George Smith's Justice

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In his forthcoming book *The Ethics of Liberty,* Murray Rothbard addresses the question of "Property and Criminality."[1] He begins by defining a criminal as "anyone who aggresses against the person or produced property of another...anyone who uses the 'political means' for the acquisition of goods and services."[2] Most libertarians would agree that "aggression" in a libertarian society would be comprised of "force or fraud" used by one party against another party(s).

Since initiating force violates the first principle of libertarianism, and most libertarians accept the right of self-defense against invasion, the practical question of implementing justice on a free market becomes a key issue in the continuing development of libertarian theory.

Rothbard posits an illuminating example: "Suppose we are walking down the street and we see a man, A, seizing B by the wrist and grabbing B's wristwatch. There is no question that A is here violating both the person and the property of B. [I would have written this a little differently, to whit: A is violating both the person and property *presently in the possession* of B.] Can we then simply infer from this scene that A is a criminal aggressor and B his innocent victim?"[3] No, answers Rothbard, because A may be trying to get his watch back from B who had previously stolen it from him. From this, Rothbard goes on to conclude that there is "just property" and "unjust property." If the watch belongs to B, then A clearly is the aggressor. If not, then A is, implicitly by the terms of the example, justified in assaulting B in order to retrieve his "just property." Logically drawing out the implications of this argument, Rothbard writes: "Thus, we *cannot* simply say that the great axiomatic moral rule of a libertarian society is the protection of property rights, period. For the criminal has no natural right whatever to the retention of the property that he has acquired by aggression.... Therefore, we must modify, or, rather, clarify the basic rule of a libertarian society so as to say: no one has the right to aggress against the *legitimate* or *just* property of another."[4]

As noted, Rothbard accepts, at least implicitly, what might be termed the "right of restitutive violence." In the remainder of his seminal chapter

on property, Rothbard confronts the theoretical implications of this reasoning for land control by imperialistic powers and various other species of aggressor. His main thrust is to provide the Third World people with an alternative to Marxist land expropriations and reforms, holding up instead the solid libertarian principle that "those sinned against will be compensated," and those not sinned against have nothing to complain about.[5] We need not follow this investigation through since the germ of the argument is sufficient for proceeding on to the practical implementation of the "just property" principle and "restitutive violence" in a libertarian society.

We shall return to Rothbard's watch example, in a somewhat expanded form, later. The reader should remember that, for the purposes of this example, he is an "interested third party" observing a violent confrontation.

In a recent paper,[6] George Smith presents his theory of how restitutive justice might work in a free market, i.e., anarchist, society. Smith's primary purpose is to oppose Robert Nozick's attempt to defend procedural rights in legal matters as something growing out of natural-law theory. Smith claims that his system of justice procedures is derivable logically from natural-law principles, and that procedures in an anarchist society will be dictated not by "rights" of procedure, but by certain necessities arising from the nature of free-market justice based on libertarian principles.

Early in the paper, Smith states the "Right of Third Party Intervention": "Where there exists a coercive state of affairs (say between two persons), a Third Party may forcibly intervene without the prior consent of the Invader." Further, "If an error is made...the responsibility for error rests with the *Victim* who failed to identify publicly his violent act as one of restitution."[7]

Third Parties (hereinafter "TP") cannot know by observation who is an aggressor and who is not. This, Smith postulates, is due to a "knowledge gap" that exists between the true victim and any TP that might intervene in his act of restitutive violence. Where there is an "information gap," surely there is profit opportunity for entrepreneurs. It is in the closing of this "knowledge gap" that justice agencies on the market will earn profits. Their primary function will be to justify restitutive violence to all TP's.

Smith proceeds to modify slightly the libertarian first principle against aggression by redefining it thus: "Whoever employs *unidentified* force in a free society is engaging in a high risk activity...."[8] In other words, as we shall see later, Smith is arguing that in exercising his "right of restitutive violence," the victim is *assuming the risk* for damages caused by TP's.

Let us put the essence of Smith's sytem, so far, down in simple propositions.

> (a) Victims of aggression have a right to restitution, said right to include the use of violence.
> (b) TP's have the right to intervene in violent disputes, and are absolved from any liability attaching to their actions in so doing.

(c) This being the case, in order to bring these rights into harmonious proximity, the victim must "publicly verify" his violence to all potential TP's.

Since Smith has stated that restitution is a "high risk activity," and further, that "public verification" is an absolute necessity, it follows quite logically that, in an anarchist society no victim can afford to exercise his "right of restitution" since in so doing he is exposed to large pecuniary loss and/or personal injury (including death). Therefore, rational citizens will, undoubtedly, "shift the risks" of seeking restitution to justice agencies, solving at once their liability, and Smith presumes, their "public verification" duties.[9]

In order to absolve TP's of liability in violent situations, Smith attacks what, in his terms, is the "absolutist" theory of liability. Under this theory, there can be no self-defense until there has actually been an act of criminal invasion. This, Smith asserts, is just not reasonable, for: "Violent acts often occur suddenly, without previous warning; and to counteract the damage of violence usually requires quick and decisive response. If a TP is required to investigate property titles before he intervenes in the defense of the *apparent* victim, the violent act will be concluded long before the TP reaches first base."[10] (Emphasis mine)

If, given that TP intervention is correct, we now proceed to the next logical link, we find that TP intervention is justified *regardless of the validity of the victim's claim against the aggressor.*[11] In other words, as I shall argue presently, Smith would make the subjective state of TP perception a valid defense against all claims of damage due to his acts in violent disputes.

This making of the TP's intervention rights an absolute severely abridges the victim's rights to restitution. Smith proceeds to justify this: "...and even if [the victim] does have a legitimate claim against [the aggressor] this does not give [the victim] a blank check to gain restitution by any method he chooses."[12]

TP's, upon viewing a violent confrontation, should always assume that the initiator of violence is the aggressor. To do otherwise, Smith maintains, would be "irrational" and "totally arbitrary."[13]

Taking up the admittedly complex area of "perceived threats," Smith once again is at odds with the "absolutist" approach to liability. He argues that the subjective evaluation of a threat by the "victim" should serve as exoneration in any subsequent legal proceedings. This would hold *even though the actions taken could not be justified by hindsight.* To hold otherwise, Smith claims, is to have the victim wait until he has been injured to defend himself. When is a threat really a threat? When the "victim" perceives it to be! QED.

Smith argues the case for this "preventive violence" as a means of justifying TP interventions. Notice that TP and potential victims are absolved in Smith's system of liability after the fact, regardless of the validity of the actions taken. This similarity is striking, showing as I believe it does that

Smith is unaware that under a system of strict liability, even though there is a good case against the "potential victim" if he is wrong in hindsight, there are justified legal defenses.[14]

In closing his paper, Smith outlines some principles and procedures for free-market justice agencies. Some of these, if implemented, would be quite interesting. The agency would, for instance, have to provide each defendant with an attorney. This has interesting implications for the "threat/counter-threat" society we presently enjoy.[15] Smith would deny to justice agencies the power to subpoena, subject to prior contractual agreements. He does not say, but seems to imply, that the right of police agencies to search for stolen property would simply not exist. Given these two conditions, or really either one of them, bringing offenders to trial will be extremely difficult.[16]

I have tried to faithfully present Smith's arguments. The reader can, of course, turn to his article for verification. This is a pathbreaking work in many respects, opening a great debate not on *whether* there can be justice under anarchy, but on *how* such justice is to come about. For this, all libertarians should thank Smith. It is well past time that the mechanics of free-market legal procedures were addressed with the serious precision they deserve. Smith's thesis, combining as it does Austrian entrepreneurship theory, a "raison d'etre" for profit in justice, and a fairly consistent libertarian outlook, is almost irresistible. I would argue, however, that resist it we should; for the principle that Smith needs to discard before his system of justice can operate is the theory of strict liability, and that is something libertarians should think long and hard on before abandoning. Strict liability is, I believe, the only legal framework consistent with the libertarian society.

The theory of strict legal liability (hereinafter "SL") holds each person to account for damages which their actions cause.[17] Simply put, if A hurts B, then there is a strong, though not completely certain, prima facie damage case against A. Individual A may have had the best reasons in the world for taking the action(s) that he did, but that is usually not a sufficient excuse. SL obviously is at odds with Smith's desire to exonerate all TP's and "victims" of perceived threats after the act and regardless of the facts. Indeed, as I will attempt to show, SL is at odds with the principle of "restitutive violence" so common in libertarian writings. There is no way to make SL compatible with Smith's justice even if we assume that victims always assume the risk in restitutive cases because of Smith's insistence on the legitimacy of "preventive violence." I do not think I misrepresent Smith when I say that he wishes to dispense with SL altogether.

Smith seems to want two things in his system: a way that TP's can be subsidized to intervene in violent disputes and a means of dealing with "potential" aggressors. It is true that if we shift liability to the victim in all restitutive cases, we will indeed get TP intervention; but I wonder if the

price might not be too high? It seems to me that in Smith's anarchy, there simply is no right of restitution *for individuals.* To think that an individual would undertake his alleged right of restitution considering the way Smith has stacked the deck against him is to believe that people are simply irrational. I will demonstrate this "stacked deck" later in the paper. What Smith's position leads to is a *monopoly of restitution by justice agencies.* This must come about simply because it is these agencies that assume the risks of liability for violence, and because it seems to be Smith's intention that it is only through these agencies that "public verification" can take place. Yet this is only the beginning of problems for Smith's position.

What are we to make of an alleged right that carries with its exercise *increased risks and liability* and even the chance that one will be killed when using it? Surely, this is not a right at all but an *ill-advised undertaking.* I am not splitting hairs here; in Smith's society, there would undoubtedly be a right to jump off a mountain with wax wings, and exercising that right would be ill-advised, but is this really germane? Smith is tampering with the basic legal structures of a libertarian society, indeed with the first principle of all free societies. At least the person jumping off the mountain suffers no *increase* in liability!

Until this attack by Smith, SL has received attention primarily from the Chicago-School economists and legal theorists.[18] They argue that SL violates some "optimal solution" in liability matters. Indeed, turning the whole concept of causation around (or perhaps merely banishing it from use altogether), Ronald Coase argues that the proposition "A harms B" is synonymous with the proposition "B harms A"![19] "No, no," says Smith, "the point is not that B is also harming A, but that A should be absolved of all guilt." These are, I think, pernicious concepts fundamentally at odds with libertarian theory.

Smith's formulation is not saved by demanding "public verification" by the victim. Is he maintaining that all TP's have some obligation to be well-informed? Why? Why can't the victim put an ad in the paper to observe Smith's verification caveat? Because (and it is here that the agency monopoly on justice comes in) the victim must demonstrate through an appropriate agency proceeding that he is indeed a legitimate victim. But if this be true, oh right of restitution, where art thou? What we have is a *privilege,* subject to certain procedural constraints, and arbitrary ones at that.

Unwittingly, or perhaps not, Smith has provided all TP's, which include justice agencies and private police forces, a blank check to claim justifiable injury or homicide. The claim for this wholly unsatisfactory state of affairs is that there is a "knowledge gap" which somehow blinded the TP to the true situation. If only the TP had read the bulletin board at the local justice agency, he might have known that he was hurting a true victim. But if the case had already been processed through an agency, why was the *victim*

engaging in violence and not his agency? Smith's whole example rests upon the victim trying to exercise a right himself which Smith is not prepared to give him!

Let us put this in concrete terms with the following two examples, labelled Case I and Case II. First, Case I:

> You are swimming in the ocean when you see a man steal your gold watch. He is tall and wears a red jacket. You swim ashore and begin looking for the aggressor. One hour later you see a man with a red jacket, about the same height (you think) with a watch that looks exactly like your stolen item. You proceed to yell "Stop Thief" and assault the man. In your attempt to get the watch off, a struggle ensues. A TP who happens to be passing by, observes this struggle. Thinking that you are a thief (after all, the "knowledge gap" blinds him to the truth), he proceeds to enter this violent encounter.

Certain possibilities present themselves:
1) The TP injures you, the true victim;
2) The TP injures the aggressor;
3) The aggressor injures the TP;
4) The victim (you) injure the TP.

It is not necessary to investigate multiple-injury situations as these possibilities will sufficiently demonstrate Smith's liability proposals to be, at best, unjust and, at worst, irrational. What are the "irrelevant" facts of the case?
A) The man is guilty...the watch is yours;
B) The man is guilty...the watch isn't yours;
C) The man is innocent...the watch isn't yours;
D) The man is innocent...the watch is yours and he knew it when he bought it from the real thief;
E) The man is innocent but has been duped into buying your watch.

Some of the upcoming ambiguity results from Smith's not dealing directly with the following question: Is the right of restitutive violence (hereinafter

TABLE 1

Liability Outcomes Under Right of Violent Restitution

Description of Outcome	A	B	C	D	E
TP injures you, the victim	you lose	you lose	you lose	you lose	you lose
TP injures the aggressor	aggressor loses	?	?	?	?
Aggressor injures the TP	aggressor loses	?	?	?	?
You, the victim, injure TP	you lose	you lose	you lose	you lose	you lose

"RRV") triggered by the confrontation with the aggressor, or by the stolen property? In situations where the property is at issue, what if the victim is incorrect in believing the property to be his?

Lawsuits for injuries are brought by each injured party against the person that harmed him. What will the outcomes be under Smith's procedures?

As we can see from Table 1, out of twenty possible outcomes, no less than eight are totally ambiguous. In ten other cases, you, the victim, lose a subsequent case irrespective of whether your claim against the aggressor is valid or not, since the TP's right to intervene *takes precedence* over your exercising your restitutive right *in this manner.* The actual aggressor loses only two cases out of twenty!

Let us modify this slightly by introducing Case II:

> Everything is the same, except that this time you come out of the water and catch the thief in the act while a TP observes the whole scene. There is no doubt in your mind as to the guilt of the aggressor. What are the outcomes?

At first, you might think that the thief's being caught in the act changes the complexion of the cases. This is clearly in error! Remember Rothbard's example? Well, on what ground can the TP in this case, *even though he has witnessed the act of property appropriation first-hand,* conclude that you are the true victim? Oh, you are screaming that it's your watch all right, but wouldn't any clever aggressor do likewise? Smith argues that to conclude that you are not the aggressor, since it is you that has initiated physical force, is "irrational". So where does that leave us? It leaves us in the upside-down world of victims being unable to exercise their rights. What is the problem here? Why won't Smith's system work?

The answer to Smith's problem is simple. We must make a distinction between various *types* of crimes, and further, we must assert that initiated violence is *always* wrong. While libertarians cannot part with SL, we can, I think, live without the alleged RRV. An individual always has the right of self-defense, to include the use of force or counterforce. But I agree with Smith that when one person attacks another, the *presumption* always should be that it is illegal. The inconsistency arises in Smith because he adheres to the RRV concept.

Let me demonstrate this by example. Happy Joe, the local libertarian used car dealer down the street from your house, sells you a car by lying about several particulars. Subsequently, you find out that Happy Joe has lied, and that you have been "taken." It matters little in this example whether you have a contract with Happy Joe or not, for in a libertarian society every man has an implicit contract with every other man that force and fraud are illegitimate means to wealth.[20] Does Happy Joe's behavior allow you to go down to the dealer and assault him? Of course not. You have

other, *peaceful* means of dealing with your friend Joe. After all, even though he took your property by fraud, he did not assault you *physically.* And it can never be emphasized strongly enough that once one person assaults another, he puts a chain of events into motion the outcome of which is always *uncertain* and *dangerous.* Yes, violence is, as Smith points out, a "high risk activity," but not because of knowledge gaps: it is the nature of reality. Knowledge gaps are a fact of reality since no TP can *ever* know the extent of prior dealings between parties. Even a TP witnessing the police forces of a justice agency trying to subdue a man who is screaming that he is not guilty of anything cannot know whether the man is an aggressor being brought to justice, or an innocent victim of police brutality. Just because the policy *say* he's guilty doesn't necessarily mean he *is* guilty.[21]

Let us then modify Smith's position slightly and see if we can escape the ambiguity and strange results obtaining under his system.

(a) A person (victim) has a right to restitution when property has been taken from him illegally. He also has the right to defend himself against physical attack, the justice of such action to be decided *ex post* if damages arise.
(b) A person has the right to detain another person he *knows* to be a criminal, having caught the other person in the act. Justice agencies and private police being made up of persons, they also have this right. Should the person resist the attempt at detention, the *self-defense* proviso is triggered, subject to *ex post* verification.
(c) No person(s) has the right to initiate physical aggression against other people, with the exceptions outlined in (a) and (b).
(d) Where a person(s) is *uncertain* as to the legality of his actions, he takes such actions *at his own risk,* subject to *ex post* verification.
(e) Rights to restitution as outlined above do not include the right to *initiate* physical violence except as put forth in (b).

Tables 2 and 3 indicate the changed outcomes from Cases I and II under this revised position.

Now that we have rehabilitated the very essence of justice that Smith

TABLE 2

Probable Outcomes Under Strict Liability*

Description of Outcome	A	B	C	D	E
TP injures you, the victim	TP loses				
TP injures the aggressor					
Aggressor injures the TP					
You, the victim, injure TP					

* Violent encounter taking place after the crime has been committed and the perpetrator has fled the scene.

TABLE 3

Probable Outcomes Under Strict Liability*

Description of Outcome	A	B	C	D	E
TP injures you, the victim	TP loses†				
TP injures the aggressor	aggressor loses				
Aggressor injures the TP	TP wins				
You, the victim, injure TP	TP loses†				

* Aggressor is "caught in the act" and attempts to leave the crime scene.

† Subject to a prior contract for mutual defense between the TP and the victim.

had tried to banish, namely the *justness of the claim of the victim,* the ambiguity and injustice of Smith's outcomes are overcome. Since the TP's were, in every case, *uncertain* as to what was going on, they bear the liability if they injure you or the aggressor. Since you have no right, in Case I, to physical restitution by violence, you are liable for all damages you commit. The aggressor is liable for damages he commits only in Case II where he is caught in the act, and *ex post,* your legitimate claim is demonstrated. In Case II, where the aggressor is caught in the act, and where there is *no doubt* in *your mind* as to his guilt, he is liable for all damages he inflicts in trying to leave the scene of the crime. TP's are *always* liable for damages they commit, except in Case II where the aggressor is guilty and resisting detention. Here, he is absolved of injuring the aggressor, but *not absolved* of injuring the victim.

At this point the reader might well argue that TP intervention in a free society would almost never occur. In reply, I would say that it almost never should occur! Violence, like anything else, is best left, as Smith seems also to suggest, to professionals. The best thing TP's can do if they are *uncertain as to who is the aggressor,* is to summon police. Private police will undoubtedly be insured against subsequent damages, and, while individuals could, in theory, insure themselves also, the police premiums will be lower precisely because they are supposed to be impartial professionals who are used to dealing in violent situations. If the TP is fairly certain as to the circumstances, (and, if I had the time, I would argue that in most cases of assault where it is necessary for the victim to be helped they *would know*), he is, of course, free to come to the defense of the victim.

Instead of penalizing those "rugged individualists" who could, quite rightfully in Smith's world, refuse to contract with defense agencies, this modified system protects the individual as well as suspected persons after the fact. Since the victim knows that he does *not* have the RRV if the crime

is over, even if he knows who perpetrated it, he can always be held liable for damages, and this does not conflict with any right he possesses. Cases that have happened without detention at the time the crime was committed would have to be settled the same way the used car case stated previously would be settled: through a claim and public hearing of the evidence by a common law court. We must dispense with the alleged distinction between *invasive and noninvasive violence.* Such a distinction is at odds with reality. Physical violence is always *invasive* and if we dispense with the justness of the victim's claims, on what grounds do we then judge subsequent outcomes? We simply cannot throw out the only criterion we have for judging violent acts. If we do, then justice will be an arbitrary concept indeed.

There is but one further area to deal with in closing this analysis of Smith's system: "perceived threats." Smith gives the following example in his paper, and for the purposes of argument, we shall repeat it. You see a man point a "gun" at you. You cannot know for sure that it is real. It may, after all, be a toy and the man may be playing a joke. On the other hand, are you to wait until you are killed before you take defensive action? (Obviously rhetorical.) Smith charges that you should be able to shoot the man, or whatever, without fear that you will be liable for subsequent damages *even though nothing has happened to you* except that you "perceived" that you were threatened. We must, argues Smith, take note of the context of the "threat." Smith believes that SL does not allow for contextual analysis, or for self-defense *before* invasive acts take place. In this, I can only point out that both the history of common law and SL *do* permit contextual analysis *ex post* as a way of evaluating defenses to claims of liability.[22] Assume, for instance, the following two cases:

> (A) While walking down the street, you raise your arm to wipe the perspiration from your forehead. A man standing nearby with a serious heart condition "perceives" that you are about to attack him. He has a heart attack and dies. His heirs sue you under SL. Who will win?
>
> (B) As a Halloween joke, you dress up in a horrible mask and stand in a dark alley on a deserted street. Along comes a man and you jump out and scare him. He has a heart condition and dies. The heirs sue you under SL. Will they collect?

In both of these cases there is a prima facie case against you under SL, but only in Case (B) will you lose the judgment. Those readers seeking the explanation are referred to Epstein (1973). Or take another case:

> You and your girlfriend are roaming in the woods one fine summer's day. Unbeknownst to both of you, you wander onto Old Farmer MacDonald's land. Being somewhat of an eccentric, Farmer MacDonald delights in taking his unloaded shotgun and confronting strangers with a hearty "Get off my land!" You and your girlfriend do not know, of course, that the gun is not loaded. You "perceive" MacDonald to be a madman about to do you in. You pull a pistol and kill MacDonald.

> After all, are you to wait to find out his intentions? Why would he have that rifle on you if he didn't intend to use it? MacDonald's wife sues you under SL. Does she win?

You bet she does! Anyone who can't understand the distinction between a trigger being pulled and not being pulled should try standing in front of a weapon as the two acts are accomplished. It is doubtful that the judge and/or jury will let you plead justifiable homicide in this case, and, indeed, they will be correct. It is simply not practical to eliminate liability for TP's or those who "perceive" threats. These are matters to be treated under SL *ex post.* There is no reason, that I can find, under Smith's system for the following not to happen: an aggressor and a TP conspire to have the TP kill the true victim if the victim tries to exercise RRV. After all, neither would be liable for this act.

Another reason, perhaps the best reason, to reject the defense of a "perceived threat" against subsequent liability claims is that there will be irresistible pressure to have "preventive law." After all, why should we allow people to kill each other when they perceive they might be attacked by some "crazy"? Would it not be better to incarcerate those who will probably commit crimes of violence rather than let them be murdered? Smith cannot object to this on libertarian grounds because his removal of liability in defense of "perceived danger" negates the rights, if not the lives, of those against whom "defensive action" is taken. Once again, the completely subjective perceptions of one person are taken as justifying his actions, even unto *unjustified homicide.* How can we evaluate subjective perception? We cannot; which is why we ought be concerned in law with *demonstrated action,* for the same reasons that we are concerned only with *demonstrated action* in economics.[23] There just isn't any other objective basis for establishing a theory of justice.

I hope that I have succeeded in pointing out what I consider to be major problems with George Smith's approach to justice under anarchy. His is a brilliant and often enlightening work, which I believe breaks new ground. He is concerned, as I am and as all libertarians are, with how justice will operate on the market. He wants a system that minimizes violence. With that objective, I am in complete agreement. But in trying to eliminate SL from his system, Smith opens the Pandora's Box of Judicial Arbitrariness. When libertarians claim that "pollution is a matter of property rights," they are, knowingly or not, invoking SL. For in a libertarian society, each of us is responsible for the effects of our actions. That is *causality.* We can, along with the Chicagoans, banish causality from our legal system or economic theories; but do we, as libertarians, wish to pay the price of accepting what is then left? I do not think we do.

NOTES

1. Murray N. Rothbard, *The Ethics of Liberty* (unpublished manuscript), p. 72.
2. *Ibid.,* p. 72.

3. *Ibid.*, p. 73.
4. *Ibid.*, p. 74.
5. This encapsulation doesn't do justice to the breadth of Rothbard's analysis, nor to its myriad subtleties. I do believe, however, that the remainder of the chapter on "Property and Criminality" is, with minor exceptions, unhelpful for the present purpose.
6. George Smith, "Justice Entrepreneurship in a Free Market," *Journal of Libertarian Studies* 3 (Winter 1979): 405.
7. *Ibid.*, p. 409.
8. *Ibid.*, p. 411.
9. It is not clear to me why Smith maintains that the "public verification" he demands of the victim is not a procedural right, for it seems to function as one. Does this necessary condition for the exercising of the right of restitutive violence (RRV) really flow logically from natural law? I don't believe Smith is on firmer ground here than Nozick.
   Also, the "verification" procedure is apt to be merely a matter of arbitrary justice-agency policy. How does this become legitimized as a necessary condition before RRV can be used? The right to protect oneself against aggression, derivable from natural-law precepts, requires no justice agencies.
10. Smith, pp. 415–16.
11. *Ibid.*, p. 416. Smith could try to save strict liability (SL) by having the victim always "assume the risks" of every TP/aggressor encounter. See Richard A. Epstein, "Defense and Subsequent Pleas in a Theory of Strict Liability," 1 *Journal of Legal Studies* (1974): 172–73.
12. Smith, p. 416. It might be possible to make the argument that there is nothing at all unusual about one right superseding another. Does not your right to swing your fist end at the point of my nose? And is not my right of self-defense to take precedence? Since rights can often come into conflict, why worry about the victim's constraints when trying to exercise RRV?

    The answer is, I think, that where a fundamental right of self-defense is presumed to exist, and upon which a whole society is presumed to rest, we ought not put arbitrary restrictions upon the exercise of that right. We must guard against formulations such as "an individual has the right to restitution, even by physical aggression, provided that he fulfill certain obligations to every other member of society."

    It solves nothing to say that TP's are legally considered informed when the agency posts a decision whether or not they have read it or have access to it. For now the alleged right of TP's to intervene has become even more qualified than the alleged right of restitution.
13. *Ibid.*, p. 418.
14. Epstein (1974): 165.
15. Donald Regan, "The Theory of Social Cost Revisited," 15 *Journal of Law and Economics* (1972): 427. Although Regan does not deal specifically with lawyers as the agents for the threat/counterthreat system we presently have, his analysis is quite amenable to that interpretation.

    A change in the assessing of court costs and lawyers' fees, such as that proposed by Smith, would indeed go a long way towards solving some of our society's more serious legal inequities.
16. This is true because of the difficulty of producing or acquiring stolen merchandise as evidence. Trials of persons who refuse to show up are fine when there are eyewitnesses. But when the only issue of substance is whether or not Jones has your watch in his bedroom, what are we to do?

    As for subpoenas, it might well be that an extremely sophisticated computer sharing plan could help alleviate some of the costs in time and money that such a legal system would necessitate. It would be difficult under such a restriction to prove many cases of criminality. I am not advocating a system of subpoenas and search warrants, but merely musing over the lack thereof.
17. Richard A. Epstein, "A Theory of Strict Liability," 2 *Journal of Legal Studies* (1973): 151.

    The two Epstein articles have been combined and will appear shortly in the Cato Papers Series of the Cato Institute.

18. The relevant literature, which the reader may wish to consult: Ronald H. Coase, "The Problem of Social Cost," 3 *Journal of Law and Economics* (1960); Richard Posner, *The Economic Analysis of Law* (Boston, Mass.: Little, Brown and Co., 1972); James Buchanan, *Cost of Choice* (Chicago, Ill.: Markham, 1969), pp. 70–83; James Buchanan, "Property, Politics and Law: An Alternative Interpretation of Miller et al. v. Schoene," 15 *Journal of Law and Economics* (1972): 439; Armen Alchian, *Economic Forces at Work* (Indianapolis, Ind.: Liberty Press, 1977), pp. 273–334; Steven Cheung, *The Myth of Social Cost* (London: IEA Press, Hobart #82, 1978).

    If the reader is curious how the idea of social cost came to be so wrapped up in liability law, observe the banishing of *causation* from legal theory by Coase (1960): "The question is commonly thought of in terms of A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."

    In other words, the existence of the victim helps cause the harm! Surely no quest could be more futile than to try and base legal decisions on some magic formula that purports to measure "the more serious harm". The proposition "A harms B", as Epstein points out, cannot be twisted to mean, simultaneously, that "B harms A".

    But this is precisely the quandary we enter into when SL is suspended. Needless to say, money prices *are not* indicators of either costs or losses or harm.
19. Coase (1960).
20. Surely there would be implicit warranties in a libertarian society, as well as mores governing everyday conduct among "reasonable men" that would ultimately manifest themselves in common-law decisions.
21. See, for instance, Glenn Garvin's article, "Cops vs. Everybody: Texas Justice," *Inquiry* (January 8 and 22, 1979).

    The problem is not solved by maintaining that the police from a justice agency are carrying out an already established verdict, since a) the TP, as shown previously, may be unaware of this, and b) there will be many occasions when detentions must be made before trial.

    What is a TP to think?
22. Epstein (1974).
23. Murray Rothbard, "Towards a Reconstruction of Utility and Welfare Economics," in *On Freedom and Free Enterprise* (Princeton, N.J.: D. Van Nostrand, 1956). Rothbard is right in maintaining that *demonstrated action* is our only guide to subjective valuations.