

OPINION

The state-haters: rationalizing our selfishness

By Robert Fellmeth

"The Structure of Liberty: Justice and the Rule of Law" (Oxford; \$29.95) is the modest title of Randy Barnett's new book. A law professor at Boston University, Barnett starts with his own theory of enumerated "natural laws," dominated by individual property rights vis-a-vis the malevolent state. From them he deduces current policy advice, chiefly: (a) employment of most criminals for victim restitution rather than punishment; (b) legalization of drug use; (c) leaving Microsoft alone (without government antitrust "interference") and (d) removing the state from wealth distribution, e.g., no taxation of income, inheritance.

Barnett is a facile writer — his prose is readable beyond those entombed in legal libraries. And he has a number of intriguing ideas. But his work represents much that is wrong with legal scholarship. The problem begins with the conceit that he starts from the relevant first principles (natural laws) and connects them through inexorable reasoning to optimum public policies. In Barnett's case, a complete listing of questions begged, alternatives omitted, empirical reality ignored and nonsequiturs committed would occupy far more than its 328 pages.

Three relentlessly omitted but legitimate "first principles" stand out:

(1) The contributions of "the state" and its role in checking private power abuse.

The state-haters increasingly hold the field in American politics and are gaining in the pretensions of legal philosophy. The extreme end of this school exhibits the features of a faith-based religion: Don't bother with the facts — we have a formula. It's simple: The state is the anti-Christ; virtue is its removal.

Barnett shares this mind-set. Its adherents suffer from selective amnesia. Let us count a few forget-me-nots brought to us from our Beelzebub: our basic infrastructure (rural electrification, ports, aqueducts, reservoirs, water, bridges, roads), trash pickup and disposal, street lights, gas and electricity monopoly

controls, sewage systems, emergency services (fire, ambulance, police), parks, wilderness preservation, schools and universities, public health, highway safety, licensing of doctors, policing of commercial deceit, drug testing, air traffic controllers, antitrust to preserve a free market, the post office, our currency, the rule of law and a criminal justice system, zoning, buses and the trolley, libraries and playgrounds and our democracy.

For all its faults, government is largely responsible for our civilization — for a great deal we take for granted. The state-hater ingrates should be led into one of the wilderness areas it has thoughtfully preserved for a camp-out on their own. After a matter of weeks without its fruits, they will be mightily pleased to be back among us, taking a warm shower of water carried 200 miles from the Colorado River, and purified for their health, by the sworn enemy.

Related to this imbalance is the failure to recognize the problems of private power abuse and the role of the state as its necessary check. Have any of these folk ever encountered a one-company town? A corrupt labor union? An abusive cartel? Neither-utopia nor a free market is the result of state absence; society is affected by all sorts of sometimes arbitrary forces — culture, wealth distribution, economic concentration precluding choice, commercial transaction rules, traditions and language, adhesion, fraud and so on. The state must intervene to preserve the underlying conditions that make the market work — and that means antitrust enforcement from which Microsoft should hardly be exempt.

(2) The need to enhance equality of opportunity and just wealth distribution.

Current wealth distribution is not entirely just, and opportunity is not equally available. Look askance at any legal philosophy that chooses as its starting point the notion that "them that has gets." There are often contrary principles entitled to supersession: equality of opportunity, a fair contest, rewards based on contribution, incentives to maximize human potential.

African-American and Latino children inherit about one-fifth the average amount of white children, but Barnett predictably concludes from his "natural law" analysis that the state should ideally exempt wealth transfer between generations from taxation. And his view is currently ascendant in Washington — we are now exempting the first million.

It has now reached the stage in California that the bottom 20 percent in income pay the highest portion

of their income in state and local taxes and the top 20 percent in income pay the lowest rate. Of little concern to most legal scholars, we have created an underclass which projects to about 35 percent of our population — children living below or just above the poverty line.

We have provided little path for their future employment, disinvesting in both K-12 and higher education. Year after year a lower percentage of youth have access to community college or university slots; politicians claim annual increases, but a supine media allows them to omit inflation and population growth which means a lower percentage of youth have a path to future employment when a quantum percentage leap is needed.

The gap between the rich and poor continues to grow as the middle class diminishes. But Barnett does not empathize with persons outside of his group — and he's not in the 35 percent underclass, nor is he thinking about larger notions: No child should go hungry, suffer, be untreated if ill, and each of them should get a real chance. Not relevant to his "natural laws."

(3) Our primary duty is to future generations.

Related to the above, and perhaps most tragic, is the implicit assumption that we do not owe a special obligation to our children and their children through the millennia to come. Barnett's exclusion of this real first principle of human ethics may reflect the dark side of the 1960s generation now in power: the glorification of self indulgence. The political system serves these base instincts, as an essentially passive Legislature bends to 1,200 lobbyists. Who do you think they represent? Future interests? The dispossessed? Children?

Here's a different natural law for Barnett and his colleagues to ponder as a proper starting point: Life should be better for our children than it has been for us. Basic evolutionary principles support such a priority, and citations may be found wherever human nobility has flourished; from the people of Abraham: ("I have drunk from wells I did not dig, I have been warmed by fires I did not build") to our Hopi brethren: ("I did not inherit this earth from my parents, I am borrowing it from my grandchildren.")

And our own culture has historically honored it, forging a chain of sacrifice over 200 years of hard work: building the schoolhouse in the rough West, helping a son acquire his own house for his family, working a lifetime so a daughter can be the first in the family to finish college. Those Marines hitting the



beaches in World War II were in the employment of the state and were not thinking about protecting their wealth — so many knowingly gave everything they had for those who followed. Not all of us have forgotten.

As an adult generation, our record has been uniquely different: on the private side, unwed births, denigration of fathers, paternal abandonment, and a media culturally obsessed with titillation and worship of celebrities; on the public side, repeated tax cuts for the wealthy and middle class over needed investment in our children. The evidence is overwhelming, and disgraceful.

Legal scholars who provide false rationalization for our generation of selfish gluttony suffer from both ethical and intellectual amnesia — including the omission of three prime "first principles": the state as a check on abusive power, the value of opportunity enhancement for the many, and underlying it all — the obligation we have to our legatees — our children.



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