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# Jonathan Crowe, "Natural Law and the Nature of Law."

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**Jonathan Crowe.** *Natural Law and the Nature of Law.* Cambridge University Press 2019. 270 pp. \$99.99 USD (Hardcover ISBN 9781108498302); \$32.99 USD (Paperback ISBN 9781108735681).

**Note:** This review was based on an electronic version of the book that lacks page numbers. As a result, citations are to entire chapters.

Crowe's new book is an insightful and original contribution to the literature on natural law theory and jurisprudence. He argues for the natural law doctrine as a tool to promote human flourishing. Crowe is well informed on the literature and makes his own distinctive contributions to each of these areas. His arguments will provide a rich source for critical discussion in many areas, given his numerous controversial conclusions.

The first half of the book is on natural law as a theory of ethics and politics. In it Crowe follows the 'new natural law' tradition that ground ethics in the pursuit of certain 'basic goods' necessary for human flourishing. He suggests there are nine basic goods: life, health, pleasure, friendship, play, appreciation, understanding, meaning, and reasonableness. A good life involves pursuit of all or most of these goods. He is not dogmatic about this list, presenting it merely as his tentative effort to identify what the basic categories of human goods are.

Crowe attempts to distance the natural law tradition from its close association with religious belief. He excludes religion or spirituality in his list of basic goods, in contrast with John Finnis. Crowe addresses this omission in an endnote to chapter 3, where he states that 'spirituality' is better seen as an aspect of the goods of 'self-knowledge and meaning' (somewhat confusingly, since self-knowledge isn't in his list either, but presumably he is referring to 'understanding.'). This strategy is understandable in a secularized society in which religion is increasingly seen as optional. Still, there is the worry that Crowe's categories of basic goods are so vague and open-ended (as well as overlapping) that they will not provide much concrete guidance as to the good life.

Crowe claims that morality is based on a twofold duty: to pursue these basic goods in our own life, and not to interfere with others in their pursuit of basic goods. Crowe is less than clear on where these two duties come from, and one may well wonder why he does not mention a duty to positively aid others in pursuit of goods. He struggles to explain why there is any duty to other people at all; in chapter 3, he puts forward 'three possible stories' as to why we should care about the lives of other people. The most 'fundamental' story, he says, is this: 'I have reason to consider the interests of other people in pursuing the basic goods ... because cultivating an attitude of openness to human flourishing in all its forms is an integral component of a meaningful and fulfilling human life.' This is more than a little obscure, and again it gives us no reason to say whether there is a positive duty to aid others, or merely a negative one not to interfere with others.

Crowe rejects the idea that natural law is 'timeless' or 'outside history' or that it is a product of revelation or even self-evidence. Instead, Crowe adopts a 'dynamic' theory of basic goods: basic goods can change over time, relative to social conditions. Thus the good of friendship in a Stone Age culture is significantly more restricted than in modern society, in which we have far more 'extended' notions of human community (chapter 1). Crowe accordingly takes a more empiricist approach to natural law: we come to recognize moral principles not by receiving them from on high, but by observing what promotes human flourishing over the course of history. For Crowe, a basic good is one that humans are characteristically disposed to pursue and to judge to be a good. History is one large 'experiment' in which people can 'explore different ways of participating in value' (chapter 5).

However, there are obvious worries about grounding morality in social practice. One is the threat of cultural relativism: do different societies create different values, even ones we would judge evil by our standards? And how reliable is an empirical method in ethics, given the woeful historical record of oppression and cruelty? Crowe's answer is to supplement his empiricism with an idealization process. A full account of practical rationality, Crowe argues, requires not merely observing human behavior, but idealizing it: we must 'capture the normative inclinations humans would hold under conditions of *full imaginative immersion*' (chapter 1). That is, we must try to envision what it would be like to pursue a basic good 'across a range of contexts of practical choice' (id.). As Crowe explains, 'the point of imagination is ... to transcend the limits of experience' (id.). However, this strategy introduces new problems. One is the extreme vagueness of this proposed method. Given infinitely many possibilities, how do we choose among them? The result, I think, is a method that is so open-ended as to please no one. The empirically minded will downplay the 'imaginative immersion' and stick to real human experience; the idealist will escape to the realm of imagination in order to derive values. And there will be no clear way to adjudicate between the two different approaches. As to whether basic goods are discovered or created, Crowe waffles: in the conclusion, he writes that natural law is 'progressively shaped and discovered by humans.'

The second half of the book addresses legal philosophy. Crowe defends the natural law position—that it is a 'necessary property of law that it serve as a rational guide for action' (chapter 7). His argument is that law can be adequately defined only by reference to its function, and it follows that a law that is 'not capable of fulfilling its function is invalid' (chapter 9). Merely failing to fulfill its function makes it a defective law, but being constitutionally incapable of guiding behavior rationally means it is no law at all. Thus, a law that is unreasonable or even unjust may be merely defective, while a law that is 'incomprehensible or deeply repugnant' is not a law at all.

The position is a reasonable one, though some may question why it matters to distinguish between laws that are merely defective and laws that are invalid—or whether it is even possible, given the vagueness of the standard (when does a law become 'deeply repugnant'—and why must it be 'deeply' repugnant, as opposed to just repugnant?). What matters is the practical implications of this distinction. In chapter 12, Crowe suggests that a judge facing a 'deeply unjust' law should try to interpret it in a way that promotes practical reasonableness, but that if its unjust intentions are completely clear, as in the case of slavery laws, the judges should not follow the law. This is a strong position to take and a controversial one; should 19<sup>th</sup> century judges have ignored democratically passed slave laws? And what of contemporary judges who find abortion laws morally repugnant? Do they have the duty to reject them?

A general problem is that Crowe tries to cover too much ground too quickly in the book. For example, in chapter 6 he argues that the state is not necessary to the common good. This is a radical position demanding a detailed defense. Indeed, since Crowe's own method involves observing the practices that have evolved over time ('We learn what works and what does not work through a social and historical process of trial and error' (Introduction)), it would seem to follow that since all complex societies have adopted the state form of government, that would be overwhelming evidence for its necessity. Yet Crowe's argument is dismayingly thin, mostly consisting of citations to Hayek, attacks on 'central planning,' and assurances that an 'emergent' system of law is 'likely' to promote more freedom and hence is 'better suited to provide a stable, reliable guide to action for all members of the community' (chap. 6). He also claims that states have a 'very patchy track record' at resolving problems such as dealing with lawbreakers (Conclusion). But it makes no sense to say that the state (i.e., all states throughout history) have a 'very patchy' record unless one has a point of comparison, and there are no complex societies run by 'emergent' or spontaneous legal orders, so we have no

baseline by which to suggest that states have done a poor job. The one example of a ‘consent-based’ system that Crowe presents is international law (chapter 6). But it would seem that, if anything, the record of international law is even worse than that of state law, given the history over the past century of violent conflict, genocides, pandemics, and the dismal failure to address the looming climate change disaster.

But even where the reader disagrees with his conclusions, Crowe’s work is stimulating and engaging, and the book is highly recommended as a thoughtful and original contribution to the field of natural law.

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