

# Natural Law Anarchism

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Gary Chartier's book, *Anarchy and Legal Order* (2013), makes a significant contribution to four distinct, albeit overlapping fields: natural law theory, libertarian and anarchist theory, philosophy of law and political philosophy. It builds on Chartier's previous work in a series of books and articles exploring issues in natural law, anarchism and economic justice.<sup>1</sup> The book is unconventional not only in defending market anarchism from a leftist perspective, but also for doing so within a natural law ethical framework. As a natural law theorist with market anarchist leanings, I am more sympathetic than many readers will be to Chartier's project. However, the unconventional nature of the arguments is part of the work's appeal.

Chartier's book uses the resources of the natural law tradition in ethics to defend a vision of law without the state. It therefore presents a theory of what might be termed *natural law anarchism*. Some readers may find this combination of views surprising. The most prominent contemporary defender of natural law ideas, John Finnis, heavily emphasizes the role of state institutions (1980).<sup>2</sup> However, Finnis's theory arguably gives a misleading picture of the relationship between natural law and the state. Natural law theory is, in fact, highly hospitable to anarchism. I wish to begin by drawing this out, since it helps put Chartier's project in context. I will then look in more detail at some features of Chartier's account.

## Natural Law and the State

The natural law tradition in ethics, politics and jurisprudence is highly diverse. However, the most influential recent strand of natural law thinking is probably the "new natural law theory" associated with authors such as Finnis, Germain Grisez and Joseph M. Boyle.<sup>3</sup> Chartier situates his project within this broad school of thought (2013: 7), although he differs from the authors mentioned above on a range of specific issues. The most notable of these divergences, given the focus of Chartier's book, is his rejection of the statist

orientation of the new natural law thinkers. It seems to me, however, that Chartier's anarchism is in many ways more consistent with the new natural law framework than the statist outlook of its leading proponents.

It will be useful to say something here about the core claims of the new natural law theory.<sup>4</sup> The core claims of the new natural law ethics are perhaps best encapsulated by two fundamental ideas: first, the plurality of both the basic forms of good and the associated principles of practical reasoning; and, second, the logical priority of the good over the right. The natural law claim that there is a plurality of basic, incommensurable goods entails the rejection of consequentialism. Consequentialism makes practical reasoning seem like an exercise in calculation: once we have reduced the consequences of each action down to a single metric, we can compare them and see which is preferable. However, natural law ethics denies that it is possible to evaluate all our actions in terms of one overarching metric. Different actions may promote different goods; in many cases, there is no objective way of weighing them up.

The new natural law theorists therefore view maximizing as an improper and, indeed, senseless attitude to apply to the basic goods. It makes no sense to say that people have a duty to maximize the total amount of good in their lives. Rather, people have a duty to both participate in and show respect for the basic goods in their actions. The new natural law approach to political theory, meanwhile, emphasizes the notion of the common good. The common good refers to a state of affairs where all members of the community are able to participate in the basic goods in a range of reasonable ways. The duty each person has to show respect for the basic goods entails a duty to do one's share for the common good. This involves maintaining a community structure where everyone can pursue the good in their own lives.

Legal rules and institutions play a twofold role in maintaining the common good.<sup>5</sup> Some laws reproduce the requirements of practical rationality. These laws simply reiterate the duties people have to show respect for the basic goods by refraining from wrongful actions, such as murder. Other laws are specifications of practical rationality: they stipulate details of social life that the natural law leaves indeterminate. There are at least some areas of social life where practical rationality does not stipulate a particular form of conduct, but where a shared rule may be necessary for coordination. Road use is a classic case: practical rationality does not tell us whether to drive on the right- or left-hand side of the road, but unless one rule is adopted across the community, many people's interests will be thwarted. Law can therefore play an important social coordination function by stipulating what shared rules community members should follow.

There is nothing in the new natural law framework, as outlined above, that entails a central role for state institutions. The common good involves

maintaining a community structure where everyone can pursue the basic goods, but it is an open question whether this arrangement is best achieved through the state. There might, indeed, be good reason to think that a stateless society will enable its members to pursue the basic goods more fully than one in which the state plays a central role. Institutions such as families and cooperative organizations may be better suited than the state to nurturing the well being of individual agents. Indeed, the natural law tradition has long given a central place to the notion of subsidiarity, which suggests that the common good is best understood and pursued at a local level.

Natural law theorists such as Finnis, however, have nonetheless thought that the state is essential for upholding the role of law in the natural law picture. Law, as we have seen, plays an important coordinating role for the new natural law theorists. Finnis argues that this role can only be fulfilled if law acts as a centralized source of social authority. He claims that social coordination requires “unanimity or authority. There are no other choices” (1980: 232). It is impractical, he argues, to secure unanimous consent on the types of complex coordination problems that arise in a large community. Legal authority is therefore necessary to solve these difficulties. This implies a role for the state in imposing legal solutions.

Finnis’s reasoning here is highly suspect. The main problem with his argument is that it overlooks the central role of social conventions in solving coordination problems. Many social coordination problems—including extremely complex ones—are solved by convention, rather than authority. Languages, for example, are complex sets of conventions that have evolved in response to the need for society-wide standards of communication. They work well, even though nobody planned them. It is arguable that many other social coordination problems could be solved by convention in the absence of a centralized legal authority. This would result, if not in unanimity, then in something functionally very similar.

The availability of convention as a mode of solving such problems raises the possibility that Finnis is overconfident in his endorsement of legal authority. However, it is possible to take this point one step further. The central role of social conventions in solving coordination problems has the potential to actively undermine state authority. Consider the hypothetical case of Thomas Street, where the legal speed limit is 50 kilometres per hour (km/h) (Crowe 2007: 787-8). However, in practice, almost everyone drives on that street at a speed of 70 km/h. In those circumstances, the best course for motorists on Thomas Street may well be to drive at the faster speed, since it is generally safer to drive at the same speed as other road users.<sup>6</sup> In other words, drivers on Thomas Street fare better by following the speed adopted by other

drivers, than they would by regarding the state mandated traffic regulations as authoritative.

There is a deeper point to this example. Legal rules gain their moral force not from their legal status, *per se*, but from their status as a salient response to a social coordination problem. Some state laws go well beyond what is required for effective social coordination and others—such as the legal speed limit on Thomas Street—do not correspond to salient social norms. Finnis thinks there is good reason for people to respond to social coordination problems by adopting the state mandated solution as authoritative. However, it is far from obvious that such an attitude is better adapted to the demands of the common good than an approach that favors emergent orders of the type that would govern a stateless society.

### Ethical Foundations

Chartier's book begins by summarizing his preferred view of natural law ethics. This is well done, as it was in Chartier's previous book on *Economic Justice and Natural Law* (2009). Chartier places significant stress on the new natural law view that there is a plurality of basic goods that cannot be reduced to a single metric. Human welfare, for Chartier, is *pluriform* (2013: 15). Furthermore, the basic goods that figure in an account of human welfare are *incommensurable*. Chartier means by this not only that the goods are *irreducible* (in the sense that they cannot be reduced to a single equation), but also that they are *incomparable* (they cannot meaningfully be compared or weighed when engaging in practical reasoning) (2013: 21-3).

Chartier's account of incommensurability here strikes me as too strong. Even if we grant that there is a plurality of basic forms of good and that these basic goods are irreducible to a single metric, this does not necessarily mean that the goods cannot be objectively weighed against each other in at least some cases. Some decisions to prioritize one kind of good over another simply reflect individual commitments. However, others seem to reflect objective priorities between different kinds of value. Suppose I am watching a rerun of *Friends* when my best friend calls me in distress and says she needs to talk. It seems like I should stop watching trashy television and help my friend. Furthermore, it seems plausible that it would be objectively wrong not to do so. Each option may contain a different form of value, but these values are sufficiently comparable to say which should objectively prevail.

I suspect Chartier would deny that there is any objective hierarchy between these options. It would be wrong for me to neglect my friend, he might say, because I have made a personal commitment to her by virtue our friendship. It is this commitment, not the intrinsic attributes of the situation,

that dictates my response. This analysis does not strike me as obviously wrong, but I still think the better way to account for the situation is to say that close friendships are objectively more valuable than certain other forms of enjoyment. Chartier's strong version of the incommensurability thesis is unable to accommodate this analysis. It therefore seems better to say that the basic goods are irreducible, but not always incomparable.

Chartier also accepts the standard new natural law view that the prohibition on directly harming basic aspects of welfare is absolute and exceptionless (2013: 34). It is always wrong to purposefully harm a person, such as by killing or injuring her. The potential difficulty this causes for cases like self-defense is then dealt with using a version of the doctrine of double effect (DDE) (2013: 37-8). This is, as I said, the orthodox new natural law analysis. However, my own view is that strained reasoning can be avoided by acknowledging that the prohibition on directly harming basic goods is highly stringent, but less than absolute. This does not dispense with DDE, but it lessens the burden it has to bear.<sup>7</sup> I do not really see what Chartier has to gain by characterizing the principle of respect as absolute, rather than merely highly stringent. It may indeed strengthen the overall appeal of his ethical framework to weaken this claim.

Chartier then uses the natural law ethical framework described above to set up a robust ethical presumption against aggression towards persons and their justly acquired property. Specifically, aggression against bodies is said to be absolutely prohibited, while aggression against property is presumptively ruled out. Chartier's discussion of bodily aggression trades on the absolute nature of the prohibition on directly harming others (2013: 46), but again I think this principle would be more plausible if treated as merely highly stringent. The treatment of property rights in Chartier's book is nuanced and persuasive (2013: 49-88). He argues persuasively that a range of diverse desiderata support recognition of a set of baseline rules protecting just possessory claims to material property. I admired Chartier's earlier analysis of property rights in *Economic Justice and Natural Law* (2009) and here he refines his theory further.

I am in print agreeing with Chartier's critique of the traditional natural law position denying the rights of animals (Crowe 2011b: 11-12; 2013: ch. 4). He repeats his argument here, with previously unpublished elaborations, and integrates it into his wider project (2013: 93-108). Chartier contends that non-human animals participate in forms of flourishing sufficiently similar to those enjoyed by humans to support claims to fundamental rights. He rightly criticizes other proponents of the new natural law theory, such as Finnis, for the poverty of their arguments concerning non-human animals. I was slightly less sure, however, about Chartier's view that animals can never be the subject

of just possessory claims. Chartier argues that animals should never be enslaved and, as such, should never be treated as possessions. However, it is not clear that exercising a possessory claim over an animal necessarily enslaves it.

The fact that it is wrong to threaten basic aspects of animal welfare does not necessarily show that it is wrong to keep and use animals, provided their rights are respected. This would allow room for limited possessory claims over animals. As Chartier recognizes, all possessory claims are limited in any case (2013: 132-53). The question here therefore seems to be what the best way is of protecting animal rights. It may well be that Chartier is correct in highlighting the potential role for animal advocates and the homesteading of animals' legal claims. However, it seems at least possible that allowing limited possessory claims over animals might turn out to be an equally effective way to protect their interests in at least some cases.

Chartier notes that he does not mean his comments to rule out "interdependent companion relationships" between humans and non-human animals (2013: 107). He acknowledges my criticisms in a footnote and concedes that it may sometimes be permissible to keep and use animals if this does not threaten their well being (2013: 107 n. 82). He still seems to maintain, however, that this should not be done through possessory claims. At any rate, it is hard to disagree with Chartier that many of the ways animals are currently treated under cover of possessory claims are morally repugnant. He is clearly right that the moral limits that the rights of animals place on our possessory claims need to be taken more seriously.

### **Anarchy Under Law**

Chartier utilizes the ethical framework outlined above to make the case for a stateless society. He argues that the common good rests crucially on peaceful, voluntary cooperation. He then contends that the state is not needed to foster such cooperation and, in fact, often tends to seriously impede it. There is much to admire in this account. Chartier's painstaking description of the various ways in which the state poses a danger to peaceful, voluntary and equal social cooperation is particularly valuable (2013: 208-32). I will not dwell here, though, on this aspect of the argument. Instead, I wish to focus on what Chartier says about law.

There is an unfortunate dearth of literature on the implications of anarchism in jurisprudence, certainly compared to the relatively robust literature in political philosophy. Chartier makes an important contribution to this field.<sup>8</sup> He offers a rich and detailed discussion of the nature of law in a stateless society. Chartier rightly notes that a stateless society would give rise to a pluralistic system featuring multiple legal regimes. He makes the important

point that while legal mechanisms in a stateless society would have multiple sources and contents, they could nonetheless be expected to exhibit common features (2013: 244-8). There would not be complete uniformity, but there would be convergence across regimes.

This point is important because it illustrates how non-state law could be expected to exhibit the virtues of pluralism and flexibility, without undermining the emergence of shared norms and expectations within a community. This picture shows how non-state law has the capacity to play the coordinating role given to law in natural law jurisprudence, while avoiding the moral and social hazards associated with the coercive apparatus of the state. An anarchist conception of law, in other words, offers the promise of legal obligation without recourse to state authority. It reveals the crucial oversight in Finnis's argument that that social coordination requires "unanimity or authority" and no other options are possible (1980: 232).

My main quibble with the way Chartier presents this material is that more attention could have been given to the way in which legal principles reflect a form of spontaneous order, as discussed by authors like F. A. Hayek.<sup>9</sup> Hayek's account of the development of the common law in works such as *Law, Legislation and Liberty* provides a rich picture of how legal norms can come to exhibit coherence without being imposed from above (1982: vol. 1, ch. 4-6). Hayek was not writing here specifically about how legal norms might develop in a polycentric legal order, but his emphasis on legal reasoning as a form of emergent order has fruitful application in that context. A rich account of the basis of customary legal norms can also be found in Garrett Barden and Tim Murphy's recent book, *Law and Justice in Community* (2010).<sup>10</sup>

An evolutionary perspective such as that presented by Hayek could also help to support Chartier's account of how outlaws could legitimately be subject to enforcement of clearly just legal principles (2013: 257-60). A partial answer to this challenge, as Chartier acknowledges (2013: 260), might be that even in a polycentric legal order a type of *ius gentium* comprising the basic principles common to all legal regimes might be expected to emerge over time. These shared principles might emerge partly through deliberate copying between legal codes, but could also be expected to emerge organically through the decisions of arbitrators, creating a common law in the Hayekian sense. This would also partially stave off worries about legal regimes overreaching and subjecting outlaws to coercive enforcement of rules falling outside the realm of clearly just basic principles. The likely convergence of legal regimes in a stateless society is, for these reasons, an important point for anarchist legal theories to emphasise.

Chartier goes on to discuss methods for rectifying injuries in a stateless society. In particular, he presents compelling and challenging arguments as to why such a society would not recognize the category of crime (2013: 264-5),

relying instead on restitution for harms. He rightly emphasizes the danger that the category of crimes against the state may become divorced from actual harms to members of the community. The category of crime is meant to protect society from violence, but in practice the criminal law often does violence against vulnerable members of the community and thereby perpetuates social inequality.

Any proposal to remove the category of crime and focus on compensable harms already constitutes a reduction in the kinds of behavior that may be prosecuted under law. Chartier wishes to go further, arguing that no liability should accrue based on purely communicative acts (2013: 274-8) or damage to reputation (2013: 278-9). I wondered, though, if it is necessary to be so austere about the categories of harm recognized by law. Expression of attitudes, after all, can directly cause harmful acts. More broadly, it can spread attitudes that cause harm.<sup>11</sup> The common law of defamation has long recognized that compensation is sometimes due for damage to reputation. There is a Hayekian case for not radically reordering these evolved principles, but rather taking advantage of the knowledge process that produced them. The focus would instead be on avoiding legal distortions produced by central planning and state regulation. This would, perhaps, be another direction an anarchist theory of law might take.

Chartier's analysis of the cultural and political benefits of a stateless society is extremely useful. The discussion makes a number of important points. In particular, the distinction between political and cultural anarchism is very fruitful (2013: 323). Chartier makes it clear that anarchism is not limited to challenging state power, but also involves working to undermine social hierarchies and create a culture that values autonomy, openness and self-expression. Anarchism is a political program in a broad sense: it is not concerned only with legal institutions, but also targets other community structures. Chartier provides a helpful outline of the different modes of political activism that contribute to this project (2013: 324-8).

This discussion of how politics is not exhausted by discourse about state institutions and how, in fact, eliminating the state could lead to more worthwhile political discourse has broader implications. Political discourse in modern Western democracies (as well as many other places) tends to be dominated by state institutions and officials. Media reports of current issues tend to be heavily skewed to what government representatives or their rivals within the state sanctioned political process have said about the issue at hand. The question of why we should care so much about what these people have to say compared to the opinions of others in the community is rarely directly confronted. The answer is surely that we only care what they say because they

have seized coercive power to direct our actions and shape the social order. Chartier's discussion makes it commendably clear why this power is illegitimate.

The final chapter of Chartier's book situates his project by framing it as a leftist, anti-capitalist and socialist agenda. The chapter is likely to be of most interest to those who have a pre-existing stake in those terms. The most useful part of the chapter for me was the discussion of different senses of "capitalism" and why advocates of freed markets should reject the term (2013: 386-97). I had occasional doubts about the importance of this chapter, given it could be seen as concerned with terminological issues. However, it helps put Chartier's anarchist project into historical context. Furthermore, the chapter performs a useful role by breaking down ideological preconceptions about the meaning of the terms discussed. The chapter, like Chartier's book as a whole, challenges prevailing orthodoxies and therefore undermines existing hierarchies. There is a clear sense in which Chartier's whole project in the book is an exercise in anarchist political activism as he defines it. It would be good if more political and legal philosophy engaged underlying social and political assumptions in this kind of fashion.

## Conclusion

I argued at the start of this article that the new natural law framework is more hospitable to anarchism than it might initially appear from the arguments of authors such as Finnis. The new natural law emphasis on subsidiarity and social coordination opens the way for a picture of law where voluntary associations and emergent legal orders play a central role. It is, at least, an open question whether state institutions represent the best way of promoting the common good. Indeed, the tendency of state institutions to crowd out more effective social solutions to coordination problems suggests that the common good may be better pursued without them. All this provides fertile ground for natural law anarchism.

*Anarchy and Legal Order* brings together the natural law and anarchist traditions in ways that are illuminating for both. One can only hope that authors operating in one of these traditions and not the other will not be deterred from engaging with Chartier's arguments. Chartier's work is ambitious, as I noted previously, not only in the variety of topics covered, but also in the radical character of its political vision and the way it attempts to break down entrenched disciplinary and ideological boundaries. I applaud its ambition and think it generally succeeds in its aims. The book is original, insightful and closely argued. It will help to cement Chartier's growing reputation as a leader in natural law and anarchist thought.

## Notes

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<sup>1</sup> See, for example, Chartier (2009; 2011).

<sup>2</sup> For critical discussion, see Crowe (2011a; 2011b).

<sup>3</sup> See, for example, Finnis (1980); Grisez (1983); Grisez, Boyle and Finnis (1987a); Grisez, Boyle and Finnis (1987b).

<sup>4</sup> For a more detailed discussion, see Crowe (2011a). See also Crowe (2012a).

<sup>5</sup> This basic insight can be traced back to Thomas Aquinas, *Summa Theologiae*, I–II, q 95, art 2.

<sup>6</sup> I assume there are no other features of the road that make it clearly unsafe to drive at 70 km/h.

<sup>7</sup> For further discussion, see Crowe (2012b: 166-8).

<sup>8</sup> For my own modest contribution, see Crowe (2014).

<sup>9</sup> Chartier acknowledges this point in a footnote. See Chartier (2013: 248 n. 6).

<sup>10</sup> For a review, see Crowe (2012c).

<sup>11</sup> See, for example, MacKinnon and Dworkin (1998).

## References

Barden, Garrett and Tim Murphy. 2010. *Law and Justice in Community*. Oxford: Oxford University Press.

Chartier, Gary. 2009. *Economic Justice and Natural Law*. Cambridge: Cambridge University Press.

Chartier, Gary. 2011. *The Conscience of an Anarchist*. Apple Valley: Cobden Press.

Chartier, Gary, 2013. *Anarchy and Legal Order: Law and Politics for a Stateless Society*. Cambridge: Cambridge University Press.

Crowe, Jonathan. 2007. "Natural Law in Jurisprudence and Politics," *Oxford Journal of Legal Studies* 27: 775-94.

Crowe, Jonathan. 2011a. "Natural Law Beyond Finnis," *Jurisprudence* 2: 293-308.

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- Crowe, Jonathan. 2011b. "Five Questions for John Finnis," *Pandora's Box* 18: 11-17.
- Crowe, Jonathan. 2012a. "Clarifying the Natural Law Thesis," *Australian Journal of Legal Philosophy* 37: 159-181.
- Crowe, Jonathan. 2012b. "Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs," *Modern Law Review* 75: 159-79.
- Crowe, Jonathan. 2012c. "Review of Garrett Barden and Tim Murphy, *Law and Justice in Community*," *Ethics* 122: 394-398.
- Crowe, Jonathan. 2013. *Legal Theory*. 2<sup>nd</sup> ed. Sydney: Thomson Reuters.
- Crowe, Jonathan. 2014. "Law Without the State," *Policy* 30: forthcoming.
- Finnis, John. 1980. *Natural Law and Natural Rights*. Oxford: Clarendon Press.
- Grisez, Germain. 1983. *The Way of the Lord Jesus: Christian Moral Principles*. Quincy: Franciscan Press.
- Grisez, Germain, Joseph M. Boyle and John Finnis. 1987a. *Nuclear Deterrence, Morality and Realism*. Oxford: Oxford University Press.
- Grisez, Germain, Joseph M. Boyle and John Finnis. 1987b. "Practical Principles, Moral Truth and Ultimate Ends," *American Journal of Jurisprudence* 32: 99.
- Hayek, F. A. 1982. *Law, Legislation and Liberty*. London: Routledge.
- MacKinnon, Catharine A. and Andrea Dworkin. 1998. *In Harm's Way: The Pornography Civil Rights Hearings*. Cambridge: Harvard University Press.