# CAUSATION AND AGGRESSION

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## 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. In short, the law should prohibit aggression. 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—it can be successfully prohibited only if the law is based on a sound understanding of the nature of human action more generally.

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 (Mises 1966, pp. 15–16, 480; and 1978; Hoppe 1995). Praxeology is central to Austrian economics, the "hitherto best elaborated part" of the science of praxeology (Mises 1966, p. 3). However, other disciplines can benefit from the insights of praxeology. Hans-Hermann Hoppe has already extended praxeology to the field of political ethics (Hoppe 1989b, chap. 7). The related discipline of legal theory, which also concerns ethical implications of human action, can also benefit from the insights of praxeology.

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.

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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" (Mises 1978, p. 8).

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 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.[1]

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 implications of action. It asks whether an actor should be held responsible for the consequences of his actions. 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. 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

[1]On the impossibility of explaining human action in terms of time-invariant causal relations, see Hoppe (1989a, p. 197; 1989b, pp. 112–13) and Hülsmann (2003, pp. 61–64).

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.

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. 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 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 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.[2]

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[2]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. (Holmes 1881, p. 91)

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, 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 to achieve his desired result.[3]

At this point, we might want to revisit the issue of intent. Why we should 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 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.

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For further discussion of causation in the law, see Epstein (1980, chap. 3, "An Analysis of Causation"), Honoré (2001), and the classic Hart and Honoré (1985).

[3]The causal aspect of a prohibited act of aggression is sometimes made explicit, and sometimes simply implicit. For example, is always Explicit in some: e.g., New York Penal Law sec. 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 [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.

## 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.[4] 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. 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 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 return.

## 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 noted,

> 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

[4]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 a coherent objection, see Kinsella (1996).

> 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. (Mises 1966, pp. 92)

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. What else does it mean to "employ" a worker, or to cooperate with others to produce wealth? In fact, as Mises commented in *Socialism*:

> in 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. (Mises 1981, p. 390; emphasis added)

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. 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 as means to achieve the illicit end desired. The latter category includes both innocent humans that one employs to cause a border invasion and 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? After all, the courier is causally connected to the killing. But because he did not know he was carrying a bomb, he 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 letter. The terrorist, by contrast, intentionally used means—the bomb materials, but also the unwitting courier—to cause his victim's death.

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*. But why not blame the victim? After all, he is the one who set off the bomb by opening the package.

The 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. The idea is that the intervening act is the true cause of the harm caused. Using ostensibly similar reasoning, some libertarians would maintain that in the case above, the intermediate person, since he has free will, performs "intervening acts" that "break" the chain of causal connection between the terrorist and the acts committed by the intermediate person.

This reasoning implies that humans *cannot* be the means for others' actions. But this premise is untenable. If an intervening will breaks the chain of causation and absolves prior actors of guilt, then on this theory the terrorist should be set free because his act of building a bomb is separated from the resulting explosion by at least two acts of intervening will. After all, the terrorist did not put the explosive package in his victim's hand—the courier did that. But wait—the courier didn't commit murder either, because the victim chose to open the package. Thus his death can only be attributed to his own willful action. It turns out that he is not a murder victim at all; he committed suicide! But surely this absurd conclusion calls into question the notion that the use of another human to achieve one's goals absolves one of responsibility for those results. Clearly, the terrorist is responsible for the death of the victim in this case. That is to say, he *caused* the victim's death.

Even the law recognizes that an intervening force only breaks the chain causal connection when it is *unforeseeable*. As the Restatement 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" (Restatement (Second) of Torts 1965, § 443, 1965). Clearly, when the terrorist in these cases 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.

We submit that the case of an intentional border-crossing being carried out in part through human actors as opposed to through exclusively inanimate 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. 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 customer's 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.[5]

Consider the following example. A malcontent, 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. (Of course, the evil midget is also liable.)

The above examples should suffice to demonstrate that 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. And as we have seen, the conspiracy 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

[5]Some might also object that each malfeasor is responsible only for his "part" of the crime. These critics mistakenly assume that there is some fixed 100 percent of liability for a crime, that cannot be shared jointly by multiple parties. But just as one criminal can harm multiple victims and be unable to be punished by, or render restitution to, each victim; so multiple criminals can each be fully and jointly liable for the damage done to the victim. There is simply no reason to believe there is a finite "pie" of "criminal harm" that has to be distributed piecemeal to multiple criminals who collaborate to harm someone. Suppose two criminals cooperate to rob someone of $10,000 worth of property and spend the money. Then they are caught; the first is penniless and the second has assets. The second should be forced to pay the victim the full $10,000, 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?

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: it is case-specific. 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, with or without their knowledge) calculated to cause an invasion of the physical borders of a nonaggressor's person or property.

## "Mere" Speech-acts and Aggression

Most libertarians have no quarrel with the notion that an actor is the "cause" of a result if he employs nonhuman means to attain this result. However, it is often assumed 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. Libertarians will often conclude 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 causality. They argue that what C did was commit murder, while A only committed a speech act, which does not in itself aggress against anyone's person or property.

This appears to be Walter Block's view. Block (2004, pp. 13–16) follows Rothbard in maintaining *categorically* that "inciting" others to commit a crime (such as a riot) is simply not a crime. Rather, "'Inciting to riot' . . . is a pure exercise of a man's right to speak without being thereby implicated in a crime" (Rothbard 1998, p. 81, also pp. 113–15). Block points out that the rioters have "free will" (Block 2004, p. 16)—unlike an inanimate object such as a bullet—and therefore the inciter is not responsible for the riot.

Rothbard and Block are assuming here that the rioter *cannot* be the means of the inciter, because the rioter has free will. 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. As Frank van Dun (2003, p. 78) correctly points out,

> 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.

But Block admits two exceptions to his rule that one is not responsible for the actions of others: first, someone who forces another to commit a crime by use of *threats* is responsible for the crime committed (Block 2004,

p. 15); second, someone who *pays* another to commit a crime (e.g., murder-by-hire) is guilty of the crime (p. 17). And presumably Block would agree that the letter-bomb mailer in the example above is guilty even though he used an innocent courier and even though the victim himself, by opening the package, played a role in the ensuing explosion. With so many exceptions to the rule that one is simply not responsible for the actions of others, the rule itself is questionable.

Moreover, these exceptions, especially the ones regarding threats and payment, are *ad hoc* and not based on any general theory.[6] It makes more sense to scrutinize actions in terms of the praxeological means-end framework. This framework explains all the "exceptions" noted above. In each case, the malfeasor 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.

What about the defense that 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.[7] 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. 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.

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. 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 it was uttered; it signifies that the commander intends for the victim to die and is choosing to employ means—his firing squad—calculated to achieve that goal. The firing squad commander isn't "merely"

[6]We cannot understand why paying someone to murder a victim makes the payer responsible (Block 2004, p. 17), while there is categorically no responsibility for inducing or persuading someone to commit the murder. After all, a contract is simply alienation to property: it is simply a property title transfer (Kinsella 2003). But 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. Moreover, it is mistaken to assume that there is always a threat implied from the boss ordering an underling. The president who orders bombs be dropped actually does not hold a single weapon, so he is not literally threatening anyone.

[7]For a discussion of how this doctrine works itself out in the context of voluntary slave contracts, see Kinsella (1998–99, p. 91).

speaking; he is intentionally colluding with the shooters for the purpose of killing the victim. Likewise the 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 and having certain relationships with other people, as a practical matter he is in a position to use other people to achieve his ends.[8]

Consider the car-bomb scenario. When A persuaded C to plant the bomb, his words did not physically cause B's car to explode. And they did not even physically cause C to plant the bomb—C voluntarily chose 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?

To return to the incitement example—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; the question turns on many specific facts and the context. What we maintain is that the inciter is not off the hook *just 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?

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 the defendant wrongly being imprisoned, has he caused harm to the defendant, through means of jurors, jailers, and the judicial system? 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, and depend on the sense of justice of the judge or jury. 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 threatened, or paid, by the first party, it is easier to see that

[8]In this regard see also van Dun's (2003, pp. 64, 79) discussion of "social causation."

the first party is the cause of the threatened or remunerated action.[9] 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

A brief contrast between conventional legal theories and that laid out here, before turning to that of Reinach, is in order. In general, in the common law, to be responsible, an actor needs to be both the cause-in-fact of a prohibited result, and also the "proximate" (or "legal") cause (referred to as "culpability" in continental legal systems).[10] One is a cause-in-fact of a result if "but for" the

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[9]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.

[10]Francis Bacon coined the term *causa proxima*. Model Penal Code (1985), sec. 2.03, 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.

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 (having the baby) 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—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).[11]

## Reinach and Causation

Reinach (2000) provides a framework for the analysis of legal causation which, although it employs different terminology, is largely compatible with the Austrian-praxeological influenced view presented above.[12] Reinach states:

> Every action which is a condition for an outcome is, with respect to the intentional crime, a cause of this outcome in the sense of the criminal law. . . . It is then also to be said: if the action of a sane person is a condition for an unlawful outcome, and if there is at the same time an intention for this outcome to occur, then the agent is customarily punished. . . . To cause an outcome means to realize, through an action, a condition for the

(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.

[11]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. For example, punishment is an action: it is intentional and 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 (Kinsella 1996). However, in punishing a mere tortfeasor, the punishment is fully intentionally, but the negligent action being punished is only "partially" intentional. Therefore punishing a tortfeasor can be disproportionate; it would be symmetrical only if the punishment were also "partially" intentional. But punishment cannot be partially intentional; therefore, the damages inflicted (or extracted) have to be reduced to make the punishment more proportionate.

[12]See Hoppe (2004) for an excellent discussion of Reinach's views on causation.

> outcome; to cause it intentionally means to realize, through an action, a condition in order to bring about the outcome. Intention, then, is the striving for an outcome through an action, or by means of 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 inheritance to which the murderer subsequently is entitled. But the outcome is "striven" for, even when it is not a final goal, it is "striven" for as a means towards a final goal. . . . There are however several kinds of strivings: one can hope for, desire, or fear an event. These are all "strivings" for an event, but not a striving in our sense. It is a striving "in relation to that to which it is applied"; for us on the contrary it is a matter of striving for an outcome with the awareness of contributing something to its occurrence. Such a striving is called an act of will. Accordingly, to cause something intentionally means to realize a condition for an outcome through an action, wanting for this condition—of course in combination with other conditions—to bring about the outcome. . . . Intention is the willing of outcome. (Reinach 2000, p. 14)

This analysis is strikingly compatible with the Austrian understanding of action. Reinach's use of "cause" and "condition" is equivalent to "cause-in-fact" 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 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 (Reinach 2000, p. 14, also pp. 6, 16–17). 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 occured 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. 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, "there is no intention if the outcome is only hoped for" (Reinach 2000, p. 14). 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. 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. 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 whose opinion polls show approval 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.

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