

*PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW.* By Nicholas Bamforth and David A.J. Richards. Cambridge University Press 2008. Pp. 403. £ 45.00. ISBN: 0-521-86863-7.

Since John Courtney Murray's influential writings in the 1950s and 1960s, the political appeal of Roman Catholic scholastic natural law theory (to American Catholics, if not to others) has been that its theological foundations—universal human participation in divine reason, and the complete coherence of reason and revelation—permit or even compel it to operate politically in the realm of human reason, without formal or even implicit reference to revelation. Over the past few decades, a group of philosophers known as the “new” natural law theorists (henceforth NNL)—among them John Finnis, Robert George, Germaine Grisez, and Joseph Boyle—have claimed to continue this tradition. Finnis—whose *Natural Law and Natural Rights*<sup>1</sup> is the centerpiece of Bamforth's and Richards's (henceforth B&R) critique—defines natural law as “the account of all the reasons-for-action which people ought to be able to accept, precisely because these are good, valid, and sound as reasons.” (40)<sup>2</sup>

B&R's painstaking response to these theorists is driven by their concern about the NNL approach to natural law “when intervening in U.S. constitutional debate and policy in support of conservative positions.” (88) They detect an incoherence between NNL arguments against abortion and gay and lesbian marriage and its reasoning on other topics (125), leading them to worry about “the extent to which the new natural law arguments—and especially the theory's conservative prescriptions concerning sexuality and gender—rest on . . . doctrinal religious commitments” not accessible to reason (57), depending “for their logical force upon [Germaine] Grisez's theological analysis,” without which they “do not make much sense.” (96) In particular, B&R are skeptical that the logic of Finnis's *Natural Law and Natural Rights*, which legal theorists (but not theologians!) generally read as straight-up legal theory, can be detached from “the overtly religious arguments

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1. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

2. John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 10-11 (Robert P. George ed., 1996).

advanced by the new natural lawyers in other contexts.” (57) Analyzed against the backdrop of his own and other group members’ other writings, they argue, Finnis’s book transgresses the basic requirements of legal theory both operationally and foundationally. That is, his arguments are “religious” in senses disallowed by commonly accepted liberal notions of political reason.

Thus far, B&R only appear to be saying that religious convictions have no place in public discourse. The book’s subtlety and length arise from the authors’ desire to disprove Finnis *without* pillorying religious reasoning or disqualifying it from legal theory. They simply want to rule out one approach that they believe breaks important rules of legal theory discourse (and of theological discourse as well) by being deceptive about its religious basis and by making inconsistent arguments (334). Their convictions include the following (ch. 2):

(1) When legal theory is stated in secular terms, its methods and foundational assumptions should not depend, in whole or in part, in any essential way upon religious claims, motivations, or definitions of the good not otherwise accessible to reason.

(2) Law is an instrument for shaping society in coherence with ideas of the good.

(3) Whether religious or secular in its basis, legal theory should defend and promote liberal ideals of justice and flourishing, including a particular vision of human autonomy.

(4) Properly understood, natural law method is inductive, and its moral reasoning must take comprehensive account of the best empirical research available.

(5) Both critical applications of natural law theory and more biblically-based Christian ethics can fulfill the criterion in. (3)

The juxtaposition of the second point (shared with NNL) and the third (explicitly rejected by it) explains the extraordinary thoroughness of B&R’s argument. Together, these convictions require the authors not simply to develop an argument about legal theory, but also to undertake a complex, almost archeological analysis of the theological substrate in which Finnis’s arguments are nurtured. This requires a deep, sophisticated knowledge of Roman Catholic moral theology.

Thus, the first broad project of the book is to demonstrate that Finnis defends positions derived from Roman Catholic Church teachings to which his methods would not otherwise lead him, that these teachings violate liberal understandings of reason and the good, and that his conclusions not only are founded upon these teachings but are unintelligible when severed from them. B&R’s initial criteria of

dependence upon religion are Robert Audi's: self-evident religious reference; religious epistemic justifications; religious motivation; and a thought process containing religious elements. (48-50) The authors make clear that they do not wish to "belittle any contribution to debate merely on the basis that it can be . . . identified as religious in character." (15) Instead, they intend to use these criteria mainly to disqualify arguments like Finnis's that purport to be secular but in fact can be shown according to Audi's criteria to depend crucially upon religious moves. This subtle point is essential, as the ostensible attractiveness of natural law ethics is that it embraces parallel justifications: one from revelation, and another based purely on universally accessible human reason without reference to religious belief. If the public face of NNL's positions on marriage and sexuality fails Audi's criteria—if it is "demonstrably based [solely] on sectarian religion" (227)—it fails as legal theory and potentially as natural law. Yet if its conclusions *could* follow from other, non-doctrinal foundation(s), they might be constructive contributions to legal theory. Unfortunately, B&R do not explore this possibility, probably because they are convinced of the truth of their own conclusions and the falsity of Finnis's. Their argument would have been stronger had they evaluated the best secular justifications for the conclusions they abhor and found them all wanting.

Finnis's apparent failure does not, B&R argue, imply that religious arguments should be banished from liberal conversation. The authors aim instead to use basic tenets of liberal theory to distinguish good religious arguments from bad ones; self-consciously religious legal theories are welcome to contend in the public square if they fulfill liberal criteria. In fact, they devote their final chapter to developing an alternative Christian approach. This distinction signals again that the argument is not about whether religious belief *per se* may ground legal or political argument (it may) but about whether the reasoned positions that a thinker's religious beliefs generate are publicly accessible, possess logical integrity, and are morally acceptable according to "our conception of liberalism." (340) In sum, it is possible to make rational, appealing public arguments rooted in Christian belief.

Thus, the next task is to demonstrate that NNL's positions on sex and gender issues fail this test. In the end, "reasonable Christian interpretations" (342) (emphasis omitted) that are "concerned to protect the powerless and repressed" (369) are constructive, but NNL should be rejected because it "uncritically reflects and seeks to defend the doctrinal dictates and, in turn, the patriarchal moral authority of the celibate male priesthood of the Catholic Church" (341) in ways that encourage

discrimination and oppression. This is the fulcrum of the argument against Finnis, and yet it is also the point where the book runs the greatest risk of circularity, as all conceptions of the good rely at some point on indemonstrable premises; very little is “self-evident.” It is also the point at which the book runs the greatest risk of accusing Finnis’s legal arguments of guilt by association with Grisez’s theology, as the authors often analyze Grisez’s theological positions to explain the difficulties that underlie Finnis’s philosophical ones. B&R attempt to escape this corner by developing a notion of autonomy as a self-evident good and by noting that heterosexual marriage, a “Johnny-come-lately” to the NNL’s list of self-evident basic goods, is both reliant on narrow theological imagery and unconvincing as a moral absolute. (337)

This journey is long and complex. Two examples from among many useful discussions may fill in my admittedly spare articulation of the book’s argument. First, the authors align traditional natural law more closely with liberal thought than with NNL by picking up a half-century-old distinction between its methods and its conclusions. Thomas Aquinas worked empirically, relying on “the best available science and philosophy of the day” (166); his successors followed suit over the centuries, amending what had in Thomas seemed absolute prohibitions in light of new evidence. B&R juxtapose this methodological fidelity and its resultant legal malleability with NNL’s tendency to enshrine some, but not all, of Thomas’s conclusions as unquestionable moral absolutes, a methodologically dishonest approach. They conclude that NNL is “neither good Thomism nor good Christianity” (344), a judgment in which they would be joined by many Roman Catholic moral theologians.

Second, in a related move, B&R found their vision of the sexual moral good on a revised notion of autonomy, which “encompasses the core liberal commitments to conscience and speech, and extends to the crucial contribution made by sexual expression and emotional feeling to our well-being as humans.” (211) Stretching autonomy to include the universal human need for reciprocal intimacy, cross-cut by diverse tastes and identities, yields the conclusion that sexual autonomy is a moral good that founds a legal right. (214) Conclusions to the contrary, they argue, have been based historically on unjust, discriminatory rationalizations legitimized by their supposed roots in the inferior “natures” of the persons to whom such autonomy has been denied. This argument is intended to answer NNL’s very different vision of autonomy, which is a truth-to-self that involves complete agreement between natural law (with its moral absolutes) and the will. Here, we

reach an impasse over the good (338) that only mutual agreement to adhere to the authors' inductive version of natural law method could overcome.

In their zeal to point (correctly) to the doctrinal fount of Finnis's positions, B&R are guilty in places of overstating their case. It is doubtless worthwhile to deconstruct the experiences and psychological motives of authoritative reasoners. So, for instance, the Roman Catholic hierarchy may indeed be patriarchal and homophobic, and Finnis may indeed intend "a defense of anachronistic patriarchal religion." (9) But legal theorists must stick to demonstrating these faults in the arguments themselves. Speculation about their psychological and experiential origins is unhelpful as legal theory. Likewise, attention to moral theologian Germain Grisez's theology is useful only to the degree that it illumines moves in Finnis's legal thought; to the degree that guilt by association is implied, the extended analyses of Grisez and the teachings of the Roman Catholic hierarchy become overkill.

On one hand, this reader is unconvinced that the argument actually requires the painstaking theological archeology the authors have undertaken. It should be possible to criticize Finnis's position according to the basic criteria of moral desirability and logical integrity without an extensive investigation of his, and his collaborators', theological and ecclesiastical loyalties. Cutting this argument would have made it possible for the authors to make a more thorough case for the reasonableness and self-evidence of "our conception of liberalism" and its goods and for the unsupportability of Finnis's conclusions, for the real problem with Finnis's arguments is that they fail basic criteria of transparency and logic.

On the other hand, B&R are to be congratulated for demonstrating carefully to legal theorists that philosophically and theologically rigorous religious reasoning stands up to the requirements of secular legal theory and that Finnis's *Natural Law and Natural Rights*, which falls short of that mark, should not be taken as representative of natural law method in theology. Here they do a real service by showing how religious arguments, including Roman Catholic natural law arguments, can belong in secular discourse. Their thorough, unrelenting internal critique of Roman Catholic moral thought will also be appreciated by Catholic moral thinkers still puzzling out the connection between religious visions of the good and participation in pluralist democracy. And their sketch of an alternative vision, though brief, resonates with much current work in Christian theological ethics.

This heavily-documented work required both wide and deep reading of legal theory, recent moral theology, philosophy, the scholastic theology of Thomas Aquinas, and Christian scriptural ethics. Members of all these disciplines will find something of interest and will learn from the creative and well-informed juxtaposition of literatures. One can make minor complaints—for instance, Thomas Aquinas’s apparent condemnation of pleasure cannot hold if one reads his treatise on temperance in the *Summa Theologiae* carefully—but such points are picayune and peripheral. All will learn much from its central points and from the erudite detours that illuminate them.

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