

## **"Justice Entrepreneurship in A Free Market": Comment\***

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In his much discussed book *Anarchy, State, and Utopia*, Robert Nozick argued that a dominant protection agency may forbid others from imposing their brand of justice on its clients. It does so because it judges all procedures besides its own to be unreliable. Since everyone has a right to resist the imposition of unreliable or unfair procedures of justice, the DPA may do so on behalf of its clients. Thus, it establishes itself, in virtue of its superior might, as the sole judge and enforcer of legal standards—as a kind of ultra-minimal state.

George Smith, like many other libertarians, is not satisfied with this conclusion and in his paper "Justice Entrepreneurship in a Free Market" seeks to develop an alternative account of procedural justice, one that closes the door on that unwelcome guest, monopolistic government. Smith agrees with Nozick that the issue of juridical procedure is a critical one. But contrary to Nozick, he does not maintain that the need for reliable procedures stems from what he calls the "phantom of 'procedural rights.'" Instead, as he puts it, "it is for his own safety, to prevent violent Third Party intervention in his quest for restitution, that the Victim must concern himself with matters of legal procedure" (p. 407).\*\* And assuming that we have objective standards by which to determine what in fact count as reliable procedures, the major issue will become "what procedures are employed, not *who* employs them" (p. 407). Since "the dominance of a particular agency has nothing at all to do with this issue," the free market is saved, and the dominant protection agency will be exposed as the coercive thug that it is.

Attractive as this account is, there are unfortunately major problems with it. For Smith's account may be turned against itself, due to a kind of

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\*\* This and following page references are to the paper by George Smith, "Justice Entrepreneurship in a Free Market," *Journal of Libertarian Studies* 3 (Winter 1979): 405.

symmetry between the positions of the dominant protection agency and the third party interveners. The liberties Smith allows third parties may be claimed by the dominant protection agency, or the demands made on the dominant protection agency must be extended to the case of third parties as well. As we shall see, Smith cannot have it both ways. The dominant protection agency, much to our dismay and Smith's efforts notwithstanding, will emerge scathed perhaps, but unbowed.

Let us begin with an example discussed by Smith: "B believes, rightly or wrongly, that C stole his wallet containing 100 dollars at a party the day before. B sees C on the street, confronts him and demands his money back. C denies everything and an argument ensues. B then wrestles C to the ground and attempts to extract C's wallet. . . . C calls for help, and an impartial Third Party. . . comes to C's aid. The Third Party fractures B's arm in an attempt to restrain him" (p. 416).

Now what does Smith say about this example? He argues that there is a principle operative which he calls the presumption of invasion: "the person who is observed to initiate violence, or the threat of violence, is presumed to be the Invader unless there is evidence to the contrary." (p. 416) Because of this presumption, the Third Party has a right to intervene in those situations where the victim has not established the legitimacy of his behavior. Since the burden of proof is on the person exercising coercion, B must, in Smith's words, "shoulder the risk of his action." And this, of course, B has done, to the point of fracture.

"But wait," cries B. "Surely this can't be right. After all, C's guilt or innocence is an objective fact. A is A. Either C is guilty or not. If C is guilty, then my attempt to gain restitution was justified. If not, then not. If my action was justified, if I was doing what in fact I had a right to do, then no one had a right to interfere. Isn't that what having a right means?"

"Yes and no," answers Smith. B, acting on his knowledge of the situation, is morally justified. But the Third Party, acting on his knowledge of the situation, is also morally justified. "If an error is made," says Smith, "if a Third Party mistakenly intervenes with a true Victim seeking restitution. . . , the responsibility for error rests with the *Victim* who failed to identify publicly his violent act as one of restitution" (p. 409). To use the immortal words of Paul Newman in *Cool Hand Luke*, "what we have here is a failure to communicate." This, says Smith, is why we need protection agencies. By hiring an agency to attain justice, B transfers what Smith calls restitutive risk from himself to the agency. "It is the business of an Agency to coordinate the knowledge of the Victim with the knowledge of Third Parties—the public in general—and thereby minimize the likelihood of public condemnation as an Invader when restitutive action is taken" (p. 411).

Let's ignore the consequences of granting B a right to do X at the same time as we grant D a right to interfere with X and assume that Smith is right. What are the implications of allowing this right of Third Party interven-

tion? Suppose that we modify the above example. Let B be a client of the dominant protection agency and C a so-called independent. C confronts B and B cries foul. The DPA rides to B's rescue and C is subdued. Is this intervention justified?

From what Smith has said, the DPA seems to be within its rights. After all, in Smith's words, "one who uses force . . . is presumed by Third Parties to be the Invader unless there is evidence to the contrary" (p. 411). The DPA cannot be held responsible for its lack of omniscience. Like any Third Party, it must act on its knowledge of the situation, and in the absence of proof of C's claim against B, must judge C an invader. But what proof will the DPA recognize as valid, what evidence as conclusive? Unfortunately for C, only its own. Since the DPA will recognize only its own juridical procedures as valid, any attempt to apply other procedures to its clients will be judged insufficient to discharge the presumption of invasion, and it will intervene. All parties will have the right to intervene on the basis of their knowledge of the situation, but only the DPA will have the power to do so. As Nozick says, "might doesn't make right, but it does make enforced prohibitions." Monopoly government will again rear its ugly head, and Smith's Third Party right will prove to be just as amenable to the DPA as Nozick's procedural rights.

But perhaps we have been too quick here. Does the DPA have the right to pass judgment on all juridical procedures? Smith would answer no. His response to this kind of argument is contained in the following passage:

...if it is possible to verify objectively that one procedure is valid whereas another is not, then it does not matter who employs the procedures in question. . . . That an agency believes in the reliability of its procedures has nothing to do with the alleged right of that agency to insist that other agencies conform to its standards. If the DPA uses what are *in fact* reliable procedures, then it cannot prevent other agencies from using reliable procedures as well. If, on the contrary, the DPA uses unreliable procedures, then to impose such procedures on other agencies would be manifestly unjust. (p. 406)

Smith, of course, is right. But the key issue is whether there do exist objective standards for evaluating the correctness of juridical procedures. In the absence of such standards, Smith's argument must fail, and the DPA must reign supreme.

There are actually two independent issues intertwined in Smith's account of procedural law that must be separated before we can pass judgment on its validity. The first is a question of fact, the second a question of the verification of fact. Or, if you will, the first is a question of theory, the second of practice. Is there even such a thing as an objectively correct juridical procedure? That's the first issue Smith must confront. Do we know the properties that a correct procedure will possess? On the ideal level, the answer is very simple. A procedure is objectively correct just in case it identifies all who are

truly guilty as guilty and all those who are truly innocent as innocent. Assuming that there is a truth to the matter of guilt and innocence, we thus have an objective *definition* of the correct juridical procedure. However, this is but an ideal, and it is very unlikely that any procedure will ever attain such perfection in the real world. What we need, then, is a definition of when one procedure is *more correct* than another. Unfortunately, things begin to get a lot more complicated here, for there are two distinct factors that must be balanced. On the one hand, we have to take into account the proportion of the guilty who are in fact found guilty and on the other the proportion of the innocent who are in fact found innocent. Now while it will be the case that one procedure will be absolutely *more correct* than another just in case it finds a higher proportion of the guilty guilty *and* the innocent innocent than another procedure, we need additional standards to determine the relative trade-off between finding the guilty innocent and the innocent guilty. It's not at all clear that there *in fact* exists such an objective standard for determining this matter, which may instead depend on social priorities and not on any *fact* or *truth* of the matter. Presumably, however, a libertarian society will place a higher priority on minimizing the punishment of the innocent than on maximizing the punishment of the guilty, since the former case involves the direct infliction of coercion on innocent parties. But it is not at all clear what the relative weights would be or how they would even be determined.

But suppose the above problems are resolvable, so that we do have an objective *definition* of relative correctness. This will bring us to the second issue Smith must resolve if his account is to be successful. For given a definition of what counts as correctness *in theory*, we need a criterion for determining correctness *in practice*. What standards can we use to determine whether a particular procedure is reliably correct or not? On the ideal level, the question is again an easy one. All we have to do is keep statistics on all the competing juridical procedures and see which procedures have the highest true conviction and release rates, according to the formula identified by our objective definition of correctness. Perhaps we could ask convicted and released parties to fill out questionnaires after their trials saying whether the verdict was correct or not. On the practical level, of course, the question is not so simple, for obvious reasons. Can we in fact obtain such statistics? I suspect not. And without these statistics, how are we to proceed? Smith promised us that he would derive an "objective standard by which to distinguish legitimate agencies from outlaw agencies in a free market," but I can find no such derivation in his paper. Smith does make some claims about the need for a public trial, but he has furnished us neither with criteria nor with evidence for thinking that public trials establish guilt or innocence better than any other procedures, whether they be via the tea-leaves of the "Lipton agency" or the psychics of the "Geller agency." Smith argues that the latter "agencies would have the responsibility to provide rigorous

philosophical and scientific justification for their methodologies. . .," but it is not at all clear what this justification would look like, and Smith is no help. Without such a methodology, the juridical business looks up for grabs, and it looks like the DPA can legitimately condemn all other procedures as unreliable in the absence of any objective proof to the contrary. As Smith says, "any ethical or political theory must be grounded in the recognition that man is neither omniscient nor infallible. And since justice is concerned, at least in part, with a question of knowledge (guilt and innocence), a reasonable theory of justice can be derived only within a contextualist framework" (p. 416). It is this framework, alas, that allows the DPA to again sneak back into the Garden of Eden and spoil our free market paradise.