PROPERTY, CAUSALITY, AND LIABILITY

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I

Wherever there is scarcity of resources in relation to human demand, the possibility of conflict arises. The solution to such conflict is the assignment of private property rights—rights of exclusive control. All scarce resources must be owned privately in order to avoid otherwise inescapable conflicts. However, while the assignment of private property rights makes conflict-free interaction *possible*, it does not assure it. The possibility of property rights violations exists, and if there are violations, then there must be rights of self-defense and punishment as well as liability on the part of a wrongdoer (Hoppe 1987 and 1993).

All this holds true regardless of how and to whom such rights are assigned and who accordingly is or is not considered aggressor or victim in any given case.

We still remain in the realm of "positive" legal analysis when we consider what might be called a *praxeological* requirement of *any* system of assigning property rights. In order to make conflict-free interaction possible, every such system must take into account the fact that man does and must act. In other words, it must be an "operational" system. To accomplish this, based on the system adopted, human actors must be able to determine *ex ante*, at any moment in time, what they are and are not permitted to do. In order to determine this, there need be some "objective" borders, signs, and indicators of ownership and property as well as of wrongful invasion of said ownership and property. Similarly, when considering a case *ex post*, judges must have "objective" criteria of property and aggression to make a determination for or against a plaintiff.

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II

In light of the technical requirements that every property rights system must meet, I will turn to an analysis of a specific—and explicitly normative—proposal of defining private property and property rights violations: the Lockean-Rothbardian solution.

In this intellectual tradition, property is defined as tangible, physical objects which have been "visibly" lifted out of the state of nature of un-owned goods through acts of appropriation and production. Through mixing one's labor with specific resources, objectively ascertainable borders of property are established and specific objects connected to particular individuals. There are indicators of owned (as compared to unowned) objects and of who owns them (and who does not), for everyone to "read." Moreover, the theory fulfills perfectly the requirement of being operational in that it traces all present property back to acts of "original appropriation" (up until which time there had only been "nature" or "unowned" resources). Based on this theory, man could indeed have acted from the beginning of time. (In distinct contrast, any theory that makes the assignment of property rights dependent on a "contract" or agreement or on State-declared law [legislation] does *not* allow man to act from the beginning on, but only *after* the conclusion of said contract or the arrival of the State. Accordingly, any such theory must be regarded as "technically" deficient.)

However, here it is not so much the positive definition of property as the complementary negative definition of punishable offense that is of interest. Based on the fundamental *stricture* that just as all property is private so all crime must be private (committed by specific individuals against specific victims), Rothbard has offered the following "strict liability theory" encompassing both criminal and tort law.[1] In every criminal or tort case,

> [e]vidence must be probative in demonstrating a strict causal chain of acts of invasion of person or property. Evidence must be constructed to demonstrate that aggressor A in fact initiated an overt physical act invading the person or property of victim B. (Rothbard 1997, p. 137)

> What the plaintiff must prove, then, beyond a reasonable doubt is a strict causal connection between the defendant and his aggression against the plaintiff. He must prove, in short, that A actually "caused" an invasion of the person or property of B. . . . To establish guilt and liability, strict causality of aggression leading to harm must meet the rigid test of proof beyond a reasonable doubt. Hunch, conjecture, plausibility, even mere probability are not enough. . . . Statistical correlation . . . cannot establish causation. (Rothbard 1997, pp. 140–41)

[1]Currently in the U.S., in criminal cases proof beyond a reasonable doubt is required. In contrast, in tort cases it is sufficient to prove that something is more probable than not (preponderance of evidence).

One important aspect of this definition: the necessity of establishing *causation*, based on "individualized evidence" rather than mere *probability* (or preponderance of evidence) based on "statistical" evidence is accepted. This not withstanding, Rothbard's proposal must be criticized as overly "objectivistic," for it ignores important "subjective" conditions which must be *combined* with objective indicators to determine liability. "Overly," because Rothbard's objectivism is not warranted by the nature of things nor is it in accord with his own definition of property and original appropriation which contains an important subjective element as well: appropriation implies *intent*. (Not every berry picking counts as an appropriation of the berry bush rather than merely the berry, and not every detour off the beaten path counts as homesteading, for instance. [Rothbard] 1998.)

In contrast, here it is argued that *not* all physical invasions imply liability and, more importantly, that some actions are liable even if *no* overt physical invasion occurs. In this argument Adolf Reinach's illuminating analysis regarding the concept of causality in (Continental European) criminal law will be valuable (Reinach 1989).

III

For Rothbard, it appears guilt or fault is established by proof of causation of harm. Reinach, on the other hand, emphasizes that causation and fault are *independent* elements, and *both* must be present in order to impose liability. Thus, he writes:

> In the case of a man's death, it is not sufficient that the death resulted from the action of an accountable (sane) person; as an additional requirement of a punishable offense, intent and deliberation (premeditation) or intent without deliberation (negligence) or, as we can summarily say, fault must be present as well. Causation of success *and* fault are requirements of punishment.–Fault must always be found.[2]

However, faultless causation, which remains free of punishment, exists also.

Consider the following examples of harm-causation which do *not* imply liability due to a lack of fault. A drives on the road. B jumps from behind a

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[2](Reinach 1989, p. 8).

> Liegt der Tod eines Menschen vor, so genügt es nicht, dass der Erfolg durch die Handlung eines Zurechnungsfähigen herbeigeführt wurde, sondern es muss als weitere Strafvoraussetzung Vorsatz und Überlegung bzw. Vorsatz ohne Überlegung bzw. Fahrlässigkeit oder, wie wir umfassend sagen können, Schuld hinzutreten. Strafvoraussetzung ist stets Verursachung des Erfolgs und Schuld.–Schuld ist immer erforderlich.

tree onto the road and is killed. A has caused B's death. Should A be held liable or should he go free? A invites B into his house. The house is struck by lightning, and B is injured. A (and his property) has caused B's injury, for without A's invitation B would have been elsewhere. Is A (or his insurer) liable to B or must B (or his insurer) bear the costs? A's tree, struck by lightning, falls onto B's property, injuring B. Is A (or his insurer) liable to B or must B (or his insurer) bear the costs? A and B go hunting together on B's (or A's) hunting ground. They approach a group of deer from opposite sides and open fire at the same time. A's stray bullet injures B. Is A liable to B or must B assume this risk and the associated costs?

Rothbard would have likely agreed that A is not liable in these cases, and he would have pointed out that he had covered this under the heading of the "proper assumption of risk." Life involves an inescapable element of risk. It is incumbent on each individual to learn how to live with such risk and to insure himself against it. However, this implies admitting that the narrow causality criterion is inadequate. What needs to be added to Rothbard's criterion would seem to be this: No one is liable for "accidents" involving his person and property. Instead, the risk of accidents and the insurance against them must be assumed individually (by each person and property owner for himself). People can be held liable only for their *actions*, whether intentional or negligent (but not for *accidents* involving them). Actions, however, involve *both* "objective" (external) *and* "subjective" (internal) elements. Hence, the exclusive inspection of physical events can *never* be considered sufficient in determining liability (there must be *fault*, too, and one can only speak of fault if an event is caused by an *action*).

IV

Now consider Reinach's definition of action-causality. An action of legal (penal) importance

> is an event that cannot be cancelled without also canceling the effect, insofar as it is of legal importance.[3] . . . "Cause" of an event . . . is called among other things that condition which must be added to one element of a conceptual whole, so that in place of its second component the event can be conceived of as having occurred.[4] . . . To cause an event means to activate a condition of success; to intentionally cause an event means to activate a condition that brings about the success. . . . To intentionally cause something

[3]Ibid., p. 29: Eine strafrechtlich relevante Handlung "muss etwas sein, das nicht hinwegfallen kann, ohne dass auch der Erfolg, soweit er rechtlich in Betracht kommt, hinwegfallen müsste."

[4]Ibid., p. 39: "'Ursache' eines Erfolges . . . nennt man unter anderem diejenige Bedingung, die zu dem einen Gliede eines gedachten Zusammen hinzugedacht werden muss, damit an Stelle des zweiten Gliedes der betreffende Erfolg als eintretend gedacht werden könne."

> thus means to activate a condition of success, willing that this condition–of course in conjunction with others–leads to the success.[5] . . . The willing thereby must be conscious that he can contribute to the willed success . . . [and] that success resulting from his "contribution" and other factors known to him is possible.[6] . . . His responsibility for negligent behavior is similar. In this case the success is not desired; but I could and should have avoided it. Insofar as it is still something whose occurrence depended on me: it, too, in a special way is "mine."[7]

In light of Reinach's definitions, we return to Rothbard's causality criterion. While his criterion is on the one hand too wide in including accidental invasions among punishable offenses, on the other hand it appears too narrow in determining liability.

A few examples, taken from Reinach and slightly modified, illustrate the point.

A, B's superior, sends B into the woods, hoping that B will be struck by lightning. His hopes are fulfilled.

Has A caused B's death or injury? Should A be liable? With regard to causation, Reinach would answer yes: without A's authorized order to B, B would not have been killed. However, Reinach would deny that A is liable, not because there is no causality, but because there is no intent or negligence on A's part (there is just hope). Rothbard also would hold A not liable, not because of lack of intent but because of lack of causality (verbal orders presumably do not count as causes, for they are not "physical" causes).

Now let us change the scenario: A is able to calculate exactly when a particular tree will be hit by lightning. He sends B to this tree, and B is indeed hit.

Reinach would find causality here in the same way as in the first case. What makes the two cases different and leads to liability in the second, is intent understood as "willing with the objectively grounded consciousness of certitude."[8] In the second case, A is liable because he caused the event with

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[5]Ibid., p. 30:

> Einen Erfolg verursachen heisst, durch eine Handlung eine Bedingung des Erfolges setzen; ihn vorsätzlich verursachen heisst, durch eine Handlung eine Bedingung setzen, damit sie den Erfolg herbeiführe. . . . Etwas vorsätzlich verursachen heisst demnach: durch eine Handlung eine Bedingung des Erfolges setzen, wollend, dass diese Bedingung–natürlich im Vereine mit anderen–den Erfolg herbeiführe.

[6]Ibid., p. 31: "Der Wollende muss (dabei) das Bewusstsein haben, dass er zu dem gewollten Erfolg etwas beitragen kann . . . (und) dass der Eintritt des Erfolges aus seinem 'Beitrag' und den übrigen ihm bekannten Faktoren möglich ist."

[7]Ibid., p. 42: "Ähnlich verhält es sich mit der Verantwortung für fahrlässiges Vorgehen. Hier ist der Erfolg zwar nicht von mir gewollt; aber ich hätte ihn vermeiden können und sollen. Insofern ist er doch etwas, dessen Dasein von mir abhing: auch er ist in besonderem Grade 'mein.'"

[8]"Wollen mit dem objektiv geforderten Bewusstsein der Gewissheit."

the objectively justified belief that his action, in cooperation with other factors, would lead to the desired result. In contrast, according to Rothbard's criterion no causation exists in the second case just as none existed in the first (the external-phenomenal sequence of events in both cases is in fact the same). Hence, Rothbard would have to let A go free in the second case just as in the first.

How is this possible? Consider another example. A, B's employer, orders B to come directly to him, knowing that half-way there is a concealed trap. B walks into the trap and is injured. Reinach would find A liable. Rothbard would let him go, because there is no "overt physical invasion" initiated by A. A merely says something (which in itself is clearly a noninvasive act) to B; and then "nature" takes its course with no further interference on A's part. That is, entrapment, as an indirectly and by in itself noninvasive means effected physical harm, would have to remain free of punishment.

This does not just stand in opposition to our moral intuition. More importantly, the exclusion of indirectly caused physical harm from the class of punishable offenses has no analogue in the positive theory of property and original appropriation. We have no trouble, for instance, conceiving of an "indirect" act of appropriation. A, B's boss, orders B to clear a piece of previously unowned land and drill for oil. B finds oil. Thereby *A*, not B, becomes the owner of the oil (although A is only the indirect cause of the act of appropriation). Accordingly, if A orders B to drill for oil, expecting that instead of finding oil B will fall into a trap at the given location, then A should be held responsible for this event as well. If not, why not?

Consider this sequence of cases: A wants B dead and tries to accomplish this through daily prayer. B indeed dies.

In this case neither Reinach nor Rothbard would find liability and presumably for the same reason. No causality exists (only coincidence) and hence there is no liability on A's part.

Now change the scenario: A prays for B's death. B happens to see and hear this and, being superstitious and of extremely delicate physical disposition, dies of fear.

In this case, too, Reinach and Rothbard reach the same verdict, that A is not liable, but they do so for different reasons. Reinach would find that causality is given in the second case. B dies *because* A has prayed for his death. What is missing and thus exculpates A is intent (or negligence) with regard to the outcome. A wants to kill B by means of *praying*, which is simply and objectively ineffective as far as the outcome is concerned. A undertakes no other means than praying. B's death is the result of a causal process that is incidental (accidental) to A's actions. That is why A must go free. Rothbard, on the other hand, would let A go because causality is absent. A has performed no action that can be construed as being invasive of B's person or property.

Consider a second change in the scenario: A prays for B's death. He knows of B's superstition and weak physical condition, and he informs B of his attempt. B dies out of fear.

Reinach would hold A liable in this case, whereas Rothbard would not. For Reinach in this case causality exists in precisely the same way as in the first. And indeed, phenomenally—as far as the outward appearance of things is concerned—the two cases are essentially the same. The only difference is *A's intentional saying* to B what B had discovered accidentally in the first scenario. Liability, according to Reinach, results from the presence of intent or negligence. In the second case, in telling B, A *acts*, whether intentionally or negligently, to bring about B's death. (Reinach would let A go only if A had *not* known anything about B's medical condition. In that case, telling B might be insensitive or cruel. However, while the causal processes involved are exactly the same as under the previous scenario: whether A knows or does not know about B's condition, B dies, A would nonetheless go free because neither intent nor negligence with regard to the outcome exists.) Rothbard, also consistent, would find that just as in the first so in the second case *no* causation exists. There is no overt physical invasion of B by A. A's praying did not cause the death, and informing B in itself did not involve any physical invasion. Hence, A should go completely free. (Based on his causality criterion Rothbard would make no distinction between A knowing or not knowing about B's condition. A is not liable in any case.)

That A should not be held liable in any way, shape or form is not intuitively convincing. Why? What if A could in fact pray people dead, and B died as a result of his praying? There is no physical-causal invasion, yet A has killed B. Should A still go free? Should he be allowed to pray dead whomsoever he wishes dead? More importantly and as indicated before, the exclusive emphasis on direct physical invasion has no analogue in the theory of appropriation. We do not exclude all "indirect" acts of appropriation as invalid *per se*. One can become the owner of things one never touches, i.e., without anything faintly resembling physical causation. Why should matters be different when it comes to aggressive rather than appropriative actions? Why should every "indirect" (covert) aggression (causation mediated through words) be categorically excluded from possible liability? Surely, if A tells B that he wished C were dead, and B kills C we would not hold A liable. But would we do the same if A paid B, or if A and B were members of an organized gang of which A were the gang's leader, and B killed C? Similarly, if Clinton or Bush ordered their generals to kill Iraqis, the generals told their officers who told the soldiers, and the soldiers then killed as ordered, should only the soldiers be liable because they have "caused" the deaths, or, as we can hardly imagine Rothbard disagreeing should everyone from the president on down to the soldiers be held jointly and severally liable? But then intent matters.

Finally, an example of failed attempt illustrates Rothbard's criterion as too narrow. A wants to kill his wife, B. He buys deadly poison from the pharmacist, and regularly adds it to B's tea. However, the pharmacist has made a mistake. He did not sell A poison but something entirely harmless. B dies in an unrelated car crash. The pharmacist discovers his error and the entire case unravels. Should A be held liable or go free (B's heirs are suing A)?

Reinach would find A liable. There is intent (and hence fault) and there is (failed) causality. A performs a series of actions that he believes to be and which objectively are suited to bringing about the desired result. It is only because of an incidental (accidental) causal event (the pharmacist's error) that the result does not occur as desired.

Rothbard would have to let A go, because no causality as he defines it exists. In fact, as far as the external world is concerned, A has done no harm to B at all. His attempt to take B's life was an all-around failure. (Rothbard himself clearly feels uncomfortable taking this position and comments: "even if the attempted crime created no invasion of property *per se*, if the attempted battery or murder became *known* to the victim, the resulting creation of fear in the victim would be prosecutable as an assault. So the attempted criminal (or tortfeasor) could not get away unscathed") Rothbard (1997, p. 163).

Again, the principal reason that this solution seems unsatisfactory is the lack of an analogue in the positive theory of property and appropriation. We do not require that an act of original appropriation (homesteading) be successful in order to find that it has taken place and to determine ownership. For example, A clears the underbrush from a previously unowned piece of woodland in order to create a park. However, in doing so he accidentally burns down all trees. A's action was unsuccessful. This is not the outcome he wanted. Is he nonetheless the owner of the burned forest? It seems so. However, if there are unsuccessful attempts of appropriation which count nonetheless as acts of appropriation, why should there not also be unsuccessful attempts of aggression which nonetheless count as aggression?

V

Clearly, while "objective" (external, observable) criteria must play an important role in the determination of ownership and aggression, such criteria are not sufficient. In particular, defining aggression "objectivistically" as "overt physical invasion" appears deficient because it excludes entrapment, incitement and failed attempts, for instance. Both the establishment of property rights and their violation spring from actions: acts of appropriation and expropriation. However, in addition to a physical appearance, actions also have an internal, subjective aspect. This aspect cannot be observed by our sense organs. Instead, it must be ascertained by means of understanding (verstehen). The task of the judge cannot—by the nature of things—be reduced to a simple decision rule based on a quasi-mechanical model of causation. Judges must observe the facts and understand the actors and actions involved in order to determine fault and liability.

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