Natural Law and Justice (Book Review)

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exploring these concerns is voluminous\(^7\) and the contributions of more detached outsiders to this debate are to be welcomed. Such contributions have been important to understanding legal realism's place in American intellectual and political history,\(^8\) but they will need to be more involved with the actual issues than *Legal Realism* in order for the discussion to move forward.

By Jay Facciolo

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Professor Weinreb's aim in this thoughtful and thought-provoking book is a drastic overhaul of the ongoing debate about natural law. Natural law as he sees it is not a mere theory about the relation of law and morality: it is a comprehensive theory about the place of human beings in the cosmos. As such, it has a profound bearing on legal questions, but not in the way its current proponents have in mind. By recasting the fundamental question of natural law, Weinreb sheds light on many subsidiary questions of legal theory. This is a difficult book, because it is closely argued. You are not always sure where the author is taking you until you get there, but the reasoning is impeccable, the prose is probably as clear as the argument will allow, and cogent and imaginative examples are regularly provided.

Weinreb constructs his argument around a central tension between causality and freedom, i.e., between affairs as determined according to some kind of plan and affairs as determined by arbitrary choice. Too much emphasis on causality impairs moral responsibility; too much emphasis on freedom impairs moral significance. Classical and medieval natural law theorists encountered this tension in their threshold inquiries about the divine ordering of the universe. If the divine will has a place for everything and everything


\(^8\) See generally, O. Graham, *An Encore for Reform* (1967).
in its place, how can human beings be answerable for what they do? But if the divine will is totally arbitrary, what basis can there be for judging what human beings do?

The answer, developed over a long period, and reaching a peak of sophistication with St. Thomas Aquinas, was that God in His ordering of the universe has assigned us an end toward which we naturally turn, and which if we act rationally, we will in fact pursue even though we are free to do otherwise. Weinreb finds this solution attractive, but in the end he cannot accept it because he cannot accept the theistic premises on which it rests:

It is essential to recall the difference between Aquinas' intellectual universe and ours. He started from the unquestioned propositions that the universe is the creation of a providential God and that it displays its Creator's purpose in all its aspects; hence, it is orderly throughout, and its order is normative. Even while rejecting his premises, we may recognize his achievement and its relevance to our own concerns. If natural law is now presented as a response to the problem of freedom in a morally indeterminate, nonprovidential universe, one that Aquinas himself could not have contemplated, nevertheless, it is associated unavoidably with Thomistic philosophy.

He spends the rest of the book showing that the central tension to which St. Thomas addressed himself crops up in one form or another in whatever theory we may adopt, and that if we do not accept the Thomistic resolution of it we must live with it unresolved.

Seventeenth and eighteenth century political theories, according to Weinreb, transferred this tension from the cosmological to the political level without fundamentally changing it. They raise the same questions about the ordering of the state that earlier theories raise about the ordering of the universe. If law is a product of rational reflection on the part of the lawgiver, what obligation has it for anyone who reasons differently from the lawgiver? If law is a produce of mere exercise of will on the part of the lawgiver, what obligation has it for anyone at all? Locke pins himself squarely on one of the horns of this dilemma, Hobbes on the other. Rousseau, by supposing a "general" will whose dictates are not to be questioned and to which the lawgiver must conform his mandate, seems to pin himself on both horns at once. Like Locke, Rousseau subjects the law to a criterion outside the lawgiver, and like Hobbes, he makes the law responsive to will rather than reason. Although Weinreb gives all three writers, especially Locke, credit for contributing to the resolution of particular issues facing the societies in which they lived, he insists for the reasons just stated that none of their solutions is theoretically viable.

He attributes to Kant "the full transformation of natural law from an ontological into a deontological theory" (p. 90). Kant insists that we exercise true freedom only when we behave rightly for the mere sake of doing so, without regard to any consequence that we may hope to bring about by
doing right or fear to bring about by doing wrong. This doctrine leads to a separation between morality and nature: living up to the requirements of nature is not following morality for its own sake.

Modern natural law doctrines do not always follow Kantian ethical theories, but they share with Kant his separation between nature and value. Weinreb discusses them in a chapter entitled "Natural Law Without Nature." He takes up at length the comprehensive theory of John Finnis, who judges law by its contribution to well-being. He deals in shorter compass with several theories such as Lon Fuller's that make internal or methodological criteria normative for law. He sees all these "deontological" theories as turning the question of freedom versus causality into a question of the moral obligation of law. If freedom depends on doing right for the mere sake of doing it, then compliance with law is compatible with freedom if and only if it is right to comply with the law. To obey the law when there is no moral obligation to do so is to act under external compulsion rather than to act freely (p. 98).

Seeing the alternatives in this way, the deontological natural law theorists must insist on a moral obligation to obey the law: otherwise there could be no freedom in a law-governed society. But to make this claim for every rule in anyone's statute book would be absurd. Accordingly, they hold that purported mandates of the positive law, if they fail to live up to certain standards of value, are not really "legal" mandates at all. "Legal positivists" take strenuous issue with this doctrine. They admit that a bad law should not be obeyed, but they insist that it is still law. It follows, of course, that they must deny any across-the-board obligation to obey the law.

Stating the question in these terms brings the central tension back into play. If only those mandates of the positive law that conform to some value criterion can be regarded as law, then what is the difference between obeying the law and doing whatever I think right? But if all such mandates are law whether it is right or wrong to obey them, then what moral significance has the law? Once again, Weinreb leaves his theorists with a dilemma that they cannot resolve.

At this point, Weinreb tells us, "the trail of natural law comes to an end" (p. 126). Accordingly, he devotes the second half of his book (the "Justice" part of Natural Law and Justice), to an alternative approach. Instead of relating legal obligation to "an independently validated moral obligation," he argues, "we might begin at the other end and look first to the conditions of a just social order" (p. 126). If a social order is just, presumably its laws will be morally obligatory and it will be consistent with freedom to obey them.

In the end, though, the new inquiry displays the same tension as the first. The two leading candidates for acceptance as organizing principles of a just social order are liberty and equality. In two brilliantly crafted chapters, Weinreb shows that each is internally inconsistent as well as inconsistent with the other. As regards liberty, there is no inherent difference between the imposition of restraints and the failure to remove them when they arise.
Whether the government keeps me off the street at night by imposing curfew, by failing to protect me against muggers, or by failing to repair or light the sidewalks, I am still not at liberty to go on the street. As regards equality, the most any society does is “to eliminate some differences so that others may count all the more” (p. 171). The race will be more often to the swift if none of the swift are excluded because they are black; it will be less often to the swift if some of the swift are excluded because they take steroids. But there is no inherent necessity that says that speed rather than skin color or creative pharmacology should determine who wins a race, or even that the winners of a race should have prizes instead of the losers.

In short, liberty and equality cannot be used as organizing principles for a just society because each casts too broad a net. Questions of liberty can arise “whenever and however a person’s own determination may count or be made not to count,” questions of equality “with respect to any aspect of persons in which they are, or may be made or deemed to be, alike” (p. 225).

Nor can we develop an organizing principle by putting liberty and equality together. In company, they exhibit another form of Weinreb’s central tension, still with no resolution. Equality in the social order, like causality in the cosmic order, can impair moral responsibility if it is carried too far. If people are at liberty to do so, they will pursue their unequal capacities or their unequal luck, to unequal results. So a rigorous equality can be achieved and maintained only by a correspondingly rigorous limitation on liberty. People cannot be allowed to make significant choices and live for good or ill with the results. On the other hand, liberty in the social order, like freedom in the cosmic order can be carried to the point of impairing moral significance. People will be able to exploit their advantages of strength, beauty, intelligence, or good fortune, and retain the social advantages secured for them by these morally irrelevant qualities.

Here, Weinreb presents yet another metamorphosis of his central tension, one internal to the concept of justice itself. Justice, he shows us, embodies two concepts, entitlement and desert. Your entitlements are given you by the rules prevailing in society, whereas your deserts depend on an overall evaluation of your behavior or perhaps of your general worth to your society. On this understanding of desert, I may well not deserve as large a salary as I get, but if that is the salary my employer agreed to pay, I am entitled to it, and it would be unjust for him not to pay it at the end of the month. I may not deserve to own as large a house as I do, but unless there is a principled change in the rules of property law, it would be unjust to make me move out. This is where the tension appears. To distribute entitlements without regard to desert is mere positivism: it would deprive the legal system of moral significance. On the other hand, to consult only desert in the distribution of social amenities would abolish any freedom to make responsible choices about how to use the amenities involved. If I have in my pocket a dollar bill that I deserve, I cannot bestow it on an undeserving
friend, because he will not be entitled to keep it or to keep what he buys with it.

In a final chapter, Weinreb pulls together all the different manifestations of his central tension. In a state of perfect liberty (i.e., Hobbes' state of nature), neither desert nor entitlement can restrict a person's power to take and keep whatever his natural capacities allow. In a state of perfect equality, there can be no recognition of desert, because deserts are not necessarily equal. The whole legal ground must be covered by entitlements to keep inequalities from creeping in. So the tension between desert and entitlement is the tension between liberty and equality. It is also the tension between deontological natural law (which seeks always to make entitlements conform to desert) and legal positivism (which insists on the significance of entitlements even when they are undeserved). It is also the ultimate tension between freedom and cause:

Beyond the jurisprudential debate, the antinomy between desert and entitlement leads finally to the ontological antinomy between freedom and cause. Freedom is not mere chance, an absence of order altogether. Its possibility depends on regularity and orderliness of occurrence, which we know only as cause. But if causal order is allowed, freedom is overthrown. If not only the effects of what we do, but our actions and even the constitution of ourselves are within the causal order, in what sense is a person free and individually responsible? We may speak of freedom itself as a kind of cause, but the very terms defeat our understanding. We cannot be part of nature and at the same time apart from it (p. 263).

In the end, Weinreb finds that the only thing we can do with these tensions is live with them, keeping the opposed elements in balance as best we can.

Within the boundaries of the task Weinreb has set himself, there are only a few things to criticize in this packed presentation. In his treatment of equality, Weinreb does not address the claim implicit in some of the law and economics theories, as well as in classical utilitarianism, that pains and pleasures can be quantified and so measured against one another. If the claim were to be accepted, it might be possible to assure people equal pleasure without assuring them equal access to any particular source of pleasure. There would then be some hope of introducing complete equality into a society without abolishing all differences. While cogent reasons exist for rejecting this line of argument, it should probably have been put forward and the reasons for rejecting it made explicit.

I would also have liked to see the concept of social justice introduced into Weinreb's treatment of justice. Social justice is the virtue that moves us to reform our institutions or, in Weinreb's terminology, to reorder people's entitlements. A consideration of it might have provided a bridge between entitlements and desert. If under the institutions currently in place we are not entitled to the social amenities we deserve, then among our deserts is a reform of the institutions.
Finally, I want to voice a mild protest at Weinreb’s manner of distinguishing “our” intellectual world from Aquinas’ and “our” explanation of reality from the one offered by Christian theology. Some of “us” who continue to find the old doctrines persuasive still claim a place on the contemporary intellectual scene.

So much for criticisms of Weinreb’s execution of his task. There remains one criticism that relates to his whole conception. He takes no account either of world history or of the history of the individual human being as an ongoing process with a beginning, a middle, and an end. The omission has serious consequences for his perception of the central tension between freedom and causality. For Weinreb, and for the philosophers he takes up, the cosmic order and human nature, if they exist at all, are models to which the world and everyone in it must conform if they are to fulfill their destiny. As a result, freedom and causality are seen as alternative accounts of how the models may be conformed to. They occupy the same ground, and unless they coincide they will clash. A historical approach, on the other hand, would exhibit cosmic order and human nature not as models but as limits within which the world moves dialectically toward a mysterious and open-ended conclusion, and each human being pursues a unique destiny. On this understanding, causality could be seen as an account of the limits and freedom as an account of the operation of individual and collective history within those limits. Then they would not have to exist in tension: one could operate in the area left open by the other.

But my misgivings about Weinreb’s metaphysics take nothing away from my profound appreciation of his jurisprudential insights. Whether or not the values that provide his central tension can be reconciled on an ontological or eschatological level, they are manifested on the level of working jurisprudence as antinomies and tradeoffs, and it is the skill of our profession to keep them in balance. Weinreb is devastatingly right in his rejection of cosmic fixes that depend on suppressing one side or the other of these antinomies.

He ends on a note of wistful skepticism borrowed from one of the most poignant of wistful skeptics:

Henry Adams observed: “Chaos was the law of nature; Order was the dream of man.” We neither achieve what we aspire to achieve, nor give over the aspiration. Which is just as well (p. 265).

But for my part, I would prefer rather to take leave of him a few paragraphs earlier, where he says: “If we have relegated moira and the Christian God to the domains of myth and religion, we have nothing to put in their place.” On that we can agree.

By Robert E. Rodes, Jr.