Patriarchal Religion, Sexuality, and Gender

A Critique of New Natural Law

Nicholas C. Bamforth
David A. J. Richards

Cambridge

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PATRIARCHAL RELIGION, SEXUALITY, AND GENDER

This book is an evaluation and critique of 'new natural law,' a school of thought first advanced by Germain Grisez and ostensibly based on the work of Thomas Aquinas. Members of this school, in particular John Finnis and Robert George, have prominently defended conservative moral views about sexuality (in particular, about lesbian and gay and 'non-marital' heterosexual sexual activity) and gender (in particular, about contraception and abortion), and have presented their arguments as being of a secular rather than doctrinal character.

Bamforth and Richards argue that the new natural lawyers' views – which were advanced before the U.S. Supreme Court in *Lawrence* v *Texas* (concerning decriminalization of gay sex) – are neither of a secular character nor properly consistent with the philosophical aims of historical Thomism. Instead, their positions concerning lesbian and gay sexuality, contraception and abortion serve as a defense of the conservative doctrinal stance of the Papacy – a stance now properly rejected by many thoughtful Catholics. The book suggests that the new natural lawyers' arguments are rooted in an embattled defense of the highly patriarchal structure of Catholic religious authority, and as such are unappealing in a modern constitutional democracy. Alternative interpretations of Christianity, not flawed in the way that new natural law is, are both possible and more constitutionally acceptable.

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A Critique of New Natural Law

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK
Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521868631

First published in print format 2007

ISBN-13 978-0-511-46046-3 eBook (Adobe Reader)

ISBN-13 978-0-521-86863-1 hardback

IN MEMORIAM

H. L. A. Hart (DAJR); Joyce M. Bamforth (NCB)

But interference with individual liberty may be thought an evil requiring justification for simpler, utilitarian reasons; for it is itself the infliction of a special form of suffering – often very acute – on those whose desires are frustrated by the fear of punishment. . . . [T]he suppression of sexual impulses generally is . . . something which affects the development or balance of the individual's emotional life, happiness, and personality.

H. L. A. Hart, *Law, Liberty, and Morality* (Stanford, California: Stanford University Press/Oxford: Oxford University Press, 1963), p. 22.

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ACKNOWLEDGMENTS

Some time before we first met – at a conference on the legal recognition of same-sex partnerships, held at the School of Law, King's College, University of London, in July 1999 – each of us had independently written short critiques of the conservative and, in our view, unpleasantly homophobic arguments concerning same-sex sexual acts and same-sex partnerships advanced by legal philosophers John Finnis and Robert George. It was Nicholas who first suggested to David that it might be possible to produce some fruitful collaborative work (perhaps, an article or two developing our previous critiques?), and took his full-year sabbatical from Oxford in 2003–2004 at New York University School of Law in part to explore this possibility further. It was that year of splendid conversation and growing friendship between us, at weekly working lunches, that led to something neither of us had anticipated: a book-length critique of new natural law, the branch of contemporary Catholic theology developed by Germain Grisez and applied in the legal context by Finnis, George, and others. By the time Nicholas returned to the United Kingdom in August 2004, we had produced the first draft of our critique, something more ambitious than anything either of us might have produced separately. This draft was extensively revised over the following two years and resulted in this book.

We are very grateful to the people who and institutions that made possible Nicholas's year-long residence in New York, including Professor Joseph Weiler – who sponsored his status during that year as a Hauser Global Fellow – and the Oxford–NYU Fund and the Governing Body of The Queen's College, Oxford, who between them underwrote most of the associated costs. We are grateful as well to the New York University School of Law Filomen D'Agostino and Max E. Greenberg Faculty Research Fund for research grants to David, and to Dean Richard Revesz and Associate Dean Clayton Gillette, for providing support for the preparation of the index and arranging accommodation for Nicholas in New York when we met in 2005, 2006 and 2007 to take our work further. Thanks are also due to David's assistant, Lavinia Barbu, for her service above and beyond the call of duty in preparing the bibliography for us, and to David's previous assistant, Lynn Gilbert, for facilitating our work together in 2003–2004.

We are also very grateful for the many useful comments on drafts of the manuscript that we received at faculty or graduate colloquia at New York University, Oxford University, Washington and Lee University (where we were honored to serve as joint Frances E. Lewis Scholars-in-Residence in early 2004), Cornell University, and Southern Methodist University. We are also extremely grateful for the illuminating conversations either or both of us enjoyed about the subject matter (whether in person or by e-mail) with Nicholas Barber, Samantha Besson, Charles Curran, Samuel Freeman, Carol Gilligan, Brendan Horan, Matthew Kramer, Brian MacDonnell, Blake Morant, Thomas Nagel, Sally Norris, Christopher Rowland, Dan Sarooshi, Peter Southwell, and Robert Summers. Sandeep Sreekumar very graciously allowed us to cite from his doctoral thesis in developing our argument. We must also especially thank Drucilla Cornell, Evan Gerstmann, and Nicola Lacey for their helpful and supportive comments on the manuscript as readers, as well as John Berger, senior editor at Cambridge University Press, for his enthusiastic support for our project, and Maggie Meitzler at Aptara Corporation, who handled copy editing issues with wonderful fortitude. The usual disclaimers apply in all cases. Conversations with David's life partner, Donald Levy, Professor of Philosophy at Brooklyn College, were invaluable in our work. Nicholas would particularly like to thank his father, Colin and sister Katharine (who, as a teacher of religious studies, has the difficult task of making sense on a day-to-day basis of the humanitarian potential but practical intolerance of many organized religions) and to remember his mother, Joyce.

We appreciate that this book may not be welcomed by segments of the legal philosophy community – particularly in the United Kingdom, where John Finnis's interventions in U.S. debates concerning sexuality and gender tend to be ignored in evaluations of his work. We offer no apology for any resulting discomfort: Meaningful evaluation of any theory *must* encompass an analysis of its practical recommendations. For liberals, this becomes a moral imperative when that theory would justify the use of law in a fashion seriously injurious to the dignity of traditionally disempowered groups – in the case of new natural law, women (heterosexual or lesbian) and gay men.

New York and London
23rd April 2007

CHAPTER 1

NEW NATURAL LAW IN CONTEXT

In the past forty-odd years, a tight-knit and highly influential group of Catholic thinkers, labeled (for wont of a better term) the 'new natural lawyers' or the 'Grisez School', has sought to develop an integrated theory applicable to the fields of religion, ethics, philosophy and law.[1] As E.M. Atkins suggests, the new natural lawyers' work "is characterized by a bold trust in reason, by elaborate systematization, by a willingness to apply theory to a wide range of specific practical problems, and by a strong allegiance to Roman Catholic moral teaching, interpreted in a conservative way".[2] New natural law provides a distinctive approach to Catholic theology, alongside a comprehensive account of ethics and the nature and proper purposes of law and legal systems. At a practical level, its proponents argue in favor of unilateral nuclear disarmament and against contraception, abortion, and any sexual activity outside of the heterosexual marriage (and many common sexual practices within it) – including all lesbian and gay sexual activity. The new natural lawyers have played a prominent part in doctrinal debates within the Roman Catholic Church, and have sought to influence the outcome of important constitutional cases in the United States by submitting closely argued *amicus* briefs. New natural law arguments were, for example, advanced before the United States Supreme Court in *Lawrence* v. *Texas* in support of a state anti-sodomy statute that was later

[1] The term 'new natural law' seems to originate in Russell Hittinger's book *A Critique of the New Natural Law Theory* (Notre Dame: University of Notre Dame Press, 1987), p. 5. Its usage is acknowledged by the new natural lawyer Robert George in *In Defense of Natural Law* (Oxford: Clarendon Press, 1999), pp. 1, 3; see also the title to ch. 1; chs. 1 and 2 of this book seek to offer a general discussion of what is "new" about this type of natural law theory. The term 'Grisez School' is frequently used in the authoritative account of the group's work edited by Nigel Biggar and Rufus Black: *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Aldershot: Ashgate, 2000). Gerard Casey humorously points out that Grisez, Finnis, and Joseph Boyle, the three central figures in the group, are "sometimes referred to portmanteau-wise as 'the Griffinboyle'" (Book review, (2000) 41 Philosophical Books 104, 105).

[2] Book review, (2002) The Heythrop Journal XLIII 533.

held to violate the Fourteenth Amendment due process guarantee,[3] and at the state supreme court level in *Romer* v. *Evans* in support of a measure that was later found by the U.S. Supreme Court to display unconstitutional "animus" towards lesbians and gay men.[4] Most recently, the new natural lawyers have been important advocates of a proposed constitutional amendment in the United States that would ban same-sex marriage.[5]

Viewed as an integrated theory, new natural law has already been subjected to comprehensive and high-quality critical analysis by theologians and ethicists.[6] Unfortunately, legal theorists have generally lagged some way behind, tending to evaluate the work of the main thinkers about law in the group – John Finnis and his follower Robert George – as a stand-alone contribution to legal theory, rather than as a component part of the cross-disciplinary new natural law perspective. This is despite the observation made by George and Gerard Bradley (another prominent new natural lawyer) that the theory was originally "proposed" by theologian Germain Grisez – who remains the preeminent theorist in the group – and "developed by him in frequent collaboration with John Finnis and Joseph Boyle", so that while work by Finnis and others has brought the theory

3 *Lawrence* v. *Texas* (2003) 123 S Ct 2472; the 'new natural law' amicus brief was submitted by Robert George and Gerard Bradley on behalf of the conservative pressure group Focus on the Family: (2002) US Briefs 102.

4 (1996) 517 US 620; John Finnis and Robert George both filed briefs at state supreme court level ((1993) 854 P 2d 1270): for an account of their arguments, see John Finnis, "Law, Morality, and 'Sexual Orientation'" (1993–4) 69 Notre Dame L Rev 1049.

5 See Chapter 3.

6 Most obviously, see Nigel Biggar and Rufus Black's edited collection *The Revival of Natural Law* (id.), in which Oliver O'Donovan tellingly notes at p. 111 (in "John Finnis on Moral Absolutes") that the theory "has attracted considerable discussion, though only, so far as I am aware, among other Roman Catholics, as a bold attempt to recover the ground of natural moral reason for conservative Catholicism". See also Timothy E. O'Connell, *Principles for a Catholic Morality* (New York: Harper Collins, revised ed., 1990), pp. 205–6 (Grisez as the "primary architect" of the "Catholic natural law theory" based on basic goods, which has been "significantly developed" by Finnis); Stephen J. Pope, "Natural law and Christian ethics", in Robin Gill (ed.), *The Cambridge Companion to Christian Ethics* (Cambridge: Cambridge University Press, 2001), p. 90 (Grisez "inaugurated" the school of thought later "systematically elaborated upon" by Finnis and others); Michael Banner, *Christian Ethics and Contemporary Moral Problems* (Cambridge: Cambridge University Press, 1999), pp. 14–5 (new natural law as a theologically serious project, but one which does not see itself as an exercise in dogmatic ethics); Alan Donaghan, "Twentieth Century Anglo-American Ethics", in Lawrence C.Becker and Charlotte B.Becker (eds.), *A History of Western Ethics* (Garland Reference Library of the Humanities, vol. 1540, 1992), p. 153 (Grisez as the formulator of the theory); William Schweiker, *Responsibility and Christian Ethics* (Cambridge: Cambridge University Press, 1995), p. 120 (the basic human goods theory of Roman Catholic philosopher Grisez); Darlene Fozard Weaver, *Self-love and Christian Ethics* (Cambridge: Cambridge University Press, 2002), pp. 167–9 (the Grisez/Finnis theory considered in the context of analyzing one's relations with God); Russell Hittinger, *A Critique of the New Natural Law Theory*, id., pp. 5–9 and "After MacIntyre: Natural Law Theory, Virtue Ethics, and Eudaimonia" (1989) 29 Int Phil Q 448 (see also the following rejoinders to Hittinger: Germain Grisez, "Critique of Russell Hittinger's New Book, *A Critique of the New Natural Law Theory*" 62 New Scholasticism 459; Kevin M. Staley, "New Natural Law, Old Natural Law, or the Same Natural Law?" (1993) 38 Am J Juris 109; Robert George, "Recent Criticism of Natural Law Theory" (1988) 55 U Chicago L Rev 1371, 1407–1429).

"to the attention of secular philosophers", it is "of particular interest to Catholic moralists. This is because [new natural law] provides resources for a fresh defense of traditional moral norms, including those forbidding abortion, euthanasia, and other forms of 'direct' killing, as well as sexual immoralities such as fornication, sodomy, and masturbation".[7]

Perhaps surprisingly, only a tiny number of legal theorists have sought to address the question implicit in E.M. Atkins's characterization of new natural law: namely, how far the theory's approach to law presupposes or requires religious or particular doctrinal understandings of morality, human agency, and basic human action.[8] Most seem, by contrast, to accept without question the notion that Finnis's account of law is of a secular character, and appear unconcerned to explore the dependence of that account upon Germain Grisez's work.[9] The aim of the present book is to help redress this failure of evaluation, a task which we believe to be particularly important given new natural law's illiberal prescriptions concerning sexuality and gender.[10] We contend that new natural law defends, in these areas, a sectarian

[7] "The New Natural Law Theory: A Reply to Jean Porter" (1994) 39 Am J Juris 303 at 303.

[8] E.g., Matthew H. Kramer, *In the Realm of Legal and Moral Philosophy: Critical Encounters* (Basingstoke: MacMillan, 1999), ch. 1 at pp. 18, 24–5. Greater ambiguity characterizes the work of Kent Greenawalt, who reports in "How Persuasive Is Natural Law Theory?" (2000) 75 Notre Dame L Rev 1647, 1676, Finnis's claim to be reasoning in a secular fashion, but is clearly aware (as several footnotes reveal) of the explicitly doctrinal work of Germain Grisez. Theorists who have been concerned to challenge Finnis, George, and Bradley's conservative views concerning lesbian and gay issues seem to be more aware of the role of Grisez, but to divide in their views as to the nature (religious or secular) of the arguments. In "Is Marriage Inherently Heterosexual?" (1997) 42 Am J Juris 51, esp at 53 and 57–62, Andrew Koppelman provides an excellent critique of Grisez's reasoning alongside an analysis of his influence on Finnis, and appears to be open to – without explicitly accepting the point (see nn. 36 and 48) – the possibility that the reasoning is religious. In "Homosexuality and the Conservative Mind" (1995) 84 Georgetown LJ 261, Stephen Macedo describes Finnis, Grisez, and Robert George as "secular philosophers . . . working in one part of the Catholic natural law tradition" (at 272); Macedo's footnotes also indicate an awareness of Grisez's doctrinal work. In *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York: Routledge, 2003), p. 118 n. 90, Carlos A. Ball acknowledges Grisez's influence on Finnis's writings, but seems to go no further.

[9] See, e.g., Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (New York, Oxford UP, 1997), pp. 84–96. For a selection of good-quality general guides to legal philosophy that say nothing (or nothing substantive) on these points, see, e.g., N.E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (London: Sweet and Maxwell, 2nd ed., 2002), ch.4; M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet and Maxwell, 7th ed., 2001), pp. 132–9; Brian Bix, *Jurisprudence: Theory and Context* (London: Sweet and Maxwell, 4th ed., 2006), pp. 72–4 (which notes at n. 32 that Finnis "largely follows" Grisez's approach, but says nothing about Grisez).

[10] Finnis himself regards labels such as 'conservative' and 'liberal' as too local, unstable, and shifting to deserve a place in a *general theory* of law, state, and society. Instead, he suggests, fruitful inquiry in political theory asks whether specific principles and laws are good, reasonable, just, fair, and so on ("Liberalism and Natural Law Theory" (1994) 45 Mercer Law Review 687, 698–9). However, since the new natural lawyers have chosen to advance their arguments in the practical arenas of political and constitutional debate, we doubt that readers will find it excessively problematical to identify their specific conclusions concerning sexuality and gender as 'conservative' in a colloquial sense. We would concede, however, that Finnis's argument makes practical sense when the views

religious view that, because of internal and external flaws, constitutes neither a consistent nor an appealing approach to law and individual rights in a modern constitutional democracy.

1. THE ARGUMENT SUMMARIZED

Legal theorists usually associate John Finnis with his widely acclaimed book *Natural Law and Natural Rights*,[11] the central argument of which is that there are:

> (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular-purpose) and acts that are unreasonable-all-things-considered, i.e., between ways of acting that are morally right or morally wrong – thus enabling one to formulate (iii) a set of general moral standards.[12]

This distinction between (and combination of) basic goods and practical reasonableness is often seen as helping Finnis's account to circumvent the so-called naturalistic fallacy[13]: the mistake, famously identified by G.E. Moore in *Principia Ethica*, of assuming without adequate argument that good is conceptually identical with some natural fact (or, as it is sometimes put more bluntly, the idea that a normative 'ought' claim cannot without more be derived from a description of what 'is').[14]

of the new natural lawyers – fiercely opposed to abortion, contraception and same-sex marriage, yet passionately committed to unilateral nuclear disarmament – are considered as a package.

[11] Oxford: Clarendon Press, 1980.

[12] *Natural Law and Natural Rights*, id., p. 23.

[13] For the new natural lawyers' responses to and/or explanation of this point, see Germain Grisez, Joseph Boyle, and John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends" (1987) 32 Am J Juris 99, 101–2, 127; Germain Grisez, "The First Principle of Practical Reason: A Commentary on the *Summa theologiae*, 1–2, Question 94, Article 2" (1965) 10 Natural Law Forum 168, 194–6 and *The Way of The Lord Jesus – Volume 1: Christian Moral Principles*, (Quincy, IL: Franciscan Press, 1983, reprinted 1997), pp. 103–8; John Finnis, *Natural Law and Natural Rights*, id., pp. 33, 36–42, "Natural Inclinations and Natural Rights: Deriving 'Ought' from 'Is' According to Aquinas", in J. Elders and K. Hedwig (eds.), *Lex et Libertas: Freedom and Law According to St. Thomas Aquinas* (Citta del Vaticano: Liberia editrice Vaticana, 1987); Robert George, "Natural Law and Human Nature", in Robert George (ed), *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), pp. 32–3, 38. For analysis, see Jeffrey Goldsworthy, "Fact and Value in the New Natural Law Theory" (1996) 41 Am J Juris 21.

[14] See G.E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1960) (originally published, 1903), pp. 15–16. Moore's fallacy is more a caution against simplistic forms of naturalism than a decisive argument against naturalism in ethics: see, on this point, David A.J. Richards, *A Theory of Reasons for Action* (Oxford: Clarendon Press, 1971), pp. 9–10. As Finnis also notes, the blunt is/ought formulation, whilst well known, may not involve the most accurate reading of

A vivid example of the acclaim with which Finnis's work has been received is provided by leading liberal-minded theorist Sir Neil MacCormick, who suggests that:

> Some books make a radical impression upon the reader by the boldness and novelty of the theses they state; to write such a book is a rare and difficult achievement. It is scarcely easier, though, and no less rare, to make a radical impression by a careful restatement of an old idea, bringing old themes back to new life by the vigor and vividness with which they are translated into a contemporary idiom. That has been the achievement of John Finnis's *Natural Law and Natural Rights*, a book which for British scholars has brought back to life the classical Thomistic/Aristotelian theory of natural law. A theory which more than one generation of thinkers had dismissed as an ancient and exploded fallacy kept alive only as the theological dogmatics of an authoritarian church was rescued from a whole complex of misunderstandings and misrepresentations. At the same time, it was exhibited as a thoroughly challenging account of law, fully capable of standing up to the theories which were regarded as having refuted and superseded it, while taking into account and accepting into its own setting some of the main insights or discoveries of those theories.[15]

In fact, MacCormick's statement provides a good illustration of exactly the type of failure – that is, to consider Finnis's work in its proper context – that we are seeking to redress. For, as we will show in subsequent chapters, many of Finnis's arguments – far from having 'rescued' natural law from 'theological dogmatics' – in fact presuppose a commitment to religious belief and might, more specifically, be seen as constituting a reflection and a defense of the authoritarian and patriarchal views propounded by the Roman Catholic Church hierarchy, most notably under the doctrinally conservative Papacies of John Paul II and Benedict XVI.[16]

We will develop this analysis using two connected strategies. First, we place Finnis's work in its proper context by showing its dependence (acknowledged by Finnis himself[17]) on the arguments of theologian Germain Grisez. While the writing of *Natural Law and Natural Rights* marked an important stage in the development of new natural law, it did not constitute the final – much less the definitive or most comprehensive – statement of that theory, as both Grisez and

David Hume's articulation of the problem: *Natural Law and Natural Rights*, id., pp. 36–42; see also Nicholas Bamforth, *Sexuality, Morals and Justice* (London: Cassell, 1997), pp. 127–8.

15 Neil MacCormick, "Natural Law and the Separation of Law and Morals", ch. 5 in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996), p. 105.

16 For an authoritative collection of Church views, see the Vatican website: http://www.vatican.va; a more informal presentation can be found on the website of the Cardinal Ratzinger Fan Club (http://www.ratzingerfanclub.com), since renamed the Pope Benedict XVI Fan Club (http://www.popebenedictxvifanclub.com/).

17 In *Natural Law and Natural Rights*, id., p. vii.

Finnis acknowledge.[18] We argue that to properly understand new natural law, it is necessary to examine Grisez's work as well as later revisions to the theory made by Grisez, Finnis, and others: for the integrated nature of new natural law, as a school of thought, really does mean that Finnis's prescriptions for law *cannot* be understood in an intellectually meaningful way *save as* part of the broader theory. Secondly, we consider in detail the new natural lawyers' interventions in constitutional arguments concerning sexuality and gender (explaining the focus on these topics in the book's title), and argue that these interventions highlight the morally unappealing dimensions of the theory, alongside its practical role in giving voice, in relevant constitutional debates, to the dictates of the contemporary Catholic Church hierarchy.

To give a fuller idea of how the argument will develop, we should explain in a little more detail how the two strategies will be pursued in the chapters that follow. Chapters 2 and 3 essentially set the stage for our critique. In Chapter 2, we set out the criteria that we use when conducting our evaluation of the new natural lawyers' work: namely, whether their arguments are internally consistent (for example, with their stated premises) and whether they are morally appealing. This is a slightly technical exercise, but one which allows us to arrange the arguments of later chapters more clearly. In particular, by explaining why our critique does not – unlike many existing U.S. analyses of the new natural lawyers' views about sexuality and abortion – rest upon John Rawls's concept of public reason, Chapter 2 helps to make clear what is distinctive about the present study. In the course of the chapter, we also discuss in greater detail the nature of the distinction between religious and secular arguments. In Chapter 3, we present an integrated account of the work of Grisez, Finnis, and other new natural lawyers, exploring their academic arguments, their practical interventions in constitutional and political debates in the United States, and their role in doctrinal debates within the Catholic Church. Although this material is not enough *on its own* to produce the conclusion that the new natural lawyers' arguments about sexuality, gender, and the law are religious, it provides the basis for such a conclusion to be drawn in the light of the analysis of later chapters, particularly Chapter 4.

In Chapters 4 and 5, we deploy our first criterion – a standard that we refer to as 'internal consistency' – in analyzing whether the new natural lawyers' arguments (and Finnis's in particular) are consistent with their premises or aims, or in terms of their logical development. In Chapter 4, we critically examine Finnis's and other new natural lawyers' claims that their arguments about sexuality and gender are of a secular rather than religious character. We suggest that these arguments in fact play a polemical role in defending the views on these topics of the Papal hierarchy (a point which we develop more generally in Chapters 9 and 10): views

[18] Most obviously in their article, co-authored with Joseph Boyle, "Practical Principles, Moral Truth, and Ultimate Ends."

now reasonably questioned by Catholics and non-Catholics alike. We suggest that Finnis and his colleagues offer not an objective, secular approach to sexuality and gender, but instead sectarian religious arguments. The new natural lawyers' work can best be seen as a defense of the pronouncements of the Church hierarchy and as an attempt to defend a morally conservative interpretation of Catholic doctrine. In Chapter 5, we consider inconsistencies in the new natural lawyers' approach to the broadly Thomistic framework within which they claim to be working. We consider Grisez's and Finnis's approach to historical Thomism, and compare the new natural lawyers' arguments about sexuality and gender with those advanced by other contemporary Catholic Thomists. We conclude from this that the reading of Saint Thomas adopted by Grisez and Finnis is overly selective and ultimately lacks both the philosophical and scientific appeal to generally accessible reasons that is characteristic of Thomas.

In Chapters 6 through to 8, we deploy our second criterion – a standard that we refer to as 'substantive appeal' – in examining the moral appeal (or, as we argue, the lack of it) of the new natural lawyers' views concerning sexuality and gender. In Chapter 6, we set out various normative arguments, both philosophical and constitutional, which explain the substantive moral good associated with lesbian and gay sexuality (and indeed, any freely chosen sexuality) and same-sex partnerships, and the wrongfulness of homophobia. We also offer, by analogy, some normative bases for condemning sexism. These arguments form the background to our exploration, in Chapter 7, of the homophobia and sexism of the new natural lawyers' approach: an approach which, we argue, is substantively unappealing in constitutional democracies. Finally, we argue in Chapter 8 that the views of the new natural lawyers are not only problematic in the areas of sexuality and gender, but that their views are also open to challenge on issues such as nuclear deterrence and intention in morality, and can be seen, on examination, to rest on a form of sometimes fundamentalist argument that is inappropriate in a constitutional democracy. As well as reinforcing our analysis of the religious arguments of new natural law, Chapter 8 suggests that the new natural lawyers' views about sexuality and gender are likely to appeal only to those with preexisting doctrinal commitments.

The points raised in Chapters 3 to 8 also raise two larger questions. The first is whether new natural law, considered in the round rather than just in terms of its arguments concerning sexuality and gender, rests on a commitment to religious belief or to the truth of a particular set of religious doctrines. In logic, three answers might be possible. The first is that it does not. On this view, although Finnis and his colleagues are devout Catholics, support for their theory does not require religious faith or a commitment to Catholic doctrine, even if their practical reasoning is informed by their own faith. The second is the answer offered by the new natural lawyers themselves: While a full acceptance of their theory carries with it an acceptance of the reality of God as the uncaused cause, their conclusions can

be arrived at by practical reason rather than doctrinal commitment and should not be seen as narrowly sectarian.[19] In logic, this second answer knocks out any role for the first, although the two are linked in so far as they both presuppose (albeit in subtly different ways) that it is intellectually possible for a theorist to prevent the theory of law which they advocate from being driven or overwhelmed by their personal moral commitments. The third possible answer is that the new natural lawyers' arguments concerning law are rooted in their authors' religious beliefs and also depend in many instances upon Catholic doctrine. Supporters of this answer might believe either that it is inevitable that *any* theorist's deep-seated moral commitments significantly affect their theorizing about the law, or that it is not inevitable but happens to be true in the case of the new natural lawyers. The material presented in Chapters 3 to 8 seems to us to make the third answer the most plausible, although – given our primary focus on sexuality and gender – we do not present a thorough defense of this view here (neither do we wish to become involved in a debate between the two possible versions of the answer canvassed in the previous sentence). Our aim, purely and simply, is to demonstrate the religious character and substantive undesirability of the new natural lawyers' arguments about sexuality and gender-related matters.

The second larger question is what motivates the new natural lawyers' arguments. We offer our diagnosis in Chapter 9, which constitutes a historical, cultural, and psychological study of the impact of patriarchal assumptions on the formation, development, and continuing existence of the Catholic Church's traditionalist views concerning sexuality and gender. We consider how such patriarchal views arose in the works of Saint Augustine and Saint Thomas and on this basis evaluate the motivations that led the new natural lawyers to defend such views today in the way that they do. We argue that whatever may once have been a reasonable basis for such views (if in fact anything ever was), they are today demonstrably unappealing in substantive moral terms. If this analysis is correct, then the new natural lawyers' arguments about important questions of individual liberty and public and private morality – relating to marriage, the role of women, lesbian and gay sexuality, pregnancy, contraception, and abortion – can be seen as playing a role in unjust contemporary rationalizations of constitutional and moral evils such as sexism and homophobia. In many ways, these points go to the heart of our critique: for we suggest that the new natural lawyers' arguments will strike anyone with a concern for individual liberty as being morally unappealing (indeed, radically so) and as unintelligible without a prior commitment of a sectarian religious nature. The new natural lawyers' underlying motivation is to defend the authority of a patriarchal Church, with a rigid and unchanging set of doctrines, against reasonable internal criticism from other Catholic thinkers and reasonable external criticisms from society at large. The legitimacy problem

[19] Discussed in Chapters 3 and 4.

currently posed by patriarchal Papal authority is, we argue, well illustrated by the Catholic Church's inadequate response to the recent priest abuse scandal in the United States. Viewed in this light, new natural law must ultimately be seen as a defense of anachronistic patriarchal religion, a key reason for thinking that the theory's arguments cannot be acceptable in modern-day constitutional democracies.

Chapter 10 draws the various threads of our argument together. Given our analysis of the patriarchal notion of religion defended by the new natural lawyers, we feel it important to stress that many forms of Christian argument are – by contrast – not only consistent with the values of a constitutional democracy, but also have advanced and deepened such values. If the writings of the new natural lawyers constitute an attempt to shore up the authoritative position of the Catholic Church, based upon a reading of one of that Church's most respected thinkers, St. Thomas Aquinas, what can a reading of the Gospels tell us about the reported views of Jesus of Nazareth himself? Chapter 10 thus offers an alternative view of Christianity that is based on a better understanding of the historical Jesus and offers a more reasonable view of sexual morality. We argue that the Gospels – subject, of course, to numerous controversies of a doctrinal nature (not confined to Catholicism) about how they are to be read – provide a very solid foundation for the view that Jesus of Nazareth was, *if* he in fact existed, the promoter of tolerance, reconciliation, and respect for the freedom and equality of individuals. None of these values – values which are rightly cherished by liberals in the modern world – sit easily with the conservative, dogmatic, and pre-modern beliefs articulated by the new natural lawyers. The historically significant contributions of Christian thinkers to progressive constitutional argument (for example, those of the radical abolitionists and of Martin Luther King, Jr.) have arisen also from anti-patriarchal forms of voice, suggesting that there is nothing incompatible between Christianity – properly viewed – and respect for the individual rights that are valued in modern constitutional democracies.

2. SOME BROADER ISSUES

In the previous section, we highlighted some significant questions which we feel spring from our analysis of new natural law. However, our account raises other broader issues which we must highlight in the present section. The first concerns the nature or basis of theoretical arguments about law, and the second – which is perhaps better described as a cluster of issues rather than a single one – the proper role of powerful organized religions (in particular the Catholic Church) and of religious arguments in modern constitutional democracies.

Turning to the first issue, one of the more frustrating features of legal theory is the ability of legal theorists, however distinguished, needlessly to detach the theory or question they are examining from its philosophical, political, social, economic,

or historical context.[20] Of course, given the law's many distinctive features – not least its vocabulary, its authority claims and, many would say, its methodology – it would be wrong to suggest that context must always provide illumination whenever we consider some aspect of the law. To understand properly the law's nature and operation, it is necessary to recognize that it often makes distinctive claims (both *about* itself and *of* individuals, organizations, and groups) and to engage with its distinctive style of reasoning. Nonetheless, since the law's main task is to regulate social relations, our understanding of its workings also stands to be impoverished if we pay insufficient attention – where attention is warranted – to the effects of rules, to the reasons for their creation, and to relevant arguments about whether a given rule can be justified, whether it deserves to be amended or reinterpreted, and whether any new rule should be introduced.[21] If context is relevant in these various ways to our understanding of the nature of the law, then it should also be relevant, albeit in subtly different ways, to our understanding and assessment of theories *about* the law's nature and its permissible uses. It may therefore be important, for example, to consider the background political and moral philosophies of theorists if we wish to gain a full understanding of their theories about the law. This is one of the underlying issues to emerge from our analysis in this book: Too many legal theorists have simply been prepared to take the new natural lawyers' arguments about law (in particular those of Finnis) at face value, and to ignore or gloss over evidence pointing to the conclusion that those arguments are in fact of a religious character. Having said this, we should stress that it is absolutely not our intention to accuse the new natural lawyers of deliberately dressing up religious arguments in a secular garb, thereby acting in bad faith by consciously misleading their readers. It seems entirely likely that, as people of deep religious commitment as well as serious scholars, they sincerely believe that their arguments about sexuality, gender, and law can be arrived at by practical reason rather than doctrinal commitment. Nowhere in law or philosophy, however, is it customary to take an author's own view of the nature of his or her argument as constituting a *definitive* explanation of that argument. As we shall see in Chapters 2 and 4, the new natural lawyers' sense of commitment may in fact make it difficult for them to apply (or apply in the same way) the analytical distinction that secular scholars tend to draw between religious and secular arguments, leading them *mistakenly* to believe that their arguments about sexuality and gender are not dependent – in so far as they

[20] This should not be confused with the bolder claims often associated with legal realists, economic analysts of law, and some feminist, queer, and critical race theorists to the effect that context (broadly) or policy arguments (more narrowly) are factors of constant and overriding importance to any meaningful understanding of the law.

[21] Sometimes, this argument seems uncontroversial. When we consider how we should understand the law or what substantive positions the law should take, for example, it is a commonplace assumption that philosophical and constitutional commitments should play an important role in our thinking, as might – depending on our philosophy – considerations relating to political efficacy or economic efficiency. This assumption is both understandable and right, given the social power and coercive potential of the law.

concern the law – upon religious belief or doctrine.[22] This makes it still the more important for legal theorists to take care – far greater care than has been the case to date – when analyzing the nature and implications of those arguments.

If we are correct in categorizing the new natural lawyers' arguments about sexuality, gender, and the law as religious rather than secular, then their interventions in constitutional litigation and political debate beg important and difficult questions about the extent to which it is permissible to give weight to arguments of a religious character (particularly arguments rooted in the doctrines of a specific religion) in determining the scope of constitutional rights: the second broader issue or set of issues identified above. Few inquiries raise more fundamental questions about the role of religion in modern-day constitutional democracies than an inquiry into the influence of religious conceptions of the good in contemporary constitutional law. That the views of religious groups can influence the legislative process is clear from examples from both sides of the Atlantic. In the United States, for example, the Religious Freedom Restoration Act 1993 was enacted so as to reassure such groups that generally applicable laws would not be used to regulate their internal activities,[23] while in the United Kingdom, religious groups succeeded in persuading the Westminster Parliament to include within the Human Rights Act 1998 a section, which had not been included in the original Bill, requiring courts to have "particular regard to the importance" of the right to freedom of thought, conscience, and religion where a judicial determination of any question arising under the Act "might affect the exercise by a religious organization (itself or its members collectively)" of that right.[24] Furthermore, while religious groups sometimes claim that decisions made by legislatures and courts have shown insufficient sensitivity to their doctrines, this claim presupposes that such doctrines have a legitimate role to play in legislative and judicial deliberations. Whether it is right for the content or any interpretation of constitutional provisions (or ordinary law) to be based upon, or to reflect, or to be influenced by religious arguments is thus a live and sensitive issue, and the activities of the new natural lawyers might be felt to offer a particularly important case study. As we shall see in later chapters, the new natural lawyers have produced an integrated body of arguments which have been influential within the legal academy,

[22] See, e.g., Robert George's very broad contention – contained, ironically, in his essay on new natural law in Philip L. Quinn and Charles Taliaferro (eds.), *A Companion to Philosophy of Religion* (Cambridge, Massachusetts: Blackwell, 1997) – that "natural law teaching" is "scarcely… 'sectarian' or narrowly Catholic" (at p. 464).

[23] Struck down by the U.S. Supreme Court in *City of Boerne* v. *Flores* (1997) 521 US 507.

[24] Human Rights Act 1998, s.13(1); see further, on this point, K.D. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 MLR 79, 93–5. That the fears of the religious organizations were exaggerated is clear from the fact that the relevant European Convention rights are qualified and must, therefore, be balanced against one another in appropriate cases (see further, on this point, *Douglas and Zeta-Jones* v. *Hello! Ltd.* [2001] QB 897; *Campbell* v. *Mirror Group Newspapers* [2004] UKHL 22; note, however, the emphasis placed on the qualified nature of the Article 9 right to freedom of thought, conscience, and religion in *R.* v. *Secretary of State for Education and Employment, ex p. Williamson* [2005] UKHL 15).

in the course of practical constitutional and political debate (even if their interventions in U.S. constitutional litigation have been unsuccessful to date), and – perhaps most powerfully, given the worldwide moral authority claimed by that body – within the Roman Catholic Church. As a practical matter, they stand at the interface between religion, philosophy, constitutional law, and politics, and have sought to play a role in all of these areas.

This debate also has an important historical dimension. Religions and conceptions of constitutional democracy both have long histories, and those histories have usually been narratives of conflict. For example, a profoundly important narrative in the development of respect for constitutional democracy has been the recognition and elaboration of the right of religious liberty as one among the core human rights that society must respect.[25] Yet, over history, most religions have in practice been hostile to this right. To speak of Christianity alone, most dominant forms of Christianity, including Roman Catholicism as well as Calvinism and Lutheranism, have called for and defended the repression of opposing religions. It is a relatively recent development that many such religions have accepted religious liberty as a constitutional essential.[26] The way in which religious traditions now interpret *themselves* as supportive of the idea of constitutional democracy, and the kind of contribution they believe they can reasonably make to constitutional and political arguments, are therefore matters of enormous interest to contemporary religion as much as to constitutionalism.

The Catholic Church has had a decidedly mixed record in relation to religious tolerance. On the one hand, historically speaking we know that Catholicism developed one of the worst forms of institutionalized intolerance in the Christian West. The English historian and liberal Catholic Lord Acton commented in bitter terms on the roles of popes in the thirteenth and fourteenth centuries and their responsibility for the medieval Inquisition:

> These men instituted a system of Persecution, with a special tribunal, special functionaries, special laws. They carefully elaborated, and developed, and applied it. They protected it with every sanction, spiritual and temporal. They inflicted, as far as they could, the penalties of death and damnation on everybody who resisted it. They constructed quite a new system of procedure, with unheard of cruelties, for its maintenance. They devoted to it a whole code of legislation, pursued for several generations.[27]

On the other hand, undoubtedly motivated by the widespread sense of revulsion at the role Christian anti-Semitism had played as the cultural background for

[25] An obvious example of which is Article 9 of the European Convention on Human Rights: see further *Williamson*, id., paras [15]-[17] (Lord Nicholls) para [60] (Lord Walker).

[26] See, on this point, Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton: Princeton University Press, 2003); David A.J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986); Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), pp. 15–36.

[27] Quoted in Perez Zagorin, id., p. 14.

the atrocities of the Holocaust, the Catholic Church fundamentally reconsidered and changed its position on intolerance, leading to the remarkable Declaration on Religious Freedom by the Church's Second Vatican Council. In December 1965, the Second Vatican Council passed this Declaration, also known from its opening words as *Dignitatis humanae personae*, by an overwhelming majority. It stipulated that "the human person has a right to religious freedom". In defining this freedom, it stated that "all men are to be immune from coercion" by individuals, social groups, or "any human power", so that "in matters religious no one is forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits". The moral foundation of this right was "the very dignity of the human person", as known through "the revealed word of God and by reason itself". The only limit the Declaration placed on the free exercise of religion was "the just requirements of public order". The Declaration also acknowledged that in "the vicissitudes of history", the Church had acted at times in ways "which were less in accord with the gospel and even opposed to it". Finally, its conclusion stressed the imperative of universal religious freedom "in the present condition of the human family", in which different traditions were coming together in much closer relationships.[28]

It bespeaks the power and appeal of the idea of constitutional democracy in Europe after World War II that the Catholic Church, which had played little or no role in the historical development of the argument for religious tolerance, should have embraced it in the form and on the grounds that it did. It was certainly not without internal controversy that the Church made this remarkable decision. When first debated, it met with considerable resistance from some Vatican officials and a number of bishops. Its inspiration, however, was John XXIII's encyclical of 1963 on world peace and justice, *Pacem in Terris*, which appealed to "universal, inviolable, inalienable rights and duties" and used the phrase "the dignity of the human person" some thirty times.[29] Among its chief intellectual sponsors was the American Jesuit philosopher John Courtney Murray, who had been called to Rome as one of the Papacy's theological advisors. In an essay circulated to the American bishops on the right to religious liberty, Murray criticized the opposing view in the Catholic Church as "intolerance wherever possible, tolerance wherever necessary".[30] Once the Declaration had been approved, Murray observed that "in all honesty it must be admitted" that the Church was "late in acknowledging the validity of the principle" of religious freedom.[31] The historian Perez Zagorin observes, "Indeed, it was very late. Moreover, the document was far from confronting with complete candor the Catholic Church's long history of

[28] Quoted in Perez Zagorin, id., pp. 309–10. For Finnis's analysis of this development, see "Liberalism and Natural Law Theory", id., 694–5.

[29] Quoted in Perez Zagorin, id., p. 309.

[30] Quoted in Perez Zagorin, id., p. 309.

[31] Quoted in Perez Zagorin, id., p. 310.

cruel intolerance and far from expressing any contrition or apology for its record of religious persecution".[32]

Despite its post-Second Vatican Council commitment to religious tolerance, the Catholic Church has been unafraid on an ongoing basis to assert its views concerning what it would regard as substantive moral issues where these arise in the constitutional context, and indeed to instruct Catholic lawmakers as to how they should vote when such issues arise. In recent years, this has come to the fore in debates concerning the legal rights of lesbians and gays – and in particular in relation to the question whether same-sex unions should receive some form of legal recognition. In July 2003, the Vatican's Congregation for the Doctrine of the Faith issued a Report, approved by John Paul II, which declared that: "There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family";[33] that "[t]hose who would move from tolerance to the legitimization of specific rights for cohabiting homosexual persons need to be reminded that the approval or legalization of evil is something far different from the toleration of evil. . . . Legal recognition of homosexual unions would obscure certain basic moral values and cause a devaluation of the institution of marriage";[34] that "[l]egal recognition of homosexual unions or placing them on the same level as marriage would mean . . . the approval of deviant behaviour, with the consequence of making it a model in present-day society";[35] and that "[a]llowing children to be adopted by persons living in [same-sex] unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development".[36] In consequence, the Report announced that "[I]f it is true that all Catholics are obliged to oppose the legal recognition of homosexual unions, Catholic politicians are obliged to do so in a particular way. . . . When legislation in favour of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic law-maker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favour of a law so harmful to the common good is gravely immoral".[37]

[32] Perez Zagorin, id., p. 310.

[33] "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons" (dated 3 June 2003 and published on 31 July 2003, after being approved by Pope John Paul II on 28 March 2003), para. 4. See further: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

[34] At para. 5.

[35] Para. 11.

[36] Para. 7.

[37] Para. 10. For the Vatican's other recent pronouncement on this topic, see the Pontifical Council for the Family's Report "Family, Marriage and 'De Facto' Unions" (dated 26 July 2000 and published on 21 November 2000), at paras. 23 and 47. See further: http://www.vatican.va/roman_curia/pontifical_councils/family. Within the Church, priests with lesbian and gay orientations have been further isolated by the Congregation for Catholic Education's "Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in View of Their Admission to the Seminary and to Holy Orders" (31 August 2005),

If the new natural lawyers can be said to have successfully presented a general theory with appeal to all, together with a convincing defense of that theory's conservative implications for the law's regulation of a range of sexuality- and gender-related issues, then they will have shown that a comprehensive and genuinely secular view can be advanced by a group of scholars who are also, within their particular religious institution, active within internal doctrinal debate. However, if – as we argue in this book – they are unsuccessful in this, their enterprise still provides an excellent way of candidly assessing at least one important Catholic understanding of the contemporary relationship between religion and constitutional democracy. In making these comments, we would stress that we are not trying to belittle any contribution to debate merely on the basis that it can be identified (however it may be labeled by its authors) as religious in character. Rather, it would seem to be of fundamental importance both for Catholicism as a religion and for the practical workings of constitutional democratic societies – and however the history of the role of the Catholic Church is ultimately to be read – to insist on candor not only about their long histories of divergence, but also about how the Church's commitment to constitutional democracy, given voice via the Second Vatican Council, can reasonably be understood and assessed. Although we do not have the space in this book to engage in a sustained analysis of the proper role of religious argument in a contemporary constitutional democracy, we offer – given the importance of the topic – occasional thoughts about the matter as we proceed.

3. CONCLUSION

We have suggested in this chapter that a critical analysis of new natural law is necessary and important for many reasons. As theorists who are committed to a liberal vision of justice, political morality, and human rights, we believe that the most important practical reason is provided by the profoundly illiberal arguments about sexuality and gender advanced by Finnis and his colleagues in recent years. More deeply, our analysis demonstrates the necessity for legal theorists always to look beyond the outward appearance of an argument about the nature of law and to think more deeply about its motivations and practical consequences. Legal theorists have generally failed, to date, to consider new natural law in these terms, and the present study aims to redress this shortfall. Moving beyond the legal realm, our study also raises significant questions about the role of religion and religious argument in modern constitutional democracies, and exposes and diagnoses in microcosm the general and pervasive problem of patriarchy in the modern world, a problem of central importance to the integrity of our religion, ethics, politics, and constitutionalism. The Catholic Church is – we argue – threatened, as a highly patriarchal institution, by reasonable political claims relating to women's

endorsed by Benedict XVI: see http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104_istruzione_en.html.

and lesbian and gay rights. This may help explain why the Church, despite having changed its fundamental moral views on many issues – including chattel slavery and religious intolerance, both of which it now condemns despite previously ambivalent or supportive views – nonetheless continues to support reactionary positions against feminist and lesbian and gay rights arguments.

Whatever readers think of our analysis or substantive conclusions, we hope that this book will at least succeed in prompting them to think about – and to form their own views concerning – how properly to characterize arguments about law and religion, and the proper reach of constitutional rights in the areas of sexuality and gender.

CHAPTER 2

CRITERIA FOR EVALUATING NEW NATURAL LAW

When a theory is concerned – as is new natural law – with the objectives or values that the law should serve, we need for two reasons to select appropriate criteria for evaluating its desirability or workability. First, any evaluation is otherwise likely to lack an intellectually secure foundation, to be unlikely to convince others of the good sense of its conclusions, and to leave itself open to inaccurate or misconceived responses. Second, if we share the characteristic liberal assumption that law, as a coercive device used by the state to regulate social life, requires a sound normative justification if it is to be used legitimately, we may well be helped – by the use of appropriate criteria – to determine whether the theory under scrutiny can provide such a justification. This second reason clearly comes into play in the case of new natural law, given that the new natural lawyers have made clear – not least through their interventions in contemporary constitutional debates concerning sexuality and gender – that they believe their theory to provide a philosophically sound basis for determining the proper reach of the law in regulating people's day-to-day lives. The purpose of this chapter is therefore to explore some criteria that might be used in evaluating new natural law, and to explain the criteria that we shall use in this book.

Other critics of the new natural lawyers' writings concerning sexuality and gender have tended to base their arguments on the idea of 'public reason' (essentially, the notion that debate concerning the uses of law should appeal to justifications that are equally accessible to reasonable citizens), a close relative of which is the 'law and neutrality' argument (broadly speaking, the notion that the law should be neutral between competing substantive theories of the good). Both ideas – which we consider at length in section 2 – seek to limit the justifiable uses of state action and are commonly associated with liberal constitutional theory. As we explain, we do not consider either idea to be sufficiently conclusive of the debate about new natural law, and in consequence we do not rely on them in later chapters. Instead, we set out in section 3 the criteria that we use, which relate to the more general appeal and logical coherence of new natural law. We

argue that since the new natural lawyers seek to provide an account of the goods which people should pursue and the law reflect, useful assessment criteria relate to the uses to which it is appropriate for a theory to seek to put the law (or the assumptions on which it is appropriate for that theory to rely), to the more general appeal of its substantive assumptions or conclusions, and to the logical coherence of its arguments. We need first, however, to distinguish between certain terms which we will use as the chapter proceeds, namely theories of law, theories of the good, theories of justice, and theories of political morality. We do this in section 1, in which we also discuss in further detail what we described as the characteristic liberal assumption concerning the need for the uses of law to be justified.

1. SOME METHODOLOGICAL POINTS

In order to clarify certain aspects of our later discussion of evaluative criteria, it is necessary in this section briefly to explain four terms that we shall use: namely theories of law, theories of the good, theories of justice, and theories of political morality, alongside what we described as the characteristic liberal assumption. We deal with these five points in turn.

First, a theory of law provides an account of the nature of law, that is, how law works and how we are to understand its character. Classically, some theories of this type have been characterized as being of a legally positivistic nature, whilst others have been described as natural law theories, the essential point of division between the two being thought to relate to the criteria which they employ when assessing whether a given rule can be classed as a law. According to this very basic account, positivists classify a rule as a law if it has been brought into being in accordance with the procedures for law-creation recognized in the society in issue (different societies quite possibly using different procedures), while natural lawyers classify a rule as a law if it *deserves* to be recognized as such according to criteria relating to its content. However, on further reflection, it is relatively easy to see that this basis for distinction is somewhat blunt: For example, it is possible to identify criteria within certain legal systems which include considerations associated with content *within* the official procedures for law-creation, or at least to imagine how such criteria could be drafted.[1] In *Natural Law and Natural Rights*, John Finnis shares this skepticism about the utility of the basic account of the distinction between legal positivism and natural law. However, Finnis's skepticism is for a different reason. As we will see in Chapter 3, Finnis's argument is that the primary task of legal theory is not to argue about what makes a particular rule a law (the essential subject-matter of the basic account), but rather about the goods which the law should pursue.[2] It is clear, however, that Finnis's account still *contains* a theory of law. Finnis is content

[1] For discussion of this possibility, see, e.g., H.L.A. Hart's 'Postscript' to *The Concept of Law* (Oxford: Clarendon Press, 2nd ed., 1994), ed. Joseph Raz and Penelope Bullock; W.J. Waluchow, "The Weak Social Thesis" (1989) 9 OJLS 23.

[2] *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), chs. 1 and 2.

(as is Grisez) to accept that something may be *identified* as a law if it is created using officially recognized procedures, although he maintains that this is not the most important question we can ask about the law: For even if something counts officially as a law, the real questions are whether it properly reflects appropriate goods, and the extent to which we are morally obliged to follow its dictates.[3]

Second, a theory of the good concerns the values which human beings – whether individually or as a society (although more commonly as a society, and – according to some accounts – as a factor common to all societies) – should protect and foster. If we were to develop what has been characterized as the basic account of the distinction between natural law and legal positivism, we might say that a constitutive aspect of any natural law theory is that it appeals to a theory of the good in order to construct its theory of law. By contrast, the connection between a theory of law and a theory of the good is, for a legal positivist, contingent. New natural law differs somewhat from the basic account: for, while one of its most important elements is its theory of the good, consisting in the notion of the practically reasonable pursuit of the basic goods, Finnis and Grisez accept that something may count as a valid law even though it does not accord with thistheory.

Third, a theory of justice presupposes and is often derived from a theory of the good.[4] It concerns the rightful distribution of entitlements (including things which are deemed to be moral goods – hence the presupposition) among members of society. Since a theory of justice is concerned with the division of entitlements between individuals or groups, it is by definition concerned – assuming that entitlements are, whether for moral or material reasons, finite – with issues of *relative* distribution.[5] This being so, it is necessary for such a theory to contemplate the existence of an authoritative body which is capable of carrying out a distribution in accordance with the theory's requirements. In the modern world, it tends to

[3] *Natural Law and Natural Rights*, pp. 26–9, 267–8, 276–281, 351–368; "The Truth in Legal Positivism", ch.7 in Robert George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996); "Law and What I Truly Should Decide" (2003) 48 Am J Juris 107. In *The Way of The Lord Jesus*, Grisez accepts and deploys this analysis: see *The Way of The Lord Jesus: Volume Two, Living A Christian Life* (Quincy, Ill.: Franciscan Press, 1993), pp. 874–887. For a discussion of civil disobedience in the context of anti-nuclear protests (in which the new natural lawyers deem certain acts of civil disobedience to be justified if committed for the right reasons), see John Finnis, Joseph Boyle, and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon Press, 1987), pp. 354–7.

[4] For a *theory* to be concerned with the allocation of a given object or attribute as a matter of justice, the object or attribute concerned needs to be deemed in some sense to be valuable, something, which can only be done by reference to some notion of what is good. For a practical illustration, consider Joseph Raz's assertion that "we only have reason to care about inequalities in the distributions of *goods* and *ills*, that is of what is of value or disvalue for independent reasons. There is no reason to care about inequalities in the distribution of grains of sand, unless there is some other reason to wish to have or avoid sand", *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 235.

[5] John Gardner, "Discrimination as Injustice" (1996) 16 OJLS 353. For a practical example, see John Rawls's exposition of the "difference principle": *A Theory of Justice* (Oxford: Oxford UP, revised, 1999), pp. 52–8, 65–73.

be assumed that this authoritative body is the state, but this is not a definitional requirement of a theory of justice.[6] While the new natural lawyers do not reason specifically *in terms of* a theory of justice, they stipulate – as mentioned above – that decision-makers (both private individuals and the state) must comply with what they characterise as the modes of responsibility/requirements of practical reasonableness (see Chapters 3 and 4) in order to reach a morally correct decision.

While a theory of justice is more closely linked to day-to-day political decision-making than is a theory of the good, it is still too abstract on its own to give us clear guidance about the rightness or wrongness of particular acts of state coercion (law being characteristically assumed, at least in liberal legal theory, to be a coercive device). For this, we need to move to our fourth point and consider theories of political morality: that is, theories concerning permissible and impermissible behavior on the part of state institutions. A theory of political morality will have both general and specific dimensions. Generally, it will be concerned to tell us when it is right for coercion to be used by the state *per se*; more specifically, it will tell us when power should be exercised by particular institutions: for example, by the courts as opposed to the legislature or the executive. As will be immediately apparent, theories of justice and political morality are in practice closely inter-connected, and may sometimes appear to blur together. The most basic level of connection has already been mentioned: To supply a defensible justification for state coercion through law, we need to employ a combination of arguments of justice (why is a particular allocation of entitlements right?) and of political morality (why should the state enforce this allocation through law rather than through some other mechanism, and which institution of the state – the courts or the legislature – should take the leading role in that enforcement?). At a deeper level, it seems clear that some arguments of justice mandate conclusions about political morality.[7] For example, a theory of justice that gave priority over all competing considerations to a particular pattern of distribution would mandate a conclusion concerning the role of the state. The resulting justification for legal coercion would presumably stipulate that a law was legitimate so long as it promoted the required pattern: The idea that it was appropriate for the state to show restraint in any way would be alien.[8]

Fifth, the idea that legal coercion needs to be justified is characteristically associated with liberal theories of justice.[9] From a liberal perspective, the most

[6] For a more abstract example (later used in the construction of a more concrete theory), see Ronald Dworkin's discussion of an auction on a desert island: *Sovereign Virtue: The Theory and Practice of Equality* (Harvard: Harvard University Press, 2000), p. 65ff.

[7] The fact that not all do makes this connection a contingent rather than necessary one. For some examples, see Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990), pp. 89–90.

[8] We might also imagine, by contrast, a theory of justice for which (given the background theory of the good) considerations of institutional morality were categorized as considerations of justice.

[9] For example, Ronald Dworkin *Law's Empire* (London: Fontana, 1986) and *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); Stephen Macedo, *Liberal Virtues*, id., ch.1;

well-known justification for, and limitation of the permissible scope of, state action is to be found in J.S. Mill's harm principle. According to Mill: "the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute."[10] In the twentieth century, this principle was powerfully reflected in the Report of the Wolfenden Committee – the body established by the UK government to make recommendations, in the socially repressive climate of the late 1950s, concerning the desirable shape of the criminal law concerning sex between men and prostitution.[11] Echoing Mill's credo, the Committee suggested that the functions of the criminal law should be confined to "preserv[ing] public order and decency, to protect[ing] the citizen from what is offensive or injurious, and to provid[ing] sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[12] The law should not seek to "intervene in the private lives of citizens, or to . . . enforce any particular pattern of behaviour, further than is necessary to carry out" these functions.[13] The Committee thus believed that, unless a "deliberate attempt" was "made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[14] Defending the Committee's conclusions, H.L.A. Hart succinctly captured the liberal approach in his assertion that: "interference with individual liberty may be thought an evil requiring justification . . . for it is itself the infliction of a special form of suffering. . . ."[15] More recently, Stephen

Jeffrey Reiman, "Abortion, Natural Law, and Liberal Discourse: A Response to John Finnis", in Robert George and Christopher Wolfe (eds.), *Natural Law and Public Reason* (Washington, DC: Georgetown University Press, 2000), at p. 110.

[10] J.S. Mill, *On Liberty* (Cambridge, Cambridge University Press, 1989 ed.), ed. by Stefan Collini, p. 13.

[11] *The Report of the Committee on Homosexual Offences and Prostitution*, Cmnd. 247, 1957. For a powerful account of the spiteful state repression of gay men at the time, see Stephen Jeffery-Poulter, *Peers, Queers, and Commons: the Struggle for Gay Law Reform from 1950 to the Present* (London: Routledge, 1991). In fact, the Committee's recommendation that consensual sexual acts between men should be decriminalized was not acted upon by the Westminster Parliament until the passage of the Sexual Offences Act 1967, and even then only on a considerably more restrictive basis than applied to sexual acts between men and women.

[12] (1957) Cmnd. 247, para. 13.

[13] Wolfenden, para. 14.

[14] id., para. 61.

[15] Assertion reprinted in H.L.A. Hart, *Law, Liberty, and Morality* (Oxford: Oxford University Press, 1963), p. 22.

Macedo has suggested that "[l]iberal, democratic politics" is "*about* public justification: reason-giving and reason-demanding, and the insistence that power be backed by reasons."[16]

In practice, however, theorists of nearly all philosophical stripes – including the new natural lawyers – appear to accept as a matter of logic and/or practice that there are certain limits to the scope of permissible state action through law, and that legal coercion is only morally permissible where it falls within those limits.[17] John Finnis's writings concerning the subject matter of *Romer* v. *Evans* (see Chapters 3 and 4) provide a good illustration. After focusing in detail on what he felt to be "wrong" with homosexual conduct – which he described as an "evil",[18] as "immoral",[19] and as a topic which caused him "embarrassment"[20] – Finnis argued that the permissible actions of a government are limited by its general justifying aim, purpose, or rationale, which is to promote the common good of the community for which it is responsible.[21] The legitimacy of the state constitutional amendment which he sought to defend in *Romer* therefore depended upon its compliance with this standard.[22] Respect for limits was also evident in Finnis's use of the word "properly" in his conclusion that a political community which judges that family life is of fundamental importance to the common good "can rightly judge that it has a compelling interest in denying that homosexual conduct – a 'gay lifestyle' – is a valid, humanly acceptable choice and form of life, and in doing whatever it *properly* can . . . to discourage such conduct."[23] Furthermore, Finnis was keen to stress that "mere hostility to a hated minority" and manifestations of "purely religious, theological and sectarian belief" could "ground no constitutionally valid determination disadvantaging those who do not conform to it",[24]

[16] "In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?" (1997) 42 Am J Juris 1, 2 (emphasis added); this essay also appears, with slight amendments, in Robert George and Christopher Wolfe (eds.), *Natural Law and Public Reason*, id.

[17] For one example, see Stephen Macedo, "In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?," id., 3, and – in relation to conservative thinkers – "Homosexuality and the Conservative Mind" (1995) 84 Georgetown LJ 261, 262–3. As a matter of logic, the only type of theory that would appear to reject the need for justification outright would be a totalitarian one: that is, a theory which maintained that the state may act as it chooses in relation to citizens merely because it is the state.

[18] "Law, Morality, and 'Sexual Orientation'", at 1055.

[19] "Law, Morality, and 'Sexual Orientation'", at 1049.

[20] "Is Natural Law Theory Compatible with Limited Government?" ch. 1 in Robert George (ed.), *Natural Law, Liberalism, and Morality: Contemporary Essays* (Oxford: Clarendon Press, 1996), pp. 12 and 17.

[21] "Law, Morality, and 'Sexual Orientation'", p. 1070 f. See also John Finnis, "Abortion, Natural Law, and Public Reason", in Robert George and Christopher Wolfe (eds.), *Natural Law and Public Reason*, at p. 77.

[22] On the question of justification, see further Finnis's discussion in *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 260ff.

[23] "Law, Morality, and 'Sexual Orientation'", id., p. 1070.

[24] At id., 1055.

and that "laws and public policies should . . . be based on reasons, not merely emotions, prejudices, and biases, and a subrational prejudice does not become a moral judgement merely by being labelled so."[25] With these standards in mind, Finnis sought to claim that a state could 'properly' enact a law such as the disputed amendment, but in general could not legitimately criminalize private sexual acts between persons of the same sex.[26]

Interestingly, the exact limits to the state's permissible scope for acting through law form one of the few points of disagreement within the new natural law school. Robert George agrees with Finnis that there are limits to how far the state may permissibly act through law.[27] He expresses support for Finnis's assertion that law and government play a subsidiary or auxiliary role in upholding individual and public morality, the primary role being played by parents, families, religious organizations, and non-public voluntary organizations.[28] He also acknowledges that the U.S. government may only lawfully do those things which it is constitutionally empowered to do.[29] However, acknowledging that he may be "blinded by what Joseph Boyle once described – in jest, I hope – as my 'incorrigibly authoritarian impulses'",[30] George asserts that there are *in principle* no sound reasons of justice for not prohibiting private and 'immoral' sexual behavior. Like prostitution, heterosexual adultery and same-sex sexual acts ("noncommercial sexual vice"[31]) damage the community's public morality, George believes, and can legitimately be prohibited.[32] Prohibitive laws serve the public interest, which consists in "the maintenance of a cultural context conducive to *genuine* virtue and inhospitable to *genuine* vice."[33] The idea of a public morality, George argues, has been "vindicated by the experiences of modern cultures which have premissed [sic] their law on its denial. The institutions of marriage and the family have plainly been weakened in cultures in which large numbers of people have come to understand themselves as 'satisfaction seekers' who, if they happen to desire it, may resort more or less freely to promiscuity, pornographic fantasies, prostitution,

[25] John Finnis, "Is Natural Law Theory Compatible with Limited Government?", ch. 1 in Robert George (ed.), *Natural Law, Liberalism, and Morality: Contemporary Essays*, id., at p. 12.

[26] Finnis appears to argue, in "Law, Morality, and 'Sexual Orientation,'" at p. 1076, that it would be illegitimate for the U.S. Supreme Court to strike down an anti-sodomy statute if to do so would entail the adoption of any positive protections for lesbians and gays.

[27] See, e.g., *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993), pp. 7, 92–3. As George makes clear at pp. 8–18, his account of the requirements of morality derives from Grisez and Finnis; see also his arguments at pp. 173–182.

[28] Finnis, "Law, Morality, and 'Sexual Orientation,'" 1052, 1075–6; Robert George, "The Concept of Public Morality" (2000) 45 Am J Juris 17, 19. See also George's *Making Men Moral*, pp. 1, 47.

[29] "The Concept of Public Morality", at 22.

[30] "The Concept of Public Morality", at 30.

[31] "The Concept of Public Morality", at 26.

[32] "The Concept of Public Morality", at 31. See also *Making Men Moral*, p. 1, and (on the criminalization of pornography), pp. 99–100.

[33] *Making Men Moral*, p. 79. George argues, at pp. 226–8, that while the notion of religious liberty derives from a good, which deserves to be promoted by law, the notion of "moral liberty" does not.

and drugs . . . societies have reason to care about their 'moral ecology'."[34] The "common good" is thus served by "a social milieu more or less free from powerful inducements to vice."[35] George acknowledges that there may be pragmatic reasons for not criminalizing particular "vices", although he is ambiguous as to when such reasons would come into play or what types of conduct they would prevent from being criminalized: George's brief to the U.S. Supreme Court in *Lawrence* v. *Texas* makes clear that he does not believe such reasons to apply in the case of anti-sodomy statutes, for example.[36] He also suggests that – despite what he describes as the "great generosity of spirit" which characterizes Finnis's approach – "virtually the entire range of traditional morals legislation" could be justified under that approach.[37]

We have attempted in this section of the chapter to explain the distinctions, interactions, and overlaps between theories of law, theories of the good and of justice, and theories of political morality, and by doing so to introduce the notion that coercive state action – typified by legal coercion – is commonly regarded as requiring a sound normative justification in order to fit within the limits of permissible state action. This discussion has been necessary in order to provide a foundation for our analysis in later sections of the criteria to be used when determining whether theories concerning the use of law deserve to be supported.

2. LAW AND NEUTRALITY; PUBLIC REASON

The two criteria to be discussed in this section – the 'law and neutrality' argument and its close cousin 'public reason' – are concerned with the appropriate limits of state action, and might for this reason be described as being of an essentially constitutional character. Despite the popularity of public reason with many critics of new natural law, we explain here why we do not intend to rely upon it, or upon

[34] *Making Men Moral*, id., p. 37. George's picture of the 'damage' to public morality that may be inflicted by private acts might be felt to be strikingly akin to that presented by Lord Devlin in *The Enforcement of Morals* (Oxford: Oxford University Press, 1965) and criticized by H.L.A. Hart in *Law, Liberty, and Morality* (Oxford: Oxford University Press, 1963). George presents a revised version of Devlin's account – including a discussion of the social harm which allegedly results from relaxing the criminal law concerning permissible sexual behavior – id., pp. 65–71 – but states (at p. 71) that the maintenance of social cohesion is not a sufficient ground *per se* for enforcing moralistic legislation.

[35] *Making Men Moral*, id., p. 190.

[36] (2002) US Briefs 102 (with Gerard Bradley). George presents a basic account of prudential reasons in *Making Men Moral*, pp. 40–2, 190 (where it is suggested that "the question of enforcing specific moral obligations is fundamentally a matter of prudence and will thus pivot on knowledge of circumstances that are necessarily local and contingent"). He discusses other reasons that may be important at pp. 42–4.

[37] "The Concept of Public Morality" id., p. 30. Note, however, George's reported comment that he would leave state laws prohibiting adultery, fornication and sodomy in place so as to set a moral standard, while acknowledging the difficulty in enforcing them: J.I. Merritt, "Heretic in the Temple: Robby George once worked for George McGovern; now he's the hero of the intellectual right" *Princeton Alumni Weekly*, October 8, 2003.

law and neutrality, as our bases for evaluating the school's arguments. In essence, there are two reasons for our reluctance. First, theorists who self-identify as liberals are themselves divided about the coherence or efficacy of law and neutrality and public reason. Second, it seems clear that many non-liberal figures – certainly including the new natural lawyers – do not believe that such criteria should be decisive in constitutional debate. In consequence, even if we ourselves felt that such criteria were and should be decisive,[38] we would not be able to engage with the new natural lawyers to any real extent if we were to deploy them as decisive bases for judgment in this book. The new natural lawyers could simply respond to our analysis by saying that we have one conception of the role that the state should play in a constitutional democracy – and hence of the constitutional criteria that a theory should satisfy in order to pass muster – whereas they have a different, and to their eyes preferable, conception. In consequence, we do not believe that it would be appropriate to treat law and neutrality or public reason as decisive criteria here. However, given the general popularity and perceived analytical importance of these criteria, we feel that it is necessary to explore them in greater detail before we take the argument any further.

(i) Law and Neutrality

Some liberal theorists maintain that the law should remain neutral as between competing conceptions of the good. This view, if correct, would constitute a significant restriction on the range of laws which the state could legitimately create and apply, for any provision which failed to respect the ideal of neutrality would constitute an illegitimate use of state coercion. Since the new natural lawyers readily admit that their theories of law and justice entail the legal enforcement of substantive views concerning morality, the law and neutrality argument could – if correct – provide an immediate basis for condemning their position as unacceptable.[39] In this section, we set out the arguments for and against the position that the law can and should remain neutral as between conceptions of the good life, and make some more detailed observations about the implications of this position for new natural law – although, as should be clear from our discussion, we do not intend ourselves to rely upon the law and neutrality argument.[40]

[38] For our individual views, see further Nicholas Bamforth, *Sexuality, Morals and Justice* (London: Cassell, 1996), pp. 125–136; David A.J. Richards, *Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization* (Totowa, NJ: Rowman and Littlefield, 1982).

[39] See, e.g., John Finnis, "Liberalism and Natural Law Theory" (1994) 45 Mercer L Rev 687, 697–8, where the discussion is tied explicitly to the law's subsidiary or auxiliary role.

[40] Useful contributions to the debate concerning law and neutrality include Lawrence Locke, "Personhood and Moral Responsibility" (1990) 9 Law and Philosophy 39; Stephen Macedo, *Liberal Virtues:* id., pp. 15–20, 39–77, 252–3, 254–285; Peter de Marneffe, "Liberalism, Liberty and Neutrality" (1990) 19 Philosophy and Public Affairs 253 and "Liberalism and Perfectionism" (1998) 43 Am J Juris 99; Chantal Mouffe, *The Return of the Political* (London: Verso, 1993), esp. ch. 9; Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986), ch. 9 and "Moral Conflict and Political Legitimacy" (1987) 16 Philosophy and Public Affairs 215; Patrick

Supporters of the law and neutrality argument do not – and cannot – maintain that there is no connection at all between law and morality. At a general level, two connections can be identified. First, as we saw in section 1, any justification for legal coercion rests partly on a theory of political morality and will – if it becomes authoritative – have the effect of tying that theory to the laws it serves to justify. Second, to the extent that the legislature and the courts act with an appreciation of the proper limits of their powers when creating or (according to one's viewpoint) interpreting the law, we might say that they are giving effect to certain considerations of political morality through that process. At a more specific level, if the law and neutrality argument is accepted, then we are – as a matter of logic – also accepting that a pro-neutrality theory of political morality should be enforced through the law.[41] The real aim of the law and neutrality argument is instead to prevent the enforcement of substantive theories of the good.

The classic liberal position – crudely summarized – is therefore that laws are only justifiable if they serve to respect people's freedom to arrive at and to live out their *own* conception of what counts as a good life.[42] The state should not, as a matter of justice, enforce its own view of the good life.[43] Robert George thus suggests that according to this view, "the moral perfection of human beings, while in itself desirable, is not a valid reason for *political* action."[44] For this reason, the classic liberal position might be described as anti-perfectionist in nature. One of

Neal, *Liberalism and Its Discontents* (New York: NYU Press, 1997), chs. 2, 3, 7, 8, and 9; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 30–3; Michael Perry, *Morality, Politics and Law* (New York: Oxford University Press, 1988); John Rawls, *A Theory of Justice*, ch. 3 and *Political Liberalism* (New York: Columbia University Press, 1993), Lectures I, IV, V.

41 See also the argument that a choice between rival justifications based on theories of justice and political morality is itself a question *of* morality: see H.L.A. Hart, *Law, Liberty and Morality*, p. 17; Neil MacCormick, *Legal Right and Social Democracy* (Oxford: Oxford University Press, 2005, reprint, edition), p. 18. As Dworkin acknowledges in *Sovereign Virtue*, id., p. 283, liberal equality cannot be neutral towards ideas that directly challenge its own.

42 For a defense of this view, see Will Kymlicka, *Liberalism, Community and Culture*, ch. 5; "Liberal Individualism and Liberal Neutrality" (1989) 99 Ethics 883. One of the best-known debates concerning the position the law should take in relation to sexual behavior took place between H.L.A. Hart, who supported the Wolfenden Committee's proposals, and Lord Devlin who opposed them: see H.L.A. Hart, *Law, Liberty and Morality* id., and *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), ch. 11 ("Social Solidarity and the Enforcement of Morality," first published in 1967); Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965) and "Judges and Law-makers" (1976) 39 MLR 1.

43 As Joseph Raz has argued, the ideas that the state should be neutral as between different conceptions of the good in relation to its own actions and that the state should be neutral as between different people's rival conceptions of the good are inter-related but logically distinct: *The Morality of Freedom*, id., pp. 108, 110–2, 134–5.

44 *Making Men Moral*, p. 20; see also pp. 129–130. George's definitions of perfectionism and anti-perfectionism – relating, as they do, to the law's effects on human beliefs and actions rather than, more abstractly, to the law's enforcement of a theory of the good – may arguably be too loose. A somewhat tighter definition (albeit amidst analysis which is, for other reasons, wide of the mark) is to be found at pp. 159 and 161–2.

the key contemporary defenders of this position is Ronald Dworkin, who asserts that "political decisions must be, as far as possible, independent of any particular conception of the good life or of what gives value to life."[45] Dworkin characterizes this as an example of the state treating people as equals:[46] for, given that people's conceptions of the good life will differ, the state will fail to treat them as equals if it prefers one conception to another.[47] In consequence, a person's right to equality of concern and respect entitles them to live an unpopular lifestyle free from state interference: The state "must impose no sacrifice or constraint on any citizen in virtue of an argument that a citizen could not accept without abandoning his sense of his equal worth."[48] It is important to note that Dworkin accepts that the state cannot be *completely* neutral as to consequences: "Any political and economic scheme", he acknowledges, "will make some kinds of lives more difficult or expensive to lead than they would be under other schemes. It is much less likely that anyone will be in a position to gather a collection of Renaissance masterpieces under liberal equality than under unrestrained capitalism."[49] As the second sentence from this quotation suggests, the key – for Dworkin – lies in the theory of justice (and ultimately of the good) which legitimates the state's actions: His preferred theory of liberal equality will, for example, sanction certain forms of economic redistribution by the state, but will not tolerate the use of law "to forbid anyone to lead the life he wants, or punish him for doing so, just on the ground that his ethical convictions are, as they believe, profoundly wrong."[50]

However, there is also a rival, perfectionist position,[51] which can rest on either or both of two arguments. The first argument is analytical and contains two strands, the first of which has been articulated by Joseph Raz. Raz maintains that the state is obliged to promote a conception of autonomy-based freedom, not merely by preventing the denial of freedom but also by creating the conditions of autonomy.[52] The autonomy-based idea of freedom has as its primary concern "the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities needed for an autonomous life."[53] Autonomy, for Raz, is "a constituent element of the good life. A person's life is autonomous if it is to a considerable extent his own creation."[54] The second strand suggests

[45] A *Matter of Principle*, id., p. 191.

[46] See, generally, *A Matter of Principle*, id., chs. 8, 9, 17.

[47] A *Matter of Principle*, id., pp. 190–1.

[48] A *Matter of Principle*, id., p. 205; see also *Sovereign Virtue: The Theory and Practice of Equality* (Harvard: Harvard University Press, 2000), chs. 5 and 6.

[49] *Sovereign Virtue*, id., p. 282.

[50] *Sovereign Virtue*, id., p. 283.

[51] The division between perfectionist and anti-perfectionist arguments is also noted by Rex Ahdar and Ian Leigh: *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), pp. 42–5, 151.

[52] *The Morality of Freedom*, id., pp. 425, 427.

[53] *The Morality of Freedom*, id., p. 425.

[54] *The Morality of Freedom*, id., p. 408; see also Raz's *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), ch.3. For a general defense of

that the anti-perfectionists are wrong to believe that it is possible to separate the law from the enforcement even of substantive ideas of the good.[55] As Stephen Macedo argues, "Neutrality builds on principles that are central to liberalism, but from them it erects an excessively strong ban on judgments about human ideals. Liberals properly deploy reasons that can be widely seen to be reasonable, and liberals believe in respect for all those who pass the threshold requirements of reasonableness. Liberals resist paternalism, and minimize interference with people's choices. These do not, however, add up to neutrality. Liberal restrictions on the reasons that can be offered to support government actions are not strict enough to constitute a commitment to neutrality."[56]

There are two more specific elements to this analytical argument, the first of which questions whether it is meaningful to seek to disentangle conceptions of the good from the provisions of the law. This point is captured in Lord Devlin's assertion – made during the course of his debate with H.L.A. Hart about the propriety of the Wolfenden Committee's approach – that there is "virtually no field of morality which can be defined in such a way as to exclude the law",[57] and that if attempts are made to set preordained theoretical limits to the state's power to legislate on questions of morality, or to delimit fixed areas of life into which the law can never intrude, these are likely in practice to come to nothing.[58] An example can perhaps be seen in Ronald Dworkin's writings. Despite his concern for the state to remain neutral as between conceptions of the good life, Dworkin's broader equality-based theory of justice contains arguments about which substantive approach to equality is appropriate, and about the requirements that this approach imposes on the state in terms of resource-allocation.[59] Wealthier members of a community can, Dworkin argues, sometimes be required by law to make larger than average financial sacrifices for the sake of the community, without being regarded as having been treated unequally.[60] Dworkin seemingly accepts that his conception of neutrality is qualified under the treatment as equals approach.[61] However, this begs the question whether the extent of that qualification is not so great that it negates the possibility that his theory can be described as being concerned with neutrality in any meaningful sense. As Sir Neil MacCormick has argued, "No less moral issues, nor less controversial ones, are

perfectionism (which takes Joseph Raz to task for allegedly not going far enough), see Robert George, *Making Men Moral*, id., chs. 6 and 7. As some of Raz's later writings – for example, ch. 6 of *Ethics in the Public Domain* id., reveal, George's interpretation of Raz's views concerning substantive issues (for example, the law's treatment of lesbians and gay men) is flawed.

55 For more specific argument, see Raz, *The Morality of Freedom*, id., chs. 5 and 6.

56 *Liberal Virtues*, id., pp. 262–3.

57 Devlin, *The Enforcement of Morals*, id., p. 12.

58 Devlin, *The Enforcement of Morals*, id., pp. 12–14.

59 *Sovereign Virtue*: id., chs. 2 and 4.

60 *A Matter of Principle*, id., pp. 205, 208–215.

61 Thus, under treatment as equals, the question is not "whether any deviation" from equal treatment is permitted, but instead "what reasons for deviation are consistent with equal concern and respect": *A Matter of Principle*, id., p. 209 (see also pp. 190, 109–9 for analogous examples).