

No State Required? A Critical Review of the Polycentric Legal Order

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I. INTRODUCTION

As the vision of law as a science wanes,¹ legal scholars justify their projects through interdisciplinary scholarship. Surprisingly, while new interdisciplinary approaches to legal analysis such as microeconomic analysis,² sociological analysis,³ critical literary analysis,⁴ and deontological theories of equity⁵ are embraced, few question the centralized legal system itself. Few anarchists will devote the time and expense to enter the legal profession and then attack the very institutions upon which their career depends.⁶ Nevertheless, such a personality occasionally violates the academy; when he does, legal scholarship takes a break from mundane pettifoggery and a truly interesting debate begins.

Randy E. Barnett,⁷ a law professor and former prosecutor, argues in his treatise, *The Structure of Liberty*, that the current monocentric constitutional

1. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 194-95 (1999) [hereinafter POSNER, *PROBLEMATICS*]. According to Lord Coke, the purpose of legal scholarship was to seek the “artificial reason of the law. . . .” *Id.* at 95.

2. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* vii (5th ed. 1998). See generally ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 3 (3d ed. 2000).

3. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). See generally ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) [hereinafter POSNER, *SOCIAL NORMS*]; Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1003-06 (1995).

4. See generally, e.g., STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH—AND IT’S A GOOD THING, TOO* (1994).

5. E.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 90 (1974) [hereinafter NOZICK, *ANARCHY*]; JOHN RAWLS, *A THEORY OF JUSTICE* 30 (1971).

6. Lysander Spooner, a nineteenth century American libertarian and anarchist philosopher, however, was a practicing lawyer. Spooner entered the legal profession in the mid-nineteenth century, when entry barriers for attorneys in the United States were quite low. See *Lysander Spooner Biography*, at <http://www.lysanderspooner.org/Bioch6.htm> (last visited Dec. 30, 2002); see also POSNER, *PROBLEMATICS*, *supra* note 1, at 281-95 (criticizing the inefficiency of the Socratic method, calling for a two-year degree program for practicing law, and bemoaning the neglect of interdisciplinary studies in standard law school curricula).

7. In 2002, Randy E. Barnett was the Austin B. Fletcher Professor of Law at Boston University School of Law. See Boston Univ. Sch. of Law, *Faculty Profiles at* <http://www.bu.edu/law/faculty/profiles/barnett/index.html> (last visited Dec. 30, 2002).

order infringes on the liberty of individuals, and that it should be replaced by a polycentric order wherein the power to adjudicate and resolve disputes would be held by private companies.⁸ Barnett's constitutional modeling relies on market forces and private enforcement of norms to provide the structure necessary to preserve liberty and individual rights.⁹ This is a radical idea and it deserves examination. Unfortunately, perhaps because of the arcane nature of such philosophical discussions, scant attention has been paid to Barnett's work outside libertarian circles.¹⁰

8. See generally RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* (1998) [hereinafter BARNETT, *STRUCTURE*].

9. Barnett makes a distinction between "liberty and license" in the first chapter. *Id.* at 1.

By liberty is meant those freedoms which people ought to have. License refers to those freedoms which people ought not to have and thus those freedoms which are properly constrained. But this distinction merely restates the tension, it does not explain or justify it. And it surely does not tell us where to draw the line.

Id. at 2. Much of the rest of the book is spent attempting to define where, abstractly, that line should be drawn. Pepperdine economist George Reisman, a staunch limited government advocate, makes a different distinction, contrasting the rational concept of freedom with what he terms the anarchic concept.

The concept of freedom when employed rationally, presupposes the existence of reality, and with it the laws of nature, the necessity of choice among alternatives, and the fact that if one resorts to force, one must expect to be met by force. Of particular importance is the fact that it presupposes the necessity of having the voluntary cooperation of everyone who is to aid in an activity—including the owners of any property that may be involved. After taking for granted the presence of all this, the rational concept of freedom then focuses on the absence of one particular thing: the initiation of physical force—in particular, by the government.

In sharpest contrast to the rational concept of freedom is the anarchic concept. The anarchic concept of freedom evades . . . the fundamental and radical distinction that exists between two sorts of obstacles to the achievement of a goal or desire: "obstacles" constituted by the ordinary facts of reality, including other people's voluntary choices, and obstacles constituted by the government's threat to use physical force.

GEORGE REISMAN, *CAPITALISM* 23-24 (1998).

10. See, e.g., David N. Mayer, Book Review, *The Structure of Liberty*, 20 *CATO J.* 279, 279 (2000), available at <http://www.cato.org/pubs/journal/cj20n2/cj20n2.html> (last visited Dec. 30, 2002). But see Lawrence B. Solum, Book Review, *The Structure of Liberty: Justice and the Rule of Law*, 97 *MICH. L. REV.* 1780 (1999) (devoting significant attention to Barnett's work).

A brief note on word usage. In this Article, "anarcho-capitalist" refers to those who support a free market without a centralized government. "Anarchist" refers to any who support a political order without a centralized government, including the anarcho-capitalists and communitarians in the tradition of Bakunin who oppose capitalism, although many on the radical left refer to their politics as "libertarian." See Noam Chomsky Archive, *Notes on Anarchism*, available at <http://www.zmag.org/chomsky/other/notes-on-anarchism.html> (last visited Jan. 29, 2003). This term herein is used exclusively to refer to individuals who support a free market, but maintain that a limited government is necessary, such as Robert Nozick.

By proffering a new legal order with private enforcement and private adjudication of criminal disputes, Barnett advocates a legal regime without a public executive or judicial branch.¹¹ Thus, he supports political anarchy of a type that may have only existed once—in medieval Iceland.¹²

It is a common misperception that political anarchists advocate a world devoid of rules. Nothing can be further from the truth.¹³ Serious anarchist scholarship recognizes the need for rules and norms to govern peaceful relations between individuals,¹⁴ despite the popular perception that anarchism is violent and destructive.¹⁵ Additionally, there exists a growing body of scholarship concerning anarchism from a pro-free market perspective.¹⁶ Much of this work is outside the academy¹⁷ and ignored by scholars.¹⁸

11. Barnett does not discuss the problem of international disputes. Whether this is because he viewed it beyond the scope of his work or, like most anarchists, he believes his polycentric legal order will only come to fruition when all men worldwide embrace it is unclear from a strict reading of the text. *Cf.* REISMAN, *CAPITALISM*, *supra* note 9, at 323 (“[I]n a world made up of free countries, there would be absolutely no rational economic basis for war or imperialism.”); *see also* KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (A. J. P. Taylor ed., Penguin Books 1967) (1888).

12. *See* WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 1-4* (1996); *see also* DAVID D. FRIEDMAN, *LAW’S ORDER* 263-67 (2000).

13. *See* THE OXFORD COMPANION TO PHILOSOPHY 31 (Ted Honderich ed., 1995) [hereinafter OXFORD PHILOSOPHY] (*s.v.* anarchism) (“[A]narchism does not preclude social organization, social order or rules, the appropriate delegation of authority, or even of certain forms of government, as long as this is distinguished from the state and as long as it is administrative and not oppressive, coercive, or bureaucratic.”).

14. In addition to Barnett’s work, see Professor David D. Friedman’s personal webpage *Police, Courts, and Laws—on the Market*, available at http://www.daviddfriedman.com/Libertarian/Machinery_of_Freedom/Moff_Chapter_29.html (last visited Jan. 2, 2003) for an example of another academic anarcho-capitalist of the spontaneous order school. *See also* LIBERTY AGAINST POWER: ESSAYS BY ROY A. CHILDS, JR. 147 (Joan Kennedy Taylor ed., 1994) [hereinafter CHILDS, LIBERTY].

15. The assassination of President McKinley by an anarchist and the Haymarket Square riots are examples of two incidents that fueled these attitudes. *See* ENCYCLOPEDIA OF THE AMERICAN LEFT 36-37 (Mari Jo Buhle et al., eds., 1990) (*s.v.* anarchism); JAMES W. LOEWEN, *LIES ACROSS AMERICA* 153-54 (1999).

16. *See* CHILDS, LIBERTY, *supra* note 14, at 131.

17. *E.g., id.* at xi-xv (discussing the collection of essays by Roy A. Childs, a prolific, self-educated writer who failed to complete a bachelor’s degree).

18. For examples of popular secondary sources that completely ignore the subject see FRANK BEALEY, *THE BLACKWELL DICTIONARY OF POLITICAL SCIENCE* 13 (1999) (*s.v.* anarchism); J. S. MCCLELLAND, *A HISTORY OF WESTERN POLITICAL THOUGHT* 602, 769, 774, 782 (1996); NOZICK, *ANARCHY*, *supra* note 5, at pt. I; *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 719 (Robert Audi ed., 2d ed. 1999) (discussing classical liberalism, but failing to discuss anarcho-capitalism); OXFORD PHILOSOPHY, *supra* note 13, at 31 (*s.v.* anarchism). *But see* THE OXFORD COMPANION TO POLITICS OF THE WORLD 27 (Joel Krieger ed., 2d ed. 2001) [hereinafter OXFORD POLITICS] (*s.v.* anarchism) (referring to “libertarian” or

This ignorance is inexcusable. The academy always benefits from salutary criticism from outsiders. Further, the mainstream academy has been quite willing to discuss seriously works written by others including prison inmates.¹⁹ It should be willing to consider works such as Barnett's and examine them with an open, though critical, mind.

This Article seeks to aid in rectifying this problem. Although the authors do not accept Barnett's central thesis, his work is powerful and quite worthy of consideration. Though we devote considerable space to critiquing his polycentric order, these criticisms are offered in the spirit of academic debate. We believe that any person who critically examines his work will come away from it respecting him as a passionate advocate of liberty.

The Structure of Liberty's thesis is that a polycentric legal order, with private protection agencies and private adjudication services, would provide a level of justice superior to the current government-run, monocentric legal system.²⁰ Three problems must be overcome when constructing a system of social order: *knowledge, interest, and power*.²¹ The problem of knowledge encompasses both the fact that local individuals possess superior knowledge of local affairs to distant ones, and problems of communication.²² The problem

"individualistic" anarchism grounded in capitalism, referring to Lysander Spooner, Ayn Rand, Max Stiner, and Robert Nozick as sources of inspiration for latter-day anarcho-capitalists). See generally A DICTIONARY OF SOCIOLOGY 19 (Gordon Marshall ed., 2d ed. 1998) (*s.v.* anarchism) (mentioning "free market principles").

19. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* at xi-xii (2000) (discussing the neo-Marxist vision of a new communist order, penned by an American professor and an Italian reporter). Though Hardt and Negri aver that they are Marxists, they also disavow anarchy. *Id.* at 350. This is odd; Marx himself thought that humanity, as it progressed, would not need a governing state in the future. MARX & ENGELS, *supra* note 11, at 116. In distinction, it appears that Marxism-Leninism, as practiced in Soviet Russia, was ready to delay that future stage of human evolution indefinitely. Hardt and Negri do not aver to be Marxist-Leninists, nevertheless, Marx and Engels viewed themselves as rivals of many anarchists. See V.I. LENIN, *INTRODUCTION TO MARX, ENGELS, MARXISM* 22 (Int'l Publ'g Co. 1987) (1915). Engels refers to "the mischief and confusion wrought by Proudhonism, in its original form, among the French and Belgians, and, in the form further caricatured by Bakunin, among the Spaniards and Italians." *Id.*; see also Tom Lewis, Book Review, *Empire Strikes Out*, INT'L SOCIALIST REV., July-Aug. 2002, available at http://www.isreview.org/issues-24/empire_strikes_out.shtml (last visited Jan. 2, 2003) (rearguing hardline Marxist's defense against Hardt & Negri's *Empire*).

20. BARNETT, *STRUCTURE*, *supra* note 8, at 284-97.

21. *Id.* at 299.

22. See 1 F. A. HAYEK, *The Fatal Conceit*, in THE COLLECTED WORKS OF F.A. HAYEK 86 (W.W. Bartley III ed., 1988) ("Once we realise what the task of such a central planning authority would be, it becomes clear that the commands it would have to issue could not be derived from the information the local managers had recognised as important, but could only be determined through direct dealings among individuals or groups controlling clearly delimited aggregates of means.").

of interest refers to the difficulties that accompany information asymmetries when decision-making power is vested in the hands of those with local knowledge.²³ The problem of power concerns the costs imposed on individuals due to enforcement error; to minimize such costs, a restitutionary system is preferred to a punitive system both for concerns of efficiency and equity.²⁴

There is much to be said in favor of *The Structure of Liberty*. It is visionary and thought-provoking. In this era of neo-liberal philosophical predominance, it is refreshing to see someone defend a different perspective in legal scholarship. Further, Barnett should be applauded for doing something that no other anarchist scholar has done: demonstrate how disputes would be resolved at the micro-level in an anarchic-capitalist²⁵ regime.

Nevertheless, there are defects in *The Structure of Liberty's* analysis. It pays little attention to scholarship in the legal, economic, and societal schools that has taken place in the past twenty years.²⁶ This is due, in part, to a flaw common to some who are inspired by the Austrian school of economics: a rejection of empirical examination of the laws of economic behavior.²⁷ This is regretful; the tools of economic analysis of law are not only compatible with an anarcho-capitalist project,²⁸ but also helpful in showing potential weaknesses in *The Structure of Liberty's* analysis that Barnett must address.

The purpose of this Article is threefold. First, the Article introduces ideas of political anarchy. The word "anarchist" too often has been used as an epithet to stifle debate; the first section will therefore explain some of the fundamental ideas behind anarchism and the version promoted by Barnett. The

23. BARNETT, STRUCTURE, *supra* note 8, at 319.

24. *Id.* at 310 n.7.

25. Professor Barnett does not explicitly identify his theories as anarchist in *The Structure of Liberty*. It is clear, however, based on his earlier writings and the very nature of the polycentric order that this is an anarcho-capitalist solution to the problems of order. See generally Randy E. Barnett, *Whither Anarchy? Has Robert Nozick Justified the State?*, 1 J. LIBERTARIAN STUD. 15 (1977) [hereinafter Barnett, *Nozick*], available at <http://www.mises.org/jls/Display.asp?letter=b&action=alphaAuthor> (last visited Jan. 2, 2003).

26. BARNETT, STRUCTURE, *supra* note 8, at 166-67 (dismissing the "free rider" problem in the problem of conflicting individual interests out of hand). Compare *id.* at 70 n.18 (dismissing the problem of externalities) with R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1, 10 (1960). One example of scholarship in social norms that will be consulted for this Article is Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1649-53 (2000) [hereinafter McAdams, *Focal Point*].

27. See generally Bryan Caplan, *Why I Am Not an Austrian Economist*, <http://www.gmu.edu/departments/economics/bcaplan/whyaust.htm> (last visited Jan. 24, 2003).

28. See David D. Friedman, *Anarchy and Efficient Law*, in FOR AND AGAINST THE STATE (John Sanders & Jan Narveson, eds., forthcoming), available at http://www.daviddfriedman.com/Academic/Anarchy_and_Eff_Law/Anarchy_and_Eff_Law.html (last visited Jan. 2, 2003) [hereinafter Friedman, *Efficient Law*].

Austrian school that inspired Barnett is unique in that it attempts to meld natural law, utility, and idealism in its base.

Next, the Article provides a detailed review of the assumptions and arguments in *The Structure of Liberty*. The Article concludes with a critique of *The Structure of Liberty's* micro-level arguments, explaining parts of Barnett's work that need to be strengthened if his project is to succeed. These include, among others, problems of legitimacy, concentrations of power, and defense against foreign aggression.

II. THE TWO VISIONS OF ANARCHY

Thomas Hobbes considered anarchy to be the natural state of humanity.²⁹ Anarchy was to be avoided because of its attendant problems, chiefly the inability to resolve disputes peacefully between individuals.³⁰ This results in new norm creation, with ruthlessness encouraged and the strongest being rewarded with both material and social honors:

Covenants, without the Sword, are but Words, and of no strength to secure a man at all. . . . [I]f there be no power erected, or not great enough for our security; every man will, and may lawfully rely on his own strength and art, for caution against all other men. And in all places, . . . to [rob] and [spoil] one another, has been a Trade, and . . . the greater [spoils] they gained, the greater was their honour; and men observed no other Law[s] therein, but the Law[s] of Honour; that is, to abstain from cruelty, leaving to men their lives, and instruments of husbandry.³¹

Political anarchists disagree with Hobbes's bleak assessment. Despite popular perception, most political anarchists do not call for a world without rules.³² Instead, they want to dismantle the government's monopoly on the use of force and create a system of *voluntary* cooperation.³³ Such a system would be one in which problems of dispute resolution and crime are addressed and in which there is no *Leviathan* compelling resolutions between recalcitrant parties.³⁴ These political anarchists seek a society in which all dispute resolution is private, removing the oppression that a centralized state inevitably delivers to its citizens.³⁵ Although all anarchists agree that the state should not

29. THOMAS HOBBS, *LEVIATHAN* 108 (Richard Tuck ed., 1991) (1660).

30. *Id.* at 111.

31. *Id.* at 117-18.

32. See BARNETT, *STRUCTURE*, *supra* note 8, at 90.

33. *Id.* at 282-83.

34. *See id.*

35. *Id.*

exist, their justifications for anarchy and their beliefs about the system that would replace the state-based system of governance, or “archy,”³⁶ are not the same.

Are rules required for society to endure? Truly, if some method of social ordering were not required, there would be no need for any government, legitimate or not. Recent research³⁷ supports the assertion that humanity has never existed in the pure state of nature postulated by Hobbes, but instead has always employed norms to govern social interactions.³⁸ Even animals such as chimpanzees follow and enforce group norms.³⁹ Man, the rational animal, is not exempt. Rules exist for a variety of purposes, primarily to ensure that humanity is not distracted by internecine fighting to the neglect of other challenges.⁴⁰

There exists anecdotal evidence supporting the view that rules are a natural part of human life even when the state or other formal institutions are absent. Despite the complete breakdown of civil authority during the Lebanese Civil War, denizens of Beirut worked together at the micro-level to deal with the resulting civil disorder:

In coping with the violence of their city, Beirutis [] seemed to disprove Hobbes's prediction that life in the “state of nature” would be “solitary.” At those moments . . . when Beirut society seemed to have disintegrated and [] all formal law and order virtually disappeared, the first instinct of most Beirutis was not to go it alone, to rape their neighbor's wife or take the opportunity to rob the corner grocery store. . . .

Rather, the behavior of Beirutis suggested that man's natural state is as a social animal who will do everything he can to seek out and create community and structures when the larger government or society disappears. . . . When the larger . . . society and government splintered, people's first instinct was to draw together into micro-societies based on neighborhood, apartment house, religious or family loyalties. These micro-

36. See CHILDS, LIBERTY, *supra* note 14, at 145.

37. Paul H. Rubin, *The State of Nature and the Evolution of Political Preferences*, 3 AM. L. & ECON. REV. 50, 50 (2001); see also ELLICKSON, *supra* note 3, at preface (stating private norms can override formal law); Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 2-4 (2001). See generally POSNER, SOCIAL NORMS, *supra* note 3, at 343-47 (discussing norms created to reduce information asymmetries in determining reliability of potential partners and associates); McAdams, *supra* note 3, at 1044 (discussing norms created because people seek esteem; this can result in the production of rules to ensure that dominant group members receives more esteem than minority group members); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 343-47 (1997).

38. Rubin, *supra* note 37, at 50-51.

39. *Id.* at 54-55.

40. See generally *id.* at 55.

societies provided some of the services, structure, and comfort that were normally offered by the government. They also helped to keep people alive, upright, and honest, sometimes even in spite of themselves.⁴¹

Beirutis worked together selflessly during the twin crises of civil war and foreign invasion in the 1980s.⁴² The human need for order thus trumps Hobbes's state of nature—people will attempt to find informal solutions to find order when no institutions exist.⁴³

As rules are thus necessary components of human social life and people are willing to voluntarily cooperate to ensure the enforcement of those rules, the next question is: what is the best mechanism for enforcing those rules in an effective manner? There are two possible answers to this question: a state holding a monopoly on law enforcement and adjudication powers, or a non-state system in which no monopoly exists, but where people and groups must resolve disputes through voluntary cooperation.⁴⁴

The nature of the non-state system can be further subdivided. It is useful to make a digression here on philosophy. Fundamentally, there are two philosophical sources of anarchist ideas.⁴⁵ The first comes from a Platonic source; its adherents view human nature as plastic, capable of being molded to internalize new rules if the proper education is provided.⁴⁶ It answers Plato's famous question from *Protagoras* in the affirmative: virtue *can* be taught and *must* be taught.⁴⁷ This vision is common to many nineteenth century philosophers and anarchists, many of whom were influenced by romantics like Rousseau⁴⁸ and Plato.

41. THOMAS L. FRIEDMAN, *FROM BEIRUT TO JERUSALEM* 42-43 (2d ed., Anchor Books 1995) (1989).

42. *Id.* at 43-47.

43. *See id.* at 43.

44. *See* BARNETT, *STRUCTURE*, *supra* note 8, at 282-83.

45. OXFORD POLITICS, *supra* note 18, at 27.

46. *See* PLATO, *Protagoras*, in 7 *GREAT BOOKS OF THE WESTERN WORLD: THE DIALOGUES OF PLATO* 38, 43 (Benjamin Jowett trans., Robert Maynard Hutchins et al., eds., 1952).

47. *Id.*

[*Socrates*:] Do I understand you, I said; and is your meaning that you teach the art of politics, and that you promise to make men good citizens?

[*Protagoras*:] That, Socrates, is exactly the profession which I make.

[*Socrates*:] Then . . . I will freely confess to you, Protagoras, that I have a doubt whether this art is capable of being taught. . . .

Id.

48. *See* Jean-Jacques Rousseau, *The Social Contract*, in 38 *GREAT BOOKS OF THE WESTERN WORLD: MONTEQUIEU, ROUSSEAU* 387, 387 (Robert Maynard Hutchins et al., eds., 1952) ("Man is born free; and everywhere he is in chains.").

The idealistic vision is illustrated in an excerpt from Plato's *Republic*: the successful internalization of societal norms such that the individual would seek to uphold them in all actions.⁴⁹ Adeimantus elucidates the point for us:

[A]ll of you who claim to praise justice . . . has ever blamed injustice or praised justice except by mentioning the reputations, honors, and rewards that are their consequences. [N]o one has ever adequately described what each itself does of its own power . . . [or] argued that injustice is the worst thing a soul can have in it and that justice is the greatest good. If you had treated the subject in this way and persuaded us from youth, we wouldn't now be guarding against one another's injustices, but each would be his own best guardian, afraid that by doing injustice he'd be living with the worst thing possible.⁵⁰

Republic and radical scholarship influenced by Plato⁵¹ present a belief that when man is socially primitive, he will require the corrective rod of a strong government to keep him in line.⁵² As he gets closer to the perfect form, however, he will need a government less and less, until the state eventually is superseded by man's new nature.⁵³

Many latter-day anarchists implicitly or explicitly rest on Plato, and are therefore amenable to the presupposition that human nature is plastic and that individual choices and preferences can be altered permanently with an appropriate education.⁵⁴ For instance, Marx viewed all politics as a tool of oppression used by those who had power (the moneyed classes).⁵⁵ It could only

49. See PLATO, *REPUBLIC* 41-42 (G.M.A. Grube trans., 2d ed., Hackett Pub. Co. 1992) (ca. 380 B.C.).

50. *Id.*

51. See generally Int'l Socialist Group, 4 *The Place of Marxism in History: The Supersession of Utopian Socialism*, at <http://www.zoo.co.uk/~z8001063/International-Socialist-Group/EMA/EMA%20-%20POM7.htm> (last visited Jan. 31, 2003).

52. See LENIN, *supra* note 19, at 46.

People always were and always will be the stupid victims of deceit and self-deceit in politics until they learn to discover the *interests* of some class behind all moral, religious, political and social phrases, declarations and promises. The supporters of reforms . . . will always be fooled by the defenders of the old order until they realize that every old institution, however barbarous and rotten it may appear to be, is maintained by the forces of some ruling classes. . . .

Marx's philosophical materialism has alone shown the proletariat the way out of the spiritual slavery in which all oppressed classes have hitherto languished....

Id.

53. See generally *id.* Some philosophers saw the church, and not the state, as the principle instrument of oppression.

54. See, e.g., *id.* at 75-77, 84-86.

55. See *id.* at 42-44.

be overcome, in his view, by those without power (the working classes) taking control of the state's mechanism, using its tools to destroy inequalities of class.⁵⁶ Once this had been achieved, humans would continue to progress until their need of the state withered away.⁵⁷ "In the place of the old bourgeois society, with its classes and class antagonisms, we shall have an association in which the free development of each is the condition for the free development of all."⁵⁸ Subsequent European anarchists, such as Kropotkin,⁵⁹ Bakunin,⁶⁰ and Daniel Guérin,⁶¹ agreed with the Marxist view that man would evolve beyond the need for a state through destruction of the oppressive state or church and imposition of an ideological education for subsequent generations. They felt, however, that humanity was ready to evolve *without* the intervening period of instruction from philosopher kings⁶² or proletarian vanguards;⁶³ either way, humanity would advance only when the shackles of the past were relinquished. Most scholars in this genus are influenced or inspired by Marx, and are therefore communitarian and anti-capitalist in their politics.⁶⁴

Friedrich Nietzsche, though not a political philosopher, and despite being generally contemptuous of Plato and Marx (to say nothing of Christianity), had a similar vision. He cited Zarathustra and established the view that man was "a rope, tied between beast and overman."⁶⁵ Like Bakunin, Nietzsche saw

56. See generally *id.* at 45.

57. See LENIN, *supra* note 19, at 86-88.

58. Karl Marx & Frederick Engels, *Manifesto of the Communist Party*, in 1 KARL MARX: SELECTED WORKS 189, 228 (V. Adoratsky & C.P. Dutt eds., Int'l Publishers 1936) (1872).

59. See generally PETER KROPOTKIN, *THE CONQUEST OF BREAD AND OTHER WRITINGS* xv-xix (Marshall Shatz ed., Cambridge Univ. Press 1995).

60. MICHAEL [MIKHAIL] BAKUNIN, *GOD AND THE STATE* 24 (Dover Publ'ns, Inc. 1970) (1916) ("Christianity is precisely the religion *par excellence*, because it exhibits and manifests, to the fullest extent, the very nature and essence of every religious system, which is *the impoverishment, enslavement, and annihilation of humanity for the benefit of divinity.*").

61. See DANIEL GUÉRIN, *ANARCHISM* 11-38 (Mary Klopfer trans., Monthly Review Press 1970) (1965).

62. PLATO, *Protagoras*, *supra* note 46, at 186-240.

63. See MARX & ENGELS, *supra* note 11, at 24 ("The immediate aim . . . is the . . . formation of the proletariat into a class, overthrow of the bourgeois supremacy, [and] conquest of political power by the proletariat.")

64. See The History Guide, *Lectures on Modern European Intellectual History; Karl Marx, 1818-1833*, at <http://www.historyguide.org/intellect/marx.html> (last visited Jan. 31, 2003); see also Noam Chomsky, *The Soviet Union Versus Socialism*, 17 *OUR GENERATION* 47, 47-52, available at <http://www.zmag.org/chomsky/articles/86-soviet-socialism.html> (last visited Jan. 31, 2003).

65. FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE* 14 (Walter Kaufmann trans., 1995) [hereinafter NIETZSCHE, ZARATHUSTRA].

humanity kept down by institutions like the state and church, whose ethics he termed a “slave morality.”⁶⁶ The church was the progenitor of a false, life-destroying morality that repressed and controlled individuals through a guilt from original sin, and a sense of duty to everyone that flowed from God’s sacrifice of his son to save humanity from death.⁶⁷

Nietzsche held that morality had been designed to redistribute the advantages that nature had bestowed upon some and withheld from others.⁶⁸ For man to progress across the rope to the overman, he would have to achieve mastery over the self:

“You must become master of yourself and master of your own virtues as well. Previously they were your masters; but they should simply be tools among your other tools. You must acquire power over your For and Against and learn how to take them out and hang them back up according to your higher aim....”⁶⁹

Thus, the overman would set for himself his own morality, and not merely follow the church or popular opinion. Despite the attempts of some to link Nietzsche to totalitarian projects like those undertaken by the Nazis,⁷⁰ it appears that Nietzsche more properly belongs in the tradition of those communitarians who see man being oppressed by coercive apparatus that must be swept away in order to progress.⁷¹ Nietzsche was in many ways a radical individualist and anti-communitarian. The parallels between Nietzsche’s thought and those of the communitarian anarchists are nevertheless striking.⁷²

What is similar about these divergent European philosophers is their *idealistic* vision of human nature—the belief that humanity could evolve to a

66. RÜDIGER SAFRANSKI, *NIETZSCHE: A PHILOSOPHICAL BIOGRAPHY* 302 (Shelley Frisch trans., 2002).

67. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 91-92 (Walter Kaufman & R. J. Hollingdale trans., Vintage Books 1989) (1967); *see also* NIETZSCHE, *ZARATHUSTRA*, *supra* note 65, at 286-87.

68. *See* SAFRANSKI, *supra* note 66, at 296.

69. FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN* I at 11 (Gary Handwerk trans., Stanford Univ. Press 1995) [hereinafter *NIETZSCHE, HUMAN*].

70. *See* SAFRANSKI, *supra* note 66, at 332-34.

71. *See generally* NIETZSCHE, *ZARATHRUSTA*, *supra* note 65, at 12-19 Whether or not Nietzsche believed the church must be destroyed for the overman to be realized, or whether the church would wither like the Marxian state at the appropriate time is unclear.

72. Nietzsche also voiced support for anarchy, though not necessarily political order. FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 78 n.127 (Walter Kaufmann & R. J. Hollingdale trans., Random House 1967) [hereinafter *NIETZSCHE, POWER*] (“I am *glad* about the military development of Europe, also of the internal states of anarchy; the time of repose . . . is over. The barbarian in each of us is affirmed; . . . [p]recisely for that reason philosophers have a future.”).

radically higher level of social existence, particularly if certain governmental or social institutions did not exist. Therefore, the destruction of those institutions would be the harbinger of greater progress to come. It is significant that in every instance, these European philosophers were aligned against an *ancient regime*, class structure, and entrenched ecclesiastical interests whose presence in everyday life was oppressive to the average individual.⁷³ For example, Pierre-Joseph Proudhon, who predated Marx's period of academic fecundity by several decades, launched a similarly radical attack on established interests, asserting that property is theft,⁷⁴ even in the context of an individualistic, anti-communitarian project. It is possible that the class structure and lack of social mobility in Europe led to such radicalized idealistic anarchism in politics and nihilism in philosophy.⁷⁵

This hypothesis is supported further by the political developments in the nation of free markets, social mobility, and political pragmatism: the United States. In contradistinction to European anarchists, there exists a primarily American school of anarchy—*anarcho-capitalism*—that, in league with methodological individualism inherited from microeconomic analysis, seeks to eliminate the state without removing the fundamental norms and rules that govern the conduct of relations within the society.⁷⁶ Absent the *Leviathan*, a

73. See, e.g., LENIN, *supra* note 19, at 1-2; see also NIETZSCHE, HUMAN, *supra* note 69, at 51-52; NIETZSCHE, POWER, *supra* note 72, at 352-84, 404.

74. PIERRE JOSEPH PROUDHON, WHAT IS PROPERTY? 13-14 (Donald R. Kelley & Bonnie G. Smith trans., 1994).

75. See, e.g., NIETZSCHE, POWER, *supra* note 72, at 12 (“Nihilism . . . is the recognition of the long waste of strength, the agony of the ‘in vain,’ insecurity, the lack of any opportunity to recover and to regain composure—being ashamed in front of oneself, as if one had deceived oneself all too long.”); see also DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 4 (1996) (interpreting Nietzsche: “Nihilism . . . is the end process of [Socratic] rationalism. It is man’s self-conscious will to destroy his past and control his future.”). Nihilism and nineteenth-century anarchism were often linked. See *The Doctrine of Assent*, LIBERTY, Sept. 17, 1881 at 2 (praising Russian nihilists for violent resistance to Czar Alexander II’s tyranny, “which the Nihilists alone are ready to tear out by the roots and bury out of sight forever. Success to the Nihilists!”).

76. See generally Wendy McElroy, *The Schism Between Individualist and Communist Anarchism in the Nineteenth Century*, 15 J. LIBERTARIAN STUD. 97, 97 (2000) (referring to the “indigenously American strain of individualist anarchism” *Id.*). This is not to suggest that these anarcho-capitalists are exclusively American; there are active capitalist-libertarian parties in Europe. See Ctr. for the New Europe, *Who We Are*, at <http://www.centrefortheneweuropa.org/about2.htm> (last visited Jan. 20, 2003). Additionally, there are plenty of American political philosophers who embrace the idealistic, or Marxist, approach to anarchy and extreme libertarianism. See generally HARDT & NEGRI, *supra* note 19, at xi-xvii (describing the current, American-backed world order as a system of interlocking power relations transcending national boundaries and observing that this universalizing system can be opposed from within by use of the tools that make it successful).

spontaneous order will arise, as if guided by an “invisible hand.”⁷⁷ Though the formal, written Constitution may be scrapped, the elements of the societal constitution would be retained: free markets, individual rights, and freedom from coercion.⁷⁸ This uniquely American strain of anarchism is known as anarcho-capitalism.⁷⁹

American anarcho-capitalism has its roots in the Austrian school of economics. The Austrian school originally comprised a group of Austrian economics scholars lead by Ludwig von Mises who fled Nazi-occupied Austria in the late 1930s.⁸⁰ They supported unfettered markets and a gold standard and rejected “the positivistic, mechanistic, and statistical methods of mainstream economics,”⁸¹ claiming that “[n]o laboratory experiments can be performed with regard to human action.”⁸² Indeed, Mises’s core philosophy—termed praxeology—applied deductive reasoning to economic theory, even for the pure logic of choice.⁸³

The influence of the Austrian school is great in libertarian circles, and many contemporary supporters of free trade and deregulation have been influenced either by Mises or by Mises’s apprentices such as Friedrich Hayek,⁸⁴ and Milton Friedman.⁸⁵ Even 2002 Nobel Prize for Economics winner Vernon Smith acknowledged the Austrian school as influencing his personal transformation from a socialist to a pro-market libertarian.⁸⁶

The Austrians also provided the inspiration for Murray Rothbard, one of the premiere American anarcho-capitalists.⁸⁷ Rothbard and his followers synthesized “Austrian-school economics, natural rights, New Left historical

77. See 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* © H. Campbell et al., eds., Clarendon Press 1976) (1776); see also NOZICK, *ANARCHY*, *supra* note 5, at 18-22.

78. See, e.g., Guglielmo Piombini, *For Anarcho-Capitalism*, at <http://super.freeweb.supereva.it/libertarian/en/anarcho.htm> (last visited Jan. 30, 2003).

79. See Peter Marshall, *The New Right and Anarcho-capitalism*, in *DEMANDING THE IMPOSSIBLE: A HISTORY OF ANARCHISM*, available at <http://dwardmac.pitzer.edu/dward/newrightanarchocap.html> (last visited Jan. 31, 2003).

80. See What is “Austrian Economics”?, *The Austrian School*, at <http://www.mises.org/austrian.asp> (last visited Jan. 31, 2003).

81. CHRIS MATTHEW SCIABARRA, *AYN RAND: THE RUSSIAN RADICAL* 286 (1995).

82. LUDWIG VON MISES, *HUMAN ACTION* 31 (1949); Lawrence H. White, *The Methodology of Human Action*, 19 *CATO J.* 211, 212 (1999) (citing MISES, *supra*).

83. White, *supra* note 82, at 212.

84. See, e.g., FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* at v-vii, 21-23 (1945).

85. See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 4-6, 10-11 (1962).

86. Mike Lynch & Nick Gillespie, *The Experimental Economist*, REASON ONLINE, available at <http://www.reason.com/0212/fe.ml.the.shtml> (last visited Dec. 21, 2002).

87. See Llewellyn H. Rockwell, Jr., *Murray N. Rothbard: A Legacy of Liberty*, at <http://www.mises.org/mnr.asp> (last visited Jan. 31, 2003).

revisionism, and an indigenous brand of American individualist anarchism in the tradition of [Benjamin] Tucker, [Lysander] Spooner, and [Albert Jay] Nock.”⁸⁸ The Rothbardian approach, this blend of idealism and rationalism, is exemplified in *The Structure of Liberty*.⁸⁹

Barnett aligns himself with this anarcho-capitalist tradition. This is seen not only in *The Structure of Liberty*, where he lauds Rothbard,⁹⁰ but also in his previous writings, where he blasted Robert Nozick’s defense of the minimal state in *Anarchy, State, and Utopia*.⁹¹

The problems generated in any approach following the Austrian school’s methodology center on its attempt to meld the idealist, Platonic form of natural law with the utility-maximizing science of economics, all the while casting a jaundiced eye on the empiricism of modern economic science. What is created is a school wherein intuition, narratives, and rationalizations against opponents occasionally take precedence over references to concrete, factual deductions and examination of real-world data.⁹² Adherence to this methodology creates ideological blind spots.

For instance, Barnett claims that the polycentric order would lead to more efficient wealth creation, but it does not appear that he makes any mention of public choice or the thesis that unfettered markets and private adjudication would lead to a concentration of power in factions. “Limiting the power of both government bodies and private individuals to make decisions that shape people’s lives and fortunes was a fundamental goal of the men who wrote the U.S. Constitution”⁹³ James Madison claimed, “a well-constructed Union [deserves more attention] than its tendency to break and control the violence of faction.”⁹⁴ These factions arise most frequently when an unequal distribution of power where in “[a] landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up . . . and divide them into different classes, actuated by different sentiments and views.”⁹⁵

88. SCIABARRA, *supra* note 81, at 279; *see also* ALBERT JAY NOCK, OUR ENEMY, THE STATE 3-10 (1935); LYSANDER SPOONER, NO TREASON at iii-iv, 5-14 (1867), *available at* <http://www.lysanderspooner.org/notreason.htm> (last visited Jan. 9, 2003); BENJAMIN R. TUCKER, INDIVIDUAL LIBERTY 20-30 (C.L.S. ed., 1926).

89. BARNETT, STRUCTURE, *supra* note 8, at 1-26; *see also* Rockwell, *supra* note 87.

90. *See* BARNETT, STRUCTURE, *supra* note 8, at viii.

91. *See* Barnett, *Nozick*, *supra* note 25, at 16.

92. *See infra* notes 93-108 and accompanying text.

93. F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 18-19 (3d ed. 1990); *see also* MILTON HANDLER ET AL., TRADE REGULATION: CASES AND MATERIALS 2 (4th ed. 1997).

94. THE FEDERALIST NO. 10 (James Madison), *reprinted in* 43 GREAT BOOKS OF THE WESTERN WORLD 48, 48 (Robert Maynard Hutchins et al., eds., 1952).

95. *Id.* at 50.

Madison recommended careful attention to the effects of factionalism to prevent factions from “carry[ing] into effect schemes of oppression.”⁹⁶

Barnett and other anarcho-capitalists have generated much paper to explain how some functions of the modern state, such as welfare,⁹⁷ public education,⁹⁸ law enforcement,⁹⁹ and national defense,¹⁰⁰ could be assumed by the non-state actors. These works merely beg the question: if public goods can be produced most efficiently by a large organization (composed of volunteers or employees), then what was the problem with having a state actor carry out these tasks in the first place?¹⁰¹ Although the anarcho-capitalists may protest that liberty is infringed when the right to use force is concentrated in a monocentric state, the likelihood that power would concentrate in one or several private defense agencies in such a scheme means there is vanishingly small difference whether a state or non-state actor is accumulating the power. It is therefore clear that a certain degree of dogmatic devotion to ideology exists in the scholarship of some anarcho-capitalists and members of the Austrian school. This charge is not made lightly; indeed, one needs only to consult the works of the followers of the Austrian school of economics, fathered by the economist Ludwig von Mises, to see the truth of this assertion.¹⁰²

Exponents of the Austrian school claim that their principles of economics have “the same *existential status* as a law of physics.”¹⁰³ On the other hand, these same exponents reject the idea of empirical examination of economic laws because, inter alia, science has not solved the mind-body problem, purportedly making normal empirical science inappropriate to examine economic issues.¹⁰⁴ William L. Anderson expounded “[A] central premise of Austrian methodology [is] that laws of human action cannot be ‘tested.’”¹⁰⁵

96. *Id.* at 51.

97. See, e.g., DAVID T. BEITO, FROM MUTUAL AID TO THE WELFARE STATE 2-4 (2000); DAVID KELLEY, A LIFE OF ONE’S OWN 151 (1998).

98. See generally KELLEY, *supra* note 97, at 151.

99. See, e.g., DAVID O. FRIEDMAN, LAW’S ORDER 263-80 (2000).

100. See, e.g., Hans-Hermann Hoppe, *The Private Production of Defense*, 14 J. LIBERTARIAN STUDIES 27, 27 (1999), available at <http://www.mises.org/jlsDisplay.asp?action=sort&volume=14&number=1submit=View> (last visited Jan. 18, 2003).

101. Thanks to David Binder of the International Brotherhood of Electrical Workers for this observation during our discussions of labor law and central planning in Reykjavik, Iceland.

102. See generally RESIMAN, *supra* note 9, at 188.

103. *Id.*

104. MISES, *supra* note 82, at 23-27.

105. William L. Anderson, *Two Cheers for the 2002 Nobel Laureates*, at <http://www.mises.org/fullstory.asp?control=1067> (last visited Jan. 18, 2003).

“Laws of economics in and of themselves cannot be set up for testing, as if they were found to be invalid in one place, by their very nature they would have to be invalid everywhere.”¹⁰⁶ It is difficult to understand how a group of scholars supposedly dedicated to the principle of reason,¹⁰⁷ could turn around and reject empiricism—“the evidence of the senses.”¹⁰⁸ Neither is it clear how the mind-body issue or *any* issues concerning human action can be resolved without eventual recourse to empirical research.

III. RANDY BARNETT’S *THE STRUCTURE OF LIBERTY*

In *The Structure of Liberty*, Barnett argues in favor of a polycentric legal order, wherein private companies provide executive and judicial services within the context of free market competition.¹⁰⁹ Barnett argues that there are three problems in the human order that must be addressed before a society may function properly: the *problem of knowledge*,¹¹⁰ the *problem of interest*,¹¹¹ and the *problem of power*.¹¹² These problems are discussed in light of the natural rights that Barnett asserts all people are entitled to possess.¹¹³ In *The Structure of Liberty*’s natural rights analysis, an individual is entitled to “negative” or “liberty” rights; “positive” or “welfare” rights to an equitable distribution of economic resources are dismissed as violating the natural rights of others.¹¹⁴ Barnett pays scant attention to philosophical issues, but acknowledges in the first chapter that the discussion of them is solely “to get them out of the

106. *Id.* (“For example, when David Card and Alan B. Krueger published their notorious 1994 paper that claimed that increases in minimum wage in New Jersey and Pennsylvania actually led to more employment in fast food industries, what they were saying was that there can be exceptions to the law of demand.”); *see also* David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 791-92 (1994).

107. *E.g.*, MISES, *supra* note 82, at 20-22.

108. RESIMAN, *supra* note 9, at 19 (“It was only when the philosophical conviction grew that the senses are valid and that sensory perception is the only legitimate basis of knowledge, that [people] could turn their full thought and attention to this world.”). *See generally* DAVID KELLEY, *THE EVIDENCE OF THE SENSES* 3 (1986).

109. *See generally* BARNETT, *STRUCTURE*, *supra* note 8, at 257-283; *see also* Solum, *supra* note 10, at 781-91.

110. BARNETT, *STRUCTURE*, *supra* note 8, at 16, 29-134.

111. *Id.* at 16, 135-196.

112. *Id.* at 16, 197-300.

113. *Id.* at 16.

114. *Id.* at 66-67 (using the words “liberty” and “welfare” rights in place of “negative” and “positive” rights, respectively, because the latter terms to be prejudicial against the “negative” position) (citing LOREN E. LOMASKY, *PERSONS, RIGHTS, AND THE MORAL COMMUNITY* 84 (1987)).

way.”¹¹⁵ Barnett primarily devotes his considerable skills as a legal analyst toward the practical reasons why a polycentric legal order is desirable and what steps are necessary to achieve this end.¹¹⁶

Barnett is distinct from other anarchist philosophers in that he not only recognizes the need for order and institutions to maintain that order, but also presents a series of concrete examples explaining how his proposed ordered anarchy would function. This is in sharp contrast with other anarchists, such as Bakunin or Kropotkin, who were more interested in fundamentals. They presented well-developed normative philosophies, but did not present a practical way to apply their philosophies to the outside world.¹¹⁷

The Structure of Liberty is divided into five different sections. First, the book discusses natural law justifications of the polycentric order.¹¹⁸ Then Professor Barnett discusses, in turn, the three problems that he contends must be addressed in order to ensure the success of the polycentric order—the problems of knowledge, the problems of interest, and the problems of power.¹¹⁹ Finally, he presents a hypothetical essay describing his polycentric utopia and how it would deal with each of the three problems.¹²⁰ In the process of this description, Barnett anticipates some objections that others may have about his work.¹²¹ Each of these sections will be discussed in turn below.¹²²

A. *Barnett's Philosophical Justifications: Human Nature and Natural Law*

Barnett begins by arguing that liberty has structure and that “this structure implies both freedom and constraint of actions.”¹²³ He compares the structure of a polity to the Sears Tower in Chicago.¹²⁴ Thousands of people move in and

115. See BARNETT, *STRUCTURE*, *supra* note 8, at 24.

116. *Id.* at 22-25.

117. See generally Noam Chomsky, *Introduction to DANIEL GUÉRIN, ANARCHISM* at vii, vii-xix (Mary Klopfer trans., Monthly Review Press 1970); Roy A. Childs, Jr., *Objectivism and the State: An Open Letter to Ayn Rand*, *THE RATIONAL INDIVIDUALIST*, Aug. 1969, reprinted in *LIBERTY AGAINST POWER* 145, 145-156 (Joan Kennedy Taylor ed., 1994). But see NOAM CHOMSKY, *DETECTING DEMOCRACY* (1991), for an example of a different problem—a radical who spends his time critiquing existing government structure and policies without presenting any hypotheses on the system that ought to replace it.

118. See BARNETT, *STRUCTURE*, *supra* note 8, at 1-26.

119. See *id.* at 29-300.

120. See *id.* at 284-300.

121. See *id.* at 301-328.

122. See *infra* Part III.A-E.

123. BARNETT, *STRUCTURE*, *supra* note 8, at 2.

124. *Id.*

out of the Tower, pursuing discrete ends chosen only by themselves.¹²⁵ The physical structure of the Tower necessarily *constrains* the people in their day-to-day activities, but it also gives them additional freedoms that otherwise would not be possible (e.g., office space and the ability to see four states from the observation skydeck).¹²⁶ Therefore, the more the structure of the Tower takes into account the discrete needs and desires of the people who will use it, the more efficiently it will be utilized by those people.¹²⁷ So it is with a polity.

Barnett states that the nature of humanity is not very malleable.¹²⁸ Indeed, his rejection of this view is necessary, he says, for his philosophy of natural rights to prevail:

[S]ome who speak of social construction . . . are objecting to basing claims simply on an alleged natural tendency of persons to act in certain ways. They deny that such behavioral tendencies are “natural” and therefore inevitable or unalterable, much less good. If natural law is based on how human beings “naturally” or normally act, then it is based on a fallacy, for human behavior . . . is as much a product of social attitudes and practices as it is of any “innate” human nature.¹²⁹

Natural law reasoning, he insists, is not limited to the natural or instinctual behavioral patterns of humanity, but rather is based on the goals that people wish to achieve and the objective facts of the material world that they must act on to achieve their goals.¹³⁰

Barnett claims that the nature of humanity and the world we inhabit yield “principles of society” that must be taken into account when attempting to construct a legal or normative system that is meant to create the structure of liberty within which humanity is to exist.¹³¹ These “principles of society” embrace not only the psychological nature of humanity, but also the physical rules of the larger universe in which humans must live.¹³² Barnett holds that a system that ignores such principles of society will suffer adverse consequences.¹³³

125. *Id.*

126. *Id.*

127. *Id.* at 2-3.

128. BARNETT, STRUCTURE, *supra* note 8, at 8-10.

129. *Id.* at 9.

130. *Id.*

131. *Id.* at 9-10.

132. *Id.* at 9.

133. BARNETT, STRUCTURE, *supra* note 8, at 9.

This natural law reasoning is contestable precisely because it is contingent on the “facts of human life,”¹³⁴ which may be disputable. Further, adopting the natural law method of reasoning does not mean that the answer will always be correct.¹³⁵ A false premise will naturally lead to a false conclusion. The process of reasoning it represents—“Having made these factual generalizations (X), it then depends upon a claim that given, X, if you want to accomplish Y, then you must do Z”¹³⁶—is not capable of being discarded.

By reasoning thus, Barnett tries to preemptively reject criticisms from, among others, H.L.A. Hart,¹³⁷ that natural law theories are invalid because unlike physical laws, one is not compelled to obey natural law the way one is compelled to obey, for instance, the second law of thermodynamics.¹³⁸ In fact, under the philosophical regime in *The Structure of Liberty*, one is indeed required to follow a certain path, *given* the nature of the universe, if one wishes to achieve a specific goal.¹³⁹ Such a path of consequentialist reasoning could only fall if the underlying factual assumptions were discovered to be in error.¹⁴⁰

Based on the previous paragraph, one could conclude that *The Structure of Liberty* advocates a utilitarian approach to human behavior along the lines of Mill,¹⁴¹ or of latter-day law and economics scholars such as Judge Posner.¹⁴² Barnett himself is reluctant to adopt this label:

If utilitarian is viewed as a *consequentialist* approach that evaluates practices by their consequences, then the conception of natural rights sketched here appears to be consequentialist. . . . Some rights are thought to be natural because adherence to them is necessary to solve some serious social problems. For this reason, these rights (not an assessment of utility) are then used to evaluate the justice of human laws. . . .

. . . .

If utilitarianism is viewed as a general *theory of ethics* or morality, however, then the natural rights approach presented here . . . is not utilitarian. [This] approach . . . does not provide a theory of how persons ought to pursue the good life, the traditional province of ethics. Many but not all natural rights theorists also take a natural law approach to this question, but historically a natural law approach to ethics is more

134. *Id.* at 10.

135. *See id.*

136. *Id.*

137. *Id.*

138. H.L.A. HART, *THE CONCEPT OF LAW* 183-85 (1961).

139. BARNETT, *STRUCTURE*, *supra* note 8, at 10.

140. *See id.*

141. *See generally* JOHN S. MILL, *UTILITARIANISM* (George Sher ed., Hackett Publishing Co., 2d ed. 2001).

142. *See generally* POSNER, *PROBLEMATICS*, *supra* note 1.

teleological—that is, based on the natural end or good for human beings—than utilitarian.¹⁴³

Barnett considers the common good to be the ultimate goal of human action.¹⁴⁴ The common good is viewed as the ability of a person to pursue “happiness, peace, and prosperity while acting in close proximity to others.”¹⁴⁵ He rejects the idea that the common good should be the sum of preference satisfaction.¹⁴⁶

This brings us back to the problems with the Rothbard-Austrian methodology. *The Structure of Liberty* does not adequately explain *why* happiness, peace, and prosperity should be the ultimate goal of human action instead of, for instance, efficient preference satisfaction. Further, without more information, it is not clear how happiness is to be defined. Without such a definition, this is akin to a meaningless bromide such as “mak[ing] everything perfect forever.” It may be that such subjective elements are unquantifiable and will always be so absent a revolution in econometrics. Given the vast philosophical literature supporting anarchism, however, one might reasonably expect more support for these assertions.

The Structure of Liberty states that three problems must be solved to allow humans the ability to pursue their happiness in peace—the problem of knowledge, the problem of interest, and the problem of power.¹⁴⁷ Each will be examined in turn.

B. Barnett's Discussion of the Problem of Knowledge

1. Types of Knowledge

Barnett describes the problems of knowledge in *The Structure of Liberty* as having two components.¹⁴⁸ First, allocation of resources must be undertaken with imperfect knowledge of those resources and their effects on the individual's goals.¹⁴⁹

143. BARNETT, STRUCTURE, *supra* note 8, at 23.

144. *Id.* at 24.

145. *Id.*

146. *Id.*

147. *Id.* at 3.

148. BARNETT, STRUCTURE, *supra* note 8, at 30.

149. *Id.* at 29-30.

[The] problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only the individuals know [is the first problem of knowledge]. . . . [I]t is a *problem of the utilization of knowledge which is not given to anyone in its totality.*

Second, the individual must also take into account the “ever-changing and potentially conflicting personal and local knowledge of *others* . . . [that] by definition they do not and often cannot have access”¹⁵⁰ when making decisions. To do otherwise would deprive the decision-maker of potentially useful personal information.¹⁵¹

Barnett assumes that there are two kinds of knowledge: personal and local.¹⁵² Personal knowledge is the sort of information one possesses that is confined to personal experience—that is, thoughts, emotions, skills and the like that are not necessarily transferable to others.¹⁵³ Barnett uses the example of an individual who can play a musical instrument but, nevertheless, who can teach this skill to others only with the greatest difficulty.¹⁵⁴ Local knowledge is knowledge that can be shared.¹⁵⁵ This knowledge does not embrace the totality of all personal human knowledge; there are subjective experiences that are nearly impossible to convey to others via interpersonal human communication.¹⁵⁶ This local knowledge is enough for effective cooperation between individuals to be effectuated.¹⁵⁷

The fact that human knowledge is necessarily limited and local in scope is the foundation of all of Barnett’s reasoning, both in *The Structure of Liberty* and elsewhere.¹⁵⁸

2. Methods of Social Ordering

The social order of *The Structure of Liberty*, because of the difficulties in communicating personal knowledge to others, is designed to ensure that those with the best knowledge have the most power to make decisions concerning dispositions of property.¹⁵⁹ The persons with the most knowledge are those with the most useful personal knowledge of the property to be disposed.¹⁶⁰ This description of the problem of knowledge puts Barnett in line with libertarians

150. *Id.* at 40.

151. *See id.*

152. *Id.* at 30.

153. BARNETT, STRUCTURE, *supra* note 8, at 31-32.

154. *Id.* at 30. Barnett wryly notes that writing *Structure* would have been much easier without this issue. *Id.* at 30-31.

155. *Id.* at 34.

156. *See id.* at 30.

157. *See id.* at 33-34.

158. BARNETT, STRUCTURE, *supra* note 8, at 34; *cf.* Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner’s Theory of Interpretation*, 28 PAC. L.J. 977, 986-87 (1997).

159. *See* BARNETT, STRUCTURE, *supra* note 8, at 53.

160. *See id.* at 46.

such as Friedrich Hayek, Murray Rothbard, and Mises in their critiques of central planning.¹⁶¹ Barnett, however, does not reject all social ordering. It is most effective, he says, “when those in charge of the ordering scheme have access to useful personal or local knowledge.”¹⁶² Such directors, however, would be unable to solve problems of large import because they would not have the *specific* knowledge required to solve those problems.¹⁶³

Barnett prefers decentralized ordering because it would place decision-making ability largely in the hands of individuals who possessed the personal and local knowledge necessary for them to make good decisions efficiently and effectively.¹⁶⁴ Therefore, because of the problems of knowledge, a constitutional order that decentralizes power and decision-making is needed to promote efficient decision-making that harmonizes personal and local knowledge of resource use with a minimal amount of central ordering.¹⁶⁵ This means putting the jurisdiction at the lowest level possible.¹⁶⁶

Jurisdiction over property rights should be limited to a micro level because the problems of knowledge multiply beyond the local level. Past that level, the complexity of problems increases, meaning that solutions must take an increasingly dynamic character.¹⁶⁷ To facilitate dynamic solutions, “[c]onsensual transfers of jurisdiction should be both permitted and required.”¹⁶⁸ In other words, the constitutional regime must mandate that all problems be solved with a maximum degree of participation by the parties whose property and lives are in dispute.¹⁶⁹ No solutions can be imposed on these people without their consent because of the *right of several property*, the cornerstone of the polycentric legal order.¹⁷⁰

The *right of several property* refers to the fact that “jurisdiction to use resources is dispersed among the ‘several’... persons and associations that comprise a society, rather than being reposed in a monolithic centralized institution.”¹⁷¹ Here, Barnett expresses the fundamental tenet of the Austrians

161. See generally HAYEK, *supra* note 84, at 21-23. LUGVIG VON MISES, *SOCIALISM*, available at <http://www.econolib.org/library/Mises/msStoc.html> (last visited Feb. 1, 2003).

162. BARNETT, *STRUCTURE*, *supra* note 8, at 46.

163. *Id.* at 46-47.

164. *Id.* at 47-48.

165. *Id.* at 47.

166. *Id.* at 52.

167. BARNETT, *STRUCTURE*, *supra* note 8, at 61-62. See generally VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES* (1998) (discussing dynamism as a pro-growth, capitalist, although not anarchist, ideology for future progress).

168. BARNETT, *STRUCTURE*, *supra* note 8, at 62.

169. See *id.* at 61-62.

170. See *id.* at 64.

171. *Id.* at 65.

and the anarchists: no one shall use force to expropriate the property of another.¹⁷² Therefore, force is never justified against people absent a restitutionary purpose; force used for any other purpose (including collecting of income taxes) is unjustified.

Barnett recognizes, however, that centralized ordering is vital at some level. Many projects would fail to get off the ground without effective centralized administration.¹⁷³ What Barnett rejects is the idea of an expansive central authority responsible for fields beyond the local knowledge of its agents.¹⁷⁴

3. Discovering Justice—First-Order Problem of Knowledge

The first-order problem of knowledge is discovering, at the personal level, what justice *is*.¹⁷⁵ Justice, according to *The Structure of Liberty*, is respect for the rights of individuals and associations.¹⁷⁶ “The *right of several property* specifies a right [for an individual] to acquire, possess, use, and dispose of scarce physical resources—including their own bodies.”¹⁷⁷ These resources can be disposed of in any way that does not interfere physically with the use and enjoyment of others’ resources, meaning, the right to one’s own person is an inalienable right.¹⁷⁸

The *right of first possession* is used to make an initial allocation of resources.¹⁷⁹ Barnett argues that by ensuring that the first person to possess the property obtains title, the legal order remains stable.¹⁸⁰ Additional claimants who would overturn the existing order (i.e., the first possessor) would have to somehow show that their claim to title is superior.¹⁸¹

Freedom of contract is essential in this order because “a right-holder’s consent is both necessary ... and sufficient ... to transfer alienable property rights.”¹⁸²

172. See REISMAN, *supra* note 9, at 57-58.

173. See BARNETT, STRUCTURE, *supra* note 8, at 57-58.

174. *Id.* at 55-56.

175. *See id.* at 83.

176. *Id.* at 63.

177. *Id.* at 83.

178. BARNETT, STRUCTURE, *supra* note 8, at 83.

179. *Id.* at 69.

180. *See id.* at 69-70.

181. *Id.* Barnett is careful to note that this is distinct from the Lockean “labor-mixing” theory of property rights. *Id.* at 69 n.17.

182. *Id.* at 83.

4. Communicating Justice—Second-Order Problem of Knowledge

The second-order problem of knowledge is the need to communicate personal knowledge of the liberal conception of justice in a way that is understandable to others.¹⁸³ It is much more cost effective for decisions to be made with regard to the efficacy of options with knowledge of the legal rules *ex ante* rather than imposing them *ex post*.¹⁸⁴ All laws must be publicized in an easily cognizable manner so that people may plan for their effects *ex ante*; this is “what is known as the rule of law.”¹⁸⁵

Because *ex ante* information is needed about allocation of several property rights, boundaries will be necessarily set up by the definition of property rights.¹⁸⁶ It follows that these boundaries must conform to the meaning that objectively attaches to human conduct.¹⁸⁷ This will enable individuals to conform to the appearances created by the behavior of others, harmonizing interactions.¹⁸⁸

Rights may not be exchanged by force under the liberal conception of justice; these “exchanges do not take into account the knowledge of the coerced right-holder,” and therefore may not be in that individual’s interests.¹⁸⁹ Similarly, fraud is also prohibited because it is a variant of theft,¹⁹⁰ and also violates the principle of keeping resources in the hands of people with the most local knowledge.¹⁹¹

5. Specifying Conventions—Third-Order Problem of Knowledge

Barnett next takes his analysis into the sphere of rules and conventions and briefly examines the procedure by which conventions are generated and disputes are resolved.¹⁹² Abstract background rights are not sufficient to explain justice on a concrete level: “Theorists who would attempt to deduce

183. BARNETT, STRUCTURE, *supra* note 8, at 107.

184. *Id.* at 100.

185. *Id.* at 107.

186. *Id.*

187. *Id.*

188. BARNETT, STRUCTURE, *supra* note 8, at 107.

189. *Id.* at 107.

190. *Id.*; cf. REISMAN, CAPITALISM, *supra* note 9, at 21 (noting that “Fraud represents force, because it means taking away property against the will of its owner; it is a species of theft.”).

191. BARNETT, STRUCTURE, *supra* note 8, at 107.

192. *Id.* at 108.

from abstract rights a set of specific action-guiding principles face a serious problem of knowledge."¹⁹³

The Structure of Liberty applauds the evolutionary mechanism of the common law process as a way to generate new conventions.¹⁹⁴ Because of its procedural mechanisms, judges are able "(a) to obtain information about the complexities of practice and (b) to formulate rules to decide future cases in a manner that is both consistent with each other and with underlying principles of justice."¹⁹⁵

Barnett says that two groupings are necessary to keep the common law process linked to the liberal conception of justice.¹⁹⁶ The first is composed of litigants seeking to enforce a colorable claim of right.¹⁹⁷ He characterizes this as a link internal to the process.¹⁹⁸ The second is an informal academic institution—an "electorate of law" that "rationally evaluates the product of common law adjudication to see if its precepts are consistent with the requirements of Justice."¹⁹⁹ This second, or external, link, according to Barnett, is composed of professional academics that influence the formation of new legal precepts through their writings in law journals and, indirectly, through the ideas they pass on to their students.²⁰⁰

At first glance, it would appear that a civil law style system with its all-encompassing code²⁰¹ and limited freedom for judicial re-interpretation might also be amenable to *The Structure of Liberty's* anarcho-capitalist system. A court system with considerable judicial discretion could be able to re-interpret established law based on the facts of a particular case.²⁰² This, after all, is the same reason that Plato recommended fixing laws for eternity, forbidding others

193. *Id.* at 131.

194. *Id.*

195. *Id.*

196. BARNETT, STRUCTURE, *supra* note 8, at 121.

197. *Id.*

198. *Id.* at 121.

199. *Id.* at 131.

200. *Id.* But see POSNER, PROBLEMATICS, *supra* note 1, at 295-96 (criticizing the ineffectiveness of law review articles as a way of influencing concrete legal decision-making process due to their highly abstract nature). Clearly, for Barnett's "electorate of law" to exist, American legal scholarship would have to become more concerned with the actual practice of law, and focus less on theoretical issues.

201. Thanks to Dr. Jan Broekman of the Free University of Amsterdam for his lectures and clarifications comparing the civil law to the common law. See also JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION at vii (1969).

202. Once this becomes part of the precedent, the unintended consequences of such a decision might resonate throughout the legal system.

to alter them lest the underpinnings of the system be overthrown by future delinquent generations.²⁰³

Barnett would likely disagree that the civil law model would work better with the polycentric order. First, given the existence of a multitude of private court systems, a firewall would exist that would keep an inefficient or inequitable precedent from arising.²⁰⁴ Second, the incremental departure from precedent—the ability of the decisionmaker at the local level to depart from precedent where circumstances require—is precisely the decentralized distribution of power that Barnett seeks for his polycentric legal order.²⁰⁵

Problems of interest, particularly those described by public choice scholarship,²⁰⁶ represent a potential hazard. Briefly, the public choice school holds that in collective choice situations, the party that controls the agenda can control the outcome.²⁰⁷ Parties with a large stake in the outcome will outbid those parties with a lesser stake.²⁰⁸ “The member of the *dispersed interest* chooses (rationally) to be worse [off] than the member of the *concentrated interest* [who has the most at stake].”²⁰⁹

Under public choice theory, it can be argued that if a concentrated interest sees a rule in a private court system that inefficiently produces justice, but benefits that interest, it will seek to use that court to maximize their own interests.²¹⁰ It will also try to employ informal norms to get people to accept their forum choice.²¹¹ True, the other court systems could theoretically refuse to deal with that inefficient court system, but those dispersed interests *are dispersed*, and will be unlikely to take corrective actions because *transaction costs are not zero*.

Although Barnett has made a good effort to address problems of interest, a strong argument can be made that, absent a law-making body, with all laws generated via judicial interpretations of Barnett’s own intuitive fundamentals

203. See PLATO, *THE LAWS* §§ 714-15 at 172-74 (Trevor J. Saunders trans., Penguin Books 1970).

204. Individuals would steer clear of courts that develop inefficient rules in favor of courts with more efficient rules.

205. Though not an anarchist, Friedrich Hayek celebrated the common law for precisely this reason. Thanks to Tom Ginsburg for this insight.

206. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1-11 (1991); DAVID FRIEDMAN, *HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE* 289-97 (1996); POSNER, *ECONOMIC ANALYSIS*, *supra* note 2, at 569-75; PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *MACROECONOMICS* 287-88 (15th ed. 1995).

207. FARBER & FRICKEY, *supra* note 206, at 7.

208. See FRIEDMAN, *supra* note 206, at 289-91.

209. *Id.* at 291.

210. See FARBER & FRICKEY, *supra* note 206, at 7.

211. See ELLICKSON, *supra* note 3, at 152.

of liberty, the most successful court systems would be the ones whose interpretations of law tend to favor those interests with money and power.²¹² Barnett's approach has ideological blinders. With no legislature and an apparently fixed law, the judiciary *becomes* the vehicle for changes in law.²¹³ When the judiciary is simultaneously presented with a wealthy class that is unrestrained in its exercise of power, the impulse for judicial corruption may be unavoidable.

C. Barnett's Discussion of the Problem of Interest

1. Partiality Problem

Another objection to Barnett's liberal conception of justice would be that a regime of justice based on bounded discretion would give preference to the rightholder's knowledge at the expense of others who may also know how to best use those resources.²¹⁴ Barnett's solution to this partiality problem is systemic: because the liberal conception of justice is based on a decentralized regime of several property rights and consensual transfers, the partiality problem is resolved by the compartmentalization of decision making.²¹⁵ The individual who wishes to use resources held by another must take their interests into account before using them.²¹⁶ The liberal conception of justice is based on laws that are publicly accessible, and the problem of partiality is therefore solved because a warning is triggered when the formal tenets of justice are violated.²¹⁷ As a violation of this nature would be open for all to see and acknowledge, these violations will be minimized.²¹⁸ Thus, Barnett relies implicitly on social norms to keep the system in balance.²¹⁹ But again he does not deign to consult the literature from Weber, Axelrod, Ellickson, Posner, and McAdams.²²⁰

212. BARNETT, STRUCTURE, *supra* note 8, at 298.

213. The authors would like to thank Peter Maggs for this insight.

214. BARNETT, STRUCTURE, *supra* note 8, at 148.

215. *Id.* at 148-49.

216. *Id.*

217. *Id.* at 149.

218. *See id.* at 148-49.

219. *See* BARNETT, STRUCTURE, *supra* note 8, at 148-49.

220. *See* discussion *supra* Part II.

2. Incentive Problems

Barnett admits that although rules may be violated in a publicly cognizable manner, this does not mean that such behavior will necessarily be corrected.²²¹ Similarly, criminal activity alone does not always create the appropriate incentive for people to investigate, apprehend, and punish the perpetrators; there is no prospect of receiving a profit or beneficial gain.²²² This incentive problem is solved in *The Structure of Liberty* through the principle of first possession.²²³ The persons who first invest in possession of a previously unowned resource will rely on continued possession.²²⁴ They do not have to worry about the others seizing their property, as their freedom *from* coercive contracts means that anyone who seeks their property must offer something they value in return; conversely, the freedom *to* contract means that they can exchange their property whenever they wish.²²⁵ Rules of law insure that legal precepts do not change too frequently and can therefore be relied on to provide a stable framework for interpersonal transactions.²²⁶

Further, takings would be compensated by requiring the perpetrator of the seizure to make restitution to the victim.²²⁷ Therefore, the victim has the incentives to take *ex ante* preventative means and *ex post* pursuit and prosecution of the criminal because it is the property owner who will lose the most if the victim of crime *and* it is the property owner who stands to achieve an appreciable gain if the perpetrator of a crime against the property interests is apprehended and convicted.²²⁸

3. Compliance Problems

The *compliance problem* has as its concern conduct that is in conflict with the rights that define justice and the rule of law.²²⁹ This problem “is the need to close the gap between the conduct that . . . rule of law requires and what people perceive to be in their interest . . .”²³⁰

221. See BARNETT, STRUCTURE, *supra* note 8, at 173-75.

222. See *id.* at 154.

223. See *id.* at 155.

224. *Id.* at 153-54.

225. See *id.* at 155.

226. BARNETT, STRUCTURE, *supra* note 8, at 167.

227. *Id.* at 159.

228. See *id.* at 167.

229. *Id.* at 168.

230. *Id.*

“Some perceptions of conflicts between justice and interest are illusory and can be resolved by a better appreciation of one’s true interest or the limits of justice.”²³¹ For example, if a hiker, who is lost and hungry in the woods, happens across a vacant lodge stuffed with food, the hiker may have the moral right to take such food necessary for sustenance.²³² The distinction is one between justice and morality; justice requires that the individual refrain from trespassing, but morality requires the hiker to take steps necessary to preserve the hiker’s life.²³³ Justice, however, requires that the hiker make restitution to the owner for the goods taken and any damage caused.²³⁴

Conversely, if the cabin were occupied, it would be proper for the occupant to deny entry because the judgment of whether or not to admit a transient is one that only the right-holder would be in a position to make knowledgeably.²³⁵ Thus a genuine gap between justice and individual interest can be caused by an emergency condition.²³⁶ The proper application of a restitutionary principle coupled with the right of first possession effectively resolves the issue.²³⁷

Gaps between justice and morality may also be created by the desire for pecuniary or psychological gain.²³⁸ Some tend to “discount the future [and] are far more likely to perceive a gap between justice and interest than persons with lower time preferences.”²³⁹ These “gaps between justice and interest [can be] closed by the process of socialization.”²⁴⁰

Remaining “gaps between interest and justice can also be [alleviated] by the use or threatened use of force or power in advance of, during, or after a rights violation.”²⁴¹ Force could also be used to prevent rights violators who have demonstrated their propensity to violate the rights of others to prevent further crimes, even if those people are not blameworthy.²⁴² The use of force to collect damages or in self-defense should be limited, however, “to imminent attacks, or attacks and trespasses already in progress.”²⁴³ Otherwise, there

231. BARNETT, STRUCTURE, *supra* note 8, at 192.

232. *Id.* at 170-71.

233. *Id.*

234. *See id.* at 171.

235. *Id.* at 172.

236. BARNETT, STRUCTURE, *supra* note 8, at 172.

237. *Id.* at 153, 192.

238. *Id.* at 172-173.

239. *Id.* at 192.

240. *Id.*

241. BARNETT, STRUCTURE, *supra* note 8, at 192.

242. *Id.* at 193.

243. *Id.* at 185.

would be tremendous problems of knowledge if self-defense were permitted prior to the existence of an imminent threat.²⁴⁴

As described above, restitution is the appropriate way to ameliorate the damages of a rights violation.²⁴⁵ This would also justify the creation of an institution responsible for collecting such payments.²⁴⁶ “The problem of collecting restitution from indigent offenders would be handled by institutions who would employ such persons at market wages. Any differences between the amount owned and that which could be earned would be covered by insurance contracts.”²⁴⁷

The Structure of Liberty criticizes the idea that wealthy criminals would be likely to commit more crimes; it is highly exaggerated, says Barnett.²⁴⁸ “[E]ven so, effective measures are possible if a problem with wealthy criminals did arise.”²⁴⁹ He does not elucidate further.

The public choice critique²⁵⁰ is apposite presently. The wealthy and well-connected do not need to commit crimes; having the inside track on the creation of laws in the first place, they are able to ensure that the laws favor their interests.²⁵¹ Barnett seems to assume that with the nonconfiscation principle in place, there will be no conflict between the interests of individuals.²⁵² In this sense, Barnett shows his philosophical biases. Like others who embrace a deontological theory of rights,²⁵³ Barnett’s work is almost wholly intuitive; this is a weakness in his philosophical argument. He needs to grapple with public choice directly and answer its critique for his project to succeed. Nevertheless, the idea that restitution is an appropriate remedy for crimes has been seriously discussed in the past, and there is much support for it.²⁵⁴

244. *Id.* at 185-86.

245. *See id.* at 159.

246. BARNETT, *STRUCTURE*, *supra* note 8, at 159.

247. *Id.* at 192.

248. *Id.* at 193.

249. *Id.*

250. *See* discussion *supra* Part III.A.

251. *See* CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 73, 149, 155-56 (1941); FARBER & FRICKEY, *supra* note 206, at 21-23.

252. Other libertarian capitalists support this idea. *See, e.g.*, AYN RAND, *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* 57-65 (1964).

253. *See* NOZICK, *supra* note 5, at 28-35 (basing analysis in a deontological theory of morality, taking inspiration from Kant).

254. Some of the work was done by Barnett himself. *See, e.g.*, Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 *EMORY L.J.* 937, 969-80 (1983). For a more recent work on the subject see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 *U. ILL. L. REV.* 363, 390-405, in which Slobogin argues for abandonment of the exclusionary rule in favor of a regime including liquidated damages for constitutional violations, personal liability

D. *Barnett's Discussion of the Problem of Power*

The third problem that *The Structure of Liberty* tackles is the problem of power.²⁵⁵ Enforcement error creates costs.²⁵⁶ These costs can be compounded when they are in a monocentric political system in which punitive damages, instead of restitutionary damages, are used to deter crime.²⁵⁷ Enforcement error imposes costs on the innocent above and beyond the costs already imposed on the victim of the crime.²⁵⁸ Because rights legitimize the use of power, the number and type of rights recognized under the dispute resolution system must be limited to minimize the costs resulting from enforcement error.²⁵⁹ Rights should therefore be limited "to those which address pervasive social problems that cannot be dealt with adequately by any other means."²⁶⁰ Additionally, restitution should be the preferred enforceable remedy to any kind of damages.²⁶¹ There should be a presumption of innocence for the accused and a standard of proof that increases with the severity of the sanction that is to be imposed coercively:

So, too, the use of force to prevent previous offenders from committing further crimes should be limited to those who have demonstrated by their past criminality or other conduct their intention to violate rights in the future. This showing should be subjected to a standard of proof beyond a reasonable doubt.²⁶²

1. Fighting Crime Without Punishment

The ability to prevent crime effectively, rather than deter its commission by ex post punishment, would be enhanced under a restitutionary regime.²⁶³ Barnett uses a simple mathematical formula to explain his thesis.²⁶⁴ The ex

for police officers who knowingly or recklessly violate the Fourth Amendment, and departmental liability for other violations. *Compare* Slobogin with NOZICK, *supra* note 5, at 78-84.

255. BARNETT, STRUCTURE, *supra* note 8, at 195.

256. *Id.* at 215.

257. *See id.* at 204-05.

258. *Id.* at 215.

259. *Id.*

260. BARNETT, STRUCTURE, *supra* note 8, at 215.

261. *Id.* at 233-37.

262. *Id.* at 215.

263. *See id.* at 233-37.

264. *See id.* at 227.

ante cost imposed on a criminal by a legal sanction equals the rate of apprehension times the severity of the sanction imposed, or:

$$\text{Cost of Punishment} = \text{Rate of Capture} \times \text{Severity of Punishment}^{265}$$

Thus, “to deter criminals from committing a crime, the subjective cost of punishment should equal (and thereby negate) the subjective benefit of the crime.”²⁶⁶ The best way to make sure that punishments are effective and equitable is to make the cost of punishment equal to the damage caused by the injury.²⁶⁷ Although this pure restitutionary system will not deter crime in every instance, increased deterrence does not necessarily follow an increase in the severity of punishment.²⁶⁸ Furthermore, producing additional rights in fighting crime merely increases the costs of enforcement error that are imposed on those who are wrongfully accused.²⁶⁹

Because “several property rights creates incentives to invest in crime prevention and the ability to exclude dangerous persons before they can act” there is a self-correcting tendency.²⁷⁰ “Freedom of contract makes possible far more responsive law-enforcement agencies than can be provided by a coercive monopoly.”²⁷¹ This means that a restitutionary system would increase “incentives to catch and prosecute defendants, thus increasing the rate at which legal sanctions are imposed” successfully and against the correct person.²⁷²

2. Enforcement Abuse

According to Barnett, advocates of a monocentric legal system elevate some individuals above others as part of their project to empower a judiciary to mete out and enforce punitive measures against those violating the rights of others.²⁷³ This practice gives the agents of the monocentric institutions a higher moral and legal status than others.²⁷⁴ The problem is that there is no way with certainty to determine to whom this power should be ceded.²⁷⁵ And even if the

265. BARNETT, STRUCTURE, *supra* note 8, at 227.

266. *Id.*

267. *Id.*

268. *Id.* at 237.

269. *Id.*

270. BARNETT, STRUCTURE, *supra* note 8, at 237.

271. *Id.*

272. *Id.*

273. *See id.* at 243-48.

274. *Id.* at 255.

275. *See generally* Eric A. Posner, *Agency Models in Law and Economics* (John M. Olin Law & Econ working paper No. 92, 2000), *available at*

initial allocation of responsibilities is carried out correctly, there is now a position of power that ambitious and clever people can reach for and use to exploit other individuals.²⁷⁶ This also poses grave temptations to the good to become less than good—as in the *Republic* where upon gaining the power of invisibility, the ancestor of Gyges of Lydia uses it to achieve his own immoral ends.²⁷⁷ According to Barnett, those who possess the monopoly power are *presumed* to use it properly;²⁷⁸ in fact, this merely enhances their ability to use it to take advantage of others.

There are three institutional features to deal with the problem of enforcement abuse by a coercive monopoly: elections, federalism, and free emigration.²⁷⁹ This combats the top-down relationship “between ruler and subject that is inherent in coercive monopoly [by trying to establish] a more bottom-up... relationship.”²⁸⁰ These three practices have, for the most part fallen short in maintaining “a coercive monopoly of power within the constraints defined by the liberal conception of justice and the rule of law...”²⁸¹ Nonetheless, each institutional feature “reflects a more fundamental principle that needs to be more robustly incorporated into institutional arrangements: *reciprocity*, *checks and balances*, and the *power of exit*.”²⁸²

Each of these principles is an integral part of what Barnett sees as an authentic constitutional solution to the problem of corruption: a decentralized or horizontal system of enforcement which could provide genuine reciprocity, real checks and balances, and effective exit powers, but of a far more sophisticated variety than can be provided by any formalistic constitutional constraints on a coercive monopoly of power.²⁸³ The authentic solution is a decentralized enforcement mechanism that conforms to the liberal conception of justice.²⁸⁴

E. Barnett's Solution: The Polycentric Legal Order

The Structure of Liberty concludes by arguing in favor of a polycentric legal order in which the police and judiciary would be run by private

http://papers.ssrn.com/so13/papers.taf?abstract_id=204872 (last visited Apr. 2, 2003).

276. BARNETT, STRUCTURE, *supra* note 8, at 250.

277. PLATO, REPUBLIC, *supra* note 49, at 35.

278. BARNETT, STRUCTURE, *supra* note 8, at 256.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. BARNETT, STRUCTURE, *supra* note 8, at 256.

284. *Id.*

corporations.²⁸⁵ These private corporations are kept from acquiring a monopoly over the use of force by constitutional constraints.²⁸⁶ It is Barnett's thesis that only in such a regime could individuals retain their fundamental rights while addressing problems of crime in a manner more effectatious than otherwise.²⁸⁷

This polycentric legal order is buttressed by two constraints: the nonconfiscation principle²⁸⁸ and the competition principle.²⁸⁹ *The Structure of Liberty* defines these principles as follows:

(1) *The Nonconfiscation Principle*: Law-enforcement and adjudicative agencies should not be able to confiscate their income by force, but should have to contract with the persons they serve.

(2) *The Competition Principle*. Law-enforcement and adjudicative agencies should not be able to put their competitors out of business by force.²⁹⁰

Nonconfiscation allows a monocentric system to evolve to a polycentric one, because "[t]he right to withhold one's patronage is the most effective means of disciplining law enforcement and is essential to creating a relationship of genuine reciprocity between the provider and the individual consumer of legal services."²⁹¹ Barnett notes that treatment received from government police is inferior to the treatment received from those working for private residential communities, "many of whom are former government police officers."²⁹² Therefore, police and courts should charge for their services, as do water departments, utilities, medical professionals, and educators.²⁹³ Police and courts must fight for customers and earn their trust and respect; barred from

285. *Id.* at 257-58.

286. *Id.* at 245. Barnett clearly refers to a constitution in the sense that Aristotle referred to the "Athenian Constitution"—referring to the body of norms, traditions, methods of functioning, and relations between the political bodies, and not necessarily to a written document in which specific basic laws are delineated, as in the U.S. Constitution. See generally ARISTOTLE, *ON THE CONSTITUTION OF ATHENS* at xivi-xiviii (F.G. Kenyon ed., 2d ed. 1891). Barnett similarly applies this holistic approach to constitutional interpretation, albeit one influenced by formalism. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 643-48 (1999); Barnett, *supra* note 158, at 989-90.

287. See BARNETT, *STRUCTURE*, *supra* note 8, at 257-59.

288. See *id.* at 259-70.

289. See *id.* at 270-82.

290. *Id.* at 258.

291. *Id.* at 260.

292. BARNETT, *STRUCTURE*, *supra* note 8, at 260.

293. *Id.* at 260-61.

forcing involuntary contracts on these people, they would have no other choice.²⁹⁴

Barnett devotes the remainder of the section on nonconfiscation to explain why wealthy and impoverished would equally benefit.²⁹⁵ Because a polycentric order would inherently be based on reputation and mutual exchange of values, any legal system that sought to cater to one side or the other would produce judgments that would lack popular legitimacy.²⁹⁶ To be effective, the justice system must provide people with the perception that it will act with *fairness* and *legitimacy*;²⁹⁷ a judgment in favor of Randy from *Randy's Mother's Court* would not have any value at all—unless Randy's mom had established a reputation as being an effective and fair adjudicator that people often went to for dispute resolution.²⁹⁸ In the polycentric order, law and law-enforcement professionals would be hesitant to cooperate with *Randy's Mother's Court* because it would undermine their own legitimacy.²⁹⁹ As for the poor, if they are able to get along without guaranteed medicine or food in the monocentric universe, they should not expect free legal services in the polycentric system.³⁰⁰ Such a system is just, Barnett maintains, because it does not deprive the poor of their basic rights; they have their freedom from contract.³⁰¹ That freedom also applies to the wealthy.³⁰²

The competition principle prevents any one law agency from dominating the others.³⁰³ Barnett notes that competition ensures quality of service in the private sector.³⁰⁴ “The more vital a good or service is,” he says,

the more dangerous it is to let it be produced by a coercive monopoly. A monopoly post office does far less harm than monopoly law-enforcement and court systems. And a coercive monopoly might go largely unnoticed if it were limited to making paper clips—that is, the inferior and costly paper clips inevitably produced by such a monopoly would not bother us too much.³⁰⁵

294. *Id.*

295. *See id.* at 264-70.

296. *Id.* at 266-67.

297. BARNETT, STRUCTURE, *supra* note 8, at 267.

298. *Id.* at 267-68. The example is wholly Randy Barnett's.

299. *Id.*

300. *Id.* at 269-70.

301. *Id.* at 270.

302. BARNETT, STRUCTURE, *supra* note 8, at 270.

303. *See id.* at 271.

304. *Id.*

305. *Id.* (emphasis omitted).

Barnett does not, however, discuss principles of antitrust law or problems with a single corporation gaining increasing amount of financial and political power through the workings of the free market.³⁰⁶ Once again, Barnett shows himself to be particularly insensitive to the concerns that generated these laws. The antitrust laws were inspired by the idea that allowing power to concentrate excessively in any one segment of society would be deleterious to democracy, freedom, and the rule of law, despite any economic efficiencies that might otherwise result.³⁰⁷ As the Supreme Court stated:

we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.³⁰⁸

The Second Circuit may have put it better:

It is no excuse for "monopolizing" a market that the monopoly has not been used to extract from the consumer more than a "fair" profit. . . . Indeed, even though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, [even] when it has not been used extortionately . . . possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy. . . .³⁰⁹

Ultimately, antitrust law anticipated the development of public choice scholarship: if economic power concentrates excessively in a certain segment of society, that segment will eventually act as a law unto itself—either by buying the legislature or more direct means.³¹⁰ In this respect, Barnett is in

306. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 8-22 (1976).

307. See *id.* at 18-19.

308. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

309. *United States v. Aluminum Co. of Am. (ALCOA)*, 148 F.2d 416, 427 (2d Cir. 1945); see also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) ("Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is 'inherently evil.'"). *But see* Alan Greenspan, *Antitrust*, in *CAPITALISM: THE UNKNOWN IDEAL* 63, 68-71 (Ayn Rand ed., 1967) (criticizing ALCOA case and arguing that antitrust laws hamper competition because they deny competitors the rewards of their superior skill, foresight, and industry).

310. See *Brown Shoe Co.*, 370 U.S. at 344. Professor Stephen Ross of the University of Illinois described to the authors a case he encountered while working for the U.S.

good company. Much libertarian scholarship casts a jaundiced eye at antitrust—including an article by Federal Reserve Chairman (and one-time radical libertarian) Alan Greenspan.³¹¹

Barnett concludes *The Structure of Liberty* with a vignette describing the self-correcting features of a polycentric legal order in which the police and judiciary functions are handled by private companies in a free market.³¹² He describes an attempt by unscrupulous elements in this legal order to dominate the legal order, but shows the effectiveness with which this order could overcome such a threat.³¹³

IV. LAW, LEGITIMACY, AND SOCIAL WELFARE

A. *Anarchy in the U.S.?*

Despite the optimism that characterizes Barnett's vision of a polycentric legal order, there are several potential problems with his vision. One is that he does not adequately explain how the monocentric system is to evolve into the polycentric order. Robert Nozick, starting from a state of nature, persuasively argued in *Anarchy, State, and Utopia* that competing protection agencies would, because of their power accretion, ultimately muscle out competitors until these agencies dominated discrete, continuous geographical areas—a state would be created.³¹⁴ Barnett does not take on this issue, leaving his opposition to a footnote that says only by granting “the ‘dominant protection agency’ a

government involving an individual who attempted to force a competitor out of business by unfair trade practices and physical violence. The perpetrator was naturally charged with both antitrust violations and arson. *See, e.g.*, *People v. Torres*, 500 N.Y.S. 2d 178 (1986).

311. *See, e.g.*, Greenspan, *supra* note 309, at 71 (“The actual practice of the antitrust laws in the United States [has] led to the condemnation of the productive and efficient . . . because they are productive and efficient.”); *see also* JEROME TUCCILLE, ALAN SHRUGGED 168-69 (2002) (“An adviser to Gerald Ford, Alan [Greenspan] routinely excused himself from discussions of antitrust enforcement because of his philosophical opposition to the entire concept of antitrust laws.”); *cf.* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 126 (1995).

[I]t should never be assumed that any ideal antitrust policy will survive unscathed the hurly-burly pressures of a political environment, in which the incentives for individual actors often cut at cross-purposes with the one sensible objective of [] antitrust law[s]. . . . [I]t is too easy in a political setting to forge an antitrust law that is more intent on protecting the positions of marginal competitors than on ensuring the preservation of open markets in which [all] firms . . . compete . . . on equal terms.

Id.

312. BARNETT, STRUCTURE, *supra* note 8, at 284-97.

313. *Id.*

314. NOZICK, ANARCHY, *supra* note 5, at 113-19.

power to put competitors out of business by force,"³¹⁵ was Nozick able to argue that the state could exist without violating individual rights.³¹⁶

It is difficult to imagine a self-interested political class voting their jobs out of existence.³¹⁷ No one would deliberately create a system in which rank and privilege could be threatened with ease.³¹⁸ Barnett, meanwhile, calls for the abolition not just of a monopolistic executive and judiciary, but apparently the legislature too, since new rules are to be created through the generation of a *nouveau* common law in the private courts.³¹⁹ However efficient that might be, the task remains to convince the mass of the population to accept a process whereby their only feedback is to choose a competitor, or to opt out of the private legal system altogether. To express this another way, network effects present a serious issue for anyone suggesting a radical change to the American constitutional order, as Barnett has done. Convincing the American people that the switching costs from the Constitution to the polycentric order are worth the potential price in social dislocation will be a difficult task indeed.

B. *Legitimacy*

A state may have its founding constitutional order fatally undermined by a change in perception of its legitimacy.³²⁰ Similarly, a proposed constitutional order that conflicts with existing popular perceptions will never materialize.³²¹ In this respect, the polycentric legal order is especially weak. The lack of an assembly of the people (or their representatives) in *The Structure of Liberty* will create problems. The public nature of the current "monocentric"

315. BARNETT, *STRUCTURE* *supra* note 118, at 259 n.4.

316. Barnett also refers the reader to references by other anarchists; alas, he does not describe their arguments at all, nor does he mention that one of them had reversed his position and endorsed the minimal state later in life. *Id.*; see also Roy A. Childs, *The Invisible Hand Strikes Back*, 1 J. LIBERTARIAN STUD. 23, available at <http://www.mises.org> (last visited Apr. 3, 2003); Murray N. Rothbard, *Robert Nozick and the Immaculate Conception of the State*, 1 J. LIBERTARIAN STUD. 45, available at <http://www.mises.org> (last visited Apr. 3, 2003). *But see* Childs, *LIBERTY*, *supra* note 14, at 181 ("Anarchism functions in the libertarian movement precisely as does Marxism in the international socialist movement: as an incoherent and therefore unreachable goal that inevitably corrupts any attempted strategy to achieve it.").

317. See FARBER & FRICKEY *supra* note 206; see also FRIEDMAN, *supra* note 206, at 289-97; POSNER, *ECONOMIC ANALYSIS*, *supra* note 2, at 569-75.

318. For the seminal work on this subject, written long before public choice scholarship became fashionable, see generally BEARD, *supra* note 251, at 149-51.

319. See BARNETT, *STRUCTURE*, *supra* note 8, at 289.

320. PHILLIP BOBBIT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 213 (2002).

321. See *id.*

government coupled with democratic elections³²² for the political classes creates a legitimacy that otherwise would be lacking.

Barnett's apparent belief that legitimacy is a province of superior decisions created by market competition is only partly true; superior decisions may be in the eye of the beholder. If I am suing you and you win, I may think that the result is unjust. If the judge then says that she ruled against me because that was her interpretation of a statute passed by the legislature that I elected along with the president I supported, then the ruling is understood as legitimate, if not personally agreeable. It becomes less so when these laws were passed by individuals I did not support, or by a Congress long past.³²³

Barnett's polycentric order, however, calls for a situation where individuals would find it necessary to defend themselves in front of private judges. These judges act privately to enforce private tort or contract or criminal law precedents developed from the cases previously decided at their dispute resolution firm that interpret the basic and flexible principles of liberty elucidated by the scholars and philosophers comprising the electorate of law.³²⁴ The only reason that court was chosen was because the plaintiff liked the laws from that court, and, if successful, will hire a private collection agency to collect wages should the defendant refuse to pay.³²⁵ Moreover, because of contractual agreements between your private protection service and the other party's service, they have agreed not to defend you because you have been convicted in the others' courts.³²⁶ Despite his protestations to the contrary, a more effective way of centralizing political power in the hands of those with financial power would be difficult to imagine.³²⁷

322. For a discussion on the flaws in execution of democratic elections, as demonstrated in the 2000 presidential election, see, for example, Brian K. LaFratta & Jamie Lake, *Inside the Voting Booth: Ensuring the Intent of the Elderly Voter*, 9 ELDER L.J. 141 (2001).

323. Thomas Jefferson desired a sunset provision in the U.S. Constitution, arguing that children were not morally obligated to follow the social contract that bound their parents. The Founding Fathers rejected these arguments, believing that a constitution so written would enshrine instability and chaos. The authors would like to thank Francis Boyle, Professor of Law, Univ. of Illinois for this information.

324. See BARNETT, STRUCTURE, *supra* note 8, at 286, 289.

325. Significantly, Barnett appears to have acknowledged the right to use force to enforce restitutionary judgments.

326. See BARNETT, STRUCTURE, *supra* note 8, at 284.

327. This is particularly true given Barnett's belief that "contingency fee lawyers [should be] held financially responsible for the legal costs of the other party if a contingent fee suit is unsuccessful." *Id.* at 286. Compare *id.* with EPSTEIN, *supra* note 310, at 307-08. Epstein creates a system grounded in economics that does *not* assume the wealthy to be a normative value to be always defended:

[I]ndividual autonomy, first possession, voluntary exchange, control of aggression, limiting privileges for cases of necessity, and just compensation for takings of private property, with a reluctant nod toward redistribution within the framework

One is tempted to invoke the all-encompassing image of unfettered conglomerates dominating the political landscape, similar to the prewar Japanese Zaibatsu.³²⁸ The Zaibatsu, huge industrial conglomerates, dominated the economic and political life of prewar Japan along with the Army.³²⁹ There were few legal restraints on their expansion, and power and wealth in Japan increasingly concentrated in the hands of the ten or twenty families that ran those conglomerates.³³⁰ In the 1930s, 0.0019% of the Japanese population possessed 10% of the aggregated family income—¥10,000 and above.³³¹ In contrast, the bottom 18% of Japan's population received only 3.8% of total family income.³³² “Through the concentration of economic power at the top, [the Zaibatsu] stifled the growth of [Japan's] strong middle class. . . .”³³³

True, this analogy appears imperfect because the Zaibatsu were given official government encouragement; in the polycentric order, there would be no legislature with which to curry favors, nor an executive with which to gain pull. But there remains a judiciary that has the power to develop new interpretations of the basic law. When the law remains unchanged, the judiciary becomes the vehicle through which the law is interpreted and changed.³³⁴ Although there appears to be no history of the public choice model being applied to the judiciary, Barnett proposes a new order in which the judiciary is the focal point for all new law generation.³³⁵ Further, nowhere in *The Structure of Liberty* does Barnett suggest *how* the judiciary is to be chosen. If this decision is left solely to the discretion of the individual companies, the opportunities for concentrated interests using judicial selection to increase the generation of favorable laws would be maximized. Therefore,

of flat taxes. The first four rules are designed to establish the basic relations between persons and their control of things, and the next two are designed to prevent the coordination problems that remain in a world of strong property rights and private contracts. The entire enterprise seeks to minimize the errors arising from these two sources. The system is one that stresses production and individual zones of choice and control. [T]he protection of the rich because they are rich . . . is no part of the overall plan. If people with great wealth and influence cannot continue to supply goods and services that others need, they they . . . will[] find their own prospects diminished in a world governed by the legal principles outlined here.

Id.

328. See MIKISO HANE, *MODERN JAPAN* 222-24 (3d ed. 2001).

329. *Id.* at 222-23.

330. *Id.*

331. *Id.* at 222.

332. *Id.*

333. HANE, *supra* note 328, at 223-24.

334. See BARNETT, *STRUCTURE*, *supra* note 8, 289.

335. *See id.*

despite the wit of the *Randy's Mother's Court* vignette above,³³⁶ if Randy is a man of power and wealth in Barnett's proposed anarcho-capitalist environment, he will likely find himself in a position to drag cases against him to his mother's court, where a favorable outcome awaits.

C. Social Norms

The focal point theory of expressive law presents another objection to Barnett's theories concerning the abolition of an elected, monocentric legislature as the chief rule-generating body in a nation.³³⁷ McAdams argues that law has a significant role as the expression of a focal point for coordinating behavior apart from any deterrence function it may have.³³⁸ As an example, focal points would come into play if "two people have a common interest in meeting each other but lack the ability to communicate about where to meet."³³⁹ Two people separated in a large department store would find themselves in such a predicament.³⁴⁰ Lost people locate each other by seeking an area that they believed the other person would also choose. McAdams offers no opinions on the normative value of focal points independently arrived at, but there are at least two concerns about them based on McAdams's work.

First, absent government intrusion, focal points tend to be decided based on the power of the parties, without concern for normative features.³⁴¹ One of the empirical examples McAdams points to is the question of which side of the road automobiles should drive on.³⁴² Eventually a spontaneous order would emerge, created mostly by the people who were most consistent with their behavior. In this example, trucking companies would eventually agree to direct their drivers to stick to one side of the road; individual drivers would have no choice but to conform.³⁴³ What is not clear in this example is the cost in terms of lives and property that would occur before an order spontaneously emerges. It is entirely possible that, in areas where there is a need to coordinate behavior for efficiency and safety, legislation could provide such a basis for such coordination.³⁴⁴ An example may be mandatory seat-belt laws. Such laws are

336. *Id.* at 267-68.

337. *See* McAdams, *Focal Point*, *supra* note 26; *see also* NOZICK, *ANARCHY* *supra* note 5, at 140.

338. McAdams, *Focal Point*, *supra* note 26, at 1657-60.

339. *Id.* at 1656.

340. This also is a natural expression of the classical "prisoner's dilemma" problem. *See* DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 312 (1994).

341. McAdams, *supra* note 26, at 1651.

342. *Id.* at 1652.

343. *Cf. id.*

344. Indeed, on the international plane, nations are seemingly more willing to

rarely enforced, but they provide a way to coordinate behavior in a manner that improves economic efficiency.

The seat-belt example dovetails into the second concern, legitimacy. Even Robert Nozick agreed that the use of government as a means for a polity to act with one voice on an issue of global importance is occasionally appropriate.³⁴⁵ People will often follow a law simply because it *is* the law;³⁴⁶ it has a special legitimacy that policies handed down from corporate decision-makers, for instance, might not have. Barnett completely misses the point that because of the democratic trappings of the American government,³⁴⁷ a greater legitimacy is granted to the laws created by Washington. No less than the machiavellian Henry Kissinger agreed: legitimacy in a government isn't a question of theoretical efficiency or effectiveness; it is a question of whether or not the people *believe* they are oppressed.³⁴⁸ At present, many people believe that the possibility exists for desirable change in government laws and policies through the democratic process, however difficult it would be to effectuate that change. Barnett's polycentric order would take all of this away and place norm and rule production exclusively in the hands of legal scholars and staff judges working for private firms. This is an important issue that Barnett must address before his theories of government can come anywhere near practice.

D. *Foreign Defense*

As noted above, few anarchists are willing to discuss national defense in their works. The existing international political order needs to be radically altered for an anarchistic political system to function in today's interdependent world.

The Structure of Liberty dismisses Nozick's explanation of how a polycentric legal order *must* evolve into a monocentric system, claiming Nozick's assumption that private police agencies would be free to use force to compete for customers is false.³⁴⁹ This amounts to Barnett doing little more than wishing away the problem. A private protection agency, unrestrained by

coordinate international actions when they agree on the need for a solution.

345. ROBERT NOZICK, *THE EXAMINED LIFE* 238 (Touchstone 1990).

346. See Plato, *Crito*, in *THE LAST DAYS OF SOCRATES* 76, 85-92 (Hugh Tredenrich & Harold Tarrant eds., Penguin Books 1993) (by remaining in Athens when he had previously been free to leave, Socrates had subjected himself to their laws; therefore he must obey those same laws when they ordain his death. To do otherwise would precipitate the destruction of laws and the benefits they accrue to the citizenry.).

347. This is true even though they may occasionally fail their constituents. See generally FARBER & FRICKEY, *supra* note 206.

348. HENRY A. KISSINGER, *A WORLD RESTORED* 23 (The Riverside Press 1957).

349. BARNETT, *STRUCTURE*, *supra* note 8, at 258-59 & n.4.

anything other than the power of other private protection agencies, would be able to expand beyond the status quo ante boundaries until it met a force (state or non-state) able to stop it. There is no reason to expect such power expansion would be limited to the traditional national boundaries.³⁵⁰

The truth is that in a world where nations are armed with thousands of nuclear weapons³⁵¹ greed and avarice, on a national scale, is something that must be contemplated by security agencies. Once modern weapons of war are acquired by a private protection agency, however, it is difficult to see what would prevent such an agency from using those weapons to acquire additional customers at home. Barnett does little to clear up this matter, but it is an issue that must be addressed before any polycentric order can be established.

V. CONCLUSION

Political anarchists, despite popular perceptions, have typically appreciated the need for order in society; what they reject is the appropriateness of the use of force to settle disputes, particularly when that force is initiated by a monopoly state. Most political anarchists trace their philosophical lineage back through a group of mostly idealist philosophers beginning with Plato. American anarcho-capitalists, beginning with Murray Rothbard, combine this idealism with the rationalistic free-market ideology of the Austrian school of economics.³⁵²

Randy Barnett's *The Structure of Liberty* is heavily influenced by the Rothbardian and Austrian anarcho-capitalists. Although the work presents a tightly focused defense of liberty over statism and socialism in the tradition of Hayek, *The Structure of Liberty* falls short of the mark in several respects, most of which are brought on by his adherence to this tradition that rejects empirical economics out of hand. Barnett fails to anticipate a possible public choice critique; he does not discuss sociological issues of legitimacy, nor does he discuss the issue of foreign defense, nor does he even attempt to describe how people will be convinced to pay the switching costs necessary to transition to his new order. By adhering to the rationalistic Austrian school, he fails to

350. See THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 354 (Robert B. Strassler ed., 1996) ("... [O]f men we know, that by a necessary law of their nature they rule wherever they can. . . . all we do is make use of [this law,] knowing that you and everybody else, having the same power as we have, would do the same as we do.").

351. Walter Pincus, *Nuclear Warhead Arsenal Trimmed*, WASH. POST, Dec. 6, 2001, at A36 (stating the U.S. and Russia have both met the START I limitation of 6,000 each; the U.S. is to reduce its arsenal further to a mere 2,000—an amount that might be barely enough to destroy the world once).

352. See *supra* text accompanying note 88.

anticipate objections coming from modern socio-economic literature. This is a failing; however incorrect we believe our opponents' positions, we must be willing to address their concerns. Right now, the dominant language in legal scholarship is the law and economics school; it carries with it certain presumptions and paradigms that must be addressed if one is to be seriously discussed in the academy.

Of course, the *Leviathan* state, because of the tremendous power it possesses in the nuclear age, will always be a threat to individual liberty;³⁵³ a system that could provide the same degree of security with better protections for individuals is something that ought to be sought. In this respect, Barnett's work succeeds magnificently. He provides a passionate defense of individual liberty, arguing that liberty is the highest end for a society. Although one may find fault with the details of his arguments, and the structure of his order, it is difficult to argue with the underlying impulse to promote and protect the rights of the individual. In this respect, we hope that this is not the last word that Barnett writes on the subject.

353. This is something on which the left and right can agree. *See supra* text accompanying notes 2-4.

