Justice Entrepreneurship In a Free Market*

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Modern libertarian thought is essentially deductive in character. Building from a foundation in natural law, libertarians derive the principle of non-aggression; and from this they deduce the standards of a just society. Consistency is the key word: what is permissible in the political sphere must be compatible with the principle of nonaggression.

On the extreme wing of libertarian ideology are the individualist anarchists, who wish to dispense with government altogether. The quasi-legitimate functions now performed by government, such as the administration of justice, can, the anarchists claim, be provided in the marketplace. Although this private administration of justice was defended by some nineteenth-century libertarians such as Gustave de Molinari and Benjamin R. Tucker, its greatest exponent has been Murray Rothbard.¹

Many objections have been leveled at free-market justice, perhaps the most serious being that it is incompatible with the rule of law. Critics of this theory envision a chaotic patchwork of competing agencies, each with its own set of procedures and standards. Without a government to impose a uniform system of (presumably) reliable and just procedures, these critics foresee various criminal bands imposing their wills in the name of justice.

The anarchists, of course, disagree with this projection. (Indeed they point out that the previous description applies to governments, past and present.) Specifically, the individualist anarchists do not oppose the rule of law. They argue that because the principles of justice are grounded in natural law, they thus fall within the province of human knowledge. Just as we do not require a government to dictate what is true in science or history, so we do not require a government to dictate standards and procedures in the realm of justice. We should look to reason and facts, not to government.

For example, the specific content of law in a libertarian society can be

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deduced with relative ease from a well-developed theory of property rights, including a theory of title, acquisition and exchange. Similarly, the formal aspects of law—that it be clearly specified in advance, impartially applied, etc.—can be defended without recourse to government. Even the principles of restitution (the libertarian substitute for "punishment") are derived from libertarian first principles and have nothing intrinsically to do with government. Where, then, is the weak link that opens the door for a monopolistic government?

Recently the issue of procedural law has come to the fore in libertarian theory, largely as a result of Robert Nozick's *Anarchy, State, and Utopia*. Does a person have "procedural rights," such as a "right to a fair trial"? If so, can free-market agencies provide adequate protection for such rights?

Nozick's conception of procedural rights is the latch with which he opens the gate for his "ultraminimal state." Does a person charged with a crime have a right to have his guilt or innocence determined by a reliable epistemological procedure? Yes, says Nozick (though he fails to explain why), so "a person may resist, in self-defense, if others try to apply to him an unreliable or unfair procedure of justice."²

For Nozick it is not enough that a person be guilty before others have a right to punish him; those inflicting punishment must *know* that he is guilty. A person may in fact be guilty, but if no one can prove his guilt, no one has a right to punish him.

From this foundation, Nozick proceeds to argue that a dominant protection agency, in its effort to protect its clients from potentially unreliable procedures, may forbid that its clients be tried by other agencies using less reliable procedures. In thus establishing itself as an enforcer of legal standards, the dominant agency evolves though no morally impermissible steps into an ultraminimal state—the final arbiter of law in that society.

Essential to Nozick's argument is the assumption that legal procedures are not a matter of knowledge. If, for instance, it is possible to verify objectively that one procedure is valid whereas another one is not, then it does not matter who employs the procedures in question. If a dominant agency employs correct procedures, then it is morally right, but so is every other agency which employs correct procedures. If, on the other hand, the dominant agency employs incorrect procedures, then it is morally wrong, as is every agency which employs such procedures. Thus, if there is an independent verifiable standard by which to judge legal procedures, then Nozick's argument has no force whatever. That an agency believes in the reliability of its procedures has nothing to do with the alleged right of that agency to insist that other agencies conform to its standards. If the dominant agency uses what are in fact reliable procedures, then it cannot prevent other agencies from using reliable procedures as well. If, on the contrary, the dominant agency uses unreliable procedures, then to impose such procedures on other agencies would be manifestly unjust.

If we postulate objective procedures, therefore, the major issue becomes what procedures are employed, not who employs them. The dominance of a particular agency has nothing at all to do with this issue.

An interesting response to Nozick is contained in Randy Barnett's "Whither Anarchy? Has Robert Nozick Justified the State?" Adopting a hard natural-rights position, Barnett flatly denies the existence of "natural procedural rights." Whether we know a person's guilt or innocence

...may be relevant as a practical problem or even a moral problem [but] I question its relevance to issues of rights.... If the nature and moral foundation of rights are what I alluded to earlier—a freedom to use property, created along with property ownership—then epistemic considerations cannot create or alter rights. The right of self-defense we contend is a direct result of an infringement on a property right. Its purpose is to protect and restore what is rightfully owned. Since it is ontologically grounded this right exists against an aggressor independently of whether we know who the aggressor is. Consequently we are entitled to take compensation from the actual aggressor whether or not we are sure of his guilt. That is, the actual guilt or innocence of the suspect as opposed to our subjective knowledge of his guilt determines if taking restitution from him is justified.³

I agree with Barnett that a Victim of invasion has the right to seek restitution from the Invader, and that the actual guilt of the Invader is the only germane issue (as far as the Victim is concerned). But Nozick raises an important issue of knowledge of guilt and its relation to the enforcement of justice. In adopting procedural rights, however, Nozick takes a wrong turn and fails to see the solution to his own problem. The important social relation that generates the whole question of reliable procedures is not that between the Victim and the Invader, but the relationship between the Victim and impartial Third Parties. It is for his own safety, to prevent violent Third Party intervention in his quest for restitution, that the Victim must concern himself with matters of legal procedure.

Much of this essay is concerned with the elaboration and defense of the above point. I shall attempt to deduce a theory of juridical procedure without recourse to the phantom of "procedural rights." Central to this discussion is the notion of justice entrepreneurship with its two essential ingredients: restitutive risk and the presumption of invasion.

If, as I shall argue, it is possible to derive specific legal procedures from the principle of nonaggression, then procedural law may be classed as a branch of natural-law theory. It shall be possible to speak of juridical procedures — methods of ascertaining guilt and innocence—as correct or incorrect, just or unjust. This has important implications for anarchist theory, for it presents to anarchism an objective standard by which to distinguish legitimate agencies from outlaw agencies in a free market. Even among those agencies which profess to uphold the libertarian principle of non-

aggression, we shall be able to segregate those that employ invalid procedures and thereby condemn them on that basis.⁴

Moreover, we shall see that the entrepreneurial function of Justice Agencies—the source of profit for such agencies—provides a strong impetus for fairness and impartiality. The idea that there must be a "super-agency"—a state—to oversee lesser agencies is rejected totally. (Who, for instance, shall oversee the super-agency?) Just as consumer response provides a reasonably trustworthy mechanism in a free market to minimize fraud and deception, so potential Third Party response provides a built-in check to minimize deceit and unreliability by Justice Agencies.

(Throughout this paper terms such as "Invader," "Victim" and "coercion" are employed constantly. The reader unfamiliar with the use of such terms in libertarian theory should consult the Appendix at the conclusion of this essay.)

II

Justice is often defined as "rendering to each man his due," and this is consistent with the libertarian theory of justice. Libertarian justice is concerned with rendering to the victim of invasion what is rightfully his—his property (or the equivalent in value), plus compensation for loss of time, suffering, etc. Libertarian justice is primarily a matter of restitution, not of punishment in the conventional sense. The Invader is liable for the loss he inflicts upon the Victim.

Before restitution can be accomplished, however, several preliminary issues must be settled. Did a violation of rights occur? If so, who was responsible? And what was the extent of the responsibility? These matters of fact must be decided before the subject of restitution is germane, and they are the first priority of a court of justice.

The first task of a court, therefore, is to settle an issue of knowledge: Did or did not the accused commit the crime charged against him? A court, as an arbiter of guilt and innocence, 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—the charge of the plaintiff (the alleged Victim) against the defendant (the alleged Invader). The onus of proof is on the plaintiff to prove his case with certainty—i.e. "beyond reasonable doubt"—and the defendant is presumed innocent until proven otherwise.

A court works within a given system of law where its task is to apply general legal standards to specific situations. Its function is that of the minor premise in a deductive syllogism:

Major Premise: An Invader is legally bound to compensate his Victim for the loss incurred (a principle of libertarian law).

Minor Premise: Jones is an Invader (to be determined by the court).

Conclusion: Therefore, Jones is bound to compensate his Victim for the loss incurred.

Because libertarian law is concerned only with the prohibition of invasive actions, a libertarian Justice Agency will concern itself only with matters of alleged invasion. The first priority of a libertarian agency, to repeat, is to settle an issue of knowledge. Can the allegation be established with certainty? 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.

H

A satisfactory account of free-market courts of law (hereafter referred to as Justice Agencies) must consider their entrepreneurial function—something that has been largely neglected in previous literature. A Justice Agency is more than a "hired-hand" employed for the efficient prosecution and apprehension of criminals. Much of the Justice Agency's service is entrepreneurial in nature. Specifically, the Agency assumes the burden of risk that accompanies the use or threat of physical force in a free society. A client contracts with a Justice Agency not only because the Agency is more efficient in obtaining restitution, but also because the Agency is more likely to overcome public suspicion that the force used to obtain restitution is of an invasive rather than a restitutive nature. The degree to which an Agency can minimize this risk is a measure of its reliability and, ultimately, the source of its profit.

The risk referred to here stems from 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. (The consent of the Victim is assumed throughout this discussion.) If A aggresses against B, a Third Party does not require the permission of A in order to come to B's defense. The coercive state of affairs initiated by the Invader creates a situation where a Third Party may violently intervene in behalf of the Victim in order to halt the invasive act.

The right of Third Party intervention is a corollary of one's right to use force in order to repel invasive acts, and it is a right which most libertarians defend. But problems arise when this right is applied to specific situations, particularly when a user of force fails to identify the *kind* of force he is using (i.e., whether or not it is restitutive). If a Third Party observes force or the threat of force, with no evidence that the force is justified, he will rationally conclude that he is witnessing an invasive act in which he has the right to intervene. And, as I shall argue later, the Third Party in this circumstance is morally justified in exercising his right of intervention. If an error is made—if a Third Party mistakenly intervenes with a true Victim seeking restitution—the responsibility for error rests with the *Victim* who failed to identify publicly his violent act as one of restitution.

This problem may be illustrated by considering Crusoe and Friday alone on an island. If Crusoe steals some of Friday's coconuts, and if there is no doubt in Friday's mind as to Crusoe's guilt, then Friday need not resort to the intermediary of a trial in order to take restitutive action against Crusoe. He may take immediate action, using force if necessary, to regain his property.⁵

Now consider the same situation with the addition of a Third Party who is absent during Crusoe's theft. Suppose that Friday makes no attempt to inform the Third Party of Crusoe's deed, or that Friday charges Crusoe with the theft but provides no evidence to substantiate the allegation. (Crusoe, of course, denies the charge.) Friday proceeds to invade Crusoe's hut in an attempt to reclaim his coconuts (or the equivalent in value). Crusoe, in the meantime, screams that he is being aggressed against and solicits the aid of the Third Party to restrain Friday. The Third Party intervenes, using force to stop Friday.

Friday, acting on his knowledge, is morally justified in seeking restitution. But the Third Party, acting on his knowledge, is (as I shall argue) justified in coming to the "defense" of Crusoe, the apparent Victim. With the existence of a Third Party, Friday's act of restitution—when no effort is made to enlighten the Third Party as to the circumstances—becomes a highrisk activity. It exposes Friday to potential harm for which he has no legitimate redress. That is to say, if a Third Party, believing Friday to be the true Invader, injures him in the process of resisting his "invasive" act, Friday cannot then seek restitution from the Third Party. Friday's failure to provide public notice and proof of his claim against Crusoe, generates an inevitable clash between Friday and the Third Party—a clash, it must be noted, that Friday could have avoided but did not. The responsibility for this Third Party conflict, therefore, rests with Friday; and he undertakes private restitution against Crusoe at his own risk.

From the potential conflict of Friday and the Third Party, there arises a need for a "public trial" to ascertain Crusoe's guilt or innocence. This trial is required not because of special "procedural rights" supposedly possessed by Crusoe (such as the "right to a fair trial"), but because this public demonstration of Crusoe's guilt is the only way to eradicate or minimize the potential conflict between Friday and a Third Party. By allowing the Third Party to examine the basis of Friday's allegation against Crusoe, with the opportunity for Crusoe to respond, it is possible to harmonize the knowledge of Friday (that Crusoe is guilty) with the knowledge of the Third Party, so that the Third Party can cooperate (or at least not interfere) with Friday's quest for restitution.

The same principles apply to any society of three or more persons. Impartial Third Parties are not privy to the special experience of a Victim seeking restitution. Man's knowledge is limited—he is not omniscient—and individuals must act on the context of knowledge available to them. Friday may be a true Victim seeking restitution, but this fact may be inaccessible to others. Friday knows it, and Crusoe (presumably) knows it; but Third Parties do not. If Crusoe denies the charge of theft, and if Friday fails to substantiate it, then Third Parties are epistemologically obliged to view

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Friday as an Invader. Given their context of knowledge, there is no other rational option.

Thus, whoever employs unidentified force in a free society is engaging in a high-risk activity because of possible Third Party intervention. One who uses force, or threatens the use of force, is presumed by Third Parties to be the Invader unless there is evidence to the contrary. Although a Victim of invasion has the moral right to seek restitution from the Invader, and need not solicit the permission of others to do so, he faces the risk of violent Third Party intervention if he fails to verify his charge publicly. This potential conflict is a result of a "knowledge gap" between the Victim and innumerable Third Parties.

To put it another way (and as a lead-in to the subject of entrepreneurship), there is a *lack of coordination* between the knowledge of the Victim and the knowledge of Third Parties. Consequently, there is a potential lack of coordination between the *actions* of the Victim (force used to gain restitution) and the *actions* of Third Parties (force used to repel the apparent Invader). This absence of coordination creates a high level of risk for one who seeks restitution in a free society without prior verification of his claim in a public forum.

The major problem, therefore, confronting a Victim who desires restitution in a libertarian legal system, is as follows: How can the Victim regain what is rightfully his, by force if necessary, and avoid being branded in the public eye as a common Invader? How can he bridge the "knowledge gap" between himself and Third Parties? That is to say, how can the Victim coordinate his restitutive action with the action of Third Parties?

Here we must look to Justice Agencies on a free market. The Victim, by hiring a Justice Agency, transfers the risk discussed above (restitutive risk) from himself to the Agency. It is the business of an Agency to coordinate the knowledge of the Victim with the knowledge of Third Parties—the public in general—and thereby minimize the likelihood of public condemnation as an Invader when restitutive action is taken.

If an Agency successfully demonstrates, in a public forum, its client's case, then it may seek restitution from the Invader without fear of Third Party intervention. But if the Agency takes restitutive action without sufficient public verification, then it assumes the risk of Third Party intervention. In either case, the client is protected. He has contracted with the agency not only to effect restitution but to bear the risk of this activity. This transfer of restitutive risk constitutes a major function of a Justice Agency, and this is the aspect that I have described as entrepreneurial.

IV

The concept of entrepreneurship has been developed by "Austrian" economists within the framework of catallactics, that branch of praxeology which studies "all market phenomena with all their roots, ramifications, and con-

sequences." Human action entails change (such as a shift in subjective value preferences); and change, coupled with man's "imperfect" knowledge, introduces uncertainty into the marketplace. This creates a role for the entrepreneur. As Ludwig von Mises puts it:

The term entrepreneur as used by catallactic theory means: acting man exclusively seen from the aspect of the uncertainty inherent in every action. In using this term one must never forget that every action is embedded in the flux of time and therefore involves a speculation.⁷

Every action, because it entails some degree of uncertainty and hence speculation, has an entrepreneurial aspect. In the marketplace, however, we may identify professional entrepreneurs as those who *specialize* in risk and speculation for profit. No real economy ever achieves a state of perfect equilibrium—the "evenly rotating economy" of economic theory—and the disequilibrium of the market generates the demand for entrepreneurs.

In his recent book, Competition and Entrepreneurship, Israel Kirzner elaborates brilliantly on the entrepreneurial function in the marketplace. He stresses less than Mises the speculative aspect of entrepreneurship and develops instead the notion of entrepreneurial alertness—the recognition "that an opportunity for profit does exist."

A basic problem of the marketplace, Kirzner points out, is the coordination of many different bits and pieces of information among market participants. The conditions for a profitable exchange may exist, but if the potential participants do not *perceive* this opportunity, the exchange cannot occur. This is where the entrepreneur may profitably intervene.

If A would be prepared to offer as much as twenty oranges for a quantity of B's apples, and B would be prepared to accept, in exchange for his apples, any number of oranges greater than ten, then (as long as A and B are each unaware of the opportunity presented by the attitude of the other) entrepreneurial profit can be secured by buying B's apples at a price (in oranges) greater than ten and then reselling them to A for a price less than twenty.⁹

Where A and B are unaware of the potential trade, Kirzner says, we have "an absence of coordination." The entrepreneur, alert to this opportunity, is able to coordinate the desires of A and B; and this "coordination of information ensures coordination of action."

The opportunity for entrepreneurial profit derives from the knowledge gap between A and B, both of whom desire to trade but are unaware of the possibility. There would be no entrepreneurial role in a world populated by omniscient beings. The absence of coordination Kirzner refers to is the result of man's limited knowledge. The entrepreneur thus functions as a conduit of information among market participants.

The manner in which I apply the entrepreneurial function to Justice Agencies should now be fairly apparent. Before proceeding, however, I

must acknowledge the significant differences between entrepreneurship in the realm of voluntary exchange and entrepreneurship as I apply it to restitutive force. For one thing, catallactic risk differs from restitutive risk. The former entails the possibility of economic loss, unfulfilled expectations or frustrated preferences. But the latter may lead to violence and a breach of justice.

Nevertheless, despite such differences, I believe there are sufficient parallels between market entrepreneurship and Justice Agencies to justify using the term in this context. I shall now summarize the entrepreneurial function of Justice Agencies, using the term "catallactic entrepreneur" to refer to the market entrepreneur of Mises and Kirzner, and the term "justice entrepreneur" to refer to my extension of this concept to free-market Justice Agencies.

Just as man's limited knowledge creates a function for the catallactic entrepreneur, so it creates a function for the justice entrepreneur. The knowledge gap between a Victim and Third Parties that will inevitably result in a violent clash opens the door for profit to one who can successfully bridge this gap. The justice entrepreneur, like the catallactic entrepreneur, seeks to coordinate disparate bits of information and thereby harmonize the actions of different individuals who operate from different contexts of knowledge.

As we have seen, for a market exchange to occur, it is not enough for the opportunity for exchange to exist. The potential participants must perceive this opportunity, and the success of an entrepreneur in transmitting information is a source of his profit. Similarly, for justice to be implemented in a free society, it is not enough for a Victim to know the justice of his cause. Because of restitutive risk, he is obliged to transmit his knowledge to the public at large; and the ability of a justice entrepreneur to fulfill this task is a source of his profit.

The entrepreneurial function of a Justice Agency provides a built-in safeguard to insure fairness and impartiality. It is not out of altruistic concern for the accused that an Agency strives to be scrupulously fair in its proceedings, but out of simple self-interest. An Agency can fulfill its entrepreneurial function of preventing Third Party intervention only if it is generally regarded as fair and reliable. If an agency conducts unfair or secretive trials, it would fail to gain esteem in the public eye and thereby defeat its own purpose. The Agency would be viewed as a common Invader, and any restitutive action on its part would be subject to legitimate Third Party intervention.

Unlike the catallactic entrepreneur, the "alertness" of a Justice Agency is its ability to recognize prospective cases involving restitutive risk where there is a reasonable chance to verify the client's allegation publicly. Its own public reputation—the vital key to its success as an agency—demands that it shun fabricated or poorly founded accusations. The fear of governmental-

ists that free-market Agencies will sell mock-justice to the highest bidder without regard for justice, objectivity and reliable procedures is without foundation. That an Agency claims to be using restitutive force is not sufficient to prevent Third Party intervention. If an Agency employs force, then, like an individual, it is presumed to be an Invader unless there is proof to the contrary. For an Agency to use (allegedly) restitutive force without public verification is to brand itself an outlaw in the public eye.

Later in this essay we shall explore further how the entrepreneurial function of Justice Agencies generates objective standards with which to distinguish a legitimate agency from an outlaw agency. Moreover, we shall see that this notion of justice entrepreneurship dispenses with the problem of "procedural rights," as well as providing the basis to answer most of the objections raised by critics of free-market Justice Agencies. Before moving to another subject, however, we should consider briefly another way in which a Justice Agency functions as an entrepreneur.

We have thus far stressed the coordination aspect of justice entrepreneurship and neglected the speculative aspect mentioned by Mises in a previous passage. But justice entrepreneurship is speculative to a degree as well because man, a fallible being, may err even in the best of circumstances. A reliable Agency may find a man guilty of invasion and use restitutive force against him only to have evidence appear at a later time that establishes the man's innocence. In such a case, of course, the Agency is required to compensate the falsely convicted individual.

When an individual contracts with an Agency to seek restitution, he thus pays the Agency to perform two basic entrepreneurial functions:

- 1. The Agency assumes the burden of restitutive risk, and it attempts to minimize or eliminate this risk by coordinating the knowledge of its client (the purported Victim) with the knowledge of Third Parties, thereby avoiding the clash of violent Third Party intervention. The less conflict involved in restitutive action, the greater is the possibility of satisfying the client's desire to be compensated for his loss. Thus, it is in the Agency's interest to employ impartial, reliable procedures; and it is in the Victim's interest to seek out an Agency with precisely this reputation.
- 2. The agency assumes the burden of future uncertainty, where future information may overturn present knowledge. Again, it is to an Agency's interest to employ reliable procedures in order to minimize, to the greatest extent possible, the element of future uncertainty; and it is to the Victim's interest to seek out such an Agency.

V

We have seen that a major entrepreneurial function of a Justice Agency is to bear restitutive risk. An Agency's expertise is measured by its ability to negate this risk through public verification and dissemination of a knowledge claim—the allegation of the plaintiff against the defendant. This discussion of justice entrepreneurship obviously hinges on the notion of "restitutive risk"—the right of Third Party intervention when a purported Victim employs restitutive force without public verification of his claim. We shall now examine restitutive risk in more detail.

There are two issues to consider: first, the right of Third Party intervention itself and, second, the *application* of this right to particular situations.

As indicated previously, the right of Third Party intervention is a right to which most libertarians subscribe. Just as there is nothing in the principle of nonaggression that prohibits the use of violence in self-defense, so there is nothing that prohibits a Third Party using violence in defense of a Victim. 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.

But a difficulty arises over the application of this right. The knowledge gap stressed earlier between a Victim and a Third Party is the rule rather than the exception. Unless a special effort is made to inform Third Parties, they rarely have access to the details of a dispute involving restitutive force. Of course it might be argued that the Third Party should ascertain relevant facts before exercising the right of intervention. If a Victim is morally authorized to seek restitution, he is right—period. Why must a Victim justify his restitutive violence for the benefit of Third Parties?

We must remember the purpose of public verification: it is not to justify the Victim's restitutive act morally, but to identify the kind of action he is taking. The potential misunderstanding between a Victim and Third Parties is factual, not evaluative. Violent acts do not bear external characteristics which enable one visually to distinguish between invasion and restitution. Invasion, for instance, may involve fraud without overt violence, in which case the Victim may be the first (and only) one to employ actual violence in his quest for restitution. The distinction between invasion and restitution can be drawn only with reference to property rights and property titles, and such particularized information is rarely accessible to Third Parties without deliberate effort.

In our previous illustration, Friday believes with good reason that Crusoe is an Invader. But the Third Party (who sees only Friday's violence against Crusoe) believes with equally good reason, given the context of his knowledge, that Friday is the Invader. This knowledge gap is caused by man's non-omniscience, and it gives rise to the key question: Who has the primary responsibility to bridge this gap, the Victim or the Third Party?

To maintain that the Third Party is obligated to know the relevant facts (who is the actual Victim, etc.) before he has the right to intervene in a coercive state of affairs is to erect what is in most cases an insurmountable barrier that effectively blocks any use of Third Party intervention whatever. Violent acts often occur suddenly, without previous warning; and to counteract the damage of violence usually requires quick and decisive response.

If a Third Party is required to investigate property titles before he intervenes in defense of the apparent Victim, the violent act will be concluded long before the Third Party reaches first base.

I contend that a contextual application of the right of Third Party intervention—an application that takes into account man's limited knowledge—places major responsibility upon the Victim. There is a principle operative here that I shall call the presumption of invasion. This principle states that the person who is observed to initiate violence, or the threat of violence, is presumed to be the Invader unless there is evidence to the contrary. If a Victim employs restitutive force, he assumes the burden of proof. As a user of violence in a free society, the presumption is against him; and he must overcome this presumption or face the consequences.

As a fulcrum for our discussion of this topic, consider another hypothetical example. B believes, rightly or wrongly, that C stole his wallet containing \$100 at a party the day before. B sees C on the street, confronts him and demands his money back. C denies everything and an argument ensues. B then wrestles C to the ground and attempts to extract C's wallet so that B can regain what (he believes) is rightfully his. C calls for help, and an impartial Third Party—a passerby who knows neither B nor C—comes to C's aid. The Third Party fractures B's arm in an attempt to restrain him.

At this point, we do not know whether C did in fact steal B's wallet, so we cannot assess the validity of B's claim against him. Indeed, the Third Party in this example does not even know (as we do) of B's belief that C stole his wallet. He sees only B's physical assault of C, and he forms his judgment—that B is the Invader—on this basis.

If the presumption of invasion is correct, then we can state that the intervention of the Third Party is justified regardless of the validity of B's initial claim against C. The relation between B and C is one thing; the relation between B and the Third Party is another. And even if B does have a legitimate claim of restitution against C, this does not give B a blank check to gain restitution by any method he chooses. If B creates a situation that is bound to engender Third Party misunderstanding and intervention, then he must shoulder the risk of his action.

The alternative to the presumption of invasion is to hold that the Third Party was justified only if C was innocent of the original theft. If, on the other hand, C was guilty—if B was seeking legitimate restitution—then the Third Party's intervention, instead of being a defense of C, was in fact an act of *invasion* against B. In this case, the Third Party would be liable to compensate B for the injury inflicted upon him.

This latter interpretation requires virtual omniscience on the part of the Third Party and should be rejected on that basis. Any ethical or political theory must be grounded in the recognition that man is neither omniscient nor infallible. And since justice is concerned, at least in part, with a question of knowledge (guilt and innocence), a reasonable theory of justice can

be derived only within a contextualist framework. We can no more require omniscience and infallibility in the sphere of justice than we can require then in other areas of knowledge.¹⁰

In maintaining that the onus of proof lies with B rather than the Third Party, we are asserting, in effect, that the Third Party cannot be held responsible for his lack of omniscience. True, B may have knowledge that the Third Party lacks—and in this sense B may be "right"—but B cannot reasonably expect others to have mystical insight into his private world of knowledge. B takes an action against C that would be regarded by any "reasonable man" as invasive. Overt violence is the most obvious and primitive form of invasive action. In a libertarian society, it is the most suspect activity in which one can engage. Although violence is not always invasive, it is presumed to be in the absence of contrary evidence. B, in opting for violence against C to effect restitution, automatically brings a wary public eye upon himself. He creates a situation where Third Party intervention seems appropriate. If things are not as they seem, then B must show why they are not. In the absence of public verification, Third Parties will regard B as the true Invader, and B assumes the risk of being so identified.

We have seen that the presumption of invasion lies with the apparent initiator of violence (or what we may term the "proximate" user of violence). This principle may be further illustrated by viewing the dispute between B and C from the perspective of the Third Party.

Prior to witnessing B's violence against C, the Third Party has no knowledge of B or C and no knowledge of a relationship between them. When the Third Party observes B's violence against C, he may infer with absolute confidence that a coercive relationship now obtains between B and C.

The proximate user of violence (B in our case) may be the Invader, or he may be the Victim seeking redress. In either case, B's violence establishes with *certainty* to any observer that a coercive state of affairs exists between B and C. His violence is a visible public announcement of this fact. By his action, B communicates a message to the public in general: he notifies them of a coercive state in which they have the right to intervene.

Thus far the Third Party has progressed from a condition of tabula rasa concerning B and C to the knowledge that he has the moral right to intervene somehow in the relationship. This is where his certainty stops, however, as he does not have knowledge of the total context in which the dispute occurred. And this is where the presumption of invasion comes into play.

The Third Party has two basic options at this point (assuming he does not ignore the situation altogether): (1) he may assume that B, the proximate user of violence, is the true Invader; or (2) he may assume that C, the apparent Victim, is actually the true Invader.

Given the Third Party's context of knowledge, (1) is rational thing to believe. Although the evidence against B is only partial (because the Third Party's knowledge is incomplete), the evidence against C, by comparison, is

nonexistent. Even partial evidence is overwhelming when weighed against no evidence at all. The Third Party has reason to believe that B is the true Invader. It was B, after all, who used violence, so it was B who chose to announce the coercive state between himself and C. For the Third Party to speculate, contrary to appearance, that C is the Invader and B is the Victim would be totally arbitrary and hence irrational. In other words, C is presumed *innocent* until proven guilty. And if B's violence is based on a knowledge claim of C's guilt, then B has the onus of proof to demonstrate his claim. Failure to do so leaves the presumption of invasion with B.

The presumption of invasion, therefore, is an extension of the principle that reasonable belief and action are based on evidence. And where there are two competing propositions, one with supporting evidence and the other without such evidence, the former proposition demands assent over the latter.

Another way to analyze the presumption of invasion—one that emphasizes more the obligation of a Victim to bridge the knowledge gap between himself and Third Parties—is to distinguish between behavior and action. Behavior, as I use the term here, refers to the outward, observable manifestations of human action. Action, on the other hand, is behavior viewed within a wider perspective of context and purpose.

The same kind of behavior may, in different circumstances, constitute different kinds of action. For instance, scratching one's head during a conversation may indicate nothing except that one's scalp itches. But if a baseball coach scratches his head during a game, it may be an important signal to a player. The behavior in these two cases is basically identical, but the purpose of the behavior, as well as the context in which the behavior occurs, are radically different. We are dealing with similar units of behavior but essentially different kinds of action.

The same is true of physical violence. Violence is an observable and easily identified unit of behavior in most cases. But violent behavior may, in different contexts, constitute different kinds of actions. Specifically, violent behavior can be either *invasive action* or *noninvasive action*. As far as moral and political theory are concerned, these are different kinds of actions altogether; they stand on opposite sides of the fence in regard to property titles.

When a Third Party sees B's violence against C, he observes the behavior of B, not the action of B. That is to say, the Third Party witnesses the outward manifestation of violence, but he cannot similarly witness the purpose and context that give meaning to B's behavior. The Third Party *infers* that B's violent behavior constitutes invasive action.

I maintain that the Third Party's inference is justified and, moreover, that B, in using unidentified violence, actually *communicates* through his behavior that he is an Invader. To defend this notion of behavioral communication adequately would require an essay in itself, so I can only outline the subject here.

Many kinds of behavior have conceptual significance within given societies. Behavior can convey a message as surely as words - indeed, language is itself a kind of behavior - 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. Within a certain society, for instance, a specific gesture may be generally understood to convey an insult. From an observable unit of behavior, individuals in that society will infer that an action of insult has occured. This creates what we may dub a "presumption of insult." That is, anyone who uses this gesture in normal circumstances is presumed to be conveying an insult. The inferred link between the observable behavior and the presumed action is normal and natural within this society, so there is a prima facie case against anyone who engages in behavior of this variety. If the gesture-user does not wish to convey the commonly understood message, then the burden is with him to explain the extenuating circumstances. In lieu of this explanation, he cannot be surprised when others respond as if they have been insulted. Indeed, they have no reason to think

The similarity between the presumption of invasion and the "presumption of insult" should be obvious. I am arguing that the inference from observed violence to invasive action is naturally to be expected, especially in a libertarian society. B, in using violence against C, sends a signal of "invasive action" through his behavior. If this is not the true significance of B's behavior, then he has the burden to explain its true meaning. There is a prima facie case against the proximate user of violence, and it is up to him to convince Third Parties that things, in his case at least, are not as they seem.

A possible objection to the preceding argument is that it relies on conventional understanding about the significance of behavior. And where we rely on convention, we enter a problematic area where clear standards based on natural law rarely fare well.

In response to this, I must point out, as was mentioned previously, that language itself is conventional. If one argues that behavior has no particular conceptual significance, why not say the same for language? Suppose a man threatens to kill me, and I take action I deem appropriate to defend myself. The words, "I am going to kill you," signify a threat to me upon which I base my response.

But suppose my attacker later claims that "kill" does not mean the same thing to him as it does to me. Words, after all, are conventional, and where in nature is it written that "kill" must mean one thing and not another? "Kill," my attacker claims, does not signify a threat in his vocabulary; instead, it signifies something akin to worship and reverence. So my attacker's words really communicated his desire to worship and revere me.

What if I injure this man in my response to a perceived threat. If he can convince a judge and jury that "kill" does indeed signify "worship" to him,

must I then compensate him for his injury? Am I now to be condemned as an Invader because I used violence in response to a misinterpreted threat?

In this case it is clear that I had good reason to believe I was going to be attacked, even if my understanding of the situation rested upon mere "convention." Perhaps I misinterpreted the intended meaning of my assailant's words, but he must bear the lion's share of responsibility for this misunderstanding. Although he was not technically an Invader, he cannot rightfully demand compensation from me for his injury.

Any approach to justice that ignores the contextual implications of language and behavior will, in the final analysis, create more problems than it solves. Suppose we cast aside contextualism and the presumption of invasion for a more absolutist approach to the problems of invasion and restitution. Enough of this talk about presumption and reasonable belief—let us consider only the facts. If a person violates property rights and property titles, he is an Invader—period. In our previous example of B seeking restitution from C, if C really is a thief, then B has a right to get his money back, by force if necessary. Hence, if a Third Party intervenes with B's restitutive force and injures B in the process, then the Third Party is an Invader vis-àvis B and must compensate him for his injury.

One of the many problems with this approach is that it cannot deal adequately with *threats* of violence. A simple threat of violence is not a transgression of property titles; it expresses an *intent* to transgress. If a man walks up to me and points a gun at my head, I am not required to wait until he pulls the trigger before I have the right to use force against him. His behavior conveys a message—an intent to invade—and I have the right to use defensive violence. Let us say that I deliver a karate chop and send the attacker to the hospital.

But suppose that the attack was a joke. The gun was simply a toy, and my apparent assailant was actually hired by some friends of mine to play a prank. There was no real weapon and no intent to invade. And the prankster never stated his intent to harm me. He simply pointed a toy at me which I misperceived as a real pistol, thereby inferring that his action was invasive in nature. It is my mistake. Does this mean that the prankster can rightfully demand compensation from me for his injury?

Yes, according to the absolutist approach. No, according to the contextualist approach. There was, in fact, no invasive action, so my violence against the prankster was, according to the absolutist theory, an act of invasion against him. (In objective terms, I violated his right to play a non-invasive joke.) The contextualist approach, on the contrary, maintains that my inference of invasion was justified, given the knowledge available to me; and that the prankster, in exhibiting behavior that ordinarily conveys invasion, must assume the risk of this behavior.

Even where a threat is genuine, an absolutist theory cannot justify defensive violence prior to the actual infliction of the invasive violence.

e de la companya de la co Threats always entail communication and inference. One cannot perceive a threat per se; one concludes that a threat exists through a process of reasoning. And if we prohibit references to presumptions, reasonable expectations and contexts of knowledge, we destroy the very foundation that gives meaning to the concept of "threat" in the first place.

VI

Having laid the foundation for restitutive risk, we shall now return to justice entrepreneurship and explore its ability to solve some problems facing a free-market legal system.

A major purpose of this essay is to derive legal procedures from the principle of nonaggression without recourse to special procedural rights. From one's own right to use violence to halt invasion, there flows the right of Third Party intervention. This right, when applied contextually, leads to the need for a public trial before a Victim employs restitutive force.

We have stressed that the foundation for juridical procedures does not lie in procedural rights of the accused. An alleged Invader will be presumed innocent in the public eye, regardless of his actual guilt or innocence, until his accuser proves the allegation in a public forum. Pre-trial violence against the accused will be viewed as invasion and subject to Third Party intervention. Thus, it is not the accused's "right to a fair trial" that protects him but the presumption of invasion against anyone who uses force against him. The accused has the same basic right as everyone else—the right to be free from invasion—and this right is sufficient for his protection.

It is not the Victim-Invader relationship that generates the need for juridical procedures but the Victim-Third Party relationship. A Victim has a compelling but purely self-interested reason for submitting his grievance to a reputable Justice Agency for trial. This is the safest way to delegate restitutive risk and minimize the likelihood of Third Party intervention.

If my argument is sound, if the entrepreneurial function of a Justice Agency is to minimize restitutive risk by defeating the presumption of invasion, then we have a tolerably clear standard by which to gauge the legitimacy of an Agency in a free market. If the Agency must provide public verification of a knowledge claim, then we can deduce the minimum procedures a court must follow to avoid condemnation as an "outlaw agency." Full elaboration and defense of these procedures would require a separate essay; here we can only sketch an outline that will hopefully stimulate further discussion.

There are two aspects to court procedure: (1) the *public* aspect and (2) the *verification* aspect. We shall consider these two aspects separately.

1. The Public Aspect

A trial must be public. A secret trial, unless requested by the defendant, negates the entrepreneurial function of a trial and is invalid on this ground

alone. There may be legitimate disagreements over the specifics that qualify a trial as public, but certain minimum requirements are, I think, beyond dispute.

- (a) There must be public access to the trial itself. Interested Third Parties must be admitted to observe the proceedings (unless the defendant wishes to exclude them).
- (b) The details of court procedure must be accessible to the public. Every Agency must have a "charter" wherein its rules and regulations are clearly specified.
- (c) Careful records of every trial must be kept to permit Third Party examination and review of the proceedings. (The court, however, need not bear the expense of providing transcripts, although it may volunteer to do so for special review agencies in order to maintain its reputation.)
- (d) A court must have a mechanism to disseminate its verdict to the public at large. This is where the reputation and integrity of an Agency play a major role. If a respected Agency wishes to serve public notice of a "guilty" verdict and an intent to use restitutive force, an announcement to this effect sent to other agencies (with an opportunity for them to challenge the verdict), combined with the implementation of restitution by uniformed, easily identifiable representatives of this Agency, will probably be sufficient to prevent Third Party intervention (or at least shift the presumption of invasion to the Third Party).

2. The Verification Aspect

In considering verification procedures, we must remember that the presumption of invasion places the onus of proof entirely upon the Justice Agency. And this onus pertains not only to specific verdicts but to the procedures themselves.

Suppose the "Lipton Agency" ascertains guilt and innocence by reading tea leaves, or the "Geller Agency" employs a professional psychic to read the accused's mind. Such agencies would have the responsibility to provide rigorous philosophical and scientific justification for their methodologies. Third Parties need not prove the unreliability of these procedures; rather, they are assumed to be unreliable until and unless the Agency employing them proves otherwise. Failure to do so will result in condemnation of the Agency as an outlaw.

(Incidentally, this underscores the vital importance of a general regard for reason among the members of a society. Juridical standards usually reflect the intellectual standards of a culture. For medieval jurists who believed that God would intervene in behalf of the innocent, trial by combat and trial by ordeal were quite logical. The evolution of rational standards within the common law tradition reflects a parallel intellectual maturation.)

Some of the specific verification procedures required from a Justice Agency are as follows:

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- (a) A Justice Agency may not employ force against a defendant prior to his conviction. The defendant is innocent until proven guilty. This means that a defendant, in effect, will be invited to attend his trial; and if he refuses he will be tried in absentia.
- (b) An Agency does not have the right of subpoena unless by prior contractual agreement with those within its jurisdiction.
- (c) An Agency must prove a defendant's guilt beyond "reasonable doubt." Anything less will not absolve it of the presumption of invasion.
- (d) An Agency, in order to reinforce its good intentions and reputation, should provide a defendant with reasonable latitude in the choice of specific procedures. For example, the defendant may have a choice of a jury up to, say, twenty members, composed of professional jurors or laypersons hired for the one occasion. Or the defendant may select a judge or panel of judges from an independent agency, thus separating the prosecution of his case from its resolution. There are many possible variations here, and in practice the reasonable options would be agreed upon in the legal profession, but the underlying principle must not be forgotten. It is the Agency that must justify itself, not the defendant. The fewer options provided by an Agency, the less willingness it displays to accommodate the reasonable requests of the defendant, the more its credibility will suffer. The self-interest of the Agency demands flexibility.
- (e) The Agency must provide a defendant with defense counsel of his choice, within an established price range. If the defendant is found innocent, the Agency must absorb the cost (or pass it on to its client, per their contract). If the defendant is found guilty, the cost of defense and other court costs may be added to the restitution.

Of all the principles discussed thus far, this may seem the most doubtful. But it can be defended on epistemological grounds. To adequately test the procedures and conclusion of a specialized discipline requires a specialist in that field. A layman, for instance, usually lacks the knowledge and skill to investigate thoroughly the conclusion of a physicist or mathematician. And a professional who subjected his conclusions only to laymen, while avoiding the examination of his colleagues, would properly be held in low esteem.

We have a similar situation in the legal profession. There is good reason to believe that a libertarian legal system would be far less complex than we have presently, but the areas of contract law and criminal jurisprudence would still have complex areas. There may be technical "gray areas" concerning the admissibility of lie detector tests or "voice prints." Such topics would require one specially trained in the legal profession.

If a court is to reach a verdict with certainty, then, like any claim to certainty, its procedures must be capable of withstanding critical scrutiny. If a court convicts a defendant who, let us say, cannot afford to hire a defense counsel while refusing to furnish him with competent assistance, then the

verdict of that court must be viewed with great suspicion. Subjecting its own procedures to independent, competent criticism is part and parcel of the Justice Agency's role of public verification.

In other words, if an Agency is to defeat the presumption of invasion, it must present the strongest case possible. And a trial without a defense counsel is certainly *not* the strongest case possible. This alone creates a serious doubt as to the Agency's integrity, and it may possibly lead to the Agency's condemnation in the public eye.

The preceding list is not intended to be exhaustive; rather, it is offered as a model of the procedures that may be derived from the principle of non-agression. The important point here is not the procedures themselves, but the methodology used in deriving them. Using the concepts of justice entrepreneurship, restitutive risk and the presumption of invasion, I have endeavored to bring the standards of procedural law into the realm of deductive natural law. I have tried to show that there are no serious gaps in the libertarian paradigm of natural law and noncoercion such that a monopolistic government must step forward to fill these gaps.

If, as I have claimed, juridical procedures can be deduced from the principle of noncoercion, then the procedures employed by a free-market Justice Agency can be judged as "correct" or "incorrect" using objective standards. It is not a matter, as Robert Nozick suggests, of the dominant Agency imposing its procedures upon lesser agencies in order to protect its clients from risky procedures. Rather, we may examine the procedures of all agencies—including the dominant Agency—in order to assess the validity of their procedures, as gauged by the entrepreneurial standard of public verification. If any Agency uses "risky" procedures (or, more accurately, invalid procedures), then that Agency is an outlaw and subject to Third Party intervention when it employs force.

APPENDIX

For the purposes of this paper, we shall assume the libertarian theory of rights and property to be correct. Human interaction, according to this theory, may be divided into two broad categories: *invasive* and *noninvasive*. These categories depend in turn upon the identification of *property titles*. A title is a specification of ownership; to have a property title is to have rightful claim of use and disposal. For a person to use or dispose of property without the owner's consent is to violate the owner's property rights.

An invasive act involves the transgression of property titles. An *Invader* is one who so transgresses, and a *Victim* is the owner whose rights have been violated. A noninvasive action is any action that does not involve such a transgression.

Where two or more individuals interact with no violation of property titles, we have a *free* state of affairs. Where at least one person violates property titles, we have a *coercive* state of affairs. Coercion may involve

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overt physical violence, or it may not. Fraud, breach of contract—such actions, although they may be nonviolent, entail title violation and thus qualify as coercive.

Violence (physical force) may be invasive or noninvasive. Violence used to institute title violation is invasive. Violence used to counter an immediate threat (defensive violence), or violence used to restore rightful control over one's property or the equivalent in value (restitutive violence) are forms of noninvasive violence. (Throughout this essay, "violence," "physical force" and "force" are used interchangeably.)

It is important to note that the libertarian theory of justice is concerned not with the use of force per se but with the question of property titles. Libertarianism does not prohibit the use of force, or even the initiation of force. If, for instance, the force used is restitutive, then it is justified, even if force was not previously used by the Invader. Force is morally neutral: it can be used to initiate a state of coercion or to eradicate a state of coercion. As an example of the latter: if a thief retains his stolen property, then a state of coercion exists between the thief and the Victim so long as the rightful owner is denied control over his property. If the owner employs violence to regain his property, then that violence terminated the coercive state of affairs. (It must always be remembered that "coercion," as used in this essay, refers to a state of affairs that obtains among two or more persons when there is a violation of property titles.)

NOTES

- See G. de Molinari, The Production of Security, translated by J. H. McCulloch (New York: The Center for Libertarian Studies, 1977); and Benjamin R. Tucker, Instead of a Book (New York: Benjamin R. Tucker, 1893). One of the more elaborate discussions of justice agencies modeled after "insurance companies" is found in Francis D. Tandy's littleknown work, Voluntary Socialism (Denver: Francis D. Tandy, 1896), especially Chapter V. For Rothbard's presentation, see For A New Liberty, rev. ed. (New York: Macmillan, 1978), pp. 215-241.
- 2. Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), p. 102.
- Randy Barnett, "Whither Anarchy? Has Robert Nozick Justified the State?" Journal of Libertarian Studies 1 (Winter 1977).
- 4. Some theorists deal with legal procedures in a libertarian society by stipulating that such procedures can be determined contractually beforehand between an Agency and its clients. Although this is a convenient way to deal with some problems, it skirts the "tough" problems confronting a free-market legal system, such as those arising when an Agency must try a person who was not previously a client.
- 5. For the purpose of illustration, I have used clear-cut examples throughout this essay, and I have avoided more complex cases involving, for instance, legitimate title contest between two parties, both of whom believe they are right.
- 6. Ludwig von Mises, Human Action, 3rd ed. (Chicago: Henry Regnery Co., 1966), p. 233.
- 7. Ibid., p. 253.
- 8. Israel M. Kirzner, Competition and Entrepreneurship (Chicago: University of Chicago Press, 1973), p. 86.
- 9. Ibid., p. 216.
- For discussions of contextualism, see the following: Richard I. Aaron, Knowing and the Function of Reason (Oxford: Oxford University Press, 1971); D. W. Hamlyn, The Theory

of Knowledge (New York: Anchor Books, 1970); J. L. Austin, "Other Minds," Philosophical Papers, edited by J. O. Urmson and G. J. Warnock (Oxford: Oxford University Press, 1961); George H. Smith, Atheism: The Cast Against God (Los Angeles: Nash Publishing, 1974), pp. 130–140; Ayn Rand, Introduction to Objectivist Epistemology (New York: The Objectivist, Inc., 1967); Tibor Machan, Human Rights and Human Liberties (Chicago: Nelson-Hall, 1975); Douglas B. Rasmussen, "Austin and Wittgenstein on 'Doubt' and 'Knowledge'," Reason Papers, no. 1 (Fall, 1974), pp. 51–60.