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Legal Order

Shawn P. Wilbur

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There is a kind of slogan or maxim that circulates in anarchist spaces: *Anarchy means “no rulers,” but not “no rules.”* It is most often presented as a kind of common-sense answer to portrayals of anarchy as some kind of “Mad Max” scenario, where all parties engage in a constant struggle to ward off the depredations of lawless others. It is generally, I think, presented in good faith — as are similar attempts to distinguish between *government* and *governance*, the various appeals to “legitimate authority” and “justified hierarchy,” etc. — but it forces us to distinguish between at least two very different currents in modern anarchistic thought.

The ultimate source of the slogan is not clear, but in *One Life at a Time, Please* (1988), Edward Abbey presents a version of it:

Ten thousand years of human history demonstrate that our freedoms cannot be entrusted to those ambitious few who are drawn to power; we must learn — again — to govern ourselves. Anarchism does not mean “no rule”; it means “no rulers.” Difficult, but not utopian, anarchy means and requires self-rule, self-discipline, probity, character.

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In the same text, of course, he also claims that:

Anarchy is democracy taken seriously, as in Switzerland, where issues of national importance are decided by direct vote of all citizens. Where each citizen, after his period of military training, takes his weapon home with him, to keep for life. Anarchy is democracy taken all the way, in every major sector of social life.

So it feels safe to say that the “anarchy” invoked there is a sort of “good government” or “self-government,” rather different from the “lawless and unprincipled” anarchy that is at the center of the theory being elaborated in “Constructing Anarchisms.”

There would probably be some utility in tracing the development — or at least the persistence — of this approach, from pre-1840 conceptions of “natural government,” through texts like Emile Digeon’s 1882 *Rights and Duties in Rational Anarchy* and on to tendencies like modern anarchist constitutionalism, if only to clarify its differences from the sort of *an-arche-centered* approach that seems to me to be a more consistent development of the indications given by figures like Proudhon after 1840. For now, however, I want to focus on the consistent definition and rejection of *legal order* and the problem of *licit harm*.

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In the anarchist context, it is common to approach the question of *legal order* by asking whether anarchists truly desire a society in which *nothing is prohibited*. This is, it seems to me, only half of the question that needs to be asked, as an anarchic society would also be one in which *nothing is permitted*. And it is probably this second aspect that is most helpful in evaluating the *antinomian* character of anarchy.

Legal order exists when society is guided by *laws, rules* or *principles* that are considered *binding* and *enforceable*. *Legal order* inevitably depends on some assertion of authority and is part of the

text of discussing “the fundamental laws of the universe,” he defined *reciprocity* — “the second law of creation and humanity” — as “the mutual penetration of antagonistic elements.” There is a tendency to treat *reciprocity* and *mutuality* as states to be achieved — through “fair trade” or “equal exchange” in some anarchistic market, or perhaps through the abandonment of market relations — but what Proudhon seems to suggest is that reciprocity is, in fact, a preexisting condition and a problem to be solved. This first “law of the universe” is “Contradiction” or “Universal Antagonism.” The second, which seems to be a bit of a corollary to the first, is that the antagonism takes place among elements that are not simply distinct. They are at least, as Stirner put it, one another’s “food” — but it probably takes a special point of view to move very directly to any kind of social harmony from that starting point, so perhaps we should just acknowledge some degree of *mutual interdependence*. We have an experience of the world, thanks to the structure of our consciousness and bodily organism, that is not always well-adapted to thinking in those terms. We instead imagine ourselves more separate, more solitary, more *unique* in various senses. Hence our inability to entirely shake the question of *property*. But perhaps beginning — or at least attempting to begin again — with the fact of *reciprocity* (in this particular sense) and the necessity of *appropriation* (whatever we make of social property-forms) has some advantages when we are trying to escape the logic of legal order.

There is a strange sense in which the attempts to begin to conceptualize anarchistic relations by hijacking various concepts associated with governmentalism commit — or tempt us to commit — the same sorts of category errors we find in anti-anarchist texts like Engels’ “On Authority.” The “rights” in Proudhon’s *War and Peace* mark demands made on the world by various organisms, not permissions granted to fulfill the various needs expressed. They are the elements that we would have to take into account if we wanted to elaborate some alternative to what we call “rights.” Perhaps, in the context of the serial dialectic adopted by Proudhon, maintaining the name makes sense, despite the changes in the institutions and relations described — but, at least for now, that framework is, almost without exception, not our own, so it is very easy for the language to lead us astray.

We can, perhaps, turn the rather clumsy critique of Engels to some good use here. If we, presumably acting as anarchists, do, in fact, attempt to justify our rebellion against authority, subordination, exploitation, etc. in terms of “our rights” — including the “right of self-defense” — then we arguably surrender much of the “high ground” that we so often claim in our conflicts with statist and authoritarians. If we don’t — dispensing with *justification* as itself part of the apparatus we are trying to abandon — then I think it is entirely fair to observe that we have a hard time articulating our rationales. Our appropriations from Stirner and some kindred spirits are a start, but arguably not much more than that.

Perhaps, for the moment, our best tools are simply an insistence on *anarchy*, in the “full force of the term,” and an understanding that those early anarchist indications and provocations do indeed come complete with contexts that might help us to first carefully trace the explorations and experiments made by their authors — and then make genuine advances of our own.

One of the passages in Proudhon that I cling to when I am trying to think about genuinely non-governmental alternatives is the one in “Organization of Credit and Circulation,” where, in the con-

apparatus of a governmental hierarchy. The range of presumed authorities can, of course, be great, but whether the basis is divinity, democracy, sanctified might or nature, the basic quality of legal order changes very little. If we understand the anarchist critique as at least in part a rejection of the hierarchical pretense of elevating some elements of society above others (either directly or as proxies for some reigning abstraction) and endowing those elements with a “right” to command, then the specific pretext for that elevation is a matter of only secondary concern.

It is important to recognize that legal order is *pervasive* — and arguably becomes so as soon as a single binding precept is established. Where *law* is in force, it tends to divide all actions into the categories of *legal* and *illegal*, *licit* and *illicit*, *permitted* and *prohibited*. So, while there are lots of obvious differences between *Leviticus*, the penal code of a given government, papal bulls, the non-aggression principle, “natural law,” etc., the systems that they represent all presume to pass judgment on essentially the whole of future human activity, with necessarily limited attention to contexts.

In anarchist circles, the defense of some form of *law* usually depends on the recognition that some small number of acts seem unjustifiable to almost anyone under any circumstances, but this is hardly a compelling argument for imposing a necessarily pervasive legal order, with all the recourse to authority and hierarchy that seems inseparable from it. After all, what the experience of legal order appears to teach us is that a certain number of absolutely intolerable acts are likely to occur despite all the laws that can be proposed and all the punishments that can be applied. These worst cases are not so much a final justification for the imposition of legal order, but instead an example of its limits.

There is no question that, even under the most promising conditions, the power of law is limited. We are often asked how we will “prevent crime” — and it is obviously not quite enough to observe

that *crime* is itself a construction of legal order. So some clarity regarding the limits of law and legal enforcement is necessary.

We know that laws do not prevent crime. They create crime — in the sense of identifying certain acts as criminal — and, in the process, they also identify those acts that can be considered *legal, licit, permitted*. They may perhaps deter crime in those most likely to conform to social expectations — but I think experience indicates that most people are fairly comfortable breaking laws that are unpopular, unenforced or unenforceable. That leaves the threat of enforcement as the primary deterrent. And, again, what we observe is that the “best” laws — those precepts about which there is presumably the least controversy — are still regularly broken, whether by criminals who remain undeterred or by agents of the governmental apparatus who are rendered exempt from the laws and immune to prosecution under them.

It would be trivial to note that laws don’t “prevent crime” — except that crime-prevention is so consistently the excuse, sometimes even among anarchists, for defending them.

Meanwhile, the problem of *licit harm* — acts that injure or endanger others, but against which those others have at best limited recourse, thanks to the “legal system” — arguably remains to key to most of our most intractable social and environmental crises.

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The practical mechanics of an anarchic, *alegal* social order remain relatively unexplored by anarchists — in part because some of us have not yet decided we really need to go there. And the difficulties of establishing practices that minimize social conflict, without, in the process, reestablishing some form of legal order, will be considerable. But there are at least useful indications going all the way back to figures like Proudhon and Bakunin.

Consider the problem of the *appropriation* of resources. While we may not know how to arrange systems of *property* without re-

course to some sort of legal framework, we know that appropriation will go on regardless. Living beings will consume and transform resources — if they are to continue living. So, whatever the social or economic framework we develop for addressing potential conflicts over resources, we aren’t going to be free of the fact of appropriation, which lurks behind all of our discussions of the alternatives to familiar property-forms and property “rights.” The question is how best to break free of *archic* assumptions enough to really distinguish our *an-arche-centered anarchism* from the various attempts at “good government.”

When we return to the “classical” sources, we often find theoretical advances couched in the language of government and authority. Proudhon and Bakunin agreed on *necessity* as the sole “law” applicable to anarchistic relations. Proudhon presented balance as “justice” and necessity as “right” — providing a kind of bridge or translation mechanism between anarchic and archic conceptions. As indications, understood in the general context of early anarchist thought, we have to consider these maneuvers at least potentially helpful — but we know how easily a notion like “the authority of the bootmaker” slips free of that all-important context. The “classics” provide first steps in processes that we must presumably continue — moving forward into unmapped territory — if we are to propose real alternatives. All too often, however, anarchists seem content to treat their half-transformed governmentalism as something familiar to cling to.

We can probably say similar things about the specific strategy of reimagining governmental relations in terms of “contract” — as proposed in works like Proudhon’s *General Idea of the Revolution in the Nineteenth Century* and much of the individualist “market anarchist” literature. Perhaps *contract* is a useful transitional notion, but it is hard to rid of fundamentally legal connotations. If contracts are binding and enforceable, then we still seem to be under the sway of legal order. If they are not, well, it’s not entirely clear what the word means.