

# Justice Entrepreneurship Revisited: A Reply to Critics

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## I

Randy Barnett, Robert Formaini, and Steven Strasnick raise many significant points in their comments on my paper "Justice Entrepreneurship in a Free Market." I welcome this opportunity to discuss these issues in more detail in the course of responding to their criticisms.

Many of the criticisms (especially those of Barnett and Formaini) center on my discussion of Third Party intervention, so I shall focus most of my attention on this topic. Strasnick's criticisms are of a different nature, and I shall comment briefly on them at the conclusion of this paper.

Many of the issues discussed here are uncharted waters for libertarian theorists, but they must be resolved and elaborated if libertarian legal theory is to progress beyond the rudimentary level. I hope that even those who disagree with my approach will lend a sympathetic hand and help to develop a systematic and integrated legal theory based on libertarian principles.

## II

Randy Barnett contends that I grant "limited liability" and even "immunity"<sup>1</sup> to Third Parties who mistakenly intervene in behalf of an apparent Victim. Such exemption, he argues, cannot "be justified on libertarian grounds." The charge that I overthrow strict liability in favor of limited liability is also made by Formaini; and because this is a central feature of Formaini's critique, I shall postpone detailed comment until I consider Formaini's paper. For now I should note that I regard my discussion of Third Party intervention as a variant of strict liability rather than as an abandonment of it. But more on this later.

My defense of "immunity" for Third Parties, according to Barnett, stems from my concern that, without such "immunity," "third parties might not be willing to take" the risk of intervention at all. This is misleading. Although I did refer to this issue briefly, it certainly was not the crux of my argument. The basic argument occurs in section V of my essay, and it is

epistemological in character. Unfortunately, Barnett does not touch upon the crucial issues raised in that section (such as countering threats of aggression or responding to what one misperceives as a threat). Consequently, it is difficult to ascertain the extent to which Barnett and I disagree on certain fundamental questions.

Barnett further maintains that, if one accepts my argument, one could as easily argue to exempt from liability a Victim who employs restitutive force against an innocent party, since full liability for the risk inherent in seeking restitution may dissuade Victims from pursuing it. As I just pointed out, however, the tendency of high risk to inhibit action was not the basis of my *moral* defense of Third Party "immunity" (although it is significant from an entrepreneurial point of view), so the presence of similar risk in other actions is beside the point.

My defense of Third Party "immunity" was based on the contention that the proximate user of unidentified violence "actually communicates through his behavior that he is an Invader." If a Victim uses restitutive violence that is not so identified publicly, his action is certain to mislead others. He communicates a signal of "Invader" to impartial Third Parties, whether that signal is accurate or not. Therefore, I argued, because the user of unidentified violence is primarily responsible for whatever misunderstanding may result with a conscientious and impartial Third Party, it is the user who must bear *primary* responsibility for mistaken Third Party intervention. It is not as if liability for mistaken intervention disappears into thin air. The extent to which a Third Party is exempt from liability for mistaken intervention is simply the extent to which the user of unidentified violence *is* liable for that mistaken intervention. There is little doubt that Barnett disagrees with this argument, but he fails to discuss it at all. Yet it is essential to my thesis, and it distinguishes Third Party intervention from the case posited by Barnett.

I shall now turn to Barnett's most significant objection. My defense of Third Party intervention, according to Barnett, begins as a transfer of the Victim's right of self-defense to a Third Party. If a Victim has a right to fend off an Invader, then he may assign that right to an agent to act in his behalf. If, however, the apparent Victim is really not a Victim at all, but an Invader from whom restitution is being legitimately sought, then the Invader "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." The rights of the Third Party, argues Barnett, "are as extensive as those of whom he seeks to represent."

In one sense Barnett is correct: *If* a Third Party "stands in the shoes" of the person he seeks to protect — that is, if the Third Party is nothing more than an agent of the apparent Victim — then it is indeed true that the rights of the Third Party cannot extend beyond the rights of the purported Victim. This would be a fatal objection to my theory, but I do not subscribe to the agency paradigm offered by Barnett. It was never my intention, as Barnett indicates, to adopt it as the foundation of Third Party intervention.<sup>2</sup> As I

stated in my essay, "If it is legitimate to use violence to counteract invasion, then *any person* may employ such violence whether or not that person is the Victim." (Emphasis added.) Before elaborating on this approach to Third Party intervention, I shall list my primary objections to the agency paradigm defended by Barnett. The following example shall be used to illustrate the discussion:

The Third Party witnesses what appears to be an act of invasive violence by B against C. The Third Party comes to C's defense, injuring B in the process. Subsequent investigation reveals that the Third Party was correct. B was in fact the Invader, and C was in fact the Victim.

Barnett maintains that the relation between the Third Party and the Victim is one of agent and principal. C "assigns" his right of self-defense to the Third Party, who acts "*on behalf of and as agent of* the apparent victim." The Third Party, according to Barnett, even "seeks to represent" the Victim.

There are serious problems with this analysis. In the first place, when, and under what circumstances, did the alleged assignation of rights occur? There is no indication by C that he wishes the Third Party to act in his behalf.<sup>3</sup> Surely a principal/agent relationship can come about only through bilateral agreement, and any such agreement is absent in this case.

Perhaps it will be said that the principal/agent relationship is implicit in the situation. The Third Party acts in C's behalf whether C expressly consents or not, which makes the Third Party an agent of C. But this will not bear scrutiny either. Even skirting the tricky problem of implied consent, the Third Party's action is unilateral. There is no reciprocal action by the Victim to indicate his desire to engage the Third Party as an agent.

Barnett's agency paradigm casts doubt on the entire right of a Third Party to defend a legitimate Victim, except when the Victim has given explicit consent. (This would be especially troublesome where the Victim has been rendered unconscious.) If Third Party intervention to halt invasion is interpreted as a principal/agent relationship, then the Third Party requires the express permission of the Victim to intervene. One cannot act as the agent of another person without that person's consent. For the Third Party to intervene without permission would be to represent himself illegitimately as an agent of the Victim, and this would constitute *fraud*.

Let us amend the above example in order to flush out another difficulty in the agency paradigm. As before, the Third Party comes to the rescue of C, a legitimate Victim. But now the Third Party gets carried away and uses excessive force against the Invader (B), inflicting unnecessary and serious injury. Unless one holds that *any* amount of force is justified in countering an invasive act (in which case a store owner could gun down a shoplifter who is about to abscond with a dollar trinket), we must conclude that B, though an Invader (and liable to C to that extent), has a valid case for recovery against the Third Party for excessive injury.

So far, so good. The Third Party inflicts unnecessary injury and is held

accountable. But if Barnett is correct — if the Third Party is an agent of C — then should not C, as the principal, also be liable for the injury inflicted by his agent? As the great libertarian theorist Lysander Spooner argued:

If a man is my servant, agent, or attorney, I necessarily make myself responsible for all his acts done within the limits of the power I have entrusted to him. If I have entrusted him, as my agent, with either absolute power, or any power at all, over the persons or properties of other men than myself, I thereby necessarily make myself responsible to those other persons for any injuries he may do them, so long as he acts within the limits of the power I have granted him.<sup>4</sup>

If a Victim assigns his right of self-defense to a Third Party and the Third Party assumes the role of agent, then it seems the Victim should be liable for excessive injury caused by the Third Party when acting in his capacity as agent. I fail to see how the Victim can reap the benefits of a principal/agent relationship without assuming the obligations as well. And so the agency paradigm, if extended to its logical conclusion, results in the Victim assuming liability for the possibly tortious actions of an uninvited Third Party.<sup>5</sup>

Contrary to Barnett, I maintain that the right to use defensive violence is *not* a right assigned by the Victim to the Third Party. It is a *primary right* of every person, regardless of whether one defends oneself or another person. This thesis is quite simple to demonstrate; and it is perhaps best illustrated by contrasting defensive force, which is *not* an assigned right, with restitutive force, which *is* an assigned right.

Restitutive force, as I explained in the *Appendix* of my essay, is “violence used to restore rightful control over one’s property or the equivalent in value.” Defensive force is “violence used to counter an immediate threat” or invasive assault. Why do I hold that restitution is a right which is available to a Third Party only if assigned by the aggrieved party, whereas defense does not require such transfer? To answer this, let us consider the case of a pacifist who morally disapproves of violence for any purpose, including restitution and his own self-defense.

If a pacifist has his wallet stolen and chooses not to use restitutive violence against the thief, does a Third Party, acting without the permission of the pacifist (indeed, in the face of his strong objections), have the right to use force to recapture the wallet in behalf of the pacifist? No. Such action by the Third Party involves a clear violation of the pacifist’s rights.

Consider that the pacifist still retains title to his wallet; it remains his rightful property even though he has been deprived of its possession. Because the pacifist retains moral jurisdiction over his wallet, *he has the sole right to say how it shall be used*. Any person who knowingly disposes of the wallet without the owner’s permission commits a wrongful act against the pacifist — and this includes well-intentioned Third Parties. For a Third Party to recapture the wallet by force without, or contrary to, the owner’s con-

sent, is for the Third Party to assume wrongful jurisdiction over property that does not belong to him. This is a clear violation of the pacifist's right to his property.

Because restitution necessarily involves disposal of the Victim's property, the decision to seek restitution (and by what means) rests with the Victim. A Third Party can acquire the right to use restitutive violence only if it is assigned to him by the Victim.

This differs from defensive violence employed by a Third Party. Suppose our pacifist is physically assaulted by a thug, but the pacifist does not wish anyone to use violence to disengage the attacker. But a Third Party—who is unaware of the pacifist's desire or who simply ignores it—violently intervenes to halt the attack. Is a right of the pacifist violated by such non-assigned Third Party intervention, as was true in the previous example? No. The pacifist has a right to his person and his property, and the Third Party interferes with neither of these. Consent by the pacifist is irrelevant, because the Third Party does not trespass into the pacifist's sphere of moral jurisdiction.<sup>6</sup> The thug does not have a right to assault; Third Party intervention prevents the thug from doing what he has no right to do in the first place. The Third Party does not act as an agent of the pacifist; he merely exercises the right of every person to halt aggression.

We see, therefore, that a Third Party's right to intervene with defensive violence is not assigned by, or in some way channeled through, the Victim. It is a right exercised directly by the Third Party against the Invader. To disengage an Invader from his Victim without the Victim's consent, in no way violates a right of the Victim. This is why, as I stated in my essay, the Victim/Invader relationship must be considered as an issue distinct from the Invader/Third Party relationship.

Because Barnett concentrates on the agency paradigm in his critique, he fails to grasp the pivotal role played by some of my arguments and illustrations in section V. The example I gave of a prankster with a toy gun is germane here. I argued that a prankster who gives every appearance of being an Invader must shoulder the risk—and therefore the liability—of communicating his false signal. The prankster does not have a claim of recovery against a mock Victim who responds as if he is being attacked. This is the conclusion reached by a "contextualist" approach to questions of justice.

The "absolutist" approach, on the other hand, would hold the mock Victim liable for injury inflicted upon the prankster. The absolutist would decry the alleged "immunity" and "limited liability" granted by the contextualist to deluded "Victims." (In fact, as we shall see, the contextualist does not wish to limit liability; he simply differs from the absolutist as to where liability properly belongs.) Of course, if one disagrees with the contextualist analysis of the prankster, one will also disagree with the contextualist analysis of Third Party intervention. But if one *agrees* with contextualism in the case of the prankster, the application of this principle to Third Party intervention follows with relative ease.

The prankster example deals with a false belief by a "Victim" generated by his apparent "Invader." I did not seek to exonerate the deluded "Victim" because of good intentions, or because he was acting on the basis of a reasonable belief. Rather, it is because the prankster is *responsible* for the "Victim's" belief that he is about to be attacked, and because the prankster's behavior would convince any "reasonable man" of this, that I sought to fasten major liability upon the prankster.<sup>7</sup>

Similarly, I maintained that the user of unidentified violence, innocent or not, sends the message of "Invader" to the public in general. A Third Party, therefore, acting on the signal generated by the apparent Invader, is justified in exercising his primary right of defensive violence. Again, it is not just the reasonableness of the Third Party that exonerates him, but the fact that his belief is triggered by the violent actions of the apparent Invader. The actions of the user of unidentified violence are such that any "reasonable man" would interpret them as invasive. Hence, just as the prankster assumes liability for harm that may result from his false signal of invasion, so the user of unidentified violence must assume liability for *his* false signal of invasion. The right to use defensive violence, construed within a contextualist framework, leads to identical conclusions in both cases.<sup>8</sup>

### III

Robert Formaini's paper raises many issues that I cannot possibly deal with in a short space. I shall confine this response to what I regard as three significant areas.

- a) Formaini makes the peculiar and unexpected claim that no individual has the right to use restitutive violence.
- b) Formaini charges that I offer the "subjective evaluation" of a Third Party as sufficient ground to exempt the Third Party from liability for mistaken intervention.
- c) Formaini considers my discussion of Third Party intervention to be an abandonment of strict liability—something he regards as potentially disastrous for libertarian legal theory.

a) In response to problems that Formaini sees in my paper, he replies that the answer is "simple." Libertarians must disabuse themselves of the right of restitutive violence (RRV). "We must dispense," Formaini argues, "with the alleged distinction between *invasive and non-invasive violence*. . . . Physical violence is always *invasive*. . . ." Although a Victim may use force if the Invader is "caught in the act" and attempts to leave the scene of the crime, a Victim may not use force to recapture his property after the crime has been committed. What, then, is a Victim to do? "Cases that have happened without detention at the time the crime was committed would have to be settled. . . through a claim and public hearing of the evidence by a common law court."

This is baffling. Earlier in his paper, Formaini appears to take me to task

for supposedly holding that "there simply is no right of restitution *for individuals*." "What Smith's position leads to," he argues, "is a *monopoly of restitution by justice agencies*." Now, while holding this to be a *practical* consequence of my position, Formaini embraces it in *theory*. He repeatedly says that there is no RRV for Victims.

To this I must query: If Victims do not have the RRV, *then who does?* It is one thing to say that the issue should be settled in court; it is another thing to explain what happens if a convicted Invader refused to relinquish the compensation demanded by the judgment. If a convicted Invader is required by Formaini's court to compensate his Victim in the amount of \$500, does that court have the right to enforce this restitution by violence, if necessary? If so, then where does that right originate, if not with the individual—more specifically, with the *Victim*? (See my previous discussion of restitution as an assigned right.) It is a basic maxim of libertarian theory that rights belong to individuals; and all rights belonging to institutions and corporations must be derivable from individual rights. So either individuals have the RRV, or no one does. And if no one has the right to use force to effect restitution, then Formaini's common law court degenerates into a toothless wonder—an agency with no teeth to back up its decisions.

Is a thief liable to his Victim for what he steals? Formaini obviously thinks so. But if the thief is liable, the Victim must have an *enforceable claim* against him—this, after all, is what liability means in a legal context. This, however, is precisely what Formaini denies. Indeed, if the Victim seeks personally to enforce restitution, he then becomes liable to the thief! As Formaini puts it: "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."

It is ironic that Formaini, in a spirited defense of strict liability, ends by turning liability on its head. Frankly, I find this confusing and unconvincing.

b) Formaini claims repeatedly that I "make the subjective state of TP [Third Party] perception a valid defense against all claims of damage due to his acts in violent disputes." Similarly, he interprets me as holding "that the subjective evaluation of a threat by a 'victim' should serve as exoneration in any subsequent legal proceedings... When is a threat really a threat? When the 'victim' perceives it to be! QED."

Perhaps my position was not expressed clearly in my essay, so I welcome this opportunity to correct Formaini's misinterpretation. My discussion of Third Party liability and perceived threats hinged on "conventional understanding about the significance of behavior." My discussion of how an insulting gesture would be interpreted in a given society (the "presumption of insult"), my analogy between behavioral communication and verbal communication, my contention that language rests on convention—these and related points were intended to highlight to role of *convention* in human interaction.<sup>9</sup> It is a serious error to equate, as Formaini seems to do, the

conventional with “arbitrary” or “subjective.” Language, for instance, is conventional, but it is not arbitrary. (Though undesigned by a single mind, there are reasons why languages evolve as they do. And once languages are established, one cannot arbitrarily change them — e.g., one cannot decide to form a new word in English with no vowels.) Nor does the understanding of language depend solely upon “subjective perception.” (There must be a common understanding and agreement about the meaning of words if language is to serve its function of communication. Language in this sense is objective.)

A natural-law theory of justice and its corresponding theory of strict liability must take the role of convention into account if they are to avoid degenerating into incoherence.<sup>10</sup> Consider the subject of consent and language. Suppose one morning I decide that, for the rest of the day, I shall say “Yes” when I mean “No,” and vice versa. For the sake of future verification, I sign a notarized statement of my plan, but no one else is informed of my decision.

On this day my neighbor asks if he can borrow my bicycle. I reply, “Yes” — by which I *really* mean “No.” The neighbor takes my bicycle, and I charge him with theft.<sup>11</sup>

Now did I give my consent? In one respect I did not. There was no subjective state of mind corresponding to consent. I *intended* to refuse permission. In another respect I did consent. I used a word — “Yes” — which, by convention, signifies agreement.

I doubt if even the strictest of strict liability theorists would hold my neighbor accountable for theft. But why not? Am I under a legal obligation to use language in one way and not another? Where in nature is it written that I cannot use a particular sound (“yes”) to signify refusing permission? Is a thief to be exonerated from liability because of his “subjective perception” of what he *thought* I meant?

Conventional understanding as to the meaning of language obviously lies at the heart of any coherent idea of “consent.” And where convention plays a role we must rely upon a “reasonable man” interpretation of disputes. It may be that I intended my “Yes” to signify “No,” but no “reasonable man”, uninformed of my idiosyncratic use of language, can be expected to know my inner intentions apart from what I say. I am legally responsible for the *conventional* meaning of my language; and the “bicycle thief” is exonerated because he acted on the basis of that convention.

My article attempted to deal in a similar way with “behavioral communication.” I argued that behavior “can convey a message as surely as words . . . and just as verbal communication is made possible by a common understanding about the meaning of words, so nonverbal communication is made possible by a common understanding about the significance of behavior.” We can no more discount behavioral communication when deciding liability than we can discount verbal communication.

A key argument of my paper — and one that seems to have eluded For-



maini as well as Barnett—is that *the presumption of invasion is valid precisely because of the message which apparently unprovoked violence communicates in a free society*. In the same way that the person who says “Yes” when he means “No” must assume major responsibility for misunderstandings resulting therefrom, so the proximate user of violence (the apparent Invader), whatever the justice of his cause, must bear major responsibility for the message of “invasion” that he communicates to the public at large. This is not a matter, as Formaini charges, of “subjective evaluation.” There are sound reasons why apparently unprovoked violence elicits the response that it does from Third Parties. And there are sound reasons why the prankster wielding a toy pistol would be regarded by any “reasonable man” as an authentic Invader. These reasons admittedly derive from social conventions (conventions, I suspect, that would be even stronger in a libertarian society), but my critics must address the intricate subject of conventional standards and justice rather than dismissing my argument as subjectivism.

c) “I do not think I misrepresent Smith,” writes Formaini, “when I say that he wishes to dispense with SL [strict liability] altogether.” Again: “[T]he 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.”

Both Formaini and Barnett are concerned that my discussion of Third Party liability entails the overthrow of strict liability. The meaning of “strict liability,” however, is not without ambiguity, and it is possible to have variations within a strict liability paradigm. (Indeed, judging by Formaini’s remark that strict liability does “permit contextual analysis *ex post* as a way of evaluating defenses to claims of liability,” it is probable that Formaini and Barnett themselves disagree on the application of strict liability.) As indicated previously, I do not regard my paper as an abandonment of strict liability. And now, fully cognizant that an adequate discussion of strict liability could easily fill a book, I shall attempt, in a few paragraphs, to explain why.

What is strict liability? According to Formaini, “[t]he theory of strict legal liability. . . holds each person to account for damages which their [sic] actions cause.” Interpreted literally, Formaini’s statement of strict liability is one which few libertarians would embrace. If I break an Invader’s watch during my effort to fend off his assault, does strict liability require me to compensate my assailant for the damage? Libertarians do not wish to hold a Victim liable for damage inflicted upon an Invader during a legitimate act of self-defense, but this would be required by a strict rendering of Formaini’s definition. And we find that common law did place this interpretation on strict liability. As William Prosser notes:

“Certainly at one time the law was not concerned very much with the moral responsibility of the defendant. . . . The man who hurt another by

pure accident *or in self-defense* was required to make good the damage inflicted."<sup>12</sup> [Emphasis added.]

In its pure form strict liability seeks to separate the question of legal liability from moral blame or innocence. A person is held liable for the damage he causes, regardless of his motives, intentions, moral culpability, or context of knowledge. Damage inflicted by accident, or inadvertently through good intentions, is recoverable in a scheme of strict liability. A theory of limited liability, on the other hand, may exempt (in full or part) a person from liability if he is shown to be morally innocent or to have acted from a reasonable belief.

If moral responsibility is divorced from legal liability, then the older common law tradition prevails, and I must compensate my assailant for his damaged watch. The facts are simple: (i) the assailant owns the watch, and (ii) I damaged it without his permission. The *reason* for my action and its moral character cannot, by definition, enter into consideration.

Modern libertarians reel from this conclusion. Of course, they say, I am not liable for the damaged watch, since the damage occurred during a legitimate act of self-defense. My assailant initiated the coercion—he is responsible for the predicament in which I find myself—so *he* is liable for the damage I inflict on his property in self-defense. On this most libertarians agree. But I wish to emphasize that libertarians have amended the older tradition of strict liability with a theory of *moral responsibility*. We cannot simply look at who damaged what. To ascertain liability we must determine who is responsible.

Does this mean that libertarians have unwittingly adopted a theory of limited liability, or even legal immunity? (A Victim, after all, is “immune” from liability for damage inflicted in self-defense.) No. To posit a theory of where liability properly belongs, as libertarians do, is not to “limit” liability or exclude it altogether. This is an essential distinction that we should explore in more detail.

Consider an example of limited liability: the case of *Randall v. Shelton*, tried by the Court of Appeals of Kentucky in 1956.<sup>13</sup> A woman was standing on her property when a rock was thrown from the wheels of a passing truck. The rock hit the woman and broke her leg. She sued the truck driver for recovery on the grounds of negligence and trespass. The Appeals Court rejected both arguments and found in favor of the defendant. According to the Court, “the true question presented is whether or not the defendant committed a culpable act. . . .”<sup>14</sup>

The truck driver was exonerated of liability because he could not have reasonably foreseen or prevented the accident. The Court, in exonerating the defendant, did not imply that the woman was responsible instead. Liability was not shifted from the truck driver to the woman (though the economic burden of liability obviously was shifted in this way). Instead, liability was, in effect, banished from the situation altogether. The woman was

expected to bear the financial loss of this freak occurrence, almost as if she had been the victim of a natural catastrophe.

Within a framework of limited liability, an Invader may be exempted from liability if he is judged to be neither culpable nor negligent. This exemption does not result from the transfer of liability to another party. Because no one is said to be at fault, no one is liable; and the injured party must make the best of a bad situation.

Strict liability, in contrast, holds that whenever there occurs a violation of rights, intentional or not, *someone* is liable. And the liable party must compensate fully for the damage he caused regardless of his moral guilt or innocence. Strict liability does not permit liability to vanish, as it were, into thin air—and this is what distinguishes it from limited liability. One party is “limited” in liability only if another party is determined liable to that degree.

An illustration may clarify this. In a tort action by B against C there are *ten* units of liability at stake. (B, let us say, has been injured ten units worth.) But a limited liability court, finding C to be relatively free of negligence or culpability, awards B only *five* units in recovery. It does this without any hint that B is himself responsible for the other five units of injury. So we arrive at the following equation:

Court finds C liable for	5 units
Court finds B liable for	0 units
Total Liability:	5 units

What happened to the missing five units of liability? The limited liability court has erased them from the scene.

Now consider the same case as tried in a strict liability court. If there are ten units of liability, the court *must* assign them somewhere. If C is liable for only five units, then B must be held liable for the other five units. In other words, when we add up the total units assigned by the court to B and C, they must equal ten. If B, the injured party, is clearly free of all liability, then C is necessarily liable for the full ten units. And this legal judgment follows regardless of C's moral culpability. Under no circumstances can liability vanish from the situation. It must be apportioned to one party or the other, or to both in varying degrees.

In the case of *Randall v. Shelton* cited above, strict liability would not allow the truck driver to be absolved of liability unless it could be shown that the woman was responsible for her own injury. The fact that the driver was not negligent or morally blameworthy is beside the point. If he initiated a causal sequence which resulted in the injury of an innocent party, then he must compensate that party fully. The driver may not be at fault in a moral sense, but he is legally obligated, in strict liability, to provide restitution.

I have emphasized a key difference between limited liability and strict liability. This difference is basic to understanding why the libertarian exoneration of a Victim who inflicts damage in self-defense is not a deviation

from strict liability. The liability for the assailant's broken watch does not disappear. The assailant is judged by libertarians to be responsible for the victim's defensive reaction, so the assailant is deemed liable for the damage which the victim inflicts. In strict liability there is always liability for property damage. In this case it rests with the assailant.

Just as the libertarian view of self-defense seeks not to eliminate liability but to assign it to the responsible party, so my discussion of Third Parties did not seek to eradicate liability in the event of mistaken intervention. On the contrary, I offered a theory, based on "contextualism,"<sup>15</sup> of *how liability should be assigned*. If a Third Party errs, a wrong is committed, and *someone* is liable. This is required by strict liability. But strict liability does not, in itself, answer the question, "*Who* is liable?" The answer to this question depends upon a theory of responsibility, and I attempted to develop such a theory in my paper. I argued that the Third Party is *not* liable for mistaken intervention to the extent that the user of unidentified violence, because of the signal he communicates to the public, *is* liable. This in no way contravenes strict liability. To eradicate liability is one thing; to assign liability to the responsible party—based on a theory of causation in human interaction—is quite another thing.

To hold a liable party accountable for the full extent of the damage he causes is something on which all defenders of strict liability agree. But the exact standard by which liability is apportioned is a subject on which these same advocates frequently (and understandably) disagree. I suggest that my differences with Barnett and Formaini are of this kind.

#### IV

The thrust of Steven Strasnick's critique is that I failed to fulfill a major task specified in my paper: to provide "an objective standard by which to distinguish legitimate agencies from outlaw agencies in a free market." Strasnick complains that he "can find no such derivation in [my] paper." Although I did "make some claims about the need for a public trial," I failed to explain why these public trials are any more dependable than reading tea-leaves or consulting psychics. Because of this Strasnick concludes that I have not disposed of Nozick's dominant protection agency that refuses to recognize any procedures but its own as reliable. The dominant agency, acting as Third Party, will intervene in behalf of its clients, using the presumption of invasion as rationale. "Since the DPA will recognize only its own juridical procedures as valid," writes Strasnick, "any attempt to apply other procedures to its clients will be judged insufficient to discharge the presumption of invasion, and it will intervene."

I am somewhat taken aback by Strasnick's critique. In presenting some basic procedures that a legitimate agency must follow, I acknowledged that I was merely "sketch[ing] an outline"; and I emphasized instead the importance of the methodology I employed. Even so I do not understand how

Strasnick can dismiss the procedures I offered in such a cavalier fashion. Surely the requirements of public access, careful records, onus of proof, the "reasonable doubt" proviso, and so forth, are substantive features of legal procedure. Strasnick may disagree with the way I derived these procedures, but to claim that he "can find no such derivation" leaves me stunned.

What is it about legal procedures that Strasnick finds so troublesome? He is concerned "whether there do exist objective standards for evaluating the correctness of juridical procedures," and he then discusses some alleged obstacles to ascertaining such standards. We must begin, Strasnick says, by distinguishing theory from practice (or the "question of fact" from the "question of the verification of fact"). On a theoretical level, "A procedure is objectively correct just in the case it identifies all who are truly guilty as guilty and all those who are truly innocent as innocent." In other words, Strasnick demands *infallibility* in order for a procedure to qualify as "objectively correct." Infallible procedures, however, are not available to fallible beings, so it is not surprising that we will inevitably fall short of Strasnick's "ideal." (It is "very unlikely," Strasnick notes, "that any procedure will ever attain such perfection in the real world." For "very unlikely" I would substitute "impossible," and I must wonder why an unattainable goal is regarded as "perfection.")

After positing an impossible standard as an ideal and pointing out man's inability to scale these heights of epistemological perfection, Strasnick goes on to say that we must settle, in effect, for second-best. We must seek a definition that will tell us "when one procedure is *more correct* than another." By "more correct" Strasnick means more frequently correct. Procedure X is more correct than procedure Y if it identifies a higher proportion of the truly guilty as guilty and the truly innocent as innocent. But what if procedure X exceeds Y in the number of innocent persons falsely convicted as guilty, and procedure Y exceeds X in the number of guilty persons falsely exonerated as innocent? (This is like asking: Which is better? — an epistemological procedure that errs by regarding true propositions as false, or a procedure that errs by finding false propositions to be true?) Complexities abound, and Strasnick is skeptical that an objective standard is available to decide these matters. We may have to rely instead on "social priorities."

Even if these problems can be surmounted, however, more difficulties await us on the practical level. How can we determine which procedure is more reliable in practice? Ideally, according to Strasnick, we could keep statistics based on interviews with defendants after they have finished their trials. But it would be difficult, if not impossible, to obtain such statistics. So the quest for objective standards seems hopelessly mired in Strasnick's procedural quicksand.

My fundamental objection to Strasnick is that he approaches the entire subject of legal procedure in a vacuum. He asks why we should regard the procedures outlined in my paper as more reliable than tea-leaf reading, and he chastises me for not specifying the kind of justification a tea-leaf court

would have to provide in order to be acceptable. Now perhaps it was presumptuous of me, but I assumed that most readers of my paper would not subscribe to tea-leaf reading as a valid epistemological procedure; and I further assumed that many of them, especially the philosophers, would be able to explain (at least to their own satisfaction) what there is about tea-leaf reading that renders it suspect. Tea-leaf reading does not qualify as a reliable legal procedure simply because it does not qualify as a valid *epistemological* procedure. As I explained in my paper, a court "is the personification of epistemological standards. It represents the social application of epistemological procedures, whose purpose is to assess the rational basis for a given knowledge claim. . . ." And again: "Implicit within the procedures of a court there lurks a theory of knowledge and certainty. The verdict of a court cannot be more reliable than the epistemological underpinning on which it is based."

By stressing that a reliable legal procedure is basically the extension of a reliable epistemological procedure to a public forum, I hoped to establish that legal procedures can be as "objective" as one's theory of knowledge permits. In other words, there is nothing peculiar to legal procedures that excludes them from objectivity. Of course, if one is a total skeptic in epistemology, this skepticism will spill over into legal theory — and the possibility of objective legal procedures will be denied. Strasnick's doubts about objective legal procedures flirt with this kind of Pyrrhonian skepticism. His doubts about verification have broader epistemological implications: they cannot be confined to the legal sphere. Guilt or innocence is a question of knowledge. If Strasnick's objections bar us from this knowledge, why would not the same objections applied on a wider scale bar us from *all* knowledge?

A thorough reply to Strasnick, therefore, requires the presentation of a full-blown theory of knowledge and certainty — something that cannot be undertaken here. I offered "contextualism" in my paper as a candidate for such a theory; and although I did not give details, I did indicate some of its basic features (along with providing some references for further reading).

Either Strasnick can solve the general problem of verifying knowledge claims, or he cannot. If he can, then he need only apply the basic solution he finds in epistemology to the subject of legal procedures. If he cannot, then he is grappling with a profound skepticism that runs far deeper than legal theory, and I suggest that he settle this issue before moving on to legal procedures.

## NOTES

1. Barnett's charge that I grant "immunity" to Third Parties for mistaken intervention is echoed in Formaini's claim that I absolve Third Parties "from any liability attaching to their actions. . . ." This is an understandable, though mistaken, interpretation. My Third Party was intended to be an ideal paradigm: impartial, reasonable, and prudent. I did not deal with deviations from this paradigm, such as a Third Party who recklessly intervenes in

a situation where it would be clear to the proverbial "reasonable man" that intervention was uncalled for. Such reckless intervention (decided *ex post* by a court of law) would entail Third Party liability. (I state in my essay that the presumption of invasion "places *major* responsibility upon the Victim" to publicly identify his violence as restitutive. This does not give a *carte blanche* to Third Parties.)

I concede that a "reasonable man" standard can be troublesome and ambiguous, but I do not see how any legal theory can dispense with this useful fiction. This topic obviously requires far more attention than I can give it here.

2. The sentence cited by Barnett ("The consent of the Victim is assumed throughout this discussion") was not intended to establish an agency paradigm. It was inserted to bypass the possibility of a "willing" Victim (who would not actually be a true Victim at all) — such as a masochist who hired an assailant to beat him, or two friends engaged in voluntary roughhousing. My ambiguous proviso should have been clarified in the essay.
3. Regrettably, I used examples in my essay where the apparent Victim solicits help from Third Parties, which lends credence to Barnett's agency interpretation. At the time I wrote the essay, however, I had not seriously considered an agency interpretation, so I did not realize how the solicitation aspect might mislead readers.

One may wish to argue that we have two distinct cases: (i) solicited Third Party intervention, and (ii) unsolicited Third Party intervention. If (i) is construed to be a principal/agent relationship, perhaps we should hold the false Victim who solicits aid liable for mistaken intervention, instead of the Third Party *or* the true Victim who uses unidentified violence.

In my opinion, solicitation in (i) does *not* establish a principal/agent relationship. For if, as I contend, the right to intervene with defensive force is a primary right, then it cannot be an assigned right as well. In other words, if a Third Party has a basic right to intervene, whether solicited or not, the incidental fact of solicitation becomes irrelevant, and any significant difference between (i) and (ii) dissolves. If a person asks me to do something that I have a right to do anyway (e.g., sell my car), I do not thereby become his agent in exercising that right.

Barnett's discussion of agency does not appear to rely upon solicitation; I assume that he would apply the agency paradigm to cases (i) and (ii) alike. Therefore, in discussing the agency paradigm, I have relied upon a case of unsolicited Third Party intervention, since this is the best testing device.

4. Lysander Spooner, *No Treason, No. VI: The Constitution of no Authority* (Boston: Published by the Author, 1870), p. 25. Reprinted in *The Collected Works of Lysander Spooner*, edited by Charles Shively (Weston, Massachusetts: M&S Press), Vol. I.
5. There is an obvious reply open to Barnett. The rights of an agent, as he explains, are co-extensive with the rights of the principal. The principal cannot assign rights he does not have. Therefore, since the Victim does not have the right to inflict excessive injury in the name of self-defense, neither can he transfer this nonexistent "right" to his agent. Hence the Third Party, insofar as he exceeds the bounds of legitimate self-defense, cannot be said to be acting in behalf of the Victim. His right as an agent ceases when he passes from defensive to invasive violence.

This reply is superficially attractive, but it wreaks havoc with the principal/agent relationship. It would, for example, exonerate all criminals who do not personally commit crimes, but who hire others to do so instead. If I hire a "hit man" to kill my wife, I would ordinarily be said to enter into a principal/agent relationship with the killer. He is acting in my behalf on the basis of a bilateral agreement. Therefore, although I do not personally pull the trigger, I share liability for the crime he commits.

But Barnett's analysis (assuming I interpret him correctly) will result in my exoneration. After all, I do not have the right to kill my wife; therefore, I cannot assign this "right" to an agent. The hit man is not an agent acting in my behalf because he exceeds the bounds of my legitimate authority, so I cannot be liable for his murderous act.

Similarly, politicians could not be held liable for crimes committed by the police and military at their behest. A dictator may never actually wield a gun, much less commit mass murder, but libertarians would nonetheless hold him accountable for crimes perpetrated by his agents. Yet, since the dictator does not have the right to commit murder, he cannot

assign this right to agents—so how can the dictator be held liable for something he did not personally do?

It is only the notion of “vicarious liability”—i.e., the principle that liability is shared by principal and agent when the latter acts in the former’s behalf—that makes this accountability possible. Barnett’s approach to agency theory, I fear, eliminates vicarious liability altogether. And without vicarious liability, none but the actual perpetrator of a crime can be held accountable.

6. For the sake of this illustration, I assume that the assault on the pacifist does not occur on his own property. A Third Party who trespasses onto the pacifist’s land in order to disengage the assailant obviously violates the pacifist’s rights, but this does not affect the basic argument. There is nothing in the defensive violence per se that necessitates violation.
7. The issue of responsibility is extremely important. Suppose a man approaches me with a curious threat. The next day while I am waiting at the bus stop he is going to walk up beside me, whistle a round of “Dixie,” and then pull a gun from his left pocket and shoot me in the head. Sure enough, the next day at the bus stop the *same* man stands beside me, whistles a round of “Dixie,” reaches into his left pocket, and then... I push him to the ground and run away. According to my theory, I am not liable for assault against the man—even if it turns out that he did not have a gun in his pocket. Why? Because he is *responsible* for the expectation I have of being shot after a certain chain of events is initiated by him.

Now consider a similar situation with a crucial difference. A man approaches me with the same story, except the would-be killer is said to be not the man relating the story, but an unidentified Third Party. A *stranger* is supposed to stand next to me at the bus stop, whistle “Dixie,” and so forth. Again, the prophecy comes true. A man I have never seen before approaches, whistles, reaches into his left pocket, and... I push him to the ground as well. As it turns out, this was an incredible coincidence. The stranger was unarmed and had no intention of assaulting me. In this case, I contend that *I am guilty of assault* against the stranger. He had nothing to do with my expectation, however reasonable it may have been.

It is important to recognize, therefore, that I do not wish to exonerate a Third Party merely because his beliefs concerning the propriety of intervention are those of a “reasonable man.” One cannot be exempted from liability on this ground alone. An innocent Victim has a right to recovery, however reasonable the beliefs and expectations of the Invader may have been. But to the degree that a Victim uses unidentified violence, he is not simply an “innocent” party when it comes to Third Party intervention (in the same sense that the man in the first example is not innocent). As I explain later in this paper, my original discussion of Third Party intervention was in essence of theory of responsibility. Using a theory of contextualism, I attempted to specify where liability for mistaken intervention should properly be assigned.

8. There is a key example that I should have used in my essay, because it would have specified more precisely the fundamental disagreement between me and my critics. It is as follows: A Third Party witnesses what appears to be an assault by B against C. Before intervening, the Third Party (wishing to minimize the possibility of error) asks B, “Are you the Invader here? Are you assaulting C without provocation?” B, apparently unafraid of what the Third Party may do, replies, “You bet I am. I just enjoy beating up on people.” On the basis of this response, the Third Party intervenes to assist C, and he injures B in the process. Unfortunately, later investigation reveals that B, perhaps moved by a perverse sense of humor, was lying to the Third party. B was actually struggling to recover his wallet from C, who had stolen it a short time before. This example removes all problems concerning “behavioral communication” by positing a straightforward (though deceptive) admission by B that he is an Invader. Is the Third Party liable for the injury he inflicts during this mistaken intervention? No, according to contextualism (for reasons that should already be apparent). But what does the absolutist say? As odd as it may appear, he must hold the Third Party liable even here. A Third Party’s mistaken belief, however acquired, cannot exonerate him for interfering with B’s



legitimate right to gain restitution. (B, let us remember, was under no legal obligation to tell this intermeddler the truth.)

If the absolutist response is shared by Randy Barnett, then my discussion of "behavioral communication" will fall on deaf ears. If overt verbal acknowledgment by B does not let the Third Party off the hook, then some less obvious form of communication cannot possibly do so either. In this case the discussion would have to shift to a more fundamental level. We would have to examine the role of convention in the administration of justice—something I discuss briefly later in this paper.

If, contrary to the absolutist, Barnett agrees with me that the Third Party is not liable in this case, then the basic principle of contextualism has been conceded. The issue now becomes a matter of degree. If verbal admission by B is sufficient to exempt the Third Party, then could there not be some other form of communication that would convey the identical message and therefore exempt the Third Party as well? And although we may disagree on whether there is another kind of communication sufficiently explicit to exonerate the Third Party, we are at least playing in the same ball park.

This illustration is probably the best litmus test for distinguishing the contextualist from the absolutist, as I employ these terms.

9. See F. A. Hayek, *Law Legislation and Liberty*, Vol. I (Chicago: University of Chicago Press, 1973) for a discussion of the role of "custom" in the rule of law. Hayek stresses social "rules [that] exist and operate without being explicitly known to those who obey them" (p. 43), and such rules are similar to the conventional standards emphasized in my paper. Hayek regards himself as outside the natural-law camp, and he is so regarded by most natural-law theorists. In my opinion, however, many of Hayek's insights into the role of custom actually *supplement* rather than contradict a natural-law theory of justice. Unfortunately, no such integration has yet appeared.
10. A theory of contract, for example, must rely upon convention at a fundamental level. Why does one's *signature* on a piece of paper commit oneself to the terms specified on that paper? I doubt if libertarians could successfully show how this convention (and other conventions relating to the validity of contracts) follow necessarily from a natural-law theory of justice.
11. I am indebted to Jeffrey Rogers Hummel of the University of Texas at Austin for bringing this illuminating example to my attention.
12. William Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, Minnesota: West Publishing Co., 1971), p. 17.
13. See William L. Prosser and John W. Wade, *Cases and Materials on Torts*, 5th ed. (Mineola, N.Y.: The Foundation Press, 1971), pp. 11–15.
14. *Ibid.*, p. 14.
15. Both Barnett and Formaini appear to equate "absolutism" with strict liability and "contextualism" with limited liability. But this confuses epistemological terms with legal terms. There is no reason why one cannot have a theory of strict liability based upon a contextualist theory of knowledge.