Natural Law and the Nature of Law: A Response to Commentators

Crowe, Jonathan

Published in:
Australasian Journal of Legal Philosophy

Natural Law and the Nature of Law: A Response to Commentators

JONATHAN CROWE[†]

I am grateful to the Executive Committee of the Australasian Society of Legal Philosophy for choosing *Natural Law and the Nature of Law* as the subject of this year's book symposium.[1] And, most of all, I would like to thank the three commentators for reading my book and providing such rich, generous and thought-provoking responses. There is no scope here to do full justice to the depth of their comments, and some interesting points will inevitably be left undiscussed. My aim, however, is to treat their remarks as a series of invitations that I will do my best to accept, rather than decline.

I. Time, Nature and Place

I will begin with Margaret Davies's interesting and challenging intervention on the time, nature and place of natural law. Davies asks:

> Does a changing natural law depend on an idea of progress in human society? If so, does this presuppose supernatural guidance? … And what happens to natural law if social history takes a wrong turn? … Are wrong turns contingencies that are accommodated in human nature and therefore natural law, or are they surface irregularities? … What if there could have been a better now?

This is a deep and difficult question, implicating central issues about human nature and ultimate ends. I am pleased to be asked it because it is exactly the kind of question philosophers should concern themselves with, and which legal philosophy too rarely engages. My answer would be that a changing natural law depends on an idea of *movement* in human society, but this movement need not be conceived as linear progress. (The idea of movement is perhaps the unifying theme in all my philosophical work, although I'm still teasing out its implications.) It seems to be false, as Davies points out, that human society is on a consistent path of moral progress. And, yet, we do seem to make progress in some areas, if not in others. How, then, can we explain what is going on?

My suggestion is that the movement of human society is best described not as a linear path, but as an *oscillation* – an idea, I should say, that my collaborator

---

† Professor of Law, Bond University.

1 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019).

Constance Lee and I have developed together over many years.[2] Human nature contains inherent dispositions to recognise and value the good – this, indeed, is the central idea of natural law[3] – but it also contains biases, prejudices and weaknesses that lead us to neglect the good in favour of motives that are ultimately destructive of our well-being.[4] Human life and history moves back and forth between these conflicting motivations, meaning that we never entirely lose sight of the good, but our realisation of it is necessarily imperfect.

Does this picture presuppose supernatural guidance? No, but if we add God into the picture, it enables us to look beyond the messy oscillation of human nature and imagine a future yet to come.[5] Theism, in other words, gives us the possibility of salvation outside, rather than within, human history. It thereby makes us less reliant on linear progress to reaffirm our faith that goodness is not futile.

The difference between the inhabitants of the earthly city and the city of God, as Augustine termed them, is not that the former are evil and the latter are perfect, but that the former are content with their imperfections, while the latter have their eyes fixed on something greater and more inspiring.[6] Or, as Oscar Wilde puts it, 'we are all in the gutter, but some of us are looking at the stars'.[7]

> Why does 'nature' for natural law stop at humans when we are so evidently enmeshed in an extended physical (and 'natural') world? Should natural law be aiming for a less anthropocentric approach?

This is an excellent question, which natural law theorists ask too rarely. It is a question Sophie Grace Chappell posed me too when she kindly reviewed my book manuscript. I have dealt with it in the book by clearly acknowledging the limitations of the natural law project as traditionally conceived.[8] Natural law theory tends to be presented as if it were a theory about what is absolutely good (what I term in my book 'the good simpliciter'). However, a more accurate characterisation would be that natural law is a theory of what is good *for humans,* given the nature they have.

The importance of this distinction lies in the fact that what is good for humans may not be good simpliciter. I pursue this distinction briefly in the book by

---

2 See particularly Jonathan Crowe and Constance Youngwon Lee, 'Law as Memory' (2015) 26 *Law and Critique* 251.

3 Jonathan Crowe and Constance Youngwon Lee, 'The Natural Law Outlook' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

4 Jonathan Crowe, 'Human, All Too Human: Human Fallibility and the Separation of Powers' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016).

5 Jonathan Crowe, 'Law's Movement' in Leon Wolff and Danielle Ireland-Piper (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge, 2017).

6 Augustine, *The City of God*, bk XIV, ch 28.

7 Oscar Wilde, *Lady Windermere's Fan*, Act III.

8 Crowe, above n 1, 33-34.

considering the analogy of an oak tree.[9] Certain things are plausibly good for an oak tree (water, sunlight, rich soil, room to grow). However, what is good for an oak tree is not necessarily good for all other organisms in its environment. Any theory of the good that simply focused on the oak tree to the exclusion of other organisms would be partial and biased. And the same applies to theories of natural law that focus on humans.

This does not mean that natural law theory, as traditionally conceived, is useless. (Of course, I don't think that, as I wrote a whole book about it.) Its usefulness stems from the fact that a theory of what is good for humans is plausibly an important part of a theory of what is good simpliciter. However, it is only one part of that broader theory, and its limitations should be openly acknowledged. Natural law theories have generally not done this, acting as if humans are the whole world.

> Can the distinction between nature as immanence and nature as the physical world be further dismantled by bringing the laws of nature beyond the human, in particular biophysical processes, into the understanding of natural law? … Do we see ourselves as different from the space around us and do we see the physical environment as essentially passive? Or do we see ourselves as entirely part of a living, interconnected, active, and even sacred earth?

I would like to think it is possible to construct a natural law theory that embraces this wider biophysical perspective. In order to do this, as Davies suggests, we need to look beyond anthropocentric Western conceptions of natural law. I have been very intrigued, in this respect, by suggestions made by Mary Graham and Irene Watson that Aboriginal law could be conceived as a type of natural law.[10] If this is so – which I find very plausible – then it would be a natural law of a radically different kind to that which one finds in John Finnis's work, for example. This is partly because of the way it would invert the anthropocentric focus of much natural law thought, emphasising that nature doesn't belong to us, but we belong to it.

> If natural law varies according to time, and if it emerges in part from social relationships, can it also be regarded as varying according to place?

I have always been obsessed with time, so there is a lot in my book about time and not so much about place. However, as Davies observes, time and place are not so unalike. And I do think it follows from what I say about natural law varying over time that natural law can – and does – also vary according to place. This is partly because

---

9 Ibid 33.

10 See, for example, Mary Graham, 'Some Thoughts About the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181; Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) ch 2-3; Irene Watson, 'Buried Alive' (2002) 13(3) *Law and Critique* 253; Irene Watson, 'Re-Centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative* 508.

the shape natural law takes for a particular community depends on how its content is specified by local norms and institutions. However, it is also because different communities may, at least in principle, have different basic goods, if their social conditions are sufficiently different. I make this point in the book by observing how societies have changed throughout human history, but the same could be true on a geographical level.

Many natural law theorists will not like this. It will seem to them to concede too much to cultural relativism. However, recognising and valuing difference does not mean we must abandon the natural law project.[11] It is crucial, I think, that natural law theorists take seriously the project of imagining natural law from different perspectives. I want to mention here, for example, the work of Catherine Carol, who engages with the work of Luce Irigaray to ask what natural law looks like from a distinctively female perspective.[12] Many variations on this project are possible, and they all contribute to the richness of our understanding of human nature.

II. Political Natural Law

I turn next to Joshua Neoh's very friendly and helpful intervention on the prospects for an explicitly political conception of natural law. I agree almost entirely with what he says, but I do want to take issue with one comment:

> This book leaves the major battle with legal positivists aside for the moment to engage in some intellectual sparring with other natural lawyers. Those who come to the book looking for a knockdown argument against legal positivism will not find it.

I do not think this is right. My book does, it is true, take aim at other versions of natural law theory, particularly the so-called 'new natural law theory' developed by Germain Grisez and Finnis.[13] However, its main target is legal positivism. There is, I think, a knockdown argument against legal positivism in the book. It comes in Chapters 8 and 9 when I present my theory of law as an artifact. I argue there that a necessary prerequisite for something to count as an artifact of a particular kind is that it is constitutively capable of performing its function. Something counts as law, then, only if it is capable of fulfilling law's function as an artifact.

Law's function as an artifact is to serve as a deontic marker by creating a sense of social obligation. A putative law that is incapable of performing that function fails

---

11 It is worth noting, in this context, that Thomas Aquinas – widely viewed as the paradigmatic natural law theorist – explicitly embraces the idea that natural law can change over time, for reasons that also imply that it varies according to place. See Thomas Aquinas, *Summa Theologiae*, I-II, q 94, art 5.

12 Catherine Carol, 'Luce Irigaray on Women and Natural Law' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

13 Germain Grisez, *The Way of the Lord Jesus: Christian Moral Principles* (Franciscan Press, 1983); John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011).

as law, while a law that is not minimally adapted to that function is legally defective. Positive laws may fail these standards due to either their form or their content. Rationally defective laws, in particular, will be legally invalid or defective, depending on the extent and nature of the flaw.

The artifact theory of law therefore vindicates what I call the *natural law thesis*: law is necessarily a rational standard for conduct.[14] This is the central claim of natural law jurisprudence. It also serves to distinguish natural law from legal positivism. The hallmark of legal positivism is the view that an adequate descriptive theory of law can be constructed solely by focusing on its social sources. Although the natural law thesis is technically compatible with inclusive legal positivism, its focus on rationality is at odds with the legal positivist methodology. My theory of law as an artifact also clearly falsifies John Austin's famous legal positivist claim that 'the existence of law is one thing; its merit or demerit is another'.[15]

> Natural law is a theory of value, of what is good in the world, while politics is a practice of value, of how to realise the good in the world. What we need, then, is an account of the relationship between practice and value. … Political natural law is not only inseparable from social practices, but it is also inseparable from history.

I fully agree with Neoh on this point. As he notes, the point is a logical development of some observations I make in my book about the role of social practices in constituting and supporting the basic goods. This is a topic I develop further in a book chapter in the *Research Handbook on Natural Law* that Lee and I recently co-edited, entitled 'Intelligibility, Practical Reason and the Common Good'.[16]

The basic goods, according to the new natural law theorists, render human action *intelligible*. The intelligibility of action does not guarantee its reasonableness: that depends on whether the action is oriented towards the basic goods in a way that meets the requirements of practical rationality. However, an action that fails to be intelligible will fail to be reasonable, because it is not directed at any underlying good. The intelligibility of an action, on this view, is therefore a necessary, but not sufficient, condition for its reasonableness.

What, then, does it mean for an action to be intelligible or unintelligible? The new natural law theorists have relatively little to say about this question, beyond describing the role of the basic goods in guiding human action. My chapter builds on this account to argue that actions are intelligible or unintelligible relative to a context

---

14 Crowe, above n 1, 137.

15 John Austin, *The Province of Jurisprudence Determined* (Weidenfeld and Nicolson, 1954) 184.

16 Jonathan Crowe, 'Intelligibility, Practical Reason and the Common Good' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

of social practices. This understanding of intelligibility reveals an important connection between the basic goods and the common good. The common good, understood as the project of creating a society that offers a wide and generally accessible array of modes of human flourishing, not only facilitates the pursuit of the basic goods, but makes the goods possible. It does this by creating a context within which judgments can be made about the intelligibility of particular kinds of intentional conduct.

The common good, then, consists at least partly in providing the intelligibility conditions for human action, thereby making it possible for there to be basic goods in the first place. A certain kind of community environment may well be conducive to full participation in the basic goods, but it is also a precondition for having basic goods at all, given their dependence on social practices. I take it that this conclusion is broadly in line with what Neoh describes as 'political natural law'.

III. What Role for the State?

Finally, I wish to respond to just a few of the points raised by Matthew Lister in his incisive commentary on the role of the state. Lister takes issue with the argument in Chapter 6 of my book that the state is not necessary for the common good, due to the availability of various non-state forms of legal order:

> My claim [that is, Lister's claim] is that none of these [forms of non-state law – that is, consensual, emergent or natural law] – neither on their own or jointly – can provide the needed framework for flourishing lives, at least in a world that is similar enough to ours to be worth considering. Rather, these forms can only do the work that they do, in our world, because of the background provided by the state. … Some people may well be able to live flourishing lives even now without a state, but most, I will contend, could not.

I think there is a genuine disagreement between Lister and me on this point – indeed, potentially a very deep one. However, I also wonder if we are talking at cross-purposes to some extent. Lister's formulation of his objection to my view leans heavily on phrases like 'in a world that is similar enough to ours to be worth considering'. I suspect there is a methodological disagreement here, concerning how close a world has to be to ours to be worth considering for political philosophy.

The issue in the background here may be one about realism and idealism in political philosophy. Idealism has come under fire lately, perhaps most notably by Jerry Gaus in his book *The Tyranny of the Ideal*.[17] I remain, however, firmly in the idealist camp. Political philosophy, as I conceive it, should focus primarily on how human society would be organised under ideal conditions and secondarily on what this means for our current arrangements. (I will have more to say about this in my

[17] Gerald Gaus, *The Tyranny of the Ideal: Justice in a Diverse Society* (Princeton University Press, 2016).

forthcoming book on *Small Justice*.) Lister, I suspect, sees things differently; he seems to be in the realist camp.[18] I think it helps in understanding our dispute to bear this in mind.

It might be useful here to distinguish some different claims about the relationship between the state and the common good. The claim I defend in the book – which was carefully chosen – is as follows:

(1) The state is not necessary for the common good.

This is, I think, a fairly weak claim since it only entails that a non-state society could realise an acceptable version of the common good under certain conditions; it does not, to my mind, entail that these conditions are ubiquitous or even common. Here are some other claims in the vicinity that I could have, but did not make:

(2) The state is not desirable.

I have some sympathy for this claim if it is understood as meaning that in an ideal world, the state would not exist. However, I do not defend it in the book. It also needs to be distinguished from the following claim:

(3) The state should be abolished.

It does not follow from the claim that the state is unnecessary or even undesirable that it should be abolished. I do not personally think it should. This is because there are important path-dependencies that come from having a state. Once the state is entrenched as the dominant mode of political governance at national and international levels, there may be little prospect of returning successfully to a stateless society. (In saying this, I agree with one of the main points of Gaus's book: just because a particular social arrangement is ideal doesn't necessarily mean we should seek to realise it.[19]) Many of the concerns Lister raises in his commentary seem to be directed at this sort of path-dependency. My rejection of this claim might therefore help to narrow, although not remove, the differences between us.

---

18 In Lister's written contribution to this symposium, he describes himself as a proponent of 'modestly ideal theory' (fn 8). He goes on to claim that 'approaches that would try to do without the state in something like its modern form owe us at least a minimal account of practical plausibility and, importantly, morally acceptable paths of transition, if they are to be worth discussing'. However, I reject the claim that the nature and merits of a stateless society are not worth discussing unless such a society is practically realisable. It is in this sense, I take it, that my conception of the role of ideal theory in political philosophy differs from Lister's. I also deny that the view that a particular mode of social organisation is consistent with the common good – or even *ideally* consistent with the common good – necessarily entails that we should try to bring it about. It is worth emphasising here that I never claim in my book that a stateless society is *uniquely* consistent with the common good; rather, my aim in Chapter 6 is merely to refute the claim that *the state* is uniquely consistent with the common good. I return to these points below.

19 Gaus, above n 17, 80-4.

A further possible claim in the vicinity is:

(4) The role of the state in promoting the common good is (and should be) marginal, not pervasive.

I do not make this claim explicitly in the book, but it is in the background of much of what I say. I suspect this claim also best captures where Lister and I truly diverge. A consistent theme in Lister's objections to my argument is that the non-state forms of law that I describe could not function effectively without the state in the background. The following passage provides an example:

> We have to ask whether, in a world like ours, important agreements like commercial contracts and marriages could function in the needed way without state backing. I will suggest that they could not do so, or would do so only significantly less well. These agreements are made 'in the shadow of the law'.

I think there are some empirical disagreements between us here. I have not done a huge amount of empirical research in my career; indeed, I try to avoid it if I can. However, one area where I have been involved in significant empirical work is in relation to the concept of the shadow of the law in family dispute resolution.[20] The outcome of that empirical study was that family mediation does not take place in the shadow of the positive law – that is, state law – but rather in the shadow of what we term the *folk law* – that is, social norms and practices. This suggests that at least some of the normative work in supporting mediation and other forms of what I call consensual law may be done by social norms, rather than the state.

Now, of course, it is true that the state is always looming in the background, so it is difficult (if not impossible) to empirically isolate the normative work done by non-state sources of order. However, one of the consistent themes of my book is that work in political philosophy and jurisprudence (including in the natural law tradition) tends to systematically overemphasise the normative work done by the state and undervalue the normative work done by social norms. I have an extended argument to this effect in Chapter 10, dealing with legal obligation.

I would suggest that Lister falls into this trap in suggesting that non-state forms of legal order would fail to achieve socially beneficial ends without the state to support them. If this were true, it seems to me, then it would be puzzling why social norms not only supplement and extend state law but potentially override it. However, it is quite common for social norms to trump positive legal standards. One example I discuss in my book concerns traffic laws; if the advertised speed limit on a street is 50 km/h, but traffic is going at 70 km/h, then drivers will often match the speed of the traffic, particularly if there are no obvious signs of enforcement.[21] This kind of

---

20 Jonathan Crowe, Rachael Field, Lisa Toohey, Helen Partridge and Lynn McAllister, 'Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution' (2018) 40 *Sydney Law Review* 319.

21 Crowe, above n 1, 189-90.

case seems to me to refute the claim that social norms can only achieve beneficial social coordination with the coercive apparatus of the state in the background.

I have some other quibbles. Lister repeatedly uses examples of states with weak or failed legal systems to illustrate the necessity of state order. However, the problems posed by failed states are not highly germane in assessing what life would be like in a stateless society. One of the problems posed by the state is precisely that it crowds out other, potentially more beneficial forms of social ordering.[22] Lister is very sceptical about the self-ordering power of markets, arguing that 'without state backing, markets are thin, subject to shocks and disruption, and do not function well.' Now, of course, markets are never perfectly efficient or stable; they also tend to produce inequalities (as, of course, does the state). However, they outperform any other known method in solving the economic calculation problem – that is, the problem of translating subjective valuation of goods into objective information such as quantities, allocations and prices.[23]

Lister also worries about the ability of non-state sources of order to provide important goods such as health care and education:

> If we think that access to acceptable health care, education, and social support is necessary for human flourishing, then this is already a significant worry for those who would attack the state. Clearly, the burden of proof is on them to show that non-state means are sufficient.

However, I am not sure why the importance of health care, education and social support for human flourishing places a burden of proof on advocates of non-state order, unless we assume that the state already does an adequate job of securing these goods. That is highly contestable. Indeed, the criticisms Lister levels at non-state order can be turned back against the state. We have, I suggest, no known examples of the state adequately providing the most vulnerable members of the community with access to these goods and many examples where, despite extensive state involvement, the goods are not provided. Lister rightly points out that non-state provision of these services would be imperfect, but he has not shown that the state is inherently better. Simply assuming this overlooks the pervasive inequalities, injustices and deprivations that exist in modern nation states today.

---

22 Ibid 130, 194.

23 Ludwig von Mises, *Socialism: An Economic and Sociological Analysis* (Yale University Press, 1951) 113-122.