

Left-Wing Market Anarchism and Natural Law

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I am relieved that Professor Storr entrusted responsibility for reviewing *Anarchy and Legal Order* to my friends. Otherwise, I might have been treated to a chorus of polite affirmations. As it happens, I have been given the valuable opportunity to learn from thoughtful colleagues, none of whom might be confused with an uncritical apologist for my work or my perspective.

The argument of *Anarchy and Legal Order* is relatively straightforward. There are some things we may never reasonably do to each other, and other things which, though not always wrong, we have very good reason to avoid doing in most cases. Territorial monopolists—states—do these things persistently. Their putative value as maintainers of social order might be thought to render their actions justifiable (when the prohibitions they violate are not exceptionless, so that *no* violation would be defensible); but, in fact, there are multiple reasons to think they are not needed to maintain social order, and further reasons to believe they actively undermine it and cause serious harm to people's interests. Consensual legal institutions can justly enforce law; we do not need territorial monopolists for that. The law they enforce should leave people as free as possible and should focus on remedying injuries rather than on punishing or deterring. This kind of law will create space for the emergence of a free culture and will facilitate effective responses to such problems as poverty and workplace hierarchy. Links with English and American radicalism justify seeing this kind of anarchist approach as rooted in the socialist tradition.

None of the commentators embraces all of these moves, though each (not necessarily in his review) embraces some of them. In what follows, I respond briefly to the observations made by each.

Skoble and Spontaneous Order

I enthusiastically embrace the spontaneous order tradition as a source of valuable insights into human sociality. So I am very pleased that Professor Skoble has chosen in his review to link that tradition with the approach to natural law theory I have defended in *Anarchy and Legal Order*. I share Skoble's view that the free development of social institutions is a discovery process through which we discern what does and does not work and that this sort of process can be expected to be particularly relevant to the challenge of setting effective limits on the range of legal options on offer in a stateless society. I think (and what Skoble says gives no reason to think he would disagree) that not only the diversity of tastes and preferences but also the diversity of ways in which we can reasonably flourish makes it essential that social institutions create space for great diversity of relationships, life-plans, and means of organizing shared activities. But, as Skoble rightly notes, this sort of respect for diversity is quite compatible with a commonality of underlying legal norms—reflective of both the exigencies of social life and convergence in moral inquiry.

Natural law theory can be seen to have quite rich implications for personal morality—but, at the same time, it can also be understood as grounding a thoroughly *liberal* public order in which force is not deployed to implement many of the moral requirements it supports. While some natural law theorists have been paternalists and statist of various sorts, I think natural law theory provides powerful support for a model of social order which leaves people free to craft divergent ways of being human, some of which will in fact count as unreasonable, perhaps even quite severely so, by natural law standards.

Crowe and Natural Law

Skoble clearly acknowledges the liberal character of this sort of natural law thinking as does Professor Crowe. Like Skoble, Crowe stresses the importance of spontaneous order as the source of legal convergence. I am sure he is right that I could have devoted more attention to this topic.

Crowe helpfully situates the book's arguments in relation to contemporary natural law theory, to which he has been a thoughtful and persistent contributor. He rightly emphasizes that social coordination and the maintenance of justice, while vital, do not, as many natural law theorists suppose, require the activity of the state. Like Skoble, he stresses the significance of spontaneous order in fostering social cooperation.

I do not want to say that basic aspects of flourishing “cannot meaningfully be compared or weighed when engaging in practical reasoning” (Crowe 2014:

291), though intemperate expression on my part may have suggested that I might want to say just this. I think it is possible to compare or weigh these aspects of well-being when engaging in practical reason. What I deny is that it is correct to claim, when one does so, that one is employing weights that just anyone would be unreasonable to ignore. Categories of well-being, and individual instances of the various categories, are incommensurable and non-fungible objectively speaking; but we clearly weigh them in the course of practical deliberation. We do so, however, in light of our preexisting commitments and preferences. We are free to adopt a variety of commitments and to embrace a diverse array of preferences; but our having accepted particular preferences and commitments will constrain how we may reasonably choose with respect to the various goods we confront (as will such natural-law requirements as, say, that we pursue goods efficiently and that we adopt and implement coherent life-plans). What we cannot do, however, is to claim that there is (at least ordinarily) anything rationally required about these commitments and preferences.

We must, on the natural law view, choose among the various goods we confront in light of the requirements of practical reasonableness. Thus, when my friend calls to ask for help as I watch a rerun of *Friends*, it would be wrong of me to ignore her need for immediate assistance in virtue of one of those principles, the Golden Rule, or, as I label it in *Anarchy and Legal Order*, the Principle of Fairness. This principle dictates that I not discriminate arbitrarily among those affected by my actions. Because I would not be willing that my friend ignore my urgent need in order to watch an episode of *Friends*, it would be unreasonable of me, because inconsistent, to ignore her urgent need in order to watch an episode of *Friends*.

I do not need to think that the good of friendship outweighs the good of aesthetic experience in any global, objective fashion. I need only assume that I would assign it a higher weight, subjectively, in this case, as regards my own deliberation; in virtue of thus assuming, I am committed to abandoning *Friends* in favor of my friend. So I can reach what Crowe rightly regards as the intuitively plausible result without making any general claims about the possibility of objectively weighing goods.² I do not need to maintain that the values of friendship and *Friends* “are sufficiently comparable to say which should objectively prevail.” (Crowe 2014: 291) Obviously, I may, indeed, value my friendship with the friend who calls more highly than the experience of watching *Friends*. Meeting the needs of a close friend is certainly much higher on my preference scale, more supported by my commitments, than the aesthetic experience of watching *Friends*. But that my friend’s claim objectively prevails will be a function of how it is appropriate for me to *choose* in the relevant situation in accordance with the requirements of practical reasonableness, and these requirements can dictate an outcome without any appeal to commensurability.

The prohibition on purposefully harming a basic aspect of someone's well-being, captured in the Pauline Principle (as Alan Donagan called it) or the Principle of Respect (as I label it in *Anarchy and Legal Order*) is rooted in the incommensurability thesis. It flows from the recognition that treating one aspect of well-being as trumping another might make sense if the various ways of flourishing were commensurable but that, since they are not, subordinating one to another won't be reasonable. Certainly, the notion that a purposeful attack on any aspect of well-being is always unreasonable captures my intuitions about things like torture and attacks on noncombatant populations better than the idea that practical reason sets a high, but not necessarily insurmountable, bar to such things.

I am very grateful for Crowe's attention to my approach to property rights in *Anarchy and Legal Order*, since I have worked hard to articulate a view of property that is consistent with contemporary natural law theory while grounding more robust property rights than many natural law theorists would be prepared to endorse. I remain convinced that such rights cannot reasonably be thought to include possessory claims on the bodies of non-human sentients. Perhaps Crowe and I simply don't have the same view of what might count as treating a non-human animal as a possession. I do not object, as Crowe notes, to cooperative relationships, as, for instance, ones in which humans might offer animals sustenance in return for, say, the provision of milk and hair—provided the animals' bodies and personalities are treated with respect and they are not subjected to violence to secure their cooperation. I would not think that this sort of arrangement would need to involve any sort of possessory claim on the part of the humans involved, any more than work relationships between humans require that one set of humans own another.

Crowe is unsure that I am right to rule out legal liability for communicative acts and reputational injuries. He is certainly correct to note, with John Hasnas, that evolved legal standards in these areas don't seem consistent with my approach. I do not think his concerns should be dismissed, but I try to provide fairly detailed arguments for ruling out liability for communicative acts. I believe, roughly, that what people do with their property and their bodies ought to be restrained for the purpose of preventing, ending, or remedying harm to others' property and bodies. Rights ought to be limited in defense of rights. But I have no right to be thought well of by others; their thinking well of me is very much up to them. So someone else's interference with how they think of me cannot reasonably be seen as violating any right of mine. (It may, of course, violate rights of *theirs* not to be defrauded.) Communicative acts which encourage others to violate third parties' rights are morally reprehensible; but it seems as if it is the rights-violators themselves, rather than those who encourage the rights

violations, who have actually committed the relevant injuries and who should be held responsible for them.

Neither Skoble nor Crowe is quite convinced that I am right in arguing that the sort of market anarchism I defend can reasonably be characterized as leftist, anticapitalist, and socialist. And I would quite agree with both that the labels aren't crucial; what is important is the recognition of the genuinely emancipatory nature of the market anarchist project as I defend it—something both seem willing to acknowledge.

Brennan and Incommensurability

Professor Brennan's basic objection in his review is to my reliance on the new classical natural law (NCNL) theory, which he believes has "crazy" implications (Brennan 2014: 300-1).

I do not seek in *Anarchy and Legal Order* to offer a full-scale defense of NCNL theory. I refer to the reader to other authors who have done this. I simply attempt to elaborate the theory and to make clear the kind of justification one might offer for it as a preface to my use of it in the book. NCNL theory can be seen as combining something like a Kantian theory of the right with an Aristotelian account of the good. The principles of practical reasonableness I employ in the book, the Principle of Fairness and the Principle of Respect, are quite similar to the Formula of Universal Law and the Formula of Humanity. It's hard to imagine that these would seem especially alien or crazy. NCNL theory also features an objective theory of well-being along Aristotelian lines. But this, again, will hardly seem crazy, even if it doesn't strike everyone as correct.

NCNL theory seems primarily to be crazy on Brennan's view because the NCNL theorists see the various aspects of well-being as irreducibly diverse and as therefore incommensurable. Does this notion seem odd? Perhaps it does to some people, but I think there's a perfectly good case to be made for it phenomenologically. Does it really seem to you that friendship, say, matters because it partakes in some substantive reality that also underlies knowledge or aesthetic experience? I submit that, in the course of seeking to realize various kinds of well-being in our own lives and those of others, we do not typically apprehend these goods as reducible to any common substrate, and so as measurable on any common scale.

This sort of analysis helps to explain why NCNL theorists view the various sorts of welfare or well-being or fulfillment or flourishing as incommensurable. The NCNL theorists' understanding of incommensurability may be distinctive; but, for instance, while he does not endorse a full-blown NCNL-style incommensurability thesis, Bernard Williams recognizes that "goods may not be homogeneous," acknowledges "that goods are not necessarily inter-

substitutable” and maintains: “That there must be something which compensates for a finite loss is just a dogma, one which is more familiar in the traditional version to the effect that every man has his price.” (Williams 1973: 144-5)

The embrace of incommensurability obviously has significant implications for the status of consequentialism. The consequentialist invites us to consider the states of affairs that might be produced by our actions (or rules, policies, character-traits, practices, institutions, etc.) and to ask, of the available options, which yields the most value (adjust the formulation as needed if you prefer a satisficing variant of consequentialism). Obviously, no consequentialist supposes that as a matter of course we can quantify the relevant values in many situations. But the consequentialist does need to assume that the notion of maximization makes sense, even if we are not typically capable of maximizing precisely; otherwise, the consequentialist injunction seems to collapse into triviality. This injunction obviously makes sense only if there’s a quantity to maximize. And it does not in fact seem that there is any such quantity underlying our choices: there are only multiple reasons to do various things, not some maximizable master value that underlies those reasons.

Absent this common substrate, it is not clear what else could make objective *quantitative* comparisons between goods or clusters of goods possible on a systematic basis. If the various ways in which lives can go well are irreducibly different from each other, approaches to practical reasoning that involve choosing among options in light of the quantum of value each produces will not be viable. Given that operationalizing this sort of approach requires aggregation, that aggregation requires commensurability, that commensurability makes sense only if there is a common substrate of value, and that there is no such common substrate, maximizing and similar strategies seem non-viable. Though he does not defend consequentialism, Brennan thinks it is obvious that we can, in fact, make some “better than” and “worse than” judgments regarding aggregate states of affairs, but I do not see how such judgments, if understood as broadly quantitative, can make sense absent some common metric.

Of course, if there is no way of ranking states of affairs quantitatively, it still might be possible to rank them qualitatively. NCNL theorists will be perfectly willing to do this in at least three ways: (i) a state of affairs involving no value at all, if such a state of affairs is conceivable, would be inferior to one involving some value, any value. (ii) A state of affairs involving a given good will be outranked by one involving just the same good and one or more other goods. (iii) As an object of choice for me, a state of affairs that includes my acting reasonably is superior to a state of affairs in which I act unreasonably. But these sorts of comparisons won’t allow for the kind of ranking required to get consequentialism off the ground.³

Brennan believes the notion that comparing overall states of affairs in terms of the value they embody is impossible is simply odd. He does not offer arguments designed to show directly that various aspects of well-being are commensurable or to show how they could be. Instead, he invokes intuitions which he thinks count against the incommensurability thesis. He does not seek to demonstrate that there is something that value *is*—something capable of quantitative comparison. His view seems to be that, because the idea of robust incommensurability yields strongly counter-intuitive conclusions, it is likely to be wrong even if he cannot show directly that it is:

It seems rather obvious to me that a day spent marrying the love of my life better contributes to my overall flourishing or well-being than, say, a day spent watching a movie I slightly enjoy. It seems obvious that a prolonged and deep friendship with someone whom I love and with whom I share a mutual understanding better contributes to my well-being than a casual relationship with an office mate. It seems obvious that my guitar playing—a skill I have developed great capacity in over 23 years—better contributes to my well-being than my ability to play Super Mario Brothers 3 on occasion. It seems obvious that getting a tenure-track academic job at a prestigious university—something I worked hard to get for many years—is better than a day spent picking one’s nose. On a collective level, it seems obvious that a world in which everyone is both virtuous and happy is better than a world in which everyone is in a pain amplifier. (2014: 302)

And Brennan thinks the NCNL theory has another counterintuitive implication:

Now suppose you are a human being looking to flourish. How would you make rational decisions about what things to pursue? It seems all you can do is put things into three categories—disvaluable, indifferent, and valuable. If you put more than one thing in the latter category and have to choose among them, you will pretty much have to flip a coin or roll the dice. That is, if your goal is to flourish, and you have the choice between spending the day marrying the love of your life or picking your nose for fun, you are in the position of Buridan’s ass. There is—by Chartier’s hypothesis—no rational basis for choosing one over another, given your goals. So you might as well flip a coin. (2014: 305)

NCNL theorists would argue that the “well-being” is simply a place-holder, a stand-in for the set of reasons we have to realize various possibilities in our own

lives and those of others. Talk about well-being may create the impression that one can say that a given activity or experience contributes to my well-being *simpliciter*, but this is really an artefact of language. Thus, NCNL theorists would agree with Brennan when he maintains that “Really, to say that something is valuable is just a roundabout way of saying that we have reason to respond to it in certain ways and to act in certain ways toward it. When I say [a] day spent marrying the love of my life is more valuable than a day spent going to the Museum of Natural History—which I somewhat enjoy—for the twentieth time, I’m just saying (in this case) that I have greater reason to do the former than the latter.”

It may be that I am to blame for failing to elaborate the relevant details in a suitably clear way. There are, for the NCNL theorists, a variety of requirements of practical reasonableness, all of which give us reasons for action. As I have noted, I focus primarily on two—the Principle of Respect and the Principle of Fairness (with a nod to a third, which I call the Principle of Recognition). But there are multiple additional principles which enable us to distinguish rationally between more and less appealing choices. So, according to the NCNL theorists, practical reason requires that one adopt a coherent life-plan (Finnis 1980: 103-5), that one take one’s commitments seriously (not merely one’s promises, but the organizing commitments one adopts for one’s life) (Finnis 1980: 109-11; Grisez and Shaw 1988: 43-50, 113, 124, 235), that one pursue one’s goals efficiently (Finnis 1980: 111-8), and that the final ends of one’s actions be real rather than illusory goods.⁴ I did not discuss these principles in *Anarchy and Legal Order*, because my goal there was to think about the interpersonal moral constraints relevant to the use of force in human affairs and the organization of social institutions. But it seems to me that they could reasonably be expected to narrow one’s range of reasonable choices quite substantially.

Thus, if your goal is to flourish, there are significant constraints on your choices. You will have good reason to take some paths rather than others. The incommensurability of goods does not leave you at loose ends. Ultimately, to be sure, you can, on the NCNL view, choose freely among the options left open by practical reason. And, if you experience no emotional inclination toward one rather than another, it will, indeed, be perfectly reasonable for you to decide using some random procedure. But by the time you’ve reached the point at which this makes sense, you will have received significant help from the requirements of practical reasonableness in narrowing your choices.

So the NCNL theorist will want to say that Brennan has very reason to spend the day marrying the love of his life, rather than visiting the Museum of Natural History, in virtue of his prior commitments (again, not just his promises but, more broadly, the role he has given his relationship with his beloved in his life) and the need to craft a coherent life-plan. And the NCNL theorist can agree

that Brennan will have reason to make choices with respect to guitar playing that he will not with respect to Super Mario Brothers 3 again, because of the role each plays in his life-plan and commitments.

Brennan offers my use of incommensurability in my response to the public goods argument for state authority as an example of the wrong-headedness of my approach.⁵ I discuss this argument over the course of twenty-four pages in Chapter 3, along with roughly seven appendix pages. Incommensurability figures in one paragraph on p. 192 and another on p. 203; I refer to it glancingly on, *e.g.*, p. 208. I think multiple, complementary considerations count against the public goods argument: incommensurability's support for anti-consequentialism provides one way, but not the only one, of showing that there need be no objective reason to think of forcible public goods provision as inescapably optimal.

I am puzzled by Brennan's claim that the book's arguments largely depend on the controversial features of NCNL theory. NCNL theory's understanding of incommensurability strengthens the book's anti-consequentialism and its anti-retributivism; but I offer or note other considerations available to ground these views. I think the strong version of incommensurability I defend is correct, but it is rarely essential to the conclusions I defend—it simply makes especially clear what, as I see it, is wrong with consequentialism. The account of just possessory claims in Chapter 2 is framed primarily with a focus on the Principle of Fairness which is, as I have noted, a version of a quite familiar principle of universalizability that, while not accepted by everyone, is hardly controversial. (Incommensurability does figure in the anti-consequentialist aspect of my case against intellectual property.) Various aspects of the argument in this chapter rely on the Principle of Respect, but, while I defend this principle in terms drawn from NCNL theory, the work it does in this chapter (at least were it suitably extended to non-human sentients) could easily be done by the Formula of Humanity, which the Principle of Respect often parallels. The Principle of Fairness and the Principle of Respect both figure significantly in Chapter 3, while incommensurability really does not. Neither principle plays a crucial part in the argument of Chapter 4. Incommensurability figures in the discussion of retribution and deterrence in Chapter 5, but it doesn't do much in this chapter otherwise; the Formula of Humanity could easily ground opposition to deterrence, and my case against retributivism doesn't depend on incommensurability. Incommensurability doesn't figure meaningfully in Chapter 6 or Chapter 7. Though the incommensurability thesis, and the Principle of Respect derived from it, can be seen to be at work at various points throughout the book, much of the book's position could be worked out without any reference to it. I think Brennan has overstressed the book's reliance on what he regards as an indefensible premise.

I've sought to defend anarchism in light of contemporary natural-law theory because I find the NCNL approach appealing and insightful.⁶ I wrote the book I did because, for over a quarter-century, I have found NCNL theory appealing and fruitful—this is my second book on the topic—and because I wanted to spell out what a version of anarchism articulated in terms of my preferred moral theory might look like. The incommensurability thesis captures an important feature of human choice, and I believe it is well worth defending. It is entirely reasonable for Brennan to challenge NCNL theory's controversial features. It seems to me, though, that these features survive his criticisms and that *Anarchy and Legal Order* as a whole is, in any case, not so dependent on them that its arguments would cease to be effective in their absence.

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Note

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² Crowe anticipates my responding to this example by appealing to a prior commitment to my friend, or to my friendship with her. I wouldn't object to this response, though the one in the text is the one that initially strikes me as most natural.

³ For all I have argued, other sorts of qualitative comparisons among states of affairs might be possible. It might be the case, for instance, that one sort of good was always objectively better than another. But it is not obvious that this would be of much use for the consequentialist. Thanks to David Gordon for this point.

⁴ This is my Principle of Recognition, which stipulates that the final end of an action should be a genuine aspect of well-being.

⁵ Brennan is correct that the Pareto criterion and the Kaldor-Hicks criterion do not require weighing one person's well-being against that of another. But implementing these standards does require one to judge that an individual is made no worse off by a change, or no worse off if compensated for the change, and that another is better off. If these are taken to be objective judgments, resort to these criteria does not entirely dissolve incommensurability issues. Thanks to David Gordon for this point.

⁶ For one spirited defense of the approach, see *Natural Law and Practical Rationality* (Cambridge: CUP 2001), by Brennan's Georgetown colleague Mark C. Murphy.

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