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BOOK NOTES

THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW

BY RANDY E. BARNETT

CLARENDON PRESS, 1998

"Everyone, or nearly so, claims to favor liberty," begins Randy Barnett's newest book, *The Structure of Liberty*. "Yet everyone, even the most 'libertarian,' also favors constraining people's conduct . . . Thus, nearly everyone carries within them a tension between freedom and constraint. How can this be?" Barnett's work sets out to evaluate the seeming contradiction in these statements, and he does so with surprising clarity. Barnett's work is accessible to the lay person (for those from other countries, Barnett even supplies the necessary details about the structure of American government), yet it does not condescend. It seeks instead to elevate the reader to the level of the discussion that needs to occur. Barnett's work does, in fact, read very much like a discussion, moving easily back and forth between explanations of philosophical tenets, exposition of his own views on the subject, and a casual, almost friendly use of analogies and examples to demonstrate his points. Barnett approaches the subject of liberty from the perspective of a classical liberal, or libertarian, a wonderful change from the ongoing war between the Left and the Right. Readers should especially take note of Barnett's explanation of the differences between the two, and why neither seems in favor of a liberal conception of justice. Barnett seems to be one of the few classical liberal writers who can combine common sense with a writing style that manages to be both clear and entertaining. In this sense, he skillfully places himself on par with authors like David Boaz (author of *Libertarianism: A Primer*) in bringing the complexities and subtleties of libertarian thought within the ambit of the 'average' reader, someone unfamiliar with the likes of F. A. Hayek, Charles Murray, and Lysander Spooner.

Barnett begins his first section, *The Problems of Knowledge*, with a discussion of knowledge and its role in decision-making. Each individual, or group of individuals, can be said to have certain knowledge about the world; personal knowledge, in the first instance, and local knowledge in the second. Using such knowledge, these individuals can make educated decisions about their lives, their property, and situations within their areas of expertise. Who has the information, experience, and perspective to best make such a decision? Or, phrased differently, who has the competence to make such a decision? Usually, it is the person most intimately involved in the matter. The transfer of power to governmental bodies is forever hindered by what Barnett refers to as the first-order problem of knowledge: in such situations, the decision-making is no longer in the hands of those with the most competence to make the decision. No matter how small

the jurisdiction of the decision-maker may be, there is no way that such a person, or group of people, could possibly internalize all of what makes the competent individual described above capable of making the best decision possible. There is, of course, one exception; and that is when each individual is permitted to make decisions about those things with which he or she is the most familiar — essentially, a jurisdiction of one.

Barnett thus introduces three basic, interdependent concepts. First is the idea of several property. This is the right to obtain, own, utilize, and discard physical resources (including one's own body) using the competence that each individual possesses. Justice involves a respect for this right and an acknowledgment that this right inherently includes the limitation that such decisions may not infringe upon the similar decisions of others concerning their own property. The second basic concept, freedom of contract, is necessary to maintain this balance and includes both the freedom *from* contract and the freedom *to* contract. The former acknowledges that the consent of a property owner must be obtained before control of that property passes to another; property cannot be seized from that individual, nor can the individual be forced to give it away, sell it, or trade for it. The latter freedom secures a stable system of exchanging goods by assuring that the ability to contract is in and of itself sufficient to demonstrate the transfer of property from one individual to another. Barnett's third basic concept is the right of first possession, which states simply that a property right is first obtained by being the initial person to exercise control over that property. If previously existing rights are disturbed in the taking control of property, it is not being claimed first, and, therefore, the property must be transferred through the system of contracts. These three elements comprise a complete system of property and property rights that is both elegantly simple and surprisingly comprehensive.

How, though, do the rules of such a system become instilled in a population? This Barnett refers to as the second-order problem of knowledge. The system of justice described above has no practical function unless it can somehow be communicated in such a way that it can be accessible to everyone. There are, in fact, two systems for communicating such information: *ex ante* and *ex post*. The need for *ex ante* communication is evident: without forewarning, no one could avoid trampling the rights of others, and it would seem clear that the most efficient method for dealing with such injustices is to explain the system of justice ahead of time so as to avoid such problems in the first place. Barnett discusses at length the requisite qualities of a competent system for accomplishing this end. He then, however, introduces the third-order problem of knowledge, which involves the question of how an individual can possibly translate such knowledge into an effective guide for everyday action. Such rules, developed in advance, can only be applied to so many situations before some form of clarification is needed. This is the role of *ex post* information, which in the American system would be best represented by the common law. As opposed to statutes, which attempt to avoid problems before they happen, common law strives to serve the dual function of resolving problems as they arise and providing guidance to others so that such problems might be avoided in the future.

Barnett's discussion of the role of knowledge in the decision-making process is insightful and thought-provoking. He easily converts what seems a rational and sensible approach into a functional framework for understanding how rules of law can be developed and followed in a complex system. Most importantly, he provides himself with an exceptionally strong foundation on which to build the rest of his theories. In the tradition of all classical liberals before him, his book begins with a firm footing in property rights and the rule of law. Barnett, however, extrapolates from these basic concepts in a more lucid, and certainly more entertaining, fashion than most.

In *The Problems of Interest*, the second section of the work, Barnett discusses three difficulties that must be overcome by a system of law in a complex society: partiality, incentive, and compliance. In discussing partiality, Barnett notes that the problem encompasses two conflicting aspects. The first is the need in society to allow individuals to pursue their own partial, or selfish, interests; the second is how to make certain that, in doing so, they take into account the partial interests of others about whose welfare they might not be concerned. Barnett returns again to the concept of several property for a logical solution. Acknowledging several property, a society effectively compartmentalizes each of these individuals, maximizing their capacity to act in their own interest while simultaneously minimizing their capacity to adversely affect others. Several property, at its core, involves giving each person ultimate control over his or her own property, restricted only by the obligation not to interfere with the rights of others to do the same with their property. The importance of contracts now becomes clear, as it stresses the interdependence of almost every member of society. When each individual requires the consent of another to acquire new or different property, he or she is forced to take the interests of the other into account. In this fashion, the problems of partiality can be overcome, but only in a decentralized system dedicated to protecting both property rights and consensual transfers of those rights. Readers may want to take special note of Barnett's interesting examination of the role played by lawyers in mitigating the partiality problem in the current American justice system.

Barnett's discussion of the incentive problem centers around a discussion of cost-benefit analysis and the effects on such an analysis of the rule of law. Barnett's extensive background in contract law continues to bolster his arguments, especially in his discussion of the right to restitution. Quite simply, operating under the rule that those who violate the rights of others must of necessity be obligated to compensate them for any harm caused, a society assures that any cost-benefits analyses will almost certainly lead potential perpetrators away from violations of justice. Barnett follows this with a cogent explanation of why such a cost-benefit based system must fail where "public goods" — that is, properties owned or supplied by the government, rather than by an individual or group of individuals — are concerned. Classical liberal writers rely on this analysis frequently, as any reader familiar with the "who will pay for the lighthouse?" example might tell you. Barnett's concise evaluation of the age-old "free rider" problem, however, seems especially clear and remarkably well thought-out.

Barnett then turns to a discussion of the compliance problem; or, put more clearly, the problem of how to narrow the gap between what justice requires people to do and what people believe it is in their best interest to do. Barnett discusses three of the primary reasons why this problem exists (the existence of emergency conditions, such as shipwreck; pecuniary gain; and psychological gain), and then moves on to an evaluation of the use of force in achieving compliance. The sources relied upon range from genuine experience with prison labor, to the works of Aristotle, to ancient Icelandic sagas, and all serve to support Barnett's point that force is not only a necessary component of ensuring compliance with the tenets of law discussed above but a preferable one as well. Barnett presents his ideas on the effectiveness of using force to ensure the collection of restitution and to prevent crime from taking place. Barnett concedes, however, that the application of force is limited to these two areas, and that even these uses have substantial costs that are frequently underestimated.

Such problems are discussed in the third section of the work, *The Problems of Power*, which analyzes how the use of force affects the areas of knowledge and interest. Barnett conducts an analysis using the "false positive/false negative" balancing approach. This, in layman's terms, is the problem of how to balance the frequency and severity of punishment of those wrongfully convicted with the possibility of victims of injustices going without restitution; and, further, the question of which of these two distasteful options we wish to favor. Barnett introduces his ideas on the strict proportionality of the sanction as related to the offense and the role of the burden of proof in enforcement and nonenforcement errors.

Barnett then turns to perhaps the most refreshing section of his work: fighting crime without punishment. He notes that, traditionally, convicted criminals are sent to public prisons, and that the vast majority of the population would agree that this is fitting. He wonders, however, where the justice lies in this policy. Where is the opportunity for restitution of the victim's losses? The victim is frequently merely a witness to testify against another who has committed a crime against the state; but does this entirely waste the potential now available in the criminal justice system for providing compensation to the victim? If we were to favor unmitigated restitution from all convicted criminals, today's prison system is hardly the place in which we would want to put them, for they will have no occasion to ever produce the resources needed to compensate their victims for the injustices done to them. In true classical liberal fashion, Barnett gently undermines the fallacy that public law enforcement, public property, and public imprisonment have anything positive to contribute to the prevention or the resolution of crime. He deconstructs the myths surrounding punitive deterrence and promotes a system of deterrence without punishment that relies almost solely on restitution. Of course, should the victim decide that revenge, rather than restitution, is what they desire, imprisonment would still be a rational alternative. Barnett's discussion is passionate and ardent while remaining within the bounds of common-sense and reasonability, a combination that many classical liberal writers fail to maintain. Readers may find themselves caught up in Barnett's hypo-

thetical scenarios to such an extent that it seems counterproductive (let alone anticlimactic) to 'return' to the current state of American law.

For those who need additional convincing concerning the ideological basis for his arguments, Barnett then turns to problems in enforcement abuse. He puts forth the "Single Power Principle," or the belief that society requires a single coercive entity that maintains a monopoly on the use of force (i.e., government.) Barnett effectively skewers this theory on the horns of logic and moves on to the role played by the United States Constitution in controlling the use of force. He puts forth two nontraditional principles of constitutional law for discussion. The first is termed the nonconfiscation principle, which suggests that the government should be obligated to follow the same rules of contract as its citizens, obtaining its income by mutual agreement rather than through forcible confiscation. This returns to the idea of freedom from contract discussed earlier: no individual should be forced to surrender his or her property. Instead, each must be persuaded to part with it through a voluntary trade of goods and services. Those who find themselves agreeing with the freedom from contract in theory often find themselves making an 'exception' when it comes to the government demanding what they feel to be its just due.

Barnett's second principle discussed is the competition principle, which posits that not even governmental agencies (specifically, adjudicatory and law-enforcement services) should be able to drive their competitors out of business through the use of force. Again, many will agree with the underlying principle of freedom to contract, also discussed earlier, but will somehow find an exemption for the government based on what they perceive to be necessity. Barnett puts forth his idea for a polycentric constitutional order; that is, a division of power such that no entity is justified in using such power to violate the basic principles of the society, specifically, the nonconfiscation and competition principles. Barnett's points are supported by straightforward logic, and presumably even the most authoritarian-minded of readers will find themselves wondering why exactly it is that we have one set of principles for the governors and a largely different set of principles for the governed.

Barnett gives us a sample of these two principles at work by spending a chapter describing a world in which both law-enforcement and adjudication are privatized. While his idealism is commendable, and his treatment of the subject is broad and remarkably detailed, the reader cannot help but notice the unfortunate implausibility of the whole system. Assuming Barnett's theories to be sound, even the reader of libertarian bent will find it hard to imagine any group of people agreeing to such a system, knowing what he or she knows about the current state of the world and about human nature. Barnett's purpose seems to be to demonstrate the application of his theories to a real-life setting, rather than to make either a prediction or express a hope about the future. The utopian world he creates, however, may leave some readers feeling that the principles put forward in the book are simply too distant from reality to ever be considered functional. This is simply not so, however; and readers should pay heed to Barnett's own note that the example is given simply to add concrete form to an oth-

erwise abstract discussion, lest they find themselves forgetting about the merits of his arguments and concentrating more on the implausibility of his tale.

Barnett's fourth section, *Responses to Objections*, is an admirable attempt to preempt many challenges that might arise in the minds of readers, and any evaluation of this section should be done by the readers themselves after reading Barnett's work in full. It suffices to say that, on whole, Barnett's work is a masterful presentation of some controversial ideas, though perhaps, if Barnett's conception of justice prevails, as it seems it should, these ideas will not remain controversial for very long. Barnett's thought-provoking work has made the classical liberal position available and accessible, and this can only but help the infusion of such concepts into today's society.

"Altering the precepts of justice to pursue other social ends – even very important ends – is like taking from the foundations of a building to add more floors to the top," writes Barnett in his final section. "The foundation of a building is not an end in itself. And a little can be stolen from here or there without noticeable effect. Such is the resilience of a well-designed foundation. But, assuming the foundation was correctly designed in the first place, the structural integrity of the building is jeopardized by the very first taking. Moreover, the *principle* of taking from the foundation to build a higher building is most certainly a threat to the structural integrity of the building and, consequently, is a mortal threat to the lives and well-being of those who reside within." Upon completion of this work, Barnett will have readers seriously questioning the soundness of the structure of liberty in the United States today. If this is his purpose, as it evidently is, it appears that Barnett has succeeded admirably.

Timothy Bove