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Book Review

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exacerbated when one considers that the human flourishing that is the goal of *recta ratio* is largely a formal concept in Fuchs's theory. The question of what the life consistent with human flourishing actually looks like or what sorts of choices and actions are conducive to human flourishing are largely left unanswered in Fuchs's work. The reason for this is, of course, Fuchs's commitment to the historical particularity of human experience and to the dynamic, developmental understanding of human nature. Nonetheless, Graham might have addressed this criticism in a productive way by exploring the relationship of Fuchs's natural law theory with contemporary Catholic virtue theory.

In sum, Mark Graham has produced an impressive work of theological scholarship. It is an important book in its own right and will serve to keep the legacy of Josef Fuchs alive to all persons engaged in Christian ethical reflection.

BRIAN F. LINNANE, *College of the Holy Cross.*

PEACH, LUCINDA. *Legislating Morality: Pluralism and Religious Identity in Lawmaking*. New York: Oxford University Press, 2002. 256 pp. $39.95 (cloth).

Lucinda Peach addresses the issue of religious lawmaking by focusing on the constitutional implications and gender issues that she argues have been overlooked by the Supreme Court and by participants in the debate about religion in politics. In particular, she argues that the regulation of abortion is a case of illegitimate religious lawmaking because it ignores women's moral agency and constitutional rights. To remedy this situation, she attempts to articulate both a pragmatic and a legal approach to religious lawmaking. These approaches can be located somewhere between the overly severe restrictions on religion that Peach argues are imposed by liberal theories (represented by Kent Greenawalt, John Rawls, and Robert Audi) and the unchecked reliance on religion that Peach maintains is permitted by communitarian theories (represented by Michael J. Perry and Michael J. Sandel). On the one hand, she recognizes the centrality of religion to moral identity (like communitarians) by examining the views of several legislators, judges, and executives (including Governor Mario Cuomo, Judge John T. Noonan, Jr., Representative Henry Hyde, Senator Mark Hatfield, President Ronald Reagan, and Rev. Jesse Jackson). On the other hand, she argues that her approaches provide more protection of citizen's Free Exercise (religious pluralism) and "Citizenship Rights" (including equal protection of the law, the right to privacy, and other fundamental rights) and raise fewer Establishment Clause concerns (alienation, exclusion, coercion, and political divisiveness) than communitarian theories.

Her pragmatist approach adopts George Herbert Mead's pragmatist theory of the social self and his concept of role-based morality. Mead claims that the core self is socially constructed in an ongoing process. Peach extends his analysis (which does not consider religion) to conclude that religion may be one of the social influences, but, unlike communitarians, religion is not the sole or exclusive determinate of moral identity. Further, "Mead's conception of role-based morality indicates that lawmakers generally should make public policy decisions on controversial moral issues such as abortion on secular grounds because making decisions on sectarian religious grounds is inconsistent with taking on the attitudes of all relevant others" (p. 153). Peach also proposes a legal approach to compensate for the purely voluntary nature of her prag-

matist solution. Her legal approach provides that petitioners can invalidate laws if they establish that the law "has been based on or influenced by religious considerations," and "has effects that are alienating, exclusionary, coercive, and/or politically divisive (raises Establishment Concerns)," and the government fails "to show that it has a substantial secular justification or rationale for the proposed law" (p. 160). If the petitioner further establishes that the law "infringes on a constitutionally protected right of citizenship," the government has the burden of demonstrating "a compelling secular State interest in effectuating the subject of the enactment that cannot be achieved through the use of less restrictive means" (p. 160). Peach concludes that this legal approach will better protect the citizenship rights of women and religious minorities but at the same time allow for "an expanded role for religion in other types of lawmaking, as well as in the public sphere more generally" (p. 161).

Despite Peach's claims, her argument is substantially weakened both by her account of religion and by her "theory" of law. Without considering any of the important accounts of the nature of religion offered by scholars of religion, she claims that there are "family resemblances among different institutional religions" that include the following characteristics: "a faith in teachings or doctrines that profess access to a universal truth, reality or morality; concern with some kind of liberation or salvation that extends beyond this world; and acceptance of certain premises that are based on faith, revelation, or spiritual authority and cannot be fully supported or understood on the basis of secular reasons" (p. 13). This simplistic definition of religion results in Peach failing both to understand the significance of religion in religious lawmaking and to overestimate the "constitutional problems" caused by it. First, she claims that religious claims are not publicly accessible and thus tend to be exclusionary and politically divisive (Establishment Clause concerns). This grand epistemological claim, however, is not based on an account of reason and rationality (in fact, she never provides a sufficient account of public accessibility). Rather, she bases this claim on several assertions, such as claims by some believers (like Stephen Carter) that outsiders have no basis to judge a religious community's beliefs and the perception of some nonbelievers and disbelievers that religious beliefs are inaccessible. In other words, religious beliefs are "inaccessible" and an illegitimate (nonsecular) basis for law just because some people think (rather than argue) so.

In addition, her definition focuses on the collective or institutional aspects of religion without specifying the significance of religion for individual moral decision making. This approach blinds Peach from recognizing her own religious convictions about when authentic human existence begins. For example, Peach quotes Judge John Noonan's argument that "once the humanity of the fetus is perceived, abortion is never right except in self-defense " (p. 72). Peach claims Noonan's argument is problematic because his conclusion that a fetus is a person is religious and because "Noonan also devalues women as moral agents by ignoring their human rights" (p. 73). Noonan, however, identifies that the key issue in the abortion controversy is whether the fetus is a person. Religious convictions provide answers to questions about when meaningful human life begins and ends and what sexual orientations are genuinely human. In other words, religious convictions provide a conception of authentic human existence. Consequently, a claim that the fetus is not a person (on which Peach and I agree) is likewise a religious claim about authentic human existence,

and Peach's disagreement with Noonan is thus an unacknowledged religious disagreement.

Furthermore, Peach's legal approach is a significant departure from the Court's current interpretation of the Establishment Clause, and her approach would dramatically increase the number of laws found unconstitutional under the Establishment Clause (and other constitutional provisions) because they were "influenced by religious considerations." To the contrary, only four Supreme Court cases (*Edwards v. Aguillard*, *Wallace v. Jaffree*, *Stone v. Graham*, and *Epperson v. Arkansas*) have found statutes invalid because they lacked a secular purpose, and all these cases dealt with the sensitive context of public elementary and secondary schools. Also, the Court has rejected the argument that the mere presence of a religious purpose invalidates a law and has held that the Establishment Clause does not prohibit the law from implying a religious purpose as long as there is also a sincere secular purpose and the religious purpose does not predominate. For instance, in *McGowan v. Maryland*, the Court recognized that mere coincidence with a religious purpose (e.g., prohibiting murder or Sunday closing laws) does not make a law invalid because it lacks a secular purpose. Otherwise, any regulation of murder, abortion, euthanasia, and so on, could be unconstitutional because the regulation (whether pro or con) could be held to coincide with a religious justification.

Moreover, Peach's understanding of law fails to take into account the indeterminacy of legal norms (a key issue in legal theory) and in particular the indeterminacy of constitutional norms. For example, Peach's critique of the Establishment Clause jurisprudence fails to recognize that Supreme Court Justices have had to rely on extralegal theories about the proper role of religion in a pluralistic democratic society (e.g., accommodationist, neutrality, and separationist) because the Establishment Clause is indeterminate. Peach also fails to consider that these current Establishment Clause theories would continue to inform Justices's interpretation of her new legal standard because it is also indeterminate. Her standard is not a mechanical bright line rule that eliminates judicial discretion. Consequently, even if her standard were adopted, it would not likely be interpreted to invalidate religious lawmaking in the manner she suggests. Thus, despite the importance of raising issues about the centrality of religion to moral identity and the possible gender issues arising from religious lawmaking, Peach's account of religion and law significantly undermines the viability of her legal and pragmatist approaches to religious lawmaking.

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ALBRECHT, GLORIA. *Hitting Home: Feminist Ethics, Women's Work, and the Betrayal of "Family Values."* New York: Continuum International Publishing, 2002. 176 pp. $22.95 (cloth).

The American debate over the family rages, now joined by the Christian feminist liberative ethics of Gloria Albrecht. Her detailed economic investigation reveals the importance of serious socioeconomic analysis that is lacking in the current literature on the family. The debate often proceeds by treating reproductive labor and productive labor as if they are completely separate matters and by discounting family work, portraying it as "non-work."

By contrast, Albrecht devotes the major portion of her book to amassing

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