not innate, reason assumes a narrower role which is centred on the mind of the individual. He tells us that reason consists purely in 'the discovery of the certainty or probability of such propositions or truths, which the mind arrives at by deduction made from such ideas, as it has got by the use of its natural faculties; viz, by the use of sensation or reflection'.[217]

With this background it is understandable then that, as Scattola argues, in the modern tradition natural law becomes:

> an idea, a concept of the mind, which does not work immediately upon the human actions, but can operate only through the logical consequences that it produces. When Pufendorf assumes sociability to be the first truth of the natural law this does not imply that human beings are naturally social and that they are urged by a natural impluse to act as social

[214] Scattola, op cit., p. 5.
[215] Aquinas, *Summa Theologica: Prima Secundae Partis*, Q. 94, A. 2.
[216] Ibid., Q. 94, A. 3.
[217] Locke, *Essay Concerning Human Understanding*, p. 324.

> beings… they only recognize the *idea* that human beings are social, and from this principle they deduce all precepts necessary to order their lives. In the old tradition theft was directly prohibited by natural law and by the seventh commandment. Human beings recognized directly in their conscience in advance of any teaching or reasoning that stealing was a crime: they felt aversion to this action and were filled with remorse after having stolen something. This acknowledgement happened instantaneously or, as Thomas Aquinas said, nearly immediately without long reasoning.[218]

We might note that the early modern form of natural law does not in fact *require* the ontological existence of any metaphysical law at all, it simply requires a first principle from which a law can be rationally deduced. We have seen that Locke's view in the *Essay* is that the natural law does in fact exist, but it is by empirical observation and, subsequently, deductive reason that we come to know it. Locke's thought in the *Second Treatise* is also symptomatic of the shift which occurred during the early modern period, from a thick natural law which actively orders creation towards the moral ends ordained by its creator and a thin natural law which amounts to human reason rendering apparent the basic first principles of man from which the right structure of a society can be rationally deduced. As Ruth Grant points out Locke's *Second Treatise* 'is not a discussion of lessons in the art of government drawn from personal experience or from historical examples. Instead, it is a kind of demonstrative normative theory the possibility of which is argued in his Essay.' The argument delineates the 'extent of political rights and duties from the premise of all men's equal natural rights to preservation.'[219]

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[218] Ibid., p. 13. Note that, for Aquinas, some acts are not rendered transparently right or wrong by the natural law without reasoning, but rather, 'through the inquiry of reason, have been found by men to be conducive to well-living.' Aquinas indicates that on some questions we need to apply right reason to our natural inclinations in order to come to a full comprehension of the content of the law of nature. Yet, Aquinas still maintains the teleological ordering of creation, which orders human's reason, desires and appetities towards their created ends.

[219] Ruth Grant, *John Locke's Liberalism* (London: University of Chicago Press, 1987) p. 22.

The problem with this approach is put well in a sardonic passage by Bredvold, '[Locke] appealed, empiricist as he naturally was, to the experience of mankind, which is not a generally recognized source of mathematical certainty.'[220] We should note that such trends did not proceed without contemporary criticism, notably from common lawyers. Matthew Hale lamented the shift from the law of nature to a much more restricted account of law in the 17th Century:

> others... have made in effect self-preservation the only cardinal law of human nature & all these rules or consequences that they have observed to be conducible to that cardinal law or to be deducible from it, they consider to be so many ramifications of that Grand natural law.
>
> ... they have improvidently singled out this one as the only governing law of nature, which is no other but one of these excellent effects, that this excellent law produceth ... as if a man should conclude that, because architecture is a notable effect or product of geometry, therefore the building of houses should take up the whole compass design, end and use of that art.[221]

Such demonstrative scientific reasoning was far from novel. The methodology is derived from Aristotle's *Posterior Analytics* yet Early Moderns such as Hobbes and Locke were doing something novel in applying such a deductive methodology to politics. Let us then turn to the *Second Treatise* to see this form of demonstrative reasoning in action.

The *Second Treatise of Government* examined

In the first chapter of the *Second Treatise* Locke informs us of the essence of his project, 'I think it may not be amiss, to set down what I believe to be political power' for the expressed purpose of finding 'another rise of government, another original of political power and another way of

[220] Bredvold, op cit., p. 177.
[221] Matthew Hale quoted in Alan Cromartie, *Sir Matthew Hale, 1609-1676: Law, Religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995) p. 92.

designing and knowing the persons that have it, than what Sir Robert Filmer hath taught us'.[222] This overarching objective is also summarised neatly in the preface of Locke's *Second Treatise* as he states, 'The latter is an essay concerning the *true* original extent and end of civil government'.[223] With this objective in mind, Locke begins by telling us what he believes the right role of government consists in.

In chapter one of his *Second Treatise of Government* he lays out his definition of political power. Political power is taken:

> to be a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and all this only for the public good.[224]

From the outset we can see the centrality of property to Locke's political thought. We shall see that the idea that man is endowed with an inalienable right to property is axiomatic to Locke's definition of the right ends of government. It is however worth noting Locke's invocation of the public good, a fact that is sometimes forgotten by those who accuse Locke of a radical individualism.[225]

In chapter two of the *Second Treatise of Government* Locke tells us that 'To understand political power aright... we must consider what estate all men are naturally in'. This statement is significant insofar as Locke supposes that the nature of political power can be deduced from a precise definition of man in his natural state; we saw the necessity for such a precise definition laid out in his *Essay*. Locke tells us that in the state of nature humans are in 'a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the

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[222] John Locke, 'Second Treatise of Government', [1690], ed. C. B. Macpherson, (Indianapolis, IN: Hackett, 1980) p. 7.
[223] Ibid., p. 3.
[224] Ibid., p. 8.
[225] See Strauss, op cit.

bounds of the law of Nature, without asking leave, or depending upon the will of any other man'.[226] It is significant that Locke identifies a law of nature which gives bounds to the liberty of the state of nature. This begs the crucial question as to what Locke means by the law of nature and what it consists in. The answer is soon provided; Locke writes, 'The *state of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent,* no one ought to harm another in his life, health, liberty, or possessions'. In this way Locke asserts a natural equality in the state of nature as well as a natural right to life, health, liberty and possessions. For Locke, this conception of man is 'evident' from reason or the law of nature. Importantly, Locke argues that the reason it is self evident that no one ought to harm others in their life, health, liberty, or possessions is because all humans are 'the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order and about His business; they are His property.'[227]

For Locke then the law of nature is reason itself, and it allows us to identify certain fundamentally held rights which we can derive from a conception of man in the state of nature created by God. Locke deductively concludes from this conception of man that 'there cannot be supposed any such subordination among us that may authorise us to destroy one another'.[228] The claims which Locke is making are not insignificant ones and they shall act as the basic axioms from which his political project will proceed.

In Chapter V of the *Second Treatise* Locke's conception of man, from which his deductive political project will emerge, takes a significant step forward. Locke argues that by 'natural reason' we can know that men 'have a right to preservation, and consequently to meat and drink, and such other

[226] Locke, *Second Treatise*, p. 8.
[227] Ibid. p. 9.
[228] Ibid.

things as nature affords for their subsistence' he bulwarks this conception of man by arguing that it is also supported by revelation. We have already seen that men have natural rights because they are God's property but Locke goes further. In a move which is significant for the liberal tradition, the rights are asserted as subjectively held individual rights, 'every man has a property in his own person. This nobody has any right to but himself.' In short, aside from any theological claims, man *qua* man is endowed with certain inalienable rights. Furthermore, Locke's argues that 'The labour of his body and the work of his hands, we may say, are properly his.' From this belief comes Locke's infamous mixing principle, which states that 'Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.' The one caveat which Locke places upon this principle is that 'no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.'[229]

These anthropological claims are axiomatic as Locke attempts to discern 'the ends of government', Locke questions, 'If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom?'. His answer is that it is 'obvious' that 'though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe' as a result, man 'seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.' From this he draws the conclusion that 'The great and chief end, therefore, of

[229] Ibid., p. 19.

men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.'[230] Here we see that from a conception of man as a bearer of property (including his person) Locke arrives at a deductive and, what he hopes to be, a theologically uncontroversial account of the right ends of government. For Locke then, this is the great end of government which can be deduced from his axiomatic anthropology of man in the state of nature.

Throughout the course of the *Second Treatise* Locke proceeds deductively from his conception of man in the state of nature as well as using scriptural authority and some historical examples as rhetorical tools to bulwark his conclusions when necessary. One possible criticism of this deductive method is that in abstractly defining the rights of man in the state of nature, Locke blurs the distinction between an abstract normative discussion and a descriptive account of real humans in real political societies. For example, in chapter VIII Locke discusses 'the Beginning of Political Societies'. He writes 'Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another without his own consent'.[231] Locke may have meant the statement normatively, but as a descriptive statement it seems wildly optimistic if not plainly false. As David Hume commented in regards to such contractarian arguments, 'would these reasoners look abroad into the world, they would meet with nothing that, in the least, corresponds to their ideas, or can warrant so refined and philosophical a system'.[232] Yet these abstract beliefs concerning men in the state of nature are not incidental, but central, to Locke's entire project in the *Second Treatise*. In Chapter VIII we see that it is precisely because of Locke's account of man in the state of nature that he proceeds to write 'When any number of men have so consented to make one community or government, they are thereby

[230] Ibid., p. 66.
[231] Ibid., p. 52.
[232] David Hume, 'Of the Original Contract', [1752] in David Hume, *Essays, Moral, Political and Literary* (Basil: J. J. Tourniesen, New Ed., 1793)

presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.'[233] Even if this is being offered as an account of how we *ought* to view the basis of society, one might question whether there is a danger to an account which blurs the distinction between how societies *ought* to be constituted and how they are actually constituted.

Throughout the *Second Treatise* Locke is not entirely clear with the reader as to whether he is making a normative point as to how men *ought* to be regarded or as to whether he is offering a descriptive account of a historical time in which 'all the world was America'.[234] It would seem from his statement in Chapter II 'To those that say, there were never any men in the state of nature…I moreover affirm, that all men are naturally in that state, and remain so, till by their own consents they make themselves members of some politic society' that Locke actually believes that this account is a descriptively true account of the historical formation of human societies. Similarly, in chapter VIII of the *Second Treatise* Locke writes, 'to conclude, reason being plain on our side, that men are naturally free, and the examples of history shewing, that the governments of the world, that were begun in peace, had their beginning laid on that foundation, and were made by the consent of the people'. Locke is never precisely clear about whether he is referring to an exact point in history, or making a normative point about man's nature. In either case, we shall see that the very possibility of such ambiguity will be a source of concern for Locke's critics, who argue that he makes little attempt to differentiate between universal claims regarding how men *ought* to be regarded and how the world *is*.

The reason the lack of distinction between normative claims and descriptive claims was to be a source of real concern for Locke's critics was because they believed that the manner in which rights, liberties

[233] Locke, *Second Treatise,* p. 52.
[234] Ibid., p. 29. Indeed, Locke certainly appears to be offering a descriptive account in Chapter 5 of the *Second Treatise*.

and laws came about in particular societies really did matter. Eighteenth century critics such as Burke and Hume expressed the belief that to reform real existing societies so that they accord to the products of abstract thought experiments was a highly dangerous endeavour, especially if those thought experiments do not correspond to the real nature of human beings. In the *Essay* we are told why Locke is muddling the normative with the descriptive. In Book IV of the *Essay* Locke tells us:

> 'Where there is no property, there is no injustice', is a proposition as certain as any demonstration in Euclid: for the idea of property being a right to anything, and the idea to which the name injustice is given being the invasion or violation of that right; it is evident that these ideas being thus established, and these names annexed to them, I can as certainly know this proposition to be true as that a triangle has three angles equal to two right ones.[235]

Yet, the proposition that 'where there is no property, there is no injustice' would seem absurd, to most moral realists, when applied to the real world. The obvious objection is that Locke is simply constructing a system of ethics which offers certain ethical judgements because it operates according to abstract definitions and does not engage with the messy reality of human existence. This is not to say that some of Locke's deductions do not strike the reader as eminently reasonable. Indeed, Locke seems to preclude the possibility of slavery within an established society in chapter IV. However, Locke's account of slavery is a good illustration of his tendency to muddle normative and descriptive claims. Locke flatly denies that slavery by voluntary consent is possible on the basis that humans are endowed with a fundamental liberty which they cannot give up, even by their own choice. Slavery only exists when a victor triumphs over an individual in a state of war. In such arguments Locke seems to conform reality to his definitions as opposed to tailoring his language to an accurate description of reality. As we have seen, he believed that watertight definitions were the key to constructing an

[235] Locke, *Essay*, p. 243.

ideal political system and, as a result, one can see how a discrepancy arises between reality and Locke's definitions.

This deductive mode of reason continues in the subsequent chapters. In chapter XI Locke offers an account of how legislative power ought to operate given his conception of man. It is his belief in man's voluntary contract which leads him to deduce that 'to be commanded we do consent, when that society, whereof we be a part, hath at any time before consented, without revoking the same after by the like universal agreement. Laws therefore human, of what kind so ever, are available by consent.'[236] Similarly it is because man has consented to be in society to preserve his natural right to property that 'The legislative, or supreme, cannot assume to its self a power to rule by extemporary arbitrary decrees'.[237] In Chapter XIV the limits of the ruler's prerogative is formulated according to this same conception of man and in Chapter XV Locke precludes the legitimacy of paternal and despotical power on the same basis.

In Chapter XVI Locke addresses the question of violent conquest. It is because of his definition of man that he concludes 'governments can originally have no other rise than that before mentioned, nor polities be founded on any thing but the consent of the people'.[238] Again we see a blurring between the normative account of man and the origins of society provided in Locke's ethical definitions and the reality of human history. Locke is not oblivious to this fact, but he seems rather to discount any form of society as actually being a society that does not accord to his definitions:

> many have mistaken the force of arms for the consent of the people, and reckon conquest as one of the originals of government. But conquest is as far from setting up any government, as demolishing an house is from building a new one in the place. Indeed, it often makes way

[236] Ibid., p. 70.
[237] Ibid., p. 71.
[238] Ibid., p. 91.

> for a new frame of a commonwealth, by destroying the former; but, without the consent of the people, can never erect a new one.

For Locke this fact is rationally obvious to all men, he tells us 'That the aggressor, who… unjustly invades another man's right, can, by such an unjust war, never come to have a right over the conquered, will be easily agreed by all men'.[239] By the same token he is led to denounce the practice of usurpation in Chapter XVII, tyranny in Chapter XVIII and the circumstances under which a government can be dissolved in Chapter XIX. In short, his political project is decisively shaped by an axiomatic conception of man in the state of nature.

To summarise then, Locke's initial claim that in a state of nature men are free and equal, seems to function both normatively and descriptively. He then proceeds to construct a universally normative account of the right ends of government by means of a deductive methodology, in the belief that we should create a good society which reflects the fact that men are free and equal. Locke utilises the idea of a social contract, stating that 'all men are naturally in that state, and remain so, till by their own consents they make themselves members of some politic society',[240] in order to make these particular rights the necessary condition for society and, by implication, government.

We have seen that, to the extent that Locke does, at times, seem to regard the natural law as a God ordained standard of right and wrong, his basic conception of the natural law is orthodox. What is notably different in the text is the manner in which Locke employs the law of nature within his broader deductive project. The law of nature is not conceived of as having coercive power in itself but it is construed as the capacity to reason. The law of nature therefore enables individuals to apprehend the particular rights common to all human beings. It is by means of right reason that we proceed from a particular conception of mankind to a comprehension of the right ends of

[239] Ibid.
[240] Ibid., p. 14.

government. Once Locke has established that right reason will apprehend and respect particular rights of men, he subsequently draws a close correlation between natural law and the rights of men which the natural law illuminates. As one commentator notes, 'Government is both limited by natural law and by men's rights, and these two came to be almost identical for Locke'.[241] One instance of this tendency is found in Locke's statement that 'All men may be restrained from invading others rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind'.[242]

In interpreting natural law as the capacity of reason itself, Locke relies on a conception of God only briefly in the *Second Treatise* and even at this point he appeals to an idea of God the property bearer in order to establish natural property rights and the equality of men in the state of nature. Notably absent are substantive teleological claims regarding the divine purposes and ends to which man and society are created as well as a belief in an innate natural law which directs men towards their proper ends. As Ashcraft points out, the theology which Locke is appealing to in the *Second Treatise* is intentionally uncontroversial as 'most of Locke's discussion of natural law centres upon the evident rationality of its substantive prescriptions'.[243]

This divergence from a scholastic conception of the natural law has similarly been noted by Michael Zuckert, 'Locke mounts a major critique of Thomistic natural-law theory in his long unpublished *Questions Concerning the Law of Nature*'. This essay gives us an important insight into the divergence between his work and Thomistic natural law thought. In agreement with what we saw in the *Essay* Locke denies that natural inclinations give us an insight into the natural law. Zuckert argues that we no longer see the natural law of Aquinas which is the divine wisdom directing all

[241] W. von Leyden, 'Locke and Natural Law' in *Philosophy*, Vol. 31, No. 116 (1956) pp. 23-35. p. 26.
[242] Locke, *Second Treatise*, p. 9.
[243] Ashcraft, *Locke's Two Treatises*, p. 40. One example of this which Ashcraft gives, is the way in which Locke avoids any debate concerning intellectualist or voluntarist interpretations of the natural law.

acts and movements, he even goes so far as to say 'One might take the entirety of the Lockean philosophic project to be an attack on the Thomist philosophy'.[244] Strauss too notes this shift, arguing that Locke's use of rights language betrays a belief in a world which is not ordered to divine ends:

> Hooker's conception of natural right is the Thomistic conception… the moment we take trouble to confront Locke's teaching as a whole with Hooker's teaching as a whole, we become aware that, in spite of a certain agreement between Locke and Hooker, Locke's conception of natural right is fundamentally different from Hooker's. The notion of natural right had undergone a fundamental change between Hooker and Locke… The period between Hooker and Locke had witnessed the emergence of modern natural science, of nonteleological natural science, and therewith the destruction of the basis of natural right.[245]

It would be wrong to argue that Locke solely emphasises rights and is nothing but a radical individualist. To portray him as such does not pay sufficient attention to his thought. Locke repeatedly emphasises incumbent moral duties and he talks at length about the relationship between children and parents and the filial obligations with which men are endowed. Nevertheless, his project in the *Second Treatise* is predominantly a deductive project which seeks to derive the right ends of society and government from an analysis of the natural rights of man in the state of nature.

A Letter Concerning Toleration

Locke's *Letter Concerning Toleration* is a more polemical and a less analytical work than his *Second Treatise*, but nevertheless the conclusions of his *Second Treatise* clearly underpin the discussion. Before Locke's arguments for toleration were penned, he had already established that the

[244] Zuckert, op cit., p. 32.
[245] Strauss, *Natural Right and History*, p. 166.

legitimate end of government is constrained to preserving life and property and de fending the commonwealth. It is then, perhaps, unsurprising when in *A Letter Concerning Toleration* (1689) Locke states, 'the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth and of every particular man's goods and person'.[246] This is again a statement which would put Locke at odds with prior natural law thinkers. It should also be noted that whilst Locke is arguing for state toleration he is also extending a wider argument for the rationality of toleration in society more broadly, or as he puts it, for 'the mutual toleration of Christians in their different professions'.[247] The letter contains a multiplicity of arguments yet there are recurrent themes, one commentator notes that Locke 'repeats arguments, runs them together in different combinations, and reiterates his case through the use of various examples' and yet 'rarely does he describe the relative importance of his arguments or provide a clear assessment of the connections between them.'[248] Whilst there are different ways of dissecting the argument I shall present three different phases. The first thrust of Locke's argument casts doubt upon the intentions of those who favour persecution and asserts that establishing the just bounds between religion and the state is critical. The second phase sets about the task of establishing t hese just bounds, delineating the state's jurisdiction and the Church's jurisdiction. The final and longest phase of the argument attempts to address the practical outworking of Locke's theory, particularly in regard to ecclesial concerns.

In the first phase of his argument Locke states, 'It would, indeed, be very hard for one that appears careless about his own salvation to persuade me that he were extremely concerned for mine'.[249] Whilst there is a satirical edge to Locke's criticism, there is a more serious issue beneath this

[246] John Locke, *A Letter Concerning Toleration* (Huddersfield: J. Brook, 1796) p. 48.
[247] Ibid. p. 5.
[248] Micah Schwartzman, 'The Relevance of Locke's Religious Arguments for Toleration' *Political Theory*, Vol. 33, No. 5 (2005) pp. 678-705. p. 685.
[249] John Locke, *Toleration*, p. 6.

observation, namely how is it possible to decipher the genuine motives of persecutors? Locke's argument in this opening section climaxes in a key passage in which Locke writes:

> that some may not colour their spirit of persecution and unchristian cruelty with a pretence of care of the public weal and observation of the laws; and that others, under pretence of religion, may not seek impunity for their libertinism and licentiousness; in a word, that none may impose either upon himself or others, by the pretences of loyalty and obedience to the prince, or of tenderness and sincerity in the worship of God; I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.

It is important to note the reasons that Locke gives for establishing the 'just bounds' between the Church and the state. The primary reason lies in the fraudulent utilisation of civic or religious loyalties for one's own ends; this pertains equally to those who would seek to persecute 'with the pretence of care of the public weal' and those who would seek 'impunity for libertinism and licentiousness' on religious grounds.[250] Locke needs to find a secure solution which will guard against such persecution. Just as in the *Second Treatise* his understanding of natural rights in the state of nature will be axiomatic in determining the nature of the polity.

Having established that the 'just bounds' need to be delineated, Locke embarks upon this task. In this second phase of the argument he defines the commonwealth as 'a society of men constituted only for the procuring, preserving, and advancing their own civil interests', defining civil interests as 'life, liberty, health, and indolency of body; and the possession of outward things.'[251] The

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[250] In John Perry's book *The Pretenses of Loyalty*, he identifies this passage as one of central importance in understanding the difficulties with Locke's liberalism. I shall turn to Perry's analysis shortly. John Perry, *The Pretenses of Loyalty* (Oxford: Oxford University Press, 2011)

[251] Locke, *Toleration*, p. 10.

magistrate's role is then to rule over the 'impartial execution of equal laws, to secure unto all the people in general and to every one of his subjects in particular the just possession of these things'.[252] We might note how Locke has subtly concluded the right function of the magistrates in a manner which makes his conclusions seem completely uncontroversial. Locke is careful to couch his language in reasonable terms and furthermore, as Perry notes, 'he presents even his most contested theological claims as "common sense"[253] when in fact 'he was taking sides on disputed theological questions'.[254] Locke offers us several reasons why it must be the case that 'the care of souls is not committed to the civil magistrate'.[255] Firstly, he reasons that it is not the case that 'God has ever given any such authority to one man over another as to compel anyone to his religion'. Secondly, 'because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind'.[256] Thirdly, because 'the force of penalties were capable to convince and change men's minds, yet would not that help at all to the salvation of their souls' as the consent would be a pretence instead of a heartfelt conversion.[257] These arguments are crucial to the conclusions of the letter and if they are false then Locke's theory of toleration is significantly diminished. Waldron summarises the point of these three arguments well; he writes, 'the crux of the argument – the step which dominates it and on which everything else depends – is the claim that religious belief cannot be secured by the coercive means characteristic of state action.'[258] As Susan Mendus notes 'his insistence that religious belief cannot be coerced points to a distinction between genuine and sincere belief'.[259] Here Locke is attempting to guard against the pretences of

[252] Ibid. p. 11.
[253] Perry, op cit., p. 108.
[254] Ibid.
[255] Locke, *Toleration,* p. 11.
[256] Ibid., p.12.
[257] Ibid., p.13.
[258] Jeremy Waldron in John Horton and Susan Mendus, *John Locke: A Letter Concerning Toleration in Focus* (London: Routledge, 1991) p. 103.
[259] Susan Mendus in Ibid., p. 111.

loyalty; establishing the rationality of this claim is important to Locke since if persecution is indeed an irrational practice then it leaves no excuse for persecution conducted by those who would do so in a 'pretence of loyalty' to the commonwealth. Waldron rightly points out that if possible Locke wants to argue 'the wrong practice is also an irrational practice', so as to invalidate its practice independent of contingent circumstances.[260]

Locke proceeds in this second phase of argument, stating 'let us now consider what the Church is'. Locke's definition of the Church is 'a voluntary society of men, joining themselves together of their own accord in order to the public worshipping of God in such manner as they judge acceptable to Him'. The term 'voluntary' is important in this definition. Locke is clear that men must be able to follow their own convictions and therefore it is for individuals to best determine their own salvation and their own Church, he envisions that 'ecclesiastical liberty will be preserved on all sides, and no man will have a legislator imposed upon him but whom himself has chosen.' Locke attacks the notion that a Church cannot be a true Church unless it is institutional, noting 'how great have always been the divisions amongst even those who lay so much stress upon the Divine institution' arguing that appealing to Orthodoxy is absurd because 'every church is orthodox to itself'[261] and 'The decision of that question belongs only to the Supreme judge of all men'.[262] In emphasising this epistemological divide Locke defers judgement to God and in doing so establishes the just bounds between the Church and the state as it is only civic crimes which are epistemologically discernible and therefore the Church has no role in punishment. As voluntary societies churches are solely in charge of their own affairs, therefore 'no church is bound, by the duty of toleration, to retain any such person in her bosom as, after admonition, continues obstinately to offend against the laws of

[260] Waldron in Horton and Mendus, op cit., p. 104. See also Brad Gregory for the rationality of persecution. There is a serious question then as to whether state coercion is in fact an irrational practice, a question which was put to Locke by Proast.
[261] Locke, *Toleration,* p.21.
[262] Ibid., p. 22.

the society', however, 'the execution thereof' must 'carry with it no rough usage of word or action whereby the ejected person may any wise be damnified in body or estate. For all force (as has often been said) belongs only to the magistrate'.[263] In this way Locke neatly divides society into two separate spheres, in the belief that should each 'contain itself within its own bounds — the one attending to the worldly welfare of the commonwealth, the other to the salvation of souls — it is impossible that any discord should ever have happened between them'.[264]

Crucially, at this juncture we can see the importance of natural rights and specifically property rights as the dividing line defining the 'just bounds' of Church and state in Locke's argument. Locke is clear that a sin is not the concern of the state if it is not in violation of an individual's rights, he states, 'Covetousness, uncharitableness, idleness, and many other things are sins by the consent of men, which yet no man ever said were to be punished by the magistrate. The reason is because they are not prejudicial to other men's rights, nor do they break the public peace of societies'.[265] Within the first few pages of his letter, Locke has seemingly achieved a golden formula for civil peace. The Church and the state are concerned with distinct jurisdictions and there is an ostensibly clear rule, rooted in property rights, for differentiating between the jurisdictions.

Locke's jurisdictions jeopardised

Upon the basis of natural property rights and the equality of men, Locke defined the ends of government and insisted on the importance of civil toleration between religious groups. Yet, what Locke does not seem to take full account of is that in the messy realm of human subjectivity, separating civic loyalties and religious loyalties seems like a hopeless task. Equally, separating the business of Government from the business of religion seems like an impossible quest. John Perry's

[263] Ibid., p. 19.
[264] Ibid., p. 65.
[265] Ibid., p. 43.

The Pretences of Loyalty is concerned with precisely this issue in Locke's thought. Perry points out that Locke was attempting to address a central problem; that citizens 'usually take up their religion in gross, and assume to themselves the opinions of their party all at once in a bundle'.[266] Perry draws attention to the fact that 'Locke's intellectual quest was for a massive debundling'[267] in order to establish civic peace and toleration. As we have seen in his *Letter Concerning Toleration* it was for this reason that Locke deemed it necessary to establish the correct divisions of the Church and the state. Yet Locke's optimism seems ill founded when one reflects upon the simple fact that religious viewpoints clearly do at times have political implications. Few instances in history have illustrated this point more clearly than the Wars of Religion which followed the Reformation. If one ceases to believe in the doctrine of Papal Supremacy then this will have radical implications for the polity. As Perry points out, 'sometimes thing *do* come in bundles.'[268]

Locke consistently attempts to avoid the conclusion that in disputed cases the state may need to take its own theological character seriously as well as avoiding the conclusion that there may be an irresolvable tension between an individual's religious and civic loyalties. Locke has hit upon the fact that the state is not in fact a neutral arbitrator, but necessarily has its own ethical and indeed theological values and equally the citizen is at times confronted with a clash of civic and religious duties. If there are then issues in which the one jurisdiction encroaches upon the other then Locke's political jurisdictions break down and the possibility of conflict and persecution arises once more. It is in such matters that we can clearly see the issue with an approach to politics which proceeds from abstract propositions. Bredvold writes, 'Such propositions… are possible only in dealing with the relations between abstract ideas, and ethics can therefore become as certain as mathematics

[266] John Locke, *Political* Essays, ed. Mark Goldie (New York, NY: Cambridge University Press, 1997) p. 146.
[267] Perry, op cit., p. 128.
[268] Ibid., p. 129.

only on the conditions that it become as abstract as mathematics. The demonstrative science of morality thus turns out to be a coherent, but self contained, system spun out of definitions.'[269] It is this rupture between theory and practice which we shall shortly see was at the heart of Burke's conservative critique of the liberal tradition a century after Locke. Bredvold writes:

> As is well known, it was this basic method that Burke attacked so vigorously and insistently… The archetype of this method may be examined in Locke, whose name its promulgators so often coupled with that of Newton.[270]

Locke's theological roots?

Locke's framework seems perfectly coherent without Christian theological considerations once he has established the existence of natural rights.[271] Perhaps understandably, Locke's desire for toleration avoided constructing his political framework upon a rich theology with a substantial teleology, choosing instead a political framework centred upon property rights. In doing so Locke hoped to preserve a universal obligation for toleration and civic obedience, making them an obligation on all irrelevant of personal theological convictions. Locke would not have foreseen or, in all probability, desired the appropriation of his philosophy without any reference to the theological roots of his argument for equality and natural rights; yet nonetheless this is a move which we shall see in contemporary formulations of contractarian liberalism. Waldron and others have pointed out that the assertion of subjective rights is incoherent without the theological roots of those rights. Whilst these criticisms are valid, what such perspectives do not emphasise strongly enough is that Locke's own theological commitments in the *Second Treatise* did not extend beyond grounding

[269] Bredvold, op cit., p. 177.
[270] Ibid., p. 176.
[271] This is the central claim which Waldron would disagree with. See Jeremy Waldron, *God, Locke and Equality,* (Cambridge: Cambridge University Press, 2002)

these subjective rights in a distinctively early modern form of the natural law.[272] In short, it is not enough to simply state that modern liberals have stripped Locke of his theology; to some extent we should acknowledge that Locke denuded his own political thought of substantial theological commitments.

A summary

To summarise the argument so far: Locke conceived of man in the state of nature as God's workmanship. This provided him with a conception of man, from which he deduced a normative political framework. Yet when Locke's political framework made contact with the real world he himself found his divisions of public and private to be unstable.

An analysis of the inadequacy of Locke's political framework must begin with an analysis of Locke's methodology, namely constructing a political framework according to a process of deductive reason. As we have seen, Locke's concern was to secure an obligation of tolerance for all time by showing deductively the rights ends of government which follow from his first principles. In short, Locke is making universally normative claims concerning the specific form that a society *ought to* take. It is hard not to be sympathetic to Locke's motivations in adopting such a method. Locke's arguments for toleration did not seek to exorcise a rich theological picture because he despised the Christian religion; quite to the contrary Locke believed that Christians should not kill each other precisely because they were Christians. Yet to make political arguments on contested theological grounds was to risk being party to the same theological disputes which had torn Europe apart. Locke's solution was the deductive form of reasoning we find in the *Second Treatise*.

[272] We can perhaps detect a nascent detachment of the Early Modern natural law from God when Grotius writes of the natural law, 'What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him.' Hugo Grotius, *De jure belli ac pacis libri tres,* Prolegomena, II, trans. Francis W. Kelsey in J. B. Scott (ed.), *The Classics of International Law* (Oxford: Clarendon Press, 1925)

In her book *John Locke's Liberalism* Ruth Grant articulates the point well: 'Locke's is a demonstrative political theory. It is demonstrative in that it is meant to be read as a series of deductions from clearly stated initial premises. It is argued as if it were a geometric proof. It is political in that its purpose is to define legitimate political authority.'[273] She proceeds to argue that 'Politics involves both sorts of thought and knowledge; one where moral principles of conduct can be known with certainty, and the other where practical judgements of probabilities must suffice. We will find that the argument of the *Second Treatise* itself is a demonstration belonging to the first type. It is a reasoned proof of the extent of the rights and duties of men in political communities.'[274]

We have seen that in the *Second Treatise* Locke does begin with the natural law and indeed harmonizes the letter on toleration with appeals to Christian charity and other such Christian values, yet nonetheless his political framework operates in essence as a framework based on a conception of man as a bearer of natural rights. As we have seen, before Locke ever employs appeals to Christian charity he has already resolved the ends of government in the *Second Treatise* through deduction from his first premises. It is only by following the straight lines of his political geometry that Locke is able to say, 'it is impossible that any discord should ever have happened between' the Church and state. This is impossible for Locke, because it is literally impossible by his definition of society. In this thesis we will trace the legacy of this geometrical approach to politics.

<u>The impact of Locke's *Second Treatise*</u>

Mark Goldie's six volume work *The Reception of Locke's Politics* provides an extensive insight into the impact of Locke's political thought in Britain, France and America in the Eighteenth and Nineteenth Centuries. Goldie is clear that Locke's political thought was considered too radical by

[273] Grant, op cit., p.7.
[274] Ibid., p. 14.

mainstream Whigs and as a result his writings were to have little serious impact upon British government following the 1689 settlement. As Goldie points out by contrast to the flurry of tracts rebutting Hobbes' Leviathan, Locke's *Two Treatises* received relatively little attention until the second half of the eighteenth century.[275] Goldie writes:

> much of the early commentary on the *Two Treatises* suggests that it was not a book which rapidly became the unquestioned catechism of post-Revolutionary political piety. Even Whigs could find it disturbingly extreme: in 1690 William Atwood issued a caution against Locke's 'recourse to the confused multitude'. Locke's 'dissolution of government', the derivation of political power from 'the people', and the right of the people to constitute a new polity 'as they think good', did not consort well with the conservative and compromising settlement of 1689. Political power had remained firmly in the hands of the established elite. The Convention which met early in 1689 – in all appearances an ordinary parliament – filled the 'vacancy' in the throne, leaving institutions of monarchy and the 'ancient constitution' virtually untouched. The Convention avoided declaring James II to have been 'deposed', and the notion that the king had 'abdicated' was accepted by many. Many Whig pamphleteers went no further than to find historical precedents for the parliamentary adjustment of the royal succession. Often they were as ready as their Tory counterparts to argue that the Revolution was an intervention of divine providence or a legitimate conquest in a just war. Scholars have consequently concluded that Locke's *Two Treatises* was too radical to serve the ideological imperatives of so cautious a revolution.[276]

As we shall see, this 'cautious' view of the revolution as a fundamentally conservative act was precisely the view that Burke held, insisting, against the Lockean views of Richard Price , that this is how the revolution had always been regarded. Pamphlets of the time support the view that the revolution was primarily justified according to established laws and the ancient constitution as opposed to an abstract doctrine of right; William Atwood writing that he was 'assured by Learned Men in the Law, whom I have consulted' that 'King *William* and Queen *Mary* are RIGHTFUL *King* and

[275] Goldie, op cit., p. xxii.
[276] Ibid. p. xxiii.

Queen, according to the ancient Constitution'.[277] Even Locke's close friend James Tyrrell was aware of the potentially revolutionary interpretation of Locke, and therefore 'aimed to make Locke safe' in his *Bibliotheca Politica*.[278]

Leading Locke scholars such as John Dunn and Francis Pocock agree with Goldie's assessment.[279] Richard Ashcraft writes:

> the Whigs who came to power in the wake of the Glorious Revolution did *not* rush to embrace the ideas of Locke and Sidney, nor did they claim their writings as the canon of a "classical Whig" doctrine… most Whigs in the 1690s went to considerable lengths to disassociate themselves from the "dangerous" opinions contained in the *Two Treatises* and the *Discourses Concerning Government"*[280]

Being highly familiar with British constitutional history, Burke would likely have been aware of such Whig reactions to Locke. Especially given that, whilst the conclusions of Locke's *Treatises of Government* did not serve as a motor for revolution in Great Britain, the intellectual impact of his political thought was perhaps most significant in its effect upon the *philosophes* and revolutionary liberals of the eighteenth century. Stanlis makes the point that Locke's disciples in Burke's own era were the foremost supporters of the French Revolution and Burke vehemently opposed them:

> Like his mentor, Price a century later rejected the traditional legal and historical Whig arguments about inherited English liberties and the ancient constitution, and substituted for them his own speculative rational ideological concepts on an original contract, natural rights in the abstract, and the political sovereignty of the whole community.[281]

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[277] William Atwood [1690] in Goldie, op cit., p. 37.
[278] Goldie, op cit., p. 64.
[279] John Dunn, 'The Politics of Locke in England and America', in John Dunn (ed.) *Political Obligation in its Historical Context* (Cambridge, 1980); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975)
[280] Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton, NJ: Princeton University Press, 1986) p. 184.
[281] Peter J. Stanlis, *The Enlightenment and Revolution* (London: Transaction, 1991) p. 249.

Indeed, in the initial years after the publication of the *Second Treatise*, both the Country Party and English republicans proved to be a more significant influence upon British society than the work of John Locke. Goldie writes, '[Leviathan] addressed metaphysical, ethical, and ecclesiological topics that the *Two Treatises* avoided. Locke's thought in those spheres were distributed among his several works; it was not clear, perhaps even to their author, exactly how they might be integrated and early commentators did not immediately posit ways of doing so.'[282] What is certainly clear is that Locke has been subject to diverse usages. Perhaps his most significant legacy was to be a tradition of radical contractarian thought which took seriously the *Second Treatise's* methodological approach to politics, as well as Locke's ideas of natural rights, liberty and equality.

Conclusion

In this section we have seen how a tradition of deductive political thought emerged in the seventeenth century. We have seen that Locke was a proponent of such thought and that he clearly believed that politics and ethics were an exact science that had the potential to be as precise as Euclidean geometry. We have noted how this deductive political thought fundamentally altered the pre-modern conception of the natural law. We have seen that early modern thinkers such as Locke conceived of the law of nature as the capacity of reason to identify axiomatic truths in nature from which a political system could be rationally deduced. We have looked in detail at Locke's *Second Treatise* and his *Letter Concerning Toleration*, showing that both are deductive works which emerge from Locke's chosen anthropological axioms (a conception of man as free, equal and a bearer of property rights). Yet we have seen that because Locke's political work was composed of abstract definitions which aimed to be as perfect as Euclidean geometry, the whole system fell apart when it made contact with the real world. For example, we have looked at Locke's claim that it is

[282] Goldie, op cit., xxii.

impossible that any man should be a slave unless he has been conquered in a state of war. We saw that Locke made the case that any other sort of slavery is an impossibility according to his definitions, on the basis that men are naturally free, equal and bearers of natural rights. Yet in reality, this claim seems to be plainly false. Similarly we looked at Locke's claim that because the role of government is solely to preserve property it is impossible that government should ever have any concern with theological beliefs. In reality this claim does not seem to be true. Edmund Burke encountered this same deductive political thought in the arguments of Lockean radicals in his own day and he considered it to be deeply mistaken. In the second half of this chapter we will look at Burke's critique of such thought.

Edmund Burke and John Locke

In the last section we looked at Locke's political thought, his central claims and the methodology he adopted. In this section I wish to introduce the objections of Edmund Burke to such deductive political reasoning. During the course of the following chapters we shall look in detail at Burke's thought and historical context, but first it may be helpful to lay out Burke's central objections.

Burke's basic claims might be separated into five points, (1) abstract concepts such as human equality and the Rights of Man cannot serve as first principles in order to discover a universally normative structure of society, because (2) deductive reason is not applicable to political and ethical matters. (3) It is therefore a grave error to move from abstract beliefs to universally normative political structures. (4) Prudence ought to be the chief guide to political questions; (5) the operation of prudence is always circumstantial, therefore precluding the possibility of ever constructing a universally normative political framework.

Burke articulated these arguments over a century after the publication of Locke's *Second Treatise* in opposition to a prominent Lockean preacher who extolled the virtues of the French Revolution. We shall turn to Burke's own context in the next chapter, but, for now, we shall focus on the content of his arguments. As we observed in the last section, the seventeenth century saw a wellspring of prominent thinkers arguing for the construction of a grand system of knowledge deduced rationally from first principles. Burke contended very simply that a form of government cannot simply be formulated from *A Priori* deduction and certainly not on the basis of ostensibly held natural rights. Burke believed that the strength of a robust political system, such as that possessed by the British, is that it is ancient, evolving and apposite to its own specific context. He argued that those who wish to treat politics as a branch of a grand deductive project neglect the history and context of a nation which mould its political character by insisting on *the* form a polity *ought* to take. The

abstract formulation of a political system in accordance with first principles which such deductive reasoning necessarily entails was, Burke feared, indifferent to the particular tradition in which individual's rights are grounded.

As we have seen, Locke's *Second Treatise of Government* is the type of deductive project which Burke was targeting. Firstly, the work is unconcerned with the historical narrative which is particular to the English nation; there is no mention of the charter of liberties under Henry I, Magna Carta, Simon de Montfort's rebellion, the Petition of Right or the progressive assertion of common law over absolute sovereignty. Instead of England's rich and convoluted history we are offered a founding myth, a social contract arising from a state of nature. We have already noted the significance of Locke's *Essay* to his political thought. Underlying Locke's thought is an epistemology which prioritises the light of empirical reason and rational systems as opposed to the accumulated wealth of tradition. The link between Lockean epistemology and Lockean politics was one of which Burke would have been aware.

Locke's epistemology came under criticism from prominent figures who were well known to Burke.[283] The Third Earl of Shaftesbury, a student of Locke's, was one serious critic of Locke's thought, which he believed to be devoid of moral and aesthetic values. For Shaftesbury it was the moral conscience instilled by God and not an idea of other humans as rights bearers which formed the basis of moral agency. His work was almost certainly known to Burke, not least because of Shaftesbury's account of the sublime. Shaftesbury was to be an influence upon the leading lights of the Scottish Enlightenment such as Francis Hutcheson, whose account of the moral sense of individuals and repudiation of Locke's innate ideas was also known to Burke. Hutcheson's account

[283] Sean Patrick Donlan has written the most comprehensive account of the impact of the Scottish Enlightenment on Burke. See Sean Patrick Donlan, 'Law and Lawyers in Edmund Burke's Scottish Enlightenment', *Studies in Burke and His Time*, Vol. 20, No. 1, (2005) p. 38.

of the moral sense operated in a similar manner to prudence, adjudicating upon the moral course in particular circumstances; Hutcheson writing, 'The Author of nature has much better furnished us for a virtuous conduct than our moralists seem to imagine'.[284] Hume too was an important critic of Locke and his work was known to Burke.[285] Despite substantial differences in other respects, Hume's critique of Locke's social contract and natural rights discourse was very similar to Burke's. Both men possessed a formidable knowledge of British history, which influenced their opinions on abstract theories of government. As Ashcraft points out '[For Hume] Political theory is thus grounded wholly in experience, custom and prudential action, and not in universalist moral claims regarding right or laws of nature... In order to grasp the meaning of politics, what is needed is "not any abstract theory of right" but an appreciation of the habits, prejudices, and the peculiar circumstances of the people.'[286] Like Hume, Burke questioned 'What were the rights of man previous to his entering into a state of society? Whether they were paramount to, or inferior to social rights, he neither knew nor cared.'[287] It is also no coincidence that admirers of Burke such as Thomas Reid, were to offer serious criticisms of John Locke's account of human psychology. Whilst Burke was not a systematic philosopher and both the form in which he expresses his thought and the content of his language are more proximate to Cicero or the common lawyers than to the leading lights of the Scottish Enlightenment, it is nevertheless worth noting that Burke would have been aware of such contemporary critics of Locke's psychology and the social contract theories of the seventeenth century.[288]

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[284] Francis Hutcheson, *An Inquiry into the Original of our Ideas of Beauty and Virtue: in two treatises. I. Concerning Beauty, Order, Harmony, Design II. Concerning Moral Good and Evil* (London: 3rd Ed., 1729)
[285] They both worked on aesthetics and English history.
[286] Richard Ashcraft, *Locke's Two Treatises,* pp. 271-272.
[287] Burke, in *The Parliamentary Register*, [1792] Vol. 33, p. 28.
[288] With this said we ought not to make too much of this fact. Indeed, there is much in Hutcheson's work which seems to run counter to Burke's own thought. Hutcheson's ideas concerning the state of nature, his ethical rationalism and his Lockean influence directly conflict with much of Burke's own thought in the

For Burke, any society was inevitably a product of so many contingent circumstances that it made no sense to speak of ideal forms of government without any reference to culture, climate, customs, geography and the innumerable factors which constitute a nation's character. Burke was clear that different forms of government would be suited to different people. It was on these grounds that Burke rejected the enlightenment notion of an abstractly conceived polity which could bring an unending peace to enlightened men:

> I flatter myself that I love a manly, moral, regulated liberty as well as any gentleman… But I cannot stand forward, and give praise or blame to anything which relates to human actions and human concerns on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction. Circumstances (which with some gentleman pass for nothing) give in reality to every political principle its discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind.[289]

Burke rejected the elevation of abstract reason above all of the concrete considerations which colour any set of circumstances. He wrote, 'Nothing universal can be rationally affirmed on any moral, or any political subject. Pure metaphysical abstraction does not belong to these matters.'[290] In another passage Burke writes of those who practice such abstract construction that, 'The levellers... load the edifice of society by setting up in the air what the solidity of the structure requires to be on the ground.'[291] Interestingly, in the Parliamentary records of the 1780's and 90's we can see that Burke not only rejected the idea of abstract natural rights, but he coupled this with a staunch defence of the established Church. It is clear from his speeches that this was because he

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Reflections. For more on this point see Peter Stanlis, *Edmund Burke and the Natural Law* (Lafayette: Huntington House, 1986) p. 290.

[289] Edmund Burke, 'Reflections on the Revolution in France', pp. 35-36.

[290] Burke, 'Appeal from the New to the Old Whigs', p. 97.

[291] Burke, 'Reflections on the Revolution in France', p. 104.

predominantly associated rights discourse with dissenters, in particular Unitarians and Deists, who he believed wished to displace the established Christian religion.[292]

As a Christian himself, Burke was no ethical relativist in political affairs and he had no problem in adjudicating between better and worse forms of government. As we examine Burke's thought it becomes apparent that there is a crucial distinction between sound political principles which are applied in concrete circumstances and the practice of abstractly proposing what *all* systems of government *ought* to look like.[293] Instead of the abstract theorising of the revolutionaries, Burke favoured prudence in political questions, 'Political reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically or mathematically, true moral denominations.'[294] We shall return to the moral character of Burke's political thought in more detail, but for the time being we might bear in mind that Burke clearly believed there was an objective moral order to which all human beings and societies were accountable.

The methodology of reform: Burke's critique of rights discourse

In the latter half of the Eighteenth Century, shortly before the French Revolution, Britain too underwent a growing agitation for reform. The rapid economic growth and expansion of the population throughout the course of the century had effected a political reaction which was felt in all strata of society, but particularly the urban middle classes. In the great urban centres of Britain a variety of clubs, societies and publications emerged. With 12.5 million newspapers being produced per year in 1775 and an ever increasing number of periodicals and pamphlets, a new age of popular

[292] See, for instance, Edmund Burke in 'The Debate on the Repeal of the Test and Corporation Acts, March 2nd, 1790', *House of Commons* (London: John Stockdale, 1790)
[293] Burke makes this point clearly when he writes, 'without the guide and light of sound, well-understood principles, all reasonings in politics, as in everything else, would be only a confused jumble of particular facts and details, without the means of drawing out any sort of theoretical or practical conclusion'. See 'Speech on a Motion for Leave to Bring in a Bill to Repeal and Alter Certain Acts Respecting Religious Opinions' [1792] in *Works*, Vol. X, p. 41.
[294] Edmund Burke, 'Reflections on the Revolution in France', p. 126.

information and political consciousness had dawned.[295] Furthermore, the American colonist's victory at Saratoga in 1777 had dealt a devastating blow to the British and the subsequent formation of the United States had given flesh to the radical idea of a republic. By 1782 Britain was in serious debt, humiliated and at risk of invasion from France. Domestic tensions were rising, as was concern at the prospect of an Irish rebellion. Unsurprisingly there was an increasing desire for political reform in Britain. Relatively moderate groups such as Christopher Wyvill's Yorkshire Association petitioned for parliamentary and economic reform; in this desire they were supported by the Rockingham Whigs. More radical societies such as the Wilkite *Society for the Supporters of the Bill of Rights*, led by John Horne Tooke, sought more extensive political change, as did radical figures such as John Jebb, an admirer of Wilkes who was greatly indebted to Locke in his political ideas, proposing radical republican ideas of popular sovereignty.[296] James Burgh's *Political Disquisitions* is a good example of a radical work which explicitly articulates its debt to Locke.[297] It is no coincidence that figures such as Burgh met regularly with Price, Priestley, Franklin and other leading radicals in the 1760's. The theological commitments of such radicals were an important influence upon their political views.[298] Many of the more radical and Lockean voices were Unitarians, Deists and other such dissenters who associated reason with political reform and the toleration of religious dissent.[299] Hampsher-Monk has pointed out the great influence which Locke exercised on Deism in the century that followed him, also making the case that Burke was well aware of Anglican arguments against the Deists, employing these arguments for his own

[295] H. T. Dickinson, *British Radicalism & The French Revolution 1789-1815* (Oxford: Basil Blackwell, 1985) p. 2.
[296] See Anthony Page, *John Jebb and the Enlightenment Origins of British Radicalism* (London: Praeger, 2003) pp. 19-25.
[297] James Burgh, *Political Disquisitions* (London: E. and C. Dilly, 1775) p. vii.
[298] A good analysis of the importance of Dissenters to the American Revolutionary cause in Britain is provided in J. C. D. Clark, *The Language of Liberty* (Cambridge: Cambridge University Press, 1994)
[299] See Ibid., pp. 334-335.

purposes.[300] Similarly, Seamus Deane writes, 'the Dissenters developed their positions on these issues from a specifically English inheritance going back to Locke'. Deane rightly points out that, given that the French radicals were influenced by the same source, 'the coincidence between these two groups is not altogether surprising.'[301] Unsurprisingly the British Jacobinism which would emerge in the 1790's would predominantly find support among such groups, with organisations such as *The Revolution Society* pressing for a repeal of the Test and Corporation Acts on Lockean grounds.[302]

We have seen that the common lawyers coupled the natural law with the ancient constitution, the one informing the other. By contrast, radical natural rights proponents believed such rights had the authority to upturn ancient institutions. One historian notes that despite earlier thinkers appealing to ancient rights and privileges, 'some "friends of liberty" now began to elevate natural over historical rights'.[303] He notes, 'The emergence of 'ultra-Lockian radicalism' among Wilkites, supporters of the insurgent American colonists, and the County Association movement for parliamentary reform in 1779-80'; though he notes that such appeals 'did not wholly replace earlier appeals to law and history.'[304] The same historian writes, 'from the early 1760s the influence of Locke, or at least of natural-rights arguments building upon aspects of his thought, revived with a vengeance.'[305] Similarly the historian H. T. Dickinson writes, 'The leading radical theorists however tended to abandon an appeal to history and stressed instead the natural and inalienable rights of

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[300] Hampsher-Monk also makes the point that Locke was well aware of the Anglican arguments against the Deists. See Iain Hampsher-Monk, 'Burke and the Religious Sources of Skeptical Conservatism', in Iain Hampsher-Monk (ed.), *Edmund Burke* (Farnham: Ashgate, 2009)
[301] Seamus Deane, *The French Revolution and Enlightenment in England* (London: Harvard University Press, 1988) p. 159.
[302] The Society of Constitutional Information was a close affiliate of the Revolution Society and was revived in 1790. In the same year one of its members, Henry Flood, introduced a motion for parliamentary reform.
[303] Wilfred Prest, *Albion Ascendant: English History 1660-1815* (New York, NY: Oxford University Press, 1998) p. 280.
[304] Ibid.
[305] Ibid.

all men. They… built upon the earlier rational theories of John Locke and Richard Price who had asserted the natural rights of all men.'[306] As Burke himself put it, they argued on the 'claim of right, on the supposed rights of man as man', proceeding to complain that 'Nine tenths of the Reformers argue thus, that is on the natural right'.[307]

It should be remembered that between 1779-1780 Burke himself had been campaigning tirelessly for economic reform and between 1779-80 he had directly opposed his patron Rockingham, an owner of Irish land, in supporting the rights of Catholic Irishman against the oppression of the protestant (and Whiggish) Irish Volunteers, even putting his own career at risk by supporting the Irish Trade Bills.[308] Furthermore, Burke and the Rockingham Whigs were themselves in favour of reform, arguing that the problem lay in the excessive influence of Crown patronage, Burke having spelt out his plans for economic reform in 1780. Such facts should remind us that Burke cannot easily be characterised as a reactionary opposing any type of reform. Burke was deeply critical of claims to a general natural right because they abrogated the particular rights bequeathed by British tradition.

Following the fall of North in 1782, William Pitt the Younger made a motion in the Commons for an inquiry into the geographical distribution of parliamentary seats. This occasion prompted Burke's undelivered 'Speech on the Reform of the Representation of the Commons in Parliament' (1782). Burke's sentiments in this speech could hardly be summarised more concisely than by Benjamin Disraeli's quip 'To the liberalism they profess, I prefer the liberties we enjoy; to the Rights of Man, the *rights of Englishmen'.* In the *Speech* Burke spoke with scorn of 'political architects' who tried to rewrite the 'Constitution of England, which for a series of ages had been the proud distinction of

[306] Dickinson, op cit., p. 14.
[307] Burke 'Speech on the Reform of the Representation in the House of Commons', *Works* Vol. X, p. 95.
[308] See Burke's 'Speech on Economical Reform', *Works,* Vol. III.

this Country'. Burke contended that 'no essential alterations are at all wanting: and that neither *now,* nor at *any* time, is it prudent or safe to be meddling with the fundamental principles, and ancient tried usages of our Constitution'.[309] He wrote:

> A prescriptive Government, such as ours, never was the work of any Legislator, never was made upon any foregone theory. It seems to me a preposterous way of reasoning, and a perfect confusion of ideas, to take the theories, which learned and speculative men have made from that Government, and then supposing it made on those theories, which were made from it, to accuse the Government as not corresponding with them.[310]

To put Burke's conclusions plainly, he was arguing that it was the British constitution which had given his fellow countrymen the rights and liberties they enjoyed. To seek to undermine the self same constitution with an abstract assertion of 'liberty' was as incoherent as it was counterproductive. As Roger Scruton puts it:

> in defending this old view, Burke demonstrated that it was a far more effective guarantee of the liberties of the individual that the new idea, which was founded in the promise of those very liberties, only abstractly, universally, and therefore unreally defined. Real freedom, concrete freedom, the freedom that can actually be defined, claimed, and granted, was not the opposite of obedience but its other side. The abstract unreal freedom of the liberal intellect was really nothing more than childish disobedience, amplified into anarchy [311]

As we have seen Locke's *Second Treatise* exhibited this form of abstract political reasoning. Locke's project proceeded deductively from a conception of man already endowed with equality, freedom and natural rights in the state of nature. Burke was clear in the *Speech* that the axioms from which rights theorists were attempting to deduce a political system were only things which British citizens

[309] Burke, 'On the Reform of Representation in the House of Commons', *Works,* Vol. X, p. 93.
[310] Ibid., p. 99.
[311] Roger Scruton, 'Why I Became a Conservative' in Mark Dooley (ed.), *The Roger Scruton Reader* (London: Continuum, 2009) p. 11.

materially enjoyed because they had been cultivated and nurtured by stable institutions and the rule of law, not because they were descriptively true of man in the state of nature. Like Coke, he believed that paradoxically the artificial construct of society is man's natural habitat. Thirty four years before the *Reflections* he had satirised Bolingbroke's naturalistic rationalism in his *Vindication of Natural Society* by asserting that nature was man's ideal social habitat. Sean Patrick Donlan writes:

> The aristocratic Bolingbroke's defence of 'natural' society thus struck him as rich indeed. But Burke's targets were wider still. Rousseau's contemporaneous *Discourse on the origin of inequality* (1755) and John Locke are both within his line of fire. The *Vindication* was the first of many criticisms, however blunted in execution, of the 'state of nature' and contractualist logic.[312]

Burke was not alone in making such criticisms. David Hume and Jeremy Bentham launched scathing attacks upon the idea of the social contract. The abuse of speculative reasoning also found opposition from Anglican divines, in particular Joseph Butler's *Analogy of Religion*, which held a place on Burke's bookshelf.[313] Given the close association of Locke's name with a particular brand of contemporary radical thought, it is understandable that Burke hardly mentioned Locke, although as Peter Stanlis rightly points out:

> Burke's opponents who attacked him from the assumption of revolutionary "natural rights" were generally well aware that they were in the political tradition of Locke. In 1793 the Constitutional Society of Sheffield printed an abstract of Locke's *Treatise on Civil Government*, the preface of which stated: "Edmund Burke, the Knight Errant of Feudality,

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[312] Sean Patrick Donlan, 'Beneficence Acting by a Rule', p. 8.

[313] Reading Butler's *Analogy of Religion* one is struck by his rejection of Deism as well as his distinction between speculative and practical reason. Notably, Butler criticises *a priori*, geometrical ethical systems, on the basis that they cannot be translated from abstraction into reality. Burke's comment, concerning the natural rights proposed by the revolutionaries, that 'their abstract perfection is their practical defect', is precisely the critique offered in Butler's *Analogy*. Furthermore, Butler, like the Scottish enlightenment thinkers, is critical of Locke's understanding of personhood.

> declared in the House of Commons, that 'Locke's Treatise on Civil Government, was the worst book ever written.' We are certain it needs no farther recommendation."[314]

Whilst there is no direct record of Burke making this statement, it is at least significant that contemporary Lockeans clearly saw Burke as an opponent of Locke.

Burke's *Speech* shows that he was already formulating the sort of arguments which would later be deployed in the *Reflections*. Burke shows himself to be convinced that societies should not be pulled down and recast according to a prescriptive vision that had been rationally deduced. In the *Reflections* he would lament, 'Is every landmark of the country to be done away, in favour of a geometrical and arithmetical constitution?'.[315] Throughout the 1780's and 90's Burke consistently made the point that the British system of government had never been drawn up according to an abstract theory. In his view such a project would most likely subvert the rule of law, upturn stable institutions and ultimately lead to anarchy and then despotism. He wrote of the natural rights theorists that:

> they have wrought under-ground a mine that will blow up at one grand explosion all examples of antiquity, all precedents, charters, and acts of parliament. They have "the rights of men." Against these there can be no prescription; against these no argument is binding: these admit no temperament, and no compromise: any thing withheld from their full demand is so much of fraud and injustice.
>
> Against these rights of men let no government look for security in the length of its continuance… The objections of these speculatists, if its forms do not quadrate with their theories, are as valid against such an old and beneficent government as against the most violent tyranny [316]

[314] Stanlis, *Edmund Burke and the Natural Law*, p. 140.
[315] Burke, 'Reflections on the Revolution in France', p. 113.
[316] Ibid., pp. 119-120.

This issue then was as much about the methodology of reform as it was about the axioms to which the reformers hoped to conform the existing social order. As we have seen, and as Burke made quite clear in his *Vindication of Natural Society*, these substantive beliefs regarding humans and societies were intimately linked with a particular methodological approach to politics.

Burke expresses the view that those characteristics which define a nation, from distinctive customs to longstanding laws and ancient institutions, should not be discarded without great thought and caution. It is because these civil institutions have served the 'common purposes of society' that they have achieved such longevity.[317] To destroy them would be paramount to pulling out the struts which uphold the great edifice of society. In Burke's view each generation receives a great inheritance of wisdom from the past and it is their obligation to preserve that wisdom for posterity. This led Burke to the belief that as 'temporary possessors' of the commonwealth no one generation should 'act as if they were the entire masters' of society. His fear was that those who do so may well 'leave to those who come after them a ruin instead of an habitation'.[318] Like the common lawyers, Burke believed in a historically constituted identity that is transmitted from the past to the present, through customs, institutions and the self understanding of a people. There was little doubt in his mind that the fundamental doctrines of the radical reformers were false, and he believed that consequently the system of politics which they engineered would be false. He states, by 'changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.'[319]

[317] Burke, 'Reflections on the Revolution in France', p. 125.
[318] Ibid., p. 181.
[319] Ibid.

British rights and British liberties

Burke was no stranger to the study of British history. In 1757, while still a young man in London, Burke endeavoured to write a history of England from Caesar to Queen Anne, despite terminating the project at the year 1216 he boasted an impressive knowledge of British history. In the *Reflections* Burke traces the lineage of British liberty from the 'Magna Charta of King John' to 'another positive charter from Henry I' both of which were a mere reaffirmation of 'more ancient standing law of the kingdom'. Burke proceeds to offer an account of the Petition of Right under Charles I, carefully noting that 'the parliament says to the king, "Your subjects have inherited this freedom", claiming their franchises not on abstract principles "as the rights of men", but as the rights of Englishmen, and as a patrimony derived from their forefathers'. Burke traces this long lineage of liberty to the declaration of right under William and Mary, of whom he writes 'the two Houses utter not a syllable of "a right to frame a government for themselves". You will see that their whole care was to secure the religion, laws, and liberties that had been long possessed, and had been lately endangered'.[320] Burke's conclusion is an explicit affirmation of the concrete historical tradition which had given rise to British liberties, and a rejection of general notions of right outside of any tradition:

> You will observe that from Magna Charta to the Declaration of Right it has been the uniform policy of our constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity — as an estate specially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right. By this means our constitution preserves a unity in so great a diversity of its parts. We have an inheritable crown, an inheritable

[320] Ibid., p. 77.

> peerage, and a House of Commons and a people inheriting privileges, franchises, and liberties from a long line of ancestors.[321]

Burke's concern is clear, he sees that it is politically naive to assert right and presume that this will safeguard society from anarchy and an egregious disregard for human dignity. The British people owed their fealty to the concrete liberties bequeathed by their predecessors:

> We procure reverence to our civil institutions on the principle upon which nature teaches us to revere individual men: on account of their age and on account of those from whom they are descended. All your sophisters cannot produce anything better adapted to preserve a rational and manly freedom than the course that we have pursued, who have chosen our nature rather than our speculations, our breasts rather than our inventions, for the great conservatories and magazines of our rights and privileges.[322]

For Burke the incremental evolution of the social body ultimately gave rise to something of such complexity that no abstract doctrine could ever hope to give a full account of it. The analogy of society as a living organism is helpful insofar as, for Burke, history is not simply a forgotten past but like the evolved assets of organisms it is an active inheritance; the social sinews forged in response to the exigencies of the past, remain intimately present in the DNA of a society. The revolutionaries' abstractions by contrast were untested by the vicissitudes of time and turbulent circumstance. Burke believed that 'The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*.'[323] He argued that politics was a practical science which could not be taught over a short period of time, because it requires 'more experience than any person can gain in his whole life, however sagacious and observing he may be'.[324] It is, in part, this belief which grounds Burke's instinct to preserve. He tells

[321] Ibid., pp. 77-78.
[322] Ibid., p. 80.
[323] Ibid., p. 124.
[324] Ibid., pp. 124-125.

us that 'it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes.'[325] For Burke, the 'simple governments' created from abstract theory, are 'fundamentally defective to say no worse of them' and unable to answer the 'complex purposes' of actual societies.[326]

Burke's social contract

In the next section I will turn to Burke's own battle with the French Revolution and we shall see that if Locke was a major influence upon a tradition of eighteenth century British radicalism, he was no less influential upon the French *philosophes*. To conclude this section on Burke and Locke it is worth analysing Burke's criticism of the social contract. The French Revolution is perhaps the most famous historical instance of an attempt to recast an ancient society around contractarian doctrines of equality and inalienable rights. Burke's fulminations are charged with the conviction that a people cannot simply divest themselves of the tradition in which their society gestated. He perceived that forgetting the past, not least the Christian past would be to remove the cornerstones of British society and expect the rest of the edifice not to crumble. It is for this reason that he rages against Rousseau, Voltaire, Helvetius and their disciples, whom he believed to be creating abstract theories of government by employing a language of rights and equality without any reference to the long intellectual and cultural tradition which bequeathed the people with tangible civil rights and liberties.

While in France in 1789, the Lockean Thomas Jefferson wrote to James Madison, 'I set out on this ground what I suppose to be self evident, "*that the earth belongs in usufruct to the living*": that the

[325] Ibid., p. 125.
[326] Ibid., pp. 125-126.

dead have neither powers nor rights over it'.[327] Burke challenged the early modern notion of the social contract. C .B. Macpherson states that Burke took the idea 'of a social contract but he transformed it, now into something mysterious and transcendental, now into something historical and organic'.[328] While Macpherson is right to point out that Burke's presentation of the social contract seeks to engage with the contractarians on their own terms, it would be misleading to argue that Burke was innovating a radically new idea in portraying British society in such terms. Quite to the contrary, he was pushing back against the relatively new contractarian doctrines of the Early Moderns with the conception of the constitution articulated from the time of Fortescue onwards. Burke writes:

> Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, callico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primaeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place.[329]

[327] Thomas Jefferson, 'Letter to James Madison, Sep. 6, 1789' in Julian P. Boyd (ed.), *The Papers of Thomas Jefferson* (Princeton, NJ: Princeton University Press, 1950) Vol. 15, p. 392.
[328] Macpherson, 'Edmund Burke', p. 60.
[329] Burke, 'Reflections on the Revolution in France', pp. 183-185.

In this definition of society Burke questions the legitimacy of any social contract which seeks to sever the legacy of those who came before us. Yet even more notably he writes that society connects the visible and invisible world. It is precisely because society is greater than any one man or generation, indeed because it is accountable to Heaven itself, that we should not try and remake it in our own image. In this way Burke grounds the narrative of British history within a broader theological narrative. To use Burke's language, Britain's history is 'a clause in the great prime aval contract of eternal society'. From this conviction comes the belief that those who are alive should not break faith with those who have died. For Burke, if this contract which the dead and living are party to is to be taken seriously then the nation's self understanding and aims will inevitably draw deeply upon the nation's historical identity, but crucially that historical identity is intimately related to the contract of eternal society.

Conclusion

We have seen in this section that Burke encountered the same deductive thought espoused by Locke in the radical reformers of his own day. While the mainstream tradition of Whigs had largely dismissed Locke's radical political conclusions or, like Burke, were overt opponents of Locke an thought, there was a tradition of natural rights radicalism which explicitly identified with Locke. Burke did not accept the axioms which the Lockean radicals of his own day were seeking to found a society on, but more importantly, he did not accept the deductive methodology of the radicals. We have seen that Burke and others believed such a methodology would upturn the stable institutions and civil liberties which had been hard won by centuries of gradual change. In the next section we shall see that France had its own tradition of radical contractarian thought which also found its roots in Locke's *Second Treatise*. We shall see how, through the medium of the French *Philosophes*, this tradition of thought produced the *Declaration of the Rights of Man and of the Citizen.*

Chapter Three

The Revolutionaries and the *Declaration of the Rights of Man*

> *We ought not, on either side of the water, to suffer ourselves to be imposed upon by the counterfeit wares which some persons, by a double fraud, export to you in illicit bottoms as raw commodities of British growth, though wholly alien to our soil, in order afterwards to smuggle them back again into this country, manufactured after the newest Paris fashion of an improved liberty* – Edmund Burke, 'Reflections on the Revolution in France' [330]

The French Revolution

In 1789 France was in the throes of financial crisis, primarily because of the ruinous Seven Years War with Britain and their involvement in the American Revolutionary War. Louis XVI and the Bourbon Monarchy were unpopular and by the spring of 1789 the rumblings of public discontent were becoming steadily louder. A series of peasant rebellions in the countryside, fuelled by a grain shortage in the spring of 1788 culminated in 'the great fear' of the peasantry. Yet these rebellions were largely ignored in Britain and it was not until July 1789 that Britain's gaze became firmly fixed on the events taking place in France. In May 1789 Louis XVI had tried to summon the first Estates General since 1614 but was fatally undermined when on the 10th of June the Third Estate broke away declaring itself the National Assembly of the People and inviting the other two estates to join them. July 1789 was a turning point that saw an intensification of violence in Paris, which culminated in the storming of the Bastille on the 14th July. Throughout the rest of the month the

[330] Burke, 'Reflections on the Revolution in France', pp. 65-66.

fever of rebellion spread throughout the country, the cry of popular sovereignty uniting peasants into militias. On the 26th August the newly formed National Constituent Assembly published their 'Declaration of the Rights of Man and of the Citizen'. A series of radical social reforms soon followed. On November 2nd 1789 it was declared that the Church's property was at the disposal of the nation and non-compliant clergy were either exiled or executed.

In the midst of this social fomentation the French *philosophes* provided an intellectual discourse which served as a motor of revolution. Eric Hobsbawn writes, 'a striking consensus of general ideas among a fairly coherent social group gave the revolutionary movement effective unity',[331] 'its ideas were those of classical liberalism... To this extent "the philosophers" can be justly made responsible for the Revolution.'[332] Another commentator writes, 'That the French Revolution was caused by 'philosophy' was affirmed by Lichtenberg and by many other German, Italian, Dutch and French commentators in 1789 and during the 1790's. The new revolutionary consciousness generated a powerful revulsion against 'aristocracy', traditional ideas, and ecclesiastical authority'.[333] Burke himself was clear on the matter, to understand the revolution it was necessary to understand the ideological commitments of the *philosophes*. Writing of his *Reflections* in 1791 Burke stated, 'I thought that the scheme of their building would be better comprehended in the design of their architects than in the execution of the masons.'[334] As Stanlis puts it, 'All of Burke's opponents 'accepted Locke's optimistic state of nature, his common-sense simplicity, his theory of a revocable contract, of the sovereignty of will over reason and his mechanistic psychology of human nature... Locke was the chief source for the "natural rights" theories of Burke's pamphleteer opponents.'[335]

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[331] Eric Hobsbawn, *The Age of Revolution: 1789-1848* (London: Abacus, 1962) p. 79.
[332] Ibid.
[333] Israel, *Radical Enlightenment*, p. 938.
[334] Burke, 'Letter to a Member of the National Assembly', *Works,* Vol. VI. p. 4.
[335] Stanlis, *Edmund Burke and the Natural Law*, p. 137.

As we shall see Burke was deeply critical of the *philosophes*, in particular Voltaire, Helvetius and Rousseau. Above all he criticised the elements of their thought which they had inherited from Locke, namely the social contract, the rights of man and the relegation of articles of faith to the interiorities of the soul.[336] Voltaire was a self-confessed apostle of Lockean political thought and Baconian empiricism. Rousseau's philosophy was distinctive in its Romanticism, but he was also deeply influenced by English contractarian thought and, in particular, Locke's understanding of the social contract. Rousseau's influence upon Robespierre in particular was to prove profoundly important as the revolution progressed. It is also worth noting the American Revolution and the Lockean rights discourse, employed particularly by Jefferson (who was no admirer of Burke)[337] and Franklin, which was to have a strong influence on Lafayette who had himself partaken in the American Revolution. The projects which occupied the leading *philosophes* in the decades preceding the revolution afford us a glimpse into the spirit of the age.

Bearing in mind the Enlightenment project, initiated by Descartes and pursued by Locke, to create a comprehensive system of knowledge in which ideal forms of government could be known as precisely as geometrical figures, it is worth drawing attention to the *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers*. Edited by Diderot, among the chief contributors were Rousseau, Montesquieu, Baron d'Holbach and Voltaire. The work can be seen as the consummation of the Cartesian project to unify all knowledge into a grand system of thought which is rooted in simple principles. In the preliminary discourse d'Alembert tells us, 'As an *Encyclopedia,* it is to set forth as well as possible the order and connection of the parts of human knowledge,' proceeding to

[336] See Burke, 'Letter to a Member of the National Assembly', *Works,* Vol. VI.

[337] In a letter of 1791 Jefferson wrote, 'The Revolution of France does not astonish me so much as the revolution of Mr. Burke. I wish I could believe the latter proceeded from as pure motives as the former … How mortifying that this evidence of the rottenness of his mind must oblige us now to ascribe to wicked motives those actions of his life which wore the mark of virtue and patriotism.' Thomas Jefferson, 'Letter to Benjamin Vaughan, May 11th, 1791', *The Papers of Thomas Jefferson*, Vol. 20, p. 391.

note the difficulty of the task upon which the authors of the Encyclopedie were resolved, 'if it is often difficult to reduce each particular science or art to a small number of rules or general notions, it is no less difficult to encompass the infinitely varied branches of human knowledge in a truly unified system'.[338] Following his seventeenth century predecessors, d'Alembert is quite explicit in reducing the natural law to an anthropological axiom from which all other laws derive, the natural law for D'Holbach consists in the right of men to preserve themselves from death in a state of nature. Accordingly men learn all other vices and virtues through social experience alone; n either revelation nor an active natural moral law are present.[339]

Similarly D'Holbach's *Système Social, Politique Naturelle* and *Morale Universelle* all published in the 1770's are a telling insight into the belief of the *philosophes* in the omnipotency of reason. In the preface to *Moralle Universelle*, D'Holbach writes:

> Morality is a science whose principles are capable of a demonstration as clear and rigorous as those of calculus and geometry. The elements of this so necessary science can be put within the reach of the simplest of men, and even children. In order to make this truth felt we here give the principles of natural morality in a fashion that renders them capable of being taught to all. They shall serve to make known whether, as some men claim, virtue is naught but a chimera, or if morality is founded on man's nature and his real interests, whatever his opinions or his prejudices.[340]

From this premise D'Holbach proceeds to articulate a vision of society as dispensable and ancillary to the rights of the individual:

> Q. But what if society, itself oppressed, does not procure for its members any of the advantages they have the right to expect?

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[338] Jean Le Rond D'Alembert, *Preliminary Discourse*, Vol. I, trans. Richard N. Schwab and Walter E. Rex, (Indianapolis, IN: Bobbs-Merrill, 1963) p. 5.
[339] Ibid. p. 12.
[340] Baron D'Holbach, *Elements de la Morale Universelle, ou Catechism Universelle*, trans. Mitch Abador, found at https://www.marxists.org/reference/archive/holbach/1765/catechism.htm (accessed, February 12th, 2014)

A. Since the goal of any political society is a greater sum of strength, of happiness, and pleasure for all of those who compose it, we can separate ourselves from that society where we find ourselves more unhappy than if we lived alone or in another society.

Q. Can society not deprive its members of their legitimate rights?

A. No. It is only useful when it preserves them; it can only take from them the power to harm their associates, a power that is never a right, but a real injustice. *Example*: All men are free, but society has the right to take from them their liberty, which ceases to be one of their rights when they make use of it to harm their associates.

Q. What is liberty?

A. It is the right that every man in society has to do – for his own happiness – all that does not harm that of his associates.[341]

From the 1760's onwards the *philosophes* were clear that they hoped to reform France in accordance with principles of liberty, equality and above all the Rights of Man. Yet disputes between them were frequent and there was remarkable disagreement as to what form of government followed from the Rights of Man.[342] Voltaire for example sought extensive reform of the state as opposed to the complete subversion of artificial institutions espoused by Rousseau. Paine on the other hand sought a radical refashioning of the existing social order. In this sense the French revolution was of a fundamentally different character to the American Revolution, which was, in its origin, more concerned with rejecting tyrannical impositions upon the civil liberties of free born British citizens, than in deducing new forms of government. The French statesman Turgot had written a letter to Dr. Price criticising the Americans for retaining an essentially British form of government. In a response, John Adams defended the fact that the Americans had retained English

[341] Ibid.
[342] On this point see John Lough, *The Philosophes and Post-Revolutionary France* (Oxford: Clarendon Press, 1982) Ch. 1.

customs, laws and, above all, an English form of government, precisely because it worked and was not in need of alteration.[343] Adams ridicules Turgot's abstract talk of gathering all authority to the nation, writing that 'A simple and perfect democracy never yet existed among men'.[344] The *philosophes* by contrast believed that the state needed to be reordered so as to accord with the universal dictate of reason.

While the *philosophes* advocated reconstituting the state in accordance with the principles of reason by no means did this necessarily entail revolution. At least during the early stage of the revolution moderate revolutionaries such as Lafayette believed themselves to be reforming the state in accordance with principles of liberty and not completely subverting it. Yet the manner of reformation was to be in accordance with a vision of the state deduced *A Priori* from the *nouveau philosophie*:

> Contrary to what is sometimes claimed, France's existing culture of law and legal thinking had no input whatever. It is quite wrong to suggest that there was any trace of legal discourse or experience in the debates which were exclusively *philosophique* in character and in the decisive closing stages led by Mirabeau and Sieyès [345]

The perennial focus of the revolutionaries upon creating a society founded upon reason and the Rights of Men made them highly cognizant of the idea that reason was undermining the old dogmas of a Christian society. Rousseau's *Social Contract* is quite clear on this point. He tells us that, 'Jesus came to establish on earth a spiritual kingdom, which, separating the religious from the political system, destroyed the unity of the state, and caused the intestine divisions which have

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[343] See John Adams letters 'In Defence of the US Constitution' for his criticisms of the vagueness of the plans of reformers such as Turgot. See John Adams, *A defence of the United States of America, against the attacks of m. Turgot in his letter to Dr. Price, dated the twenty-second day of March, 1778*, Vol. I, (London: J. Stockdale, 1794)

[344] Ibid., p. 7.

[345] Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (Oxford: Oxford University Press, 2001) p. 905.

never ceased to agitate Christian nations'.[346] Proceeding to argue, 'I am mistaken in speaking of a Christian republic; each of these two words excludes the other. Christianity preaches only servitude and dependence. Its spirit is too favourable to tyranny for the latter not to profit by it always. True Christians are made to be slaves; they know it and are hardly aroused by it. This short life has too little value in their eyes.'[347] In Rousseau's mind true religion is 'without temples, without altars, without rites, [and is] limited to the purely internal worship of the supreme God'.[348] As Israel puts it:

> Instead of drawing on Christianity, [Rousseau] thinks 'la volonte generale est le droit naturel' and that from society's 'volonte generale' all ideas of justice and morality derive. The *Encyclopédie's* underlying message, Chaumeix correctly grasped, is coherent, prevalent throughout the *Encyclopédie*, and mostly presented 'a couvert', hence was a forbidden, clandestine philosophy, and its essence is that reason is man's exclusive guide in this world, and this life the only life there is, so that all the religious mysteries 'ne sont que des ténèbres'.[349]

In the light of such writings it is easier to understand why Burke felt he needed to offer such an outspoken defence of Christendom. For Burke such deductive reasoning in politics was closely associated with atheism. He believed that the *philosophes* clearly desired the:

> utter abolition, under any of its forms, of the Christian Religion, whenever the minds of men are prepared for this last stroke against it, by the accomplishment of the plan for bringing its ministers into universal contempt. They who will not believe, that the philosophical fanaticks, who guide in these matters, have long entertained such a design, are utterly ignorant of their character and proceedings. These enthusiasts do not scruple to avow their opinion, that a state can subsist without any religion better than with one; and

[346] Jean-Jacques Rousseau, *The Social Contract* [1762], ed. Tom Griffith, (London: Wordsworth Ed., 1998) p. 131.
[347] Ibid., p. 136.
[348] Ibid., p. 133
[349] Israel, op cit., p. 76.

> that they are able to supply the place of any good which may be in it, by a project of their own – namely, by a sort of education they have imagined, founded in a knowledge of the physical wants of men; progressively carried to an enlightened self-interest, which, when well understood, they tell us, will identify with an interest more enlarged and publick.[350]

Burke's fear that the enthronement of reason would in time produce an uncompromising attitude towards the imposition of faith into any matters of public policy proved to be well founded:

> Nothing could be clearer than that an uncompromising ideology of equality, anti-aristocracy, democracy, and freedom of expression had become entrenched at the outset in the Assembly and Paris press, and dominated subsequently until late 1792… A good government, held the radical *philosophes*, is one where legislation and the law-makers eschew all theological criteria (no matter how many people consider them sacred) [351]

Given the extent of Locke's influence upon the *philosophes* it is perhaps unsurprising that the *Second Treatise* clearly adumbrates the *Declaration of the Rights of Man and of Citizen*. I will take the *Declaration of the Rights of Man* to be the most comprehensive articulation of the philosophical undercurrents which aroused Burke's concern during the early stages of the French revolution. Stanlis writes, 'the culmination of Lockian or Rousseauist "natural rights" was the Declaration of the Rights of Man... In attacking this declaration Burke consistently opposed the state of nature with the norms of civil society'.[352] In the *Declaration* the revolutionaries were attempting to bring about a model of society which owed much to Locke's political thought, as well as that of the *philosophes* upon whom his conception of man and society had had a great influence.[353]

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[350] Burke, *Reflections on the Revolution in France*, p. 270.
[351] Israel, *Radical Enlightenment*, p. 918.
[352] Stanlis, *Edmund Burke and the Natural Law,* p. 130.
[353] In the second half of the twentieth century, historians of the French Revolution moved away from socio-cultural Marxist interpretations emphasising the importance of the philosophical background to revolution.

The French revolutionaries and the *Declaration of the Rights of Men*

On the 26th August 1789 at Versailles the deputies presented the *Declaration of the Rights of Men and of Citizens,* a document which served as the preamble to the constitution of 1791 and which stated the universal rights of men and the political implications of these rights. It should of course be noted that the French Revolution was a multi-faceted and complex event. Amongst the 'revolutionaries' there were a variety of factions with differing aims, ranging from reform to complete revolution. The National Party of which Lafayette and Mirabeau were members, was on the more radical end of the reforming spectrum although they were exceeded in their radicalism by some of the more extreme Jacobins such as Robespierre and the Abbé Sieyès. What is important for our analysis is that the chief revolutionary figures who composed the *Declaration* believed themselves to be upturning an old an unjust order and replacing it with a society founded on reason. They believed this reason to be grounded in the empirically established first principles of equality and natural rights. Jonathan Israel writes:

> By 1788 emerging Third Estate leaders already proclaimed equality the overriding moral and legal principle in legitimately determining relations among men. To them, the crown was irrelevant, the clergy's authority usurped, and nobility illicit. Their plans were molded not by social class or experience, nor profession or economic interest, but a comprehensive, interlocking system of principles rooted in la philosophie, which, according to Mirabeau, Sieyès, Volney, Condorcet, and Brissot, was solidly anchored in empiricism and science.[354]

The revolutionaries believed their project to be something far more significant than just the reformation of France. By 1791 the Girondist Jacques-Pierre Brissot had formulated a military plan to bring the enlightened liberties of the revolution to the rest of Europe. This ideal was a vision

[354] Jonathan Israel, *Revolutionary Ideas: An Intellectual History of the French Revolution from The Rights of Man to Robespierre* (Princeton, NJ: Princeton University Press, 2014) p. 26.

shared by British radicals across the channel. Richard Price and the Revolution Society, writing to the National Assembly in Paris, stated that they hoped others would 'assert the *unalienable* rights of mankind, and thereby to introduce a general reformation in the governments of Europe' and 'make the world free and happy'.[355] Repeatedly we see the revolution conceived in transnational terms as a struggle for the liberty of mankind, Lafayette famously wrote, 'Humanity has won its battle, liberty now has a country'.[356] The Enlightenment faith in the reason of mankind is well summarised in Jefferson's optimistic statement, 'I have so much confidence on the good sense of man, and his qualifications for self-government, that I am never afraid of the issue where reason is left free to exert her force; and I will agree to be stoned as a false prophet if all does not end well in this country. Nor will it end with this country. Hers is but the first chapter of the history of European liberty.'[357]

The *Declaration* itself was penned initially by Lafayette with influence from Mirabeau and Jefferson. A biographer of Lafayette writes, 'Lafayette's draft of a declaration of rights in January revealed him as a child of the eighteenth-century Enlightenment. He might easily have picked up the ideas expressed in it from a knowledge of English history or of Montesquieu and Rousseau'. Lafayette himself clearly conceived of the Enlightenment as instating a new order based on reason, 'The era of the American Revolution, which may be regarded as the beginning of a new social order for the whole world, is properly speaking the era of the declaration of rights'.[358] Similarly, in an early draft of the *Declaration*, Lafayette included 'The spread of Enlightenment' as a political aim. Israel

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[355] Proceedings of the Revolution Society, *The New Annual Register, Or General Repository of History, Politics, And Literature for the Year 1789* (London: J. Robinson, 1790)

[356] See Janet Polasky, *Revolutions Without Borders: The Call to Liberty in the Atlantic World* (New Haven, CT: Yale University Press, 2015); Samuel Bernstein, *French Political and Intellectual History*, (New Brunswick, NJ: Transaction, 1984)

[357] Thomas Jefferson, 'Letter to Diodati, 3rd August 1789', *Papers*, XV, p. 326.

[358] Lafayette, "Sur la declaration des droits," Memoires, II, 303-4, in Margaret Madox and Louis Reichenthal Gottschalk, 'Lafayette in the French Revolution, through the October days' (Chicago, IL: University of Chicago Press, 1973) p. 85.

comments that 'Nothing could be more mistaken than to suppose the 'human rights' of 1789 were deeply bound up with "state and nation". The Radical Enlightenment's Human Rights constituted, rather, an unqualified moral universalism.'[359]

After several drafts, which were almost certainly revised by Jefferson, Lafayette completed the *Declaration* and read it as a 'profession of faith' to the National Assembly on July 11th 1789, the following day it was widely circulated around Paris. This draft was followed by proposals (with similar content) from a number of deputies including Sieyès, Target, Mounier, Rabaut, Mirabeau and indeed the Sixth Bureau collectively before resolving upon the *Declaration* on the 26th August after a week of discussion and voting in the Assembly.[360] The French Revolution is hard to comprehend without the admission that the key figures were seeking to replace the *ancien regime* with an enlightened constitution derived from the axiom that men are born free and equal.[361] As Israel puts it, 'the Revolution's supporters conceived la philosophie modern as the path to universal emancipation and happiness'.[362]

The French *Declaration* declared that:

I. Men are born and always continue, free and equal in respect of their rights. Civil distinctions, therefore, can be founded only on public utility.

II. The end of all political associations is the preservation of the natural and imprescriptible rights of man: and these rights are liberty, property, security and resistance of oppression.

It is striking that these first two articles could equally have been written by Locke. The structure of the project in which they are engaged seems near identical. Beginning with a normative assertion

[359] Israel, *Radical Enlightenment*, p. 937.
[360] William Doyle, *Oxford History of the French Revolution*, (Oxford: Oxford University Press, 2nd Ed., 2002) Ch. 5.
[361] See Jonathan Israel, *Revolutionary Ideas*.
[362] Ibid., p. 20.

of the equality of men and the natural rights of men, they proceed deductively to the role of government. The first two articles of the *Declaration* alone show a remarkably strong conceptual similarity between the *Second Treatise* and the political project in which the intellectual vanguard of the French Revolution were self-consciously engaged.

In the last section we saw that Burke thought this species of deductive political science to be dangerous. Looking at the *Declaration* it is not hard to identify the hallmarks of this same project. The preface to the *Rights of Man* is illuminating, the declaration aims to ensure:

> that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all. Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen

The phrase 'based hereafter upon simple and incontestable principles' betrays the mode of deductive enquiry in which, like Locke, the French revolutionaries were engaged. It is also worth noting the token nod to the 'auspices of the Supreme Being' which both utilises Locke's language and draws upon a similar conception of the natural law to that employed by Locke. Notably, the *Declaration* avoids substantive theological commitments, simply invoking a divine authority which serves to ground the Right of Man.

The *Declaration* proceeds to present a political manifesto of seventeen articles which emerge from these first principles. It is striking that there is no reference to the *ancien regime*, to the existing government or to the culture and customs of France. It was because of this abstraction that Burke was led to admonish the revolutionaries, 'You had all these advantages in your ancient states, but

you chose to act as if you had never been molded into civil society and had everything to begin anew. You began ill, because you began by despising everything that belonged to you'.[363]

The lack of historical narrative or contextual considerations in the *Declaration* is well illustrated in its fourth article, concerning liberty:

> 4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

This definition of liberty, echoing both Hobbes and Locke, which proposes a 'freedom to do everything which injures no one else' is a good example of the abstract definition of liberty which troubled Burke. For Burke, such a definition of liberty could never hope to specify the myriad customs, habits, traditions, social norms and religious duties all of which constitute the complex texture of true human liberty: 'Abstract liberty, like other mere abstractions, is not to be found'.[364] He believed that the concrete liberty provided by a nation's longstanding laws would curtail the boundless freedom of the individual in one sense yet it would ultimately provide a more substantial freedom.[365] As he put it, 'Liberty, too, must be limited in order to be possessed'.[366] The fact that the revolutionaries spoke in terms of a universal liberty had a tangible effect on the way they viewed the traditions and history of a people:

> This transformation which, under the terms of their commissions, the deputies had no right to vote for at all, and was rightly dubbed a 'usurpation' of power by Marmontel, entailed more than just a change of name and merging of three orders. No longer were the deputies mandated by or answerable to particular groups, vested interests or defined entities.

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[363] Burke, 'Reflections on the Revolution in France', p. 82.
[364] Burke, 'Speech on Conciliation with America', *Works*, Vol. III, p. 49.
[365] This is a point Russell Kirk makes well. Russell Kirk, *Edmund Burke: A Genius Reconsidered* (New York, NY: Arlington House, 1967) p. 154.
[366] Burke, 'Letter to the Sheriffs of Bristol', *Works*, Vol. III, p. 185.

> Henceforth, delegates were no longer representing particular communities, classes or localities but were simply individual representatives of a people all deemed equal and equal in rights so that the representatives simply represented the volonté générale as a whole, a conception totally at odds with all known precedent, an obvious product of 'philosophie' justified in particular by Sieyès [367]

It is notable that whilst the *Declaration's* preface promises to deliver the 'rights and duties' of men in society it never again mentions the word 'duty'. Furthermore, the article's outline of liberty is concluded with the phrase 'these limits can only be determined by law'. Such a statement betrays a belief in the efficacy of legislation to construct a society, the final authority of which inevitably resides with the will of the legislative body.

The radical individualism which Burke identified in the revolutionaries' thought owes to the fact that their first principles maintain a conception of man as a solitary and rational creature. The *philosophes* did not model a society upon a vision of man as a socially integrated being, a dependent being, or a religious being. As we shall see, Burke protested that we should envisage human beings as we find them; in a society of established customs, particular manners, social bonds and religious feeling. He argued that many aspects of human existence which do not easily render themselves transparent to reason are a critical cohesive which bind together the small platoons of family and community.

The Revolutionary conception of law articulated in the *Declaration* would have been no less troubling to Burke. Article VI begins with the blunt statement that, 'Law is the expression of the general will'. Rousseau can be credited with this phrase and in such statements the revolutionaries went beyond Locke's liberalism.[368] If this article seems to be an intentional affront to the belief that

[367] Israel, op cit., p. 897.
[368] Locke's contractarianism was perhaps less prone to the tyranny of the General Will than Rousseau's, due to its emphasis on property rights and individual liberty. With this said, one might question, with Burke,

all authority emanates from God, then we should not be surprised. Such a statement was intentionally aimed at repudiating notions of divine and monarchical sovereignty. Israel writes, 'The impulse to (nonviolent) revolutionary de-Christianization was basic to the outlook of the philosophique leadership who made the Revolution before, as well as in, 1789'.[369] We might also notice the paradoxical link between the radical assertions of individual liberty and equality of the revolutionaries and the corporate tyranny which followed. Burke identified both excesses as different faces of the same coin, both being permutations of arbitrary will and the defiance of legitimate authority. The abstract elevation of the reason and rights of the individual would, in Burke's eyes, inevitably result in corporate despotism. It was precisely because of this link that Burke predicted that 'some popular general, who understands the art of conciliating the soldiery, and who possesses the true spirit of command, shall draw the eyes of all men upon himself.'[370] In making this prediction Burke argued that when legitimate hierarchies of authority were displaced and excessive individualism elevated, the tyranny of rule by force would ensue, 'How came the Assembly by their present power over the army? …They have destroyed the principle of obedience …The soldier is told he is a citizen and has the rights of man and citizen. The right of a man, he is told, is to be his own governor and to be ruled only by those to whom he delegates that self-government.'[371] Indeed, the link between radical individualism and a strongly coercive corporate rule was certainly a link which Maximilien Robespierre perceived clearly, 'The general will rules in society as the private will governs each separate individual.'[372]

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whether an excessive emphasis on individual liberty is not always proximate to the danger of corporate tyranny.

[369] Israel, *Revolutionary Ideas*, p. 28.

[370] Burke, 'Reflections on the Revolution in France', p. 390.

[371] Ibid., p. 391.

[372] Maximilien Robespierre, *Lettres à ses Commettans*, Vol. 2, (January 5th, 1793)

Conclusion

In this chapter we have looked at the contractarian thought of the revolutionaries. We have seen that Locke was the dominant influence upon the *Declaration,* and observed that the similarities with the *Second Treatise* are striking. In particular, it has been pointed out that the axiomatic basis for the revolutionaries' political project, as well as the methodological assumption (that a perfect system of government can be rationally deduced) were both inherited from Locke. We have noted that the thought of Rousseau, Voltaire and other *philosophes* gave the *Declaration* a different character to the *Second Treatise*. While the same assumptions animated the core of the tradition, we have seen that the atheism of the *philosophes* and, in particular, Rousseau's doctrine of the general will, gave the revolutionary movement a more anti-clerical and corporatist tone than Locke's work. In the next section we will turn to Burke's account of the natural law and its relation to the British constitution. We shall see how different Burke's understanding of the natural law is to that of the contractarian thinkers we have looked at. We shall then contrast Burke's social vision with that of the French revolutionaries.

Edmund Burke and the Revolutionaries

In 1790 Edmund Burke composed a response to the prevailing intellectual winds that were blowing across Europe. Burke's *Reflections* were published at an early stage of the revolution at which point many Whigs including Richard Sheridan and Charles Fox welcomed the revolution as the dawning of liberty in France, going so far as to call it 'the greatest event it is that ever happened in the world!'[373] One of the reasons Burke's writings have exercised so much influence subsequently is because read in retrospect they seem to exhibit a substantial degree of prescience concerning the historical events which were soon to take place. Burke had begun his work on *The Reflections* in January 1790 in response to a sermon preached by Richard Price entitled 'A Discourse on the Love of our Country', which drew parallels between the French Revolution and the Glorious Revolution of 1688. Burke was distrustful of the revolution when it first broke out, although at first he did not articulate outright condemnation. By early October 1789 Burke privately condemned the revolution, writing to his son that 'the elements which compose human society seem all to be dissolved and a world of monsters to be produced in the place of it'.[374] By contrast, in February 1790 Fox was openly hailing the triumphs of the revolution. Pitt too, welcomed the revolution though perhaps more for the opportunities it presented to Great Britain than for affection towards the ostensible dawning of liberty. In response Burke publicly condemned the revolution in Parliament for the first time. This came as a great surprise to Burke's contemporaries as Burke had been a key supporter of the Americans in their agitations for liberty. His denunciation of the French revolution was seen as nothing short of a betrayal by Sheridan and he appalled many of his

[373] L. G. Mitchell, 'Fox, Charles James (1749–1806)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Oct 2007, http://www.oxforddnb.com/view/article/10024, (accessed 29th April 2013).

[374] Edmund Burke, 'Letter to Richard Burke' in J. C. D. Clark (ed.), *Reflections on the Revolution in France: A Critical Edition* (Stanford, CA: Stanford University Press, 2001) pp. 61-62.

contemporary Whigs. By 1791 his condemnation of the revolution would sever his relationship with Fox, culminating in a dispute which saw Fox in tears in the House of Commons.

Burke's metaphysics

We have seen that Burke rejected the revolutionaries' attempt to derive a political model by reason from first principles. I hope to defend the view that Burke's belief in a premodern conception of the natural law was a significant influence upon his thought in this area. Burke spoke of the natural law on numerous occasions and I will maintain that it is an important feature of his political thought. He believed that 'We are all born in subjection—all born equally, high and low, governors and governed, in subjection to one great, immutable, pre-existent law' which is 'antecedent to our very existence'. For Burke, it is by this law that 'we are knit and connected in the eternal frame of the universe, out of which we cannot stir.'[375] It has even been argued that the natural law was the great axis around which the constituent components of his political thought orbited.[376] We have already noted that contemporary Burke scholarship has seen something of a backlash against the view that Burke's understanding of the natural law was Thomistic. It is of course true that Burke would certainly not have identified predominantly as a Thomist and a natural lawyer.[377] Yet, we have seen that there were credible channels through which Burke would have seen a Thomistic articulation of the natural law linked with the British constitution. As we saw in the work of the common lawyers, the belief that the natural law gave form to the constitution was not a novel idea. Such ideas were commonplace well into the nineteenth century and constitutional authorities such as Blackstone show themselves to have been familiar with them.

[375] Burke, 'Speech in the Impeachment of Warren Hastings', pp. 165-67.
[376] The most comprehensive work on this topic is Peter Stanlis, *Edmund Burke and the Natural Law*.
[377] To my knowledge no Burke scholar has made this claim.

It is also worth drawing attention to the more explicitly theological sources from which Burke's education in the natural law might have been advanced. Francis Canavan rightly notes Burke's statement that he had 'turned his attention to the reading of all the theological publications, on all sides, that were written with such wonderful ability in the last and present century'.[378] Burke possessed an extensive list of theological works in his personal library, St. Augustine, William Chillingworth, Archbishop Leighton, John Tillotson, William Warburton, William Wolaston and James Foster are but a few prominent names.[379] Furthermore there are references in Burke's writings and speeches to Richard Hooker, Edward Stillingfleet, Joseph Butler, John Leland and Anthony Ellys.[380] As Canavan points out, if Burke is taken at his word it seems highly likely that he was familiar with these authors and gave significant weight to the importance of their theology. Burke was certainly cognizant of the distinction between the traditional natural law and the natural rights claimed by the revolutionaries.[381] Furthermore, Burke's reading of Cicero would have supplemented his understanding of the natural law.[382]

Burke, like the common lawyers, expressed the belief that the British state had emerged in accordance with the natural law and he saw the hand of providence actively ordering the state. The state was in some sense sanctified by virtue of its congruence with the natural law:

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[378] Edmund Burke, 6 June 1780, *Parliamentary History*, 21: 710. Quoted in Francis Canavan, *Edmund Burke: Prescription and Providence* (Durham, NC: Carolina Academic Press, 1987) p. 6.
[379] See *Catalogue of the Library of the Late Right Hon. Edmund Burke* (Oxford: Bodleian Library)
[380] Canavan, *Prescription and Providence*, p. 10.
[381] This point has been missed by some critics of the natural law school, for instance see Drew Maciag, *Edmund Burke in America: The Contested Career of the Father of Modern Conservatism* (Ithaca, NY: Cornell University Press, 2013). In this work the author seems to conflate natural law and natural right and in doing so comes to the conclusion that Burke made contradictory statements on the topic. Leo Strauss argues convincingly that Burke harked back to a premodern tradition in the face of natural rights theorists. See Leo Strauss, *Natural Right and History*.
[382] See Christopher Insole, 'Burke and the Natural Law' in *The Cambridge Companion*. Burke clearly was influenced by the writers of antiquity. In his 'Letter to a member of the National Assembly' he wrote, 'We continue, as in the last two ages, to read, more generally than I believe is now done on the continent, the authors of sound antiquity. These occupy our minds.' Burke, 'Letter to a Member of the National Assembly', pp. 39-40.

> This great law does not arise from our conventions or compacts; on the contrary, it gives to our conventions and compacts all the force and sanction they can have. It does not arise from our vain institutions. Every good gift is of God; all power is of God; and He who has given the power, and from Whom alone it originates, will never suffer the exercise of it to be practised upon any less solid foundation than the power itself. If, then, all dominion of man over man is the effect of the Divine disposition, it is bound by the eternal laws of Him that give it, with which no human authority can dispense. [383]

In *The Reflections,* Burke draws heavily upon the natural law in order to furnish his criticisms against the French revolutionaries. Burke articulates a teleological account of both man and the state, when he writes that the members of society in their:

> corporate character [should] perform their national homage to the institutor and author and protector of civil society; without which civil society man could not by any possibility arrive at the perfection of which his nature is capable, nor even make a remote and faint approach to it. They conceive that He who gave our nature to be perfected by our virtue willed also the necessary means of its perfection. He willed therefore the state — He willed its connection with the source and original archetype of all perfection. They who are convinced of this His will, which is the law of laws and the sovereign of sovereigns, cannot think it reprehensible that this our corporate fealty and homage, that this our recognition of a seigniory paramount, I had almost said this oblation of the state itself as a worthy offering on the high altar of universal praise, should be performed as all public, solemn acts are performed, in buildings, in music, in decoration, in speech, in the dignity of persons, according to the customs of mankind taught by their nature [384]

Canavan notes the importance of this passage, writing that 'In Burke's philosophy there can be no merely secular society because there is no merely secular world'.[385] Indeed one of the most remarkable things about this passage is that in a political tract Burke embarks upon an exposition of society which clearly bears the hallmarks of the natural law tradition. This passage implicitly

[383] Burke, 'Speech in the Impeachment of Warren Hastings', pp. 166-167.
[384] Burke, 'Reflections on the Revolution in France', pp. 185-187.
[385] Canavan, *Prescription and Providence*, p. 108.

assumes a human teleology which is ordered towards the perfection of the creator; society is conceived as a corporate body, endowed with laws and sovereignty which connect it with the creator. Society is also envisaged as a means by which man might facilitate the cultivation of his own virtue in community with others. Once more the overt influence of pre-modern natural lawyers in the passage is thrown into sharp relief when contrasted with the account of natural Law offered by Locke, with its lack of social and anthropic teleology.

It is indeed striking that the French revolutionaries' Rights of Men seem to have been conceived as impotent in themselves, only finding their potency when they were claimed by men brandishing weapons, a point which Burke himself made. By contrast, Burke's understanding of the natural law is of a law that is actively engaged throughout history in ordering creatures and societies towards their right ends wherever the precepts of the natural law were rightly adhered to in concrete circumstances. The common lawyers' belief in the natural law gives us an insight into why they were so keenly aware of the importance of history and the continuity of society; chiefly because the flourishing of right order requires time. Burke feared that the deductive method of the revolutionaries, which revered reason alone, would seek to destroy the entirety of the *ancien régime*, including the amassed wisdom which had been accrued over the course of ages. The instinct to conserve then is, at least in part, attuned to a theological belief in the providential ordering of society by God. Burke clearly expresses a belief in such providence, and this belief did not preclude the importance of human agency in the divine plan. On the contrary, Burke believed humans to have a choice as to whether they would adhere to God's law or not. The French revolutionaries 'appear[ed] rather to resist the decrees of Providence itself, than the mere designs

of men.'[386] Burke believed that man had an important role to play in the social order and that if he was to act rightly then prudence was an indispensable virtue.

Prudence

For Burke, prudence was the bridge between the natural moral law and the contingent set of circumstances in which any human society exists. By definition, prudential reasoning possesses a moral dimension and Burke was clear that prudence seeks the good within any particular set of circumstances, 'God forbid that prudence, the first of all virtues, as well as the supreme director of them all, should ever be employed in the service of any of the vices.'[387] For Burke, the role of the prudential statesman was to deliberate upon the moral course of action in particular circumstances without speculating upon utopian schemes to recast society at large. For Burke, prudence was not only 'the first in rank of the virtues political and moral, but she is the director, the regulator, the standard of them all.'[388] Rejecting the revolutionaries' faith in abstract reason, prudence was the touchstone to which Burke consistently returned in political questions.

Ronald Howell picks up on this point writing that 'As a "realist" Burke made normative "reason" or justice superior to arbitrary "will" or power in both God and man, and rejected voluntarism both in his theology and in politics'; this is why reason or prudence occupies a central place in Burke's thought. Howell writes that 'Burke's reason... was that of Aristotle and Medieval Thomist Christianity' the implication of this was that Burke accepted Aristotle's belief that 'the function of speculative reason was contemplation, whereas the function of practical reason was (political) action'.[389]

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[386] Burke, 'Thoughts on French Affairs', *Works*, Vol. VII, p. 85.
[387] Burke, 'Trial in the Impeachment of Warren Hastings', *Works* Vol. XIII, p. 275.
[388] Burke, 'Appeal from the New to the Old Whigs', p. 98.
[389] Ronald Howell 'A Review of The Political Reason of Edmund Burke by Francis P. Canavan', *The Journal of Politics* 22 (1960) pp. 730–732. p. 731.

Burke is clearly cognizant of this distinction when he argues that:

> Nothing universal can be rationally affirmed on any moral, or any political subject. Pure metaphysical abstraction does not belong to these matters. The lines of morality are not like ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications. These exceptions and modifications are not made by the process of logic, but by the rules of prudence.[390]

Canavan expresses this sentiment through a nautical analogy 'Burke's doctrine of political reason and prudence thus made it possible for him to advocate what may be called a principled pragmatism. In contrast to pure pragmatism – if there is such a thing – Burke's pragmatism was not without "absolutes" and fixed stars on which to set a political course. These unchanging points of reference were provided by the natural moral law, which in essence stated an order of ends, derived from human nature, which must ultimately be attained'.[391]

In Burke's writings we see that his commendation of the piecemeal operation of prudence is made, in part, on the basis that human beings are both creaturely and fallen. To reason prudentially men do not need to know God's mind, they do not need to be capable of listing the universal and eternal rights of men, nor do they need to be capable of deducing a universally normative form of government. Instead, prudence, informed by culture, education and the natural moral law was, for Burke, the guiding light of the statesmen. For this reason, Burke was able to view political order as 'a joint product of God and man, in which the order of society derived from and reflecting the divinely-ordained order of the universe, was produced, maintained and improved by the constant

[390] Burke, 'Appeal from the New to the Old Whigs', p. 97.
[391] Francis Canavan, *The Political Reason of Edmund Burke*, (Durham, NC: Duke University Press, 1960) p. 28.

exercise of man's political reason'.[392] It is in this context that man can be a co-creator with God, not seeking to be the architect himself but following the prudential course in each circumstance.

Burke was aware that the myriad of contingencies which surround a society will inevitably alter their form of government, as he put it, 'People must be governed in a manner agreeable to their temper and disposition'.[393] As we have seen the universally normative political structure of the revolutionaries had no room for history or considerations of locality. Burke was to perceive with some prescience that precisely because the natural rights discourse of the revolutionaries was ahistorical and abstract it would strip society of all that was deemed to be superfluous, foremost in the line of fire would be the Christian religion.

Burke and Christianity

The abstraction and ahistoricism of the French *philosophes* was not merely academic. The neglect of a rich teleology coupled with a disdain for the *ancien regime* was to turn upon those institutions which it did not recognise as legitimate. Burke suspected that behind the veneer of liberal discourse the French revolutionaries really desired the 'utter abolition, under any of its forms, of the Christian religion' noting this with some irony given that 'we hear these new teachers continually boasting of their spirit of toleration.'[394] In this suspicion Burke was to be vindicated. Charles A. Gliozzo documents some of the anti-religious activities which characterised the revolution, listing 'aggressive anti-clericalism, prohibition of any Christian practice or worship either in public or private life, closing of the churches, the formation of a revolutionary calendar to replace the Christian one, and the establishment of new religious cults – the Cult of Reason and the Cult of the

[392] Francis Canavan, 'Edmund Burke's Conception of the Role of Reason in Politics' in Iain Hampsher-Monk ed., *Edmund Burke*, (Farnham: Ashgate, 2009) p. 34.
[393] Edmund Burke, 'Observations on a Late State of the Nation', *Works*, Vol. II, p. 166.
[394] Burke, 'Reflections on the Revolution in France', p. 273.

Supreme Being'.[395] He argues that it was no coincidence that the revolution as so profoundly anti-religious as a 'direct influence can be traced from the *philosophes* to the dechristianizers of the Revolution'.[396] He relates how Voltaire rejected the Christian God, preferring instead to refer to the Supreme Being, also advocating that all ecclesiastical hierarchy should be destroyed. Similarly Rousseau's notion of spirituality envisaged the lone individual in nature, employing his reason to discover the Supreme Being. Burke was deeply critical of Helvetius, Voltaire, Rousseau 'and the rest of that infamous gang', identifying in their thought a systematic attempt to purge society of religion:

> we cannot be ignorant of the spirit of atheistical fanaticism, inspired by a multitude of writings, dispersed with incredible assiduity and expense, and by sermons delivered in all the streets and places of public resort in Paris. These writings and sermons have filled the populace with a black and savage atrocity of mind, which supersedes in them the common feeling of morality and religion.[397]

Burke believed that above all things they were motivated by their own vanity, 'When your lords had many writers as immoral as the object of their statue (such as Voltaire and others) they chose Rousseau, because in him that peculiar vice [vanity] which they wished to erect into a ruling virtue was by far the most conspicuous.'[398]

As we have seen significant intellectual figures such as Voltaire, Rousseau and Helvetius were deeply skeptical of tradition, revelation and inherited wisdom and, in their own different ways, championed the liberating power of reason. Gliozzo writes that the '*Philosophes…* determined human nature empirically, for they perceived in men not their relationship to an objective world of

[395] Charles A. Gliozzo 'The Philosophes and Religion: Intellectual Origins of the Dechristianization Movement in the French Revolution' *Church History*, Vol. 40, No. 3 (Sep., 1971) pp. 273-283. p. 273.
[396] Ibid.
[397] Burke, 'Reflections on the Revolution in France', p. 278.
[398] Burke, 'Letter to a Member of the National Assembly', p. 32.

ends and values, but their actual needs, wants, feelings inclinations and ideas. They taught that by reason, man may be the master of things and of himself, that he can imagine a society in which all men enjoy freedom and happiness, and that he can deliberately create the society he has imagined'.[399] Again, we see the Lockean belief that right political order can be deduced by reason from an empirically grounded definition of man. In the French revolution we can see that a political ideology which is remarkably similar to that described in the *Second Treatise* has little interest in traditional religion or inherited wisdom. It is no surprise then that the revolutionary scions of the *philosophes* had such contempt for the institutional Church. Gliozzo notes that 'though Voltaire, Rousseau, Diderot, and Helvetius were often in disagreement, they were united in common goals: the movement for a better society and the destruction of traditional Christianity.'[400] Echoing this point Roger Scruton writes, 'The Revolution involved a war against religion: an attempt to re-create the world as a world uncreated.'[401] This was one of the features of the revolution which Burke found to be most disturbing.

We have noted that the bulk of revolutionaries were atheists, deists and dissenters and that Burke was well aware of this fact. Burke clearly saw a direct link between the theological beliefs of the dissenters and the political ideas which he found to be most troubling. Whether it be in their rejection of the natural affections, the optimistic view of man in the state of nature, the profession of natural rights, their rejection of tradition, their geometrical approach to politics or their overt attacks upon Christianity, all of these political ideas were derived from theological beliefs, and primarily deistic theological beliefs. One might argue that we can almost tell as much about Burke's

[399] Gliozzo, op cit., p. 283.
[400] Ibid.
[401] Roger Scruton, 'Man's Second Disobedience: a Vindication of Burke' in Iain Hampsher-Monk (ed.), *Edmund Burke*, (Farnham: Ashgate, 2009) p. 430.

theological beliefs and his understanding of the created order by analysing the political ideas that he rejected, as we can by analysing his defence of the established Christian religion.

In Britain, Burke affirmed a distinct and particular religious tradition which, he argued, had been at work in the country's national character for centuries. He states 'We are Protestants, not from indifference but from zeal.'[402] Burke speaks of the 'Christian religion which has hitherto been our boast and comfort', insisting that whilst we do not 'Violently condemn... the Greek nor the Armenian, nor, since heats are subsided, the Roman system of religion, we prefer the Protestant, not because we think it has less of the Christian religion in it, but because, in our judgment, it has more'.[403] For Burke then the particular religion which abetted the formation of a particular society is deeply important to that society's institutions and values. But moreover, Burke was zealous for the cause of Christianity in Britain because he believed it to be true.

Burke writes, 'religion is the basis of civil society and the source of all good and of all comfort.'[404] For Burke the civil is intimately involved in the formation of the political, and the two occupy overlapping jurisdictions. Ian Harris points out that for Burke 'Christianity generated benefits not only to the individual's soul... but also to political arrangements'.[405] Interestingly Burke does not preclude non-Christian religions from being a social asset, writing that 'where the Hindoo religion has been established, that country has been flourishing'.[406] Harris notes that statements such as these did not imply any sort of relativism for Burke, who was committed to the truth of Christianity, rather Burke is observing the social utility of religious traditions. Yet Harris makes one further point, he states that 'the religion which has become bound up with a society is the one that suits it'

[402] Burke, 'Reflections on the Revolution in France', p. 174.
[403] Ibid., p. 174.
[404] Burke, 'Reflections on the Revolution in France', p. 173.
[405] Ian Harris 'Burke and Religion' in Christopher Insole and David Dwan, (eds.), *The Cambridge Companion to Edmund Burke* (Cambridge: Cambridge University Press, 2012) p. 135.
[406] Burke, 'Speech in the Impeachment of Warren Hastings', p. 72.

therefore an assault upon the established religion of a society is 'likely to produce retrogression' in that state.[407] This point is well illustrated in Burke's discussion of the history of India, as he writes of 'the time of the prophet Mahomed' in which 'that proud and domineering sect' used 'the ferocious arm of their prophetic sword to change the religion and manners of that country' to dire effect. [408]

The fact that Christianity had been such an important influence upon the political formation of both Britain and France was important to Burke. He followed Hooker in conceiving of the Church and state as an organic whole. He writes 'In a Christian commonwealth the Church and the State are one and the same thing; being different integrant parts of the same whole'. [409] This is perhaps never clearer than in the *Reflections*. Burke writes that 'all the good things which are connected with manner and civilization' have 'depended upon two principles... the spirit of a gentlemen and the spirit of religion.'[410] The reason that Burke believed 'religion is the basis of civil society' is because 'man is by his constitution a religious animal'.[411] Burke believed that religion would bear upon every area of an individual's life and for this reason he was deeply suspicious of any attempt to extricate religion from society. He writes that 'If our religious tenets should ever want a further elucidation, we shall not call on atheism to explain them. We shall not light up our temple from that unhallowed fire'.[412] In his belief that society was inextricable from the civil institutions which compose it he writes 'instead of quarrelling with establishments, as some do who have made a philosophy and a religion of their hostility to such institutions, we cleave closely to them.' [413]

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[407] Harris, op cit., p. 138.
[408] Burke, 'Speech in the Impeachment of Warren Hastings', pp. 75-76.
[409] Burke quoted in Harris, op cit., p. 137.
[410] Burke, 'Reflections on the Revolution in France', p. 154.
[411] Ibid., p. 174.
[412] Ibid., p. 173.
[413] Ibid., p. 175.

We should note that in these convictions Burke was articulating the conviction of the vast majority of Whigs and Tories, whether they hoped for the further emancipation of Dissenters and Catholics or not. By one estimate, in 1760 over 92 per cent of the nation professed a belief in the established Anglican faith; there were almost no self confessed atheists and only around one percent of the nation were Catholics, whilst the total number of dissenters, non-conformists and Jews did not even account for five per cent of the nation.[414] Such statistics give us an insight into quite how radical the thought of the *Philosophes* was to a British audience. Burke, like most of his countrymen, envisaged Christianity as the very basis of British and French society, because both societies had gestated in the womb of Christian conviction.

In the first of his *Letters on a Regicide Peace*, Burke wrote that 'The whole of the polity and economy of every country in europe has been derived from the same sources', chiefly 'the very same Christian religion'.[415] Similarly, in Burke's *Abridgement of English History*, which he began composing as early as 1757, the benign effect of Christianity upon the customs of the English people is made clear. He relates how, after reunifying the kingdoms of England, Alfred found 'the whole face of things in the most desperate condition: there was no observance of law and order; religion had no force; there was no honest industry; the most squalid poverty and the grossest ignorance had overspread the whole kingdom.' He then tells us that Alfred resolved to revive and improve the Saxon institutions. Proceeding to state, 'The Christian religion, having once taken root in Kent, spread itself with great rapidity throughout all the other Saxon kingdoms in England. The manners of the Saxons underwent a notable alteration by this change in their religion: their ferocity was much abated; they became more mild and sociable; and their laws began to partake of the

[414] Clive Field, 'Counting Religion in England and Wales: The Long Eighteenth Century, c. 1680 - c.1840', *Journal of Ecclesiastical History*, Vol. 63., No. 4, October 2012, pp. 693-720.
[415] Burke, 'Letters on a Regicide Peace', p. 181.

softness of their manners, everywhere recommending mercy and a tenderness for Christian blood. There never was any people who embraced religion with a more fervent zeal than the Anglo-Saxons, nor with more simplicity of spirit.'[416] It was not simply religion, but the Christian message in particular, which Burke believed had a socially benign effect on a people.

Burke and the Church

Burke was clear regarding the social benefits of religion, and of Christianity in the case of Britain, but what of the institutional Church itself? The Burke scholar Conor Cruise O'Brien has gone so far to argue that Burke's Anglicanism was a matter of expediency and, in reality, his sympathies remained with the Catholicism of his homeland.[417] It is true that Burke did petition for dissenters and despised the oppression of Catholics in Ireland, as is made clear in his unpublished *Tract Relative to the Laws against Popery*. Yet in spite of these facts there is little evidence that he was anything other than a committed Anglican establishmentarian throughout his life. As early as 1765 he wrote to Rockingham to assure him that he was not a Catholic and, understandably given his Irish background, Catholicism was an issue which Burke was deeply sensitive about. For example, in 1770 he chastised his dear friend Richard Shackleton for having given information to an English enquirer regarding the religious background of his mother and wife; Burke was less than impressed that the information had found its way into the *London Evening Post*. In 1772 Burke gave his *Speech on the Acts of Uniformity* arguing against the liberalisation of the clergy's subscription to the thirty-nine articles. In this speech he shows himself to be a fierce defender of Church

[416] Burke, 'An Abridgement of English History: from the Invasion of Julius Caesar to the end of the Reign of King John', *Works*, Vol. X, p. 282.
[417] See, Conor Cruise O'Brien, *The Great Melody: A Thematic Biography of Edmund Burke* (Chicago: University of Chicago Press, 1994)

establishment, arguing that the very Union of 1707 would be endangered should the clergy's subscription be relaxed.

Similarly, Burke spoke passionately in the commons in 1790, in his 'Speech on the Repeal of the Test and Corporation Acts'. In this Speech Burke is explicit in connecting rationalist dissenters to the subversion of the Church and the state, arguing that 'the leading preachers among the dissenters were avowed enemies to the Church of England'.[418] He cites two catechisms produced by a Mr. Robinson and a Mr. Palmer, his central concern of the first catechism being that it 'contained no precept of religion whatsoever'. He proceeded to argue that 'The catechisms were filled with invective against kings and bishops, in which every thing was misrepresented'.[419] He also quotes from both Priestley and Price in order to show that leading dissenters were intent on the disestablishment and destruction of the Church. In riposte to the contractarian arguments of such revolutionaries Burke argues that instead of having 'Abstract principles of natural right', Britain had 'what was much better, society, which substituted wisdom and justice, in the room of original right', proceeding to say that society 'took in all the virtue of the virtuous, all the wisdom of the wise. It gave life, security, and action to every faculty of the soul, and secured the possession of every comfort which those proud and boasting natural rights impotently held out'. What is most interesting about this speech is the role that Burke gives to the Church in this argument. After listing the virtues of society, he writes 'Such were the advantages attributable to society, and also deducible from the church, which was the necessary creature and assistant of society in all its great and most beneficial purposes.' He proceeds to profess a 'peculiar regard and reverence for the established church' and speaks of the necessity 'to preserve it safe and entire at a time like the

[418] Edmund Burke, 'Speech on Repeal of the Test and Corporation Acts' [1790] in *The Speeches of the Right Honourable Edmund Burke in the House of Commons and in Westminster Hall in Four Volumes*, Vol. III, (London: A. Strahan, 1816) p. 480.
[419] Ibid., p. 477.

present'. [420] Equally Burke cautions against protestant fervour that could level the state, as it nearly did in the Gordon Riots of 1780.[421] For all of this impassioned rhetoric it is perhaps in the *Reflections* that we hear Burke at his most passionate in defending the established Church.

The treatment of the French Church at the hands of the revolutionaries horrified Burke and he feared that the Church of England could suffer a similar fate. Just as Locke had asserted an unassailable divide between Church and state, the dominant wing of the French revolutionaries also believed that the church should have no commerce with the state. [422] As one commentator puts it, 'Nobody had ever expected that, once the reform of France began, the Church would remain untouched.'[423] The revolutionaries articulated a clear link between the elevation of reason and the denigration of religion as a threat to man's authority. While in theory the authors of the *Rights of Man and the Citizen* had established a freedom of equality, freedom of expression, freedom to run for public office and the extension of equal civil rights, yet some proved to be more equal than others. As early as 1789 'Clerical speakers were regularly jeered in the gallery', 'all monasteries and convents, except those dedicated to educational and charitable work, were dissolved, and new religious vows were forbidden.'[424] By 1790, still an early stage in the revolution, it was increasingly clear that freedom of conscience was to be severely circumscribed. On the 27th November the deputies resolved to 'dismiss at once all clerics who did not accept the new order unequivocally. And to test this acceptance they imposed an oath. All beneficed clergy were to swear after mass on the first available Sunday "to be faithful to the nation, the king and the law, and to uphold with all their power the constitution declared by the National Assembly and

[420] Ibid., p. 476.
[421] See, Ibid., pp. 473-483.
[422] Israel, *Revolutionary Ideas*, p. 28.
[423] Doyle, op cit., p. 136.
[424] Ibid., p. 137.

accepted by the king.'[425] At this stage the Pope involved himself in the dispute, composing a letter of objection, 'In Paris, the pope was burned in effigy and hostile crowds prevented refractory priests and their congregations from exercising the freedom of worship vouchsafed as one of the Rights of Man and the Citizen'.[426] Worse was to follow as the Revolution unfolded.

The *Reflections* is marked by the conviction that the established Christian religion is integral to the social and political order of the nation. Burke writes that 'We are resolved to keep an established church, an established monarchy, an established aristocracy, and an established democracy, each in the degree it exists, and in no greater.'[427] He believed a direct corollary of 'the destruction of the Christian religion' was 'a persecution which would strike at property, liberty and life.'[428] Burke is clear that the Church is a defender of liberty, not an oppressor. He writes that 'I think that Church harmonises with our civil constitution, with the frame and fashion of our Society, and with the general Temper of the people. I think it is better calculated all circumstances considered, for keeping peace amongst the different sects, and of affording to them a reasonable protection, than any other System.'[429] Burke writes that the people of England 'tremble for the public tranquillity from the disorders of a factious clergy, if it were made to depend upon any other than the crown'.[430] Burke explicitly denounces those who seek to upturn the 'Act of Uniformity', arguing that they are in danger of removing a central pillar of the state. Speaking of those who petition on the

[425] Ibid., p. 144.
[426] Ibid., p. 146.
[427] Burke, 'Reflections on the Revolution in France', p. 175.
[428] Ibid., p. 209.
[429] Burke, 'Letter from Burke to an unknown person Jan 20, 1791' in M. W. McConnell, 'Establishment and Toleration in Edmund Burke's "Constitution of Freedom"' *The Supreme Court Review* (1995), pp. 393–462. p. 399.
[430] Burke, 'Reflections on the Revolution in France', p. 191.

basis of right he argues that if the nation is to permit them to continue they will simply be funding fanaticism.[431]

Burke shows an awareness of the danger of close Church-State relations writing that 'politics and the pulpit are terms that have little agreement' proceeding to state that 'The cause of civil liberty and civil government gains as little as that of religion by this confusion of duties.'[432] Is this a contradiction then from his prior statement that 'the church establishment' is not 'convenient' but 'essential to their state' and the 'foundation of their whole constitution, with which, and with every part of which, it holds an indissoluble union'?[433] In direct opposition to Price, Burke is differentiating between a functional communion of Church and state and the moral communion of Church and state. Burke is rightly wary of allowing the Church to dictate particular political issues yet this in no way marginalises the importance of the Church in composing the moral fabric of the state. The danger then comes not from the Church undergirding the society with its moral authority but rather from men who are 'Wholly unacquainted with the world in which they are so fond of meddling, and inexperienced in all its affairs on which they pronounce with so much confidence'. Burke is cautioning us against those who wish to determine decisions in politics, despite having 'nothing of politics but the passions they excite'.[434] Yet this did not stop him from envisaging a government and judiciary which is moulded by a particular theological tradition.

For Burke, the established church is an integral part of the nation as it informs the moral sensibilities of the people. This infusion of moral teaching extends to legislators, judges, aristocrats as well as the common man. That Burke does not mean for the Church to be relegated from the public sphere into a private enclave is made explicit when he writes that 'with a parental solicitude,

[431] Burke 'Speech on the Acts of Uniformity' Works, Vol. X.
[432] Burke, 'Reflections on the Revolution in France', p. 42.
[433] Ibid., p. 188.
[434] Ibid., p. 48.

we have not relegated religion (like something we were ashamed to show) to obscure municipalities or rustic villages. No! we will have her to exalt her mitred front in courts and parliaments. We will have her mixed throughout the whole mass of life and blended with all the classes of society.'[435] We have seen that for Burke prudence is critical to political reason. Yet crucially in such passages we can see that Burke believed the moral instincts of a people ought to be informed by the Christian faith through the medium of the institutional church. In this picture, being a Christian nation is not simply about adhering to a specific set of doctrines or having an institutional church; it is about cultivating a character which is informed by the moral content of the Christian religion.[436]

In their belief that reason could arrive at a formula for the perfect society the revolutionaries were attempting to circumvent the mediating role of time and prudence. Burke predicted that, as a result, the revolutionaries would despise the Church, whose traditions and deferral to revelation epitomised that which the Jacobins in particular loathed. In attacking the Church, Burke believed that the revolutionaries were disembowelling the moral core of the nation. Given the course which the revolution subsequently took it is hard to avoid the conclusion that Burke's concerns had some legitimacy.

The legacy of revolution

In April 1792 the French declared war on Austria, with Prussia joining soon after. As the French encroached upon Austrian territory in the Southern Netherlands the British and the Dutch became increasingly concerned and joined the fight against the fledgling French Republic. On 17th January 1793 Louis XVI was condemned to death. Given what was to follow there is a grim irony in the fact

[435] Ibid., p. 195.
[436] Such sentiments are also clearly expressed by Hooker. See Richard Hooker, *Of the Laws of Ecclesiastical Polity*, Vol. I, ed. Stephen McGrade (Oxford: Oxford University Press, 2013)

that the charge brought against him was that of conspiring against the public liberty. The shock waves following the King's execution reverberated around Europe. The financial state of France became increasingly untenable due to the war effort and as a result there was a swell of popular discontent. Fearing a loss of control the Jacobins seized power and formed the Committee of Public Safety in April 1793. The Jacobins began by arresting twenty nine leading Girondins, thus assuring their own political dominance. By the end of 1793 'the incorruptible' Robespierre had effectively become a dictator. The Committee of Public Safety had the Hebertist and Dantonist journalists who opposed them executed at the guillotine. On October 21st 1793 legislation was passed which ordered the execution of priests and any who harboured them on sight. On 24th of October the Revolutionary Calendar was first inaugurated in order to cleanse any remaining remnant of Christian tradition. These acts were accompanied by the sacking of churches and monuments, the prohibition of religious education and forced recantations of belief. In the place of traditional Christianity, Robespierre instated the cult of the Supreme Being in a ceremony in Notre Dame Cathedral. In the first festival of the Supreme Being, Robespierre himself would descend from a man made mountain in Paris, dressed all in white, as the chief prophet of the Supreme Being.

The Reign of Terror between September 1793 and July 1794 is perhaps one of the most shocking features of the revolution. Sixteen and a half thousand people were sent to the guillotine with another 25,000 killed across France without any trial. A sizeable proportion of those who were killed were clergy and aristocrats, although the peasantry accounted for over seventy per cent of the deaths. In 1794 Robespierre purportedly made statements such as 'Terror is nothing else than justice, prompt, severe, inflexible' with the justification that 'it is supported by the most holy of all laws: the Salvation of the People'. Ultimately, France degenerated into a chaos which could only be quelled by further violence. Large scale revolts were mercilessly repressed, resulting in a massacre at Vendée which claimed between 170,000 and 250,000 lives. The National Convention trampled

on the liberties of its subjects using armed militias to extort farmers for grain and executing those who opposed the revolutionaries for 'crimes against liberty'. Ultimately Robespierre fell victim to his own violence and was himself executed without trial on 28th July 1794. A bankrupt and weary country would in time unite behind a strong and brutal dictator who could galvanise the nation, Napoleon Bonaparte. Yet this was not to be the end of the blood and violence in France as in the ensuing century successive turbulences tore at the country.

It would be wrong to use the French Revolution as a simple vignette to illustrate that contractarian movements inevitably result in revolution and disaster. There are of course many contingent factors which shaped the course of the revolution; the grain shortages of the 1780's, the influence of *philosophes* such as Rousseau and Voltaire, the radicalism of leading figures such as Robespierre , and finally, a particularly obstinate ruling establishment. Nevertheless, the contractarian preference for natural rights and reason over ancient institutions was clearly an important element in providing the logic for revolution. It seems hard to separate the revolutionaries' actions from the intellectual impetus offered by the *philosophes*, and if leading historians such as Israel and Hobsbawm are to be believed, we would be wrong to do so. Whether contractarian thought inevitably leads to revolution is highly doubtful. Whether contractarianism self-consciously provides a logic that confronts established orthodoxies seems historically evident. It is perhaps for this reason that, at its best, it is a tradition that has boldly challenged grave injustices, yet at its worst, it has brought a nation to its knees.

Conclusion

In this chapter we have looked at Burke's account of the natural law. We have seen that Burke's understanding of the natural law and its relation to the constitution, is far more akin to pre-modern thinkers than to Locke's understanding of the natural law. We have seen that Burke rejected the

notion that deductive political reason, operating upon a conception of the rights of man, could instate a new form of government which would bring an end to injustice. Fearful at the potentially revolutionary consequences of such ideas, we have seen that Burke advocated the piecemeal operation of prudence in political matters. In the first chapter we saw that, as a student of the common law tradition, Burke would have been well aware of the idea that the natural law operating through prudence was the chief source of formation for the British constitution. In this chapter we saw that Burke's understanding of prudence was both religious and deeply tied to his Christian worldview. We have looked in particular at Burke's fear that the contractarian thought of the revolutionaries would seek to destroy the Christian religion precisely because of their rationalism, deductive political thought and their belief in natural rights. Contrary to the ideas of Locke, we have seen that Burke followed Hooker and the common lawyers in the view that the Church was an integral part of the state which unified the nation and provided the people with a moral orientation. We have seen that Burke rejected the notion of a secular society, believing that it was a Christian society which provided the surest possibility for civil concord. In the next section we shall turn to a more contemporary, and moderate, articulation of contractarian thought, in order to see if some of the political dangers which we have identified in the contractarian movements of the past are still present in more modern forms of the tradition.

Chapter Four

John Rawls: Contemporary Contractarian Liberalism

Up to this point, we have looked at the views articulated by the seminal figures of the common law tradition. We have seen how they related the natural law to the common law, precedent and the ancient constitution. We have seen that Edmund Burke was an avid student of English legal thought and it has been argued that his political thought was strongly influenced by this tradition. We have looked at two different accounts of the contractarian tradition and provided a Burkean critique of their methodology and substantive commitments. We have seen that Burke roundly rejected the abstract natural rights of the contractarian reformers, which he believed to be an illegitimate innovation and a threat to the constitution. In this chapter we shall look at a more modern account of contractarian thought and question whether the Burkean critique still retains its force in our own age.

John Rawls was the most sophisticated and influential proponent of the contractarian tradition in the twentieth century. For this reason I have chosen to engage with his work, though needless to say there have been other sophisticated contractarian thinkers in the last century, and indeed a good deal of scholarly work on social contract theories in the 21st Century. [437] In this chapter I will give a brief introduction to some of Rawls' fundamental ideas before exploring these ideas in more depth by engaging in dialogue with Burke. This is primarily because an overview of Rawls' whole

[437] Samuel Freeman, *Justice and the Social Contract* (Oxford: Oxford University Press, 2007); David Ghautier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), Ken Binmore, *Natural Justice* (Oxford: Oxford University Press, 2005), James Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor, MI: University of Michigan Press, 1965)

system of thought would require a book in itself; therefore I believe the elements of his thought which are most pertinent to our discussion are best brought out in conversation with Burke. In the second half of this chapter I will focus in particular on Burke's engagements with Richard Price and Warren Hastings, arguing that Burke's understanding of constitutional formation provides a critique of Rawls' political philosophy. Incorporated into this discussion will be an explanation as to why Burke believed that the natural rights liberalism of the revolutionaries gave precedence to human will over divine law. I shall argue that Rawls' political philosophy also exhibits this characteristic. I shall proceed to undertake an exposition of Burke's belief in the common law and custom as the motors of constitutional formation, arguing that Burke's natural law based constitutionalism adequately addresses the anxieties which have animated Rawls' work.

Given that Rawls is a contemporary thinker I will spend less time in this section elaborating upon the context in which his ideas have been articulated. It is nevertheless worth noting the extent of Rawls' influence. The MIT philosopher Joshua Cohen wrote 'His achievement in moral and political philosophy is certainly the largest achievement in the English-speaking world since John Stuart Mill's… his work has a place among the greatest tradition of moral and political philosophy and that would include Plato, Aristotle, Rousseau. I expect his work to continue to be studied for the indefinite future.'[438] The Harvard University President, Lawrence Summers wrote, 'Few if any modern philosophers have had as decisive an impact on how we think about justice.'[439] It is hard to assess Rawls' influence upon particular political parties or policies, but given the seminal influence of his thought upon a generation of thinkers it seems very likely that his work has percolated down to policy level. We may at least say that if the influence of rights and equality discourse is a barometer of influence then Rawls and other liberal thinkers of his generation have made a decisive

[438] Joshua Cohen, 'Rawls Remembered', in *The Philosophy Magazine*, Issue 22, 2003, p. 34.
[439] Lawrence H. Summers, in Ibid.

impression upon political and popular culture. As Richard A. Epstein wrote 'Political philosophers, policymakers, and lawyers are all in the debt of [this] modest man'.[440] In this chapter a conceptual critique of Rawls' liberalism shall be offered in the belief that he offers the most comprehensive account of the premises and convictions which underpin liberal political discourse in the early 21st Century.

In this section I will focus primarily on two of Rawls' most recent and influential works which mark the culmination of much of his political thought. The first of these is his 1993 work, *Political Liberalism* and the second of these is his 2001 work *Justice as Fairness: A Restatement*. Rawls' political philosophy is as expansive as it is intricate and a thoroughgoing analysis of its nuances is beyond the ambition of this chapter. I do however hope to register the prevailing currents of the contractarian tradition which flow through his work as well as identifying the features of Rawls' thought which I believe to be most problematic for the theologian. I shall begin by sketching a brief outline of Rawls' political vision, drawing attention to the hallmarks of the liberal tradition to which it is heir.

Before turning to his work it is worth briefly mentioning how Rawls historically connects to the contractarian thinkers we have looked at.[441] Importantly Rawls places himself in the stream of contractarian thought which I have identified. He writes that he aspires 'to carry to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant'.[442] In an accompanying footnote he tells us that 'I shall regard Locke's *Second Treatise of Government,* Rousseau's *The Social Contract*, and Kant's ethical works beginning with the *Foundations of the*

[440] Richard A. Epstein, in Ibid.
[441] Some political philosophers have drawn a distinction between contractarianism and contractualism. For the purposes of this thesis the distinction is not significant.
[442] John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, Revised Ed., 1999) p. viii.

Metaphysics of Morals as definitive of the contract tradition'.[443] Just as Locke's thought was conditioned by the work of Hobbes, Filmer and the current scientific ideas of his era, and the revolutionaries' thought shaped by Rousseau and Voltaire, so Rawls has his own influences. The most important of these is Immanuel Kant.[444] I will not dwell on this point at length in the analysis but we might note that if Rawls' work seems to make a conscious effort to avoid metaphysical claims, it is not a coincidence that his thought has been influenced by Kantian ethics. We **s**hall see that certain core features of Rawls' thought are remarkably similar to those found in the two prior instantiations of contractarian thought that we have looked at, however we will once again see the capacity of the contractarian tradition to reinvent itself for a new generation.

Rawls – a brief introduction

In *Political Liberalism* [445] Rawls asks 'How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?'.[446] This is a question which might sit happily in the preface to Locke's *Letter on Toleration*. The question provides the basis for a project of political construction which aspires to show 'that a certain arrangement of basic political and social institutions is more appropriate to realizing the values of liberty and equality when citizens are so conceived [as free and equal persons'.[447] Like Locke, Rawls' starting point involves an abstract conception of man as free and equal, he tells us that '[political constructivism] uses a rather complex conception of person and

[443] Ibid., p. 10.
[444] Note that Rawls' interpretation of Kant is not undisputed. See Onora O'Neill, 'Constructivism in Rawls and Kant', in Samuel Richard Freeman (ed.) *The Cambridge Companion to Rawls*, (Cambridge: Cambridge University Press, 2003)
[445] See also John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971); idem, *Justice as Fairness: A Restatement*, ed. Erin Kelly, (Cambridge, MA: Harvard University Press, 2001); idem 'The Idea of an Overlapping Consensus', *Philosophical Papers,* ed. J. Freeman, (Cambridge MA: Harvard University Press, 1999); idem, 'Kantian Constructivism in Moral Theory', *Journal of Philosophy*, 77 (1980) pp. 515–572.
[446] Rawls, *Political Liberalism,* p. 4.
[447] Ibid., p. 5.

society to give form and structure to its construction'.[448] We shall look in more detail at Rawls' anthropology shortly, but we might note that, like Locke, there is a distinctive, and self-conscious, absence of teleology in Rawls' account of the human person. Sandel notes this of Rawls' thought, and draws the link with the origins of contractarian thought, 'Only in a universe empty of *telos*, such as seventeenth-century science and philosophy affirmed, is it possible to conceive a subject apart from and prior to its purposes and ends.'[449] As with Locke, Rawls wants his political model to begin with a normative conception of free and equal humans who possess specifiable rights, as it is from these first principles that Rawls will construct his political framework. Yet, unlike Locke, Rawls does not offer a metaphysical vindication of this claim or reference a state of nature which God created us in.

In order to establish 'reasonable principles of political justice'[450] Rawls employs an 'analytical device' which he terms 'the veil of ignorance'.[451] The veil of ignorance involves imagining an 'original position' in which society is recast and no individual has any way of knowing what circumstances they will occupy in the new society.[452] One might feel resonances of Locke's state of nature in this 'analytical device', yet unlike Locke's state of nature Rawls is not trying to vindicate his conception of man but attempting to establish valid principles of political justice. Rawls believes that from this position we have 'all the relevant requirements of practical reason'[453] in order to envisage a just society. Rawls' substitution of Locke's state of nature for the veil of ignorance

[448] Ibid., p. 93.
[449] Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 2nd Ed., 1998) p. 175.
[450] Rawls, *Political Liberalism*, p. 381.
[451] Ibid., p. 23.
[452] Ibid., pp. 23–27.
[453] Ibid., p. 90.

argument seems a prudent move as it not only dispels the problem of the historical validity of state of nature arguments, but also exorcises any need for God in the argument.

Rawls calls his view 'justice as fairness'.[454] Rawls argues that using the original position we can identify two principles of justice (which we shall look at shortly), that would regulate the institutions of a well-ordered society. In this way a consensus can emerge in which society is 'a fair system of cooperation between free and equal citizens.'[455] The first of the principles of justice assures citizens of 'an equal claim to a fully adequate scheme of basic rights and liberties'.[456] He argues that all members of society should accept such a consensus as 'reasonable and rational' citizens. Rawls maintains that being 'reasonable persons', citizens should desire 'a system of fair cooperation' and that 'its fair terms be reasonable for all to accept is part of its idea of reciprocity.'[457] Being reasonable and rational similarly has implications for our comprehensive doctrines and the issue of tolerance. Rawls explains that 'the burdens of judgement – among reasonable persons are the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement'.[458] In other words as reasonable individuals an acceptance of our epistemic limitations and the contingencies of any moral decision should promote tolerance. For the Burkean, this might be seen as a critical improvement in Rawls' thought from prior contractarian thinkers. While, as we shall see, Rawls retains a belief in abstraction and even makes statements which liken his procedural constructivism to mathematics, taking stock of the burdens of judgement in contingent circumstances *is* a part of the procedural application of Rawls' methodology. Despite the fact that Rawls aims to take Locke's abstractions to a higher level [459] he

[454] Ibid., p. 11.
[455] Ibid., p. 22.
[456] Ibid., p. 5.
[457] Ibid., p. 50.
[458] Ibid., p. 56.
[459] One of the reasons that Rawls desires to make Locke's arguments more abstract is because, in his view, Locke's doctrine of the state of nature 'improperly subjects the social relationships of moral persons to

equally allows greater scope for accommodating those abstractions to particular circumstances. Rawls proceeds to argue that the political conception of justice is perfectly compatible with different 'reasonable comprehensive doctrines' because there can exist an 'overlapping consensus' in a pluralistic society as 'the reasonable doctrines endorse the political conception, each from its own point of view.'[460] For Rawls, if an individual is unreasonable they should be contained 'like war and disease—so that they do not overturn political justice.'[461]

Rawls is quite clear that political liberalism is not itself a comprehensive doctrine, meaning it makes no metaphysical claims. In keeping with this claim, Rawls argues that his conception of the person is a purely political conception. For Rawls then, social unity is not based on any one comprehensive doctrine but rather on a 'consensus on the political conception'. Rawls hopes to appeal to a consensus among all citizens in the conviction that the right end of government ought not to involve any particular theological position. For this reason Rawls is able to argue that 'the political conception of justice is... a freestanding view'[462] which can be supported from within any comprehensive doctrine but is not itself indebted to any one comprehensive doctrine. Rawls employs the idea of 'Public Reason' which is simply 'the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution.'[463] Again the point is clear, the reason of those who compose society at any one chronological point is the final arbiter of what should constitute a society. Individuals then make political decisions 'guided by the criterion of reciprocity, whenever constitutional essentials and matters of basic justice are at stake.'[464] The ultimate end for Rawls is the construction of a 'well

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historical and social contingencies that are external to, and eventually undermine, their freedom and equality'. Rawls, *Political Liberalism*, p. 287.

[460] Ibid., p. 134.

[461] Ibid., p. 64 (footnote 19)

[462] Ibid., p. 12.

[463] Ibid., p.214.

[464] Ibid., p. iv.

ordered society'[465] in which free and equal citizens employ their reason to construct principles of basic justice and constitutional essentials which will benefit all members of society.

Rawls' methodology

Rawls is self-consciously engaged in what he terms a 'constructivist'[466] project. Rawls' Kantian constructivism does not necessarily reject moral realism, but neither does it rely on it. By the same token Rawls' theory does not embrace anti-realism in the same way, for example, emotivist theories of ethics would. Rawls writes that he seeks to identify general 'conceptions in terms of which political liberalism can be formulated' the first among these conceptions being 'the conception of political justice' closely followed by 'the conception of a well ordered society' and 'the political conception of the person'.[467] Employing 'the work of abstraction'[468] he hopes to 'work out' 'the fundamental idea of society as a fair system of cooperation between free and equal citizens as reasonable and rational'.[469] The task of developing a 'conception of person and society' is undertaken with the intention 'to give form and structure to its construction.'[470] Rawls writes 'political constructivism specifies an idea of the reasonable and applies this idea to various subjects: conceptions, and principles, judgements and grounds, persons and institutions.'[471] In a section on 'abstract conceptions' Rawls writes that 'the deeper the conflict the higher the level of abstraction we must ascend' therefore we must deal in extreme abstractions when discussing issues of 'toleration and the basis of cooperation for a footing of equality'. Rawls repeats the point when he expresses the opinion that 'formulating idealized, which is to say abstract, conceptions of society

[465] Ibid., p. 35.
[466] Ibid., p. 94.
[467] Ibid., p. 43.
[468] Ibid., p. 45.
[469] Ibid., p. 146.
[470] Ibid., p. 93.
[471] Ibid., p. 94.

and person connected with… fundamental ideas is essential to finding a reasonable political conception of justice.'[472]

Insofar as this approach is a first order moral account which does not ostensibly rest on objective meta-ethical claims, but on a public consensus, it differs from Locke whose axioms (free and equal individuals who bear property rights) are metaphysical.[473] Yet Rawls' position is not dissimilar from Locke's insofar as a conception of humans as free, equal and rational provides the basic axioms from which a conception of right political order is constructed by reason. Rawls, clearly influenced by Kant, speaks of 'rational agents... select[ing] the principles to regulate the basic structure of society'.[474] Rawls' understanding of the form a government should take does not ostensibly hold the same assumptions of a universally normative form that we saw in early modern thought. Yet nevertheless, Rawls does express ideas which come close to identifying constructivism with the same form of reasoning we find in mathematics. He tells us that:

> While constructivist views have a legitimate place within moral and political philosophy, they also have some affinity with constructivist ideas in the philosophy of mathematics… in both cases the idea is to formulate a procedural representation in which, so far as possible, all the relevant criteria of correct reasoning – mathematical, moral or political – are incorporated and open to view. Judgements are reasonable and sound if they result in following the correct procedure correctly and rely on true premises.[475]

Rawls also tells us that, like the Kantian moral reasoning he is emulating, in which 'the procedural representation is given by the *categorical* imperative that expresses the requirements that pure practical reason imposes on our rational maxims', so in arithmetic 'The procedure shows the basic

[472] Ibid., p. 46.
[473] Rawls is heavily influenced by Kant in this respect and whether one interprets Kant as a realist or an anti-realist, the categorical imperative is both universal and morally binding.
[474] Ibid., p. 93.
[475] Rawls, *Political Liberalism*, p. 102.

properties about numbers, so that propositions about numbers that are correctly derived from it are correct.'[476]

This raises an important point regarding the distinction between speculative and practical reason. On the one hand Rawls clearly tells us that he wants to take the contractarian work of Locke and Rousseau to a higher degree of abstraction. He compares the formal procedure of constructivism to mathematics, from an axiomatic account of humans he reasons *a priori* about the structure of society, and *prima facie* his project seems to be a theoretical one. This would indicate that he is engaging in the same sort of speculative political project which we have seen in the work of former contractarians. On the other hand Rawls speaks frequently of practical reason and it appears to be at the heart of his account of ethics. This all raises the question as to whether Rawls' project is in fact practical or speculative.

Rawls is not just offering us a theoretical account of the right ends of government or the right structure of society. He is clearly attempting to provide a means by which we can move from such theoretical concerns to practical applications. Rawls does see his project as being a function of practical reason. He writes, 'Following Kant's way of making the distinction, we say: practical reason is concerned with the production of objects according to a conception of those objects – for example, the conception of a just constitutional regime taken as the aim of political endeavour – while theoretical reason is concerned with the knowledge of given objects.'[477] Here we ought to make a more nuanced distinction than we have so far made between practical and theoretical reason. If practical reason can loosely be defined as 'reason concerned with action', a given project can still involve a great amount of abstract theorisation yet legitimately be considered to be within the realm of practical reason. Burke's concern with what he saw as theoretical reason in politics

[476] Ibid., p. 103.
[477] Rawls, *Political Liberalism*, p. 93.

was that it was highly abstract, universalising and detached from the contingencies of the real world. The simple point is that, while Rawls might legitimately claim his project falls within the domain of practical reason, this classification rather depends on whether the theory is ultimately intended for practical application. In other words, if practical reason is simply defined as 'reason concerned with action', the division of practical and speculative reason comes to hinge upon the intention of the reasoning rather than the nature of the reasoning. In Rawls' project the broadly theoretical task (of offering an abstract account of the right structure of a society – which he terms 'ideal theory') is the necessary precursor to practical action, yet the whole account is seen to be within the domain of practical reason. If we are to follow Rawls in seeing his whole project as one of practical reason, then past contactarian theories might also be considered within the domain of practical reason, insofar as they were seeking to offer a theoretical account of ethics and politics which was ultimately intended to effect practical action.

For our analysis the important point is that Rawls' practical reason is, by his own admission, more abstract and detached than former contractarian accounts of government. Referencing Kant, he argues that 'As reasonable and rational, we must, as it were suitably construct the principles of right and justice that specify the conception of the objects we are to produce and in this way guide our public conduct by practical reason.'[478] Still operating within the realm of practical reason Rawls can write things which would have troubled Burke greatly, 'ideal theory, which defines a perfectly just basic structure, is a necessary complement to nonideal theory without which the desire for change lacks an aim.'[479] It is because of this highly theoretical form of practical reason that Rawls believes 'the comparison between practical reasoning and mathematical thought is instructive'.[480]

[478] Rawls, *Political Liberalism,* p. 117.
[479] Ibid., p. 285.
[480] Ibid., p. 118. We might also be mindful that Kant himself argued for the social contract and, due to the fact that it is rational, it can be compelled upon citizens. This understanding of the general will is clearly

We need not dwell too long on this point, but it is important to recognise that Rawls' understanding of practical reason involves a commitment to 'ideal theory' which Burke would not have admitted in political affairs. The heavily theoretical aspect of his practical reasoning does however raise the question as to whether the distinction we have made thus far between speculative reason and practical reason is quite as black and white as it first appears. This is a point that we shall return to in chapter six.

Conclusion

We have seen that Rawls offers a striking reformulation of traditional contractarian political thought. We have noted in particular his debt to Immanuel Kant, and his solution to the problem of religious pluralism. We have also seen that in its foundational anthropological assumptions and methodological approach, Rawls' work is in direct continuity with that of previous contractarian thinkers. While we have noted that Rawls doesn't state that he is deducing a political model which is Euclidean in its perfection, he does retain a particular vision of human autonomy, anthropology and reason itself. By his own admission he seeks to take political reason to a higher level of abstraction than past contractarian thinkers, and it is quite clear that this is done to facilitate the operation of *a priori* reason.

Insofar as Rawls assumes the foundational assumptions of the liberal tradition it is unsurprising that his thought is subject to many of the same criticisms which Burke levelled at the revolutionaries' rights discourse. Yet in the next section I wish to look at a central Burkean idea which seems to find disagreement with Rawls' political philosophy in particular; namely, the idea that laws and constitutional essentials are not subject to the arbitrary will of a people. In order to bring Burke's

influenced by Rousseau. We shall see that Kant's idea of the person as 'free, equal and independent' is no less important for Rawls.

position into focus I will look at Burke's opposition to Richard Price and Warren Hastings, which illustrates his concerns within the context that they were first articulated, before returning to a more detailed analysis of Rawls' thought on this issue.

Edmund Burke and John Rawls

Political authority: Burke and Richard Price

The catalyst for Burke's *Reflections* was a sermon preached by Richard Price on November 4th 1789, entitled 'A Discourse on the Love of Our Country'. In this sermon Price drew a comparison between what he perceived to be the principles of government which the British had voluntarily chosen in 1688 and the struggle in France to establish their own political system. Price was a dissenting minister as well as a philosopher, a demographer and fellow of the Royal Society; he was also personally acquainted with Thomas Jefferson, John Adams and Benjamin Franklin, as well as the infamous pamphleteer Thomas Paine. Notably he was sponsored in his role as a fellow of the Royal Society by Benjamin Franklin and was a vocal supporter of the American Revolutionary War.

Price so incensed Burke because of what Burke perceived to be Price's assertion that through the employment of reason we might select for ourselves principles of right government and then simply instate this system of government by an act of will. Price's argument seemed to insinuate that in the events of 1688 the British had forsaken the inherited constitutional principle of hereditary monarchy. In the Discourse Price asserts three principles on which he claims 'the Revolution [was] founded'; these principles are 'First, the right to liberty of conscience in religious matters'; 'Secondly, the right to resist power when abused' and 'Thirdly, the right to chuse our own governors, to cashier them for misconduct, and to frame a government for ourselves'. It was the third of these in particular which was anathema to Burke. Price's third principle was based on the premise that 'liberty of conscience is a sacred right... and that civil authority is a delegation from

the people' and this caused him to detest 'odious doctrines' such as 'the divine right of kings'.[481] Influenced heavily by the Lockean appeal to man endowed with natural reason and natural rights in a state of nature, Price was disparaging towards accumulated tradition and saw the ancient constitution which Burke so revered as an impediment to natural reason. Stanlis writes, 'Price, and other reformers of parliament came more and more to look upon the constitution as an artificial barrier, an impediment infringing upon the abstract "rights" which man had enjoyed in a state of nature'[482]. Burke by contrast gloried in the constitution precisely because it was artificial, elevating society above the depravity that a state of nature entailed.

Price's interpretation of both the revolution and the constitution were unacceptable to Burke:

> It is true that, aided with the powers derived from force and opportunity, the nation was at that time, in some sense, free to take what course it pleased for filling the throne, but only free to do so upon the same grounds on which they might have wholly abolished their monarchy and every other part of their constitution. However, they did not think such bold changes within their commission.[483]

Burke was angered by the view that political arrangements were the product of pure will; whether it be the will of the people or of the ruler it was a doctrine which Burke rejected in the strongest terms.[484] Burke argued that there were fixed and inescapable moral duties which inhered within the constitution which a nation was bound to and in his view the British people had not taken leave of these duties in the revolution of 1688. In his Speech on the Army Estimates, Burke writes that 'the Prince of Orange... was called in by the flower of the English aristocracy to defend its ancient

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[481] Richard Price, 'A Discourse on the Love of Our Country' [1790], in Ellis Sandoz (ed.), *Political Sermons of the American Founding Era: 1730-1805,* Vol. 2 (2nd Ed. Indianapolis: Liberty Fund, 1998) p. 1021.
[482] Stanlis, *Edmund Burke and the Natural Law*, p. 129.
[483] Burke, 'Reflections on the Revolution in France', p. 56.
[484] Stanlis gives the most comprehensive description of the antithesis between will and reason as Burke perceived it. Stanlis, *Edmund Burke and the Natural Law*, ch. 3.

constitution and not to level all distinctions'.[485] He believed that the conduct of 'the whole English nation at that time' was completely different to that of the French, 'In truth, the circumstances of our Revolution (as it is called) and that of France are just the reverse of each other in almost every particular, and in the whole spirit of the transaction.'[486] Burke proceeds to point out that the English had taken every care to preserve the constitution to which they were bound, stating, 'With us we got rid of the man, and preserved the constituent parts of the state. There they get rid of the constituent parts of the state, and keep the man.'[487] Burke was adamant that in 1688 England had been acting in accordance within the legal framework prescribed by the constitution, 'The Church and the State were the same after the Revolution that they were before, but better secured in every part.'[488]

In reference to Price's sermon Burke writes that all rulers are obliged to follow the:

> steady maxims of faith, justice, and fixed fundamental policy, [which] are perfectly intelligible and perfectly binding upon those who exercise any authority, under any name or under any title, in the state [489]

For Burke, the steady maxims of faith, justice and fixed fundamental policy resided in the constitution. This intimates the first clue as to why it was so critical, for Burke, that the events of 1688 should be in accordance with constitutional law. He writes that it may be impossible to 'give limits to the mere *abstract* competence of the supreme power, such as was exercised by parliament at that time' yet 'the limits of a *moral* competence subjecting, even in powers more indisputably sovereign, occasional will to permanent reason'.[490] For Burke, working within the

[485] Edmund Burke 'Speech on the Army Estimates', *Works* Vol. V, p. 19.
[486] Ibid.
[487] Ibid., pp. 19-20.
[488] Ibid. p. 20.
[489] Burke, 'Reflections on the Revolution in France', p. 57.
[490] Ibid.

defined parameters of the constitution was a moral issue. To flagrantly transgress the constitution was an assertion of will over reason, wholly unacceptable to him.

As we have seen, such a rejection of arbitrary will and the assertion of the natural law inhering within constitutional law was well established in the thought of the common lawyers and was common characteristic of the pre modern natural law tradition. As Merio Scattola points out, one of the defining features of premodern varieties of natural law discourse was a belief in a universal order of justice before which rulers were accountable. If they violated this order and ruptured the demands of justice then they were to be held accountable:

> Both the scholastic tradition of Thomas Aquinas and the Lutheranism of Melanchthon suppose the existence of a superior, universal order in which all existing rules play a role. A main consequence of this idea of participation, which is expressed both in the Thomist eternal law and in the Melanchthonian law of God, is that good and evil, virtue and vice, command and prohibition correspond with an objective order that is given and cannot be changed… The order of universal justice speaks immediately to every human being in several ways: through natural law, in Old Testament Law of the Ten Commandments and in the words of Christ…as the universal order can be understood by every person or by every political subject, they may be always able to recognize whether their rulers are governing in accordance with justice or against it. The existence of a universal order therefore makes possible the difference between good and bad governments. The king who does not rule for the sake of his own subjects, but only seeks for his own private advantage, turns into a tyrant, who infringes the law of nature and will be punished both by men and by God. The existence of a universal order also makes it possible for subjects to identify the tyrant, to reject him and to struggle against him.[491]

Modern natural lawyers such as Locke held quite different presumptions. In conceiving of the natural law as an idea or first principle from which a rational framework could be constructed, appeals against a tyrant begin with the idea of right. In Locke's thought it is from the idea of natural

[491] Scattola, op cit., p. 7.

right that a ruler might be deposed. The despotic monarch does not violate a given order of justice but violates his contract with the people. The political corollary of these two fundamentally contrasting conceptions of the natural law is at the heart of the differences between Burke and Price. Burke's language betrays a premodern understanding of the natural law, whereas the Lockean Richard Price outrages Burke's premodern sensibilities by speaking of cashiering the ruler for misconduct on the basis of right. As one commentator puts it, 'some of Price's expressions can easily give rise to the belief that he thought that political judgement is simply the application of *a priori* principles'.[492]

For Burke, the British constitution was almost conceived of as an organic entity, not a product of man's *a priori* reason. The constitution was a microcosm of society itself, a compact through time between Heaven and Earth. Another commentator writes that 'Burke speaks of the great primeval contract of eternal society. This contract fixes the moral limitations of all societal action. Burke identifies the constitutional compact as a subordinate species of this great primeval contract so that constitution sets the same sort of moral limitations for its own citizens as the eternal contract does for society at large.'[493] These moral limitations are laid out quite clearly in the constitution and define the legitimate use of power:

> The House of Lords, for instance, is not morally competent to dissolve the House of Commons, no, nor even to dissolve itself, nor to abdicate, if it would, its portion in the legislature of the kingdom. Though a king may abdicate for his own person, he cannot abdicate for the monarchy. By as strong, or by a stronger reason, the House of Commons cannot renounce its share of authority. The engagement and pact of society, which generally goes by the name of the constitution, forbids such invasion and such surrender. The constituent parts of a state are obliged to hold their public faith with each other and

[492] D. O. Thomas, 'Price, Richard (1723–1791)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2005, http://www.oxforddnb.com/view/article/22761, (accessed 2nd May 2013).
[493] Almeida, op cit, p. 209.

> with all those who derive any serious interest under their engagements, as much as the whole state is bound to keep its faith with separate communities. Otherwise competence and power would soon be confounded and no law be left but the will of a prevailing force.[494]

Again, the tacit implication in this passage is that there is a deeper authority resident in the constitutional compact, which binds the respective parties to their ordained stations. Burke is clear that law must take precedence over the brute force of pure will derived from a claim of Right. As a result he argues that there is an inescapable obligation and duty upon all citizens who are born subject to this constitutional compact, a duty which it is not at their discretion to dissolve. Just as Burke argues that the House of Lords is not at liberty to dissolve the Commons, so he argued that citizens, who are born under the authority of a constitution which supports a principle of hereditary monarchy, are not morally competent to simply elect a new monarchy by an act of popular will.

Burke wrote of Price, 'The gentlemen of the Society for Revolutions see nothing in that of 1688 but the deviation from the Constitution'.[495] For Burke the events of 1688 were no deviation at all, the succession was in lawful continuity with the bloodline of the monarch. Burke feared that a principle of election by general will would 'stain the throne of England with the`blot of a continual usurpation', yet more importantly for Burke was the moral argument that legal right could not be transgressed by pure will, 'Do they mean to invalidate, annul, or to call into question... that great body of our statute law... to annul laws of inestimable value to our liberties'.[496] Burke's understanding of the compact of mutual trust which binds a society together is grounded in the authority of Heaven which partakes in the earthly compact and gives rise to all earthly laws, not the Right of man. This has radical implications for those who possess power. In an age exploring the

[494] Burke, 'Reflections on the Revolution in France', pp. 58-59.
[495] Ibid., p. 60.
[496] Ibid., p. 61.

idea of popular sovereignty, Burke was swift to remind the world that neither regent nor commoner is ultimately sovereign:

> All persons possessing any portion of power ought to be strongly and awfully impressed with an idea that they act in trust; and that they are to account for their conduct in that trust to the one great Master, Author and Founder of society.
>
> This principle ought even to be more strongly impressed upon the minds of those who compose the collective sovereignty, than upon those of single princes [497]

We have already noted that, somewhat oddly, Burke never mentions Locke in relation to the revolution of 1688; particularly notable given that, in the late eighteenth century, Locke's *Second Treatise* was believed to be a defence of the Glorious Revolution. As we saw in the first chapter, Locke's *Second Treatise* rested upon an idea of natural rights, as opposed to an accumulated body of law and culture. As a follower of Locke, Price too gave precedence to the will of man, which he believed morally at liberty to forsake constitutional precedent in favour of creating a new society. For Burke this was nothing less than a violation of the divine moral law by an act of illegitimate will.

Will and law: the case of Warren Hastings

The motif of law taking precedence over will was perhaps elaborated upon most fully in Burke's attack on Warren Hastings. In 1788 Burke delivered his speech on the impeachment of Warren Hastings, the Governor General of Bengal whom Burke believed had deeply damaged Indian society through his own avarice.[498] Amongst Warren Hastings 'despotic' actions, were his alleged attempts to re-orchestrate Indian society by wielding arbitrary power and employing tyrannical practices; Hastings justified his actions on the basis that all that had preceded British rule in Asia was tyranny and the exercise of arbitrary power. Burke questions 'Will your lordships submit to hear the corrupt

[497] Ibid., pp. 177-178.
[498] See Stanley Ayling, *Edmund Burke: His Life and Opinions* (London: John Murray, 1988) pp. 172–81.

practises of mankind made the principles of government?', proceeding to state incredulously, '*He* have arbitrary power!—my lords, the East India Company have not arbitrary power to give him; the king has no arbitrary power to give him; your lordships have not; nor the Commons; nor the whole Legislature.' The reason for this conviction was that:

> We have no arbitrary power to give, because arbitrary power is a thing which neither any man can hold nor any man can give. No man can lawfully govern himself according to his own will—much less can one person be governed by the will of another. We are all born in subjection—all born equally, high and low, governors and governed, in subjection to one great, immutable, preexistent law, prior to all our devices, and prior to all our contrivances, paramount to all our ideas and to all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the universe, out of which we can not stir.[499]

For Burke constitutional law was no less than a derivative of the natural law, a flawed derivative, yet it was still a reflection of the natural law appropriated by time and prudence to the particular circumstances of Great Britain.

We have already seen that the common law tradition with which Burke was so familiar had a long history of assimilating the ancient constitution to the natural law when faced with despotism. In the eighteenth century it was no less prevalent, it was the natural law inhering within the ancient constitution which the Americans colonists appealed to before the Revolution, as one commentator writes:

> Apparently in the thought of these colonials, the law of nature was a thing that could be "adopted into the Constitution" or "engrafted into the British Constitution," and having thus been made a part of English law by the great constitutional documents, Magna Carta

[499] Burke, 'Speech on the Impeachment of Warren Hastings' in *The Writings and Speeches of Edmund Burke: Vol. IX,* p. 455.

> and the like, it was so very real that the colonists might appeal to it over the head of Parliament.[500]

The following statement from the House of Representatives perfectly encapsulates Burke's own view of the constitution, 'It is the glory of the British Prince and the happiness of all his subjects that their constitution hath its foundation in the immutable laws of nature; and as the supreme legislature, as well as the supreme executive derives its authority from that constitution, it should seem that no laws can be made or executed which are repugnant to any essential law of nature.' [501]

For Burke, earthly rulers cannot legitimately separate their will from the divinely ordained natural law. Like natural lawyers before him, Burke thus grounds the legitimacy of any political or legal authority in God's divine authority:

> If, then, all dominion of man over man is the effect of the divine disposition, it is bound by the eternal laws of Him that gave it, with which no human authority can dispense; neither he that exercises it, nor even those who are subject to it; and, if they were mad enough to make an express compact, that should release their magistrate from his duty, and should declare their lives, liberties and properties, dependent upon, not rules and laws, but his mere capricious will, that covenant would be void.[502]

Herein lies the heart of Burke's gripe against Price's interpretation of the revolution. For Burke, the story of 1688 was the story of a tyrant who had disregarded the sovereignty of the constitution and thus the sovereignty of the natural law, in favour of arbitrary power. The revolution of 1688 then was in Burke's famous phrase 'in a constitutional light, a revolution, not made, but prevented'.[503] If there was a revolutionary in the story it was the King who forsook the obligations of his ordained

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[500] Randolph Greenfield Adams, *Political Ideas of the American Revolution*, (New York: Barnes and Noble, 1939) p. 121.
[501] 'House of Reps. Of Mass. To Conway', [Feb. 13, 1768], Almon, *Prior Documents*, pp. 181-2. Quoted in Randolph Greenfield Adams, *Political Ideas of the American Revolution*, (New York: Barnes and Noble, 1939) p. 121.
[502] Burke, 'Speech in the Impeachment of Warren Hastings', p. 166.
[503] Burke, 'Speech on the Army Estimates', p. 20.

post. Burke believed that in response the people of England had ensured the continuity of the sovereign demands of the constitution; they had certainly not replaced the arbitrary power of James II with their own arbitrarily willed constitution. Burke writes that:

> Law and arbitrary power are in eternal enmity. Name me a magistrate, and I will name property; name me power, and I will name protection. It is a contradiction in terms, it is blasphemy in religion, it is wickedness in politics, to say that any man can have arbitrary power. .. man is born to be governed by *law;* and he that will substitute *will* in the place of it is an enemy to God.[504]

The subjection of reason to will is a theological issue for Burke who, like the Anglican divines, perceived the subjugation of divine law to human will as nothing other than 'blasphemy in religion'. I hope now to show that this emphatic rejection of voluntarism which we find in Burke's reactions to Price and Hastings pertains also to the political thought of John Rawls.

Rawls; creating principles of justice in order to select constitutional essentials

Bearing in mind Burke's belief that the constitution is subject to the divine law and as such we are subject to the inherited constitutional order, I wish to look in more detail at Rawls' political philosophy and his understanding of legal and constitutional formation. In *Justice as Fairness*: *A Restatement,* Rawls attempts to develop 'a theory of justice from the idea of a social contract'. Rawls is quite explicit that the account of justice should be 'justified by reference to political values and should not be presented as part of a more "comprehensive" moral, religious, or philosophical doctrine.'[505] Rawls makes it clear that his project takes 'the basic structure [of society] as the primary subject of political justice'; Rawls is deliberately vague in clarifying precisely what institutions constitute the basic structure of society but he does indicate that he is referring to the

[504] Burke, 'Speech in the Impeachment of Warren Hastings', p. 169
[505] John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly, (Harvard MA: Belknapp Press, 2001) Editor's foreword.

major social and economic institutions at the heart of society, such as the family, the constitution, the legal system and the economy itself. In order to establish his principles of justice, Rawls works on the premise that citizens are 'free and equal' as well as 'reasonable and rational.' They are equal, Rawls says, in the sense that 'the basis of equality is having to the requisite minimum degree the moral and other capacities that enable us to take part fully in the cooperative life of society'[506] they are free in the sense that 'they regard themselves as self-authenticating sources of valid claims'.[507] Rawls is also explicit that these are political conceptions of freedom and equality serving to constitute a political conception of justice and that metaphysics should not encroach into this discussion.[508]

Rawls' attempt to circumnavigate metaphysics could be interpreted as the culmination of the contractarian desire, which we first saw in Locke, to avoid substantive metaphysical claims, on the understandable grounds that substantive metaphysical claims are rarely agreed upon. From Locke's brief appeal to a divine creator in order to ground his natural rights, to the French revolutionaries' nod towards the 'auspices of the supreme being', the contractarian tradition has a history of avoiding metaphysical claims beyond the bare necessity of establishing the basic rights of man. This tradition is consummated in Rawls' work as he attempts to establish a purely political conception of personhood, justice and society with no recourse to metaphysics. Despite the undoubted ingenuity of Rawls' achievement, it should be noted that this is a move which a variety of critics have found questionable. Rawls writes that 'The conception of the person itself is meant as both normative and political, not metaphysical'.[509] Yet Rawls is unclear on how it is possible to speak of normative personhood without reference to the vocabulary of metaphysics. Rawls simply writes that 'the

[506] Ibid., 20.
[507] Ibid., p. 23.
[508] Ibid., p. 21.
[509] Ibid., p. 19.

conception of the person is worked up from the way citizens are regarded in the public political culture of a democratic society'.[510] This idea seems to fall subject to Burke's complaint of natural rights claimants who seek to reconstitute the society which had bequeathed them with a conception of rights in the first place. In other words it is a *post hoc* account of a conception which has emerged from the Christian tradition. Despite the historical influence of the Christian tradition upon the western conception of the self, God seems to be completely excised from the picture; all that remains is the reasonability of the pre-social self.

In 1982 Sandel offered a critique of the Rawlsian conception of selfhood, arguing that 'a self totally detached from its empirically given features would seem no more than a kind of abstract consciousness (conscious of what?)'.[511] Proceeding to point out that for Rawls, 'the antecedent unity of the self means that the subject, however heavily conditioned by his surroundings, is always, irreducibly, prior to his values and ends, and never fully constituted by them.'[512] Ramsay articulates Sandels' criticism well, 'Rawls relies on a metaphysical concept of the self which makes no sense. The person in the original position is an abstraction, a "radically disembodied subject". Such a pre-social individual independent of their particular interests, desires, values, conceptions of the good and communal ties which constitute their identity would be incapable of deliberation and choice'.[513] Wolff argues that 'in striving for absolute universality, for a contemplation of the foundations of social philosophy *sub specie aeternitatis*, Rawls abstracts from all that is characteristically human and social. The result is a model of choice problem that is not sufficiently determined to admit of solution, and neither historical nor human enough to bear a useful

[510] Ibid., p. 19.
[511] Sandel, op cit., p. 21.
[512] Ibid., p. 22.
[513] Maureen Ramsay, *What's Wrong With Liberalism? A Radical Critique of Liberal Political Philosophy* (London: Leicester University Press, 1997) p. 115.

relationship to the real issues of social theory.'[514] A unifying thread which runs through all of the liberal thinkers that we have looked at is the belief that a conception of man in isolation, whether the state of nature or in the original position, is capable of defining the ends of society by virtue of their own self possessed reason. Sandel picks up on the continuity between the vision of selfhood connecting Locke, the revolutionaries and Rawls: 'the theme common to much classical liberal doctrine that emerges from the deontological account of the unity of the self is the notion of the human subject as a sovereign agent of choice, a creature whose ends are chosen rather than given, who comes by his aims and purposes by acts of will, as opposed, say, to acts of cognition'.[515]

Burke tells us that humans are being created with social obligations and subject to the divine law. For Burke, it is only because humans are born under law with duties and obligations that they possess any meaningful status of equality. It is therefore incoherent to conceive of human equality and human dignity without conceiving of humans as subject to law and duty. Oliver O'Donovan articulates this idea well:

> the equality of all human beings cannot simply be posited, as in the notorious Rawlsian program which attempts to derive it from self-interest veiled in ignorance; it has to be grounded in a truth that is to be told about humankind's relations to that which is not humankind, and the only relation which answers the point is that in which each human being stands to the creator.[516]

For Burke then, the self is not prior to, but constituted by, the community in which it is always already situated. For the Burkean, the very basis of Rawls' project is questionable. It seems likely

[514] Robert Paul Wolff, *Understanding Rawls: A Reconstruction and Critique of a Theory of Justice* (Princeton: Princeton University Press, 1977) p. 179.
[515] Sandel, op cit., p. 22.
[516] Oliver O'Donovan, *The Ways of Judgement* (Cambridge: Eerdmans, 2005) p. 41.

that Burke would have been equally troubled by Rawls' understanding of the constitutional implications which follow from an account of free and equal citizens.

The original position

Having established the freedom and equality of citizens, Rawls seeks to establish principles of justice by which constitutional essentials and matters of basic justice may be settled. Rawls begins by explicitly dismissing any appeals to God's law, a moral order of values or the natural law preferring instead to decide the fair terms of social cooperation by an appeal to 'free and equal citizens engaged in cooperation'. In order to arrive at the 'first principles of justice'[517] which will determine the basic structure of society, Rawls believes it to be essential that our reasoning 'must be removed from and not distorted by the particular features and circumstances of the existing basic structure';[518] therefore in his view we must turn to abstract thought experiments. Rawls is attempting to carve a fine course, extracting his theory from particular social contingencies, yet avoiding transcendental metaphysical claims. As Sandel puts it, 'It is the original position that "enables us to envisage our objective from afar", but not so far as to land us in the realm of transcendence.'[519] It is in this area that Rawls is most heavily influenced by Kant and the original position can be seen as 'Rawls' response to the Kantian problem in the *Critique of Pure Reason*'.[520] What is important to this analysis though is that Rawls retains the autonomous and rational self which is implicitly present in Locke and is central to Kant's architectonic.

In the original position we are to imagine a veil of ignorance in which 'the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they

[517] Rawls, *Justice as Fairness*, p. 16.
[518] Ibid., p. 15.
[519] Sandel, *Liberalism*, p. 24.
[520] Ibid.

represent'[521] from this position they can decide the basic principles of justice as fairness. In beginning with a conception of man as free and equal, in employing reason to create principles of justice, in extricating oneself from existing society in order to do so and in expressly arguing that we can choose the basic structure of society through an appeal to popular will, Rawls' methodology seems vulnerable to Burke's criticisms of the revolutionaries. But why does Rawls go to such lengths to circumnavigate the moral realist's account of justice, and in particular, a religious account of justice? We have already seen that Rawls is responding to the issue of a pluralism of comprehensive doctrines, but at least part of Rawls' concern lies in his view of religious moral reason itself.

Rawls argues that if moral limits are determined by faith as opposed to reason, then they will be dogmatic and unnegotiable:

> an important difference between Rousseau and Locke, who advocated a limited toleration, and Aquinas and the Protestant Reformers who did not… with Aquinas and the Protestant Reformers the grounds of intolerance are themselves a matter of faith, and this difference is more fundamental than the limits actually drawn to toleration. For when the denial of liberty is justified by an appeal to public order as evidenced by common sense, it is always possible to urge that the limits have been drawn incorrectly, that experience does not in fact justify the restriction. Where the suppression of liberty is based upon theological principles or matters of faith, no argument is possible. The one view recognizes the priority of principles which would be chosen in the original position whereas the other does not.[522]

We have seen that Burke was a moral realist and yet he clearly believed that over time it is right that societies should evolve and change. This owed both to his belief in the epistemic and creaturely limitations of human beings and the view that moral matters were deeply complex and required much prudence and discernment. Burke's account was entirely contrary to Rawls' in this

[521] Rawls, *Justice as Fairness*, p. 15.
[522] Rawls, *Theory of Justice,* pp. 189-190.

sense. As a Christian and a reformer, Burke was perfectly content that justice took time and deliberation to work out. It was Rousseau and the contractarians' faith in their own reason which was to be feared, precisely because they were so certain in their ability to reason rightly. In this area Burke's thought offers a cogent response to Rawls' view of religious reason. Let us now contrast Burke and Rawls' conceptions of justice.

Two principles of justice

Now that Rawls has a method by which he can establish principles of social justice the next step of his project is to specify two principles of justice as fairness:

a.) Each person has the same indefeasible claim to a full adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

b.) Social and economic inequalities are to satisfy two conditions: first they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

Rawls writes that the 'first principle of justice applies not only to the basic structure (both principles do this) but more specifically to what we think of as the constitution, whether written or unwritten.'[523] As a direct result of the belief that we can specify the principles of political justice, Rawls moves to the belief that we can determine the basic structure and constitutional essentials of society.

Burke's conception of justice is very different to that of Rawls. Burke starts with God who has divinely decreed an eternal order of justice which is immutably present throughout the universe and is impressed upon the hearts of men. It is important to remind ourselves that Rawls does not

[523] Rawls, *Justice as Fairness*, p. 46.

preclude this possibility, yet neither does he endorse it, his project is purely political, which , for Rawls, means not metaphysical. We can at least say that in Burke's view justice is not, as Rawls would have it, a political notion of 'justice as fairness' settled by right reason without any reference to metaphysics or a particular religious tradition. Rather, Burke's account of justice is overtly metaphysical:

> There is one thing, and one thing only, which defies all mutation: that which existed before the world, and will survive the fabric of the world itself—I mean justice; that justice which, emanating from the Divinity, has a place in the breast of every one of us, given us for our guide with regard to ourselves and with regard to others, and which will stand, after this globe is burned to ashes, our advocate or our accuser, before the great Judge , when He comes to call upon us for the tenor of a well-spent life.[524]

As a part of God's eternal law, the role of justice in shaping the basic structure and constitutional essentials of a society is just as important for Burke as for Rawls, yet as we have seen Burke would have been disturbed by the idea that it is for us to conceive of the principles of justice and even more troubled by the idea that this can be done through rational reflection without any reference to an authority beyond popular volition. Furthermore, we have also seen that Burke would be scandalised by the suggestion that creating the basic structure of society and a just constitution was our prerogative, instead believing that eternal laws of justice would shape society over generations through the operation of judicial prudence.

Choosing constitutional essentials

Having established the relevant principles of justice, Rawls expresses the belief that we can now choose the constitutional essentials of our society. Rawls' belief that 'the political values of a constitutional democracy... can be worked out using the fundamental idea of society as a fair

[524] Edmund Burke, 'Indictment of Warren Hastings' in Lewis Copeland, Lawrence W. Lamm and Stephen J. McKenna (eds.), *The World's Greatest Speeches* (USA: Dover, 4th Ed., 1999) p. 164.

system of cooperation between free and equal citizens as reasonable and rational' [525] seems entirely contrary to the tenor of Burke's thought. In similar passages Rawls states that 'citizens' must with 'the greatest urgency...reach practical agreement in judgement about the constitutional essentials.'[526] Burke would most likely have viewed such a project as politically dangerous, undermining the institutional and legal bulwarks which have historically preserved the identity and liberty of the people. Burke may well have seen such a move as giving precedence to will over reason: 'Law and arbitrary power are in eternal enmity... he, that will substitute *will* in the place of [law], is an enemy to God'.[527]

As we have seen Burke did not consider us to possess such a prerogative, because humans do not have the authority to dissolve at will the constitutional essentials of a society and recast them as they think fit. Not only is society a contract between the living and the dead, but it is a contract between man and God. God's mystical action is present in society from its conception onwards ; he is envisaged as the very 'founder of society'. For Burke this meant that the constitution was not a machine to be dismantled and tinkered with, nor an unanimated corpse which could be subjected to the scalpel of reason, but something sanctified, something to be revered. Crucial to this picture is Burke's understanding of man. Man is born into a hierarchical universe ordered by God and a society ordained by God, as such he is endowed from birth with social duties and obligations. A state of society with obligations and fraternal bonds is man's natural habitat, not a crude isolated state of nature. The following passage taken from Burke's 'Appeal from the New to the Old Whigs', explicates these themes:

> the awful author of our being is the author of our place in the order of existence; and that having disposed and marshalled us by a divine tactick, not according to our will, but

[525] Rawls, *Political Liberalism,* p.126.
[526] Ibid., p. 227.
[527] Burke, 'Speech in the Impeachment of Warren Hastings', p. 169.

according to his, he has, in and by that disposition, virtually subjected us to act the part which belongs to the place assigned us. We have obligations to mankind at large, which are not in consequence of any special voluntary pact. They arise from the relation of man to man, and the relation of man to God, which relations are not matters of choice. On the contrary, the force of all the pacts which we enter into with any particular person or number of persons amongst mankind, depends upon those prior obligations. In some cases the subordinate relations are voluntary, in others they are necessary—but the duties are all compulsive. When we marry, the choice is voluntary, but the duties are not matter of choice. They are dictated by the nature of the situation. Dark and inscrutable are the ways by which we come into the world. The instincts which give rise to this mysterious process of nature are not of our making. But out of physical causes, unknown to us, perhaps unknowable, arise moral duties, which, as we are able perfectly to comprehend, we are bound indispensably to perform. Parents may not be consenting to their moral relation; but consenting or not, they are bound to a long train of burthensome duties towards those with whom they have never made a convention of any sort. Children are not consenting to their relation, but their relation, without their actual consent, binds them to its duties; or rather it implies their consent because the presumed consent of every rational creature is in unison with the predisposed order of things. Men come in that manner into a community with the social state of their parents, endowed with all the benefits, loaded with all the duties of their situation. If the social ties and ligaments, spun out of those physical relations which are the elements of the commonwealth, in most cases begin, and always continue, independently of our will, so without any stipulation, on our part, are we bound by that relation called our country, which comprehends (as it has been well said) "all the charities of all." Nor are we left without powerful instincts to make this duty as dear and grateful to us, as it is awful and coercive. Our country is not a thing of mere physical locality. It consists, in a great measure, in the antient order into which we are born. We may have the same geographical situation, but another country; as we may have the same country in another soil. The place that determines our duty to our country is a social, civil relation.[528]

[528]Burke 'Appeal from the New to the Old Whigs', pp. 206-207.

In this paragraph Burke counters some of the axiomatic claims of Rawls' contractarian thought. For Burke, the fraternal bonds which knit society together are not born out of a social contract, nor are they a product of reason, but they are given to us by a divine authority. He also tells us that we are born with divinely ordained obligations which, like the whole 'order of existence', are grounded in God's authority. We can see why, for Burke, any thought experiment which conceives of humans as free, equal and dislocated is unlikely to offer useful conclusions for the real concrete existence of actual humans. We have seen that Burke suspected that the 'reason' which the revolutionaries championed was in fact just an expression of their own human desires, and therefore their own will. For this reason Burke rejected any notion of choosing constitutional essentials and argued that the self is not prior to society and the will of individuals is not subordinate to true reason, namely the reason of ages, which accords with the divine moral law and which is resident in the constitution and in legal precedent.

The basis of political authority is one of the defining differences between the contractarian tradition and Burke's thought. As one commentator writes, 'the social contract, the veil of ignorance… and all of liberalism's other artificial mechanisms fail to account for the way authority works in the real world.'[529] Whether it be the spiritual authority of the Church, the legal authority of the constitution, the authority of our natural prejudices or the customary authority of the forefathers, all of these were deeply important anchors for Burke, who took the view that we live in a universe in which legitimately grounded authority precedes human will.

[529] Adam Macleod, 'A Review of Jean Porter's Ministers of the Law', *The Journal of Faith and the Academy*, Volume IV, Number 1 (Spring, 2011)

Overlapping consensus and public reason

Having argued that Rawls gives primacy to a belief in man's reason, it is important to analyse the next stage of his project in order to give his political philosophy a fair hearing. As we have seen Rawls seeks to provide a means by which all people can affirm the constitutional essentials and share a common basis for further political discussion. We have previously noted that Locke responded to the issue of different religious claims by separating the claims of religious belief from the role of government. In this way his political philosophy relied on the least controversial appeal to a creator of natural rights. The genius of Rawls' work is that he purports to find a novel solution to the initial liberal dilemma of facilitating peaceful coexistence whilst allowing freedom of religious belief. We have seen that Rawls has ostensibly constructed a political philosophy which has no need for an appeal to metaphysical rights. This neatly solves the issue of appealing to a deity in order to ratify these rights. Rawls cleverly argues that from within each citizen's own faith tradition they can subjectively affirm the liberal conception of justice. Rawls calls this idea 'overlapping consensus', writing that whilst citizens are expected to support the principles of justice 'we do not assume they do so for all the same reasons, all the way down'[530], this allows for citizens to have 'conflicting religious, philosophical, and moral views' and yet allows them to 'affirm the political conception from within different and opposing comprehensive doctrines'.[531]

This overlapping consensus is employed not just to affirm constitutional essentials, but also as a way in which society can come to decisions concerning public affairs. Rawls proposes that political decisions should be made on the basis of reasons which are transparent to the common reason of other citizens and not on the basis of privately held beliefs which other citizens would not consent to. Rawls writes, 'To justify our political judgements to others is to convince them by public reason,

[530] Rawls, *Justice as Fairness*, p. 32.
[531] Ibid.

that is, by ways of reasoning and inference appropriate to fundamental political questions, and by appealing to beliefs, grounds, and political values it is reasonable for others also to acknowledge',[532] continuing to state that 'when the premises and conclusions are not acceptable on due reflection to all parties in disagreement, valid argument falls short of public justification.'[533]

Whilst Rawls' idea sounds like a reasonable compromise for opposing traditions, one concern which has been raised by critics is that in reality Rawls' stream of liberalism is itself a comprehensive doctrine which takes precedence over any particular tradition, despite the fact that it works upon a purely political (and not a metaphysical) conception. Indeed Rawls himself is quite candid about this. In a section of *Political Liberalism* entitled 'Permissable conceptions of the Good and Political Virtues', Rawls frankly states:

> Justice as Fairness is not procedurally neutral. Clearly its principles of justice are substantive and express far more than procedural values, and so do its political conceptions of society and person, which are represented in the original position.[534]

Therefore, insofar as the ideological tenets of liberalism act as the filter which arbitrates what other traditions are allowed to articulate, contractarianism does not just, as some have claimed, prioritise the right over the good, but to some extent it does favour a particular account of the good. Rawls writes:

> Suppose that a particular religion, and the conception of the good belonging to it, can survive only if it controls the machinery of state and is able to practice effective intolerance. This religion will cease to exist in the well-ordered society of political liberalism.[535]

[532] Ibid., p. 27.
[533] Ibid.
[534] Rawls, *Political Liberalism*, p. 192.
[535] Ibid., p. 154.

Therefore, in keeping with what we have seen in earlier contractarian philosophies, the revealed truths of Christianity and a belief in a teleologically ordered creation, find their public limits within the contractarian account of man as a reasonable being who possesses natural rights. Furthermore, Locke's fear that citizens will offer ostensibly public reasons whilst harbouring private motives seems to be a real danger in Rawls' scheme, which screens anything that does not conform to his account of reasonableness.

Maureen Ramsay gives voice to the concern that Rawls' solution is not simply a fair means of arbitration but the prioritisation of a more substantive liberal ideology. She is particularly concerned with the original position which provides the basis for Public Reason, writing 'the original position is infected with the premises, concepts and values of liberalism'.[536] She proceeds to make a comment which could have been penned by Burke: 'the asocial, atomistic, solitary, self-seeking free and equal person represented in the original position is so abstracted it is difficult to conceive of such a 'stripped down' individual being motivationally relevant to actual existing people'.[537] Her fear that people will continue to be motivated by interior prejudices but simply articulate them in a manner which conforms to the liberal ideology is one which should cause concern for both those who desire freedom of speech and transparency of motivations.

At first glance Rawls' theory may seem a striking innovation to the Kantian problem of engaging with ethical questions without making metaphysical claims. Yet in reality there are serious questions as to whether it is possible to assert a political conception of free and equal persons. Affirming this political conception from the basis of various faith traditions seems little different from the traditional liberal appeal to a loosely defined supreme being. In the end, Rawls' liberalism only seems to offer a conditional promise of freedom to religious citizens, providing that in public

[536] Maureen Ramsay, *What's Wrong with Liberalism*, p. 114.
[537] Ibid., p. 115.

they consign themselves to beliefs which accord with the premises of contractarian thought. In this way man's natural reason provides the parameters within which religion must be framed.

Rawls seems to remain within the tradition of contractarian liberalism which seeks to renovate the existing social order in accordance to a political model premised on an idea of the individual. The potential dangers with this aspect of liberalism were voiced by the common lawyer William Blackstone long before the French Revolution ever made his prophecy manifest: 'The principles of Mr. Locke... would have reduced society almost to a state of nature; would have levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity'.[538] Burke agreed with this analysis when he was confronted with the idea of the sovereignty of popular will in his own day. As we have seen Burke argued that Britain already had a means by which matters of basic justice and constitutional essentials were established and it was not through the popular will of a people implementing that which the *philosophes* deemed to be reasonable.

Conclusion

In this section we looked at Burke's understanding of political authority. We saw that Burke believed that political authority was not derived from the people, but from God. We saw how, for Burke, this led to the view that the constitution and the common law were vested with an authority which the arbitrary will of men simply did not have the authority to overturn. Furthermore, we saw that it was on the basis of his belief in the sovereignty of the natural law that Burke rejected the idea that popular democracy was the final court of arbitration. Contrasting this with Rawls, I argued that Rawls' belief that principles of justice are for us to decide by virtue of our reason would have

[538] Blackstone quoted in Stanlis, *Edmund Burke and the Natural Law*, p. 136.

been deeply troubling for Burke. Similarly the Rawlsian idea that we might choose constitutional essentials for ourselves by means of abstract reflection falls prey to some of Burke's sternest criticisms. I have also shown that both of these Rawlsian ideas emerge from an axiomatic belief in humans as free, equal and rational. From these anthropological axioms, we have seen that Rawls attempts to construct a conception of government by means of the original position, which functions in a similar manner to the social contract. In the methodological approach of his project, as well as the axiomatic anthropological beliefs, I have pointed out the distinct similarities between Rawls and the prior contractarian thinkers we have looked at. Now that we have looked in some detail at the contractarian tradition and Burke's own political thought I wish to dissect the political principles which animated Burke's critique of contractarianism. In the next section I will enumerate these principles and argue that they emerge from a theological worldview and, as as result, they are deeply consonant with the Christian faith.

Chapter Five

The Six Theo-Political Principles of Burkean Conservatism

All persons possessing any portion of power ought to be strongly and awfully impressed with an idea that that they act in trust; and that they are to account for their conduct in that trust to the one great master, author, and founder of society. This principle ought even to be more strongly impressed upon the minds of those who compose the collective sovereignties, than upon those of single princes

- Edmund Burke, *Reflections on the Revolution in France*

There can be no genuine conservatism which is not founded upon a religious view of the basis of civil obligation, and there can be no true religion where the basis of civil obligation is treated as purely secular.

This has been the conclusion of so many different Conservative thinkers that I should be utterly untrue to the Conservative tradition as well as to my own conviction were I not to say so.

- Baron Hailsham, *The Case for Conservatism*

Introduction

Up to this point we have brought the political thought of Edmund Burke into dialogue with three different instantiations of the contractarian tradition. In the preceding analysis we saw that Burke offered arguments against a radical contractarian tradition characterised by a conception of pre-social man who is rational, autonomous and a bearer of inalienable rights. Burke identified that it was this distinctive anthropology and its concomitant account of reason which undergirded the

social vision of the revolutionaries. We have seen Burke offer a variety of arguments which seem to emerge from a body of political principles. In this section I wish to pinpoint six practical political principles which can be identified in Burke's writings and in the political tradition which followed him. I shall argue that there is a congruence between the theological claims of the Christian faith and the political principles which characterise the conservative approach to politics. It is important to note that I am not making the claim that Burke and other conservatives would have articulated these principles in such overtly theological terms. In fact, one might suspect that Burke himself may have been uncomfortable with distilling a body of principles from his writings at all. Nevertheless, I will maintain that the principles are present in Burke's thought and that they emerge from his Christian worldview.

Conservatism and Christianity: a glance at the conservative tradition more broadly

Firstly, let us recapitulate what is meant by the term 'conservative'. One might argue that to speak of the history of conservatism is too ambiguous. Burke himself was a Whig and his admirers have included Whigs, Tories, utilitarians, liberals and socialists. Furthermore, the tradition that is commonly identified as conservative is comprised of individuals with substantially divergent political views. The One Nation Conservatism of Disraeli was markedly different from the modernising and free marketeering conservatism of Robert Peel and Lord Aberdeen. Furthermore, Christian Liberals such as Gladstone were deeply influenced by Burke and would have been sympathetic to most of the principles outlined in this chapter, largely on the basis of his Christian faith. Despite the potential ambiguity in speaking of 'conservatism', I shall identify the principles that I outline as Burkean conservative principles. I shall use the term 'Burkean' because Burke articulated these principles more clearly than any other thinker and I shall use the term 'conservative' because these principles have chiefly been associated with the conservative

tradition, though, as I have argued, there were notable articulations of these principles before Burke.

In this chapter I hope to show that it is not a coincidence that the political principles which define conservatism seem to resonate with the foundational assumptions of the Christian faith. We have already examined the Anglican faith of Burke and his intellectual influences. We have seen that Burke's Christian anthropology, eschatology and his belief in the natural law as a force of social formation was an important influence upon his politics. Both those who have been identified as influences upon Burke, and those conservatives who followed Burke, have predominantly been Christians. Richard Hooker, Lord Liverpool, Samuel Coleridge, Alexis de Tocqueville, Cardinal Newman, George Canning, Robert Peel, Benjamin Disraeli, Lord Salisbury, G.K. Chesterton, Stanley Baldwin, T.S. Eliot, Christopher Dawson, Russell Kirk and Baron Hailsham; all of these figures held an approach to politics, which we might (in some cases anachronistically) call conservative, on the basis of Christian convictions. This is an important point because it means that the subsequent task should not be conceived of as a quest to draw points of coincidental consonance between two distinct traditions. Rather, I shall seek to make the conceptual case that the set of political principles which characterise this conservative tradition naturally emerge from predominantly Christian presuppositions, and as a result the principles which define the tradition are hard to articulate aside from them. This is true also of the conservative critique of liberalism. As Peter Stanlis writes, it was 'In the principles and history of Anglicanism, no less than in Catholicism, [that] Burke found much that opposed theories of primitive or "natural" society, much that nourished a system of civil manners which made possible the development of a free and just society.'[539]

Conservatism as a set of political principles and not political ideology

[539] Stanlis, *Edmund Burke and the Natural Law*, p. 204.

I wish to begin this analysis from the premise that all approaches to politics are vitalised by a tension between what is and what ought to be the case. In other words there is an ethical consciousness at the heart of political discourse which pursues a perceived set of normative social goods. As such, from a Christian perspective, politics ought not to be conceived in purely secular terms but must always be a facet of the Christian ethical life. As William Temple wrote, 'If Christianity is true at all it is a truth of Universal application; all things should be done in the Christian spirit and in accordance with Christian principles.'[540]

The Christian gospel is charged with the tension between what is and what ought to be. For the Christian the 'ought' which drives their engagement with the world is not solely a product of reason or human imagination but the received promise of a coming kingdom which has arrived in part but will one day reign in full. The crucial implication of this belief is that for Christians there can be no utopian political solution short of the eschaton, when the King himself will rule the kingdom and 'establish it with judgement and with justice henceforth and even forever.'[541] Until the advent of that new age all human polities will be marred by the sin and strife which are endemic to the world and the human condition. This belief is both religious and incontrovertibly political. In one breath it defies the claims of ideologies which promise salvation from our own fallenness and insists upon the contingency and imperfectability of any political system. This is explicated with the vivid Parable of the Tares in Matthew 13. Until the Coming of the Kingdom the wheat and the tares will grow side by side, good and evil will cohabit in the city of man. Political ideologies which do not begin with an admission of God's kingship are often marked by one commonality; a belief in the kingship of another who can bring right order and enduring peace to the polity. In short, idolatry paves the road to ideology. If the Christian is to have any approach to politics at all it cannot be an

[540] William Temple, *Christianity and Social Order* (London: SCM Press, 1950) p. 48.
[541] KJV, Isaiah 9:7.

ideological approach, because the vision of the coming Kingdom is neither for the labourers to fully know nor to fully consummate. If Christians are to engage in politics then, they must be mindful of God as the architect of the coming kingdom. This means forfeiting pretensions to the divine mind and ultimately bowing the knee to the authority of God's rule in Christ. Practically, in the eschatological interim which we inhabit this involves a refusal to accept political ideologies, especially those which hold out an illusory promise of enduring peace and true freedom aside from Christ. As Oliver O'Donovan writes, 'Just as there is only one true throne, so there is but one structured human community, and there can never be a second.'[542] To these points we shall return.

Conservatism, I shall argue, offers a *via media* between despairing pessimism at the possibility of any stable political project outside of Christ's final rule and the endeavour to instate an earthly utopia. It is at this juncture that we must draw a clear distinction between political principles and political ideology. Burke's conservatism, insofar as it is a political philosophy at all, is composed of principles, there is no grand political architecture which emerges from a set of axioms and climaxes in a prescriptive vision of how the polity ought to look. Fascism, communism and contractarian liberalism have all, at certain points in history, taken such an ideological form. Burke's conservatism offers no such universal vision.[543] In this regard the conservative tradition has arguably been subject to a misnomer; one could make the case that at the foundation of Edmund Burke's conception of social order is not conservation but the admission that God is the sovereign founder and sustainer

[542] Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996) p. 156.
[543] We have seen that in rejecting the idea that ethics and politics were in the domain of speculative reason, Burke rejected the idea that a universally normative form of government or society could ever be deduced. Instead Burke believed that political forms and ethical questions were contingent upon circumstance.

of the state, without whose authority it would be illegitimate.[544] Conservation would then be but one ancillary principle that emerges from this central admission.

This idea has been clearly articulated in Anglican social thought. In *Christianity and Social Order* William Temple wrote, 'There is no such thing as a Christian social ideal, to which we should conform our actual society as closely as possible... But though Christianity supplies no ideal in this sense, it supplies something of far more value – namely, principles on which we can begin to act in every possible situation.'[545] Burkean conservatism I would contend is merely a body of such principles, by no means exhaustive but nevertheless comprehensive, formulated primarily by Christians and indebted to their worldview. Conservatism then is an integrated set of political principles, emerging from a Christian worldview to which the admission that God is sovereign is basic. As such, these principles actively seek to establish right order within a specific context whilst resisting any prescriptive political vision precisely because of the admission that God is sovereign.

One criticism of conservatism is that it offers no social vision, no universally normative account of what a society ought to look like. It merely affirms an arbitrary status quo and petulantly resists the tides of change. I will argue that this criticism is entirely valid if conservatism is divorced from its Christian moorings. It is of course true that conservatism is a broad church and there are conservatives who simply articulate a belief in maintaining social stability by resisting change, David Hume being the forefather of this line of conservatism. Yet we have seen that this is not Burkean conservatism. Indeed one might argue that Hume's conservatism strays very close to making

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[544] Burke made this point clearly on several occasions: 'All persons possessing any portion of power ought to be strongly and awfully impressed with an idea that that they act in trust; and that they are to account for their conduct in that trust to the one great master, author, and founder of society. This principle ought even to be more strongly impressed upon the minds of those who compose the collective sovereignties, than upon those of single princes', Burke, 'Reflections on the Revolution in France', pp. 177-178; 'We know and we feel inwardly that religion is the basis of civil society, and the source of all good and all comfort', Burke, 'Reflections on the Revolution in France', p. 173.

[545] Temple, op cit., p. 52.

conservation a first principle from which a conservative ideology could feasibly arise.[546] I shall argue that the great advantage of Burke's political thought, for the Christian, is that it offers no grand political framework and therefore allows a religious vision to occupy the heart of the ethical-political endeavour.

Conservatism, as I have defined it, is not a theocracy precisely because it limits itself to a body of political principles which emerge from a Christian's practical engagement with politics. A theocracy by contrast would seek to instate a comprehensive political vision, dragging the divine into the contingent. A Christian eschatology defies the belief that God's consummated rule could ever be reduced to a political formula which weds the New Jerusalem to Babylon. It is precisely because God's final rule will exceed the transience of the present age that theocracy cannot be an alternative for Christians. T.S. Eliot wrote that 'to identify any particular form of Government with Christianity is a dangerous error: for it confounds the permanent with the transitory, the absolute with the contingent'.[547] At the heart of the conceptual consonance between Burkean conservatism and Christianity lies Burke's refusal to offer a political architecture which will right the wrongs of the world. The distinction between principles and ideal political systems was one which Burke himself made clear:

> When I praised the British constitution and wished it to be well studied, I did not mean that its exterior form and positive arrangement should become a model for you, or for any people serviley to copy. I meant to recommend the principles from which it has grown, and the policy on which it has been progressively improved out of elements common to you and to us.[548]

[546] Though it would be hard to see how such an ideology could be universal in scope, it would nevertheless be a likely source of concern for the Christian.
[547] T. S. Eliot, *The Idea of a Christian Society* (New York, NY: Harcourt, Brace, 1939) p. 57.
[548] Edmund Burke, 'Letter to a member of the National Assembly', pp. 57-58.

In a similar passage he wrote:

> without the guide and light of sound, well-understood principles, all reasonings in politics, as in everything else, would be only a confused jumble of particular facts and details, without the means of drawing out any sort of theoretical or practical conclusion[549]

Historically speaking it is not a coincidence that conservatism finds principles preferable to a substantive vision of an ideal political arrangement, the simple reason for this is that by and large most conservatives already had a conception of Heaven and it was not on earth. Seminal Conservative thinkers have advocated conservation in the conviction that we inhabit an interim. As a result they did not strive for the eschatological fulfilment of all things but instead adopted an attitude of caution, aspiring to preserve just institutions, truth and right judgement where they found it. Burke did not resist the involvement of religious feeling in politics but actively resisted any attempt to instate Heaven on earth. To the pragmatist who would say that conservatism ought to favour these principles not because of their Christian roots but because they work, the Burkean conservative might reply that they work because they are attuned to the true realities of the world which are explicated by the Christian faith. To this principle we now turn.

Principle 1.) reckoning with reality

In the 1960's the United States found its historically Christian culture challenged both internally and externally by communism and socialism. In opposition to this challenge there arose a conservative outcry. Russell Kirk was perhaps the chief trumpeter of the distinction between ideological dogma and conservative principle. Kirk wrote that 'the attitude we call conservatism is sustained by a body

[549] Burke, 'Speech on the Petition of the Unitarians', *Works,* Vol. X, p. 41.

of sentiments, rather than by a system of ideological dogmata.'[550] The Burkean conservative Gerhart Niemeyer puts it aptly:

> conservatism cannot be a doctrine, as liberalism and socialism are. So it is true what Irving Kristol, accusing forefinger raised, has said about conservatism: it had and has no ideology. And it is true what William Buckley remarked in *The Jeweler's Eye*, that conservatism cannot be defined because, in its essence, it is an attitude. One can only describe it empirically: "Look - this is a Conservative!"[551]

In Burke's critique of the liberalism in his own day we can see a sustained attack upon what he believed to be an element of fantasy in the thought of contractarian thinkers. From the state of nature, to natural rights and a belief in a political framework which could be deduced from such first principles. Burke's exasperation was centred on the fact that if such doctrines do not correspond to reality then instead of heaven on earth, the liberal society would risk declining into hell on earth no matter how benign the revolutionaries' intentions, 'A man full of warm, speculative benevolence may wish his society otherwise constituted than he finds it, but a good patriot and a true politician always considers how he shall make the most of the existing materials of his country.'[552] As we have seen it was Burke's political realism which grounded his belief in the necessity of stable and legitimate governance. In this respect Burke's affinity with the common law tradition is no coincidence, as Roger Scruton notes:

> Law is constrained at every point by reality, and utopian visions have no place in it. Moreover the common law of England is proof that there is a real distinction between

[550] Russell Kirk, 'Ten Conservative Principles', http://www.kirkcenter.org/index.php/detail/ten-conservative-principles/, (accessed 22nd October 2013).
[551] Gerhart Niemeyer, 'Russell Kirk and Ideology', *The InterCollegiate Review*, Vol. 30 (Fall, 1994) pp. 35-38. p. 36.
[552] Burke, 'Reflections on the Revolution in France', p. 285.

> legitimate and illegitimate power, that power can exist without oppression, and that authority is a living force in human conduct [553]

Burke's political realism, which I have argued emerges from a Christian inheritance rooted in Thomism and Aristotelian realism brought him into opposition with the liberal doctrines which he perceived served as the justification for the revolutionaries' voluntaristic approach to politics. As Joseph Pappin III writes, 'I hold that it is irrefutable that Burke's politics adheres to a natural law foundation which permeates his thinking' it was 'the off-spring of his theistic stance' and it grounds his 'realist understanding of human nature.'[554]

This is a critical point of conjunction between the Christian and the conservative. The inherent realism which grounded Burke's view of human nature and the physical and spiritual world provided the basis for a gritty engagement with reality, in which the necessity for bulwarking oneself against the fact of human evil is readily apparent. C.S. Lewis famously wrote that 'I believe in Christianity as I believe that the sun has risen: not only because I see it, but because by it I see everything else'.[555] A Christian worldview has framed the political discourse of many in the conservative tradition. From a Christian perspective, this has enabled them to see reality with a more acute focus. Gerhart Niemeyer writes:

> Conservatives know each other by their intellectual openness toward reality: the immediate reality of social, economic, and political relations, and the divine reality beyond and above this world. Beyond this openness, conservatives cannot say much about themselves. They pretend no firm system of ideas about the means to deal with life's troubles.[556]

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[553] Roger Scruton 'Why I Became a Conservative', in *The New Criterion*, Vol. 21, (Feb, 2003) p. 4.
[554] Joseph Pappin III, 'Edmund Burke's Progeny: Recent Scholarship on Burke's Political Philosophy', *Political Science Reviewer*, Vol. 35 (2006)
[555] C.S Lewis, 'Is Theology Poetry?' in *The Weight of Glory: And Other Addresses* (New York, NY: 1949, HarperCollins) p. 140.
[556] Niemeyer, op cit. p. 36.

As we have seen Burke held a belief in the illuminating nature of the Christian faith and it undergirded his conviction that all men, particularly those of any great influence, should consider themselves to have a religious vocation. William Temple writes, 'Christians have some clues to the understanding of human nature which may enable them to make a more accurate estimate than others of these points. But they will not, if they are true to their own tradition, approach the question with rosy-tinted spectacles. Its assertion of Original Sin should make the Church intensely realistic, and conspicuously free from Utopianism.'[557] To this principle we turn.

Principle 2.) An acute consciousness of human fallenness, human creatureliness and human sociality

One characteristic which is closely aligned with the epistemic realism inherent in Burke's thought is a political realism as to the nature of uncivilised man. For the Christian this is the most basic of doctrines at the heart of the Christian faith. In all areas of life Christians must reckon with the fallenness of man and the consequences which will arise if man's sinful nature is left utterly autonomous and unchecked. As it is articulated in the Thirty Nine Articles, 'it is the fault and corruption of the Nature of every man, that naturally is ingendered [sic] of the offspring of Adam; whereby man is very far gone from original righteousness, and is of his own nature inclined to evil, so that the flesh lusteth always contrary to the spirit'. Divorced from this most basic admission the Mosaic Law, the incarnation, the resurrection, the Church and the eschatological renewal are all rendered incomprehensible. One might question whether, at root, the contractarian tradition refuses the image of Adam shamed and banished from Eden and the image of Cain, standing bloodied over his lifeless brother. Temple again makes the point well, 'the political problem is concerned with men as they are, not with men as they ought to be. Part of the task is so to order

[557] Temple, op cit., p. 51.

life as to lead them nearer to what they ought to be; but to assume that they are already this will involve in certain failure and disaster.'[558]

Temple's voice is aligned with that of Burke's two hundred years after Burke's assessment of liberalism's basic doctrines, which he believed to be unduly optimistic about the reality of man's nature in an uncivilised wold devoid of the rule of law. Burke lamented that the revolutionaries 'systematically corrupt a very corruptible race'.[559] His view of man was characterised by an optimism about the place of man in God's original creation and the capacity for man to do good should he be governed properly, but a profound sobriety regarding the nature of man ungoverned and loosed from all chains of social restraint.

Beyond the fallenness of Adam's progeny, the Christian doctrine of man offers an anthropology which stands in tension with that offered by the contractarian tradition. Firstly, the Christian doctrine of man begins at a temporal point with man as a created being affirmed by God (Gen 2). It is in God's prior affirmation that man is defined and his relations with others are defined (1 John 4:19). O'Donovan writes:

> sociality itself is not a bare empirical *datum*, but a historical and eschatological destiny. It is something we cannot pretend to get behind, as though there were a pre-social individual human nature with "basic needs" that generated society as an instrument for its own protection. When God said "it is not good for man to be alone," that was not an afterthought, but the determining moment in the creation of the human race.[560]

We shall turn shortly to the conservative understanding of man's natural affections and prejudices, but for now we can simply note that Burke was consistently clear that man is naturally a social being, always and already in community with those around him and conditioned by those who have

[558] Temple, op cit., p. 50.
[559] Burke, 'Letter to a Member of the National Assembly', p. 36.
[560] Oliver O'Donovan, *The Ways of Judgement*, p. 241.

come before him and ultimately in relation with his divine maker. Because of this conviction one of his main gripes against the 'Synagogue of Antichrist' by which he meant 'the sect which predominated in the Constituent Assembly of 1789' was that 'All their new institutions, (and with them everything is new,) strike at the root of our social nature'.[561] Such an understanding of the sociality of man ran deep in his intellectual bloodline from Cicero, Hooker and the Anglican divines to Coke and Blackstone. The sociality of man finds its most comprehensive articulation in Burke's redefinition of the social contract and it underlies his convictions concerning the civil tissue which binds the social body together, to these convictions we shall shortly return.

If Burke's engagement with politics was mindful of man as an always already relational being, dependent from her very conception, endowed with duties by her creator and always ontologically dependent upon another, we have seen a more complicated picture in the contractarian tradition. The Burke scholar Niemeyer cites the inherent sociality of man as one reason that we cannot 'fall back on Locke's human rights, the condition on which each isolated person enters human community by the gate of *quid pro quo*. These and other similar worldviews have nothing to say to the reality of living human beings with body and soul, mind and spirit'.[562] Whilst we have seen that Locke did in fact stress the importance of particular civic duties, Niemeyer might rightly point towards the social contract to illustrate a social atomism in Locke's conception of society. The Christian belief that humans were from their conception social and dependent beings, militates against the liberal reductionism which draws conclusions about the normative form society should take from the alleged character of the pre-social individuals who compose the whole. Ramsay comments on this writing that liberal theories of society 'are reductionist in that they assert that

[561] Edmund Burke, 'Letters on a Regicide Peace', pp. 173-174.
[562] Niemeyer, op cit.

the compositional units of the whole are ontologically [and chronologically] prior to the whole'.[563] As a result, the polity proposed by the contractarians of Burke's day, was a society which, Burke believed, had an excessive esteem for autonomy, denying the need for dependence and ultimately magnifying the aberrant excesses of man's fallen nature instead of curbing them. Burke argued that it was because of human vanity that the revolutionaries enthroned the individual; speaking of Rousseau's influence he wrote 'under this philosophic instructor in the ethics of vanity, they have attempted in France a regeneration of the moral constitution of man',[564] as a result the revolutionaries revelled in 'absurd theory'.[565] In Burke's estimation such individualism would ultimately bear toxic fruit, 'the commonwealth itself would, in a few generations, crumble away, be disconnected into the dust and powder of individuality, and at length dispersed to all the winds of heaven.'[566]

Burke's anthropology, as we have seen, is more closely approximated to the Christian doctrine of man than the Lockean man in the state of nature. Burke wrote of the revolutionaries, 'This sort of people are so taken up with their theories about the *Rights* of man, that they have totally forgotten his *nature*'.[567] Conservatives such as Russell Kirk have argued that the corroding power of sin is indifferent to the hypothetical distinctions between public and private. If sin is deemed acceptable and even encouraged in our private lives then, like a virus, it will inevitably pervade the public life of the polity. As an approach to politics which embraces reality at its most acute, conservatives from Burke to Kirk have articulated an account of man as a fallen yet inherently social, created

[563] Maureen Ramsay, *What's Wrong with Liberalism*, p. 8.
[564] Burke, 'Letter to a member of the National Assembly', p. 36.
[565] Ibid., p. 3.
[566] Burke, 'Reflections on the Revolution in France', p. 183.
[567] Ibid., p. 130.

being. As the Burke scholar Richard Hoff wrote: 'The most important questions about the human race Burke answered from the Church of England's catechism'.[568]

Principle 3.) A refusal of ideological claims

We have already noted that if Christians are to be true to the gospel proclamation of Christ's lordship then they cannot accept political ideology because the absolute cannot be assimilated to the contingent. An acknowledgment of God's Kingship and the new order of creation held together in Christ, defies the absolute pretensions of temporal authorities and demands that their judgements are subordinated to God's if they are to be legitimate. By this definition ideology does not hold the admission that 'Jesus is Lord', instead proclaiming the lordship of another, in the case of Bolshevik communism, economic equality, in the case of Nazi fascism the nation state, and, in its worst form, we have seen that contractarian liberalism has enthroned a conception of the autonomous man. In what Burke referred to as a form of 'political geometry', ideologies of all stripes draw a blueprint of the polity in accordance to a governing first principle. In attempting to reorder society towards a distinctive teleology other social goods become disordered and the fabric of the nation is torn apart. As O'Donovan puts it: 'A social order based on a single principle, however fine, becomes ideological; and a political theology which defends freedom without filling it out with the content of the divine command and the divine redemption of society in Christ is ideologically liberal'.[569]

Rather than men being stewards in the creative project, ideologies assert a political architecture which the labourers are so transfixed upon that they are wilfully blind and deaf to God's active voice in the polity. In Matthew's gospel, Christians are admonished to be ever vigilant against false

[568] Ross Hoffman and Paul Levack, *Burke's Politics* (New York, NY: Alfred A. Knopf, 1949) p. xiv.
[569] O'Donovan, *Desire*, p. 250.

prophets who come with messianic pretensions (Matthew 24: 3-8). During the Twentieth Century the Church has been acutely aware of the threat of ideology. In 1891 Pope Leo XIII penned *Rerum Novarum* in which he condemned the materialism of free market liberalism as well as the ideologies of communism and socialism. In 1931 Pope Pius XI argued in *Quadragesimo Anno* that communism and socialism in all their forms could find no truce with the Christian religion precisely because they idolised the material means of production and excluded the gospel. He wrote 'let all remember that liberalism is the father of this Socialism that is pervading morality and culture and that Bolshevism will be its heir'.[570] This is a critique that was strongly supported in *Mater et Magistra* by Pope John XXIII. More recently Pope Benedict XVI issued *Caritas in Veritate* in which he warned against 'merely human' utopian and ideological visions posed by technology and a blind faith in the free market.[571] Protestants have been no less alive to the threat. In Karl Barth's 1934 'Theological Declaration of Barmen' the point was forcefully made that ideologies of all stripes must be considered pretenders to the throne of Christ and must be rejected by Christians, whose vocation is to preach the gospel, not least to the state. As Russell Kirk pointed out, 'Ideology is inverted religion' which operates by 'denying the Christian doctrine of salvation through grace in death' instead holding the illusory promise of 'salvation here on earth'.[572] The reality of God's sovereignty conflicts with all ideological claims which is why Karl Rahner defined ideology as 'an erroneous system which must be rejected by a true interpretation of reality'.[573]

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[570] Pope Pius IX, *Quadragesimo Anno* [Encylical Letter on Reconstruction of the Social Order], sec. 122, http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html, (accessed 21st January, 2015).
[571] Pope Bendedict XVI, *Caritas In Veritate* [Encyclical Letter on Integral Human Development in Charity and Truth], sec. 53, http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html, (accessed 21st January, 2015).
[572] Kirk, op cit., p. 4.
[573] Karl Rahner, "Ideology and Christianity," *Theological Investigations*, trans. Karl-H. and Boniface Krueger (Baltimore: Helicon, 1969) Vol. VI. pp. 43-58.

The conservative tradition has, at its roots, a scepticism of totalising ideologies and a deep respect for creative human freedom in civil society (a theme that is also recurrent in Catholic and Anglican Social thought). This lack of comprehensive political vision preserves a sanctified space for the joint operation of God and man, one site of which is in man's prayerful prudence. Oliver O'Donovan writes, 'God builds God's kingdom. But God has ordered his world in such a way that his own work would take place not least through one of his creatures in particular, namely the human beings who reflect his image... He has enlisted us to act as his stewards in the project of creation.'[574] It is for this reason that the Christian must reject an ideal form of government in favour of a system of government that seeks to conform itself to God's law, as Pope Leo XIII wrote, 'by the State we here understand, not the particular form of government prevailing in this or that nation, but the State as rightly apprehended; that is to say, any government conformable in its institutions to right reason and natural law'.[575]

Burke reminds us that a healthy society consists in the gradual accumulation of a body of law which by means of prudence nurtures society as an organism, to embody the ends ordained by its creator. For Burke, the Christian gospel assists in every stage of this task furnishing society with customs and manners. He clearly believed that religion was closely associated with the 'observance of law and order' and 'honest industry'.[576] Burke rejected the suggestion that the complex web of human life, replete with myriad social goods which often operate in a symbiotic symphony, could be reduced to one governing first axiom. The one first axiom which I believe one might justifiably cite at the heart of Burke's work is that of God's sovereignty. From a Christian perspective, a foundational belief in the sovereignty of a relational God cannot be distilled into an idol and thus defies attempts at

[574] O'Donovan, *Desire,* p. 218.
[575] Pope Leo XIII, *Rerum Novarum*, [Encyclical Letter on Capital and Labour], sec. 32, http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html, (accessed 21st January, 2015).
[576] Burke, 'An Abridgement of the English History', p. 293.

geometrical system building. To assert God's sovereignty is to defer to the untameable, ineffable and incomprehensible mystery of God's own being, moreover it is to accept that his ways are unfathomable and his thoughts untraceable. The admission that God alone is rightfully the founder, sustainer and guide of society encourages a radically different approach to the political endeavour. No longer are we political architects drawing a blueprint for the polity, but we are labourers attentive to the director's voice in each concrete circumstance by means of prayerful prudence.

In such a picture, the movement is from God to man, not man to God. The gospel narrative relates how man was unable to attain his own salvation by great works but instead the absolute plunged into the particular and met man in a set of concrete circumstances. So in their approach to politics Christians must reject any attempt to attain their own salvation, which has already been attained, instead remaining attentive to the word of God who meets them in their particular needs. With this cultural admission alone can the pre-rational intuitions and religious instincts which grasp at the divine mystery oppose a purely rational architectonic centred on the maximization of foundational axioms and the reordering of society towards that end.

This conviction does seem to be present in Burke's writings and is implicit in such passages as the following: 'can it be imagined… that He will suffer this great gift of government, the greatest, the best, that was ever given by God to mankind, to be the plaything and the sport of the feeble will of a man, who, by a blasphemous, absurd, and petulant usurpation would place his own feeble, contemptible, ridiculous will in the place of Divine wisdom and Justice?'.[577] In Burke's own wrestlings he found recourse in cautious prudence instead of an abstract rule, 'To enable us to correct the Constitution, the whole Constitution must be viewed together; and it must be compared with the actual state of the people, and the circumstances of the time… Please God, I will

[577] Burke, 'Speech in the Impeachment of Warren Hastings', pp. 166-167.

walk with caution, whenever I am not able clearly to see my way before me.'[578] Speaking of the Christian religion as the cornerstone of the English system of government, Burke wrote, 'The body of all true religion consists, to be sure, in obedience to the will of the Sovereign of the world, in a confidence in his declarations, and in imitation of his perfections.'[579] Burke is quite clear that the enthronement of enlightenment reason was no substitute for the guiding light of wisdom, 'Dr. Price seems rather to over value the great acquisitions of light which he has obtained and diffused in this age'.[580] In Burke's view it was a misplaced faith in man's reason which caused the revolutionaries to 'march from error to error, through a dry desert, unguided by the lights of heaven, or by the contrivance which wisdom has invented to supply their place.' Burke intimated that in turning away from the 'lights of heaven', the vainglorious ideology of the revolutionaries followed in the footsteps of Satan's own self apotheosis:

> They endeavour to destroy that tribunal of conscience which exists independently of edicts and decrees. Your despots govern by terror. They know that he who fears God fears nothing else; and therefore they eradicate from the mind, through their Voltaire, their Helvetius, and the rest of that infamous gang, that only sort of fear which generates true courage. Their object is, that their fellow citizens may be under the dominion of no awe, but that of their committee of research, and of their lanterne.[581]

If Burkean conservatism holds an admission of God's sovereignty, it is no coincidence that his political thought seems unsystematic and even inconsistent at times. Burke believed the statesmen's thought ought to be regulated by a prudence ever present of God's sovereignty in complex concrete circumstances. He made the point clearly in his *Speech to the Electors of Bristol*,

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[578] Edmund Burke, 'A Letter to the Chairman of the Buckinghamshire Meeting, Held at Aylesbury, April 13, 1780 on the Subject of Parliamentary Reform' in *Selected Writings and Speeches of Edmund Burke*, pp. 383-384.
[579] Burke, 'Reflections on the Revolution in France', p. 289.
[580] Ibid., p. 132.
[581] Burke, 'Letter to a Member of the National Assembly', p. 41.

in which he defined the role of a statesman, 'His enlightened conscience, he ought not to sacrifice to you; to any man, or to any set of men living. These he does not derive from your pleasure; no nor from the Law and the Constitution. They are a trust from Providence, for the abuse of which he is deeply answerable.'[582] His contractarian adversaries by contrast had, in his view, no qualms at putting prudential considerations to the altar of a governing first principle. Burke was clear that in idolising their philosophy the revolutionaries sought to abolish true religion, 'They who will not believe that the philosophical fanatics who guide in these matters entertain a design of utterly abolishing the Christian religion… are utterly ignorant of its character and proceedings.'[583]

Burke perceived that from the admission of God's sovereignty follows the right order of the nation, political and civil. The following passage paints a graphic picture of what Burke envisaged when a nation turned its back on God in favour of human reason:

> I call it *Atheism by Establishment,* when any State, as such, shall not acknowledge the existence of God as a moral Governor of the World; when it shall offer to Him no religious or moral worship: when it shall abolish the Christian religion by a regular decree; when it shall persecute with a cold, unrelenting, steady cruelty, by every mode of confiscation, imprisonment, exile, and death, all it's ministers; when it shall generally shut up, or pull down, churches; when the few buildings which remain of this kind shall be opened only for the purpose of making a profane apotheosis of monsters whose vices and crimes have no parallel amongst men, and whom all other men consider as objects of general detestation, and the severest animadversion of law. When, in the place of that religion of social benevolence, and of individual self-denial, in mockery of all religion, they institute impious, blasphemous, indecent theatric rites, in honour of their vitiated, perverted reason, and erect altars to the personification of their own corrupted and bloody Republick; when schools and seminaries are founded at publick expence to poison mankind, from generation to generation, with the horrible maxims of this impiety; when wearied out with

[582] Burke, 'Speech at Mr. Burke's Arrival at Bristol, and at the Conclusion of the Poll', *Works*, Vol. III, pp. 18-19.
[583] Burke, 'Reflections on the Revolution in France', p. 270.

> incessant martyrdom, and the cries of a people hungering and thirsting for religion, they permit it, only as a tolerated evil—I call this *Atheism by Establishment'*[584]

The importance of Christianity as an active social force is prevalent in this passage. We can clearly see that beyond the guiding light of practical reason, grounded in God's natural law, Burke and subsequent conservatives have also stressed the importance of the Christian gospel in civilising the customs and manners of a society.

For some, the idea that the Christian God's sovereignty is the precondition for healthy political discourse intimates intolerance, as Temple points out 'no one really wants to live in the ideal state as depicted by anyone else',[585] but in this statement Temple identifies an important point. I have made the case that if Christians are to be true to the gospel then they will be very wary of the notion that we might discover a universal model for an 'ideal' state. In the absence of an ideal political architecture conservatism preserves a space for debate, plural voices and mutual enrichment in the construction of the polity, but crucially the necessary prerequisite for that space of communication is a cultural admission that God is sovereign. Following Aquinas, we might argue that only God as God can so transcend our understanding that he defies any univocal conception or appropriation as an idol; therefore it is only when transfixed upon God as our final end that our lives and our political discourse are perceived correctly.[586] Without such an admission the space for toleration and mutual enrichment insisted upon by Christian conservatives such as Burke and Disraeli, risks being usurped by an ideological vision, because as Chesterton purportedly pointed out there is no such thing as a vacuum of belief, 'when a man stops believing in God he doesn't then believe in nothing, he believes anything.'[587] Burke made precisely the same point when he

[584] Burke, 'Letters on a Regicide Peace', pp. 170-171.
[585] Temple, op cit., p. 52.
[586] Thomas Aquinas, *Summa Theologica: Prima Parta* Q. 13, A. 10.
[587] Adage attributed to G.K. Chesterton.

remonstrated against those who believed 'we should uncover our nakedness by throwing off that Christian religion which has hitherto been our boast and comfort, and one great source of civilization amongst us'. He proceeded to write 'that the mind will not endure a void' and should the nation lose its Christian faith 'some uncouth, pernicious, and degrading superstition might take place of it.'[588]

It is important at this point to interrogate whether contractarian liberalism can in fact be considered an ideology. The most obvious objection to the belief that liberalism is an ideology would be those who would follow Martha Nussbaum in drawing a distinction between perfectionist liberalism and political liberalism.[589] Nussbaum's analysis argues that, in contrast to Isaiah Berlin's perfectionist liberalism which imposes a conception of the liberal good life upon citizens, Rawlsian liberalism allows citizens to specify their own conception of the good life. In the last chapter we looked at the work of Rawls and questioned whether Rawls' work does not in some important ways conform to Nussbaum's notion of perfectionist liberalism. While we saw that Rawls certainly does show more consideration for the particularity of polities than prior contractarian thinkers, we also saw that a perfectionist liberalism, which specifies a very particular anthropology and account of human reason, underlies the framework of his political liberalism within which plural faith traditions are accommodated. We saw that this accommodation of comprehensive doctrines was permitted on quite specific terms of adherence to his axiomatic anthropological assumptions and the understanding of reasonableness which followed from these assumptions. I have therefore argued that Rawls' conception of the individual, of reasonableness, and the formal structure which societies ought to assume, create a tension between his work and the claims of the Christian gospel

[588] Burke, 'Reflections on the Revolution in France', p. 174.
[589] See Martha Nussbaum, 'Perfectionist Liberalism and Political Liberalism', *Philosophy and Public Affairs*, Vol. 39, Issue 1, (Winter, 2011) pp. 3-45.

and leave open the *possibility* for the type of ideological enthronement of human reason which we saw in French contractarian thought of the eighteenth century.

At this juncture we might also make a distinction between 'liberal' as a political disposition and the liberal contractarian tradition, which I have argued can assume a substantive ideological form which emerges from foundational axiomatic beliefs. There is, of course, no reason why a Christian could not be of a "progressive" disposition on particular issues. Indeed, one might argue that Christians should always be seeking to discern God's active voice in the polity, bringing necessary change with it. But such progressivism will of course be *ad hoc* depending on what particular issue is in question. Burke's career was a perfect example of this. There is also no reason why a Christian might not argue that other political principles are more important than those emphasised by conservatives – an advocate of the British Labour tradition, for instance, might reasonably make the case that showing solidarity with the poor is a more important political principle than those principles emphasised by the conservative tradition. I am arguing that the chief issue with contractarian liberalism as a system of belief for Christian citizens (irrelevant of their position on particular moral issues) is that its axiomatic assumptions stand in tension with the doctrinal claims of the Christian faith and its methodological approach to politics holds the possibility of marginalising the role of God's active voice in the prudential reason of humans. With this said, it is important to look at specific articulations of contractarian liberalism in particular times and places. One might feasibly claim that in Locke's insistence that all law should be subject to the divine law and that man was created by God and endowed with social obligations, his articulation of contractarian liberalism was not ideological by this definition. Nevertheless, I have contended that in Locke's political methodology, which relies chiefly on human reason, and in his anthropology which is, at points, in serious tension with the biblical account of man, he paved the way for an approach to politics which, at its most extreme, actively sought to exorcise God from the polity.

The potentially ideological nature of contractarian liberalism shall be returned to, but for now it will suffice to say that the vein of contractarian liberalism which I have examined so far strays close to being a species of ideology insofar as it gives primacy to substantive anthropological claims and from these constructs a universally normative conception of society. As we saw in the first chapter, contractarian liberalism seeks to reorder the polity in accordance with a belief in equality, autonomy and natural rights. Whilst such aims may seem laudable in contrast to the more overtly sinister ambitions of other ideologies, one need only look to the French revolution or indeed the Bolshevik revolution in order to see the potentially disastrous consequences of benign sentiment translated into political ideology. Rather than an empty plea for mutual tolerance devoid of more substantive claims, I have argued that the tolerance contractarian liberalism promotes nevertheless demands conformity to its own teleological reordering of society. In his criticism of the revolutionaries Burke consistently flagged up traits which we might identify as symptoms of an ideology.[590] Burke spoke of the revolutionary philosophy's abstract nature, its geometrical approach to politics, its mythical beginnings, optimistic anthropology and the metaphysics of right which were used to fortify its claims. Burke's defence of a natural law based constitutionalism set a precedent for the conservative tradition, in opposition to any attempt at recreating the polity according to a totalising creed or a foundational set of axioms.

Principle 4.) Authority and freedom

If Edmund Burke's realism was premised on a rationally intelligible divine order, so was his understanding of authority. An acceptance of authority be it divine, political, civil or customary is another principle of conservatism deeply indebted to the influence of Christianity. As we have seen Burke's understanding of an intelligible world created by a God whose intellect and will were in

[590] Note that the etymology of the term ideology originated in late 18th Century France.

perfect harmony, led him to defend a hierarchically ordered universe, forthrightly rejecting the voluntarist notion of the legitimacy of rulers who governed by pure will. Peter Stanlis writes that because Burke believed that all authority was from God 'it was imperative, therefore, that all men, and particularly rulers, should "acknowledge the existence of God as a moral governor of the world"'.[591] It was this conviction that led Burke to write of the Christian religion that, 'we will have her to exalt her mitred front in courts and parliaments. We will have her mixed throughout the whole mass of life and blended with all the classes of society'.[592] It seems likely that he would have approved of William Temple's sentiment that 'All Christian thinking, and Christian thinking about society no less than any other, must begin not with man but with God.'[593]

The hierarchy of authority, emanating from the divine and apportioned to individuals in office as representatives of the people is well summarised in the following passage taken from the *Reflections*. Burke's arguments show that he was profoundly concerned that those who wield any great portion of power should be deeply conscious of the source of their power and to whom they are ultimately accountable. Furthermore he once again clearly articulates the illegitimacy of rulers who do not subject themselves to the natural law:

> When the people have emptied themselves of all the lust of selfish will, which without religion it is utterly impossible they ever should, when they are conscious that they exercise, and exercise perhaps in a higher link of the order of delegation, the power, which to be legitimate must be according to that eternal, immutable law in which will and reason are the same, they will be more careful how they place power in base and incapable hands. In their nomination to office, they will not appoint to the exercise of authority as to a pitiful job, but as to a holy function, not according to their sordid, selfish interest, nor to their wanton caprice, nor to their arbitrary will, but they will confer that power (which any man

[591] Stanlis, *Edmund Burke and the Natural Law,* p. 205.
[592] Burke, 'Reflections on the Revolution in France', p. 197.
[593] Temple, op cit., p. 52.

> may well tremble to give or to receive) on those only in whom they may discern that predominant proportion of active virtue and wisdom, taken together and fitted to the charge, such as in the great and inevitable mixed mass of human imperfections and infirmities is to be found.[594]

The exercise of authority being described as a holy function which should be received in fear and trembling is particularly striking. For Burke the political is always conceived of as the vicarious exercise of divine power. Acutely aware of the 'mass of human imperfections and infirmities', Burke commends individuals of 'active virtue and wisdom' in order that society may be ordered rightly under their prudential judgements in accordance with the 'immutable law.' For conservatives since Burke, defending the cultural primacy and the political establishment of a Christian worldview has allowed legitimate political claims to be made regarding the authoritative created moral order in which any society exists. This inevitably impacts upon the way a nation is governed and the customs and manners which citizens cultivate: from the effect it has upon a legislator's understanding of the right ends of human nature, to the way it effects citizens' judgements of particular moral claims. A society which accepts the establishment of the Christian faith is free in its public discourse to overtly acknowledge a world that is animated by moral forces and ordered by a creator.

The conservative emphasis on institutional authority is paradoxically inspired by a deep concern for the preservation of freedom. Winston Churchill captured this apparent paradox in Burke's thought well when he wrote, 'on the one hand he is revealed as a foremost apostle of Liberty, on the other as the redoubtable champion of Authority'. Churchill drew the correct conclusion when he wrote 'No one can read the Burke of Liberty and the Burke of Authority without feeling that here was the

[594] Burke, 'Reflections on the Revolution in France', p. 180.

same man pursuing the same ends, seeking the same ideals of society and Government'.[595] The species of freedom which Burke spoke of is the freedom which is only found in the exercise of one's duty in communion with others, as duty implies authority the two operate in unison and are paramount to Burke's thought. Again, this conviction emerged from a Christian anthropology which rejects the exercise of unrestrained will in the belief that true freedom was to be found under the divine law and within a community conceived by God. Such an understanding of freedom under the law was present in all of Burke's great influences, from Cicero to the common lawyers, and indirectly Aquinas and Aristotle. In the face of a radical redefinition of freedom, Burke harked back to the pre-modern conception of freedom inspired by conformity to law. A contemporary conservative rendering of the dynamic between authority and freedom is offered by Roger Scruton who captures well the freedom found in the common law as an appropriation of the natural law:

> Liberal thinkers… have seen the constraints on freedom as arising only negatively and in response to individual rights. Freedom should be qualified only by the possibility that someone might suffer through its exercise. For the conservative constraint should be upheld, until it can be shown that society is not damaged by its removal. Thus the constraints on freedom arise through the law's attempts to embody (as for a conservative it must embody) the fundamental values of the society which it aims to rule.[596]
>
> this Anglo-Saxon freedom is rightly valued by all of us who share its benefits… But this freedom is not identifiable apart from the institutions which have fostered it. It is a freedom to do precisely what is not forbidden by law, and what is forbidden by law records a long tradition of reflection on the nature and constitution of English society.[597]

[595] Winston Churchill, 'Consistency in Politics' [1932] in James W. Muller (ed.) *Thoughts and Adventures: Churchill Reflects on Spies, Cartoons, Flying and the Future* (Wilmington, DE: ISI, 2009)
[596] Roger Scruton, *The Meaning of Conservatism* (Basingstoke: Palgrave, 2001) p. 15.
[597] Ibid., p. 7.

I have argued that it is out of the creative freedom bestowed by the acknowledgement of God's sovereignty that the healthy civil functioning of customs, traditions and institutions flourish. To these we turn.

Principle 5.) An emphasis on customs, tradition and institutions, in particular the Church

The conservative emphasis on customs (often embodied in law), traditions and institutions is deeply attuned to the principles we have already noted, namely a belief in the creaturliness of man, a rejection of abstract ideology and a belief in the authority of the natural law which brings right order to a polity through prudential judgements. The historical point of convergence between Christianity and this aspect of conservatism is in the common lawyers and ultimately Thomas Aquinas. In this regard Burke's conservatism is more aligned with the Thomistic tradition than the Augustinian. Burke's conservatism seems to be less well captured by Augustine's doctrine of the two cities than it is by Aquinas' polity of divinely ordained natural ends in which the good is realised in community with others. Michael Banner articulates Aquinas' political thought well:

> For the Thomist tradition, which thinks of society as existing outside the church in virtue of the claims made upon human life by its natural ends, it is the common good that serves to unite its parts. The classical organic image of society thus maintains its naturalistic quality, with a special emphasis, however, on the need for the head to identify the common good and coordinate its pursuit.[598]

This image of the social body directed towards the common good by a political head is one which was employed by Aristotle and Cicero before Aquinas. After Aquinas, John of Salisbury and common lawyers such as Fortescue and Blackstone employed the same metaphor. The metaphor certainly resonates with Burke's thought. And yet, it is important to note that Burke's

[598] Michael Banner, 'Christianity and Civil Society', in *Christian Political Ethics*, John A. Coleman (ed.), (Princeton, NJ: Princeton University Press, 2007) p. 9.

understanding of the polity was not authoritarian, ordering society from the top down, but rather the importance of the directing influence of the head lay in the fact that, by means of right judgements, it was able to reflect the constitution of the body of which it was a natural extension. Defending the integrity of the particular character of individual societies and embracing this difference as part of God's created order are aspirations which have a natural place in the conservative tradition. It is a principle which finds strong biblical precedent. The story of the tower of Babel militates against a belief in the univocal reason of humanity, corporately summiting the heights of heaven by virtue of their own will. It is a story which haunts an unshakeable belief in the efficacy of a universal reason to construct the polity without conceding Christ's sovereignty.

It is also worth noting that Aquinas' polity has less rupture between the prelapsarian and postlapsarian than Augustine's. For example, Aquinas sees man as naturally social and political and does not therefore regard political power as a necessary evil, one commentator put it well:

> Under Aristotelian influence St. Thomas exchanged the Augustinian conception of a conflictual and disjunctive social order for a more organically harmonious one. His minimising of the spiritual distance between the traditionally "pre-lapsarian" institutions such as marriage and family and the post-lapsarian institutions such as private property and political rule enabled him to weave social life into a unified moral texture. He viewed sinful society as retaining the inherent harmony of a hierarchy of natural ends and functions, each part having its appointed place within the teleological whole. With no disjunctive division between different communities, especially between political and non-political communities, all together constituted a real social totality, a common will directed toward a common good.[599]

[599] Joan O'Donovan in Banner, op cit., p. 9.

Burke shared this organic vision of society. In Burke's thought the civil and the political were not distinct but two interpenetrating spheres. Political society and the laws of the nation emerge from the accumulated customs of the people and naturally reflect them.

Burke's description of customary manners conveys well the bottom up formation of society; laws are derived from manners and customs, not the other way round:

> Manners are of more importance than laws. Upon them, in a great measure, the laws depend. The law touches us but here and there, and now and then. Manners are what vex or sooth, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in. They give their whole form and colour to our lives. According to their quality, they aid morals, they supply them, or they totally destroy them.[600]

Equally important are customs, described as:

> obligations written in the heart. They approximate men to men, without their knowledge, and sometimes against their intentions. The secret, unseen, but irrefragable bond of habitual intercourse, holds them together, even when their perverse and litigious nature sets them to equivocate, scuffle, and fight about the terms of their written obligations.[601]

Burke believed the nations of Europe had a heritage which was greatly indebted to 'the old Germanic or Gothic' customary law.[602] As we have seen, Aquinas, who also saw custom as an important source of law, also exercised a great influence upon the common lawyers. Aquinas wrote:

> All law proceeds from the reason and will of the lawgiver; divine and natural law from the intelligent will of God, human law from the will of man regulated by reason... by repeated deeds, which set up a custom, a law can be changed and explained, and also a principle can

[600] Burke, 'Letters on a Regicide Peace', p. 172.
[601] Ibid., p. 181.
[602] Ibid., p. 182.

> be established which acquires the force of law, and this because what we inwardly mean and want is most effectively declared by what outwardly and repeatedly we do. When anything is done again and again it is assumed that it comes from the deliberate judgement of reason.[603]

He proceeds, 'On these grounds custom has the force of law, and abolishes a law, and is the interpreter of laws.' Though he is careful to note that 'no custom can acquire the force of law against divine or natural law' but must be subordinate to both.[604]

Aside from the Thomistic heritage of the idea the conservative emphasis on customs and traditions seems to resonate deeply with the Christian belief that we are situated, historical creatures and as such we are subject to the influences of the world around us, benign and malign. The early church was acutely aware of this fact, envisaging themselves, like Israel, as a community set apart by their righteous conduct and filial care for each other in order to witness to the new life that they had received in Christ. St. Paul's letters are filled with admonitions for right conduct and the cultivation of good habits, most notably in his exhortation to the Philippians, 'Finally, brethren, whatever is true, whatever is honourable, whatever is right, whatever is pure, whatever is lovely, whatever is of good repute, if there is any excellence and if anything worthy of praise, dwell on these things. The things you have learned and received and heard and seen in me, practice these things.'[605]

Like the early church, Burke recognised that an acknowledgement of Christianity's truths exercised a profound influence upon the manners and customs of a society. By 1790 Burke had noticed, what he perceived to be, a concomitant decline in morality alongside the decline of the Christian religion's influence in France. In the name of reason the French revolutionaries had completely altered the institution of marriage, denying its divine origin and making it a civil contract. Burke

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[603] Aquinas, *Summa Theologica: Prima Secundae Partis*, Q. 97, A. 3.
[604] Ibid.
[605] KJV, Philippians 4:8.

wrote 'The Christian religion, by confining marriage to pairs, and rendering the relation indissoluble, has by these two things done more toward the peace, happiness, settlement, and civilization of the world, than by any other part in this whole scheme of divine wisdom. '[606] In an age in which traditional social mores such as marriage are scrutinised by an establishment which aims to reform in accordance to equality and human rights, Burke's defence of distinctively Christian institutions, which emerge from theological beliefs, seems particularly pertinent and reminds us that a society which is governed by a Christian culture looks distinctly different to that which emerges from the anthropological premises of the contractarian tradition.

This relationship between the institutional church and the state has been also been elaborated by a figure greatly influenced by Burke, namely Samuel Taylor Coleridge in his *On the Constitution of Church and State.*[607] For Coleridge the role of the Church included the diffusion of civil manners in all parts of society. Although Coleridge and Burke were both clear that a functional separation between the Church and state was requisite they nevertheless believed that the Church had a central role to play in society. Such a belief was hardly novel, the Country Party championed by Bolingbroke in the 1740's, and supported by Swift and Samuel Johnson, inspired a conception of the Church as an important third estate which should maintain an independent revenue so as to maintain its freedom. This was a belief which both Burke and Coleridge advocated strongly. Burke helped to inspire a strong Anglican tradition which echoed these beliefs, especially following the reform act of the 1830's. At the same time that Coleridge wrote his deeply Burkean work on the Church and state, Thomas Arnold authored, *Principles of Church Reform* and political figures such as Disraeli (and indeed Gladstone) championed the moral influence of the Church of England upon the nation. In the twentieth century such an understanding of the Church as the cultural centre of

[606] Burke, 'Letters on a Regicide Peace', p. 174.
[607] Samuel T. Coleridge, *On the Constitution of the Church and State* [1826] (Charleston, SC: Nabu Press, 2012)

gravity for society was echoed by T. S. Eliot who saw 'culture [as] being, essentially, the incarnation (so to speak) of the religion of a people.'[608] All of these individuals emphasised the importance of the church institution in the belief that man was not an autonomous agent governed only by legislation, but rather a social creature shaped by customs, manners and institutions. For Burke, the healthy customs and manners of Britain emerged from the natural law and were supplemented by the civilising message of the Christian gospel as narrated by the Church.

Principle 6.) An emphasis on the role of civil society and subordinate affections, as well as the nation state as a legitimate locus for such affections

The great British conservative George Canning wrote, 'It is idle, it is mere pedantry… to overlook the affections of nature'.[609] This principle of conservatism is related to, yet distinct from the conservative emphasis on customs. Once again this principle springs from an acknowledgement of our creatureliness and the conviction that the natural bonds of civil society are integral to human flourishing. Nigel Biggar offers a helpful theological account of the natural affections towards community and in particular the nation as a locus of community:

> Christians should base their view of the nation on their understanding of human being as creaturely. This involves distinguishing it sharply from the universal and eternal being of God and taking seriously its historicality — that is, its boundedness by time and space. Humans come into being and grow up in a particular time, and if not in one particular place and community then in a limited number of them. Human individuals are normally nurtured, inducted into social life, and encouraged in certain self-understandings by their family and by other institutions — educational, religious, recreational, economic, and political — that mediate the history and ethos of their local and national communities. It is natural, therefore, that individuals should feel special affection for, and loyalty toward,

[608] T. S. Eliot, *Notes towards the Definition of Culture* (London: Faber and Faber, 2nd Ed., 1962) p.28.
[609] George Canning in 'The Anti-Jacobin Review and True Churchman's Magazine', Vol. XLVI, (January to June 1814) p. 614.

> those communities that have cared for them and given them so much that is beneficial; and, since beneficiaries ought to be grateful to benefactors, it is right that they should.[610]

Such an account would certainly have been agreeable to Burke who continually sought to reassert the humanity and creatureliness of human beings against the rationalism of the *philosophes*. It certainly resonates with Burke's own statements concerning our natural prejudices and seems to be implicit in his admonitions to accept our nature as social creatures in a community with others. Burke perceived that in taking a conception of humanity as rational, equal and free, to be axiomatic, the philosophy of the revolutionaries resulted in an inhumane and cold polity. Commenting on the relation between parents and their children Burke wrote, 'Your masters reject the duties of this vulgar relation, as contrary to liberty; as not founded in the social compact; and not binding according to the rights of men; because the relation is not, of course, the result of *free election*; never so on the side of the children, not always on the part of the parents'.[611] Given his ostensible emphasis on feelings, it is perhaps surprising that Rousseau in particular, whom Burke called, 'a lover of his kind but a hater of his kindred',[612] came into Burke's firing line for a complete lack of feeling:

> It is that new invented virtue which your masters canonize, that led their moral hero constantly to exhaust the stores of his powerful rhetoric in the expression of universal benevolence; whilst his heart was incapable of harbouring one spark of common parental affection. Benevolence to the whole species, and want of feeling for every individual with whom the professors come in contact.[613]

Burke was equally clear in identifying the roots of this unfeeling in the same vain esteem for human reason, 'The bear loves, licks, and forms her young; but bears are not philosophers. Vanity,

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[610] Nigel Biggar, 'The Value of Limited Loyalty: Christianity, the Nation and Territorial Boundaries' in John A. Coleman (ed.) *Christian Political Ethics* (Princeton, NJ: Princeton University Press, 2007) p. 93.
[611] Burke, 'Letter to a member of the National Assembly', p. 35.
[612] Ibid.
[613] Ibid., p. 33.

however, finds its account in reversing the train of natural feelings. Thousands admire the sentimental writer; the affectionate father is hardly known in his parish'.[614]

In Joshua Hordern's recent work *Political Affections*, he aims to approach 'the question of affections' role in political relations from an explicitly theological direction'[615] and thus helps us to dissect the theological importance of such parochial affections. In Chapter three of the book Hordern explicitly cites Burke's statement that the rampant individualism of the revolutionaries is no basis for the construction of society:

> Nothing is left which engages the affections on the part of the commonwealth. On the principles of this mechanic philosophy, our institutions can never be embodied, if I may use the expression, in persons, so as to create in us love, veneration, admiration, or attachment. But that sort of reason which banishes the affections is incapable of filling their place. These public affections, combined with manners, are required sometimes as supplements, sometimes as correctives, always as aids to law [616]

Hordern laments the fact that Burke is 'imprecise' about the way in which such public affections are 'somehow vital to the personal, representative embodiment of institutions and the workings of law.'[617] Hordern is correct insofar as Burke does not offer an explicit account of the theological significance of the affections. For Burke natural prejudices were part of what it was to be a created being and as we have seen he reasserts their importance in the face of cold enlightenment rationalism. Burke did not however believe that prejudices and affections should be followed blindly. He believed them to be the glue which binds man to his fellow man and ultimately to God.

[614] Ibid., p. 34.
[615] Joshua Hordern, *Political Affections: Civic Participation and Moral Theology* (Oxford: Oxford University Press, 2013) p. 132.
[616] Burke in Hordern, op. cit., p. 132.
[617] Ibid.

Burke had shown himself to be cognizant of the necessity of the natural affections from an early age. He had reviewed Smith's *Theory of Moral Sentiments* whilst working for Dodsley's *Annual Register* and, whilst expressing doubts as to the completeness of Smith's theory, Burke nevertheless believed it to be 'one of the most beautiful fabrics of moral theory, that has perhaps ever appeared.'[618] Similarly, in his *Vindication* he satirises the view that reason alone is sufficient for social order. For Burke, the affections should only be followed to the extent that they lead us to act in a manner which is in keeping with God's created order and subordinate to the divine law. As Stanlis puts it the 'invisible tissue of loyalties and prejudices… gave cohesion and concreteness to the divine contract, which connected man in the eternal frame of the universe'.[619]

Burke does in fact provide an account of the way in which our affections are linked to effective participation and ultimately representative embodiment in institutions. We have seen that the natural law is what links subordinate affections to the nation at large, drawing us into expanding circles of communication and affection. For Burke the benign effect of the natural law is the right ordering of society, as such a well ordered society naturally leads humans from proximate affections to distant affections:

> To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.[620]

Hordern helpfully describes such affections as 'the participative beginnings of understanding',[621] this involves an acknowledgement that we are contingent beings with situated backgrounds; in short we are from somewhere. The admission of this basic fact is helpful not least because it 'is

[618] Edmund Burke quoted in David Bromwich, *The Intellectual Life of Edmund Burke*, (London: Harvard University Press, 2014) p. 40.
[619] Stanlis, *Edmund Burke and the Natural Law*, p. 84.
[620] Burke, 'Reflections on the Revolution in France', p. 100.
[621] Hordern, op cit., p. 62.

directly opposed to an autarchic or self-sufficient view of life'.[622] Drawing on Lacoste, Hordern speaks of 'intentional, affective recognitions of value';[623] in this account affections are not blind sentimentality, but the 'half-light of ethics' which identify values as 'the first ethical facts'.[624] In such a conception affections are 'the beginning of a process by which moral norms are disclosed'. As the half light of ethics and the beginning of ethical understanding Hordern suggests that within political communities the affections should be subject to a process of 'intersubjective verification'.[625] Moreover, 'through them we are drawn into a close attentiveness to what the world is like and to what we should do about it', they are a 'deeply human way of... being attentive to reality'.[626] Hordern describes the affections as a 'creaturely, participatory form of knowing', arguing that these first affective 'recognitions of value' are the beginnings of us 'being knit into all that there is, when "all that there is" is interpreted as 'the moral order vindicated in Christ'.[627] Such an account seems to hold much common ground with Burke's view of affections as the first link in the series of a divinely ordained order by which we are knit together with man and God.

In Burke's criticism of the revolutionary establishment he too draws this link between instinctive affections and virtue: 'The whole drift of their institution is contrary to that of the wise Legislators of all countries, who aimed at improving instincts into morals, and at grafting the virtues on the stock of the natural affections.'[628] It is significant that Burke laments that 'they dispose of all the family relations of parents and children, husbands and wives' arguing that in so doing 'they corrupt the morals' of the people.[629] The following passage is particularly helpful in understanding the way

[622] Ibid.
[623] Ibid., p. 73.
[624] Ibid., p. 77.
[625] Ibid., p. 78.
[626] Ibid., p.80.
[627] Ibid., p. 90.
[628] Burke, 'Letters on a Regicide Peace', p. 173.
[629] Burke 'Letter to a Member of the National Assembly', p. 38.

in which Burke sees affections as ultimately leading us to God. It should be noted that the Church (and its message) is not incidental in this process:

> First, I beg leave to speak of our church establishment, which is the first of our prejudices, not a prejudice destitute of reason, but involving in it profound and extensive wisdom. I speak of it first. It is first and last and midst in our minds. For, taking ground on that religious system of which we are now in possession, we continue to act on the early received and uniformly continued sense of mankind. That sense not only, like a wise architect, hath built up the august fabric of states, but, like a provident proprietor, to preserve the structure from profanation and ruin, as a sacred temple purged from all the impurities of fraud and violence and injustice and tyranny, hath solemnly and forever consecrated the commonwealth and all that officiate in it. This consecration is made that all who administer the government of men, in which they stand in the person of God himself, should have high and worthy notions of their function and destination, that their hope should be full of immortality, that they should not look to the paltry pelf of the moment nor to the temporary and transient praise of the vulgar, but to a solid, permanent existence in the permanent part of their nature, and to a permanent fame and glory in the example they leave as a rich inheritance to the world.
>
> Such sublime principles ought to be infused into persons of exalted situations, and religious establishments provided that may continually revive and enforce them. Every sort of moral, every sort of civil, every sort of politic institution, aiding the rational and natural ties that connect the human understanding and affections to the divine, are not more than necessary in order to build up that wonderful structure Man, whose prerogative it is to be in a great degree a creature of his own making, and who, when made as he ought to be made, is destined to hold no trivial place in the creation. But whenever man is put over men, as the better nature ought ever to preside, in that case more particularly, he should as nearly as possible be approximated to his perfection.[630]

This passage could attract a wealth of commentary, but we might highlight three main points in relation to the present topic. Firstly, the Church is seen as 'the first of our prejudices' and Burke is

[630] Ibid.

careful to note that the esteem attributed to the church is 'not destitute of reason.' In this account the Church plays an integral role in the right ordering of society, building up the august fabric of states and consecrating society. The natural law exercised through prudential judgements may be central to Burke but so is the Church's message. Secondly, Burke is clear that society should be consecrated by the Church's benign influence in order that those who administer in the Government of men which is 'in the person of God himself' should be full of the hope of immortality. Burke's account of the function of hope is interwoven with the affections, directing man towards God in order that man should become what he ought to be. If they are invigorated by the hope afforded by such an eternal perspective then they will 'leave a rich inheritance to the world'. Finally, Burke is clear that in a rightly ordered society, moral, civil and political institutions work harmoniously to connect the natural human affections and understanding to the divine. It is notable in itself that affections and understanding are coupled. For Burke, affections are not blind and senseless but directed towards natural ends and thus, when rightly ordered, harmonious with reason and understanding.

For Burke then there is a clear link and a mutually enriching harmony between the natural affections of created beings, the gospel message as disseminated by the Church and the common grace of the natural law which informs our practical reason and our moral intuitions.

Conclusion

To conclude this section, we have identified six intersecting political principles which can be called Burkean and conservative insofar as they are recurrent political motifs which arise in Burke's thought. We have seen that these principles are deeply consonant with theological beliefs which Burke held. I have argued that it is unlikely that this is a coincidence and that these beliefs were a product of his Christian worldview and Christian influences upon his thought. I have explicated the

theological roots of these principles and have shown that Burke and the conservatives who followed him were articulating principles which have also been expressed by Christian theologians, notably in Anglican and Catholic social teaching. In the next section I wish to turn to the work of a contemporary theologian, Oliver O'Donovan who I believe can add some depth to some of the less comprehensively developed theological themes in Burke's thought and provides a sophisticated theological framework for Burkean conservatives.

Chapter Six

Oliver O'Donovan and Edmund Burke

Having identified six of the central political principles which characterise the conservative tradition I wish to turn to the work of Oliver O'Donovan. O'Donovan's work provides a helpful frame of reference for the core principles of the conservative tradition. In this section I hope to show how O'Donovan's narrative helps to flesh out the theological rationale of the conservative principles which I have outlined. Firstly, I will present a broad overview of O'Donovan's view of the relationship between politics and theology, as presented in *The Desire of the Nations*. Secondly, I shall give an account of O'Donovan's critique of contractarian thought, drawing attention to the similarities between O'Donovan's critique and the critique offered by Burke and subsequent conservatives.[631] Finally, I have argued that the conservative tradition is a set of principles which have emerged from a broadly Christian worldview. I hope to show how O'Donovan's analysis adds theological depth to each of these principles by situating them within the theological narrative O'Donovan presents.

O'Donovan's account of politics

In 1996 Oliver O'Donovan first published *The Desire of the Nations: Rediscovering the Roots of Political Theology*. In the book O'Donovan aims to 'discover the Kingship of Christ' and the political implications which this holds. O'Donovan's account of political authority begins with an exegetical analysis of the Old Testament. He draws attention to the centrality of the kingship of Yahweh for

[631] I do not presume that Burke would have been comfortable expounding his political arguments in the theological terms employed by O'Donovan, nor would I presume that O'Donovan is a Burkean in his political orientation. Nevertheless, I will make the case that O'Donovan's theological narrative provides a helpful framework for Burke's political thought.

Israel, when the Israelites sang '*Yhwh malak'* or 'Yahweh is King' it was a 'liturgical act in which political and religious meaning were totally fused'.[632] O'Donovan identifies three associations of this phrase; the first association of this admission was a 'geophysical reassurance about the stability of the natural order'.[633] Secondly there was an assurance that God was in charge of the international political order,[634] another association was that God was responsible for 'ordering Israel's own social existence, by justice and law, ensuring the protection of the oppressed and vulnerable'.[635] O'Donovan notes that 'As we survey the texts which speak of Yhwh's kingship, we notice a reluctance to make direct connexions with any concrete form of political order.'[636]

In order to explore Yhwh's kingship O'Donovan employs the prophetic proclamation in 'Yhwh is our judge! Yhwh is our lawgiver! Yhwh is our king! He it is that will save us!'[637] as an exegetical framework for this purpose. From this proclamation O'Donovan highlights three main functions of God's Kingship in Israel; Salvation, Judgement and Possession. In O'Donovan's view these were rightly met by the human response of praise to Yahweh's rule. [638] As we shall see later, it is important to note that this human response is 'not a constitutive element in Yhwh's Kingly rule but a demonstrative proof of it'.[639]

<u>The nature of political authority</u>

With this threefold explication of Yhwh's kingship in hand, O'Donovan proposes three theorems relating to the nature of political authority. Firstly, '*Political authority arises where power, the execution of right and the perpetuation of tradition are assured together in one coordinated*

[632] O'Donovan, *Desire,* p. 32.
[633] Ibid.
[634] Ibid.
[635] Ibid.
[636] Ibid., p. 35.
[637] Isa. 33:22.
[638] O'Donovan, *Desire*, p. 36.
[639] Ibid., p. 113.

agency'; secondly, '*That any regime should actually come to hold authority, and should continue to hold it, is a work of divine providence in history, not a mere accomplishment of the human task of political service'*; and thirdly '*In acknowledging political authority, society proves its political identity*.'[640] O'Donovan notes of this final theorem that 'The Thomist tradition of political theology expressed this insight by relating politics immediately to our created sociality through "Natural Law".'[641]

Central to O'Donovan's thesis is the belief that 'The unique covenant of Yhwh and Israel can be seen as a point of disclosure from which the nature of all political authority comes into view. Out of the self-possession of this people in their relation to God springs the possibility of other peoples' possessing themselves in God. In this hermeneutic assumption lay the actual continuity between Israel's experience and the Western tradition.'[642] O'Donovan then does not simply undertake an exegetical or conceptual analysis concerning the nature of authority but he is also making a historical claim that Judaeo-Christian conceptions of political authority have been a decisively formative influence upon the history of western political thought. Moreover, the very fact that the Christ event was a concrete historical act which initiated a tradition means that Christian political thought can never be purely abstract and conceptual, it must always look backwards to a historical moment in time.

The Christ event is unsurprisingly central to O'Donovan's explication of political authority. For O'Donovan we can see God's Kingship in the life, death and resurrection of Jesus Christ, 'in the Christ-event we found the elements of God's rule: an act of power, an act of judgement and the gift of possession.' O'Donovan expounds at length upon the belief that Christ acts a representative of

[640] Ibid., pp. 46-47.
[641] Ibid., p. 47.
[642] Ibid., p. 46.

Israel, embodying all the aspects of his kingly rule and thus taking Israel's place in God's punishment, 'the death of Jesus summed up the condemnation of Israel at God's hands. In representing God, he represented Israel, too, "in the likeness of sinful flesh, and for sin" (Rom. 8:3); for their two causes, by God's act, had been made one.'[643] In embodying God's rule, Christ was a representative of Israel and vindicated his rule in his death and resurrection, 'Faith in the coming of the Kingdom, then, implied an act of political recognition directed to Jesus himself. The dawning rule of God was experienced in his ministry. To recognise God's rule was to see him as the figure who satisfied the hopes and expectations which had been vested in the reappearance of the traditional monarchical leadership. In that sense the coming of the Kingdom was proved by acknowledgement of Jesus as king.'[644]

The Christ event constituted a 'decisive act, an act in which God's rule was mediated and his people reconstituted in Christ'; the implications for our understanding of political authority are extensive, 'to speak of God's rule from this point on' is incomprehensible without 'recounting this narrative and drawing the conclusions implied in it.' Importantly 'We cannot discuss the question of "se cular" government, the question from which Western political theology has too often been content to start, unless we approach it historically, from a Christology that has been displayed in narrative form as Gospel.'[645] In other words, any discussion of secular government must be framed by the kingship of God in Christ. The figure of Christ triumphant raises an important question, 'Given that Christ has overcome the principalities and powers by his death and resurrection, what rights can they still claim?' O'Donovan argues that their right function now 'is judgement',[646] 'What has now changed is the privileging of this aspect of governmental authority, so that the whole rationale of

[643] Ibid., p. 130.
[644] Ibid., p. 117.
[645] Ibid., p. 133.
[646] Ibid., p. 147.

government is seen to rest on its capacity to effect the judicial task.'[647] The Kingly functions of possession, judgement and salvation have been fulfilled in Christ. Yet while final judgement has been made in Christ's death there still remains a need for 'provisional and penultimate judgements', such provisional judgement points towards Christ, 'the continued presence of such judgements in the world, however, is an important witness to those to whom the word of final judgement has yet to come.'[648]

In the final analysis then only two forms of government inhabit this age, 'The Messianic age was to be the age of ultimate choices and conflicts, in which the pluriform structures of political mediation would be propelled to a simple decision between the two governments: the creative government of the Word of God and the predatory self-destructive government of human self-rule. In this age that decision must underlie all other decisions.'[649] For O'Donovan it is in the life of Church that we are offered a picture of Christ's rule.[650]

> St Paul declared that God has "disarmed the principalities and powers and made a public show of them in Christ's triumphal procession" (Col. 2:15). That must be the primary eschatological assertion about the authorities, political and demonic, which govern the world: they have been made subject to God's sovereignty in the Exaltation of Christ. The second, qualifying assertion is that this awaits a final universal presence of Christ to become fully apparent. Within the framework of these two assertions there opens up an account of secular authority which presumes neither that the Christ-event never occurred nor that the sovereignty of Christ is now transparent and uncontested.[651]

In this account of secular authority the role of government is to fulfil the judicial function of Christ's rule and, in doing so, to preserve a social space for the Church to fulfil its earthly mission of

[647] Ibid., p. 148.
[648] Ibid., p. 151.
[649] Ibid., p. 157.
[650] Ibid., p. 146.
[651] Ibid.

proclaiming the gospel.[652] The Church then prays for and anticipates the coming of the Kingdom, yet it equally prays for earthly authorities in their quest to maintain peace and justice.[653]

Christendom

This leads us into the final aspect of O'Donovan's thesis which I wish to draw attention to, which is his account of Christendom. O'Donovan refers to the time period 'an era in which the truth of Christianity was taken to be a truth of secular politics... Let us say that the era lies between AD 313, the date of the Edict of Milan, and 1791, the date of the First Amendment to the US Constitution'.[654] O'Donovan argues that 'Those who ruled in Christendom and those who thought and argued about government believed that the gospel was true. They intended their institutions to reflect Christ's coming reign'[655], 'it is the idea of a confessionally Christian government, at once 'secular' (in the proper sense of that word, confined to the present age) and obedient to Christ, a promise of the age of his unhindered rule.'[656] In short, the rules of Christendom were attentive to the reality of Christ's rule, 'The rulers of the world have bowed before Christ's throne. The core idea of Christendom is therefore intimately bound up with the church's mission'. The claims which O'Donovan makes are strong claims, 'Christendom is *response* to mission, and as such a sign that God has blessed it. It is constituted not by the church's seizing alien power, but by alien power's becoming attentive to the church.'[657] What does this look like? O'Donovan writes that 'the legal-constitutional conception is the essence of Christendom's legacy' the reason for this is bound up with the freedom of the people to submit to Christ's rule willingly, 'within the context of Christian constitutionalism, sovereignty (*suprema potestas)* had a clearly defined reference to that office of

[652] Ibid., p. 146.
[653] Ibid.,p. 147.
[654] Ibid., p 195.
[655] Ibid., p. 194
[656] Ibid., p. 195.
[657] Ibid., p. 195.

state which, by presiding over other offices, ensured the lawfulness and authority of the whole. Sovereignty within the state was compatible with, even depended on, the rule of divine law over the state.'[658]

O'Donovan is quite clear that in Christendom Christ's rule was not complete and society cannot be seen as redeemed:

> Even in deep Christendom civil society was not identical with the church, but, at most, merged with it on the surface in a prosopic union. Society shaped by the presence of the church forms a kind of penumbra to the church; it has been heedful, but not wholly obedient; it has been claimed for the Kingdom, but not sacramentally made part of it... pending the final disclosure of the Kingdom of God, the church and society are in a dialectical relation, distant from each other as well as identified. Though many members of a society have decided for the Gospel, society has not yet decided. It stands on the threshold, not within the door. It has before it the possibility of deciding either way, for the Kingdom or against it.[659]

O'Donovan's narrative proceeds into the early modern period, he argues that in the seventeenth century, social contract theories prompted a stream of radical political thought in which 'the ruler's primary responsibility ceased to be thought of as being to divine law, but rather to the people whose supposed act constituted him. This act of popular will came to be thought of as the source of all law and constitutional order.'[660] This leads us to O'Donovan's critique of liberalism.

<u>O'Donovan's critique of contractarian liberalism</u>

O'Donovan identifies 'seed-thoughts that were present at the beginning of the modern era' which have flourished in the late modern period that we inhabit today. He detects an undergirding theme

[658] Ibid., p. 240. Bearing in mind the common lawyers conception of the relationship between the divine law and human law, one might speculate that this was particularly true in England.
[659] Ibid., p. 251.
[660] Ibid., p. 241.

'behind the disparate critiques of modernity... it centres on the notion of the abstract will, exercising choice prior to all reason and order, from whose *fiat lux* spring society, morality and rationality itself.'[661] Like Burke, O'Donovan's understanding of the ultimate source of political authority makes him highly suspicious of the story which liberalism tells about personhood and society. Perhaps the most surprising thing about O'Donovan's account is the degree of similarity between his arguments and Burke's. O'Donovan writes that the 'point of departure' from Christian social order:

> is the moment of 'free' choice, indifferent and indeterminate. We may recall Rousseau's famous dictum, 'Man was born free, yet everywhere is in chains.' The chains he had in mind were the chains not of tyranny but of constitutional social order, and Rousseau announced it as his intention to 'legitimate' them (*Social Contract* I.I). But what did he mean by 'free'? A state of pre-social and pre-moral individualism, which, for all the seriousness with which he takes society, is still surrounded with an aureole of nostalgia.[662]

Like Burke, O'Donovan recognises that the liberal tradition is built on this anthropological account. He proceeds to critique 'the myth of the social contract', in which:

> society derives from an original free compact of individuals, who have traded in their absolute freedoms for a system of mutual protection and government. So obviously is this myth unhistorical that it is easy to underestimate its hold on the modern mind. It means that society's demands are justified only in so far as they embody what any individual might be expected to will as his or her own good. It rejects the Christian paradox of freedom perfected in service.[663]

As we have seen this is the species of freedom which Burke advocated, impressed upon us at its most basic level as the incumbent duties of a social being. Both Burke and O'Donovan clearly reject the myth of the isolated individual because, amongst other things, it abrogates the human need for

[661] Ibid., p. 274.
[662] Ibid., p. 275.
[663] Ibid., p. 275.

community and the authority of social institutions. For both thinkers social goods cannot be realised outside of such communities and traditions. O'Donovan tells us that

> Christian thinkers, could, perhaps allow a sense in which the individual must be the measure of the social good; but this would need to be balanced dialectically by the assertion that society is the measure of the individual good. Certainly Christians believe that community is good for individuals; but they do not believe society exists solely to serve individuals' private purposes. Social existence could never be accounted for as an instrument for private purposes, since private purposes have no intelligibility apart from social existence. But the detached pre-social individual becomes the basic unit out of which society is then constructed. Shorn of all prior contexts, natural or social, which could make him intelligible, he makes his appearance as a naked will, a pure originator.[664]

He also cites 'a collapse of the idea of a universal Natural Law, and its replacement by a nationalist positivism'[665] introduced by the 'radical political thought' of 'contract-theory'[666] which prioritised the 'act of popular will' to the 'divine law' and thus pure will 'became the source of all law and constitutional order'.[667] Burke's recourse to the natural law in articulating the organic formation of society and his outright rejection of the voluntarism which he associated with the arbitrary will of Warren Hastings and the revolutionaries is echoed by O'Donovan, who writes that 'Late-modern liberalism' has 'followed the path of devaluing natural communities in favour of those created by acts of will. Communities formed by blood-ties or by local contiguities are thought to derogate from freedom, since they cannot be opted into from a position of indifference.' He also notes the modern distrust of natural prejudices, 'it ceases to be a point in their favour that we can see something of ourselves in our natural communities and so embrace them as "our own". The very sense of being owned by some family or neighbourhood is an embarrassment to modern freedom,

[664] Ibid., p. 276.
[665] Ibid., p. 241.
[666] Ibid., p. 240.
[667] Ibid., p. 241.

putting in question the free choice of the will from which our ties and obligations are supposed to find their source.'[668] Such sentiments are in agreement with Burke's account of the healthy operation of prejudicial affections towards one's own platoon. The strain of contractarian liberal thought that envisages the lone agent consenting to participation in society is equally resisted by O'Donovan and Burke.

O'Donovan traces the root of 'the various critiques of modernity' to a recurrent theme which 'centres on the notion of the abstract will, exercising choice prior to all reason and order, from whose *fiat lux* spring society, morality and rationality itself.' Like Burke, O'Donovan sees the critical issue as being the arrogation of arbitrary will to the human subject, in contempt of divine authority mediated by the created order. O'Donovan articulates this issue with a theological vocabulary:

> To put it theologically: the paradigm for the human presence in the world is creation *ex nihilo*, the absolute summoning of reason, order and beauty out of chaos and emptiness. This does not, of course, honour God's creative deed, but competes with it. Faith in creation means accepting the world downstream of the Arbitrary Original, justified to us in being, goodness and order. Voluntarism, on the other hand, situates the agent at the source; it offers a mystical access to the moment of origination, and leads the spirit to the rapture of pure terror before the arbitrariness of its own choice.[669]

Stanlis writes of Burke that 'Nothing could be more explicit and clear than Burke's insistence upon the divine origin of the state' citing Burke's comment that 'He who gave our nature to be perfected by our virtue willed also the necessary means of its perfection. He willed therefore the state – He willed its connection with the source and original archetype of all perfection.'[670] There is then in O'Donovan and Burke a common root for the rejection of liberal voluntarism.

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[668] Ibid., p. 276.
[669] Ibid., p. 274.
[670] Stanlis, *Edmund Burke and the Natural Law*, p. 205.

O'Donovan also notes that the central intellectual movement in this development of modernity is liberalism, 'Liberalism, too, has been a central theme of modernity-criticism. Here again what is in view is a false posture of transcendence, an illusion that society may be organised on formal principles from the perspective of a 'view from nowhere' (Nagel). This poses the question of how late-modern liberalism, conceived in these terms, may have sprung from early-modern liberalism'.[671] Joining with twentieth century conservatives such as Russell Kirk, O'Donovan relates 'at once how modernity is the child of Christianity, and at the same time how it has left its father's house and followed the way of the prodigal. Or, to paint the picture in more sombre colours, how modernity can be conceived as Antichrist, a parodic and corrupt development of Christian social order.'[672] Importantly both Burke and O'Donovan reject the claim that a just and fair society necessarily entails a secular state. Both men insist that Britain's constitutionalism emerged from Christian roots. Burke saw the liberal revolutionaries as counterfeiting the notions of equality, right and freedom which had long existed in the British constitution. Similarly, O'Donovan rejects the claim that the best aspects of contemporary constitutional democracy were gifted to us by the contractarian liberal tradition. His narrative traces the long history of constitutionalism, highlighting how it was intricately connected to Christian beliefs in divine and temporal rule.

Up to this point then O'Donovan's critique of contractarian thought certainly seems to hold a substantial amount of common ground with Burke's critique. Both he and Burke offer a political critique which employs theological language and relies upon a broader theological framework. Undoubtedly the two men are preoccupied with different concerns as Burke is a politician drawing on a theologically informed worldview whereas O'Donovan is a theologian offering an account of

[671] O'Donovan, *Desire*, p. 275.
[672] Ibid., p. 275.

political authority, nevertheless Burke's own political thought is remarkably well framed by O'Donovan's theological account.

O'Donovan and the six principles of conservatism

In the first half of this chapter we identified six integrated political principles which are at the heart of the Burkean tradition. I have argued that these principles have been articulated by Christian conservatives from Burke onwards and they are rooted in Christian theological convictions, specifically in the belief that there is a created moral order. While in the common lawyers and the conservative tradition we do see explicitly theological reasoning invoked in the employment of these principles, O'Donovan's theological exposition of political authority within the Christian narrative and his elucidation of what it means to live in a created moral order helps to consummate the theological case for these conservative themes, giving a clearer theological rationale to the principles we have identified. I will once more list the six core principles of conservatism which I have identified in Burke's thought and see how O'Donovan's theological narrative helps to unpack these themes.

Reckoning with reality

We have seen that the realist belief in a created moral order is at the heart of the Burkean tradition. In O'Donovan's work *Resurrection and Moral Order*, we are told that 'The order of things that God has made is there. It is objective, and mankind has a place within it.' The implication of human existence in this order is that Christian ethics has 'an objective reference' which is applicable to all humanity. O'Donovan notes the agreement between Christianity and classical traditions of ethics on this point, notably 'Plato, Aristotle and the Stoics which treated ethics as a close correlate of metaphysics.' O'Donovan also writes that we should not be surprised to see a

recognition of the created moral order in other cultures which have been untouched by the Christian religion, precisely because they stand within that moral order.[673]

A belief in such a created moral order is important to both Burke and O'Donovan's approach to practical reasoning. Indeed the belief that there is a good and prior created order is the very reason that both express a faith in the efficacy of practical reason. We have seen numerous occasions in which Burke refers to the created order of the universe, whether it be in India, America or Ireland. We have also seen him express the belief that man has a moral constitution. Like Burke, O'Donovan's account of man's moral constitution and man's perception of the world is heavily qualified. O'Donovan argues that 'in speaking of man's fallenness we point not only to his persistent rejection of the created order, but also to an inescapable confusion in his perceptions of it.' We cannot then simply turn to nature without 'a measure of epistemological guardedness'.[674]

On this issue O'Donovan, as we might expect from a theologian as opposed to a statesman, is more overtly Christological than Burke and it perhaps a significant difference between them; right apprehension of the moral order can only be attained through the lens of Christ's resurrection:

> We say that this, that or the other cultural demand or prohibition (the prohibition of incest, for example, or of racial discrimination) reflects the created order of God faithfully, but that too is something we can know only by taking our place within the revelation of that order created us in Christ.[675]

Therefore, whilst O'Donovan is unequivocal about the objective existence of the created order he equally emphasizes the necessity of supplementing a knowledge of that order with the Christian narrative. He argues that there are 'dauntingly high barriers' for a natural ethic discovered by reason alone. Yet he doesn't conclude that this means there is not an '*ontological* ground for an

[673] Oliver O'Donovan, *Resurrection and Moral Order* (Grand Rapids: MI: Eerdmans, 2nd Ed., 1994) p. 17.
[674] Ibid., p. 19.
[675] Ibid.

"ethic of nature"', but he is clear that the only knowledge we have of that order is as a result of God's own self disclosure of that order within creation.[676]

For O'Donovan then the natural order does offer us a basis for ethics but in order to be understood rightly the Christian narrative must frame the ethical enterprise. If ethics only finds its proper context when it is located in the history of divine action then the resurrection is, for O'Donovan, crucial to ethics. This is because through the resurrection the history of divine action is 'demonstrated precisely in its vindication of creation order as a basis for rational action.'[677] O'Donovan concludes, 'We must speak, therefore, of a *history* of creation order, and yet of a history of *creation order*, at once a proclamation rooted in the contingency of history and at the same time a vindication of reality which affords us an authority for doing something without equally affording an authority for doing the opposite.'[678] Such a statement both reminds us of the Christian tradition's affirmation of history and its mindfulness of historical events (such as the fall and the resurrection) upon the created order. Such an affirmation perhaps raises questions over a universalising, ideal and deductive approach to ethics, which is not sufficiently mindful of the contingency of history or the fallenness of the created order.

To take the Christian narrative seriously demands that we take seriously the claims it makes about reality including claims regarding the redemption of the created order and the operation of the Holy Spirit. This is perhaps an area in which the conservative tradition could heed O'Donovan's exposition of the resurrection and what it entails for practical reasoning; 'Creation and redemption each has its ontological and epistemological aspect. There is the created order and there is natural knowledge; there is the new creation and there is revelation in Christ';[679] neither aspect of this can

[676] Ibid.
[677] O'Donovan, *Desire*, p. 19.
[678] Ibid.
[679] O'Donovan, *Resurrection,* p. 19.

be denied in our practical reasoning. O'Donovan reiterates this point, he argues that there has been a confusion in modern theology between 'the ontological and the epistemological' as a result 'we are constantly presented with the unacceptably polarized choice between an ethic that is revealed and has no ontological grounding and an ethic that is based on creation and so is naturally known.' For O'Donovan, 'This polarization deprives redemption and revelation of their proper theological meaning as the divine reaffirmation of created order.'[680] He argues that Christian moral reasoning occurs in light of Christ's resurrection and our anticipation of the eschatological renewal but he is equally clear that we can experience the first fruits of the eschaton through the gift of the Holy Spirit.[681]

Whether Burke was more attentive to the created order or to revelation is, of course, not an easy question to answer or to substantiate. Yet as O'Donovan makes clear, if the resurrection is understood aright, then the revelation of the Christian gospel and the created order given to us in the natural law should be congruent in our practical reasoning. Burke is at least clear about the benign effect of the Christian gospel and church upon the European peoples and he is also clear that the humility and mercy which characterise the gospels should be integral to our practical reasoning. With this said, Burke's account of prudence is certainly not explicitly christological, even if we might have good reason to suspect that his practical reasoning was influenced by his faith.

When *Resurrection and Moral Order* first appeared there was some criticism that O'Donovan had simply reauthenticated natural law in light of the resurrection. O'Donovan later clarified this point, arguing that the resurrection must be central to every aspect of Christian moral reasoning.[682] Here we hit upon a critical point. Throughout this thesis we have seen two sides championing reason in

[680] Ibid.
[681] Ibid., p. 22.
[682] O'Donovan, *Desire*, p. 19.

politics. The contractarians beginning with Locke championed *a priori* reason, working with precise definitions, as the chief guide to discerning ideal political forms. Indeed, we saw that Locke presented his *a priori* reflections on government as a form of natural law reasoning. On the other hand, we have seen Burke and leading common lawyers, championing prudential, situated reason. As we have seen, Burke and Coke regarded this political reason as 'artificial' in the sense that it emerged from a distinctive tradition and natural insofar as its moral component partook in the natural moral law and originated from God. O'Donovan's understanding of Christ's resurrection is important in this regard as it authenticates the natural moral law which is part of God's original created order but it also insists that there is no such thing as a view from nowhere. This throws the 'objective reason' of the liberal contractarian tradition into doubt when applied to political questions. O'Donovan's account maintains a belief in a given and comprehensible natural order of creation but emphasises the fact that our perception of this order needs to be supplemented with the Christian narrative and it emphasises the fact that our perception of this order always comes from a particular time and place. This gives warrant to the particular logic of a tradition, or the artificial reason of Coke and Burke. Such 'internal logic' is not divorced from the divine reason which orders creation but it is a form of practical reasoning which self-consciously operates with the knowledge that it is conditioned by a particular place and tradition.

<u>An acute consciousness of human fallenness, human creatureliness and human sociality</u>

We have seen that O'Donovan expresses a belief in a created moral order, a knowledge of which is accessible to man but this knowledge is seriously qualified by man's creatureliness and fallenness. In Chapter four of *Resurrection and Moral Order*, O'Donovan poses a foundational question in politics, 'How is the order of the created universe available to our knowledge, seeing that we belong to it, and cannot rise above it to survey it like God?'. One of the points O'Donovan makes is

that 'such knowledge must be knowledge *from man's position* in the universe.'[683] This touches upon the creaturely nature of man and politically we shall see that, for O'Donovan, a recognition of the concrete and situated knowledge of human beings has serious implications concerning how we are to conceive of politics. Beyond man's creatureliness there is a deeper issue which must be considered. He draws attention to the fact that knowledge is 'inescapably compromised by the problem of fallenness, the defacement of the image of God'. While the fallen man still apprehend generic and teleological order, 'he misconstrues that order and constructs false and terrifying world-views… Idolatry is the distinctive corruption of philosophical knowledge.'[684] In this statement he recognises that the epistemological problem is no mere hurdle to be overcome by means of education, but it is as endemic to the human condition as the sinfulness from which, at least in part, it originates.

O'Donovan offers a defence of the necessity for concrete situated knowledge and an adherence to the natural moral law which seems to hold substantial resonance with the natural law based constitutionalism which we saw in Burke:

> What, then, must such knowledge of created order be, if it is really to be available to us? It must be an apprehensive knowledge of the whole of things, yet which does not pretend to transcendence over the universe, but reaches out to understand the whole from a central point within it. It must be a human knowledge that is co-ordinated with the true performance of the human task in worship of God and obedience to the moral law. It must be a knowledge that is vindicated by God's revelatory word that the created good and man's knowledge of it is not to be overthrown in history.[685]

As we have seen, the incarnation, resurrection and participation in the life of Jesus Christ is, according to O'Donovan, indispensable if we are to attain a correct knowledge of the created moral

[683] O'Donovan, *Resurrection*, p. 81.
[684] Ibid., p. 82.
[685] Ibid., p. 85.

order. Christ is, for O'Donovan the sole 'narrow point in the human race' from which the vocation to human knowledge can be fulfilled and indeed from which human *being* in general is fulfilled. He argues that the doctrines of the fall and the redemption inform us that Christ fulfils precisely this function.

O'Donovan is perfectly clear that this does not render knowledge unattainable to non-Christians, 'It requires no revelation to observe the various forms of generic and teleological order which belong to it. An unbeliever or a non-Christian culture does not have to be ignorant about the structure of the family, the virtue of mercy, the vice of cowardice, or the duty of justice… Nevertheless, such knowledge is incomplete unless the created order is grasped as a whole, and that includes its relations to the uncreated.'[686] An important function of revelation then is to provide the narrative context in which the moral, historical and political reality of the world is truly seen.[687]

A refusal of ideological claims

The explanation O'Donovan gives for rejecting a contractarian ideology which deduces an ideal political framework is very similar to Burke's own distinction between pure abstract theory and the necessity for theoretical observations regarding the nature of political institutions given the existence of a created moral order. We shall see that both place a heavy emphasis upon the tradition and context of particular political institutions.

We should start the analysis by highlighting that for both O'Donovan and Burke, God alone is ultimately sovereign over society. For both, the dangers of focusing the political order upon a ruling first principle or the arbitrary will of a person are paramount. In O'Donovan's exegesis of political

[686] Ibid., p. 88.
[687] Ibid., p. 89.

authority in the Old Testament he emphasises that the prophet plays a crucial role in resisting the temptation to turn the monarch into an idolatrous substitute for Yhwh.[688] He writes:

> instead of rejecting the absolutist temptation by distributing powers, it permitted a unitary government subject to the independent authority of Yhwh's law, which had its independent voice in society through the prophetic movement. Essentially the same alternatives have confronted modern political reflection when it has sought strategies to avoid absolutism. The constitutional separation of functions within government has risen in favour when confidence in the effective authority of a common social 'possession' of moral principle has been weak. If we are to express Israel's experience in a theoretical way, we must do so by reaffirming the political significance of such a moral tradition. *The authority of a human regime mediates divine authority in a unitary structure, but is subject to the authority of law within the community, which bears independent witness to the divine command.* This theorem corresponds to what has often been said in the West in terms of 'Natural Law'. It is important to grasp that it is a *political* reality in society to which government is answerable. Absolutist regimes violate the individual consciences of their subjects, no doubt; but it is the common conscience, which is a constitutive factor in the political identity of the community, that they violate most directly. The wrong they do is therefore a political wrong, attempting to override the rule of God within the community.[689]

It could be argued that Burke perceived the natural law as carrying out this same prophetic role insofar as Burke perceived it to demand conformity to a universal standard of justice. O'Donovan rightly notes that the natural law in the Christian tradition has often been seen as an aspect of God's divine law, demanding conformity to God's rule.[690]

In O'Donovan's account of political authority the cultural admission that God is sovereign is requisite if idolatry is to be avoided, he is clear that humans are by their constitution designed for

[688] O'Donovan, *Desire*, p. 65.
[689] Ibid.
[690] Ibid., p. 241.

worship and a society that ceases to worship God does not simply cease to worship. He argues that in the formation of every political society there is a sense in which there is an act of worship directed towards the divine rule. In O'Donovan's view this is at least one explanation for the common connection between the religious and the political. A realisation that all politics involves such worship gives us an insight into the danger of political loyalties, 'for a worship of divine rule which has failed to recollect or understand the divine purpose can only be an idolatrous worship which sanctions an idolatrous politics.' At this point O'Donovan explicitly pinpoints secular theories of government. He argues that Western societies which have come to believe that the basis of society is constituted by human authority are 'in a state of pervasive moral debilitation, which, from time to time, inevitably throws up idolatrous and authoritarian reactions.'[691]

O'Donovan finds the warrant for these arguments in the Hebrew Scriptures in which 'the holy community' is the context in which individuals find their particular identity.[692] In short, the Israelites did not denigrate the significance of man or society but neither did they enthrone either. Both found their proper place in relation to God. O'Donovan's critique invites us to reflect as to whether the foundational assumptions of contractarian liberalism might be idolatrous:

> The warning is commonly enough heard that if liberalism does not look out for its own foundations, it may "provoke a reaction"… by proceeding along its present lines, liberal society may *deserve* a reaction, because it is incapable of taking the spiritual capacities of its members seriously.
>
> The loss of wisdom that we have to fear, as the prophets have always said, is idolatry, the refusal to acknowledge God as the sovereign authority of any human society.[693]

[691] Ibid., p. 49.
[692] Ibid., p. 73.
[693] Oliver O'Donovan, *The Ways of Judgement*, p. 77.

He makes an important point which differentiates his project from that of the deductive rationalism which we have seen in the contractarian tradition:

> It is not [political theology's] goal to describe an ideal set of political institutions; for political institutions are anyway too fluid to assume an ideal form, since they are the work of Providence in the changing affairs of successive generations. The assimilation of the idea of authority to office and structure was a cardinal mistake which arose as Western politics turned its back on its theological horizons. Nevertheless, a truthful description of the political act, which will establish its conditions, purpose and mode of execution, will also shed light upon political institutions. It would be absurd if it did not; there can be no virtue in a theory which makes ordinary patterns of political relationship appear grotesque and unintelligible. Still, they cease to be the primary focus and become the explained, not the explanation. By opening up the horizon again, theology can restore to the idea of authority its proper depth as a moment of vocation.[694]

In such statements O'Donovan shows himself to be deeply conscious of time, context and tradition in the life of any polity. He acknowledges that if we are to define the legitimate political act then it will necessarily shed a light upon the type of political institutions which should be considered legitimate.

This is perhaps a point which Burke was not clear enough on, and a point in which he might even come into direct conflict with the Christian ethicist. Burke does bring, what we might loosely term 'theory', into his political reasoning and he does in fact explicitly acknowledge that a certain type of theorisation is a legitimate aspect of practical reasoning – in other words not all theoretical reflection upon political questions need necessarily entail the species of speculative 'geometrical' reasoning with which the revolutionaries were engaged.[695] For example, it was because of his belief in the accountability of all authorities before God's rule and in the supremacy of the natural law

[694] O'Donovan, *Desire*, p. 20.
[695] Burke, 'On the Reform of Representation in the House of Commons', p. 99.

that Burke desired to check the arbitrary will of the East India Company. In this sense it is perfectly legitimate for practical reasoning to be guided by Christian doctrinal beliefs; chiefly because doctrine is not (for the Christian) pure theory, but a constituent part of the created order which needs to be accounted for in arriving at ethical judgements. It was abstract political theorising which took no stock of concrete circumstances, or the reality of a fallen, heterogeneous world, which Burke believed to be so dangerous. Given that many have misread this aspect of Burke's thought, and believed him to be a utilitarian who did not believe that Christian beliefs bore any relation to politics, we might might turn to O'Donovan for a more full account of Christian moral reasoning in politics.

O'Donovan reminds us that there is a place for a particular type of 'theoretical' reflection in our practical political reasoning. Quite clearly Christian ethics also turns to doctrinal models in the belief that the created order is patterned after its creator: the fellowship of the trinity tells us something about the good of friendship, Christ's love for his Church tells us something about the institution of marriage, etc. In this sense Christian ethics attributes normative status to some institutions. However, for reasons we have looked at,[696] I have argued that the very particular type of 17th Century geometrical reasoning which emerged from questionable axioms ought to be precluded by the Christian ethicist. O'Donovan's political reflections involve doctrinal claims about the nature of man, the shape of history and the ends of creation; it is not so much deductive *a priori* reflection from first principles, as it is a historically and doctrinally conscious account of political order within which we might frame our practical reasoning. In other words O'Donovan's account serves to explicate the actual reality of the created order within which all polities are

[696] These reasons being: 1.) They made universal claims regarding the shape polities ought to take. 2.) This was done according to a belief in a geometrical form of ethical reason 3.) The anthropological and theological axioms upon which these claims were made, were themselves questionable.

situated, and in which practical reasoning takes place. O'Donovan reminds us that the Christian faith itself gives us warrant for the Burkean belief that the concrete circumstances of a given political order are significant. In other words, the sort of abstract theorisation of the revolutionaries is precluded in O'Donovan's account. O'Donovan delineates the proper limits of theoretical reflection and what such reflection can tell us regarding the proper limits of political institutions**.** While Burke clearly believed that some political institutions were morally illegitimate, he does not explicitly articulate Christological reasons for such claims, relying instead on claims to a comprehensible moral order. Again, this is an area in which Burke might not have said enough to satisfy the Christian ethicist.

In the prior chapters we saw that for Burke prudence was the means by which the statesman might make right political judgements within God's created order. Using O'Donovan's account we might lay a heavier emphasis upon prayerful prudence and specifically the operation of the Holy Spirit in our practical reasoning.[697] Indeed one criticism which might be made of the conservative tradition in general and Edmund Burke in particular is a lack of overt pneumatology. It is true that Burke clearly articulates a belief in divine providence and God's hand is seen to be actively involved in the affairs of men, but the third person of the trinity is almost never explicitly mentioned as a mediator between God and man.

O'Donovan is clear that Christian moral reasoning occurs in light of Christ's resurrection and our anticipation of the eschatological renewal but 'Of that final enjoyment we have a present anticipation through the Pentecostal gift of the Holy Spirit.'[698] In this picture the Holy Spirit is at the heart of prudential judgements, bestowing a vision which is mindful of God's redeemed order. As

[697] See O'Donovan, *Resurrection*, p. 25.
[698] Ibid., p. 22.

one can see in Christ's ministry this necessarily involves a precise mode of contextual attention and deliberative wisdom. O'Donovan's account of such wisdom is striking:

> I see 'mankind' as apart from myself, even though I am a part of it; and even when I do see myself as a part of mankind, I objectify myself and make 'myself' other than myself in order to do so. But salvation does not consist merely in the objective reality of a renewed order of things apart from myself. It does not consist even in my 'knowing' of that reality, if this 'knowledge' is still qualified by an alienated detachment from its object. The Pentecostal gift means that the renewal of the universe touches me at the point where I am a moral agent, where I act and choose and experience myself as 'I'. It means that in the redemption of the world I, and every other 'I', yield myself to God's order and freely take my place within it. There is a transition from the objective to the subjective mode.[699]

To put it in O'Donovan's terms, Christ had the authority to administer acts of particular judgement and in his resurrection he has restored this authority to humankind. As such, humanity's vocation both morally and politically is to take their place in God's good created order as moral agents who testify to the redemption of that order. By implication humanity's commission is not to design their own utopian order as a substitute for God's good creation.

Authority and freedom

O'Donovan's work has much to say about authority; as we have seen *Desire of the Nations* is primarily concerned with a theological exposition of political authority. We have already traced O'Donovan's narrative in which Christ has redeemed creation and subjected the principalities and powers to his rule. The discussion of political authority and freedom offered by O'Donovan is framed by this narrative.

[699] Ibid., p. 23.

O'Donovan's starting point is St. Paul's assertion that 'all authority is God's authority'. He asserts this in opposition to certain neo-platonic strains of Christian thought which seek to make divine authority immanent to earthly authority. O'Donovan takes this Pauline statement to be indicative of God's authority being vested in creation. He writes, 'They owe their power, as they owe their being, to his creative gift and to his continual affirmation of that gift in sustaining providence. There is no authority except *from* God. Nevertheless, that gift was really given.'[700] Such a statement must of course be qualified by O'Donovan's view that in Christ's resurrection all authority is *rightfully* his, yet O'Donovan's point is that stewards of political authority have the freedom to exercise God's authority as they will.[701]

O'Donovan's account of freedom resonates with that of the conservative tradition, namely a freedom found under law in rightly ordered community, as O'Donovan puts it, 'Liberty too must be limited in order to be possessed,' mirroring Burke's statement that 'there is an extreme in liberty, which may be infinitely noxious to those, who are to receive it, and which in the end will leave them no liberty at all.'[702] O'Donovan's understanding of freedom under authority includes but is not restricted to freedom under the authority of the law, he is clear that there are more authorities than law alone, 'Where authority is, freedom is; and where authority is lost, freedom is lost.'[703] In the created order we find different varieties of natural authority such as 'beauty, age, community and strength' which 'have the capacity, as we encounter them in individuals, in human institutions and in the natural world, to inspire and order our actions in distinctive ways'.[704] To these O'Donovan also adds the authority of injured right which can 'command our resentment and

[700] Ibid., p. 124.
[701] O'Donovan, *Desire*, p. 241.
[702] Burke, 'On the Reform of the Representation in the House of Commons', p. 103.
[703] O'Donovan, *Ways of Judgement*, p. 132.
[704] O'Donovan, *Resurrection*, p. 124

vengeance', this is 'the authority which shapes our structures of justice and government'.[705] *Political* authority is conceived of as 'a complex phenomenon which owes something both to the immediacy of the natural authorities and to the critical reflectiveness of moral authority.'[706] O'Donovan argues that political authority is the product of the 'natural authorities of might and tradition' and the authority of 'injured right'. He believes that when these authorities are combined they wield a moral authority which 'requires that we defer to them'. In his view they are rightfully exercised together when might and tradition are subjugated to the authority of injured right, 'that is, when one whose possession of *might* is in accord with the *established order* of a society takes responsibility for the *righting of wrongs* within that society.'[707]

Such an understanding of political authority militates against an account of the sovereign as one who is capable of wielding their will arbitrarily by might; political authority is only held legitimately when it seeks to execute right judgement. In *The Desire of the Nations* O'Donovan makes the case that whilst that state is right to offer judgement it is always a judgement under Christ and therefore under law, not as a law unto itself. He goes so far as to say, 'the only sense of political authority acknowledged within Christendom was the law of the ascended Christ, and that all political authority was the authority of that law.'[708]

O'Donovan argues that this conviction shaped the political institutions of Christendom and he offers a lengthy account of the relation between secular and spiritual authorities in Christendom: Eusebius' interpretation of Constantine establishing Christ's kingdom, Ambrose of Milan's chastisement of Valentinian II for overreaching his imperial jurisdiction, the Hildebrandine reforms of the middle ages which forcefully distinguished spiritual and secular rule, Luther's ideal two

[705] Ibid.
[706] Ibid., p. 127.
[707] Ibid., p. 128.
[708] O'Donovan, *Desire*, p. 233

kingdoms, the revision of the Salamancan school which stressed a natural law basis for secular authority, and Calvin's Geneva. In light of this history of Christendom O'Donovan concludes:

> Certain key convictions about law became formalised in Christian Europe: all law derives from the will of God; all law is one; all secular rulers are subject to law. These shaped the creative remodelling of the existing traditions of Roman law… Christendom in effect refused the classical commonplace that the ruler was a 'living law', his personal authority indistinguishable from the authority of the law he gave. Even those Christians who defended most determinedly the supremacy of the sovereign over earthly courts understood well enough that the sovereign's decree had no legal substance if it ran counter to divine law, natural or revealed.[709]

This is indeed the understanding of the divine rule expressed in the natural law constitutionalism which we saw in the common lawyers, particularly in Fortescue who is both attentive to God's sovereignty in the natural law and in Christ's rule over the saints. As we have seen Burke believed that obedience to divine rule in the natural law was essential in ordering the British constitution, yet he also maintained that the Christian message had had a decisive effect upon the laws, customs and manners of the European continent. O'Donovan contributes to this understanding, by identifying the way in which Christianity not only attenuated the manners and customs of the European peoples but also engendered a self-conscious subjugation of earthly authority to Christ's final rule.

If, as O'Donovan argues, earthly government is legitimated by its judicial function, one might raise the important question of how the authority of a particular government is established, especially if one accepts the view that 'community identity is no longer self evident. It is called in question by the existence of a new people, drawn from every nation, which by its catholic identity casts doubt

[709] Ibid., p. 234.

on every other'.[710] O'Donovan stresses that Christendom's attempt to answer this question proceeded in several phases but ultimately culminated in conceptions of constitutional law. Crucially, for our analysis, he is careful to note that 'there is no appeal to a natural political form; the political community is defined in terms of a hypothetical act performed in common.'[711] Expanding upon this point O'Donovan writes that, 'The "perfect society", we may observe, is a purely formal unit, determined by the contingent fact of self-sufficiency, not a natural unit. What counts and does not count as a perfect society may change with history, so that the element of social plasticity under the providential sovereignty of God is still insisted on.'[712] Such a profession of the plasticity of society under divine sovereignty again resonates with Burke's account of the constitution as a corporate expression of identity both deferential to God's sovereignty and informed by the story of a particular people in a particular place. O'Donovan proceeds to highlight the point that in accepting constitutionalism pre-modern Christendom rejected the notion that there was an ideal political form:

> The absence of a natural political form has thrown the weight of the theory back upon an act of collective will. This element of voluntarism, which was, of course, to become much more marked in later political theory, was due to the lack of any other social ground for saying that this, and not that, should be the unit of political society. However, in the constitutionalist stage of the theory, the act of will does not account for the nature of political authority as such. If later contractarians found the essence of political rule in the capacity of a community to will as one, the constitutionalists found only the occasion. The source of authority for them was the will of God. In appointing itself a head, society entered into a provision for political structure that God had decreed, and began to enjoy a

[710] Ibid., p. 235.
[711] Ibid., p. 237.
[712] Ibid.

> power of political agency that it had not enjoyed while it was still acephalous. Society had no political authority otherwise.[713]

In his defence of the Glorious Revolution, his rejection of the French revolution and his rejection of arbitrary will, Burke articulates very similar ideas. O'Donovan concludes that:

> Constitutional reflection became one of the hallmarks of the Christian political tradition, following a course quite different from the classical reflection about what kind of government was best… For Christian culture the question, rather, was how a government of any of these kinds can claim to be *the* government of a given people.[714]

It is interesting to note that this is not an account of the Christian political tradition which Rousseau would have disagreed with. We have seen that Rousseau believed Christ's division of the spiritual and the political had destroyed the unity of the state in Christian nations.[715] It was precisely because of the pre-modern constitutionalist conviction in a dual authority that Rousseau considered a Christian society to be weak.

For O'Donovan the legal-constitutional conception which Christendom produced was not accidental, it emerged from the theological conviction that Christ's rule is sovereign, 'the legal-constitutional conception is the essence of Christendom's legacy'. The reason for this is bound up with the freedom of the people to submit to Christ's rule, 'within the context of Christian constitutionalism, sovereignty (*suprema potestas)* had a clearly defined reference to that office of state which, by presiding over other offices, ensured the lawfulness and authority of the whole. Sovereignty within the state was compatible with, even depended on, the rule of divine law over the state.'[716] O'Donovan makes the point that this is also true with regards to international law, arguing that Western Christendom developed a conception of international law which arose as a

[713] Ibid.
[714] Ibid., p. 235.
[715] Rousseau, op cit, p. 131.
[716] O'Donovan, *Desire*, p. 240.

result of the presumption that there was a natural law 'implanted in human minds by God' and 'given effect by international custom and convention.'[717] Burke, was certainly aware of such shared presumptions among the nations of Christendom, referring to Englishmen as 'citizens of the great commonwealth of Christendom'.[718]

As we have seen the corollary of authority, for O'Donovan and Burke, is freedom. O'Donovan's understanding of freedom is developed at length in *Ways of Judgement*. O'Donovan differentiates freedom conceived of as '*the power to act*' which 'always belongs with some kind of individualism'[719] and is ultimately 'abstract and unproductive'[720], from 'a more substantial sense of freedom: *The realization of individual powers within social forms*. This is the sense in which we can say that the objective correlate of freedom is authority.'[721] This is a far closer correlate to the conservative sense of freedom than the understanding of freedom conceived by Hobbes, Locke and Rousseau and taken up by the revolutionary liberals. Burke is quite explicit on this point. He tells us that 'of all the loose terms in the world, liberty is the most indefinite. It is not solitary, unconnected, individual, selfish liberty, as if every man was to regulate the whole of his conduct by his own will. The liberty I mean is *social* freedom.' He proceeds to speak of 'A constitution of things in which the liberty of no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person'. Importantly, Burke too identifies such freedom with justice, 'This kind of liberty is, indeed, but another name for justice; ascertained by wise laws, and secured by well constructed institutions… whenever a separation is made between liberty and justice, neither is, in my opinion, safe.'[722]

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[717] Ibid., p. 236.
[718] Burke, 'Letters on a Regicide Peace', p. 164.
[719] O'Donovan, *Ways of Judgement*, p. 67.
[720] Ibid., p. 68.
[721] Ibid., p. 68.
[722] Burke, *Letter to M. Depont*, in Peter J. Stanlis (ed.), *Selected Writings and Speeches*, p. 505.

O'Donovan's account of freedom is also bound up with the expression of a community's shared life. 'Freedom, then, has to do with a society's particular historical way of existing. Societies cannot be free if they cannot sustain their historical identities.'[723] He speaks of a 'tradition of communications, handed on from generation to generation' which is enriched and mediated as it is passed down. This tradition of communications includes the shared language, culture, geographical locality and undergirding assumptions which give a people their common life together.[724] O'Donovan's conclusion regarding this specific form of social freedom holds so much in common with Burke's *Reflections* that it is hard to believe he did not have Burke's writings in mind when he states:

> For Greeks to be free implies not merely that they can live in Greece and communicate with other people there; but that they can receive from previous generations of Greeks accumulated stores of experience and practice related to the place, and can contribute constructively to their transmission to younger Greeks. In realizing personal freedom we come to understand that the material content of our own communications was all provided through the communications of others; and we discover the extent of what we have received, we recognize the significance of our social identity. Even the rebel depends upon his society to react against. When the conditions for social identity collapse, it is felt as personal injury by every member, and the resulting loss of a sense of personal significance may often be expressed in outbreaks of wild and irrational violence.[725]

Like Burke, O'Donovan is clear that freedom cannot simply be found in any established tradition, he is no cultural relativist. O'Donovan's account of freedom realised in society means that if society is to facilitate the realisation of personal freedom then it needs to conform itself to the created moral order in its own specific circumstances.

[723] O'Donovan, *Ways of Judgement*, p.70.
[724] Ibid., pp. 70-71.
[725] Ibid., p. 71.

While social freedom is bound up with a community's self-understanding for O'Donovan there is also another, related yet distinct, sense of freedom which is focused upon the vocation of the individual. The role of the Holy Spirit is also central in this discussion of freedom. As we have seen, for O'Donovan, the Holy Spirit allows Christians to partake in the freedom of the new order by liberating the bondage of the will and participating in Christ's authority over the created order. Personal freedom then is not merely social, 'there is more to personal freedom than simple participation in a tradition. The individual is called by God to his or her own vocation.'[726] O'Donovan is clear that society has an important role to play in helping individual's discover their personal vocation. If a society aims to facilitate the freedom of its citizens in this sense, then its laws and culture need to be congruent with the reality of God's created order. O'Donovan tells us that talk of a social vision within which personal identity is situated is helpful, as long as we remember 'that not any vision will do, only a true vision.'[727] For O'Donovan society has an important role in 'forcing us to come to terms with reality'[728] and therefore it fulfils its role as it ought to if it imparts a social vision which is aware of the created order. He proceeds to argue that society fails when 'it fails to comprehend its own communicated goods in relation to the supreme good – God himself, and also the Word and Wisdom of God which gives form to the universe of beings. Its structure of shared meanings becomes falsified, and it comes to be held together by a distorted idea of itself. This may take form as an overt ideology of the traditional kind, a legitimating theory based on claims for some class, race or civilizational form.'[729] O'Donovan dissects, in theological terms, the conservative anxiety surrounding the ideological tendency to conform society to a governing first principle. In doing so his analysis offers a critique of the secular society which ostensibly offers a neutral

[726] Ibid.
[727] Ibid., p. 73.
[728] Ibid., p. 74.
[729] Ibid., p. 73.

freedom. He also raises a serious question as to whether a society that is separated from the supreme good to which all social goods are directed (and in doing so distorts the particular identity of a people and their relationship with God) can ever offer true social freedom. O'Donovan makes this point in direct reference to the social contract theorists:

> "social contract" theories of government of the seventeenth and eighteenth centuries which assigned the origin of political institutions to a mythical agreement among the members of society. The myth was clumsy because in representing the community's will to have government as a self conscious device, it confused morality with planning, and represented the whole sphere of political existence, even communal existence, as the invention of man's will. Christian thought, in attributing the origin of authority to divine providence, can recognize the extent to which the political will in any community disposes of an already existing matter. [730]

O'Donovan acknowledges the '"conservative"' philosophy which 'stresses the strongly formative role of a society's tradition in shaping its member's self understandings… It is through the enfolding perspectives of a society's tradition that our attention is first drawn to ourselves, and our self-awareness must accommodate itself to reality as our society conceives it.' By contrast, he emphasises a position which he calls 'liberal' (not intended in the contractarian sense of the word), but by it he means a focus on the individual (which I would contend has always been central to the conservative tradition.) O'Donovan comments that 'the social mediation of reality has to act as midwife to a personal vocation that is not simply a social role. Out of the communicative process there must come a moment at which the individual stands apart and looks upon the social system

[730] O'Donovan, *Resurrection*, p. 130. This is a statement which holds common ground with Burke's belief that: 'A man full of warm, speculative benevolence may wish his society otherwise constituted than he finds it, but a good patriot and a true politician always considers how he shall make the most of the existing materials of his country.' Burke, 'Reflections on the Revolution in France', p. 285.

as it were from outside.'[731] Indeed, one might argue that if a society is to be faithful in its witness to the created order then it cannot help but encourage such critical reflection in in dividuals.

Burke was clear that in the final analysis individuals ought to stand apart from the social order and act upon the dictates of their own conscience, for the reason that they would someday be held accountable before God.[732] O'Donovan makes the same point as he writes:

> For a moment society must withdraw, like John the Baptist, and point its disciple beyond itself, to the place where this reflective stance is accessible. "Blessed is the man who does not stand in the counsel of the ungodly, walk in the way of sinners, or sit in the seat of the scornful" (Ps. I:I). The "counsel of the ungodly," or the "company of evil-doers" (ps. 22:16; 26:5), is the first object against which society arms the individual, warning him that it is moral weakness to be too gregarious, too wholly responsive to social pressure. And the society which so arms the individual admits that it is itself a "company of evil-doers," that it is arming him against itself. The moral horizon which Kierkegaard called "becoming an individual," anti-social though it may seem, is in fact the horizon to which a society must direct its members if it is to fulfil itself as a society.[733]

The important point is made that if a society seeks to engage the individual with reality then it necessarily encourages critical reflection, 'If freedom is the self-realization of the individual within social forms, the twin guiding lights of sociality and individuality mark the runway along which any discussion of freedom must get airborne'[734] Such an admission is integral to the conservative tradition which neither seeks to subsume the individual in a corporate body nor does it seek to exult the individual to the status of a God. But it is in an admission of God's sovereignty that the twin foci of individual and society are placed in their correct relation.

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[731] O'Donovan, *Ways of Judgement*, p. 75.
[732] Burke, 'Indictment of Warren Hastings' in Lewis Copeland et al., op cit., p. 164.
[733] O'Donovan, *Ways of Judgement*, p. 75.
[734] Ibid., p.69.

For both Burke and O'Donovan justice is a topic that is closely related to freedom. Reading Burke on the need for a public judgement beyond the arbitrary will of the people one is clearly reminded of O'Donovan's account of the function of the ruler:

> But where popular authority is absolute and unrestrained, the people have an infinitely greater, because a far better founded, confidence in their own power. They are themselves, in a great measure, their own instruments. They are nearer to their objects. Besides, they are less under responsibility to one of the greatest controlling powers on the earth, the sense of fame and estimation. The share of infamy that is likely to fall to the lot of each individual in public acts is small indeed, the operation of opinion being in the inverse ratio to the number of those who abuse power. Their own approbation of their own acts has to them the appearance of a public judgment in their favor. A perfect democracy is, therefore, the most shameless thing in the world. As it is the most shameless, it is also the most fearless. No man apprehends in his person that he can be made subject to punishment. Certainly the people at large never ought, for as all punishments are for example toward the conservation of the people at large, the people at large can never become the subject of punishment by any human hand. It is therefore of infinite importance that they should not be suffered to imagine that their will, any more than that of kings, is the standard of right and wrong.[735]

In this passage we can clearly see Burke's belief that justice emerges from an objective order, and not simply from the aggregated will of individuals. In this sense, within a democracy, the *demos* should not imagine that it has an ultimate moral authority, as citizens remain stewards in a given order of creation.

The knowledge that humans are themselves to be the stewards of justice should chasten our expectations as to the extent to which a perfectly just society is achievable. O'Donovan's account of

[735] Burke, 'Reflections on the Revolution in France' pp. 178-179.

the operation of justice is rightly tempered by a belief in the frailty and fallenness of humanity. He reminds us that:

> even at its best, public right action can bear only an indirect relation to the demands of truth and goodness considered absolutely. Justice in human communities is only relatively just. It is not mistaken to think of political authority, by positive law or by other means, as 'applying' the principles of natural law to social life; for 'applying' is a sufficiently broad term to cover any kind of conscientious attempt to make action correspond to the demands of right

Such a caveat would be important for the Burkean who wishes to stress human frailty and the deeply contextual considerations involved in any act of judgement. Furthermore, one could argue that O'Donovan's whole notion of individual acts of judgement seems to resist the construction of a polity according to an unchanging set of axioms. Importantly for conservatives O'Donovan is clear that 'The exercise of political authority is the search for a compromise which, while bearing the fullest witness to the truth that can in the circumstances be borne, will, nevertheless, lie within the scope of possible public action in the particular community of fallen men which it has to serve.' [736] As we have seen, such concerns were paramount for Burke, who was deeply suspicious of any political ambitions which subjugated all consideration of means to a given end.

<u>An emphasis on customs, traditions and institutions; in particular the Church</u>

We have seen that O'Donovan believes there to be an intimate link between tradition and freedom. His starting point on this issue is Israel's understanding of the law. The parallels between Israel's understanding of the law and Burke's view of the common law and the British constitution are striking. O'Donovan points out that in Israel's eyes Yhwh's judgements were of lasting validity. As a result, 'The distinction between law and history was by no means so sharp in Israel as we may be

[736] O'Donovan, *Resurrection*, p. 130.

tempted to make it out to be'. He sees the development of a legal culture in Judaism as something which emerged from the salvation history of Israel, arguing that if history was Israel's means of relating Yhwh's saving acts to posterity 'then law is the telling of his judgements, which, once given, are to be handed on.' O'Donovan argues that, in contrast with other cultures, Israel's concept of law was 'founded on occasional precedent' and not on 'all-encompassing "codes"'. Israel then, was constantly mindful of its own identity and history, as defined by its relationship with Yhwh.[737]

O'Donovan also identifies a connection between the historical identity of the Jewish people and the land. He argues that 'without the consciousness of something *possessed* and handed on from generation to generation there could be a theology of divine judgements but not a political theology, since it would never be clear how the judgements of God could give order and structure to a community and sustain it in being.' He argues that the traditional possession of Israel was not just the law but 'Originally and fundamentally' Israel's self undertanding as a people was tied to the land. Yet there is a deep connection between these two ideas, 'Possessing the land was a matter of enjoying that purchase on the conditions of life which was Yhwh's gift…. On the one hand Israel as a whole possesses the land as a whole. On the other hand each tribe and family has its share, its own way of participating in the gift of God to his people. The gift is both collective and distributive.'[738] Such an equilibrium between the collective and the individual is both present in the Christian doctrine of the Church and in Burke's view of the individual in society. Individuals are stakeholders in a corporate body in which their own identity is found.

The belief that one vital role of political authority is to steward the inheritance of the past is also articulated by O'Donovan. As Chaplin notes, 'the task that the bearer of political authority bears is the *task of public judgement*. Yet the scope of political authority can also be characterised by its

[737] O'Donovan, *Desire*, p. 39.
[738] Ibid, p. 41.

vocation to *defend the common good*. The two are linked simply by virtue of the fact that *it is the needs of the common good to which judgement is essentially directed*.'[739] Chaplin expands upon this point, writing that 'Traditions incorporate accumulated principles and practices for the discernment of the requirements of justice.' Therefore 'claims of justice do not exhaust the common good, nor, it seems, the task of government. The common good also includes "the flourishing of a particular society with a particular identity"; that is, a society's "tradition"'.[740]

Speaking of O'Donovan's conception of tradition, Chaplin writes that 'the author clearly distances himself from any suggestion of a traditionalist conservatism which absolutizes the norm of historical continuity... Rather, traditions only sustain themselves through an ongoing process of internal critical renewal'.[741] This is an important point which we have noted previously. The instinct to conserve can easily become an ideological principle to which all other considerations are sacrificed. It would certainly be very hard to bring this charge against Burke, who spent so much of his political life inveighing for social change. This leaves O'Donovan with an account of tradition as 'the *historically particular form of a people's defence of its common good*. It is the characteristic shape of *this* people's common good as distinct to the shape of *that* people's.'[742] The similarity between Burke and O'Donovan on this issue is quite pronounced. For instance O'Donovan tells us that, 'Tradition safeguards the sphere of *public* life; for the substance of any community, that which its members hold in common, is determined by what they can 'pass on' from one to the other'.[743] But what of the civil authority of the church as an institution?

[739] Chaplin, op cit., p. 300.
[740] Ibid.
[741] Ibid., p. 299.
[742] Ibid.
[743] O'Donovan, *Resurrection*, p. 129.

This understanding of the relationship between tradition, institutional Christianity and the common good is, as we have seen, profoundly Burkean. It is also an area in which O'Donovan is at odds with significant contemporary theological figures of the twentieth century. The most notable contemporary theologian to offer a critique of Constantinianism is Stanley Hauerwas. In Hauerwas' view the Church ought not to be wedded to the state and should live distinctively as a community of character; in this sense he takes on the same assumptions that various contractarians have held, albeit for different reasons.[744] O'Donovan is not so pessimistic about the idea of a Christian state, as John Hughes puts it 'O'Donovan responds specifically to Hauerwas's charge of 'Constantinianism' by arguing that Christendom was simply what happens when the rulers of the world submit (with varying degrees of sincerity) to Christ, rather than a sinister alliance with corrupting power… actively to desire the persecution of the Church is to be perverse.'[745] In reading O'Donovan's work we should be mindful of his own tradition and the extent to which Burke and O'Donovan are linked by a shared Anglican heritage. We shall shortly look at the Anglican tradition in more detail, but it is nevertheless worth noting that O'Donovan is familiar with Burke's writings and the writings of Burke's influences such as Hooker. It is not a coincidence that Hooker, Burke and O'Donovan offer such similar accounts of the Church as a vital organ of society that helps to mould the customs and culture of the nation. Similarly, all three articulate the belief, albeit in different manners, that the Church's role is not to be subservient to the state, but to preach the gospel and in doing so to remind the state of its limits. Reading all of these thinkers we are reminded that we can only speak of the Church and state as an organic whole, as long as the state is attentive to the Church.

[744] See Stanley Hauerwas, *The Peaceable Kingdom: A Primer in Christian Ethics* (London: SCM, 2003)
[745] John Hughes, 'After Temple? The Recent Renewal of Anglican Social Thought', in Malcom Brown (ed.), *Anglican Social Theology: Renewing the Vision Today* (London: Church House Publishing, 2014) p. 86.

An emphasis on the role of civil society and subordinate affections, as well as the nation state as a legitimate locus for such affections

We have seen that in national governments O'Donovan finds a legitimate locus of political authority, which reflects the identity of the people. O'Donovan believes that a warrant for national traditions is both present in the Old Testament and legitimated under Christ's rule:

> if Israel's experience of government is to be taken as a model for other societies, then we must allow that divine providence is ready to protect other national traditions besides the sacred one… The second is that the particular traditions are apparently susceptible of a kind of protection which the tradition of human society as a whole is not. In securing the total tradition of humanity, we are in a context in which it is out of place to invoke the commanding role of a government; but it is not out of place to invoke the role of law and to conceive relations between particular national communities in terms of a law-structure. This says something about the limits of our collective identities. But there is no collective identity so overarching and all-encompassing that no human beings are left outside it. In that sense it is true that to speak of 'humanity' is to speak of an abstraction. Only in that sense, for in fact 'humanity' has a perfectly conceivable referent, and we should not hesitate to say that 'humanity' is real. But it is not a reality that we can command politically. We do not meet it in any community, however great, of which we could assume the leadership. We meet it only in the face of Christ, who presents himself as our leader and commander. The titanic temptation which besets collectives needs the check of a perpetual plurality at the universal level. There are always 'others', those not of our fold whom we must respect and encounter.[746]

Such was Burke's logic when he denounced proclamations of the dawning of liberty for humanity. He recognised that there was no political locus which accommodated humanity, which was a mere abstraction. Yet O'Donovan also identifies the precise reason why speaking of Christ's political

[746] O'Donovan, *Desire*, p. 73.

achievements for all humanity is legitimate, namely because God in Christ has a legitimate political claim on all humanity.

The nation then fulfils a special function in the eschatological interim, O'Donovan writes that 'The nation is a concrete territorial order of political power, judgement, and tradition that sustains a space within the sinful human condition for the gathering of Christ's faithful people through the work of the Holy Spirit.'[747] Whilst O'Donovan argues that many of the 'constitutive elements' of the nation remain the same, theologically 'it is no longer revealed to be the vehicle of salvation'[748] but 'merely the guaranteed social space within which God's saving work proceeds. It is revealed to belong to the Father's sustaining governance of the world rather than his transforming governance through the spirit of Christ.'[749]

Elaborating upon why the nation state in particular finds a particular warrant to exercise earthly authority, O'Donovan writes:

> In the light of the advent of Christ's kingdom, we can discern the defining aspect of the earthly nation to be the concrete rendering over time of legal justice, that is, the ongoing practice of judgement conducted through the medium of law. It is this rather than permanent territorial boundaries or ethnic/linguistic homogeneity or economic power that gives political identity to a society. In the Christian political tradition the defining primacy of legal justice has been elaborated in the twin theological themes of (1) the divine vicariate of the ruler and (2) the commonwealth as a body of law, both of which have been central pillars of the Christian formation of nations. The supercession of these themes in the modern concepts of the nation goes some way to accounting for the proliferating perversions of the 'nation-state' in our time.[750]

[747] Oliver O'Donovan, *Bonds of Imperfection* (Grand Rapids, MI: Eerdmans, 2004) p. 285.
[748] Ibid., p. 286.
[749] Ibid., p. 287.
[750] Ibid., p. 287.

The role of the nation state has been a subject of much discussion in twentieth century political theology. Reinhold Niebuhr famously expressed a fundamentally pessimistic view of nations, expressing the belief that on a domestic level citizens were capable of moral behaviour, but at the level of classes and nations, humans would rarely transcend their own self-interest.[751] During the Second World War the German Lutheran Karl Barth expressed serious concerns at the idea of Christians associating too closely with the nation state.[752] Similarly, within Anglican social thought there have been figures that have reacted against the state. Concerned at the prospect of an overbearing and ideological state, John Figgis' account of the *Communitas Communitatum* argued for small communities within a state which were not influenced coercively by the state other than in matters of justice.[753] O'Donovan is, of course, not writing in a bubble and is well aware of Burke's writings, as well as other Anglican theories of Church and state. Like Coleridge, O'Donovan balances a belief that the Universal Church is fundamentally distinct from the state with the hope that the Church can be an engaged moral influence upon the society of which it is part. This is an idea which has been central to Anglican Social thought and even Eighteenth Century Tractarians such as Edward Pusey believed that the state 'would be left adrift' if it did not have an established Church. This is perhaps another area in which Burke's thought might be checked. Burke's attachment to the constitution can at times seem so absolute that it is almost an expression of religious faith; to say that this ever did amount to a religious faith would be to overstate the case; Burke is clear that all governments will one day be swept away and justice will reign supremely;[754] we have seen that he was also perfectly clear that the Church should retain its moral independence; yet nevertheless,

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[751] Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* [1932] (London: Westminster John Knox Press, 2001)
[752] See, the 'Barmen Declaration' and Karl Barth, *Church and State* [1938], trans. G. Ronald Howe (London: Smith and Helwys, 2009)
[753] John Figgis, *Churches in the Modern State* (London, 1913)
[754] Burke, 'Indictment of Warren Hastings' in Lewis Copeland, op cit., p. 164.

O'Donovan and others offer us good theological cautions against associating any constitution too closely with God's righteous rule.

This is a point which O'Donovan stresses in relation to contemporary western beliefs in democracy, he writes: 'the theological naïveté which has gripped Christians and non-Christians in the last century – particularly the latter half – is to think that two wholly unified and articulate common goods can coexist harmoniously and cooperatively: namely, the Church of Christ and the civic nation united in the purely secular faith of "the democratic creed." For the most part, Christians have not perceived the inflation of what belongs to Caesar in democratic civil religion, its capacity to tyrannize society like some Jacobin-at-large. Both early critics of nationalism and totalitarianism like Jacques Maritain and later generations of critics have failed to appreciate how the democratic creed itself functions as an ideology: i.e., a pseudo religion justifying a false social totality'; importantly he adds that 'the advent of Modern tyranny depended on the demise of a Christian political world where rulers were vicars of God'.[755] In short, for O'Donovan the withdrawal of Christianity from public discourse is the precondition for a dangerous faith in whatever vision of the common good is established by democratic consensus.

One key conviction which O'Donovan expresses well is that moral sensibility is not simply transparent to reasonable individuals, but it is deeply rooted in the historical identity of a community. Equally, the rights and liberties of an individual are safeguarded by the deeply rooted character of a nation:

> [T]he conscience of the individual members of a community is a repository of the moral understanding which shaped it, and may serve to perpetuate it in a crisis of collapsing morale or institution. It is not as a bearer of pre-political rights that the individual demands

[755] O'Donovan, *Bonds of Imperfection*, pp. 294-295.

> the respect of the community, but as the bearer of a social understanding which recalls the formative self-understanding of the community itself.[756]

We have seen the idea that the idea of the nation as a repository of moral knowledge is recurrent in Burke and the common lawyers. In this sense, it was the nation's moral character which secured the individual and collective wellbeing of the people.

Even within the context of a single nation, locality is a recurrent theme in Burke's work. From his small platoons to his defence of regional identity and local affections he is an advocate of the local and the particular. The proposition that geographical locality is a natural counterpart to community is an increasingly interesting one in a digital age. Yet for O'Donovan the existence of concrete communities cannot be dispelled by technology; in part this follows from the conviction that the spiritual is not divorced from the physical, but the two are in some sense woven together. He tells us that the belief that locality does not matter is based amongst other things on a false intuition that 'the Old Testament is full of the sense of place, but the New Testament is indifferent to it.' Quite to the contrary, he argues, 'If Christianity spiritualized the Old Testament territorial categories, then, it was because it found them already half-spiritualized. It took seriously the freight of commerce between God and man with which the land was charged'.[757] We have seen that such ideas are not entirely foreign to Burke, though to speak of land itself being vested with spiritual significance is perhaps not the natural territory of a politician such as Burke. Again, we might supplement Burke's thought by pointing towards the biblical witness to the spiritual significance of place and, more generally, matter. From Israel's Promised Land, to the incarnation, the biblical narrative consistently vests the physical world with spiritual significance.

[756] O'Donovan, *Desire*, p. 80.
[757] O'Donovan, *Bonds of Imperfection*, p. 311.

Conclusion

While I would not presume to identify O'Donovan as a conservative thinker, and we have noted points of divergence between O'Donovan and Burke, I have argued that his thought is a helpful supplement to the core of Burkean conservatism established by Burke's own thought. O'Donovan reminds the Christian that a conservative ethic must be framed by the Christian narrative. He also reminds the Christian that a true knowledge of the created order is inseparable from Christ's resurrection. Finally, we have seen that O'Donovan's work can help us fill out the Burkean notion of prudence, by emphasising the active role of the Holy Spirit in moral deliberation. These central Christian beliefs add theological flesh and coherence to the six principles of Burkean conservatism as I have defined them. In the concluding chapter I wish to draw together the threads of this thesis, questioning what we have learnt about the contractarian and conservative traditions and how this might impact our political practice today.

Conclusion

At the start of this thesis we looked at Justice Laws' judgement in the Gary MacFarlane case. In his judgement we identified a number of ideas which emerge from the liberal contractarian tradition. In the subsequent chapter we looked in some detail at the presumptions which animated the English common law tradition, in particular a belief that the natural law sculpted the British constitution. I argued that such ideas exercised a substantial influence upon Edmund Burke. We then traced the liberal tradition from its roots in the tumult of seventeenth century England to the upheaval of the French Revolution and finally to a more contemporary articulation in the work of John Rawls. At each juncture I have brought the constitutionalism and natural law based conservatism of Edmund Burke into dialogue with the contractarian tradition. We then synthesized Burke's arguments and worldview into six theo-political principles and added O'Donovan's theological narrative in order to give a more substantial framework and theological depth to these principles. In this concluding section of the thesis I wish to draw these strands of argument together and consider the ways in which a retrieval of Burke's thought might provide us with a different approach to contemporary political questions than that provided by contractarian liberals.

What have we learnt about contractarian liberalism?

One of the reasons we have looked at different instantiations of the contractarian liberal tradition is in order to draw attention to the breadth of the tradition, so that it is not treated as an entirely homogenous body of beliefs. We have seen that the core premises of contractarian liberalism have been appropriated diversely by a variety of individuals and parties in different contexts.

In the work of Locke we saw the desire of contractarian liberalism to defend the inherent worth of human beings and to reconcile this worth with divergent religious beliefs. Yet as a result of Locke's

objectives we also saw a thinning out of a Christian account of creation and God's relation to the social order. Where Locke sought to establish the 'just bounds' that lie between government and religion he presumed the neutrality of the state and concomitantly the possibility of privatising religious belief. He would almost certainly have been aggrieved to have been a source of inspiration for the French revolutionaries, who suppressed religious belief in favour of the ostensibly neutral reason of the state.

In the contractarianism of the British radicals we saw that radical political views were, understandably, associated with religious dissent. We saw that by the time of the American Revolution a Lockean discourse of rights was the primary resource for such dissenting British radicals. Similarly among the French revolutionaries we saw significant elements of the *Declaration of Man and of Citizen* were deeply influenced by Locke's thought. However we noted that the contractarian thought of the revolutionaries had a more communitarian tone than Locke's *Second Treatise*, primarily due to the influence of Rousseau's doctrine of the general will. We also noted that there was a more radically anti-religious tone to French Jacobinism than there was amongst British radicals. We saw that in the revolutionary France of the early 1790's certain fundamentally held beliefs were asserted and it became considered heretical to diverge from them. We heard Burke's deeply pessimistic view of the 'Atheism by Establishment' of the revolutionaries at a time in which the *Declaration* had an explicit provision for the freedom of religion. We saw that the basic presumption that reason was supreme, and religion was little more than a private eccentricity to be permitted by the state, ultimately resulted in the attempted extirpation of the Christian religion in France.

In the contractarian thought of Rawls we saw a more inclusive contractarian philosophy which endeavours to cater to all reasonable parties in a pluralistic society. We saw that, unlike Locke and the revolutionaries, Rawls shies away from any metaphysical claims, seeking to speak purely in

terms of political conceptions. As well as looking at Rawls' account of humans as rational and reasonable, free and equal, I also offered a detailed examination of Rawls' account of justice and the idea that constitutional essentials can be rationally selected. I have argued that there is a strong enough family resemblance between these contractarianisms to identify a core body of beliefs which we might scrutinise politically and theologically, and I have tried to show how Burke's criticisms of contractarian thought in his own day might also pertain to the work of Rawls.

Throughout this thesis we have looked in some detail at the methodology of the contractarian tradition, which, it has been argued, is closely linked to the substantive claims of the tradition. The methodological approach to politics has been assessed from a theological perspective and I have questioned whether its vision of man is overly optimistic and indeed whether it places too much esteem in the reasonability of human beings, both as citizens and as political architects. I also questioned the liberal tradition's conception of reason and whether it is sufficiently alive to the deeply contextual operation of reason and the fact that reason operates within a tradition of thought which always already contains certain assumptions about the world. I have made the case that John Rawls is more aware of this issue than former contractarian thinkers and has tried to incorporate a degree of contextual sensitivity to the process of political reasoning. Nevertheless, I have expressed doubts as to whether Rawls' thought has really moved away from a belief in an objective reason which operates outside of any substantive metaphysical commitments. Furthermore, I have shown that Rawls' political constructivism still necessitates the abstract process of political reason, of which Burke was so suspicious.

Whilst I have not sought to make the claim that Justice Laws is necessarily a Rawlsian or Lockean, I have held his judgement on the Gary MacFarlane case up as an instance in which we can see clearly the premises of contractarian liberalism articulated. The extent to which such a Rawlsian discourse has actually permeated contemporary British society is, as I have noted, beyond the scope of this

thesis. We need merely note that in Justice Laws' judgement we can see how the accepted axioms which undergird a culture effect the legal, political and everyday deliberations of individuals in a society. This thesis has primarily sought to make a conceptual case that, from a Christian theological point of view, the broadly contractarian assumptions which Laws makes ought to be regarded with a degree of suspicion. Furthermore, it has been pointed out that there is good historical evidence to suggest that Laws' interpretation of the law in this case is, contrary to his suggestion, quite at odds with the understanding of the common law and the constitution held by the great historical figures of the English legal tradition.

What have we learnt about Burke and conservatism?

The first chapter of this thesis made the case that Burke was deeply engaged with the common law tradition and that this common law tradition was substantially influenced by Thomas Aquinas' conception of the natural law. I have drawn attention to a variety of assumptions which were active in the common law tradition which have often been seen as characteristically Burkean. Among these assumptions are an emphasis upon precedent, accumulated wisdom, prudential reasoning, the primacy of the rule of law, the sanctity of the constitution, the influence of the natural law upon the common law and the importance of custom. In this sense we have learnt that, as Burke himself told us, many of the principles which governed his political thought were not novel but an inheritance from significant constitutional and legal thinkers. Interestingly, we have observed some of the political logic of eighteenth, nineteenth and twentieth century conservatives operating in the legal thought of the pre-modern common law tradition. Notably, this logic was closely tied to Christian beliefs about the world in general, and the nature of law in particular.

We have looked in detail at Burke's thought and brought it into engagement with the contractarian tradition. We have seen that the arguments which Burke brought to bear upon the French

revolutionaries were also a reaction to a domestic tradition of radical contractarianism which found its roots in Locke's *Second Treatise*. I have pointed out that Locke's political thought was perceived as radical by contemporary Whigs and that Burke largely ignores Locke, notably in his defence of the Glorious Revolution. We saw that there is some evidence to show that Burke was perceived as an opponent of Locke by his contemporaries and I have made the case that this is not surprising given Burke's well known rejection of contemporary Lockean discourse. Furthermore, we also saw that contractarian arguments drew criticisms from a variety of figures whom Burke was familiar with, from common lawyers such as Matthew Hale to philosophers such as David Hume. I have made the case that there is much in the contractarian tradition which opposes the common law tradition's esteem for precedent and ancient wisdom. I have argued that as a scholar of the common law, it is no coincidence that Burke saw the contractarians as a threat. I have made the case that Burke's reaction against the enlightenment ideas of the *philosophes* goes beyond his defence of British constitutionalism. We have seen that Burke defended the 'untaught feelings' and affections of men against what he perceived to be an attack upon them by the 'enlightened reason' of the *philosophes*. Similarly we have seen that Burke's understanding of the natural law was markedly different to that of Locke. I have argued that this is another area in which Burke shows himself to be an heir to premodern thought in general and English legal thought in particular. Underlying Burke's rejection of the enlightenment thought of the revolutionaries, I have argued, is a rejection of what Burke perceived to be a philosophy which despised the Christian religion. I have made the case that Burke consistently associates what he considers to be the worst elements of the thought of the *philosophes* with dissenters and atheism. I have shown that in the areas in which Burke was most critical of the *philosophes* (such as the affections, the social contract, the rights of man, and their geometrical approach to politics) he perceived a direct link between their

theological beliefs and their political ideas. By contrast, Burke's political thought, I have argued, was informed by his Anglican faith.

Finally, it has been argued that there is a congruence between Christian doctrinal commitments and a tradition of Burkean conservatism. I have noted that there are serious ambiguities in speaking of 'conservatism' and that a multitude of thinkers with divergent political concerns have identified as conservatives of one type or another over the course of the two centuries since Burke's death. Nevertheless, I have argued that there is a historically coherent tradition of thinkers who self-identified as Burkean conservatives. I have set out six political principles which all of these thinkers followed Burke in articulating. I have then made the case that these principles are not only compatible with a Christian worldview but likely emerged from Christian doctrinal commitments. I have argued that Oliver O'Donovan's thought provides a helpful supplement to the political principles of the conservative tradition, adding theological coherence to the principles I outlined. We noted areas in which Burke's thought was, from a Christian perspective, in need of expansion and we also noted some more points of tension between Burke and O'Donovan. Nevertheless, I have argued that overall O'Donovan's thought helps to elucidate the theological rationale of Burkean conservatism.

A comparison

In many of their ideas concerning toleration Burke and Locke were remarkably closely aligned. Both were religious men who sought toleration for religious dissenters and both were seemingly animated by a desire for peace, justice and civil concord. We have seen that where these two great men find themselves in fundamental disagreement is in their conception of man and the state as well as in their methodological approach to politics. We identified that one corollary of Burke's affirmation of the Christian religion as the ground of the state was a belief in the incremental

development of the state in accordance with the natural law. We saw that, for Burke, this law was operative in the moral instincts and prudential reason of men. By contrast, Locke's ground for the state emerged from man's volition. Similarly Locke's conception of man did not emerge from substantive religious doctrines but from the idea of man in the state of nature endowed with subjective rights. As we have seen the Supreme Being of the *Second Treatise* was incidental enough to Locke's political project that the liberal tradition was able to sever God entirely in subsequent formulations of liberal political thought. We saw that it was a contractarian vision of society, the efficacy of man's reason and his inalienable rights to freedom and equality, which provided the substantive foundations for Locke's political thought.

Whilst we have looked at length at the theological issues with a political system which is built upon a conception of humans as free and equal, we have seen that the conservative tradition also esteems the ideals of freedom and equality. We have heard Burke's argument that it was precisely because of the esteem which the British constitution attributed to freedom and equality that the liberal tradition was gifted with these ideas. We have also heard his belief that if ideas of freedom and equality are to do good and not ill they must always be qualified, limited and couched within a particular context. We have seen that Burke did not hope to renovate society according to a conception of the individual as naturally free precisely because he believed that this was the surest way to jeopardise the existing freedoms and the equality before the law which British citizens enjoyed.

With reference to O'Donovan's work, this thesis has argued that the normative standard of freedom and equality is not to be found in an idealised form of man's own reflection, but in the face of the risen Christ. It has been argued that in Christ's redeemed creation the natural law and the guiding power of the Holy Spirit are accessible to those who wish to discern and instate the first fruits of God's coming Kingdom. The characteristics of Christ's coming rule are thus appropriated to

our own concrete circumstances in just laws and cultures which concede that the final rule is Christ's alone. In this picture tyranny and human suffering are deposed, not on the basis of inherent natural rights, but on the basis of the divine demand for justice and human dignity witnessed to by Christ. Yet, as has been argued, the admission that we still occupy a fallen world necessitates a sensitivity to circumstance, context and prudential judgements in seeking to appropriate right order to our own contexts.

The case has been made that the pursuit of a culture which seeks to concede Christ's lordship must always be held in tension with the admission that the kingdom has not yet arrived. It has been argued that human beings must be allowed the freedom to reject Christ, if they so choose. In response to the argument that a secular liberal democratic state allows just this; a sphere of limited freedom for individuals to accept or reject Christ, a freedom which is limited only by the bounds of property, civil rights and equality, this thesis has sought to make the case that the character of the contractarian liberal state is more substantial than a simple arena of negative freedom in which an objective form of reason dictates the terms of public debate. While liberalism has been publicly presented in such terms, notably by Justice Laws, this thesis has tried to highlight the undergirding axioms and methodological assumptions which animate the tradition. In contrast to the claims made by Justice Laws, it has been argued that a precondition for true freedom is a society of just laws and commonly held moral truths which derive from the Christian tradition. I have contended that if the political ordering of a nation is not to be arbitrary, there must be a distinctive cultural discourse according to which a nation is politically ordered. Carey's anxieties stem from the concern that a secular liberal ideology is beginning to pervade the political discourse of the nation where the claims of the gospel used to be the unifying vision which provided the common language of a people. This thesis has argued that a broad cultural admission of God's sovereignty supplemented by the claims of the Christian gospel is the firmest foundation for a society which

aspires to true freedom; including the freedom to reject Christ. I have argued that this freedom consists in an accurate comprehension of the world through the truths of scripture and by the ordering of human lives in accordance with those truths. As the conservative historian Christopher Dawson wrote, 'the freedom of man is in the knowledge of God.'[758]

A conclusion

Burke and the conservative tradition which followed him did not seek to resolve political questions by reimagining the form the polity ought, or reforming the polity according to abstract axioms. It has remained a central belief of the conservative tradition that a rejuvenation of culture in the civil realm and the operation of prudence in the political, is more potent than such abstract political theorisation. In the final analysis it is the decision of the individuals who compose a nation to choose which they will put first, a belief in man, autonomous, equal and a bearer of natural rights, or a belief in Christ, to whom all are subject, before whom all are made equal, and in whom human dignity is redeemed. We have seen that from a Christian theological perspective, the distinctive vocation of the Church is to proclaim the message of the gospel and in doing so transform the culture of a nation. If we are to take the claims of the Christian gospel seriously then secular politics does not contain the final solution to the strife that accompanies the co-existence of human beings. This thesis has argued that for politics to know its true vocation and its proper limits it necessarily requires the Church's proclamation of the true ground upon which all authority rests.

Whilst this thesis has argued that the conservative tradition holds a set of political principles which preserve a space for the sovereignty of God and offers a distinctly Christian approach to politics it has also been noted that a Christian might make a case for supporting another tradition on the

[758] Christopher Dawson in Russell Kirk (ed.), *The Portable Conservative Reader* (New York, NY: Penguin, 1982) p. 499.

basis that the gospel admonition to solidarity with the poor is emphasised. In both of these principled political positions the congruence of the political principles with the gospel of Jesus Christ must, for the Christian, be the central point of concern. For this precise reason, the case has been made, that there are political positions which must be precluded if the Christian is to be faithful to the claims of the gospel. Most notably in this category are political ideologies which hold a totalising claim to reorder society according to a particular set of axioms which do not acknowledge God as the ultimate source of right order and justice. The claim has been made that at the foundation of the contractarian tradition is an anthropology and an account of secular authority which sits uneasily with the biblical account of these issues, as well as a methodological approach to politics which elevates human reason to the detriment of a more expansive theological account of human sociability**.** As such it is a tradition which, at its best, has sincerely sought peace and justice, but, at its worst, has assumed an ideological form which has sought to denounce and displace the Christian faith. The conservatism of Edmund Burke has been presented as a preferable approach to politics. In his substantive claims, and in the methodological approach to politics which follows from these claims, we have seen that Burke diverges significantly from the contractarian tradition and offers us an old way of approaching new political challenges.

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