

THE ROLE OF PERSONAL JUSTICE IN ANARCHO-CAPITALISM

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A criticism with which an anarcho-capitalist is usually assailed concerns the operation of free-market courts. How can the free market guard the interests of justice? Will not there be an incentive for a person to hire a relative (family bias) or to bribe a judge so as to receive a favorable verdict? Murray N. Rothbard⁽¹⁾ and other libertarian writers have found that actual free-market courts which existed in the past competed with each other, not on the basis of their respective susceptibilities to bias, but on the basis of their respective fairness and impartiality. Yet, to my knowledge, there has been no theoretical, *a priori* explanation of this phenomenon. This paper will attempt to provide such an explanation. This aspect of a free-market court system will be discussed and will be contrasted with the operation of government court systems.

The key to eliminating injustice via family bias and bribery in an anarcho-capitalist court system is found in the concept of a “personal judiciary”. Reference to John Locke’s political theory is helpful in explaining this concept.⁽²⁾

A major reason why Locke believes that living under a government is preferable to living in a state of nature is because of the nature of a pre-government judiciary. In a state of nature, aggressors are punished directly by injured parties. Each injured party sets himself up as a judge in his own case and punishes according to his own estimate of the damages. With injured parties judging their own cases, however, there would be a tendency for these judges to exact more than enough compensation for their damages. The former aggressors, perceiving that an injustice has been done to them, judge their own case and punish the punishers. If the injury is more than compensated for, then the aggression–overcompensation cycle could con-

tinue indefinitely. To rid themselves of this cycle, men establish independent and impartial arbitration institutions to decide cases.

What Locke refers to as setting up one’s self as a judge in one’s own case is what I call a “personal judiciary”.

In what respect is the concept of a personal judiciary relevant to the operation of an anarcho-capitalist court system? Let us consider an example. Suppose that Smith has injured Jones. Jones then hires the fairest free-market judge he can find and institutes proceedings against Smith. The court finds Smith guilty and orders him to pay Jones for actual damages and court costs. Smith, on the other hand, hears of the verdict and rushes to “hire” his brother to decide the case as a free-market judge. His brother, meanwhile, has had no experience in arbitration and, in addition, has plainly stated that he intends to find his brother not guilty regardless of the facts. So, Smith’s brother pronounces a verdict of not guilty. The courts are at a deadlock. (I assume, for convenience, that there are no free-market appeals courts.) What happens now?

It is evident that Smith has set up his own agent as a judge in his case. This, in essence, is the same as setting himself up as his own judge. The particular incidentals differ, but the essential principle remains the same: a judge, biased in favor of Smith, judges the case. Smith’s actions demonstrate that he consents to that principle.

But, since Smith consents to that principle, he can hardly expect to exclude Jones from acting in accordance with that principle. Smith has stated a preference by means of his actions; Jones’s acting in accordance with Smith’s legal principle fulfills Smith’s preferences. Indeed

it would take very little persuasion to convince Jones that he is entitled to respond in kind. Smith, by virtue of his actions, tacitly consents to Jones's response.

Of course, Jones does not have to go through the motions involved in "hiring" his own brother in response to Smith's actions — Jones may hire himself as a judge. Jones may revert to acting in accordance with Smith's legal principle in a more overt manner. Jones could grab his shotgun and seize part of Smith's property in compensation for Jones's injuries.

Jones has a moral advantage. He had shown his good faith by hiring initially the most impartial jurist he could find. He may be able to gain the support of a large segment of that society in any personal action he takes against Smith. In addition, other members of the society may take advantage of Smith's legal rule to inflict injuries on him without having to pay compensation. Hiring his brother may be tantamount to Smith's declaring himself an outlaw — an unenviable position indeed.

But it really does not matter that I am able to outline the motives which may prompt Jones to seek compensation or that I am able to suggest how society may act with regard to Smith and Jones. What matters is that in a free market, personal judiciary actions are always a viable alternative open to an injured party when an aggressor has initiated such actions to stymie the operation of justice. But, one must remember that there are disadvantages associated with the initiation of personal judicial actions — to wit, Locke's infinite aggression-overcompensation cycle. This disadvantage provides an incentive for all parties to show good faith in having their disputes decided impartially. This incentive is especially strong for an alleged injurer who wishes to establish his innocence.

In a governmental society, however, the state's judiciary is the only and final arbiter. Suppose that Smith and Jones live in the same locality and that Smith's brother is the municipal judge. If Smith injures Jones, then Jones has no recourse but to bring his case before Smith's brother. This situation is essentially the same as a situation in which Smith has set himself up as his own judge. And it is likely that

Jones will have to accept the verdict. (In some localities municipal court decisions cannot be appealed. Even if the decision could be appealed, enforcing lower courts' compliance with the appeals court ruling could be a problem.) Jones cannot respond in kind as he could in a free-market society. Society's resources are marshalled to enforce state edicts; in this case they are marshalled to enforce injustice. If Jones revolted against this injustice, he would be considered to be an outlaw and would be treated accordingly.

With the possibility of personal judiciary retaliation ruled out, there is no incentive for state judges to be fair. Even if a decision could be appealed and the higher ruling could be enforced, there is no incentive for Smith's brother to be fair, but only an incentive to rule in such a way as to barely avoid any grounds for appeal. Of course, whether these grounds for appeal approximate justice is a pertinent issue in itself.

These problems would not occur in a free market. The only way to avoid personal judiciary actions would be to patronize those judges with the greatest reputation for fairness. Hence, there would be incentives both for litigants to demand fair judges and for judges to acquire reputations for fairness.

Bribing a judge is subsumed under the same personal judiciary principle: a person sets himself up (in this particular case, his agent, who is paid to be biased) as a judge in his own case. Overt bribery would have the same result as the family bias situation. Hence let us assume that the bribery is covert. Obvious injustice would result in retaliatory action. Therefore, only by piecemeal injustice would the briber have any chance at success. But, paying a bribe for only piecemeal injustice may be prohibitively costly. Still, personal judiciary retaliation could take place, even in piecemeal cases, especially if the judge has a reputation for susceptibility to bribery. Personal retaliatory actions can be avoided only by hiring fair judges.

In governmental societies, if one bribed lower and appeals court judges, injustice could be perpetuated by means of the state judiciary's institutional monopoly on arbitration. In the American legal system, all one would have to

do is to bribe the jury — they decide cases' facts and their decisions cannot be appealed. Society's resources (for which the victim himself is paying) are consolidated in the state and can be directed against any person who rebels against an unjust verdict.

If one examines the purpose of a judiciary one can discover why a free-market court system is superior to a governmental court system. The courts' purpose is to enable men to settle disputes so as to avoid violent resolution as well as aggression-overcompensation cycles. Regarding the courts' decisions as legitimate is the only way for the litigants to avoid personal judiciary actions. But, courts' decisions are regarded as legitimate only if they are pronounced fairly and impartially. A person who takes advantage of family bias, for example, tries to disguise the illegitimacy of the verdict by cloaking it in an air of legitimacy. Legitimacy, however, is not to be gained by mere appearances. The verdict's unfairness will deprive it of legitimacy and personal judiciary actions will result. Thus, money spent on unfair

judicial procedures is money wasted. This constitutes the incentive for free-market courts to compete on the basis of fairness, not unfairness. Government judges do not have to compete on the open market to survive financially; they survive by virtue of their coercive monopoly on legal arbitration services. Moreover, their decisions are backed by force. Thus, individual judges have an incentive to be fair only insofar as the legal norms of a nation embody the principles of fairness. If a state court is fair, it is fair only by coincidence. In light of such an elucidation and contrast, it is difficult to understand why men still cling with almost hysterical desperation to the judicial embodiments of tyranny.

NOTES

1. Murray N. Rothbard, *For A New Liberty* (New York: Macmillan, 1973), pp. 234-243; and *idem.*, *Power and Market: Government and the Economy* (Menlo Park, Calif.: Institute for Humane Studies, 1970), p. 4.
2. John Locke, *Two Treatises of Government*, ed. P. Laslett (2nd Ed., Cambridge: Cambridge University Press, 1967), pp. 368-370.