

KNOWLEDGE, CALCULATION, CONFLICT, AND LAW

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PERVASIVE SOCIAL PROBLEMS

Libertarian theorists have made significant contributions to the fields of economics, politics, and even philosophy. Intimately bound up with libertarian and political theory, of course, is the question of what laws and legal systems are appropriate. Law and legal theory, therefore, have also been subjected to libertarian scrutiny. The writing in this area, however, is usually focused on narrow legal topics, such as contract or constitutional law (Evers 1977, pp. 3–13; Barnett 1986a, p. 269; 1995, p. 93; 1993, p. 853; Spooner 1992; and McGee 1992, pp. 451–76). Moreover, many libertarian authors are economists or philosophers who are not sufficiently familiar with the workings of real legal systems; others are not completely or consistently libertarian in their approaches.¹ Jurisprudence has yet to receive the attention it deserves from libertarians.

The publication of Randy Barnett's latest book, *The Structure of Liberty: Justice and The Rule of Law*, helps to fill this lacuna. Barnett, as a former criminal prosecutor and now law professor at Boston University School of Law, is intimately familiar with the operation of the American legal system and also with the arcana of academic jurisprudence. His libertarian credentials are also impeccable: he has published important libertarian-oriented works on topics as diverse as contract

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¹Various works with at least a semi-libertarian approach to legal and constitutional theory include DeRosa (1996), Berger (1989), Bork (1990), Quirk and Bridwell (1995), Leoni (1991), Hayek (1973; 1976; 1979), Epstein (1985; 1995; 1989). Richard Epstein has contributed enormously to libertarian and legal theory, but is not a completely consistent libertarian and is certainly not an anarcho-capitalist. Moreover, Epstein adheres more to mainstream, neoclassical economics in which interpersonal utility is both relevant and comparable (see, e.g., 1995, p. 141), than to Austrian economics, which does not suffer the many theoretical deficiencies of neoclassical economics, e.g., interpersonal utility comparisons, logical positivism and scientism, etc.

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law, constitutional theory and natural rights, restitution and criminal law, and drug prohibition.² Barnett was thus well-positioned to write *The Structure of Liberty*, the first broad and systematic treatise on legal theory written from a thoroughly libertarian perspective.

Barnett's aim in this ambitious book is to determine the type of legal system, laws, and rights which are appropriate, given the widely-shared "goal of enabling persons to survive and pursue happiness, peace, and prosperity while living in society with others" (p. 23). Happiness, peace, and prosperity are fine principles to select and quite compatible with libertarianism, but Barnett does not attempt to try to justify these basic norms or values. His argument is thus hypothetical and consequentialist, though not, he maintains, utilitarian (pp. 8, 12, 17–23, esp. 22–23).

According to Barnett, the goals of social happiness, peace, and prosperity cannot be achieved unless society's politico-legal system somehow solves certain problems which stand in the way of this happy state. These are "the serious and pervasive social problems of knowledge, interest, and power" (p. 3, emphasis added). Libertarianism enters the picture because the libertarian (Barnett prefers the inferior and confusing term "liberal") conceptions of justice and the rule of law provide the "structure of liberty" that addresses these problems. These principles include the "natural background rights to acquire, possess, use, and dispose of scarce resources (and other rights as well)" (p. 16). Barnett's argument thus proceeds by showing how and why libertarianism is the best way to overcome the problems of knowledge, interest, and power.³

THE FIRST-ORDER PROBLEM OF KNOWLEDGE

Parts 1, 2, and 3 of the book respectively describe the three fundamental problems, and how they are solved by libertarian rights and institutions. Barnett's first topic, discussed in Part 1, is the problem of knowledge, which is broken down into separate first-order, second-order, and third-order aspects.

The first aspect—basically the Hayekian "knowledge problem" (Hayek 1948b,c)—concerns how individuals make "knowledgeable" use of physical resources (p. 29). This analysis starts out by presuming that an individual needs to "be able to act on the basis of [his] own personal knowledge," and "when so acting [he] must somehow take into account the knowledge of others" (p. 36; emphasis added).

Alas, this is difficult to achieve, because such knowledge is "dispersed" or "fragmented," and each individual has "ever-changing and potentially conflicting personal and local knowledge of potential resource use" (p. 40). Each person is thus rendered "hopelessly ignorant" of the "knowledge of others." So the alleged

²See, e.g., Barnett (1996, p. 157; 1986a; 1993; 1995; 1997, pp. 745–93) and others cited in the Bibliography to *The Structure of Liberty*.

³The *Structure of Liberty* contains excellent summaries provided throughout the book at the end of many chapters and sections. Excerpts from the book may also be found on the web at <http://www.bu.edu/rbarnett/SOL.htm>.

problem is this: given the dispersed, often inaccessible, and potentially “conflicting” nature of such knowledge, how can individuals act on the basis of their own knowledge, while avoiding conflicts over resource use? And how can they take into account the knowledge of others (p. 36)?

According to Barnett, libertarian rights are necessary because they facilitate the sharing and dissemination of knowledge (p. 44). They include the natural rights of “several” property (Hayek’s term for private property), Lockean first possession (homesteading), and freedom of contract (p. 83). If individuals are accorded these rights, the first-order problem of knowledge is solved. One of the main ways this happens is that prices arise under such a private-property order, and prices themselves convey, in “condensed” form, personal and local knowledge.

Knowledge vs. Calculation

There is, unfortunately, much to be desired in Hayek’s emphasis on the role of knowledge in the economy, as opposed to Ludwig von Mises’s stress on the more fundamental role of money prices in economic calculation.⁴ Hayek’s and Mises’s differing views have been improperly conflated (Salerno 1993), and Barnett makes the same error by attributing to Mises Hayek’s views on the information-conveying role of prices (p. 54, n. 21).

What, then, are the differences between Mises and Hayek on the role of prices in the economy? Hans-Hermann Hoppe has ably summarized Mises’s original calculation argument as follows:

If there is no private property in land and other production factors, then there can also be no market prices for them. Hence, economic calculation, i.e., the comparison, in light of current prices, of anticipated revenue, and expected cost expressed in terms of a common medium of exchange—money—(thus permitting cardinal accounting operations), is literally impossible. Therefore, socialism’s fatal error is the absence of private property in land and production factors, and, by implication, the absence of economic calculation. (Hoppe 1996, p. 143)

The theories of Hayek on which Barnett and others have relied, however, downplay calculation and appraisal in favor of communication of knowledge. For Hayek, as Jörg Guido Hülsmann notes,

the impossibility of socialism stems from its inability to communicate dispersed knowledge. . . . [I]nformation about the particular circumstances of time and place can never be centralized. It necessarily exists in dispersed form and yet it can be communicated by the market prices of capitalist societies. Only capitalism is thus capable of solving the knowledge problem. (Hülsmann 1997, p. 23; emphasis added)

⁴This has been pointed out in recent debates among Austrian economists, published primarily in the pages of *The Review of Austrian Economics*. See Hülsmann (1997, pp. 23–48), Hoppe (1994, pp. 67–93; 1996, pp. 143–49), also Salerno (1990, pp. 25–54; 1993, pp. 113–46; 1994, pp. 111–25; Herbener (1991, pp. 33–50). For recent, related papers less critical of Hayek’s position, see Horwitz (1998, pp. 427–50) and Caldwell (1997, pp. 1856–90).

But any informational function of prices is, at best, only secondary in comparison to the primary role of private property and money prices. The fundamental economic role of private property, along with money prices arising from exchanges of such property, as Mises showed, is to permit economic calculation. And, socially speaking, private-property rights serve to prevent conflict over resources. This is why private-property rights serve Barnett's goals of peace and prosperity: private property rights permit conflicts to be avoided (peace) and allow genuine, free-market money prices to form which can be used for economic calculation and hence rational resource allocation (prosperity).

Concentration on the information-conveying role of prices instead of calculation obscures this role.⁵ For example, Hayekians claim that prices contain economic information in "condensed" (or encrypted, encoded, or abridged) form.⁶ Barnett follows the Hayekians when he states that "the knowledge-disseminating function of prices is largely unknown . . . the knowledge embedded in prices is not explicit. . . . It is encoded knowledge" (p. 54).

There are several problems with viewing prices as encoding information. For one thing, concepts such as encoding, encryption, and the like imply an encoder—a person who actively and consciously encodes information in some communication medium, in accordance with some encoding scheme (i.e., the code). Yet there is clearly no intentional encoding of whatever knowledge may be embedded in prices; there is no encoding scheme and no way to decode the information. I buy a car for \$30,000 because I think it is worth it, not to convey some secret message to someone.⁷ Knowledge that I paid this price for the car

⁵Leoni (1991, p. 89 passim), seems to similarly attribute Hayekian knowledge-related concepts to Mises:

[T]hat the central authorities in a totalitarian economy lack any knowledge of market prices in making their economic plans is only a corollary of the fact that central authorities always lack a sufficient knowledge of the infinite number of elements and factors that contribute to the social intercourse of individuals at any time and at any level.

See also Kinsella (1995, pp. 132–181, esp. 157–60), in which I, too, influenced by Leoni, conflated Hayekian and Misesian ideas in overstating the analogies between central economic planning and central law-creation. See note 25, below, and accompanying text, concerning the possibility of deducing more concrete legal principles from (themselves deduced) abstract rights.

⁶The term "data compression" is often used synonymously by engineers with terms such as data encoding or encryption, so I suppose it is only a matter of time before Hayekians say that prices convey, in "compressed" form, fragmented and dispersed local knowledge of the particular circumstances of time and place.

⁷The encoding metaphor seems to be a pseudoscientific and scientistic attempt to give this kind of economic theorizing a patina of scientific respectability by borrowing engineering terminology. It is scientistic because, in vainly trying to borrow natural science terminology, there is an assumption that only the "hard" or natural sciences have true validity. It is akin to using such inapt phrases as the "momentum" of the leading team in a basketball game, the "energy" of crystals and astral forms, or, even worse, "revving the engine" of the economy. Both economics and ethics can be sciences, but not in the same way as the causal, natural sciences. On scientism

does not reveal any information about the underlying objective conditions that give rise to this price (e.g., the intensity of my demand or the relative scarcity of the car). Such knowledge reveals only that I valued the car more than \$30,000, and the seller had the opposite valuation.

Prices result from the subjective evaluations of goods by seller and buyer, but prices are exchange ratios. Beside these ratios, what other information could money prices communicate? What information can a mere price ratio convey? Take Hayek's famous tin example, which assumes

that somewhere in the world a new opportunity for the use of some raw material, say, tin, has arisen, or that one of the sources of supply of tin has been eliminated. It does not matter for our purpose—and it is significant that it does not matter—which of these two causes has made tin more scarce. All that the users of tin need to know is that some of the tin they used to consume is now more profitably employed elsewhere and that, in consequence, they must economize tin. There is no need for the great majority of them even to know where the more urgent need has arisen, or in favor of what other needs they ought to husband the supply. If only some of them know directly of the new demand, and switch resources over to it, and if the people who are aware of the new gap thus created in turn fill it from still other sources, the effect will rapidly spread throughout the whole economic system and influence not only all the uses of tin but also those of its substitutes and the substitutes of these substitutes, the supply of all the things made of tin, and their substitutes, and so on; and all this without the great majority of those instrumental in bringing about these substitutions knowing anything at all about the original cause of these changes. (Hayek 1948c, p. 85; emphasis added)

In this example, what information, exactly, is supposed to be conveyed by prices? Let us explore the possibilities. Can the original cause of the price increase (i.e., the change in demand or supply) itself be conveyed via prices? Well, no. Prices are the result of action. Thus, action that changes the prices must already be informed by knowledge.⁸ Entrepreneurs first see the changed conditions and then bid prices up or down. They do not learn about the changed conditions from the resulting prices. Rather, they cause the prices to change, based on their appraisal of tin and knowledge or judgment of underlying conditions. Hayek seems to recognize that those entrepreneurs who “know directly of the new demand, and switch resources over to it” do not learn from prices, but rather help to form prices based on their own preferences, knowledge, evaluations, and judgments.

What about users of tin who merely observe the change in prices paid for tin—do these persons learn anything, from observed past prices, about the

and empiricism, see Rothbard (1997b) and Hoppe (1989a, p. 179). On epistemological dualism, see Mises (1962; 1981) and Hoppe (1995; 1989a).

⁸In other words, the prices generated on the market are past prices, which are always the outcome of action, not its cause. Hülsmann (1997, p. 26) explains that “all information that this action was based upon had to be acquired beforehand. The price itself could not have communicated the knowledge that brought it [the price] about.” With regard to the tin example, “tin does not become scarcer and then this fact can come to be known to someone and lead to adaptations. Rather it is the other way around. The very fact that demand increases means that someone already knows of a more value-productive employment of tin” (p. 28).

underlying conditions or “original cause” of the change in prices? No, because any of a variety of causes results in higher or lower prices (e.g., changes in demand by buyers or sellers, decrease in supply, changes in demand for money on the part of sellers or buyers, etc.). For these reasons, Hayek says that mere users of tin do not know “anything at all about the original cause of these changes.”

Then what possible information can prices convey? Hayek writes: “[a]ll that the users of tin need to know is that some of the tin they used to consume is now more profitably employed elsewhere and that, in consequence, they must economize tin” (1948c, p. 85; emphasis added). But the users do not need to know this; if tin is scarcer, there is less of it to go around.⁹ Whether the prospective users know of the increased scarcity or not, they cannot use what does not exist. Their plans will have to conform, sooner or later, to this increased unavailability of tin.

At most, one could argue that the existence of prices enables prospective users to recognize the good’s relative scarcity somewhat earlier than they would in the absence of prices (that is, sooner rather than later). And even this cannot be stated to be true as an economic law, simply because all prices are speculative, and based on entrepreneurial judgments and anticipations about future conditions. An entrepreneur, for example, may bid the price of a good up based on a mistaken judgment about relevant future conditions, such as supply and demand. What do prices then convey in such a case—misinformation?

In any event, even granting that observers can learn of relative scarcity of a good from prices, emphasis on this aspect of prices distracts from the crucial role that prices play in economic calculation. That is, even if prices do tend to help users to become aware of a good’s relative scarcity somewhat earlier than they would otherwise, it is not this function of prices which addresses the insurmountable problems of production and human action that are faced in the absence of private property. The fundamental problem faced by acting man is not the fact that information is dispersed.¹⁰ Rather, it is deciding how to rationally allocate resources in the face of an uncertain future and given the subjective nature of value, which makes it impossible to compare alternative projects or plans in the absence of a cardinal set of prices.

Thus, as Rothbard (1991, p. 66) explains, “what acting man is interested in, in committing resources into production and sale, is future prices.”¹¹ The primary role

⁹Notes Hülsmann (1997, p. 28):

[a]n increased scarcity of tin implies that some market participants who otherwise could have benefited from tin are now of necessity prevented from using it. If a quantity of tin is sold, then the seller cannot sell it again, regardless of the exchange rate. There is simply no more of this tin left.

¹⁰In fact, as Salerno points out (1994, pp. 114–15), “dispersed knowledge is not a bane but a boon to the human race; without it, there would be no scope for the intellectual division of labor, and social cooperation under division of labor would consequently, prove impossible.”

¹¹As Mises (1966, p. 332) notes: “Appraisalment is the anticipation of an expected fact. It aims at establishing what prices will be paid on the market for a particular commodity or what

of prices in a productive, advanced economy is not to communicate information, but to serve as the starting point for estimating what future prices will be.¹² The forecasted future prices are then used to quantitatively compare various projects and to select the most profitable—and thus most value-productive—use of resources under consideration.¹³ Prices are thus important because they serve as an accessory of appraisal. “Current” (immediate past) prices tell only what the current price structure is, and thus serve as a basis for forecasting what the future array of prices will be, given the current starting point. Thus, present prices “can have no communicative function because they are only the, if indispensable, starting point for our understanding of the future.”¹⁴

The problem faced in a society without libertarian property rules is that there can be no money prices and there can thus be no economic calculation. Talk of a knowledge-disseminating role for prices is flawed and misses the point. Accordingly, Hoppe (1996, p. 146) concludes that “Hayek’s contribution to the socialism debate must be thrown out as false, confusing, and irrelevant.”¹⁵

Barnett on Knowledge

Barnett’s attempt to make knowledge the central inquiry, instead of calculation, scarcity, and interpersonal conflict leads, not surprisingly, to confusion. Barnett maintains that the problem to be solved is “potentially conflicting personal and local knowledge of potential resource use” (p. 40) or conflicting “preferences”

amount of money will be required for the purchase of a definite commodity” (emphasis added). “The essential elements of economic calculation are speculative anticipations of future conditions,” and the entrepreneur calculates based on “an understanding of future conditions, necessarily always colored by the entrepreneur’s opinion about the future state of the market” (p. 349).

¹²See Hülsmann (1997, p. 44) discussing the secondary importance of any possible information communicated through prices.

¹³Barnett gives an example of a consumer using prices to decide whether or not to purchase an airline ticket to fly to France (p. 55). But this example ignores the role of prices in entrepreneurial appraisal in favor of its economically less essential role in consumer choices. See Mises (1990, pp. 4–6, 24); Rothbard (1991, pp. 56–57): “consumers goods are not the real problem. . . . The real problem . . . is in all the intermediate markets for land and capital”; (pp. 58–60): “the crucial decisions in the capitalist economy are the allocation of capital to firms and industries.” See also Mises (1966, p. 328): “The driving force of the market process is provided neither by the consumers nor by the owners of the means of production . . . but by the promoting and speculating entrepreneurs”; also pp. 229 and 696. Further see Salerno (1990, pp. 45–46).

¹⁴Hülsmann (1997, p. 47). Horwitz (1998, p. 441) also notes that current “prices . . . do serve as the starting point for the next round of entrepreneurial appraisal,” but then adds, “because they do provide (imperfect) information about scarcity, wants, and opportunity costs.” The latter part of the sentence seems to be superfluous and not logically connected to the first. Current prices are the starting point in appraisal because today’s prices will change in various ways to result in future prices, which are of interest to entrepreneurs. For a discussion of the connection of current prices to previous prices, see Mises’s regression theorem (1966, pp. 408–10; 1951, pp. 408ff.) and Rothbard (1962, pp. 231–37).

¹⁵See also Rothbard (1991, p. 66; “the entire Hayekian emphasis on ‘knowledge’ is misplaced and misconceived”), Hülsmann (1997, p. 39; discussing “the irrelevance of knowledge problems”), and Salerno (1990, p. 44: “[t]he price system is not—and praxeologically cannot be—a mechanism for economizing and communicating the knowledge relevant to production plans. The realized prices of history are an accessory of appraisal”).

(p. 38).¹⁶ He then claims that private property and related liberal rules would minimize such conflicts, because it would lead to you taking into account my information and vice-versa, and to a general spreading of information (in encoded form).

As an example, Barnett hypothesizes that “there is a particular tree between my neighbor’s house and mine” (p. 38). One neighbor wants to keep the tree; yet the other wants to cut it down because it blocks his view of the sunset. Although Barnett acknowledges that it is these proposed actions (keeping the tree; cutting it down) which conflict with each other, he awkwardly and unnecessarily tries to fit this within the knowledge framework. He writes:

In my example, my neighbor and I both have personal knowledge of how the tree affects the view from our respective windows. My neighbor and I have personal knowledge of each of our preferences concerning the use of this particular tree. Finally, and most significantly, these preferences conflict or, more precisely, each of us subjectively prefers to use the tree in physically incompatible ways. . . . Notice that there is no problem of scarcity in the absence of an incompatibility of subjective preferences. (p. 38)

Now assigning property rights to the tree, as Barnett advocates, does solve the problem of conflict over use of the tree: whichever neighbor owns the tree gets to decide whether to cut it down or not. But this solution has nothing to do with knowledge—except to the extent that non-owners must of course know someone else owns the tree in order to avoid conflicts over use of the tree.¹⁷ The true way to avoid conflict is to establish, and promote respect for, property rights, not to disseminate “local” knowledge or information about others’ preferences.

Barnett’s account implicitly recognizes this. He says, for example, that the “radical dispersion of knowledge . . . leads to a knowledge problem when people seek to act on the basis of their differing knowledge in incompatible ways” (p. 41). Note that the phrase “on the basis of their differing knowledge” is completely superfluous here; if it is eliminated, then this says that a problem arises “when people seek to act—in incompatible ways”—that is, when there are conflicting actions in the use of scarce resources. But conflicts are not caused by lack of knowledge, and thus cannot be solved by the spreading of knowledge. Conflicts arise because of the fundamental fact of scarcity and the lack of property rights allocating control of resources to specified owners.¹⁸ That is why property rights are the only way to prevent conflicts over scarce resources.

¹⁶One wonders why Barnett does not refer instead to “problems of preference.” But this may have been a more obviously faulty notion, as it does not garner automatic respectability due to association with Hayek and other intellectuals.

¹⁷See note 23, below, and accompanying text, discussing the boundary-defining role of property rights and its relation to Barnett’s second-order problem of knowledge.

¹⁸Hayek’s model leads Barnett into further error, as can be seen in his statement that “there is no problem of scarcity in the absence of an incompatibility of subjective preferences” (p. 38). But this gets it backwards. We cannot even meaningfully say that preferences “conflict” unless they are manifested in conflicting actions regarding the use of particular scarce resources. Thus the concepts of scarcity and conflict are more fundamental than the notion of

Why would anyone think knowledge could prevent conflict? Even omniscient actors, who are fully aware of each other's preferences and intentions, may struggle for control of a given scarce resource. If lack of knowledge is the reason for conflict over the tree in Barnett's tree example, surely the two neighbors would be able to learn of each other's conflicting preferences—by speaking with or watching each other—more easily than they learn similar facts in “condensed” form from the general price system! How will prices tell owners who owns the tree, i.e., who may control it? In fact, the existence of prices presupposes a system of private property, which itself already resolves conflicts over the use of scarce resources. As Hoppe (1996, p. 145) puts it, “[p]rivate property is the necessary condition—die Bedingung der Möglichkeit—of the knowledge communicated through prices.” In any private-property system, whether or not prices have yet arisen, the private-property rules themselves suffice to promote peace and cooperation.

And a deeper difficulty looms in Barnett's account. For how can knowledge, or even preferences, of two individuals “conflict”? If we use the term “preference” in the precisely defined meaning it has in praxeology, where it concerns only one's demonstrably preferred use of one's own property (Rothbard 1997c), there can be no conflict in preferences. The non-owner simply cannot have demonstrated preferences with regard to his neighbor's property, because these preferences would have to be demonstrated in action with another's property, which is prohibited. And if, instead, Barnett means only to use “preferences” in some colloquial, imprecise sense, how can information prevent conflicting preferences? In this loose sense of preference, individuals can have different preferences, even if they are “aware” of the other's wants. And such a casual conception of preference cannot hope to be used to establish a rigorous case for private property, anyway.

Libertarians (and Misesian–Austrians) recognize that it is only actions that can conflict; it is the very possibility of conflict over the use of things that renders these things scarce resources and thus possible economic goods. Again, when the rubber hits the road, Barnett recognizes this truth: he notes that “there would be no knowledge problem with respect to resource use in the absence of scarcity” (p. 37). He also notes that

[t]he actions of some, not their preferences, are what interfere with the ability of others to pursue happiness by acting on the basis of their own personal and local knowledge. What is sought is a social order in which such knowledgeable actions by everyone are possible. (p. 43).¹⁹

conflicting preferences or knowledge. On the theory of demonstrated preference, see Rothbard (1997c) and Mises (1966).

¹⁹Barnett's (p. 77) conception of rights is also consistent with this emphasis on scarcity and action. “[R]ights are construed as enforceable claims to acquire, use, and transfer resources in the world—claims to control one's person and external resources.” Such rights are thus operational and can serve to guide action so that conflicts are avoided. See also pp. 100–01.

Thus, when he actually has to formulate operational rules for guiding conduct, Barnett appropriately focuses on conflicting actions directed at scarce resources and shows that property rights are necessary to prevent such conflicts. Talk about knowledge and preference conflicts, and about the need for “knowledgeable actions” (instead of successful action), is superfluous and distracting window dressing.

Instead of the misplaced emphasis on knowledge, Barnett could have more straightforwardly noted that there indeed is a problematic potential for interpersonal conflict over scarce resources (including one’s body), which would interfere with his assumed goals of peace and happiness. He could then have argued that private-property rights and the libertarian principles of self-ownership and Lockean homesteading solve this problem of interpersonal conflict (Hoppe 1989b, p. 131). Libertarian homesteading and property rules give rise to peace and prosperity, because in such a system conflicts can be avoided and prices can arise to allow economic calculation and thus rational resource allocation.

In fact, this more direct approach could have led Barnett to recognize that it is possible to give much more than a merely hypothetical or consequentialist defense of libertarian principles, by using Hoppe’s pathbreaking argument that advocacy of any social ethic other than private property contradicts peace- and happiness-conducive norms such as cooperation and conflict-avoidance, which are necessarily presupposed by all participants in argumentation.²⁰ In fact, in other writings Barnett argues, in a way compatible in approach with Hoppe’s argumentation ethics, that those who claim that the U.S. Constitution justifies certain government regulation of individuals are themselves introducing normative claims into discourse, and thus cannot object, on positivist or *wertfrei* grounds, to a moral or normative criticism of their position (Barnett 1995, p. 100).²¹

What about the goal of prosperity? Here Barnett could have pointed out, following Mises, that the private-property order and its accompanying price system also permits economic calculation and thus is the only way to achieve this goal. “Knowledge” would have been recognized as merely a technical problem²²

²⁰See Hoppe (1989b, p. 131). Hoppe’s discourse ethics would appear to be a natural complement to Barnett’s own views and previous writings, especially given that Barnett has in the past been heavily influenced by Hoppe’s mentor Rothbard (1988, pp. 44–45), who claimed that Hoppe “has managed to establish the case for anarcho-capitalist–Lockean rights in an unprecedentedly hard-core manner, one that makes my own natural law/natural rights position seem almost wimpy in comparison.”

²¹See also Barnett (1995, pp. 93–122; 1993, pp. 853–68; 1998, p. 122) following Fuller in arguing that the common law usefully requires parties to state their claims in terms of rights, thus necessarily asserting (presupposing) some principle or standard by which the claim to right can be tested.

²²Hülsmann (1997, p. 44). The need to acquire knowledge faces even Crusoe alone on his island, who has no need for private-property rules because there are no other people and thus no possibility of interpersonal conflict.

that confronts any individual when choosing means to achieve certain ends, and when deciding which ends to pursue.

As for the right to contract (contractually transfer resources to others), Barnett provides a Byzantine argument that such a contract-based system is desirable because it requires the buyer to take the current owner's knowledge "into account" (pp. 53–54). Barnett also favors freedom of contract because it allows a price system to emerge, which serves as a powerful engine for the encoding and transmission of knowledge. Again, knowledge need not be even mentioned to support the institution of contracting. First, Barnett has already argued that the rights to homestead and use property are necessary to solve conflicts and promote prosperity. But the right to contract is implicit in the rights to acquire and use property. This is because if one has the right to acquire property, one has the right to abandon it (i.e., one has to be permitted to get rid of it, e.g., give it to another). And if one has the right to use property, this implies that others cannot take the property without obtaining the owner's consent.

Second, as Barnett notes, the right to exchange titles to property allows a price system to arise. Yet as already noted, the price system promotes Barnett's goal of prosperity not because of knowledge dissemination but because of the crucial role of prices as accessories of appraisal. Third, permitting contractual transfer of resources promotes prosperity because both parties to a voluntary exchange are made better off (Rothbard 1997c).

Thus, it is the potential for interpersonal conflict and lack of objectively and justly defined property rights that endangers liberty, peace, and prosperity, not ignorance of others' preferences and local knowledge. Barnett's various "knowledge problems" are therefore better reformulated as "conflict problems." Libertarian principles would then be seen as ways to promote harmony and prosperity and to avoid conflict, instead of remedying the non-problem of deficiencies in knowledge.

THE SECOND-ORDER PROBLEM OF KNOWLEDGE AND THE RULE OF LAW

"The second-order problem of knowledge is the need to communicate knowledge of justice in a manner that makes the actions it requires accessible to everyone" (p. 85). This is where the rule of law comes in. The rules of justice (i.e., substantive laws concerning private-property rights etc.) must be adequately communicated to individuals so that they can serve as guides to action and thus prevent conflicts. To ensure adequate communication, various "formal" requirements must be satisfied. These formal requirements—the rule of law—govern both the form of laws and processes by which they are generated and promulgated (p. 84).

For example, rules of conduct must be communicated ahead of time (*ex ante*); and they must also be sufficiently concrete to be applied in a variety of situations. These and other considerations lead to the conclusion that laws must be: "(a)

general rules or principles that are (b) publicized, (c) prospective in effect, (d) understandable, (e) compossible, (f) possible to follow, (g) stable, and (h) enforced as publicized" (p. 107). Otherwise, a rule cannot serve as an operational guide to conduct, or will not be just.

Abstract Rights and Legal Precepts

As Barnett insightfully explains, principles such as private property, first possession, and freedom of contract are very abstract, and thus cannot serve to guide conduct except in relatively rare situations (pp. 84, also 85, 94–97, and 109–17). (Barnett refers to such abstract natural rights as "background" rights, as opposed to the actually existing or enforced laws or rights, which he refers to as legal rights. It is background rights to which legal rights should conform [p. 16]). Thus, any legal system must develop a body of specific or concrete legal rules or principles, based on or at least compatible with more abstract background rights. Barnett refers to the particular, concrete rules or principles that serve as guides to action as legal precepts (pp. 94–95).²³

This analysis is on the mark, because it is true that legal principles must be known (communicated or published) and operational (sufficiently concrete) if they are to be used to avoid conflicts. The common tie between Barnett's second-order and first-order problems is therefore not knowledge but rather conflict-avoidance. A private-property order helps to avoid conflicts because each scarce resource is assigned a specified proper owner (reformulated first-order analysis). For conflicts to actually be avoided by individuals respecting these rules, however, the various rules as well as actual property boundaries must of course be known: I cannot consciously avoid trespassing on your property unless I know it is property and that trespassing is impermissible.

As a practical matter, this requires the rule of law be followed, and that legal rules be concrete enough (Barnett's legal precepts) to serve as operational guides to action. This problem is in a sense inherent in the very idea of a private-property order, because the latter cannot exist if no one knows what conflict-avoidance rules to follow, but it is a real problem nonetheless and deserves the attention Barnett gives it.

THE THIRD-ORDER PROBLEM OF KNOWLEDGE AND THE COMMON LAW

What kind of legal and political system guarantees (or at least makes it possible) that the rule of law will be followed? How will concrete legal precepts be developed? (Barnett does not ask how the abstract natural or background rights are to be developed; presumably through the writings of academic specialists like Barnett.) Clearly, some institutional means of providing such concrete private-property rules is

²³On the objective function of property rules, see Hoppe (1989b; 1993); see also Barnett (p. 101): "Only a general reliance on objectively ascertainable assertive conduct will enable a decentralized system of rights to perform its allotted boundary-defining function."

needed. This is where a decentralized law-generation process such as the common law steps in.

In chapter 6, Barnett expands the conception of the rule of law to include the way in which a body of legal precepts is developed. According to Barnett, the “third-order problem of knowledge is the need to determine specific action-guiding precepts that are consistent with both the requirements of justice and the rule of law” (p. 108). Again, I would characterize this as related to conflict-avoidance, rather than knowledge. In order to avoid conflicts, concrete private-property rules must be developed by some institution, and the institution must be such that the rules developed are just.²⁴

Barnett first maintains that there are limits to the ability to deduce specific legal precepts from abstract principles of justice (natural rights), in part because many sets of legal precepts are consistent with the general parameters of the abstract principles of natural rights (pp. 109–11). He argues that a common-law type decentralized legal system, unlike law professors and philosophers, can develop legal precepts because, in such a system, they gradually develop and evolve from the outcomes of thousands of actual cases.

Yet, Barnett does not provide a rigorous argument showing where are the exact limits of the ability to deduce concrete rules. He evidently feels that the more abstract principles can, for some reason, be established by armchair theorists. If denizens of the ivory tower can do this, why can they not deduce or establish more concrete rules by simply considering more and more contextual facts? In the Roman law system—a somewhat decentralized legal system superior in many ways to the common law—Roman jurists (jurisconsults) helped develop the great body of Roman law by providing opinions on the best way to resolve disputes. These disputes were often purely hypothetical or imaginary cases, in which the jurists asked: “under such and such a possible or conceivable combination of circumstances, what would the law require?”²⁵ It is conceivable that a large part or even all of the legal code existing in a given society can be “deduced” in this fashion, and then these rules applied like precedents to actual controversies as they arise. As a libertarian (and, I confess, a lawyer), I must say that I believe I would be more comfortable living under a set of concrete rules deduced by libertarian philosophers than the (perhaps more concrete) set of rules developed under the actual common law.

²⁴Just rules are those that conform to the type of private-property order that serves to permit conflict avoidance and enable prosperity. As Hoppe has shown, such a private-property order is based on Lockean type homesteading since the first-possessor rule is the only objective rule that can be intersubjectively and universalizably agreed upon by potential disputants. See Hoppe (1989b, p. 131).

²⁵Hadley (1996, p. 66) goes on to note that “A recent able lecturer on ancient law, Mr. Maine, finds in this fact an explanation of the more thorough scientific development which distinguishes the Roman law from the English.” See also Frier (1985, pp. 163–71), Jolowicz (1952, p. 93), Buckland and McNair (1965, pp. 6–15, esp. 9). Barnett notes the similarity between common-law and civil-law legal systems (p. 115, 10n). The civil law was derived from principles developed in a common-law fashion in the Roman law. It is the Roman law, more than the more positivistic and legislation-worshipping civil law, that bears a similarity with the common law. See Kinsella (1995, pp. 135–36).

Still, Barnett's argument in favor of a common-law system makes sense, even to libertarians who favor a deductive approach to rights (Hoppe 1989b, p. 131; Rothbard 1998; Kinsella 1997, pp. 607–45). Legal rules must be concrete in the sense that the rules must take into account the entire relevant factual context. Since there are an infinite number of factual situations that could exist in interactions between individuals, a process which focuses on actual cases or controversies is likely to produce the most "interesting" or useful rules.²⁶ It probably makes little sense devoting scarce time and resources to developing legal precepts for imaginary or unrealistic scenarios. If nothing else, a common-law type system that develops and refines legal precepts as new cases arise serves as a sort of filter that selects which disputes (i.e., real, commonly-encountered ones) to devote attention to.

Barnett thus makes a convincing case that, in a decentralized legal system such as the English common law (or the early Roman law, the Law Merchant, and even modern arbitral systems)—especially one in which judges or arbitrators attempt to apply fundamental notions of justice to concrete situations—it is reasonable to expect a body of concrete legal concepts and precepts to develop, which are more or less compatible with fundamental notions of justice.²⁷

If and when unjust legal precepts do arise, they are not necessarily permanent because a common-law process allows them to be modified or replaced when this becomes apparent. However, unless it is clear that a given legal precept is inconsistent with justice, then there should be reluctance to jettison established legal rules or precedents. This thus gives rise to the legal doctrine of *stare decisis* (or *jurisprudence constante* in continental or civil-law systems) (Kinsella 1994, p. 1278).

This leads Barnett to make the provocative (for libertarians) argument that the "legal rights generated by a sound legal process may even be entitled to presumptive legitimacy" (p. 22, emphasis added; also p. 130),²⁸ and thus can even assist in determining the content of our background rights. We can always subject concrete legal precepts developed by courts to the scrutiny of the more abstract principles of justice and natural rights. This can help identify legal precepts "that are . . . inconsistent with either justice or the rule of law or both" (p. 110).

One question that bears exploring in this regard is exactly how libertarian are the abstract principles of justice that have been followed throughout the ages by judges and jurists of the common law, Roman law, and Law Merchant? In other words, just how libertarian are the legal precepts actually developed historically, and just how strong is the presumption of legitimacy which is to be accorded to

²⁶This is analogous to Mises's method selecting certain empirical assumptions (e.g., assuming there is money instead of barter) to develop "interesting" laws based on the fundamental axioms of praxeology, rather than irrelevant or uninteresting (though not invalid) laws. See Mises (1962, p. 41; 1981, pp. 14–16, 30–31, 87–88; 1966, pp. 65–66).

²⁷For further discussion of decentralized legal systems and related matters, see Kinsella (1995).

²⁸For conventional views regarding the duty to obey laws promulgated by the state, see Smith (1973, pp. 950–76) and Green (1996, p. 15).

these extant bodies of law? Which concepts of the common law are illiberal enough, when compared to Barnett's carefully-developed abstract principles of justice, to overcome the presumption of legitimacy? And how did the common law happen to employ more or less correct abstract principles of justice even before modern libertarian theory? Are these principles intuitive? Was it luck? Natural selection? Barnett does not answer these questions, but cannot be criticized for not doing everything.²⁹ Libertarian law students and scholars looking for topics to research, pay heed!

PROBLEMS OF INTEREST AND POWER

After discussing the problems of knowledge (better characterized as conflict-avoidance, as noted above), Barnett turns to problems of interest and power. The problems of interest concern how individuals balance questions of incentive, compliance, and partiality in access to resources. The problems of power are the possibility that there will be error and abuse in applying or enforcing legal precepts. Barnett elaborates on these challenges, and shows how each of them is addressed by the libertarian conception of justice and the rule of law.

Most of Barnett's arguments concerning interest and power are more straightforward than those regarding knowledge in Part 1, even where Barnett tries to support his arguments by referring to various knowledge-related aspects of the issue at hand. Barnett's discussion of the "problem of partiality," however (the first problem of interest), seems overly muddled due to the preoccupation with knowledge. Barnett claims that there is a "partiality problem" which "arises from the fact that people tend to make judgments that are partial to their own interests or the interests of those who are close to them at the expense of others" (p. 136). This partiality "leads to a tendency to favor one's own interest"; partiality "is judgment affected by interest" (p. 137). Maybe I am slow, but I cannot see what is the alleged problem here. This seems to be nothing more than the unavoidable fact of self-interest. Of course people are partial to themselves. What is wrong with this? I see no need for people to take "into account the partial interests of others" (p. 137). So long as others' property rights are respected, it seems to me that one ought to be able to be as "partial" as one likes without others complaining about it.

Barnett's discussion of the other problems of interest and the problems of power, though, are much more fruitful and less tainted by the occasional and vain attempt to link it to the Hayekian knowledge paradigm. For example, it is certainly true that the incentives (chap. 8) which are provided under capitalism are very useful and are missing under socialism. And there is indeed a need to ensure compliance (chap. 9) with private-property rules, e.g., by using force for self-defense, restitution, and punishment (pp. 176, 184, 191). I see no strong reason to call these problems of "interest," although the label seems harmless enough.

²⁹But see his discussion on pp. 122–23.

And (Part 3), there are indeed dangers involved in the use of power, such as the possibility of error in enforcement and punishment (chaps. 10 and 11), and abuse of the power of law enforcement (chap. 12). Many of Barnett's arguments here are very insightful and persuasive (some discussed below), although again, I find most of them to be so despite the superfluous comments on knowledge. In fact, I found the last half of the book (chaps. 9–15), which bears less and less on the knowledge paradigm introduced at the beginning, to be the most fascinating and best part of the book (plus the discussion of the common law in chap. 6).

Restitution vs. Retribution

One interesting argument that Barnett makes, with regard to enforcement error and abuse, is that all criminal justice should be restitutive, not punitive or retributive. As I have argued elsewhere,³⁰ I believe Barnett is mistaken that retribution (punishment) violates the rights of (actually guilty) aggressors.³¹ However, in keeping with his consequentialist approach which avoids questions of justification of fundamental norms, Barnett does not pretend to make a strong theoretical case for the rights of aggressors to be free from punishment.³²

Indeed, most of Barnett's concerns regarding punishment are warranted: he opposes it because he believes it may deter crime less than would a restitution-based system, and also because the unavoidable possibility of error can lead to "infliction of harm on the innocent" (p. 228, emphasis added; also pp. 197, 228). Like Barnett, I am concerned about the unavoidable possibility of mistakenly punishing the innocent, and thus admit the appeal of a restitution-based system in order to avoid punishing innocents. Moreover, Barnett makes a powerful and original argument for why the standard of proof should be higher if a victim seeks to punish a purported aggressor rather than merely obtain restitution (p. 212). Thus, a victim seeking to punish the aggressor must prove guilt beyond a reasonable doubt, whereas the lower standard of preponderance of the evidence is more appropriate for a civil trial for damages. It is therefore more costly to seek punishment than to seek restitution. For this and other reasons, restitution would probably become the predominant mode of justice in a free society.

³⁰Kinsella (1998–99, pp. 79–93); for more on the theory of inalienability, including discussion of Barnett's views in this regard, see Kinsella (1999) and Block (forthcoming).

³¹For justification of the right to punish aggressors, see Kinsella (1997; 1996, pp. 313–26) and Hoppe (1989b, p. 131).

³²As Barnett acknowledges, "this analysis cannot conclusively prove that no combination of compensation or punishment can ever address effectively the compliance problem" (p. 237). And further: "I do not claim to have completely demonstrated this proposition [that justice requires restitution, not punishment] either in my earlier writings, or in this book" (p. 185 n. 36). See also, pp. 228, 320, 321: "If men were gods, then perhaps imposing rewards and punishments on the basis of desert would be a workable theory." Also: "It has been noted that one who wishes to extinguish or convey an inalienable right may do so by committing the appropriate wrongful act and thereby forfeiting it" (Barnett 1986b, p. 186). As I noted in (Kinsella 1998–99) Smith (1996, p. 46) is incorrect in claiming that Barnett's writings support Smith's view that all rights, even those of a murderer, are inalienable.

Nevertheless, acknowledging (and justifying) the theoretical legitimacy of punishment can be useful. For example, punishment (or a theory of punishment) may be utilized to reach a more objective determination of the proper amount of restitution,³³ because a serious aggression leads to the right to inflict more severe punishment on the aggressor, which would thus tend to be traded for a higher average amount of ransom or restitution than for comparatively minor crimes.³⁴ Especially offended victims will tend to bargain for a higher ransom; and richer aggressors will tend to be willing to pay more ransom to avoid the punishment the victim has a right to inflict, thereby solving the so-called “millionaire” problem faced under a pure restitution system (where a rich man may commit crimes with impunity, since he can simply pay easily-affordable restitution after committing the crime).

Moreover, even if punishment is banned (*de facto* or *de jure*) and is not an actual option—because of the possibility of mistakenly punishing innocents, say—an award of restitution can be based on the model of punishment. To-wit: a jury could be instructed to award the victim an amount of money it believes he could bargain for, given all the circumstances, if he could threaten to proportionately punish the aggressor. This can lead to more just and objective restitution awards than would result if the jury is simply told to award the amount of damages it “feels” is “fair.” Barnett nowhere specifies any objective standards or criteria by which a judge or jury is to determine the amount of restitution a victim is to receive for a non-economic crime like murder, rape, and the like. He specifies only that the aggressor must “compensate” the victim for the “harm caused,” to “restore” the victim (pp. 159, 185). Thus, a retribution-based system, even if used only as a model to help determine the amount or standard of restitutive damages, supplements Barnett’s theory of a restitution-based justice system.

Preventative Force

Barnett makes a convincing case that the principle of “extended self-defense” justifies imprisoning (sometimes for life) those who have made a sufficiently unambiguous communication of a threat to another (pp. 186–91). Because of the possibility of enforcement abuse and rule of law considerations, however, Barnett would limit this remedy to those persons who have communicated a threat to others by their past criminal behavior (i.e., those who have been convicted, perhaps multiple times, of a crime), and only if the previous crimes were proved beyond a reasonable doubt (pp. 213–14).³⁵

³³On the issue of determination of the proper amount of damages, see Benson (1996, pp. 79-83) and Rothbard (1998, pp. 88–89).

³⁴For further discussion of criminals buying their way out of punishment, see Kinsella (1998–99; 1997, p. 635); Rothbard (1998, pp. 86, 89); Pilon (1978, p. 356).

³⁵See also Barnett (1996, p. 157). One problem with Barnett’s solution here is that, under his restitution-based system, previous crimes would have been proved by some standard less than the “beyond a reasonable doubt standard,” such as the “preponderance of the evidence” standard, and thus it would be very difficult to jail threatening individuals.

This limitation on the principle of extended self-defense seems to me to be unduly restrictive, however. In my view, a threat can be viewed as a species of the crime of assault. Assault is defined as putting someone in fear of receiving a battery (physical beating).³⁶ A threat should count as a type of assault because the threatener puts the victim in fear of receiving a battery, and also deliberately increases the likelihood of physical harm befalling the victim. As explained elsewhere (Kinsella 1997, pp. 639–40), assault may be punished because this is the only way the victim can reciprocate and put the aggressor–threatener in a like state of fear. I see no reason to allow extended self-defense only where the aggressor has previously been convicted of a crime. Even the first crime is a crime.

POLYCENTRISM—I MEAN, ANARCHO-CAPITALISM

One of the best parts of *The Structure of Liberty* is its argument in favor of anarcho-capitalism. It is marred by its strict avoidance of the more appropriate terms anarcho-capitalism or anarchy; Barnett for some reason prefers to describe anarcho-capitalism as a “polycentric constitutional order,” presumably to avoid unduly alienating statist readers. (If he feels polycentric is a better term than anarcho-capitalism, he does not offer reasons.)

Barnett notes that various types of structures have been tried “to deal with the problem of enforcement abuse by a coercive monopoly of power,” i.e., government, including elections, federalism, and free emigration. Yet, he recognizes, these have failed to keep government in check. Thus, he argues that each of these three principles “reflects a more fundamental principle that needs to be more robustly incorporated into institutional arrangements: reciprocity, checks and balances, and the power of exit” (p. 256).

Barnett elaborates on these in chapter 13, one of the best in the book. He notes that two constitutional principles are sufficient to achieve a polycentric order: nonconfiscation and competition. Under the former, “[l]aw-enforcement and adjudicative agencies should not be able to confiscate their income by force, but should have to contract with the persons they serve.” Under the latter, they “should not be able to put their competitors out of business by force” (p. 258). As is clear to libertarians, adherence to these two principles would indeed result in the anarcho-capitalist society, for no government can exist without the ability of a coercive monopoly over its services.³⁷

³⁶Louisiana Criminal Code § 36; Black’s Law Dictionary (1994, p. 114; defining assault); *Mason v. Cohn*, (1981; defining assault). The Louisiana Criminal Code defines assault as “an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery.” A battery is defined as “the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.” Louisiana Criminal Code § 33. Assault can thus also include an attempted battery (which need not put the victim in a state of apprehension of receiving a battery—e.g., the victim may be asleep and be unaware that another has just swung a club at his head, but missed).

³⁷Charles Murray (1997, p. 64) makes a similar point when he argues that citizens should be able to opt out of certain government programs.

Barnett makes several excellent points in chapter 13. He notes, for example, that if an individual refuses to contract with any legal system, force can still be used against him if he harms others. "The justice of using force against such a person is based on the fact that he or she violated the rights of the victim, not that he or she consented to the jurisdiction of a court" (p. 278). It is refreshing to see this point emphasized, because many advocates of anarcho-capitalism seem to feel that an aggressor can be punished by a defense agency only if the aggressor somehow previously consented to the jurisdiction of the agency (if he did not consent, the only permissible remedy is presumably ostracism).

Another excellent point concerns the likelihood of a polycentric order actually embodying liberal norms. Barnett sensibly points out that

it is difficult to imagine a society that did not adhere to some version of a liberal conception of justice ever accepting a polycentric constitutional order in the first instance. A societal consensus supporting these rights and remedies would seem to be a precondition for ever peacefully ending [monopoly government power]. And, once adopted, the inherent stability of the robust "checks and balances" provided by a competitive system is likely to preserve this initial consensus. (pp. 281–82)

Finally, my favorite part of the book is the well-written, thoughtful, and imaginative chapter 14, "Imagining a Polycentric Constitutional Order: A Short Fable," in which Barnett speculates on what a possible polycentric-ordered society might look like and how it might function. I mean, an anarcho-capitalist society.

TERMINOLOGY

It is clear that Barnett is a libertarian and that *The Structure of Liberty* is thoroughly infused with libertarian principles with regard to rights, government, and economics. He even goes so far as to advocate a polycentric—i.e., anarcho-capitalist—system. But one irritating aspect of the book is the unconventional and idiosyncratic use of terminology. Some of these terms seem to be used to try to avoid alienating statists. It is understandable—but ultimately futile, in my view—why Barnett might want to soften the blow of loaded terms like libertarian and anarchy, and use the kinder, gentler (but blander, less descriptive, and more misleading) terms liberal and polycentric instead.³⁸ In my view it is preferable to call a spade a spade.³⁹ We won't fool anyone into supporting anarcho-capitalism by using a fancier term.

³⁸At least the book is not loaded with the recent term "market liberal," which is, thankfully, withering on the vine.

³⁹See Rand (1964, p. vii):

The title of this book [*The Virtue of Selfishness*] may evoke the kind of question that I hear once in a while: "Why do you use the word 'selfishness' to denote virtuous qualities of character, when that word antagonizes so many people to whom it does not mean the things that you mean?" To those who ask it, my answer is: "For the reason that makes you afraid of it."

Rand also unabashedly, and admirably, proclaimed herself to be a radical for capitalism.

Some of the terms employed, such as “several property” and “polycentric” order, clearly reveal the Hayekian influence on Barnett; other Hayekian terms such as “spontaneous” and “coordination” are also sprinkled throughout the book. Nothing seems to be gained except confusion and lack of clarity by replacing perfectly good terms like private property and anarcho-capitalism with inferior terms, or even with equally conceptually valid terms.

Barnett also uses the expressions “background rights” instead of natural rights; and “legal precepts” instead of “concrete legal rules” or some other such descriptive term. I must admit that I like having a term for operational, concrete legal rules as distinct from more abstract principles; and “legal precepts” seems, I suppose, as good as any. But “background rights” does not seem to be an improvement over terms such as natural or moral or individual rights (or just plain “rights”). However, these quibbles mainly relate to Barnett’s strategy or style, not to the substance or soundness of his arguments.

PROBLEMS WITH THE PROBLEMS

A consequentialist analysis can be valuable, but one difficulty with Barnett’s account is that he presumes that the universally shared goals of peace, prosperity, and happiness can be achieved if only we solve three main problems (of knowledge, interest, and power). I have already explained that the Barnettian problems of knowledge are better reformulated as aimed at conflict-avoidance, and thus peace (and perhaps at enabling economic calculation, and thus prosperity). A deeper question is why are these the only problems that get in the way of our goals? Why are these three problems exhaustive? What about other purported problems harped on by communitarians, socialists, or other consequentialists, such as inequality and poverty, commercialism and consumerism? Barnett’s considers this issue (pp. 325–26), but provides only a brief and somewhat unconvincing argument that addressing these other problems with legal coercion would undermine the “foundations” of the “structure of liberty” and thus prevent the three fundamental problems from being solved.⁴⁰

CONCLUSION

As is often the case in a review of this sort, many of my comments have been critical, but this should not give the impression that I find fault with the bulk of Barnett’s work. I have focused primarily on the aspects with which I disagree, and have emphasized economic calculation and the Hayekian knowledge paradigm, and have largely omitted discussion of the many valuable ideas in *The Structure of Liberty*. In fact, I have profited immensely from many of Barnett’s previous theories, such as his views on constitutional interpretation, contract theory, and his tantalizing suggestion that there should be a presumption against the legitimacy of government statutes in derogation of common law or liberties—a “presumption of liberty” (1995; 1993). Most of these

⁴⁰For a similar critique of Barnett’s argument in this regard, see Solum’s (1999, pp. 1791–92) review of *The Structure of Liberty*.

are not included or discussed at length in this treatise. Luckily, Barnett's next book is reportedly *The Presumption of Liberty: Restoring the Constitution* (Mingardi 1999).

The Structure of Liberty is an important new work by one of libertarianism's most significant and thoughtful legal scholars. Its primary substantive deficiency is its over-reliance on the Hayekian knowledge paradigm, but the work nonetheless arrives at the private-property norms that address the more relevant issue of interpersonal conflict. The book is full of subtle insights regarding standards and burdens of proof, restitution, the workings of the common law, and the operation of anarcho-capitalism. It is must-reading for all serious libertarian theorists, especially libertarian lawyers and legal theorists.

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