

Austin has identified patterns and provided extensive documentation to establish that Burchard was guided by certain principles while compiling the *Decretum*. It is, however, extremely difficult to prove the intentions of an author or compiler. Whether Austin's argument convinces scholars that Burchard was indeed a great systematiser of canon law prior to the papal reform period is arguable. Another avenue that might prove fruitful is a consideration of the concepts; an assessment of the content of the *Decretum* in conjunction with the editorial choices of Burchard might round out future interpretations. However, there is no doubt that Austin's detailed knowledge of Burchard's texts, manuscripts and sources makes this work a significant contribution to the field and her thesis challenges scholars to reconsider assumptions about early collections of canon law.

ALICE CHAPMAN

Grand Valley State University, Allendale, Michigan

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Religion and Public Reasons (Collected Essays: Volume V)

JOHN FINNIS

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John Finnis has been the leading exponent of natural law theory in the field of legal philosophy at least since the publication of *Natural Law and Natural Rights* (NLNR) in 1980. He has taught at Oxford since 1965 and held the Chair of Law and Legal Philosophy from 1989 until his recent retirement.

Oxford University Press has now published a five-volume collection of Finnis' essays, some previously unpublished. The earliest dates from 1967, the latest from 2010. They have also published a second edition of NLNR; this leaves the text virtually unchanged but adds a substantial Postscript 'to indicate where the original needs . . . amendment or supplementation'. Finnis' principal themes, the twin forces of practical reasoning and divine revelation as a source of good morals (and good law), are painstakingly elaborated in NLNR. They are developed or embroidered in many of the essays, whose strength or value thus depends considerably on the power of Finnis' original arguments.

I am only concerned here with the fifth and last volume of essays, *Religion and Public Reasons*. It contains 24 essays arranged under four headings: 'Religion in public reason and law', 'Bases for accepting revelation', 'Conscience and faith' and 'Controversies'. A number are specifically addressed to a Roman Catholic readership, notably Essay V.6, 'Catholic positions in liberal debates'. Essay V.1

is perhaps of particular interest to lawyers because it advocates special constitutional protection for religion. The argument depends on religion's claim or claims to truth; it is 'the practical expression of, or response to, truths about human society' (p 31).

Because so much material in the essays, particularly in volume V, depends on Finnis' original arguments laid out at length in *NLNR*, it is difficult – and plainly this is no criticism – to get to grips with their strengths or weaknesses without a critique of the fullness of the reasoning advanced in the earlier book. *NLNR* has been the subject of much learned disquisition over the years; I cannot travel the whole ground of Finnis' thought here, so some particular observations must suffice, which I will relate so far as I can to *Religion and Public Reasons*.

By way of preliminary it is worth noting how much Finnis is concerned to condemn subjectivism in morals. In that connection it is interesting that two recent important books on moral philosophy, both published last year, are also concerned to advocate theories of objectively ascertainable moral principles; perhaps the vogue in ethics is not what it was when *NLNR* was published in 1980. The books are Dworkin's *Justice for Hedgehogs* and Parfit's *On What Matters*.² Finnis has many criticisms of earlier works by Dworkin, whom he clearly regards as an unsound liberal; there is thus a certain irony in what may be described as Dworkin's own deployment of practical reasoning in the service of objective morals.

Turning to Finnis' work, I should make it clear that I have major difficulties with his treatment of the relationship between reason and divinely revealed truth, and the nature of both. Finnis is at pains to state that the existence of God is 'accessible to natural reason (reason unaided by revelation)' (Essay V.6, p 114). The process, he claims, involves recognising a necessity, 'the rational necessity of adhering to those norms of rational inquiry and judgment which articulate what experience of discovering reality shows is *needed* for overcoming ignorance, illusion and error' (V.1, p 22; and see V.9 and *NLNR*, pp 68–69, 385). It is reasonable

to infer that the actuality and intelligibility of every entity, process, or state of affairs result from a *sui generis* reality which *has what it takes* both to exist – be actual – without being caused and to cause, intelligently, absolutely every such resultant ('created') entity, process, and state of affairs. (V.1, p 23)

Further,

the existence of the contingent is ultimately explicable only by reference to a state of affairs – let us call it the act of Creation – which includes within

2 R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, 2011); D Parfit, *On What Matters* (Oxford, 2011).

it a reality – God the Creator – which needs no explanation because what this reality is is all that it requires to exist (so that to know *what* it is would be to know *that* it is). (V.11, p 178)

The ‘necessity’ of which Finnis speaks is not, however, the necessity of logical entailment or of ‘psychological necessity’ (V.1, p 22; compare ‘not logically, but rationally’, V.13, p 192).

Here are my difficulties; I am sure they are not original. First, I do not know what is meant by Finnis’ postulate of God’s existence – its ‘necessity’. As formulated it is not a matter of deductive, nor presumably of inductive, logic, nor of observation or evidence. It is said to be a ‘rational necessity’. What sort of necessity is that? Second, and it is part of the same problem, I do not know what is meant by ‘a *sui generis* reality which *has what it takes* both to exist – be actual – without being caused and to cause . . . every . . . “created” entity’. What does it ‘take’? How are we to understand a being or entity that has no cause?

None of this is to say, of course, that there may not be truths accessible only by revelation and not by reason. Aquinas, in whose work Finnis is an expert, would say as much. But Finnis’ metaphysics suggest to me that the *via negativa*, the apophatic theology of the Cappadocian Fathers and others, has much to commend it.

A more general difficulty is that Finnis’ use of language is too often impenetrable. I recognise of course that he is dealing with difficult ideas and that context may explain a great deal. But I fear it is not very helpful to be told that ‘The rational processes by which one comes to assent to those foundational principles whose assertibility is known only to the wise remain unthematized’ (V.9, p 150) or ‘It is the normativity of a strong rationality norm that constitutes the non-logical but cogent necessity of the argument for an uncaused cause’ (V.9, p 153). And there are many more.

Turning to Finnis’ reliance on reason as a source of moral truth, an important theme is his insistence that ‘practical reason’s first principles can be understood . . . and their normative implications extensively unfolded into rich, substantive moral . . . theory, without relying upon . . . or even adverting to the existence of God’ (V.1, p 31). He considers there to be an interdependence between revelation and reason: ‘the moral precepts of the Catholic faith are . . . *also* . . . truths of public reason’ (V.8, p 137). However, it seems to me that, in seeking to demonstrate (or illustrate) this interdependence, and thus to establish an identity between conclusions of practical reason and tenets of the Catholic faith, Finnis presses reason further than it can go. Essay V.23 provides instances. It consists in reflections on the Papal Encyclical *Humanae Vitae*, which Finnis retranslated for its fortieth anniversary in 2008. It is clear, however, that he regards its teaching on marriage and sex, including contraception, as ‘accessible even without the aid of divine revelation’

(p 350). But the argument on contraception, judged purely as a product of reason, seems to me to be wholly unpersuasive. It depends first on accepting that there are ‘two inherent meanings of marital intercourse: unitive and procreative’, which are ‘not rightly severable by human volition’ (*Humanae Vitae*, section 12, cited at p 353). It is then asserted that ‘reasonable sex acts . . . must each and every one of them be marital’, and ‘To make a choice against the procreateness of any sex act is one way to guarantee that it is not a marital act and therefore, in the Christian understanding of human reasonableness, is not a morally suitable act for anyone’ (p 354). I am not sure whether the phrase ‘the Christian understanding of human reasonableness’ betrays a wobble between reason and revelation. In any case, I think that the reasoning, as reasoning, is empty: it merely defines marital sex as including the prohibition of contraception. The possibility, moreover, of a meaningful homosexual union that is exclusive and permanent is dismissed in (I am sorry to say) a brutal footnote: ‘in the absence of joint biological parenthood any commitment to exclusiveness or permanence as a couple has no intelligibly sufficient point’ (V.23, p 351, n 10). I am quite sure that reason does not take one there, and am entirely mystified by the notion that a loving God might do so.

The last essay in the volume, V.24, is a previously unpublished paper entitled ‘Hell and hope’. Finnis believes in Hell, citing St Augustine and Thomas More; but he seems to me to be rather coy about it. Though he refers on page 369 to God’s punishments – ‘penalties which in the more serious cases of defiance or contempt for his limitless goodness and authority extend to punishment if not without limit at least without end’ – he insists on the next page that ‘the loss and misery of hell is something one brings about by one’s own free choices, without any further response on God’s part’. It is a ‘self-made judgment’. He states that the Church’s teaching about hellfire means ‘nothing more nor less than that the essential misery of permanent unfulfilment will have natural and painful consequences at the level of experience’. But the ‘self-made judgment’ must in fact, in Finnis’ view, be the judgment of God; and the ‘natural and painful consequences’ must be no less terrible than hellfire.

If there is a god who consigns anyone who dares to defy and reject him to eternal suffering, he is surely a cruel god, whom it would be our duty to condemn if only we were brave enough. But Finnis says ‘there is . . . at least one free willing and intelligent creature, Satan (whose reality is affirmed by the Second Vatican Council in eight different places), who is in hell forever; and that is consistent with God’s salvific generosity’ (p 378). I can think of nothing more baffling.

Finnis’ learning is profound, steeped in history and literature, and *NLNR* was a seminal work. His essays cover a vast range: the scope of volume IV alone, *Philosophy of Law*, is remarkable. But the horizons of volume V are sometimes elusive; and where Finnis reveals them, too often he unveils a harsh, forbidding

landscape. I do not think that reason requires us to dwell in it, and I, for one, would not choose to do so.

JOHN LAWS

Lord Justice of Appeal

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Miracles of the Virgin in Medieval England: Law and Jewishness in Marian Legends

ADRIENNE WILLIAMS BOYARIN

DS Brewer, Woodbridge, 2010, xi + 217 pp (hardback £50.00)

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The Homiletic Writings of Archbishop Wulfstan

JOYCE TALLY LIONARONS

DS Brewer, Woodbridge, 2010, viii + 194 pp (hardback £60.00)

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The two books reviewed here are far from being the run-of-the-mill works on mediaeval law (canon law or otherwise). Both present their subjects with a passing glance at the law, and there is a delight in seeing the law from a different perspective.

Adrienne Boyarin's consideration of the legendary accounts of the intercession of the Virgin Mary in mediaeval English literature is a work of dense scholarship, spanning literary criticism, art history and social and cultural studies. Its vocabulary is heavily technical, and it is not at all an easy read. Nevertheless, it is a worthwhile read, particularly in the latter chapters, in which Boyarin studies the legal aspects of the tales of the miraculous activity of the Virgin Mary in the Middle Ages. Aelfric's use of the 'Legend of Theophilus' in his first sermon on Mary's Assumption emphasised the Virgin's role as a legal advocate; later English writings expanded this to the presentation of Mary as a type of Moses – not simply a *mediatrix* but a *legisatrix*. Mary was especially significant for her relationship to contract law in the Theophilus legend, because she retrieves the 'soul-stealing charter' from the devil. The Virgin becomes the 'bearer of the text' of the law, quite literally a *corpus legis*. In a series of images similar to the lactation legends associated with Saint Bernard of Clairvaux in the previous century, Mary produces books of law at her breasts, giving birth to the Law. The sources invoked range from heavily illustrated English Carthusian manuscripts to the plan for the late fourteenth-century Lady Chapel in York Cathedral. Boyarin concludes by placing these literary and artistic productions in the context of the anonymous Walsingham Ballad and the tradition