

# SCOTTISH POLITICAL THEORY: FROM NATURAL LAW TO COMMON SENSE

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The opening section of my paper comments in very general terms on European thought during the sixteenth and seventeenth centuries. My aim in this part of my paper is to provide background. Section 2 comments on the modern natural law tradition as a response to the intellectual situation sketched in section 1. Section 3 onwards explores Scottish responses to the same intellectual situation, and proposes that Scottish political theory stands to one side of natural law thinking.<sup>1</sup>

## 1. *European thought*

During the sixteenth and seventeenth centuries, European thought became gripped by concern about how moral claims and claims to knowledge might be justified. On what foundation – on what basis of justification – might such claims rest? Questions about foundations were not seen as merely questions about the validity of individual truth claims or value claims. In addition, they were seen as questions about the justifiability of *criteria of validity* themselves.<sup>2</sup>

In the course of the sixteenth and seventeenth centuries, questions about foundations took a number of forms. In philosophy, they presented themselves as questions about how the challenge of scepticism – and, more

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<sup>1</sup> My claim is, I stress, that Scottish *political theory* stands aside from the natural law tradition. (Sometimes, I employ *political theory* and *social and political theory* as loosely-interchangeable expressions.) The paper does *not* attempt to sketch the history of Scottish legal theory or Scottish law.

<sup>2</sup> On ‘criteria’ (or ‘standards’) in a sixteenth-century context, see Sextus Empiricus – translated into Latin in 1562 – *Outlines of Scepticism* (Cambridge University Press 2000) p. 72; and for commentary R.H.Popkin *The History of Scepticism from Erasmus to Descartes* (Van Gorcum 1964) p. 3.

specifically, “Pyrrhonian” scepticism<sup>3</sup> – might be met. In religion, they took the form of questions about the standard against which faith might be measured. In addition, they took the form of questions about how authentic faith might be identified. In the development of natural science, they took the form of questions about whether a ‘method’ might be found which led beyond human frailty – not least, frailty rooted in the ‘dullness, incompetency, and deceptions of the senses’.<sup>4</sup> For moral philosophy, questions about foundations were highlighted by the discovery, during voyages of trade and exploration, of non-European ethical systems. Politically, questions about the foundations of allegiance and legitimacy were highlighted by wars of religion and by processes of far-reaching social change.

In order to round out my very general comments on European thought, a brief note on ‘scepticism’ – a term that I have employed in passing – is in order. Conceptually, sceptical questions and questions about foundations are two sides of the same coin: what the seeker after foundations attempts to identify – namely, a way of justifying criteria of validity – and what the sceptic believes may never be found are one and the same thing. A conceptually consistent seeker after foundations attempts to refute scepticism, whereas a conceptually consistent sceptic maintains that reliable truth claims and value claims do not exist. In the sixteenth and seventeenth centuries, I propose, a concern with foundational issues – or, stated differently, a concern with overcoming scepticism – was widespread. This is not to say, of course, that the influence of any given school of sceptical thought was all-pervasive. Nor is it to say that, in the sixteenth and seventeenth centuries, there was a universal or even widespread tendency to suspend judgement on doubtful issues in a cautious or prudent or indeed tolerant way.

## 2. *Natural law*

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<sup>3</sup> Sextus presents himself as following the views of Pyrrho of Elis, who ‘appears to us to have attached himself to scepticism more systematically and conspicuously than anyone before him’ (*Outlines* p. 4). In his *Essays*, and especially in his ‘An Apology for Raymond Sebond’, Montaigne shows himself to have been influenced by scepticism in its Pyrrhonian – which is to say, relentless and extreme – form.

<sup>4</sup> Francis Bacon *Essays* Appendix 4 (Penguin Books 1985) pp. 280, 284.

For reasons of space, my paper concentrates on foundational questions concerning moral or normative claims. Questions concerning the foundations truth claims or claims to knowledge are set to one side. In the sixteenth and seventeenth centuries, how did European thought propose to defend moral or normative values – how did it propose to defend even the *possibility* of moral or normative values – against sceptical attack?

A possible answer to this admittedly extremely general question is: theorists turned with renewed interest, and with fresh expectations, to the notion of natural law. In a series of influential books and articles, Richard Tuck has argued that what is sometimes referred to as the “modern natural law tradition” emerged as an attempt to overcome scepticism’s threat.<sup>5</sup> The *laws of nature* set out by modern natural law theorists are, in Tuck’s view, rules taken to be minimally necessary if human society is to exist.<sup>6</sup> Seen thus, lists of natural laws are – in the words of Jean Barbeyrac, Samuel Pufendorf’s translator – lists of ‘certain duties, without which society could not be maintained’.<sup>7</sup> Such an enumeration of minimally necessary laws or duties has a claim to count as an answer to scepticism because (so it is argued) even the sceptic desires that social relations between human individuals should obtain.

Amongst historians of political theory, Tuck’s account of the modern natural law tradition remains controversial.<sup>8</sup> Not least, critics have questioned the claim that the tradition emerged as a response to scepticism: for writers in the modern natural law tradition such as Grotius, the topic of scepticism was not – so critics argue – a central concern. Here, I record my own feeling that the debate between modern natural law and scepticism has been skewed by a tendency, on the part of Tuck and his critics alike, to identify scepticism

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<sup>5</sup> For Tuck and the modern natural law tradition, see R.Tuck *Natural Rights Theories* (Cambridge University Press 1979); *Philosophy and government 1572-1651* (Cambridge University Press 1993); ‘The “modern” theory of natural law’ in A.Pagden (ed.) *The Languages of Political Theory in Early-Modern Europe* (Cambridge University Press 1996); Tuck’s introduction to H.Grotius *The Rights of War and Peace* (Liberty Fund 2005). For Tuck’s account of scepticism, see *Philosophy and government* ch. 2.

<sup>6</sup> On the ‘minimalist’ nature of modern natural law thinking, see Tuck’s introduction to Grotius p. xviii.

<sup>7</sup> J.Barbeyrac *An Historical and Critical Account of the Science of Morality* (London 1729) p. 3.

<sup>8</sup> For criticism of Tuck’s views, see B.Tierney *The Idea of Natural Rights* (Eerdmans 1997) ch. 13; P.Zagorin ‘Hobbes without Grotius’ *History of Political Thought* Vol. 21, No. 1 (2000); J.P.Sommerville ‘Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory’ in V.Kahn and L.Hutson (eds.) *Rhetoric and Law in Early Modern Europe* (Yale University Press 2001); T.Mautner ‘Grotius and the Sceptics’ *Journal of the History of Ideas* VI. 66, No. 1 (2005).

with a single current of sceptical thought.<sup>9</sup> The issue of foundations *versus* scepticism was, I have suggested, one that took numerous forms in the sixteenth and seventeenth centuries. It may be – I suggest, without supplying argument – that the emergence of modern natural law is best understood by placing it against a background of concern with foundations and with scepticism in a broader and more many-sided sense.<sup>10</sup>

In the present paper, I do not comment further on the debate concerning the modern natural law tradition's emergence. Instead, I set developments in Scottish political theory against the background that the first two sections of my paper have sketched.

### 3. *Scottish thought: two questions*

The period on which I comment is the two-hundred-or-so years between (roughly) the Scottish Reformation of 1560 and the high point of the Scottish Enlightenment. Before exploring this period in greater detail, I propose answers to two questions.

(i) During the reformation-to-enlightenment period, did Scottish social and political theorists address foundational questions?<sup>11</sup>

My reply is that they did. A striking feature of Scottish discussions in the sixteenth and seventeenth centuries is their tendency to see particular situations as raising points of general principle. Does this or that king possess legitimate authority? Very rapidly, the question becomes one about the nature of (or criterion for) kingship and the basis on which royal authority rests. Should such and such an instance of political resistance be supported? Very rapidly, discussion of the question comes to turn on the nature of (or criterion for) political obligation; and questions about how obligation may be justified – through an appeal to God's will? or through appeal to an act of promising? – come to the fore. A present-day student of

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<sup>9</sup> The (admittedly extremely important) current of sceptical thought in question is that associated with the 1562 Latin translation of Sextus and, following Sextus, Montaigne.

<sup>10</sup> A broader and more many-sided approach allows pre-1562 scepticism to be considered.

<sup>11</sup> My working definition of a foundational question (or a question about foundations) is that it asks whether – and, if so, how – the truth criteria employed in this or that set of truth-claims or value-claims may be justified. Since my paper discusses social and political theory, value-claims (or normative claims) rather than truth-claims (or cognitive claims) are at the centre of my attention.

such debates may, rightly or wrongly, form the impression that questions about criteria and foundations lay very close indeed to the surface of Scottish political life.

(ii) What overall account might be given of Scottish intellectual history during the period that I have mentioned? Would a historian of ideas be on the right lines if – for example – he or she understood Scottish social and political theory from the sixteenth century onwards as a variant upon the story about natural law that Richard Tuck tells?

My reply is that the story of Scottish thought departs significantly from a “Tuckian” paradigm. Scottish social and political thought from the sixteenth century onwards *may not* be understood as a story where the notion of natural law occupies the central place. Although (as we shall see) Scottish social and political theory does indeed draw upon the notion of natural law, its most characteristic posture – one adopted for different reasons at different times – is to hold natural law thinking and its claims at arms length. Scottish thought is, arguably, at its most challenging when it explores lines of thought that lead beyond the natural law tradition’s boundaries.<sup>12</sup>

Can my reply to question (ii) be defended? What form must a defence take? An effective defence calls for nothing less than a summary account of Scottish social and political theory during the reformation-to-enlightenment period and this – taking a step closer to questions of historical and textual detail – the following section of my paper attempts to provide.

#### *4. Social and political theory from the Scottish Reformation to the Scottish Enlightenment: an overall sketch*

In Richard Tuck’s account of political theory’s development, the modern natural law tradition emerges as a response to scepticism. My own proposed account of Scottish political theory between the Reformation and the Enlightenment is, similarly, one where the issue of foundations-*versus*-scepticism forms a point of departure. Similar though the starting points of Tuck’s and my own discussions may be, however, a difference may be

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<sup>12</sup> A reference to ‘boundaries’ invites discussion of definitions. Wisely or unwisely, I do not discuss definitional issues in the present paper.

noted. The line of sceptical thought to which, for Tuck, the modern natural law tradition responds is that of Montaigne and his followers. In Scotland, by contrast, the influence of Montaigne-inspired scepticism is not felt until the eighteenth century.

For reasons on which I do not here speculate, the Scots of the late-sixteenth and early-seventeenth century experienced anxiety about scepticism as anxiety that took a religious form. Anxiety about scepticism was experienced not as anxiety about seemingly-insoluble philosophical puzzles but as anxiety about the web of deceit woven by the devil, about man's Fallen condition and about sin. For us, in commenting on Scottish thought of the period, it is – I suggest – of first importance to understand how the relation between the *philosophical* and *religious* forms of scepticism here distinguished is to be seen. Both remain forms of *scepticism*. Conceptually, a considerable overlap existed between the picture of a world gripped by philosophical uncertainty and the picture of a world where sin prevails.<sup>13</sup> In passing, it is of interest to note that Jean Calvin – the European Reformer whose work marked Scottish Protestantism so deeply – thought of sin as originating not in 'sensual intemperance' but in deceit or fraud or subtlety.<sup>14</sup> In effect, Calvin's message was that only God-given faith – in contrast to human philosophical reason – may rescue humankind from scepticism's maze. It is likewise of interest to note a consequence of Scottish thought's displacement of anxiety concerning scepticism into a religious framework: for long and wearisome decades in the seventeenth century, Scottish Calvinists agonised over the criteria that might be used in distinguishing authentic from merely apparent faith.<sup>15</sup>

My comments on religious anxiety and Scottish thought's detour through Calvinism are relevant in the present connection for two reasons. First, they help to shed light on Scottish political theory's mistrust of natural law. If everyday existence is pictured as sinful through and through, the notion of a natural order which might supply a basis for natural law thinking (however

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<sup>13</sup> A striking passage from the young Knox may serve as an illustration to this contention: 'They [the godless] shall know that their works were vain, and that they placed their refuge in lies. Their vestiments of spiders webs (which are their vain works) shall not abide the Lord's wind: but they shall stand naked, and the works of iniquity in their hands: to their extreme confusion. And this shall overtake them, because they call light, darkness: that which was sweet, they call bitter: and by the contrary, that which was bitter, they called sweet...'.  
<sup>14</sup> J. Calvin *Institutes of the Christian Religion* (Eerdmans 1989) Vol. 1, pp. 212-3.

<sup>15</sup> On this anxiety see Calvin *Institutes* Vol. 1 pp. 478-9, 484: for Calvin, even assured faith involves 'doubt'. See, for discussion, M.C. Bell *Calvin and Scottish Theology* (Handsel Press 1985), esp. pp. 23-4.

“minimalist”) becomes difficult to maintain. Even if natural laws are seen as ‘duties, without which society could not be maintained’ (Barbeyrac), a conception of sinfulness that afflicts nature itself seems to deprive the ‘duties’ concerned of any moral force.<sup>16</sup> In scholarly discussion of Calvin, a fierce debate has raged on the extent to which Calvinist theology and the notion of natural law are compatible.<sup>17</sup> I do not comment on this debate here. I suggest, however, that Scottish writers during the late-sixteenth and seventeenth centuries felt the force of Calvinism in its most severe and unpromising (and anti-natural law) form.

Second, my comments help to shed light on a controversy that dominated Scottish political theory throughout most of the seventeenth century – the controversy, that is to say, between writers who defended a divine right theory of kingship and writers who grounded legitimate rule on the notion of a covenant or contract. The above comments help to make intelligible the circumstance that neither side saw the debate as a quarrel over who might make the most effective use of the idea of natural law.<sup>18</sup>

For both sides, we may note, the debate turned on foundational issues. For upholders of divine right, the criterion of legitimacy was royal descent; the justification of legitimacy was God’s will (as revealed in God’s providence). For contractarians or covenanters, the criterion of legitimacy was a social contract (which might take the form of a coronation oath or a ‘general bond’<sup>19</sup>); its justification lies in the act of promising itself. What is significant about these observations in the present connection is that *neither* an appeal to God’s will *nor* an appeal to human promising is an appeal that need rest upon the notion of natural order. The major controversy in Scottish political theory in the century after the Reformation is, it seems, one where foundational issues are raised without invocation of a natural law scenario.

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<sup>16</sup> Stated differently, the ‘duties’ become merely instrumental or prudential rules that are vulnerable to “free rider” objections.

<sup>17</sup> See E.Brunner and K.Barth *Natural Theology* (Wipf and Stock 2002) – which reprints the deeply opposed articles around which scholarly debate on Calvin turns. On Calvin and natural law, see S.E.Schreiner *The Theater of His Glory* Baker Books 1991) pp. 87-90; W.J.Bouwsma *John Calvin* pp.73-8; S.J.Grabill *Rediscovering the Natural Law in Reformed Theological Ethics* (Eerdmans 2006) ch. 3.

<sup>18</sup> As it stands, this comment requires qualification. See section 6.1, below.

<sup>19</sup> A vivid instance of a coronation oath is given in [Anon.] *The Form and Order of the Coronation of Charles the Second* (Aberdeen 1651) pp. 41-3. The term ‘general band’ is employed (twice) in the National Covenant of 1638: see W.C.Dickson and G.E.Donaldson (eds.) *A Source Book of Scottish History*, Vol. 3 (Nelson 1954) pp. 85, 100.

My summary account of Scottish social and political theory has, so far, concentrated on the period that runs from the Scottish Reformation to the seventeenth century's closing decades. During the later years of the seventeenth century and the opening decades of the eighteenth – which is to say, on the eve of the Scottish Enlightenment – a different intellectual situation obtained. In part, the change occurred because Scots seeking education in the Netherlands came in contact with the natural tradition;<sup>20</sup> in part, it stemmed from political changes and changes in Scottish university teaching.<sup>21</sup> Besides these considerations, however, the new intellectual situation was made possible by a circumstance which forms part of the story that we have been tracing: Calvinism made its peace with the notion of natural law (and *vice versa*). An early sign of this peace comes in James Dalrymple's (Viscount Stair's) 1693 observation that, although 'sin and evil custom' had 'much defaced' natural law, 'God in his goodness hath given man more radiant rays of reason and preserved it more after his fall, about his rights of *meum* and *tuum*, than in any other science or knowledge'.<sup>22</sup> A somewhat later sign is Carmichael's view of natural law as resting on (Calvinist) natural theology.<sup>23</sup> Once natural theology was accepted as a basis for argument, natural law might indeed put down roots in Scottish culture: as in the writings of Hutcheson and Turnbull, for example, the notion of natural law might be seen as defensible on providential and religious grounds.<sup>24</sup>

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<sup>20</sup> J.W.Cairns 'Importing Our Lawyers from Holland: Netherlands Influences on Scots Law and Lawyers in the Eighteenth Century' in G.G.Simpson *Scotland and the Low Countries 1124-1994*, Tuckwell Press 1996, pp 136-53; also his 'Legal Theory' in A.Broadie (ed.) *The Cambridge Companion to the Scottish Enlightenment*, Cambridge University Press 2003, esp. pp. 226-8. On the (subsequently) best known of the Scottish students abroad, see K. Van Strien and M.Ahsmann 'Scottish Law Students in Leiden at the End of the Seventeenth Century: The Correspondence of John Clerk, 1694-1697' *Lais* Nos. 19 and 20 (1993 and 1994).

<sup>21</sup> See J.W.Cairns 'The First Edinburgh Chair in Law: Grotius and the Scottish Enlightenment' (<http://law.ed.ac.uk>).

<sup>22</sup> James, Viscount Stair *Institutions of the Law of Scotland* (University Presses of Edinburgh and Glasgow 1981) pp. 77, 89.

<sup>23</sup> See J.Moore and M.Silverthorne (eds.) *Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gersom Carmichael* (Liberty Fund 2002) pp. 24, 30-1 and (especially) 229-31 For hard-line Calvinism, I note in passing, all natural theology is suspect since nature itself is drenched in, and saturated by, sin: see Barth, as cited in note 17, above. The circumstance that Carmichael refers to a natural theology which has a Calvinist provenance means that (in Scotland and elsewhere) Calvinism was relaxing its "hard-line" stance.

<sup>24</sup> F.Hutcheson *A Short Introduction to Moral Philosophy* (Liberty Fund 2007) pp. 103-5; F.Hutcheson *A System of Moral Philosophy* (Continuum 2005) Vol. 1, pp 174-89, 268; G.Turnbull 'A Discourse upon the Nature and Origin of Moral and Civil Laws' in J.G.Heineccius *A Methodical System of Universal Law* (Liberty Fund 2008) p. 609. A further example might be A.Ferguson *Institutes of Moral Philosophy: For the Use of Students in the College of Edinburgh* [Kessinger reprint] (Edinburgh 1773) p, 116-8. On Hutcheson, see J.Moore 'The Two Systems of Francis Hutcheson: On the Origins of the Scottish Enlightenment' in M.A.Stewart (ed.) *Studies in the Philosophy of the Scottish Enlightenment* (Clarendon Press 1990).



For a time, in other words, Scottish political theory appeared to be moving on to lines in the history of ideas traced by Tuck. Natural law might be a late arrival in Scotland (in contrast to England) but, once established, its future might be bright. My suggestion is that, fortunately or unfortunately, matters were less straightforward. At roughly the same time as Turnbull and Hutcheson succeeded – or apparently succeeded – in establishing natural law in Scotland, crisis overtook the natural law tradition. In part, the theorists whose work gave expression to the crisis were Scots.<sup>25</sup>

The crisis which overtook natural law theory in the middle years of the eighteenth century had broadly European origins. At the same time as natural law became accepted in Scottish Universities, lines of thought which called the notion of natural law in question were starting to gather strength. Through (in part) the influence of Pierre Bayle's *Historical and Critical Dictionary* of 1697, "Pyrrhonian" scepticism – scepticism of the form endorsed by Montaigne – entered Scottish letters.<sup>26</sup> Barbeyrac's *Historical and Critical Account of the Science of Morality* (quoted earlier) and his lengthy footnotes to Pufendorf defended natural law but, at the same time, spread awareness that natural law might be vulnerable to Pyrrhonist threat.<sup>27</sup> An outcome of these sceptical stirrings was David Hume's *Treatise of Human Nature* (1739-40). Arguing in a broadly Pyrrhonian fashion, Book I of the *Treatise* cast to the winds notions of divine order and natural necessity on which – it was widely assumed – doctrines of natural law might rely.<sup>28</sup> Book III went on to criticise promise-based or covenant-based notions of legitimacy and political obligation. The overall effect of Humean scepticism, as unfolded in the *Treatise*, was to precipitate in Scotland and elsewhere a long-term or "slow motion" crisis of thought which had implications throughout social and political theory.

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<sup>25</sup> I stress the qualifying phrase "in part". Besides Hume and Smith – the Scottish theorists whom I here have in mind – Rousseau, in his *Discourse on the Origin of Inequality*, played a signal part in bringing the modern natural law tradition to its knees. For brief comment on Rousseau, see section 6.2, below.

<sup>26</sup> A sign of the times is Francis Grant's reference in his (anonymous) pamphlet *The Patriot Resolved* ([Edinburgh] 1707) p. 28 to 'confused scruples' which may 'remain with a *Pyrrhonian*'. Grant evidently thought that the term 'Pyrrhonian' would be familiar to his not-necessarily-philosophical audience.

<sup>27</sup> See, for discussion, J. Moore 'Natural Law and the Pyrrhonian Controversy' in P. Jones (ed.) *Philosophy and Science in the Scottish Enlightenment* (John Donald 1988).

<sup>28</sup> Popkin has stressed that Hume's *Treatise* was seen by early reviewers as 'a continuation of the Pyrrhonian tradition': R. Popkin 'Sources of Knowledge of Sextus Empiricus in Hume's Time' *Journal of the History of Ideas* Vol. 54, No. 1 (1993).

Amongst the Scottish theorists who sought answers to Hume was Adam Smith – with whom my sketch of developments in social and political theory ends. In the present context, not the least interesting feature of Smith’s reply to Hume is that it did not attempt to turn back the clock to the time before the *Treatise* was written. Instead, it took Hume’s critique as its starting point and set out to orient itself in, so to say, a post-Humean world.<sup>29</sup> What this meant in practice was that Smith explored a line of thought which lead beyond natural law’s domain.

The work in which Smith explored this line of thought is his *Theory of Moral Sentiments*. There, human interaction between oneself and others is portrayed as a medium in which moral values exist;<sup>30</sup> changing the metaphor, it is seen as a seed-bed from which moral values emerge.<sup>31</sup> Stating Smith’s contention in terms closer to those of the present paper: the practice of human interaction is, itself, the foundation upon which moral claims (and, perhaps, truth claims) rest. Smith, we may note, indicates a dynamic in interaction which he sees as linked to the theme of foundations: it is a dynamic in which the notion of an ‘impartial spectator’ plays a key role.<sup>32</sup> For reasons of space, I do not explore this dynamic here. Before ending my sketch of Scottish social and political theory, however, I note three points which serve to bind my comments on Smith into my earlier discussion.

- (i) If interaction between individuals is, as Smith suggests, the basis on which values rest, no especial significance attaches to interacting which takes the specific form of contracting or covenanting or promising. Similarly, there is no need to invoke notions of natural order and there is no need (as in divine right theory) to appeal to the will of God. The conceptual framework of seventeenth-century Scottish polemic between covenanters and divine-right monarchists are surpassed.

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<sup>29</sup> As is well known, Smith and Hume were close friends. Rothschild has suggested that Hume and Smith were in broad agreement on important matters: in particular, she thinks it likely that ‘Smith’s and Hume’s religious opinions were indeed quite close’: E.Rothschild *Economic Sentiments* (Harvard University Press 2002) p 130; see also p 68. See, for a broadly similar judgement, N.Phillipson *Adam Smith: An Enlightened Life* (Allen Lane 2010) p. 67.

<sup>30</sup> For more on Smith and interaction, including the relation of interaction to moral values, see my ‘From Smithian Sympathy to Hegelian Recognition’, paper to the International Conference of Political Economy: Adam Smith Today, Kocaeli University 2009.

<sup>31</sup> The metaphors in this sentence are mine and not Smith’s.

<sup>32</sup> See, on the ‘impartial spectator’, A.Smith *Theory of Moral Sentiments* (Liberty Fund 1984) pp. 116, 130-1.

- (ii) In technical terms, Smith gives a *procedural* answer to the question of how moral foundations may be seen. The *procedure* to which the *Theory of Moral Sentiments* directs attention is, as I have suggested, the procedure of interaction. A procedural answer is one which explains how a result may be arrived at, but does so without anticipating the result itself. Smith indicates how criteria of moral judgement may be established – his view is that they may be established through interaction – but he does not, in a systematic fashion, attempt to establish what these criteria may be.
- (iii) Because Smith gives a procedural answer to questions about foundations, the notion of a *minimalist* list of social rules finds no place in his thought. In conversational interaction, any values whatever may be considered: there is no reason why conversation should deal solely with *moral* questions about rules and basic values rather than exploring broader *ethical* questions about comparative ways of life.

Taken together, my points underline the distinctiveness of Smith as a social and political theorist. In the context not merely of Scottish but of European thought, the *Theory of Moral Sentiments* is (I suggest) a work of immense originality and significance. Smith's interactionist answer to sceptical questions raised by Hume and others is, we may note, one which owes nothing to theism – or to the notion of natural law.<sup>33</sup>

## *5. Social and political theory from the Scottish Reformation to the Scottish Enlightenment: general comment*

The sketch of Scottish social and political theory that I have provided in the preceding section of my paper can be summed up in two statements. One is

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<sup>33</sup> I am aware, of course, that my presentation of Smith is deeply controversial: Smith is widely praised for having launched (or re-launched) the notion of natural law on a historically sensitive course. Such a view of Smith is, I consider, mistaken. At most, Smith may be said to have been *ambivalent* about natural law theorising. To take one example: when Smith sets out to give an account of private property, he does so not by introducing an account of original acquisition in the manner of Grotius and Locke but by invoking an interaction-based, 'spectatorial' viewpoint and by referring to the "four stages" conception of history. See A. Smith *Lectures on Jurisprudence* (Liberty Classics 1982) pp. 8, 17, 459ff. Does this mean that Smith has stepped outside of the natural law tradition? My suggestion is that it does. At the very least, it is far from certain that – as is commonly assumed – he remains within the natural law tradition and raises it to hitherto-unenvisaged heights.

that Scottish social and political theory from the mid-sixteenth to the mid-eighteenth century falls into two periods. The other is that neither period embraced natural law tradition wholeheartedly – although, in each period, the reason for reluctance was different.

In the first period, which opened in 1560 (the year of the Scottish Reformation) and which continued until the late 1600s, mistrust of natural law was rooted in the scepticism towards nature (including natural reason and human nature) as a source or criterion of value which stemmed from Calvinism's preoccupation with sin. Political thought of this period invoked either God's will or humanity's capacity to make promises: in neither case did theorists rest their case on appeals to natural order or natural law.

In the second period, which opened in the latter part of the seventeenth century, natural law temporarily flourished but was overtaken by a mistrust that stemmed from “Pyrrhonian” or Montaigne-inspired scepticism. Partially as a result of Bayle’s influence, such scepticism became an issue in Scottish letters at this late stage.<sup>34</sup> The result was Hume’s corrosive critique of previous outlooks, and Smith’s attempt to identify foundations in the disenchanted world that Humean critique had left. If there is a hero in my account of Scottish social and political theory, it is the author of the *Theory of Moral Sentiments*. There, Smith launches theory on a course – an “interactionist” or dialogical course – which breaks new ground and which moves beyond natural law’s agenda.<sup>35</sup>

In section 3 of my paper, I suggested that Scottish thought departed from a “Tuckian” paradigm: in Scottish thought, the notion of natural law did not occupy a central place. My summary of Scottish thought in section 4 attempted to back up this suggestion. How might my summary be defended? Evidently, what is needed is a book-length treatment – and, no less evidently, such a treatment is impossible here. In the remainder of the present paper, I offer not a connected discussion but a series of short notes or (so to say) vignettes illustrating themes in Scottish social and political theory.

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<sup>34</sup> “Late” because, in early seventeenth-century Scotland, Montaigne (d. 1592) appears to have been surprisingly uninfluential. William Drummond of Hawthornden's 'A Cypresse Grove' (1630) is unusual in that – according to L.E.Kastner, editor of Drummond's *The Poetical Works* (Manchester, at the University Press 1913) – it shows evidence of first-hand knowledge of Montaigne's work.

<sup>35</sup> For more on this, see (again) my Kocaeli paper.

## 6. Social and political theory from the Scottish Reformation to the Scottish Enlightenment: some comments

### 6.1 Natural law in George Buchanan, James VI, Thomas Craig and Samuel Rutherford

My account of Scottish social and political theory has sought to dislodge the notion of natural law from a position of prominence. This is not to say, however, that I see natural law as playing no significant part in the development of Scottish thought.

Such view would be untenable. The reformation-to-enlightenment period in Scotland opens with a political theorist who undeniably belongs in the natural law tradition: George Buchanan. From the 1560s onwards, Buchanan supported the side of the Reformers and advocated a form of social contract theory;<sup>36</sup> however, he appears to have remained unaffected by Calvinist *angst* and the outlines of his contractarian thought were laid some twenty years before the Scottish Reformation.<sup>37</sup> In his *De Jure Regni*, Buchanan expressed the view that that God implanted in human nature a ‘law of nature’ which allowed man to ‘distinguish base from noble things’.<sup>38</sup> In the decades which followed, Buchanan’s contractarianism remained popular but the natural law basis of his thought faded in the light of growing Calvinist concerns.

During the period which followed Buchanan’s death in 1582, it was on the “royalist” (rather than “presbyterian” or Calvinist) wing of Scottish politics that the notion of natural law appeared to find a place. Two theorists call for mention in this regard. One is King James VI of Scotland who referred, in his seminal *Trew Law of Free Monarchies* (1598), to ‘the law of nature’ as one of three headings under which the obligations of king and people might

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<sup>36</sup> On the notion of a ‘mutual pact between a king and his subjects’, see G. Buchanan *A Dialogue on the Law of Kingship amongst the Scots* (Saltire Society 2006) p. 140.

<sup>37</sup> I base this comment on the date (early 1540s) at which Buchanan wrote his Latin dramas, *Jephtes* and *Baptistes* – which introduce key themes in his later political theory.

<sup>38</sup> Buchanan *Law of Kingship* p. 49.

be discussed.<sup>39</sup> This reference may, perhaps, appear to a reader striking: in context, however, its significance should not be exaggerated. For James, a king's legitimacy derived from supernatural (rather than merely natural) considerations:<sup>40</sup> the *Trew Law* is not a natural law text but an appeal *beyond* the natural order to God's law or God's providence. The main thrust of the work is to trump natural appeals by an appeal to supernature.

The second theorist calling for mention is Thomas Craig, whose *Ius Feudale* (written in 1603) referred to the law of nature as a component of Scottish law – the others being the law of nations and civil or municipal law.<sup>41</sup> Craig's main influence was on legal theory and, here, I take refuge in my earlier claim only to consider political theory (or social and political theory).<sup>42</sup> This said, I record my uncertainty as to whether Craig's concern was to argue that Scottish law was (in part) grounded in natural law or to demonstrate that 'the general principles of the law of nature' gave an inadequate grasp of how questions in the law of Scotland should be seen.<sup>43</sup>

Craig was a supporter of James VI/I; in 1604, he travelled south to act as a commissioner for the then-projected union of the Scottish and English kingdoms. He conforms, that is to say, to my generalisation that seventeenth-century support for natural law came from “royalists”. Samuel Rutherford is a different matter. Not only is his *Lex, Rex* of 1644 arguably the greatest work of presbyterian political theory; in addition, it combined appeals to the Bible with natural law arguments. On political matters, wrote Rutherford, ‘the Scripture’s arguments may well be drawn out of the school of nature’.<sup>44</sup> The significance that a reader of *Lex, Rex* should attach to Rutherford's arguments from natural law is, however, difficult to determine: it is not altogether clear whether the 'nature' to which they refer is nature in a

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<sup>39</sup> James I and VI *Political Writings* (Cambridge University Press 1994) p. 64. Note that, in late 1638, Drummond of Hawthornden followed James in referring to the ‘Law God and Nature imposed on princes [or kings]’: W.Drummond *Poems and Prose* (Scottish Academic Press 1976) p. 180.

<sup>40</sup> This point could be expanded, employing a “public”/“private” distinction. In public, James argued in terms of divine right theory and appealed to a Christian God. In private, it might be argued, he saw regal authority in terms derived from Plato. Whether Christian or Platonist elements in James’s outlook are stressed, however, he saw he saw kingship as having a supernatural basis.

<sup>41</sup> T.Craig of Riccarton *The Jus Feudale* (William Hodge and Company 1934) pp. 105.

<sup>42</sup> See note 1, above.

<sup>43</sup> Craig *Jus Feudale* p. 106. For discussions of Craig, see J.G.A.Pocock *The Ancient Constitution and the Feudal Law* (Norton 1967) pp. 79-90; J.W.Cairns 'The Civil Law Tradition in Scottish Legal Thought' in D.L.C.Miller and R.Zimmermann *The Civilian Tradition and Scots Law* (Dunker and Humblot 1997) pp. 200-3.

<sup>44</sup> S.Rutherford *Lex, Rex* (Sprinkle Publications 1982) p. 3.

pre-lapsarian or post-lapsarian sense.<sup>45</sup> A further uncertainty arises from the circumstance that Rutherford places the act of promising at the very centre of his political theory and theology: how, in Rutherford's understanding, are the themes of how (a reader may ask) are the themes of natural and of natural law and promising combined?

## 6.2 *Scottish thought and social contract theory*

My comment at the end of the preceding section concerning *promising* and *natural law* calls for explanation. Why should a question arise about the manner in which the notions might be combined? Historians of ideas frequently see the notions of *natural law* and of a *social contract* (or *mutual promise*) as notions that presuppose one another. In a pre-social or asocial state of nature, so the story goes, natural law obtains; then comes a social contract and the founding of civil society. This conventional story is unhelpful, I suggest, where Scottish presbyterian versions of contractarian thinking are concerned.

A reader of Scottish texts dating from the late-sixteenth and seventeenth centuries very quickly notices that, although the notion of a contract or covenant is frequently invoked, there is little mention of a state of nature.<sup>46</sup> Rather than emphasising the notion of a state of nature in Scottish contractarianism, the emphasis falls on the act of promising itself. The act of promising concerned may be either a coronation oath or, as in the National Covenant of 1638, a public event involving broad sections of the people. In either event, promising is seen as an action that launches (or re-launches) a distinctive set of obligations.<sup>47</sup> My suggestion is that, in dispensing with the notion of a state of nature, Scottish contractarianism dispensed with a natural law framework. Scottish versions of a social contract sought to generate legitimacy through the speech act of promising, rather than through appeal to an already-existing natural order.

Why should presbyterians, who had their eye on salvation, stress so strongly the powers inherent in a human action – namely, the act of promising? Various answers to this question suggest themselves, but none strike me as

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<sup>45</sup> See J.Coffee *Politics, Religion and the British Revolutions: The mind of Samuel Rutherford* (Cambridge University Press 1997) pp. 152-5.

<sup>46</sup> Buchanan is a seeming exception to this generalisation: see his *Law of Kingship* pp 46-7.

<sup>47</sup> In terms of twentieth-century theory, promising is seen as a performative speech act.

sufficient. A lengthy tradition of “bonding” or “banding” had familiarised Scots of the sixteenth and seventeenth centuries with the notion that mutual promising generated a socially cohesive force.<sup>48</sup> Calvinist theology, itself, emphasised the notion of God’s promise, and one leading sixteenth-century Calvinist especially – Theodore Beza<sup>49</sup> – foregrounded contractarian ideas. Once these and similar considerations have been noted, however, a historian of ideas is left with the conundrum that a group of Godly men rested their political theory on a human foundation. If the line of argument presented in the present paper is valid, the presbyterians’ mistrust of nature (and of natural law) is intelligible. What is less intelligible is that, instead, presbyterians treated a human capacity – the capacity to make promises – as a political and theological key.

### 6.3 *David Hume, Adam Smith and the eighteenth-century crisis in natural law*

Intellectual ‘crises’ are, in their nature, difficult to define and document. Here, I employ the term to indicate that, in the mid-eighteenth century, aspects of the natural law tradition came under intense critical scrutiny. In very different ways, Hume’s *Treatise* (1739-40) and Rousseau’s *Discourse on the Origins of Inequality* (1755) called into question assumptions on which the natural law tradition had come to rely. Smith responded to both Hume and Rousseau and, in doing so, broke fresh conceptual ground.

Hume’s contribution to the crisis was (as I have suggested) to question the notion of natural order. His questioning took two forms. First, he cast doubt upon the notion of a ‘necessary connection’ between objects, suggesting that such necessity exists ‘not in the objects’ but ‘in the mind’.<sup>50</sup> Unless a principle of ‘necessary connection’ exists in the world that we perceive, notions of natural order and natural law are difficult to maintain. Second, he cast doubt upon the idea of final (as distinct from efficient) causation – upon which the defence of natural law offered by, say, Hutcheson had relied. ‘I cannot agree to your sense of *natural*,’ wrote Hume in a letter addressed to

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<sup>48</sup> See J.Wormald *Lords and Men in Scotland: Bonds of Manrent 1442-1602* (John Donald 1985); *Court, Kirk and Community in Scotland 1470-1625* (Edinburgh University Press 1992) p. 111.

<sup>49</sup> See his ‘Concerning the Rights of Rulers over their Subjects and the Duty of Subjects towards their Rulers’ of 1564.

<sup>50</sup> D.Hume *A Treatise of Human Nature* (Clarendon Press 1978) pp. 77, 165; see also p. 410. His comments on natural necessity are, of course, consistent with his analysis of causality in terms of ‘constant conjunction’ (*Treatise* p 171).



Hutcheson. ‘Tis founded on final causes; which is a consideration, that appears to me pretty uncertain and unphilosophical’.<sup>51</sup> Once notions of necessary connection and final causation have been removed, arguments from natural theology (to which Scottish natural law theorists appealed) become problematic.

Rousseau’s contribution to the crisis was of a different order: his *Discourse on the Origins of Inequality* emphasised the category of private property as one which permeated the values of existing society. For Rousseau, the values of existing society were those articulated in the modern natural law tradition, and his *Discourse* declared against the property-based and competitive assumptions of the existing world and the natural law tradition alike. In a review published in 1755, Smith wrote appreciatively about the *Discourse* and quoted extensively from it.<sup>52</sup> Rousseau does not in so many words accuse writers in the modern natural law tradition of “possessive individualism” – and this (much later) term has come to acquire a range of meanings.<sup>53</sup> In a broad sense, however, Rousseau’s target is the modern natural law tradition’s possessive-individualist assumptions.

Smith, in his *Theory of Moral Sentiments*, wrote as though Hume’s and Rousseau’s points were valid. He wrote, that is to say, on the assumption that natural law theory’s eighteenth-century crisis was irreversible. On the one hand, the *Theory of Moral Sentiments*’ interactionist conception of the individual has little in common with the natural law tradition’s conception of the individual as a proprietor: Smith had internalised Rousseau’s lesson. On the other hand, the *Theory of Moral Sentiments*’ grounding of values on interaction makes no appeal to natural order or ‘necessary connection’ – and thereby avoids the trap that Hume had identified.

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<sup>51</sup> Hume to Hutcheson 17 September 1739: J.Y.T.Grieg (ed.) *The Letters of David Hume*, vol 1 (Clarendon Press 1932) p. 33. The passage is quoted in E.C.Mossner *The Life of David Hume* (Clarendon Press 1980) p 135. For a parallel (or at least similar) passage in the *Treatise*, see p. 171.

<sup>52</sup> A.Smith ‘Letter to the *Edinburgh Review*’ in his *Essays on Philosophical Subjects* (Liberty Fund 1982) pp. 242-56. On p 251, Smith declares that the *Discourse* ‘consists almost entirely of rhetoric and description’: this declaration is, I suggest, by no means dismissive.

<sup>53</sup> On the term “possessive individualism”, see C.B.Macpherson *The Political Theory of Possessive Individualism* (Oxford University Press 1962). For Macpherson, individualism counts as *possessive* when the individual is seen as ‘essentially the proprietor of his own person or capacities’ (*Possessive Individualism* p. 3): in short, possessive individualism involves self-ownership. In a broader sense, however, the term may be used when individuals are seen *as proprietors* (whether or not *what* they own is themselves).

In effect, Smith followed seventeenth-century presbyterianism in claiming that human action may be a foundation of values. Whereas the presbyterians pointed to the specific action of promising, however, Smith – once again taking on board a point made by Hume<sup>54</sup> – makes an appeal to interaction in a more general sense.

#### 6.4 Adam Smith: from natural law to common sense

My claims regarding Smith can be summarised in the statement that the *Theory of Moral Sentiments* records a turn from natural law to common sense. The term common sense – which is frequently associated with the “Scottish school” of philosophy – has a lengthy history and has acquired a number of meanings. Not all of these meanings concern us here.

In its most usual meaning, the term common sense refers to what is evident or obvious. I invite a reader to set this meaning aside and, instead, to keep in mind two ways in which the philosophical term ‘common sense [*sensus communis*]’ has been used. Sometimes, in the history of philosophy, ‘common sense [*sensus communis*]’ has been understood as a sense shared by a number of individuals.<sup>55</sup> At other times, ‘common sense [*sensus communis*]’ has been understood as a sense which is present in each individual, and which integrates the data supplied by the more familiar five senses (such as sight and touch).<sup>56</sup>

Is Smith’s *Theory of Moral Sentiments* a work of ‘common sense’ philosophy? I suggest that it is, my reason for the suggestion being that the themes of interaction (much emphasised by Smith) and of a sense *shared by a number of individuals* are closely interwoven. What (a reader may ask) about ‘common sense’ in the second meaning that I have distinguished – ‘common sense’ seen as a sense which *integrates the data supplied by the*

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<sup>54</sup> Hume criticised promise-based conceptions in his *Treatise* and elsewhere, and Smith – see his *Lectures on Jurisprudence* pp. 316-7 – endorsed Hume’s criticism.

<sup>55</sup> In Scottish thought, Hutchinson understands common sense in this fashion when he translates *sensus communis* as ‘public sense’ (F.Hutcheson *An Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense*, Liberty Fund 2002, p. 17).

<sup>56</sup> This is ‘common sense’ in Aristotle’s and Aquinas’s meaning. It is also Reid’s meaning in his ‘Cura Prima on Common Sense’ (included as an Appendix in L.Marcil-Lacoste *Claude Buffier and Thomas Reid: Two Common Sense Philosophers*, McGill-Queens University Press 1982) esp. p. 189. Note that Reid’s *Inquiry into the Human Mind on the Principles of Common Sense* (1764) is structured as a discussion of the five senses.

*other five?* Does Smith count as a ‘common sense’ philosopher in my second meaning of the term?

My answer to this question is more hesitant. In one passage at least, the *Theory of Moral Sentiments* describes not merely moral values but sensory knowledge and ‘reason’ as existing in an interactive fashion.<sup>57</sup> This passage suggests that Smith was alive to issues that ‘common sense’ philosophers in my second meaning of the term sought to address. It suggests, moreover, that Smith held a highly original view about how the two meanings of ‘common sense’ might be related. In effect, he held that it was *through interaction with other individuals* that different aspects of one’s own sensory experience become drawn into a common framework. More briefly stated: he held the view that private coherence presupposes public interaction. Standing back, I note that, although the view is a striking one, reference to more than a single passage is needed if we are to ascribe it to Smith. What is required is a demonstration that Smith saw not merely moral claims but also cognitive claims as existing in and through interaction, and resting on an interactive basis. I attempt no such demonstration here.

Instead, however, I underline a further sense in which Smith made a fundamental contribution to common sense philosophy. Writers who, in the history of philosophy, drew upon the notion of common sense tended (despite differences that divided them) to view it as sense that *already exists* and to which appeal might be made. Reid (writing in 1764) made this assumption explicit when he stated that ‘philosophy...has no other root but the principles of common sense; it grows out of them, and draws its nourishment from them’.<sup>58</sup> In the *Theory of Moral Sentiments*, by contrast, Smith made no such assumption. His proposal was not that interaction rests upon an *already existing* common sense as its basis. It was, conversely, that common sense (understood as a sense shared amongst individuals) *exists in and is generated through* interaction; that it rests upon interaction as its basis. If *the foundation of interaction is common sense*, a further foundational question arises very rapidly: where does common sense come from? The answer given to this question by Reid and others was that the principles of common sense come from God. If *the foundation of common sense is interaction*, the – *pace* Reid – questions about common sense have a

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<sup>57</sup> ‘I judge of your sight by my sight, of your ear by my ear, of your reason by my reason, of your resentment by my resentment, of your love by my love’: *Theory of the Moral Sentiments* p. 19.

<sup>58</sup> T.Reid *An Inquiry into the Human Mind on the Principles of Common Sense* (Edinburgh University Press 2000) p. 19.

human answer. Smith's concern was with foundations, and his answers to questions about foundations were given in human (as distinct from theistic) terms.

The *Theory of Moral Sentiments* is a work which turns from natural law to common sense in order to provide an understanding of foundational issues. In doing so, however, it stands characteristic lines of common sense argument on their head.

### *Conclusion*

Like theorists in a number of other European countries, Scottish writers of the reformation-to-enlightenment period addressed foundational issues. The present paper comments on Scottish writers' accounts of the basis upon which moral values rest. More specifically, it proposes that Scotland did not respond to questions about scepticism and foundations by turning to natural law theory. Instead, it followed a "Calvinist" path which made appeals to natural law problematic; later, in the eighteenth century, it found claims regarding natural law difficult to maintain in the face of a renewed sceptical threat.

If my line of thought is followed, it leads to questions – about, for example, the list of theorists who deserve prominence in accounts of the Scottish Enlightenment. Here, I note only that the hero in my account of Scottish social and political thought is Smith – but a Smith seen in, perhaps, an unfamiliar light.