PART III

Libertarian Legal Theory

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Causation and Aggression

In 2001, I presented a paper entitled “Reinach and the Property Libertarians on Causality in the Law” at a Mises Institute symposium on Adolf Reinach and Murray Rothbard.\* I later collaborated with Patrick Tinsley on an article based on this paper, published in 2004 in a related symposium issue in The Quarterly Journal of Austrian Economics.† This chapter is a substantially revised version of that article.††

\* “Reinach and Rothbard: An International Symposium,” Ludwig von Mises Institute, Auburn, Ala. (March 29–30, 2001; https://perma.cc/396W-HJEL). The other presenters were Walter Block, Guido Hülsmann (also the director), Hans-Hermann Hoppe, Larry J. Sechrest, and Barry Smith.

† Stephan Kinsella & Patrick Tinsley, “Causation and Aggression,” *Q. J. Austrian Econ.* 7, no. 4 (Winter 2004): 97–112. Then a law student, and a former student of Walter Block’s at Holy Cross, Tinsley is now a practicing attorney at Fletcher Tilton, PC (https://perma.cc/8LS5-AGN4). This article was included in a symposium issue (vol. 7, no. 4, Winter 2004), on “Austrian Law and Economics: The Contributions of Reinach and Rothbard,” which contained contributions based mainly on the papers presented at the 2001 symposium. For other articles in that issue, see note 66, below—I’ve moved them to the end to avoid awkward formatting issues. Also: when “we” is used in this chapter, it is retained from the original article.

†† My co-author Tinsley has reviewed the changes made in this chapter and fully agrees with them.

For an application of the causation ideas in this chapter to related issues, see Kinsella, “Corporate Personhood, Limited Liability, and Double Taxation,” *The Libertarian Standard* (Oct. 18, 2011); Kinsella, “KOL100 | The Role of the Corporation and Limited Liability In a Free Society” (PFS 2013); also Kinsella, “KOL382 | FreeTalkLive at PorcFest: Corporations, Limited Liability, and the Reno Reset,” *Kinsella on Liberty Podcast* (June 23, 2022); *idem*, “KOL354 | CDA §230, Being “Part of the State,” Co-ownership, Causation, Defamation, with Nick Sinard,” *Kinsella on Liberty Podcast* (Aug. 3, 2021).

For other related material published after the original article, see *idem*, “Intellectual Property and the Structure of Human Action,” *StephanKinsella.com* (Jan. 6, 2010); *idem*, “KOL021 | ‘Libertarian Legal Theory: Property, Conflict, and Society, Lecture 4: Causation, Aggression, Responsibility’ (Mises Academy, 2011),” *Kinsella On Liberty Podcast* (Feb. 21, 2013 [Feb. 21, 2011]).

PRAXEOLOGY AND LEGAL ANALYSIS:   
ACTION VS. BEHAVIOR

For libertarians, the purpose of a legal system is to establish and enforce rules that facilitate and support peaceful, conflict-free interaction between individuals, i.e., property rights. In short, the law should prohibit aggression—the unconsented-to use of someone’s owned resources, or “property”—by identifying and protecting private property rights.[[1]](#footnote-1) Because aggression is a particular kind of human action—action that intentionally violates or threatens to violate the physical integrity of another person or another person’s property without that person’s consent[[2]](#footnote-2)—it can be successfully prohibited only if the law is based on a sound understanding of the nature of human action more generally.[[3]](#footnote-3)

Praxeology, the general theory of human action, studies the universal features of human action and draws out the logical implications of the undeniable fact that humans act.[[4]](#footnote-4) Praxeology is central to Austrian economics, the “hitherto best elaborated part” of the science of praxeology.[[5]](#footnote-5) However, other disciplines can benefit from the insights of praxeology. Hans-Hermann Hoppe has already extended praxeology to the field of political ethics.[[6]](#footnote-6) The related discipline of legal theory, which also concerns ethical implications of human action, can also benefit from the insights of praxeology.[[7]](#footnote-7)

In the context of legal analysis, one important praxeological doctrine is the distinction between action and mere behavior. The difference between action and behavior boils down to intent. Action is an individual’s *intentional* intervention in the physical world, via certain selected *means*, with the *purpose* of attaining a state of affairs that is preferable to the conditions that would prevail in the absence of the action. Mere behavior, by contrast, is a person’s physical movements that are not undertaken intentionally and that do not manifest any purpose, plan, or design. Mere behavior cannot be aggression; aggression must be deliberate, it must be an action.[[8]](#footnote-8)

In order to better understand this distinction between action and behavior, we may focus on the role of causality in explaining each. Human action involves two-fold causality. On the one hand, human action requires that time-invariant causal relations govern the physical world. Otherwise, a given means could not be said to *achieve* a desired result. “As no action could be devised and ventured upon without definite ideas about the relation of cause and effect, teleology presupposes causality.” [[9]](#footnote-9)

And on the other hand, human action requires that those time-invariant causal relations can be understood and exploited by an individual whose actions are not themselves subject to time-invariant causal relations. Otherwise, there would be nothing to distinguish human action from blind natural forces. In such a world, laws and norms would be pointless, because no one could be considered responsible for his actions—human beings would not be actors but passive conduits for mechanical processes.[[10]](#footnote-10)

To some extent, of course, human beings are just that. Not everything we do is intentional; we also exhibit what is mere (i.e., non-purposeful) *behavior*. Our hearts beat, our eyes blink, and we fall asleep—all without any intention on our part. In these cases, we can understand the behavior in terms of time-invariant physical causes. There is no need to apply the concept of an actor deliberately choosing and employing means for the purpose of attaining a desired end. We can understand human behavior exactly the same way we can understand any nonhuman natural (i.e., nonteleological) process. But unlike most natural processes, human beings are capable of more than mere behavior; they are capable also of action, of purposeful behavior.

As legal theorists, therefore, we cannot accept an entirely mechanistic picture of the world. Legal theorizing is concerned with the ethical or normative implications of action.[[11]](#footnote-11) It asks whether an actor should be held responsible for the consequences of his actions and what rights to respond his actions give rise to on the part of the recipients of his action. And to hold someone responsible for the consequences of his actions is implicitly to invoke the two-fold concept of causality expressed above. For there even to be consequences in the first place, the physical world must be governed by time-invariant causal relations. And to hold an actor responsible for those consequences, we must determine that they can be traced back to his own deliberate use of means to achieve a desired result: his “action” cannot itself be a merely mechanical response to physical stimuli; he is the author, or “cause,” of the results achieved.[[12]](#footnote-12) In other words, like Austrian economics, legal theory must presuppose both time-invariant causation (an actor could not *employ* *means* to attain his goal otherwise) and agent-causation in which the actor himself is the *cause* of results that he intended to achieve by the use of certain means (the actor is not *acting* otherwise).

The law, therefore, in prohibiting aggression, is concerned with prohibiting aggressive *action*—nonconsensual violations of property boundaries that are the product of deliberate action. Analyzing action in view of its praxeological structure is essential.

AGGRESSION AND THE IMPLICIT   
CONCEPT OF CAUSALITY

Hitting someone without permission is an example of the kind of aggression libertarians oppose. If it is illegal to hit someone, however, this means that it is illegal to *cause* another person to be hit; that is to say, it is illegal to use physical objects, including one’s fist, in a way that will cause unwanted physical contact with another person. Therefore, if *A* does *intentionally* (and uninvitedly) hit *B*, he can be held responsible for the action—the aggression can be imputed to him and he can be lawfully punished for it—because *A*’s decision to hit his victim was not itself conditioned by strictly physical laws. It was volitional. *A*—not some impersonal force of nature, and not some other person—was the cause of the aggression against *B*. *A*’s aggression is an action.[[13]](#footnote-13)

The general question facing libertarians, then, is whether a particular actor, by his action, intentionally *caused* the prohibited result—an uninvited border-crossing. Implicitly, the libertarian prohibition on the initiation of force is a prohibition on willfully *causing* an unwanted intrusion.

Where *A*’s action—not mere behavior—is the cause of aggression against *B*, we might simply say that “*A* killed *B*.” But if we unpack this statement, we will usually find that *A* did not directly kill *B*; some intermediate means was employed to achieve that end (hence the causal aspect of action). Action is not just intentional; it is the intentional use of *means* to attain a desired end. For example, *A* deliberately loaded his gun, deliberately pointed the gun at *B* and then deliberately squeezed the trigger, causing a bullet to discharge into *B*’s heart. Why say that *A* killed *B*? Why not say that the *bullet* killed *B*, whereas *A* merely squeezed a trigger? Why connect *A*’s action of squeezing a trigger with the resulting harm to *B*? In some contexts, of course, *A*’s action would be irrelevant. To a medical examiner conducting an autopsy, for instance, the bullet is the cause of *B*’s death, and who fired it and why is beside the point. But that does not change the fact that in a legal and normative context we trace the chain of causation back to *A*’s intentional action of squeezing the trigger. There is, after all, a causal connection between the immediate action and the means employed on the one hand, and the harmful consequence on the other hand.[[14]](#footnote-14)

In praxeological terms, we can say that *A*’s goal or end was to kill *B*; he selected a means—the gun—calculated and designed, according to known laws of cause and effect in the physical world (the causal realm), to achieve that goal. *A*’s action was intended to cause *B*’s death, and the action employed means that did, in fact, result in *B*’s death. As shorthand we say that *A* killed *B*, but implicit in this account is that *A* undertook an intentional action employing means and exploiting causal laws (causal realm) to achieve his desired result (teleological realm).[[15]](#footnote-15)

At this point, we might want to revisit the issue of intent. Why should we concern ourselves with *A*’s *intent*? If we objectively determine that *A*’s actions caused the death of *B*, what should it matter what *A* intended to do—or whether *A* intended to do anything at all?

Intent matters because without intent there is no action and without action there is no actor to whom we may impute legal responsibility. If *A* did not intend to do anything at all, then we cannot determine that *A*’s actions caused the death of *B*—because *A* *took* no action. Intent is a necessary ingredient in human action; if there is no intent, then there is no action, only behavior: involuntary physical movements guided by deterministic (or perhaps random) causal relations.

The role of law in a free society is to protect the rights of nonaggressors and, where those rights are violated, to compensate the victims and punish the aggressors. But aggression must be intentional—otherwise, there is no reason to attribute it to a particular human actor instead of an impersonal natural force. For person *A* to be the cause of *B*’s death, *B* must have died as the result of a series of events initiated by *A*’s willful action. If, on the other hand, *B* dies as the result of a thoroughly deterministic process unconnected with any willful action, then there is no one to punish; no one caused *B*’s death. To punish *A*’s unintentional bodily movement would be like punishing lightning for destruction of property or punishing a flood for assault. *A* can murder *B*, whereas lightning (or a flood, or a cougar, or an involuntary human reflex) cannot.

PUNISHING AGGRESSION

There is another, closely related reason why intent matters for the assessment of criminal guilt. A guilty criminal—that is, an aggressor—may be lawfully punished. Or, to put it another way, an aggressor cannot meaningfully object when his aggression is met with physical force in response. After all, his aggressive actions conclusively demonstrate that he does not find nonconsensual physical force objectionable. In common law terms, we may say that by virtue of his own violence against others, an aggressor is “estopped” from objecting to (proportional) violence against himself.[[16]](#footnote-16) But to punish someone is to engage in an *intentional* act. As an intentional act, punishment is only justified in response to an intentional act of violence; this is the elegant symmetry of libertarian ethics. Neither an unintentional movement, nor an intentional act of *nonaggression*, can justify the use of force. We may punish *A* if he intentionally strikes *B*, but not if *B* is struck by lightning; and we may punish *A* if he intentionally shoots *B* with a gun, but not if he shoots *B* with a camera. If we do punish *A* for nonaggression, we become aggressors ourselves—because nonaggressive action cannot estop A from mounting a coherent objection to the use of violence against him. Thus we can say that when an aggressor intentionally and uninvitedly attempts to (or does) impair the physical integrity of another’s person or property, he gives his victim the right to punish him, because he can no longer withhold his consent to physical force in response to his initiatory force.[[17]](#footnote-17)

COMPLICATING THE PICTURE:   
CAUSATION, COOPERATION, AND HUMAN MEANS

Compared to many real-world cases of murder, the above example in which *A* deliberately shoots *B* is simple and straightforward. After all, *A*’s chosen means of carrying out his aggression against *B* was a gun—an inanimate object enmeshed in a web of causal relations but incapable of initiating a causal sequence on its own. As the well-known slogan goes, guns don’t kill people, people kill people. There is little difficulty in laying the moral and legal responsibility for the murder on *A*, therefore, because only *A* engaged in an action. Only *A* made a choice to which moral and legal blame could attach. The means that *A* employed—the gun and its ammunition—were physical objects completely bound by causal laws.

What about actions that involve other humans? As Mises observed:

A means is what serves to the attainment of any end, goal, or aim. Means are not in the given universe; in this universe there exist only things. A thing becomes a means when human reason plans to employ it for the attainment of some end and human action really employs it for this purpose. Thinking man sees the serviceableness of things, i.e., their ability to minister to his ends, and acting man makes them means.… It is human meaning and action which transform them into means.[[18]](#footnote-18)

Now in these comments Mises is primarily concerned with the use of nonhuman scarce resources as the things employed as means. But there is no reason that other humans cannot also be one’s means, in a sense. What else does it mean to “employ” a worker, or to cooperate with others to produce wealth? In fact, as Mises commented in *Socialism*:

[I]n the means of production *men serve as means*, not as ends. For liberal social theory proves that each single man sees in all others, first of all, only means to the realization of his purposes, while he himself is to all others a means to the realization of their purposes; that finally, by this reciprocal action, in which each is simultaneously means and end, the highest aim of social life is attained—the achievement of a better existence for everyone.[[19]](#footnote-19)

There is no doubt that cooperative, productive action is possible, in which case multiple actors cooperate with each other and, in a sense, employ each other as means to achieve mutual and/or separate goals. But not all cooperative action is productive and peaceful. It is also possible for multiple actors to collaborate or conspire together to trespass against others’ property rights.

In analyzing action through the lens of the praxeological means-ends structure to determine if it amounts to aggression, we ask if the actor employed *means* to achieve the end of invading the borders of another’s property or body—in other words, we ask if he *caused* the border invasion or trespass. The means employed can be inanimate or nonhuman means governed solely by causal laws (a gun), *or* it can include other humans who are employed (used) as means to achieve the illicit end desired. The latter category includes both innocent humans that one employs to cause a border invasion as well as culpable humans that one conspires (cooperates) with to achieve the illicit end.

Consider the following case in which an aggressor employs an innocent human as one of his means. A terrorist builds a letter-bomb and mails it to his intended victim via courier. The courier has no idea that the package he is delivering contains a lethal device. When the addressee dies in an explosion after he opens the package, whom should we hold responsible? The obvious answer is: the terrorist. Why not the courier? Or the victim himself? After all, the courier is causally connected to the killing, as is the victim. The courier delivered the package; the victim opened it. But because he did not know he was carrying a bomb, the courier did not have the intent to aggress against the victim. Instead, he was connected to the killing only as a means. When the bomb exploded, it was the terrorist’s action, not the courier’s, that was completed. The courier simply handed over a package. The terrorist, by contrast, intentionally used means—the bomb materials, but also the unwitting courier—to cause his victim’s death. It is no different than if the terrorist used a nonhuman robot or drone to deliver the bomb. This case would be similar to the gun example, but not significantly different from the case in which a human courier was employed. From the point of view of both the victim, and the terrorist, whether the means employed was an innocent human or a nonhuman mechanistic delivery mechanism is irrelevant. The victim opposes being harmed in both cases; and the terrorist achieves his end, in both cases.[[20]](#footnote-20)

In fact, the victim’s own actions play a role in this scenario—after all, he opens the package, “causing” it to explode. We would not hesitate to say that the terrorist killed the victim, even though there is a significant time lag between the terrorist’s initial actions and the ensuing result, *and even though the victim’s own volitional actions were part of the chain of events.* So why not blame the victim? After all, he is the one who set off the bomb by opening the package. But this is obviously absurd. The victim did not intend to kill himself!

It is true that the positive law has long recognized that one accused of a crime or tort is not responsible if the damage was really caused by an “intervening act” that breaks the chain of causal connection” between the actions of the accused and the damage that occurred.[[21]](#footnote-21) The idea is that the intervening act is the true cause of the harm caused. But this is the case only if the event is superseding cause—that is, an *unforeseeable* intervening cause. In other words, an intervening force only breaks the chain of causal connection when it is *unforeseeable*. As the *Restatement (Second) of Torts* provides, “The intervention of a force which is a normal consequence of a situation created by the actor’s … conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.” [[22]](#footnote-22)

But it is simply not the case that when an actor (whom we may in general refer to as a “boss” or “inciter”) induces another human to aggress against a victim, that the act of aggression is “unforeseeable” merely because the intermediary has free will.[[23]](#footnote-23) When a terrorist uses a courier to deliver a letter bomb, it is not unforeseeable that the victim will receive it; and it is not unforeseeable that the victim will open it. If I hire a hit-man to kill someone, I am doing so because I hope and expect the victim to be killed. If I send my underling to rob a bank, I am doing it to have the bank robbed. If a woman persuades her lover to murder her husband, and he does, she gets the result she wanted; can we really say the outcome was “unforeseeable”?[[24]](#footnote-24) Thus, the fact that there are other humans with free will who are part of the chain of events does not excuse the instigator. This is, admittedly, how the positive law reasons, but I think this is reasonable and compatible with libertarian-based principles of rights, causation, and responsibility.

We submit that the case of an intentional border-crossing being carried out in part through human actors as opposed to through exclusively inanimate or nonhuman means poses no special praxeological problems. Whether the terrorist handed the bomb to his victim directly or through an innocent third party, the legal analysis remains the same. We look to see who intentionally employed means to cause an unwanted invasion against another. The means can be nonhuman or inanimate means, or another human, whether innocent or acting in coordination with the actor. In this case, the (innocent) courier was the terrorist’s *means* of killing the victim. It is simply confused to claim, as some do, that the terrorist in this case is not a cause of the killing because the chain of causation is “broken” by the “intervening” acts of another human (the courier) with free will. The acts of the courier do not *absolve* the terrorist; to the contrary, they *implicate* him, since he used the courier and his actions to cause damage to the victim.

In the cases mentioned above, only innocent parties—the courier, or the victim himself—are employed as the malfeasor’s means of committing aggression. Although here we find the terrorist alone responsible for the killing, it will not always be the case that an act of aggression “belongs” to just one person. For example, consider a bank heist in which there are several participants. One of them drives the getaway car; another handles crowd control; a third directs the action by walkie-talkie; and a fourth actually steals the money. The one who takes by force money that does not belong to him is clearly guilty of robbery. But most libertarians would agree that his companions are no less guilty. Most libertarians would recognize this as a “simultaneous” criminal conspiracy that renders all of its participants independently and jointly responsible. And that is our conclusion as well. But how can we justify that conclusion, inasmuch as only one person actually took possession of the stolen money?

The key is causation. Each of these actors had the goal that the bank’s and customers’ property be seized and each intentionally used means—including one another—to attain this goal. In other words, *each* bank robber that was part of the conspiracy was a cause of the robbery. Each had intent to achieve, and employed means to attain, the illicit end.[[25]](#footnote-25)

Consider the following example: *A* purchases a remote-controlled tank. With the remote control he can steer the tank and fire its cannon. He directs the tank to blow down the walls of a neighbor’s house, destroying the house and killing the neighbor. No one would deny that *A* is the cause of the killing and is guilty of murder and trespass. However, after the rampage, a hatch opens in the tank, and an evil midget jumps out. It turns out, you see, that the midget could see on a screen which buttons were pressed on the remote control, and he would operate the tank accordingly. We submit that *A* is equally liable in both cases. From his point of view, the tank was a “black box” that he used to attain his end, regardless of whether there was a human will somewhere in the chain of causation. No one can plausibly argue that we cannot determine *A*’s liability until we know whether there was a midget, or mere machinery, in the tank. (Of course, the evil midget, if there is one, is also liable.)[[26]](#footnote-26) In general, one can be liable for acts commited by another, if one is employing them as means to commit aggression. As Frank van Dun argues,

Hitler, Churchill, Roosevelt, Stalin, and their likes were not innocent practitioners of free speech at a time when a lot of their compatriots were blowing up towns and villages and people. The general who, in his search of scapegoats for a defeat, sends a handful of privates to the firing-squad is not exonerated by the fact that some other privates actually fired the shots that killed their convicted colleagues.[[27]](#footnote-27)

In other words, the simple fact that a person’s actions are mediated through other persons does not mean he should not be held liable for them. The driver of the getaway car is responsible for the robbery because he is intentionally engaged in a “simultaneous” criminal conspiracy to commit the heist. The mob boss who orders a crime is liable for his underling’s actions. The political leader who orders military actions is responsible for them. People can conspire—collaborate, cooperate—to commit crimes.

Moreover, the conspiracy or joint action need not even be simultaneous. In the terrorist example, the bomb did not detonate until long after the terrorist had handed it over to the courier. Nevertheless, he used the courier as an unwitting “partner” in a temporal “conspiracy” to kill the intended victim. In situations such as these, other human actors (including the victim) can be means to an end. It should be emphasized, of course, that this is a general rule; the analysis in each situation must be case-specific and take relevant facts and context into account. Whether a given person is considered to be “in” or “out” of the conspiracy—an intentional actor or an unwitting dupe—will depend on the circumstances surrounding the particular case.

Generally, however, the libertarian position is that what is impermissible—and properly punishable—is *action that is aggression*. This means action characterized by the following structure: the actor intentionally employs some means (which can be mere objects but could also include other actors, whether innocent or not) calculated to cause an invasion of the physical borders of a nonaggressor’s person or property.

LIBERTARIAN OBJECTIONS

Virtually no one has a quarrel with the notion that an actor is the “cause” of a result if he employs nonhuman means to attain this result. However, as indicated above, some, including some libertarians, assume that if another *person* is employed as the means, somehow the “chain” of causation is “broken.” For example, *A* somehow persuades *C* to plant a bomb under *B*’s car, which kills *B*. Some libertarians maintain that, while *C* is responsible for *B*’s murder, *A* is not, because *C*’s actions were undertaken with “free will,” thereby “breaking the chain of causation.” They argue that what *C* did was commit murder, while *A* committed a mere speech act, which does not in and of itself aggress against anyone’s person or property. Similar arguments are made for someone inciting a mob to lynch someone—“mere incitement” is not, according to this view, and never can be, a crime. You are not responsible for what a mob does, even if they act on your instructions, since its members have free will.

Consider, for example, Walter Block’s approach to these issues.[[28]](#footnote-28) Block follows Rothbard in maintaining *categorically* that “inciting” others to commit a crime (such as a riot) is simply not a crime. Rather, as Rothbard maintains, “‘Inciting to riot’ … is a pure exercise of a man’s right to speak without being thereby implicated in a crime.”[[29]](#footnote-29) Block points out that the rioters have “free will”[[30]](#footnote-30)—unlike an inanimate object such as a bullet—and therefore the inciter is not responsible for the riot. This reasoning can be extended to absolve various mob bosses, political leaders, and the like, who merely instruct underlings or intermediaries to engage in aggressive acts. Hence the libertarian joke that Hitler’s defense to war crimes would be, “I just gave orders.”[[31]](#footnote-31)

Rothbard and Block are assuming here that the rioter *cannot* be the means of the inciter, *because the rioter has free will*; they assume that having another human in the chain of causation breaks the chain. But as explained above, there is no reason other humans cannot serve as means for one’s action.

*Ad Hoc* Exceptions

Understandably, libertarians who advance such views are uncomfortable with the implications—with the idea that presidents and political leaders, mob bosses, people who hire hit men, and so on, are not liable. To avoid these difficulties, they advance various *ad hoc* exceptions to their “incitement is never a crime, it’s just free speech” or “the free will of the intermediary breaks the chain of causation” arguments.[[32]](#footnote-32) Walter Block, for example, argues that the “instigator” of actions   
directly committed by an intermediary can be liable if (a) he threatens or coerces the intermediary to commit the crime,[[33]](#footnote-33) (b) he contractually pays the intermediary money to commit the crime,[[34]](#footnote-34) (c) he “orders” the intermediary to commit the crime,[[35]](#footnote-35) or (d) he is “in” a “criminal conspiracy with” the other person, whatever that means.[[36]](#footnote-36) So if you coerce someone, or pay them, or “order” them, or “conspire with” them, you are liable for the intermediary’s crimes. With so many exceptions to the rule that one is simply not responsible for the actions of others, the rule itself is questionable. Moreover, there is no clear reason given for any of these exceptions; they are all apparently supposed to be intuitively obvious cases, but there is no unifying theme between them. These exceptions are *ad hoc* and not based on any general theory.[[37]](#footnote-37)

For example, if an instigator is usually off the hook for actions committed by an intermediary, because the intermediary has free will, why does coercion or monetary payment make a difference? If you coerce someone, or pay him, he still has free will. Whether the instigator threatens, or merely persuades, the intermediary, he still does not “determine” the intermediary’s actions, since in both cases, he has free will.[[38]](#footnote-38) In fact, legal systems do not absolve someone from liability for crime just because they are coerced, in recognition of the fact that even coerced agents have choice and culpability.

Furthermore, why is contractual, *monetary* payment some special exception? What about other types of contract, such as a contract for services, or other forms of inducement, such as the promise of sex or getting in the instigator’s good graces? We cannot understand why paying someone to murder a victim makes the payer responsible, while there is categorically no responsibility for inducing or persuading someone to commit the murder. Focusing on monetary payment as a special exception seems contrary to the Rothbardian view of contracts as mere title transfers (in which money is just one type of thing that can contractually be transferred), and also contrary to the Austrian view of the subjective nature of value (because people can be motivated by things other than title transfers; the end of action need not be obtaining ownership of something).

As for the former point: a contract is simply alienation to property: it is simply a property title transfer. It is not a “binding obligation.”[[39]](#footnote-39) Yet Block does seem to rely on the conventional view of contracts as “binding obligations” or promises, instead of as mere transfers of title to alienable owned resources (Rothbard’s view, which Block elsewhere seems to support), to support his *ad hoc* “incitement-by-monetary-payment” exception. As he writes:

However, if Van Dun *paid* me for this information, e.g., the hikers *paid and therefore contractually obligated* the local yokel to tell the truth, then we would have entirely a different matter. Then he would be guilty of a contract violation that resulted in death, a very serious matter indeed.[[40]](#footnote-40)

Block’s use of the language “contractually obligated” indicates he is not here viewing a contract as a mere transfer of ownership of a resource, but rather as some kind of promise giving rise to a legally-enforceable or binding obligation—contrary to the Rothbard-Evers title-transfer theory of contract.

As for the latter point: paying someone is simply one means of inducing them to do something—to obtain money that they subjectively value. They could be induced or persuaded by giving them other things they value, such as gratitude, or a service. Whether a woman pays a hitman money to kill her husband or persuades him to do so for sexual favors should not make a difference. To focus on the payment of money, or coercion, as exceptions, is simply *ad hoc* and also ignores the Rothbardian view of contracts, as well as the Austrian view of the subjective nature of value.[[41]](#footnote-41)

As for Block’s view that an instigator can be liable for the intermediaries actions if he “orders” him, it is not clear what the rationale is, although Block’s comments suggest he means here an order coupled with a threat, in which case this exception collapses into the first.[[42]](#footnote-42) Why can’t the person who incites the mob be characterized as “ordering” them to lynch someone, if ordering does not require threats? If ordering does not require threats, then why would this reasoning not apply to an inciter?

As for the final exception—liability in the case of being part of a criminal conspiracy—there is no definition provided and no clear explanation of why this makes one culpable.[[43]](#footnote-43) No reason is given as to why we can’t characterize the person inciting a lynch mob as being part of a criminal conspiracy with the lynchers.

As noted above with the Hitler example, even with these exceptions, many “instigators” would not technically be culpable for actions taken by their subordinates.[[44]](#footnote-44) Block attempts to find a way out of absolving a Hitler or other political leader, or mob boss, army general, and the like from liability for actions of their subordinates by simply assuming or positing that they are always, necessarily, threatening their subordinates, so that the first exception applies. As he writes:

[T]he libertarian legal code proscribes not only invasive acts, but also intimidation. Hitler, Stalin, et al. were not merely engaging in their free speech rights. Rather, they were issuing orders to their subordinates to maim and kill innocent people. Implicit in these commands was the threat that if they were not obeyed, those who failed to carry out these orders would be summarily dealt with.[[45]](#footnote-45)

But this is simply a convenient, yet false, assumption. First, not every underling is literally threatened with physical punishment if he does not obey orders. Second, even if the underling is threatened, the threat does not necessarily come *from the boss*, but rather from others in the hierarchy or organization. Did Hitler *literally*, personally threaten any of his generals or subordinates *himself*? Did President Truman threaten his generals or, indirectly, the airmen who dropped nuclear bombs on Japan? Simply assuming every leader or boss is necessarily “threatening” the underlings is unrealistic and just too convenient of an assumption to let one wriggle out of the uncomfortable consequences of this *ad hoc* theorizing. (And, again, even when the underling is threatened, this *still* does not mean his actions were “determined”; he still has the same free will that a non-coerced intermediary has.) We would argue that the leaders in these social or institutional hierarchies are responsible for the crimes committed by subordinates, even if they don’t threaten them.

In sum, it is a mistake to conclude that someone can be responsible for the actions of others *only* in the cases of the exceptions of coercion, monetary payment, orders + threats, or criminal conspiracy. It makes more sense to scrutinize actions in terms of the more generalizable praxeological means-end framework set forth above. This framework easily justifies all the “exceptions” noted above, and more. In each case, the malfeasor (wrongdoer) had a prohibited end in mind (some type of property invasion), and employs means that attain this end. The fact that the means in these examples were other people simply does not prevent the action from being classified as aggression.

*Fixed Pie of Responsibility and Joint and Several Liability*

The reluctance to attribute responsibility to the instigator of a crime, unless one of the exceptions is met, may be due to confusion about the nature of responsibility for torts or crimes. First, as noted above, some believe that the intermediary or underling’s free will breaks the chain of causation so that the instigator is not liable. But since cooperative action (for good or evil) is possible, and humans can employ other humans as means to accomplish ends, this is not a tenable objection.

In addition, some libertarians seem to believe that holding the instigator or inciter liable would relieve the underling or henchman of responsibility, which they understandably oppose. We may refer to this as the “fixed pie of responsibility” fallacy. For example, libertarian author Jack Lloyd seems to implicitly adopt such reasoning; note the use of the word “rather” here: “In this Steel-Man-case scenario, Hitler would not be culpable for an initiation of force. *Rather*, the people who did the actual initiations and threats of force would be culpable.…”[[46]](#footnote-46) The word “rather” implies it has to be *either* Hitler, *or* his underlings, that is responsible. But why can’t it be both?

Block also seems to implicitly accept such an approach. He writes:

Van Dun tries to make an analogy between the triggerman and the bullet, on the one hand, and the inciter and the rioter, on the other. He argues that the gunman is really responsible for the murder, not the bullet that actually kills, because the former came first in the causal chain, and so was responsible for the effect of the latter. This conclusion is true enough. But then he maintains that precisely the same relationship obtains between the inciter and the rioter who murders. To do so, however, he would have to say that, after all, the inciter, too, is responsible for the murder, not the rioter who actually kills, because the former came first in the causal chain, and was thus responsible for the effect of the latter.

When put in this way, the problems with the analogy are apparent. First, no one in his right mind would hold the bullet guilty of anything. It is an inanimate object, for all of its destructive power. Yet, it would be the rare analyst, even one as intent upon incarcerating the *inciter* as is Van Dun, who would allow the *rioter* off scot-free, as he would the bullet. That is, no one would even think to “punish” the bullet for its evil deed.[[47]](#footnote-47)

Note the language “he would have to say that, after all, the inciter, too, is responsible for the murder, *not the rioter who actually kills*” (emphasis added) and the criticism that by holding the inciter responsible, the rioter would have to be let off “scot-free.” But there is no basis for this contention. Just because the inciter or instigator is culpable does *not* mean the rioter or underling is off the hook. It is perfectly possible to hold them *both* fully liable; this is what joint and several liability means.[[48]](#footnote-48)

With this “fixed pie of liability” assumption, some might object that each malfeasor is responsible only for his pro-rata “part” of the crime. Maybe the instigator is 60% responsible and the underling 40% responsible. And so on. These critics mistakenly assume that there is some fixed 100 percent bucket of liability for a crime, which cannot be shared jointly by multiple parties. They thus are leery of attributing some responsibility to the boss because they think that this would reduce the liability of the underling. But there is no conceptual problem with having multiple parties *each fully liable* for the same act of aggression, under the notion of joint and several liability. It is not clear why my opponents here do not realize that this doctrine can play a useful role as part of the analysis of collective action. As an example, suppose *A* and *B* jointly borrow money from *C*. If *A* is unable to pay his share later, it is not as if *C* can only pursue *B* for half the amount owed; he can pursue each debtor for 100% of the amount owed (barring contractual terms to the contrary).[[49]](#footnote-49)

Likewise, just as one criminal can harm multiple victims and be unable to be punished by, or render full restitution to, each victim—so multiple criminals can each be fully—jointly and severally—liable for the damage done to the victim. There is simply no reason to maintain that there is a finite “pie” of “criminal harm” that has to be distributed piecemeal to multiple criminals who collaborate to harm someone. It is the victim’s rights that matter most, not that of individual criminals.[[50]](#footnote-50) Suppose two criminals cooperate to rob someone of $10,000 worth of property and then they spend the money. Suppose they are later apprehended; the first is penniless and the second has assets. The second should be forced to pay the victim the full $10,000 owed,[[51]](#footnote-51) not only half on the grounds that his partner owes the other $5,000 to the victim. Why should the victim, as opposed to the bankrupt criminal’s partner in crime, be left holding the bag? Thus it is just to hold both the mob boss, and his henchman, fully liable and responsible for a murder committed by the henchman but ordered by the boss.

*“Mere” Speech and Causation*

Related to the above-noted arguments is the notion that “mere” speech cannot be aggression since it does not actually invade others’ property borders. It is true that a speech act *per se* is not an act of aggression: it does not intentionally cause the person or property of another to be physically and nonconsensually infringed upon.[[52]](#footnote-52) (Shooting a gun, or swinging your first, is also not *per se* an act of aggression!) But some speech acts can be classified as acts of aggression in the context in which they occur because they constitute the speaker’s use of means calculated to inflict intentional harm, and because of the social and institutional hierarchies involved. One clear example of this is threats of force. The threat to stab someone does not actually pierce the victim’s skin; it is a “mere” speech-act, but it is still regarded as aggression. Offering to pay money to someone to assassinate someone would be another example. But these are not mere *ad hoc* exceptions; they are the result of the application of the more general means-end analysis.[[53]](#footnote-53)

In other cases, the act of speaking—communicating—and the other people with whom the speaker communicates serve as one’s means to achieve a certain end. The firing squad commander who yells “Fire!” is as responsible for the ensuing execution as the riflemen themselves.[[54]](#footnote-54) This is not because his spoken word was physically the cause of the victim’s death. His voice did not propel the bullets forward—and it did not have to. Instead, the firing squad commander is responsible for the execution because of what the command “Fire!” *signifies* in the context and social hierarchy in which it was uttered; it signifies that the commander intends for the victim to die and is choosing to employ efficacious means—his firing squad—calculated to achieve that goal. The firing squad commander isn’t “merely” speaking; he is intentionally colluding with the shooters for the purpose of killing the victim. Likewise the American president who orders a bomb be dropped is causing the bombing; he is employing the pilot and other underlings as his means. By being part of a certain organization or hierarchy and having certain relationships with other people, as a practical matter he is in a position to use other people to achieve his ends.[[55]](#footnote-55)

Consider the car-bomb scenario discussed above. When *A* persuades *C* to plant the bomb, his words do not physically cause *B*’s car to explode. And they do not even physically cause *C* to plant the bomb—*C* voluntarily chooses to do so. The fact that *C*’s action was voluntary, however, does not mean that *A*’s action—persuading someone to plant a car-bomb—cannot itself be considered aggression. To the contrary, *A* is an aggressor because his actions demonstrated the intent to kill *B* and the use of means calculated to do just that. So what if his chosen means included another person and his intervening will?

Let us return to the incitement example. In order to determine whether the inciter is responsible, we ask whether the inciter *used the mob as his means* to attain the violent acts committed by the rioting mob. For the inciter’s action to be considered aggression, he would have to *intend* the prohibited result; and he would have to have *chosen means* that resulted in the rioting. We do not maintain that the inciter is necessarily responsible in every case; the question turns on many specific facts and the context. What we maintain is that the inciter is not off the hook *merely because* the rioters had free will. The question to be answered is: was the mob the *means* of the inciter? Was the inciter a cause of the mob rioting, or of their ensuing havoc?

As Van Dun keenly observes:

Who should take credit for the poem: the blind poet, or his girlfriend who lovingly typed the manuscript (which she could have refused to do)? And if the blind poet really is the author of the poem, why should the rabble-rousing demagogue not be the author of the riots he incites?

Why should we require libertarian judges to turn a blind eye to real processes of “social causation” when we know that advertisers, educators, politicians, and agitators are very much aware of them—and willing to use them for their purposes? It is not just in a libertarian world that each person is responsible for his own acts; it is true in every world. However, we should not take that as an excuse for disregarding the complex causal processes that go on in the real world, whatever legal code is in force. A libertarian judge has to confront the facts. Reality does not yield to theory. It is all right for a judge to remind a man charged with participating in a violent mob that he is responsible for his own actions, but only after he has determined what the man’s own *actions*—not merely his bodily movements—really were. If the man was forced (coerced, compelled) by another to participate, we have one sort of case. If he got paid to smash windows, we have another sort of case. If he was manipulated in any other way, surely we cannot just pretend that then everything was the same as if he was not manipulated in any way—and treat the manipulator as if he was just an innocent bystander.[[56]](#footnote-56)

The same question is asked in a variety of situations: did the general kill people, using his troops as means to this end? Did the manager use his employee as a means to attain some end? Did the wife kill her husband by using her lover (or a hired hit-man) as the means to attain this goal? If someone votes in favor of socialism (or speaks out in favor of it), are they a cause of the ensuing acts of aggression by state agents? If a witness lies on the witness stand, resulting in a criminal defendant wrongly being imprisoned, has he caused harm to the defendant, through means of jurors, jailers, and the judicial system?[[57]](#footnote-57) In other words, was the first party a *cause* of the result that was actually committed by an intermediate person?

Although there will be easy cases, we do not suggest that merely formulating the issue in this manner makes the correct answer easy to find in every situation. Such questions must take into account relevant facts and the context, custom, social hierarchies and realities, and depend on the sense of justice of the judge or jury—of the community. Looking at actions from the praxeological point of view, however, helps us look in the right place and ask the right questions. No doubt, in cases where the intermediate actor is coerced, or paid, by the first party, it is easier to see that the first party is the cause of the threatened or remunerated action.[[58]](#footnote-58) But it is simply arbitrary to restrict cause to cases where the intermediate actor is threatened, or paid cash.

CAUSE-IN-FACT, PROXIMATE CAUSE, AND ACTION

Before turning to Reinach’s views on causation, a brief discussion of the contrast between conventional legal theories and that laid out here is in order. In general, in the common law, to be responsible, an actor needs to be both the cause-in-fact (or “but-for” cause) of a prohibited result, and also the “proximate” (or “legal”) cause (referred to as “culpability” in continental legal systems).[[59]](#footnote-59) Both need to be satisfied. One is a cause-in-fact of a result if “but for” the person’s actions, the result would not have occurred. There are various tests for proximate cause, but basically the idea is that the results had to be intended, or somewhat foreseeable to the actor, and not too “remote” (hence “proximate,” meaning near or close) from the person’s action. It is sometimes said that the result had to follow as a natural, direct, and immediate consequence of the action, with no “intervening cause” breaking the connection between the action and the result. For example, a murderer’s mother is a cause-in-fact of the murders he commits, for without her actions (giving birth to him) the murders would not have been committed. Yet she is not a proximate cause of the murders and therefore not responsible.

In our case, when we ask if someone was the cause of a certain aggression, we are asking whether the actor did choose and employ means to attain the prohibited result. For there to be “cause” in this sense, obviously there has to be cause-in-fact or “but-for” causation—this is implied by the notion of the means employed “attaining” or resulting in the actor’s end. Intentionality is also a factor, because action has to be intentional to be an action (the means is chosen and employed intentionally; the actor intends to achieve a given end).[[60]](#footnote-60)

REINACH AND CAUSATION

Reinach provides a framework for the analysis of legal causation which, although it employs different terminology, is largely compatible with the Austrian-praxeological view presented above.[[61]](#footnote-61) Reinach states:

Every action which is a condition for an outcome is, in relation to the intentional crime, a cause of this outcome in the sense of the criminal law. … Disregarding exceptional cases of the law, the characterized principle is fully valid. It is then also to be said: if the action is a sound [*zurechnungsfähigen*] condition of an unlawful outcome, and if an intention is also given in relation to this outcome, then the agent is customarily punished. … That an outcome is brought about means that it is brought about by an action which sets a condition for the outcome; to bring about intentionally means to bring about via an action that sets a condition. The latter condition brings about the outcome. Intention is a striving for an outcome via an action, or mediated by an action. This outcome itself can of course be a means to another outcome. The death of a human being can be striven for in order to obtain the things left behind which the murderer subsequently is entitled to. But the outcome is “striven” for, also when it is not a final goal, but in that case is “striven” for as a means towards a final goal. There are however several kinds of strivings: one can hope for, desire [*ersehnen*], or fear for [*befürchten*] a result. These are all “strivings” for a result, but not a striving in our sense. It is a striving “in relation to that to which it is applied”; for us it is a matter of striving for an outcome with the awareness that something can be contributed [such as to control] to its occurrence. Such a striving is called an act of will [*Wollen*]. To cause something intentionally means to set a condition for an outcome through a voluntary action such that this condition of course in combination with other conditions brings about the outcome.… Intention is to will an outcome.[[62]](#footnote-62)

This analysis is strikingly compatible with the Austrian understanding of action. Reinach’s use of “cause” and “condition” is similar to the proximate cause and “cause-in-fact” test discussed above. Reinach maintains that an action that intends the outcome to occur (i.e., desires a given end or goal), and “causes” this outcome to occur by an action (i.e., employs a means to attain this goal), then the actor should be punished for the action, which is a crime.

Using Reinach’s causal analysis, one would, as in the analysis presented above, not necessarily absolve someone of responsibility simply because another human is used to help “cause” the unlawful end. Reinach’s paper is full of interesting and illuminating examples and applications of causation framework. In one colorful example, *A* sends *B* into a forest in the hopes that he will be struck by lightning.[[63]](#footnote-63) Reinach contrasts this case with one in which *A* is able to calculate precisely where and when a tree will be struck by lightning, and, with malicious intent, sends *B* to be at the fateful place where lightning strikes. In both cases, Reinach argues, *A* is the “cause” (our “cause-in-fact”) of *B*’s death, since *B*’s death would not have occurred but for *A*’s having sent him into the forest. Nevertheless, Reinach concludes that *A* may be punished only in the second case and not in the first. The difference hinges upon *A*’s intent. In the first case, *A* hoped for *B* to die, but it was simply wishful thinking: he had no control over the lightning, and no knowledge of any objective likelihood that it would strike where it did.

In praxeological terms, *A*’s action in the first case cannot be construed as “killing” *B*, because he did not really intend *B* to die and did not employ any means expected to attain such a goal, any more than a rain dance causes it to rain or sticking pins in a voodoo doll harms the “victim.” *A*’s action is not calculated to cause harm to *B*; in fact, *A* does not expect and has no reason to expect that *B* will die as a result of going into the forest. As Reinach puts it, “the intention fails if the outcome is only hoped for, but the intention is present if it is expected with certainty.”[[64]](#footnote-64) Thus the praxeological view and Reinach’s framework are consistent in this case.

In the second case, *A* has more than an empty wish: he has certain knowledge that sending *B* into the forest will result in *B*’s being struck by lightning. Here Reinach finds *A* to have the intent necessary to be held responsible for *B*’s death. Likewise, praxeologically, *A*’s action now becomes more than simply “dispatching *B* into the forest.” With the knowledge that sending *B* into the forest will cause his death, *A*’s action rises to the level of “intentionally killing *B*.” This is because, if *A* knows for certain that sending *B* into the forest will result in *B*’s death by lightning, then *A* has the requisite intent to attain the goal of *B*’s death, and his action employs means (namely, sending *B* into the forest) that do attain this goal.

This example can be a useful tool for separating criminal aggressors from their noncriminal sympathizers. Earlier we pointed out that the rule that allows one person to be responsible for another person’s aggressive actions is a general one that must be applied cautiously and on a case-by-case basis, taking context and circumstances into account. The lightning example can help clarify our intuitions about which actions are aggressive and which are not. It is aggression when one person intentionally uses another as a means to cause an unwanted property violation; it is not aggression when one person merely hopes for a property violation to occur but does not intentionally use means to accomplish it. The Israeli   
government, for example, recently assassinated Hamas founder Sheik Ahmed Yassin.[[65]](#footnote-65)

Putting aside the question of whether Yassin was an innocent victim or a deserving target, we can surely acknowledge that there are many people—especially in the United States and Israel—who wanted to see Yassin killed. But only a very small number of these people intended to kill Yassin themselves or to assist his killers in any way. The lesson of Reinach’s lightning example is that the people who simply hoped that Yassin would die, or who rejoiced when he was killed, are not responsible for his killing. They gave his killers silent support and sympathy, but they did not intentionally act with the purpose of killing him. The team of assassins themselves, and the Israeli government that sponsored them, are responsible for the killing, but not the citizens who opinion polls show approve of the assassination.

This result is compatible with the framework advocated herein. The subtle insights, analysis, and examples provided in Reinach’s century-old paper are clearly still useful in constructing a praxeologically sound theory of legal causation today.[[66]](#footnote-66)

1. See generally “What Libertarianism Is” (ch. 2) and Kinsella, “How To Think About Property (2019),” StephanKinsella.com (April 25, 2021); and Hans-Hermann Hoppe, Economy, Society, and History (Auburn, Ala.: Mises Institute, 2021; https://www.hanshoppe.com/esh/), pp. 2, 10–12, et pass. See also “What Libertarianism Is” (ch. 2), Appendix I (regarding the use of the term property to refer to the rights actors have with regard to resources, instead of the resources themselves, and also regarding the nature of a property right as a right to exclude, not a right to use). [↑](#footnote-ref-1)
2. For discussion of the distinction between an action’s intentionality or purposiveness (thus distinguishing it from mere behavior, such as a reflexive or involuntary response), which factors into responsibility and liability, and its motive or actual purpose, which factors into the appropriate punishment, see Kinsella, “Hate Crime—Intentional Action and Motivations,” StephanKinsella.com (July 9, 2009). See also text at note 8, below. [↑](#footnote-ref-2)
3. As described elsewhere in this book, aggression means nonconsensual use of another’s owned resources, so is dependent upon the prior and more fundamental concept of property rights. In other words, to determine what actions constitution aggression, one must first know who owns what. See “What Libertarianism Is” (ch. 2), at notes 6, 9, 11, and accompanying text et pass.; also Kinsella, “How To Think About Property (2019)”; idem, “Aggression and Property Rights Plank in the Libertarian Party Platform,” StephanKinsella.com (May 30, 2022). In any case, aggression is always an action, and thus in order to identify and analyze property rights violations, an analysis of action is necessary. See idem, “The Non-Aggression Principle as a Limit on Action, Not on Property Rights,” StephanKinsella.com (Jan. 22, 2010) and idem, “IP and Aggression as Limits on Property Rights: How They Differ,” StephanKinsella.com (Jan. 22, 2010). [↑](#footnote-ref-3)
4. As Hoppe writes:

   Essentially, economic analysis consists of: (1) an understanding of the categories of action and an understanding of the meaning of a change in values, costs, technological knowledge, etc.; (2) a description of a situation in which these categories assume concrete meaning, where definite people are identified as actors with definite objects specified as their means of action, with definite goals identified as values and definite things specified as costs; and (3) a deduction of the consequences that result from the performance of some specified action in this situation, or of the consequences that result for an actor if this situation is changed in a specified way. And this deduction must yield a priori-valid conclusions, provided there is no flaw in the very process of deduction and the situation and the change introduced into it being given, and a priori-valid conclusions about reality if the situation and situation-change, as described, can themselves be identified as real, because then their validity would ultimately go back to the indisputable validity of the categories of action.

   Hans-Hermann Hoppe, A Theory of Socialism and Capitalism: Economics, Politics, and Ethics (Auburn, Ala.: Mises Institute, 2010 [1989]; www.hanshoppe.com/tsc), p. 142. See also Ludwig von Mises, Human Action: A Treatise on Economics, Scholar’s ed. (Auburn, Ala.: Mises Institute, 1998; https://mises.org/library/human-action-0), pp. 3, 15–16, 480; idem, The Ultimate Foundation of Economic Science: An Essay on Method (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962; https://mises.org/library/ultimate-foundation-economic-science); and Hans-Hermann Hoppe, Economic Science and the Austrian Method (Auburn, Ala.: Mises Institute, 1995; www.hanshoppe.com/esam).

   See also “A Libertarian Theory of Punishment and Rights” (ch. 5), n.36 and “Knowledge, Calculation, Conflict, and Law” (ch. 19), at n.65, regarding the need to select relevant facts and assumptions when applying such reasoning to result in interesting and useful results. [↑](#footnote-ref-4)
5. Mises, Human Action, p. 3. [↑](#footnote-ref-5)
6. See Hoppe, A Theory of Socialism and Capitalism, chap. 7 and, generally, “Dialogical Arguments for Libertarian Rights” (ch. 6) and “Defending Argumentation Ethics” (ch. 7). [↑](#footnote-ref-6)
7. See also Kinsella, “The Other Fields of Praxeology: War, Games, Voting… and Ethics?,” StephanKinsella.com (Aug. 5, 2006). [↑](#footnote-ref-7)
8. See, on this, note 2, above, and accompanying text. [↑](#footnote-ref-8)
9. Mises, The Ultimate Foundation of Economic Science, p. 8. See also Kirzner on the employment by human actors of scarce means to achieve ends:

   In a market system each member of the society is free to act, within very wide limits, as he sees fit. Moreover, the system operates within a framework of law which recognizes individual rights to private property. This means that each individual is free at each moment to employ the means available to him for the purpose of furthering his own ends, providing only that this should not invade the property rights of others.

   Israel M. Kirzner, Market Theory and the Price System (Princeton, N.J.: D. Van Nostrand Co., Inc., 1963; https://mises.org/library/market-theory-and-price-system-0), p. 13. [↑](#footnote-ref-9)
10. On the impossibility of explaining human action in terms of time-invariant causal relations, see Hoppe, “In Defense of Extreme Rationalism,” in The Great Fiction, pp. 330–31; Hoppe, A Theory of Socialism and Capitalism, pp. 134–36; and Jörg Guido Hülsmann, “Facts and Counterfactuals in Economic Law,” J. Libertarian Stud. 17, no. 1 (2003; https://mises.org/library/facts-and-counterfactuals-economic-law-1): 61–64. [↑](#footnote-ref-10)
11. In fact, as noted in the Preface, at one point I considered entitling this book The Ethics of Action—a title and meaning distinct from, but inspired by, similar titles such as Murray N. Rothbard, The Ethics of Liberty (New York: New York University Press, 1998) and idem, The Logic of Action (Edward Elgar, 1997, later republished as Economic Controversies (Auburn, Ala.: Mises Institute, 2011; https://mises.org/library/economic-controversies)); also Michael Polanyi, The Logic of Liberty (Routledge, 1951); G.B. Madison, The Logic of Liberty (New York: Greenwood Press, 1986); and James M. Buchanan, The Limits of Liberty: Between Anarchy and Leviathan, vol. 7 in The Collected Works of James M. Buchanan (Indianapolis: Liberty Fund, 2000 [1975]). [↑](#footnote-ref-11)
12. As Mises wrote, “Action is purposive conduct. It is not simply behavior, but behavior begot by judgments of value, aiming at a definite end and guided by ideas concerning the suitability or unsuitability of definite means.” Mises, The Ultimate Foundation of Economic Science, p. 34 (emphasis added). See also the quote by Holmes in note 14, below. [↑](#footnote-ref-12)
13. In my view, one need not take a stand on the interminable (and somewhat pointless and intractable) free will debate to hold these views. It does not matter if humans “really” have “genuine” free will in the causal realm in order to usefully characterize their actions teleologically. We conscious and self-aware humans are aware of the external world via our senses and reason, but also aware of an internal perspective by which we characterize our own actions as involving choice and goals. In order to understand, interact with, and predict the behavior or conduct of other humans, it is reasonable and useful for us to assume they have a similar internal perspective, since they are biologically similar to us, and thus, to interpret their motions as actions in pursuit of goals, as opposed to mere causal behavior. To the extent we adopt a teleological perspective to characterize other humans’ actions, categories of choice, opportunity cost, time preference, and so on are unavoidable. Though I do not consider it relevant to the arguments made in this chapter (or this book), I view my perspective on free will and determinism/causality as a type of compatibilism, but a unique one informed by Misesian dualism. It is no more spooky to refer to an actor’s “choice” than it is to conceptually distinguish the mind from the brain or the person from his body, as it is undeniably a conceptually useful, and probably unavoidable, way to characterize what other humans do. [↑](#footnote-ref-13)
14. See also Frank van Dun, “Against Libertarian Legalism: A Comment on Kinsella and Block,” J. Libertarian Stud. 17, no. 3 (2003; https://mises.org/library/against-libertarian-  
    legalism-comment-kinsella-and-block-0): 63–90, p. 78 (“Few are likely to believe a progressive lawyer who argues that, while his client admittedly did aim his gun at the victim and pulled the trigger, it was the bullet that killed the victim.”).

    As Justice Oliver Wendell Holmes noted:

    An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff’s harm is no part of it, and very generally a long train of such sequences intervenes.… When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way, but it is the delight of elementary writers to point out what a vast series of physical changes must take place before the harm is done.

    Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown, 1881), p. 91.

    For further discussion of causation in the law, see Richard A. Epstein, “An Analysis of Causation,” in A Theory of Strict Liability: Toward a Reformation of Tort Law (San Francisco: Cato Institute, 1980; https://perma.cc/PVV6-U3Y7); Tony Honoré, “Causation in the Law,” The Stanford Encyclopedia of Philosophy, Edward N. Zalta, ed. (2001; https://perma.cc/3JJ6-VD29); H.L.A. Hart & Tony Honoré, Causation in the Law, 2d ed. (Oxford: Clarendon Press, 1985). [↑](#footnote-ref-14)
15. The causal aspect of a prohibited act of aggression is sometimes made explicit and is sometimes simply implicit. As an example of the former, see New York Penal Law §105.05: “Conspiracy in the fifth degree,” which provides:

    A person is guilty of conspiracy in the fifth degree when, with intent that conduct constituting:

    1. a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct; or

    2. a crime be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

    New York Penal Law §105.05 (https://perma.cc/FEV5-KBK3; emphasis added).

    In the case of torts, the mandate is: do not unreasonably act so as to cause harm to another. In crimes such as rape, theft, and burglary, the causal aspect may only be implied. But theft occurs, for example, when the actor’s voluntary act causes movement (asportation) of the goods stolen. Rape includes the crime of causing another’s penis to be inserted into victim, and so on. [↑](#footnote-ref-15)
16. For a libertarian theory of punishment grounded in the insight that an aggressor may be punished because and insofar as his own use of violence deprives him of the ability to mount a coherent objection, see “A Libertarian Theory of Punishment and Rights” (ch. 5) and “Dialogical Arguments for Libertarian Rights” (ch. 6). [↑](#footnote-ref-16)
17. In other words, initiatory force, or aggression, is unjust; but responsive force is justifiable. For further discussion of how to characterize the nature of aggression—as trespass, or invasion of borders, or unconsented use or altering the physical integrity, of owned resources, see “What Libertarianism Is” (ch. 2), notes 9 & 11 and accompanying text; also Kinsella, “Aggression and Property Rights Plank in the Libertarian Party Platform.” See also Hoppe, A Theory of Socialism and Capitalism, p. 23 n.11 & 165–68; also Hans-Hermann & Walter Block, “Property and Exploitation,” Int’l J. Value-Based Mgt 15, no. 3 (2002; https://perma.cc/UQ8U-UM35): 225–36; Rothbard, “Law, Property Rights, and Air Pollution,” in Economic Controversies, p. 375; idem, Man, Economy, and State, with Power and Market, Scholar’s ed., second ed. (Auburn, Ala.: Mises Institute, 2009; https://mises.org/library/man-economy-and-state-power-and-market), chap. 2, § 12, p. 183; Kinsella, “Hoppe on Property Rights in Physical Integrity vs Value,” StephanKinsella.com (June 12, 2011). [↑](#footnote-ref-17)
18. Mises, Human Action, p. 92. See also Hoppe, Economy, Society, and History, p. 8 et seq. [↑](#footnote-ref-18)
19. Ludwig von Mises, Socialism: An Economic and Sociological Analysis, J. Kahane, trans. (Indianapolis, Ind: Liberty Fund, 1981; https://oll.libertyfund.org/title/kahane-socialism-an-economic-and-sociological-analysis), chap. 30, §1, p. 390 (emphasis added).

    To be clear, there is a distinction between the nonhuman scarce means of action employed by actors, and other humans employed to help achieve one’s ends. Only the former are ownable things. (See “A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability” (ch. 9) and “Selling Does Not Imply Ownership, and Vice-Versa: A Dissection” (ch. 11).) Because of confusion and often equivocation surrounding the term scarce, e.g., in the intellectual property context (“good ideas are pretty scarce, so IP must be legitimate”), in recent years I have tried to emphasize the rivalrous or “conflictable” nature of the types of resources, things, or entities that may be subject to property rights. See Kinsella, “On Conflictability and Conflictable Resources,” StephanKinsella.com (Jan. 31, 2022); also “Against Intellectual Property After Twenty Years: Looking Back and Looking Forward” (ch. 15), at n. 29; “What Libertarianism Is” (ch. 2), Appendix I. [↑](#footnote-ref-19)
20. See also the “evil midget” example in the text at note 26, below. [↑](#footnote-ref-20)
21. I trust my readers can google, but see e.g. https://en.wikipedia.org/wiki/Intervening\_cause. [↑](#footnote-ref-21)
22. Restatement (Second) of Torts, § 443 (1965). [↑](#footnote-ref-22)
23. In this chapter I will use various terms, such as “instigator,” inciter, boss, and the like, to refer to the person who attempts to persuade or induce another human, whom I will often refer to as an intermediary, underling, henchman and so on, to directly commit an act of aggression against some innocent victim. [↑](#footnote-ref-23)
24. The example given on Wikipedia is as follows:

    An intervening cause will generally absolve the tortfeasor of liability for the victim’s injury only if the event is deemed a superseding cause. A superseding cause is an unforeseeable intervening cause. By contrast, a foreseeable intervening cause typically does not break the chain of causality, meaning that the tortfeasor is still responsible for the victim’s injury—unless the event leads to an unforeseeable result.

    For example…, if a defendant had carelessly spilled gasoline near a pile of cigarette butts in an alley behind a bar, the fact that a bar patron later carelessly threw a cigarette butt into the gasoline would be deemed a foreseeable intervening cause, and would not absolve the defendant of tort liability. However, if the bar patron intentionally threw the cigarette butt into the gasoline because he wanted to see it ignite, this intentional act would likely be deemed unforeseeable, and therefore superseding.

    https://en.wikipedia.org/wiki/Intervening\_cause. [↑](#footnote-ref-24)
25. Frank van Dun’s discussion of “social causation” is also relevant here. See Van Dun, “Against Libertarian Legalism,” pp. 64, 79. It is discussed in further detail in the text below. [↑](#footnote-ref-25)
26. For a critique of our reasoning here, see Matt Mortellaro, “Causation and Responsibility: A New Direction,” Libertarian Papers 1, art. no. 24 (2009; https://mises.org/library/causation-and-responsibility-new-direction), p. 11 et seq. This paper also criticizes other aspects of the reasoning in our original article. [↑](#footnote-ref-26)
27. Van Dun, “Against Libertarian Legalism,” p. 78. [↑](#footnote-ref-27)
28. See, e.g., Walter Block, “Reply to ‘Against Libertarian Legalism’ by Frank van Dun,” J. Libertarian Stud. 18, no. 2 (2004; https://mises.org/library/reply-against-libertarian-legalism-frank-van-dun): 1–30, at pp. 3–16. [↑](#footnote-ref-28)
29. Murray N. Rothbard, “Self-Defense,” in The Ethics of Liberty (New York: New York University Press, 1998; https://mises.org/library/right-self-defense): p. 81; see also idem, “‘Human Rights’ As Property Rights,” in ibid. (https://mises.org/library/human-  
    rights-property-rights), pp. 113–15. [↑](#footnote-ref-29)
30. Block, “Reply to ‘Against Libertarian Legalism,’” p. 16. [↑](#footnote-ref-30)
31. Libertarian, or “voluntaryist,” Jack Lloyd:

    [I]f we assume that Hitler did not murder anyone and, on top of that, we assume for the sake of argument that Hitler had no other partaking in initiations of force whether it was receipt of stolen goods or rape, could Hitler be held to account for the murders that took place under his watch?

    In this Steel-Man-case scenario, Hitler would not be culpable for an initiation of force. Rather, the people who did the actual initiations and threats of force would be culpable, whether it was just pointing guns to threaten people into railcars or using physical violence to massacre people in concentration camps.

    Jack Lloyd, “Justice and Voluntaryism,” Voluntaryist Association (Dec. 7, 2022; https://perma.cc/2FZJ-U4EX).

    The perversity of the joke noted in the text illustrates why this reasoning is flawed. Imagine a Jewish woman conscripted to be Hitler’s cleaning lady at the height of World War II, with her family being imprisoned in a concentration camp. If one night she is cleaning Hitler’s office while he is there alone and has the chance to kill him, some libertarians literally argue this action would be murder since Hitler is not himself an aggressor (!). I trust the absurdity and perverseness of this position is apparent to most readers. Of course the enslaved Jewish woman, in the hypothetical above, has a right to kill Hitler, in self-defense and defense of others, implying Hitler must be an aggressor, even though he “only gives orders.” Thus, not all speech-acts are nonaggressive.

    See also the related discussion in Kinsella, “KOL149 | IP And Beyond With Stephan Kinsella—Non-Aggression Podcast,” Kinsella on Liberty Podcast (Aug. 30, 2014). [↑](#footnote-ref-31)
32. Somewhat similarly, Rothbard also tried to ameliorate the unacceptable consequences of some of his contract views in The Ethics of Liberty. He first argues (correctly, to my mind; see “A Libertarian Theory of Contract” (ch. 9)) that voluntary slavery contracts are invalid because the human body or will is inalienable. (See ibid., Part III.C.) Yet he also then argues that failure to repay a debt is “implicit theft” and that, therefore, in principle, debtor’s prison is justified. (Rothbard is in error here, as I discuss in ibid.) If someone may be imprisoned for failing to pay a contractual debt (on the basis of the “implicit theft” characterization), this is just another way one can, in fact, alienate one’s body by contract. In other words, the positions “the body is inalienable” and “debtor’s prison is justified” are contradictory. Perhaps sensing this, Rothbard tries to minimize the latter view by simply asserting that imprisoning an “implicit thief”—the debtor—is somehow necessarily disproportionate and “excessive” punishment. See ibid., Part III.D.

    Lloyd, quoted in note 31, above, also tries to minimize the implications of absolving a Hitler from liability. He writes:

    But that Hitler may escape a direct consequence over physical initiations of force does not mean, “no justice.” … Justice is brought by holding the order-followers accountable for their harms and by exposing Hitler’s role.… The social and economic ramifications are themselves a toll on him and his ability [to] live and should not be discounted in the calculation.

    For some of us, probably most of us, this is pretty thin gruel. [↑](#footnote-ref-32)
33. Block, “Reply to ‘Against Libertarian Legalism,’” p. 15. [↑](#footnote-ref-33)
34. Ibid., p. 17. [↑](#footnote-ref-34)
35. Ibid., p. 15 (footnotes omitted):

    According to Van Dun’s interpretation of my viewpoint, they [Hitler, Stalin, et al] would therefore be “guilty” of no more than exercising their free speech rights, and should be considered innocent of all wrongdoing.

    However, Van Dun reckons in the absence of threats. To reiterate, the libertarian legal code proscribes not only invasive acts, but also intimidation. Hitler, Stalin, et al. were not merely engaging in their free speech rights. Rather, they were issuing orders to their subordinates to maim and kill innocent people. Implicit in these commands was the threat that if they were not obeyed, those who failed to carry out these orders would be summarily dealt with.

    Here Block seems to imply that “orders” necessarily include a threat. In this case, the “orders” exception noted above seems to collapse into the first exception, where the instigator threatens of coerces the intermediary. But see Walter Block, “Reply to Frank van Dun’s ‘Natural Law and the Jurisprudence of Freedom,’” J. Libertarian Stud. 18, no. 2 (Spring 2004; https://mises.org/library/reply-frank-van-duns-natural-law-and-jurisprudence-freedom): 65–72, p. 67, which seems to distinguish orders from threats, with the conjunction “or,” although it is somewhat ambiguous: “A gang leader does not merely incite his followers to criminal behavior, he orders them to do it, or threatens that if they do not, they will be visited with physical sanctions.” [↑](#footnote-ref-35)
36. See Walter Block, “Were Manson, Hitler, Criminals? Yes.”, LewRockwell.com (Feb. 1, 2017; https://www.lewrockwell.com/lrc-blog/manson-hitler-criminals-yes/) (“Were Manson, Hitler merely inciting? No, they were ‘involved in a plan or conspiracy with others to commit various crimes.’”); Łukasz Dominiak & Walter E. Block, “Libertarian Theory of Bribery and Incitement: A Reformulation,” MEST Journal 5 no. 2 (July 15, 2017; http://www.walterblock.com/wp-content/uploads/2017-bribery-and-incitement.pdf): 95-101, p. 98 (emphasis added):

    From Rothbard's point of view, inciting to crime “is a pure exercise of a man’s right to speak without being thereby implicated in the crime. On the other hand, it is obvious that if Green happened to be involved in a plan or conspiracy with others to commit various crimes, and that then Green told them to proceed, he would then be just as implicated in the crimes as are the others—more so, if he were the mastermind who headed the criminal gang.”

    Mortellaro also seems to advance a view which would absolve a mafia boss or a Hitler in some cases, but then tries to make an exception in cases of conspiracy or collaboration. See Mortellaro, “Causation and Responsibility,” p. 16:

    With regard to the necessity of the inciter, it would seem that the hitman has the ability and means to engage in the crime without the help of the inciter. Indeed, unless the inciter plays some other role—if he helps hide the hitman from the authorities, drives the getaway car, picks the lock on the target’s door, or something actually involved in the crime itself, then and only then would he have been necessary for the hitman to carry out the crime. [↑](#footnote-ref-36)
37. See also Mortellaro, “Causation and Responsibility,” p. 14 (footnote omitted):

    Kinsella goes on in his paper to criticize the inconsistency of some of the defenders of the Rothbardian position for making ad hoc exceptions to the theories which they support. This will be discussed in greater detail below, but suffice to say for now that I am entirely in agreement with Kinsella on this point and can bring no substantive objection to his criticisms. [↑](#footnote-ref-37)
38. As Mortellaro notes:

    [W]hy should we assume that the hitman’s actions are determined? Why should we assume that by the mere act of offering money the inciter is able to take control of the hitman’s body and make him do the dirty work? The same argument which underpins the Blockian and Rothbardian support for the right to incite-by-words can be used to bolster the right to incite-by-monetary-payment.

    Mortellaro, “Causation and Responsibility,” p. 16. See also Van Dun, “Against Libertarian Legalism,” p. 64 n.3 (“there is such a thing as one person causing another to do something without actually using compulsion or force to make him do it and without having him agree to a contractual obligation to do it.”). Moreover, as noted in the text, under the Rothbardian title-transfer theory of contracts advocated in these pages, contracts do not give rise to obligations anyway, but only cause title to owned resources to be transferred. See “A Libertarian Theory of Contract” (ch. 9). [↑](#footnote-ref-38)
39. See “A Libertarian Theory of Contract” (ch. 9). [↑](#footnote-ref-39)
40. Block, “Reply to Frank van Dun’s ‘Natural Law and the Jurisprudence of Freedom,’” p. 66. [↑](#footnote-ref-40)
41. See also Mortellaro, “Causation and Responsibility,” p. 16, criticizing Rothbard and Block for the ad hoc exception of “incitement-by-monetary-payment” as being inconsistent with their objection to “incitement-by-words” and also as being “in tension with the Austrian theory of value, namely, that it is entirely subjective … we have no reason to condemn money payments while turning a blind eye to psychic value.” [↑](#footnote-ref-41)
42. See note 35, above. [↑](#footnote-ref-42)
43. Block attempts to clarify the principle in Walter Block, “Rejoinder to Kinsella and Tinsley on Incitement, Causation, Aggression and Praxeology,” J. Libertarian Stud. 22, no. 1 (2011; https://mises.org/library/rejoinder-kinsella-and-tinsley-incitement-causation-aggression-and-praxeology): 641–64, p. 652, but he simply restates his rule in other terms, without any basis or justification. He writes:

    There are no exceptions here. The arm’s length rule of cooperation, collusion, aiding and abetting, is exceptionless. Of course, it is sometimes a delicate matter to determine where on the arm’s length continuum any particular case lies.

    But what are the criteria for “colluding” or “cooperation”? Why are these even the criteria? Why isn’t the inciter who whips a mob into a lynching frenzy “colluding” with them? [↑](#footnote-ref-43)
44. See note 31 and accompanying text, above, et pass. [↑](#footnote-ref-44)
45. See note 35, above. [↑](#footnote-ref-45)
46. See Lloyd, “Justice and Voluntaryism,” quoted in note 31, above (emphasis added). [↑](#footnote-ref-46)
47. Block, “Reply to ‘Against Libertarian Legalism,’” p. 16. [↑](#footnote-ref-47)
48. Block adds:

    Second, and not unrelated, the rioter is a human being, presumably with free will; no one could say the same of a piece of lead. Third, there are many cases in which an inciter incites until his lungs give out, and no subsequent riot takes place, further attesting to the distinction between free will and inanimate objects that mars Van Dun’s analogy. But, apart from a misfire, bullets always discharge when fired. According to Van Dun, the inciter “fires off” the rioter in much the same way as the shooter does to the bullet. This is not at all the case. To be logically consistent, Van Dun would have to hold the inciter guilty of a crime even when no subsequent riot ensued.

    Ibid., p. 16 (footnote omitted). I have already argued above that the “free will” of the rioter does not mean the inciter is innocent; after all, in other cases in which Block does believe the instigator is liable, such as coercion or monetary payment, the intermediary still has free will. But consider here Block’s final sentence, criticizing Van Dun because someone who attempts to incite a riot that does not happen, under Van Dun’s approach, would presumably still be guilty of a crime. Block points this out as if this conclusion is obviously wrong or unjust. But why is it wrong? If you try to shoot someone but miss, you can still be guilty of attempted murder, a lesser crime than actual murder, perhaps, but a punishable offense nonetheless. The libertarian view of rights and aggression prohibits not only trespass, battery, and so on, but also assault (which is attempted battery, or putting someone in fear of receiving a battery), threats, and the like. See “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.F, “Why Assault, Threats, and Attempts Are Aggression”; and Kinsella, “Stalking and Threats as Aggression,” StephanKinsella.com (Jan. 10, 2021). So, yes, someone who tries to whip   
    a mob up into lynching someone, even if he fails, might be guilty of attempted aggression. [↑](#footnote-ref-48)
49. See, e.g., Saúl Litvinoff, The Law of Obligations: Part I: Obligations in General, 2d ed. (St. Paul, Minn.: West Publishing Company, 2001), § 7.13 (citing 2 Williston, A Treatise on the Law of Contracts, 3d ed. (1959), pp. 316, 320 and Restatement (Second) of Contracts (1981), § 289), and §7.26 et seq. See also the similar concept of “solidary obligation” in the civil law. See Litvinoff, The Law of Obligations, § 7.61; Louisiana Civil Code (https://www.legis.la.gov/legis/Laws\_Toc.aspx?folder=67&level=Parent), art. 1794 (“An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.”); Alain A. Levasseur, Louisiana Law of Obligations in General: A Précis, 3d ed. (LexisNexis, 2009), chap. 3, in particular §§ 3.2.1, 3.2.2, 3.3.1; and idem, Louisiana Law of Obligations in General: A Comparative Civil Law Perspective, A Treatise (Durham, NC: Carolina Academic Press, 2020), chap. 3, ¶ 117 et seq. [↑](#footnote-ref-49)
50. For more on this approach, see “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.B, “The Victim’s Options,” et pass. [↑](#footnote-ref-50)
51. Of course, more than $10,000 would arguably be owed, but this is not relevant here. (For more on this issue, see “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.C, “Enhancing Punishment Due to Other Factors.”) [↑](#footnote-ref-51)
52. For a discussion of how this doctrine works itself out in the context of voluntary slave contracts, see “A Libertarian Theory of Contract” (ch. 9) and “Inalienability and Punishment: A Reply to George Smith” (ch. 10), the section “Inalienability.” It is ironic that Block generally opposes the notion that speech acts (such as incitement) can give rise to liability, except for the ad hoc exceptions of monetary payment and coercion, yet in his view of voluntary slavery, the uttering of the words “I hereby promise to be your slave” justify the “master’s” use of force against the purported “slave”—as if his words had committed a type of aggression against the “master” that justifies the use of (responsive) force against the promisor. [↑](#footnote-ref-52)
53. See “A Libertarian Theory of Punishment and Rights” (ch. 5), Part IV.F, “Why Assault, Threats, and Attempts Are Aggression”; Kinsella, “Stalking and Threats as Aggression.” [↑](#footnote-ref-53)
54. This argument should not be conflated with Justice Oliver Wendell Holmes’s famous (and flawed) example of liability for shouting “Fire” in a crowded theater, which he used to argue that First Amendment free speech rights are not absolute. As Rothbard notes:

    [C]ouching the analysis in terms of a “right to free speech” instead of property rights leads to confusion and the weakening of the very concept of rights. The most famous example is Justice Holmes’s contention that no one has the right to shout “Fire” falsely in a crowded theater, and therefore that the right to freedom of speech cannot be absolute, but must be weakened and tempered by considerations of “public policy.” And yet, if we analyze the problem in terms of property rights we will see that no weakening of the absoluteness of rights is necessary.

    For, logically, the shouter is either a patron or the theater owner. If he is the theater owner, he is violating the property rights of the patrons in quiet enjoyment of the performance, for which he took their money in the first place. If he is another patron, then he is violating both the property right of the patrons to watching the performance and the property right of the owner, for he is violating the terms of his being there. For those terms surely include not violating the owner’s property by disrupting the performance he is putting on. In either case, he may be prosecuted as a violator of property rights; therefore, when we concentrate on the property rights involved, we see that the Holmes case implies no need for the law to weaken the absolute nature of rights.

    Rothbard, “‘Human Rights’ As Property Rights,” p. 114 (references omitted). [↑](#footnote-ref-54)
55. In this regard, see also Frank van Dun’s discussion of “social causation.” Van Dun, “Against Libertarian Legalism,” pp. 64, 79. Block, in responding to some of Van Dun’s criticisms, writes:

    The essence of Van Dun’s criticism of my article is that while all physically invasive acts must be characterized as unjustified aggression and prohibited by law, there is a second type of aggression, call it for want of a better term “mental aggression,” which should also, in addition to physical aggression, be considered legally illicit. Examples of this, as we shall analyze below, include libel, lying, making false accusations to the police, blackmail, “hate” speech, and negative “social causation” such as incitement to riot, gang leaders or dictators ordering their henchmen to commit crimes (of physical invasion), etc.…

    Further instances of “mental aggression” might include shunning, boycotting, cutting “dead,” refusing to deal with, buy from, sell to, etc. It is difficult to see how any libertarian could favor the outlawry of such behavior, but this would seem to be the implication of Van Dun’s theory.

    Block, “Reply to ‘Against Libertarian Legalism,’” p. 3 and n.7 (footnote omitted). I agree with Block’s criticism of Van Dun here, except for the social causation part, where I agree with Van Dun. [↑](#footnote-ref-55)
56. Van Dun, “Against Libertarian Legalism,” p. 79. For a recent real-world example, see Ellen Moynihan & Larry McShane, “Bronx mom charged with luring ex-boyfriend to his shooting death by current beau,” New York Daily News (Mar 15, 2023; https://perma.cc/79Z8-UV8L). [↑](#footnote-ref-56)
57. See Thomas Aquinas, Summa Theologica (New Advent; https://www.newadvent.org/summa), Secunda Secundæ Partis, Question 64, art. 6, Reply to Objection 3 (emphasis added):

    If the judge knows that man who has been convicted by false witnesses, is innocent he must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent: but if he cannot do this he should remit him for judgment by a higher tribunal. If even this is impossible, he does not sin if he pronounce sentence in accordance with the evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty. [↑](#footnote-ref-57)
58. In cases where the victim’s own actions, or those of an innocent intermediate party like the courier (as in the letter-bomb case) are part of the chain of causation, the instigator is solely liable. In cases where someone collaborates with other malefactors to commit an act of aggression, as in a bank robbery, the co-conspirators each have joint and several liability. [↑](#footnote-ref-58)
59. As Francis Bacon wrote in his treatise Maxims of the Law, regarding causa proxima, or proximate cause: “‘In jure non remota causa, sed proxima spectatur’ (In law not the remote, but the proximate cause is looked at).” Patrick J. Kelley, “Proximate Cause in Negligence Law: History, Theory and the Present Darkness,” Washington U. L. Q. 69, no. 1 (Jan. 1991; https://openscholarship.wustl.edu/law\_lawreview/vol69/iss1/6/): 49–105, at 54. See also International Risk Management Institute, “The History of Proximate Causation” (https://www.irmi.com/articles/expert-commentary/the-history-of-proximate-causation).

    The Model Penal Code (1985), §2.03 (https://archive.org/details/ModelPenalCode\_ALI), which codifies a dominant test for causation in the law, provides:

    Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result.

    (1) Conduct is the cause of a result when:

    (a)   
    it is an antecedent but for which the result in question would not have occurred; and

    (b)   
    the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

    (2)   
    When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

    (a)   
    the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

    (b)   
    the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.

    (3)   
    When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

    (a)   
    the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

    (b)   
    the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.

    (4)   
    When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor’s conduct. [↑](#footnote-ref-59)
60. Notice that this analysis helps to explain why damages or punishment is greater for intentional crimes than for negligent torts that result in similar damage. Keep in mind that punishment is an action, and a fully intentional one; it is not negligent, or “partially intentional.” Punishment is an intentional action that aims at punishing the body of the aggressor or tortfeasor. In punishing a criminal, the punishment is justified because the criminal himself intentionally violated the borders of the victim; the punishment is therefore symmetrical (see “A Libertarian Theory of Punishment and Rights” (ch. 5)). However, in punishing a mere tortfeasor, the punishment is fully intentional, but the negligent action being punished is only “partially” intentional, so to speak. In order to make the punishment or response to a torfeasor proportionate, since the tort was only partly intentional but the punishment will be fully intentional, therefore, the damages (intentionally) inflicted (or extracted) have to be reduced to some degree to make the punishment more proportionate overall. As an example, if a criminal intentionally murders someone, it would (in principle) be symmetrical for the victim’s heirs to have him killed. But if a tortfeasor accidentally kills someone, the punishment inflicted on him would have to be an order of magnitude lower since his action was not fully intentional while that of the punisher would be. Walter Block argues that if it were technologically feasible to “suck the life out of” a criminal, or even a negligent tortfeasor, to bring the victim back to life, this would be justified. See Roy Whitehead & Walter Block, “Taking the Assets of Criminals to Compensate Victims of Violence: A Legal and Philosophical Approach,” J. Law in Society 5 (2003; http://www.walterblock.com/publications/): 229–253, p. 249 et seq. Since this is so far-fetched and probably would never be possible, I state no opinion on this argument but do not find it relevant.

    For some of my thoughts on how negligence law might develop in a private-law society, see Kinsella, “The Libertarian Approach to Negligence, Tort, and Strict Liability: Wergeld and Partial Wergeld,” Mises Economics Blog (Sep. 1, 2009). [↑](#footnote-ref-60)
61. See Hans-Hermann Hoppe, “Property, Causality, and Liability,” Q. J. Austrian Econ. 7, no. 4 (Winter 2004; https://mises.org/library/property-causality-and-liability-1): 87–95, also included in Hoppe, The Great Fiction: Property, Economy, Society, and the Politics of Decline, Second Expanded Edition (Auburn, Ala.: Mises Institute, 2021; https://www.hanshoppe.com/tgf/), for an excellent discussion of Reinach’s views on causation. [↑](#footnote-ref-61)
62. Adolf Reinach, “On the Concept of Causality in the Criminal Law,” Libertarian Papers 1, art. no. 35 (2009 [1905]; http://libertarianpapers.org/35-concept-causality-criminal-law/), pp. 27–28. In our original article, Tinsley and I relied on the then-unpublished translation of Reinach’s article. I subsequently published a revised version of the translation in Libertarian Papers. I have updated the references in this chapter as well as the quoted passages to conform to the published version of the translation.

    Another important work by Reinach not discussed in this chapter is Adolf Reinach, “The A Priori Foundations of the Civil Law,” in Aletheia 3 (1983; https://philarchive.org/rec/REITAP-9): 1–142, which volume also includes other important commentary on Reinach, e.g. by Husserl and others. See also Kevin Mulligan, ed., Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1987). [↑](#footnote-ref-62)
63. Ibid., pp. 11, 27, 31–33. [↑](#footnote-ref-63)
64. Ibid., p. 28. [↑](#footnote-ref-64)
65. See https://en.wikipedia.org/wiki/Ahmed\_Yassin. [↑](#footnote-ref-65)
66. As pointed out in note †, above, our paper “Causation and Aggression” was published in a symposium issue on “Austrian Law and Economics: The Contributions of Reinach and Rothbard,” in Quarterly J. Austrian Econ. 7, no. 4 (Winter 2004). In addition to our paper, the symposium issue included the following (plus two additional papers not presented at the original in-person symposium): Jörg Guido Hülsmann, “Editorial,” https://mises.org/library/editorial-special-symposium-issue-austrian-law-and-economics-0, pp. 3–6; Laurent Carnis, “Pitfalls of the Classical School of Crime,” https://mises.org/library/pitfalls-classical-school-crime-0, pp. 7–18 (this paper does not deal with Reinach); Larry J. Sechrest, “Praxeology, Economics, and Law: Issues and Implications,” https://mises.org/library/praxeology-economics-and-law-issues-and-implications-0, pp. 19–40; Jörg Guido Hülsmann, “The A Priori Foundations of Property Economics,” https://cdn.mises.org/qjae7\_4\_4.pdf, pp. 41–68; Walter Block, “Austrian Law and Economics: The Contributions of Adolf Reinach and Murray Rothbard,” https://mises.org/library/austrian-law-and-economics-contributions-adolf-reinach-and-murray-rothbard-law-economics-and, pp. 69–85; Hoppe, “Property, Causality, and Liability”; and Leo Zailbert, “Toward Meta-Politics,” https://mises.org/library/toward-meta-politics-0, pp. 113–28.

    Barry Smith’s original paper presented at the in-person symposium, “The A Priori Ontology of Social Reality,” was never published. In private correspondence with Smith (Nov. 25, 2022), he stated that although he has lost track of the original symposium piece he presented, one of his subsequent papers contains many of the pertinent elements of the argument of that presentation: Barry Smith, “An Essay on Material Necessity,” Philip Hanson & Bruce Hunter, eds., Return of the A Priori (Canadian J. Philosophy, Supplementary Volume 18, 1993; https://philpapers.org/archive/SMIAEO-2.pdf): 301–322; and that a much later paper concerning these issues is Barry Smith & Wojciech Żełaniec, “Laws of Essence or Constitutive Rules? Reinach vs. Searle on the Ontology of Social Entities,” in Francesca De Vecchi, ed., Eidetica del Diritto e Ontologia Sociale. Il Realismo di Adolf Reinach (Milan: Mimesis, 2012; https://perma.cc/LR2P-NLXW): 83–108. [↑](#footnote-ref-66)