

# Michigan Law Review

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Volume 86 | Issue 6

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1988

## Natural Law and Justice

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### Recommended Citation

Heidi L. Feldman, *Natural Law and Justice*, 86 MICH. L. REV. 1466 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss6/41>

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NATURAL LAW AND JUSTICE. By *Lloyd L. Weinreb*. Cambridge, Mass.: Harvard University Press. 1987. Pp. ix, 320. \$25.

In the preface to *Natural Law and Justice*, Lloyd L. Weinreb<sup>1</sup> poses two questions: "What is the dispute between natural law and legal positivism?" and "What does the idea of justice add to the ideas of liberty and equality fully considered?" (p. vii). Ultimately, Weinreb attempts to answer these questions by demonstrating the relationship between them — theoretically, a worthwhile exegetical technique. But the promise of a simultaneous and mutual explication of the two questions disappears into two separate quasi-historical analyses of theories of natural law and justice. Weinreb never elucidates the purpose of asking the two questions together in the first place.

Weinreb hopes to show that each of the two questions rests on conceptual antinomies endemic to their subject matter and parallel to one another. The controversy between natural law and legal positivism arises from the inevitable clash between freedom and causation; when justice confronts liberty and equality two further antinomies result: the contest between desert and entitlement precludes a satisfactory account of individual justice, and the tension between liberty and equality precludes such an account of social justice. In all of these antinomies, argues Weinreb, each part requires the other if either is to be understood — but a full comprehension of either half defeats the possibility of a rich notion of the other. For instance, any concept of entitlement depends on one of desert, but the full development of either concept displaces the other entirely. Weinreb devotes most of *Natural Law and Justice* to explicating this situation for each antinomy. Unfortunately, such tensions and even the parallels between them are standard fare in political philosophy.<sup>2</sup> Weinreb fails to capitalize on the novel aspect of the two main questions he considers: the implications that each question has for the other.

In part 1 of *Natural Law and Justice*, Weinreb attempts to reestablish natural law as a viable legal theory. Historically, natural law the-

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1. Lloyd L. Weinreb is Professor of Law, Harvard Law School. Professor Weinreb's areas of specialization include criminal law, criminal procedure, and jurisprudence. He is also the author of *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* (1977) and *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* (4th ed. 1987).

2. In fact, many works address Weinreb's concerns, although from a variety of perspectives. For a sampling, see generally I. BERLIN, *FOUR ESSAYS ON LIBERTY* (1969) (a seminal discussion of apparently incompatible conceptions of freedom); Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 175 (A. Ryan ed. 1979) (a rebuttal of Berlin's preferred version of freedom); M. SCHLICK, *PROBLEMS OF ETHICS*, ch. VII (1939) (denying that the question of free will presents a serious philosophical difficulty); Campbell, *Is "Free Will" a Pseudo-Problem*, in *FREEDOM AND RESPONSIBILITY* 173 (H. Morris ed. 1961) (reasserting the problematic nature of free will). See also R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

orists sought to discover or to justify human sovereign law by reference to an a priori legal order posited by God and evidenced by nature. With the post-Enlightenment collapse of religious world-views, such theories seemed implausible. Thus came the advent of legal positivism. Positivism ultimately validates human law self-referentially;<sup>3</sup> Weinreb maintains that this circularity fails to ensure the morality of law (p. 99). Instead, he urges a modern natural law theory that would reconnect law and morality by regarding as law only that which fits within a preexisting normative order (pp. 101-26).

To develop this argument, Weinreb attempts to provide the reader with an understanding of natural law, and its beef with positivism, by tracing the conceptual development of natural law from ancient Greece to contemporary natural law theory. This whirlwind sweeps the reader through ancient Rome (discussing by name obscure Roman lawyers), medieval England (including such esoteric figures as John Duns Scotus and William of Ockham), and the Enlightenment (devoting subsections to Hobbes, Locke, *and* Rousseau). Although Weinreb highlights the aspects of natural law he perceives as continuous throughout the tour, the sheer number of stops does not allow a reader unfamiliar with the terrain a chance to formulate an overall view of the subject. Because Weinreb claims that his emphasis is not historical (p. 8), he should have reduced his attention to particular historical figures, and instead presented his own understanding of natural law, supplemented by references to the ideas he learned from his historical scholarship. In this way, the reader could proceed to the book's second half with the first digested, ready to grasp the parallels crucial to Weinreb's method.

In part 2 of the book, Weinreb discusses his second question and turns to justice as the cornerstone of the normative order he seeks. Weinreb tries to find a framework to accommodate both liberty and equality. This framework would, in turn, support his brand of natural law. To explore his second question, Weinreb shifts the focus of his technique from historical coverage to analysis of contemporary American political philosophers, particularly John Rawls, Robert Nozick, Alasdair MacIntyre, and Michael Sandel. By diminishing the number of philosophers surveyed, Weinreb alleviates some of the rapid-fire effect found in the historical section. Still, the tension of attempting to make his own case via the works of others produces another difficulty reminiscent of those in the first part. Weinreb needs to prove his claim that justice contains an ineradicable antimony between desert and entitlement on the individual level, and liberty and equality on the social level. Thus he critiques the leading liberal and communitarian ac-

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3. For example: A particular piece of legislation is legally binding if and only if it is enacted constitutionally; and the constitution is legal because it was ratified according to proper procedure . . . and so forth.

counts of justice, hoping to show both the presence of the antimony and the respective theorists' inevitable failure to resolve it. In these critiques, however, Weinreb seems more to be capitalizing on others' works to identify the concerns underlying his own project, than to be discovering tensions truly implicit in the works he appraises.

Weinreb's treatment of Rawls illustrates this tendency.<sup>4</sup> Weinreb argues that Rawls's theory of justice reduces justice exclusively to entitlement; by eliminating desert from justice, claims Weinreb, "Rawls's theory diminishes the person — the area of personhood — by excluding personal characteristics that are ordinarily regarded as constitutive" (p. 238). In other words, the "autonomy that remains [to the Rawlsian person] is an abstraction that attaches to a 'noumenal' self unrelated to the incidents of our actual lives" (p. 223). These claims depend upon a disputable reading of Rawls, particularly in light of Rawls's recent writings.<sup>5</sup> Regardless of Rawls's latest work, however, Weinreb's claims seem to disregard elements of Rawls's initial theory of justice such as the thin theory of the good<sup>6</sup> and the idea of social union,<sup>7</sup> which support Rawls's claim that "moral personality is characterized by two capacities: one for a conception of the good, the other for a sense of justice."<sup>8</sup> Rawlsian theory does not preclude consideration of the experiences and attachments of our actual lives. In fact, these experiences constitute half of the foundation for the Rawlsian framework. Rawls's plan for justice must be constructed by selves with moral personality, and moral personality requires a conception of the good. In the end, this conception stems from the overlapping experiences of actual people. The capacity for a conception of the good depends upon just those characteristics Weinreb claims Rawls's theory fails to accommodate. Rather than consider all of

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4. This review addresses only Weinreb's analysis of Rawls, although his treatments of Nozick, MacIntyre, and Sandel suffer from similar flaws.

5. See Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985); Rawls, *Social Unity and Primary Goods*, in UTILITARIANISM AND BEYOND 159 (A. Sen & B. Williams eds. 1982); Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. (1980); Rawls, *The Basic Structure as Subject*, in VALUES AND MORALS 47 (A. Goldman & J. Kim eds. 1978).

6. See J. RAWLS, A THEORY OF JUSTICE 399-416 (1971). The possibility of a "thin" theory of the good gets Rawls's entire theory off the ground. He proposes and defends a "morally neutral" understanding of the good, whereby people with little specific knowledge of themselves or others can still evaluate the goodness of various entities based on their common knowledge of the world. Rawls offers as an example the functional appraisal of a watch: if one knows what a watch is, one can formulate a basic idea of the qualities of a good watch. The thin theory of the good depends precisely on our actual experiences. *Id.* at 401.

7. *Id.* at 520-29. With the idea of a social union, Rawls acknowledges the importance of the good of community within a pluralistic theory of justice. Arguing that "human sociability" is essential to meaningful lives, Rawls awards a high priority to association. His rejection of community as the basis for a theory of justice does not imply that the actual people covered by the theory are "noumenal selves" forever alienated from one another.

8. *Id.* at 561.

Rawls's theory, Weinreb merely isolates those aspects that generate support for his antinomies.

Not only is Weinreb's discussion of Rawls objectionable; his criticism of Rawls exposes a deeper problem in his own book. Weinreb's fundamental criticism of Rawls has serious implications for Rawls's theory of personal identity (pp. 237-38). Yet Weinreb himself declares that although the "problems of personal identity and the minimum criteria of personhood are complex and notoriously difficult . . . it does not seem necessary to embark on them here" (p. 236). In the process of using Rawls to buttress his sketch of the antinomies inherent in any conception of justice, Weinreb pinpoints another — possibly more insightful — area of debate. Then, however, he immediately abbreviates any discussion of the problem of personal identity.

This failure to pursue an emergent and innovative line of thought due to preoccupation with the antinomies manifests itself on a larger scale in the final chapter of *Natural Law and Justice* (pp. 224-65). Here, after having followed Weinreb through the explication of three sets of antinomies, we expect him to derive from his explication some substantive, meaningful conclusions. Instead he traces the parallels between the antinomies and concludes that they are indeed irreconcilable — at least until a "transformation" of our understanding of our own experience occurs (p. 265). But the irreconcilability of the antinomies between freedom and causation, desert and entitlement, and liberty and equality are nothing new in political philosophy — or in the practice of law — and Weinreb remains mute as to what such a "transformation" of our understanding of experience could possibly mean. Nor does he explain why it will "be the product of accumulated facts and a slowly accumulating shift in the fundamental conceptual system by which facts are ordered" (p. 265). Although Weinreb's claim is appealing, and in line with some key contemporary social philosophy,<sup>9</sup> his failure to clinch his position makes it difficult to discern the point of *Natural Law and Justice*; we remain hung up on the brink of an interesting argument that Weinreb never develops.

— Heidi Li Feldman

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9. See generally 1 J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1981); Habermas, *Toward a Reconstruction of Historical Materialism*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 130 (1979); Taylor, *Social Theory as Practice*, in 2 *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 91 (1985). Both Habermas and Taylor, as well as Rawls in his more recent work, assert a connection between theory and practice and develop some account of the relationship between them.