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Beyond Liberal Constitutionalism (reviewing Richard Weisberg, Poethics: And Other Strategies of Law and Literature (1992))

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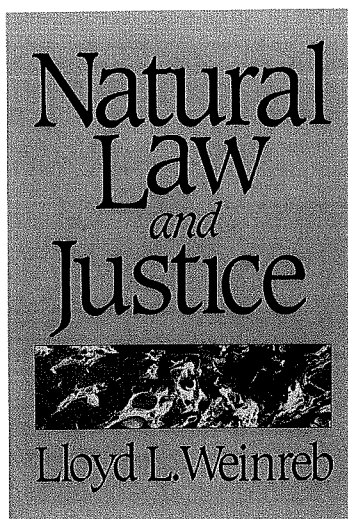
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Beyond Liberal Constitutionalism

by Lewis H. LaRue '62

Natural Law and Justice by Lloyd L. Weinreb '62 (Harvard University Press, 1987).



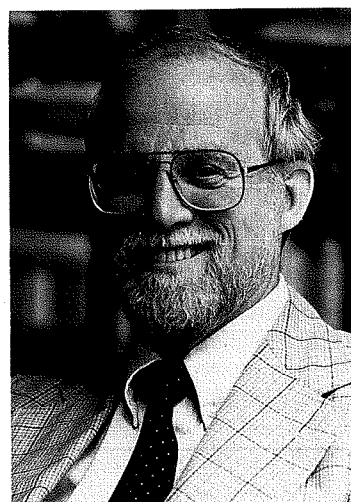
When Lloyd and I were in law school, reputable scholars did not take natural law very seriously. Times have changed, and the presence of Lloyd's new book is proof.

One difference between now and then is that natural law's historical associations with Roman Catholicism no longer automatically condemn it. There was a cliché in those days that anti-catholicism was the anti-semitism of intellectuals, but this corrosive cliché is not accurate now, if indeed, it ever was. Nowadays both Protestant and Jewish thinkers are more attentive to the intellectual traditions of Catholicism.

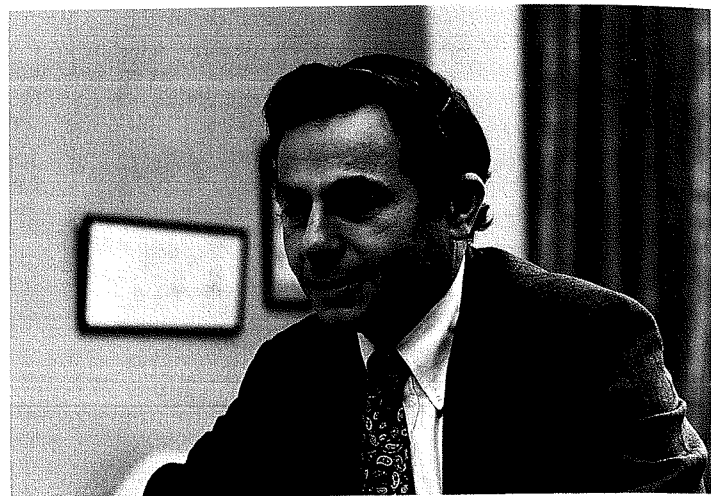
Another difference between now and then is that pure proceduralism is no longer the dominant ethos. When Lloyd and I were in school, the ethos of the man on the street was that one should play the game by the rules and then be a good sport about the outcome; intellectuals had translated this ethos into the high art of theory. Liberal democracy, with its base in constitutional-

ism, was understood by many of our most impressive thinkers in purely procedural terms. However, we have moved beyond the shallow comforts of those days. It is now well understood that one must make hard choices on substantive values, and if we have to commit ourselves to values, then natural law looks plausible, not eccentric.

Consequently, natural law is having an academic rehabilitation, and it will not surprise any of his classmates that Lloyd Weinreb has produced a book on this topic. Even in the early sixties, Lloyd's interests ranged far beyond the routine confines of liberal constitutionalism. In those days, he was a passionate devotee of Camus. And unlike the rest of us, he did not need to spend his afternoons studying law; he left Langdell and crossed over into Harvard Yard, where he participated in the intellectual life of the college. He



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Professor Lloyd Weinreb

did spectacularly well in law school, apparently quite without effort.

The versatility that Lloyd has always displayed is well represented in this book. He begins with a historical account of natural law, starting, as one must, with the Greeks. Unlike many historical accounts, however, Lloyd does not limit himself to Plato and Aristotle. He takes a close and sympathetic look at the ideas presented in Homer and in the great Greek dramatists, Aeschylus, Sophocles, and Euripides. He moves forward into the Roman era, and he draws a sympathetic portrait of Cicero and the Roman jurists such as Gaius and Ulpian. Unlike many political theorists, he takes the Christian Middle Ages seriously, and he presents Aquinas as the giant that he was.

When Lloyd advances into the modern era, he discusses at length both the founding classics and the works of our own day. The ideas of Locke, Hobbes, Rousseau, and Kant are con-

sidered at length. He brings the story up to our own day with discussions of Lon Fuller, John Finnis, David Richards, and Ronald Dworkin. The scope of the historical sections of this book is truly ambitious.

Lloyd does not limit himself to historical discussions. In part two he includes a series of thematic chapters, organized around the concepts of liberty, equality, and justice. And finally, in the last chapter, he attempts to relate the thematic and the historical in a daring attempt at synthesis.

Given such a sweeping display of learning, I find the task of criticizing rather daunting. It is surely too soon to offer an appraisal, since the project of reconsidering the natural law tradition is still too new. Many more books are forthcoming, and so it is obviously premature to offer an accurate cartographic placement to Lloyd's contribution.

Furthermore, it is hard for me to respond since I have not yet made up my mind. I dis-

agree with some of Lloyd's assertions, but I am not sure about how to measure my own thoughts against his. Some of my disagreements are minor and some appear to be fundamental, but I am not certain which are which. The argument in the book is complex, and I will need to live with it for some time before I can be comfortable in my judgments.

My principal disagreement is that I find Lloyd too devoted to modernism. In the first chapter, he confesses that certain Homeric positions seem strange to him—positions that I find to be powerfully true. For example, Lloyd examines Agamemnon's statement that the wrong he did to Achilles was caused by his fate and yet

was also due to his moral fault. He says of this, "From our point of view [Agamemnon's statements] are not even superficially consistent, . . ." To me the error lies in the phrase, "from our point of view." In Homer's view, if not in Lloyd's, Agamemnon's "fate" implies not only supernatural forces, but characterological ones as well. I think that Homer is wiser than most modern theorists.

The truth of Homer rests on ordinary experience. I suspect that others have experienced, as I have, the same dreadful plight of which Agamemnon speaks. I have acted with a helpless loss of control and while thus disabled have done things for which, to my shame, I was morally respon-

sible, despite the fact that my actions were in some sense "caused." So too with Agamemnon; and his description seems true for an enormous range of human action. Since true descriptions are by definition consistent descriptions, it seems to me straightforwardly false to say that Agamemnon's words are inconsistent. The error, then, must lie in our theories, in the modern point of view on the inconsistency of causation and responsibility.

This defense of Homer and Agamemnon is not peripheral. Anyone who reads Lloyd's book, and I hope that there are many, will see that the issues posed by the question: Is Agamemnon consistent or inconsistent? are issues that

run throughout *Natural Law and Justice*. Indeed, I suspect that the book will be accepted or rejected by readers based on their answer to this single question. Yet, there are long sections to which this issue is clearly peripheral, and one might judge them to be the fundamental theses of the book.

Even I, standing in disagreement, can freely recognize the high quality of Lloyd's achievement. *Natural Law and Justice* is intellectually stimulating, carefully and gracefully written, and displays an enormous erudition without being in the least pretentious.