

“Justice Entrepreneurship in A Free Market”: Comment*

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George Smith is to be commended for his paper “Justice Entrepreneurship in a Free Market,” even though he has raised again the ugly spectre of procedural rights that many had hoped was successfully vanquished at the 1975 Libertarian Scholars conference and in Volume 1, Number 1 of the *Journal of Libertarian Studies*.¹ In this paper, Smith examines the issue in a particularly clear, concise and productive manner that lends itself to thoughtful reflection and criticism. Not to be unappreciated as well is the fact that he, unlike Robert Nozick,² enters the discussion with clean hands. While Nozick was searching for a device that would catapult his minimal state into being, Smith attempts to further explicate the workings of a free market in law enforcement, a subject that sorely needs a good deal of explication.³ Furthermore, as I shall try to show, almost everything Smith has to say is correct and insightful, so much so as to overshadow the one issue on which we disagree.

In the paper, Smith makes three principal claims that I shall consider in turn. The first is that market forces are likely to produce law enforcement agencies that will be more than “hired guns.” The second claim is that third parties benefit from what he calls a “presumption of invasion” that amounts to a limitation of the liability for erroneous third party interventions in the restitutive actions of victims. And third, that the nature of law enforcement work recommends certain practices and these amount to moral rules that are objective, ontologically grounded and, therefore, “natural laws” (though they are not necessarily “natural rights”). In this comment I will express an enthusiastic agreement with the first and third claims and a sympathetic, though nonetheless resolute, disagreement with the second.

Turning to the first claim – that the existence of risk, in particular restitutive risk, will cause law enforcement agencies to tend toward extensive procedural protections even in the absence of a defendant having a natural

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right to the same—I found this to be an excellent exercise of applied economic reasoning in complete accord with long-held instincts which I had been unable to articulate satisfactorily. Here at last is a response to the simple-minded criticisms of market justice that have caused the arguments of both proponents and opponents to degenerate. Surely now it is clear, if it hadn't been already, that because of the inherent danger, victims would no sooner collect their own restitution than we would put out our own fires or perform surgery on our own children, though exceptions surely do and will exist. Smith's contribution is his clear articulation of the risks involved—not only the risk of the criminals' defense or retaliation, but also of drawing into the conflict third parties who do not know the true situation. This insight makes clear how law enforcement agencies will find it in their interest as risk-minimizers to adopt acceptable legal procedures—both of fact-finding and censure.

The only significant criticism I have of Smith's presentation is his failure to follow his analysis far enough. For just as the substantial risk to victims in pursuit of reparations produces a market for law enforcement agencies performing this vital service, so too does the risk facing third parties considering thrusting themselves into a melee give rise to a market for law enforcement agencies who would perform this function. Consider that when we see a crime being committed, our immediate response may not be to forcibly intervene, in part because we don't know which side to choose, but primarily because we figure quite correctly that we might get injured. So we pick up the phone and call our sometimes friendly, local monopoly law enforcement agency to do the work and take the risk.

Smith, however, seeing one aspect of third party risk—what he terms “restitutive risk”—worries that third parties might not be willing to take this risk and he concludes therefore that limited liability for erroneous intervention is warranted. By this reasoning, however, one could as easily argue that since a victim exacting restitution risks taking it from the wrong person, for which the liability would discourage restitution collecting, we must or should limit the liability of those victims who mistakenly force restitution from the innocent. This I think Smith would reject, but the alternative solution that he proposes for victims—risk-spreading through the market, a form of insurance—is equally applicable and effective for third parties and defendants as well. In practice, the limited liability approach to risk would have the unhappy effect of making restitutive activity even more risky and therefore more costly to victims than it would otherwise be. For it would encourage the intervention of third parties or, as the common law colorfully dubbed them, officious intermeddlers, without their making every effort to discover who is the rightful party. This reveals, I think, that Smith's economic analysis, applied broadly enough, largely disposes of the problem which whole or partial third party immunity was offered to solve.

Putting practical matters aside, we must consider whether this purported

immunity or right can be justified on libertarian grounds. I think not. Though I see many problems with Smith's argument, I shall only consider here the most important.

The first difficulty involves an almost imperceptible shift that occurs during the discussion. The purported third party right of intervention begins its life as an assignment of the victim's right of self-defense. Thus, Smith states, "The consent of the victim is assumed throughout this discussion."⁴ What need would there be for this assumption, but for the fact that the third party has no rights of *his own* in the matter but is acting *on behalf of* and *as agent of* the apparent victim? If, however, the victim is not in fact a victim at all but a criminal, then he has no right of self-defense against a legitimate and properly enforced claim for restitution, and consequently has no right to assign to the third party. It is said that the third party "stands in the shoes" of the person he seeks to protect, meaning his rights of action are as extensive as those of whom he seeks to represent.⁵

Given this analysis, what then are we to make of the "presumption of invasion" that Smith relies on so heavily? While such a presumption probably does exist—for proponents of a monopoly state who must justify its inherent initiation of force against innocent persons it exists with a vengeance—this presumption does not, I think, entail whole or partial third party immunity. For then it would cease to be a presumption which can, after all, be *rebutted* by presenting evidence to the contrary, and becomes instead ir-rebuttable and therefore either a substantive rule of law or an axiom of some kind. Thus, in an action by a third party against the person who attempted to extract restitution, if it could be demonstrated that in the course of obtaining his restitution this person caused the third party harm by the voluntary use of force, this proof would satisfy the prima facie case for the restitution seeker's liability. But this could be rebutted by the defense that restitution was being *legitimately* sought and that the third party interfered without any right to so act.⁶ It would be so much the better if the purported victim had a judgment⁷ to this effect entered by an enforcement agency that employs procedures recognized as reliable. This, however, in no way obligates the victim, beyond his desire to minimize a not inconsiderable risk, to obtain such a judgment beforehand, much less publish it or communicate it to all potential officious intermeddlers. Even granting then, as I do, a presumption of invasion, there follows from it no limit of third party liability but only a procedural burden of proof. While Smith presents other less central arguments, I think each is answerable and that this idea of third party immunity or rights should be thoroughly reconsidered.

Lastly, Smith attempts to derive certain natural law rules of legal procedure. In this endeavor I am very sympathetic and I have tried elsewhere to show that natural law methodology can apply to procedural as well as substantive concerns.⁸ Following the arguments set out by the late Lon Fuller in his book *the Morality of Law*,⁹ I have argued that from the nature and

purpose of legal systems can be derived certain principles of legality. I call this enterprise, together with more traditional substantive concerns, Legal Naturalism. But, though these procedures may be morally warranted, they are not an entailment of justice and are not rights or entitlements, but standards.¹⁰ As Smith correctly points out, "it is not the accused's 'right to a fair trial' that protects him, but the presumption of invasion against anyone who uses force against him. The accused [and, I would add, any third party] has the same basic right as everyone else—the right to be free from invasion—and this right is sufficient for his protection."¹¹

I suppose if I had one request of Smith—assuming of course that this brief comment has not persuaded him to reject third party immunity altogether—it would be to divide this project into three papers. The first would be an economic analysis of protection agencies as presented here and expanded to include those other risks and incentives I have suggested above. This would be an invaluable and, I suspect, a largely non-controversial enterprise. The second would be an argument for third party immunity based on the extension of the presumption of invasion beyond what I submit to be its proper procedural role. And finally, he might consider a paper on the necessary principles of legality, an effort that would not be, strictly speaking, a *libertarian* project but would fall more broadly within the ambit of the philosophy of law.

My emphasis on Smith's undue reliance on "the presumption of invasion," should not detract from what is an otherwise excellent paper, and I hope his effort here signifies an intention to continue the exploration of these uncharted waters in future papers. I for one will eagerly await such a future work.

NOTES

1. See Roy A. Childs, Jr., "The Invisible Hand Strikes Back," *Journal of Libertarian Studies* 1 (Winter 1977): 23; Murray N. Rothbard, "Robert Nozick and the Immaculate Conception of the State," *ibid.*, p. 45; and my "Whither Anarchy? Has Robert Nozick Justified the State?," *ibid.*, p. 15. See also John T. Sanders, "The Free Market Model Versus Government: A Reply to Nozick," *ibid.*, p. 35; and Jeffrey Paul, "Nozick, Anarchism, and Procedural Rights," *ibid.*, 1 (Fall 1977): 337.
2. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).
3. I see no reason why monopoly statisticians should also merit a monopoly on the term, "law enforcement." As Lon Fuller has shown in *The Morality of Law*, rev. ed. (New Haven and London: Yale University Press, 1969), it is not the monopoly of the rule giver or rule enforcer that makes a rule a "law," so there is no good reason for non-statists to resort to strange terms like "protection agencies" or "defense firms" when what is really meant is *law enforcement agencies*.
4. George Smith, "Justice Entrepreneurship in a Free Market," *Journal of Libertarian Studies* 3 (Winter 1979): 405.
5. See *People v. Young*, 11 N.Y.2d 274, 229 N.Y.S.2d 1, 183 N.E.2d 319 (1962). See also William L. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, Minnesota: West Publishing Co., 1971), pp. 112-13.
6. The proper role of presumptions and burdens of proof is insightfully examined by Richard A. Epstein in "Pleadings and Presumptions," *University of Chicago Law Review* 40

- (1973): 556; and *id.*, "Defenses and Subsequent Pleas in a System of Strict Liability," *Journal of Legal Studies* 3 (1974): 165.
7. "The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination." *Black's Law Dictionary*, 4th ed., rev. (St. Paul, Minnesota: West Publishing Co., 1968), p. 997.
 8. Randy E. Barnett, "Toward a Theory of Legal Naturalism," *Journal of Libertarian Studies* 2 (Summer 1978): 97.
 9. Fuller, *Morality of Law*.
 10. In this light it is misleading to refer as Smith does to "just" procedures; rather procedures might be "good," "prudent," or "appropriate."
 11. Smith, *Justice Entrepreneurship*, p. 421.