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Rejoinder to Kinsella and Tinsley on Incitement, Causation, Aggression and Praxeology

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I. Introduction

Kinsella and Tinsley (2004)[1] is beautifully written, infused with keen insights, in some ways solidly predicated upon libertarianism and praxeology, and yet, and yet, much as I enthusiastically agree with goodly portions of it and am even inspired by them, I cannot see my way clear to accepting all of their insights.

The present paper is devoted to a critique of those parts of the paper with which I cannot agree. Section II follows the same organization as theirs. That is, it offers a point by point critical commentary on their paper. Section III is devoted to discussing and exploring a series of *reductios ad absurdum* of their thesis. We conclude in section IV.

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[1] Hence, KT.

II. CRITIQUE

1. Praxeology

I stand second to none in my long standing appreciation of the Austrian theory of praxeology (Block and Barnett, 2005; Block, 1973, 2000). But, aware of the importance of the normative—positive chasm, I am reluctant to place as much weight on it for legal analysis as are KT.

According to these authors (KT, 2004, 97): "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." So far, so good. But then, cheek by jowl with this statement, they (KT, 2004, 97) offer the following: "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." And here by aggression they clearly mean occurrences in reaction to which punishment, or violence, or defense, is justified. Or to put this in quintessentially Kinsellian terms, the aggressor is in no position to argue against violence being perpetrated against himself, in reaction to, or in retaliation against, his initial act of coercion: he is "estopped" from any such objection. State KT (2004, 101) in this regard:

> 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 in 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.[2]

But if this is true, that is, if punishment and retaliatory violence must be reserved for those who are *praxeologically* guilty of *actions* which constitute uninvited border crossings, then mere *behavior* or accidents cannot be treated in this manner *at all*. And this, to say the

[2] For more of Kinsella's brilliant analysis of estoppel, see Kinsella, 1992, 1996a, 1996b, 1997, 1998–1999.

least, would imply a truly grotesque legal order. A is cleaning his gun and, purely by *accident*, shoots his neighbor, B. Surely, no reasonable legal regime would let A off scott free, with no penalty *at all*.

In some places in their article, these authors seem to be saying precisely that. For example (KT, 2004, 98–99):

> 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).
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> 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.

And again, KT (2004, 100):

> 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.

But then, elsewhere in their paper (KT, 2004, 109, fn. 11) they appear to take it all back:

> 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.[3]

Now, it cannot be denied that in this later quote they are not conceding accidents, mere behavior, non praxeological action, must be punished. Instead, they are attempting to explain and/or justify *lesser* punishment in such cases. But *lesser* punishment is still *punishment*. If the only thing that justifies the use of retaliatory force is purposeful praxeological human action, then accidents, negligence, etc., should not be punished *at all*.

But that is a highly problematic stance to take. To return to our paradigm case in this regard mentioned above. A is cleaning his gun. He accidentally, negligently, unintentionally, inadvertently, mistakenly, carelessly, neglectfully shoots his very good friend, B, or his TV set. He never in a million years *intended* to do any such thing. Surely it would be an abrogation of justice to let him entirely off the hook. Yes, by all means, punish him to a lesser extent[4] than if he had done

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[3] This seem to me to be a rather convoluted way to put the matter. KT tie themselves into this knot due to their insistence that *only* purposeful aggression can be punished. They note, correctly, that punishment *must* be purposeful; an accidental punishment must be a great curiosity, or the stuff of science fiction. But they err in the logical implication from the fact that punishment must be purposeful. Based on their own premises, the logical conclusion from an accidental uninvited border crossing is *not* lesser punishment, however sound is this conclusion on other grounds. Rather, the correct conclusion is no punishment at all, were they to cleave narrowly to their own premises. They only arrive at the correct and reasonable conclusion of lesser punishment by jettisoning these premises.

[4] In my own analysis (Whitehead and Block, 2003; Block, 2004A, 2006), the purposeful murderer owe the heirs of his victim "the teeth for a tooth" plus costs of capture and scaring, while the accidental killer only owes "one tooth," his own life. The purposeful shooter of the TV owes two TVs, plus costs of capture and scaring (Russian roulette with the number of bullets and chambers proportional to the danger imposed). See on this also Rothbard (1998, p. 94, ft. 6).

it purposefully, as a part of praxeological human action. But not to punish him at all appears incompatible with libertarianism.

KT say that "No one caused B's death." Why, A did, would appear to be the proper response. To punish A's unintentional body movement (he accidentally pulls the trigger, we may suppose) would not at all be like "punishing lightning for destruction of property or punishing a flood for assault."

To be sure, there is an important praxeological distinction to be drawn between purposive human action and random body movements. However, it by no means logically follows that only the former should trigger punishment. It is fully compatible with libertarian theory, in my view, that *both* be forced to compensate their victim. Of course, to different degrees. And this is where, I contend, the distinction between action and mere reflex comes in; not with regard to punishing or not punishing, but insofar as severity of punishment is concerned. In other words, I fully support the most recent statement of KT (2004, 109, fn. 11) and reject the others.

Does this mean we must jettison Kinsella's brilliant concept of estoppel? This would appear to be the inescapable conclusion based on KT (2004, 101):

> 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.

Let me say two things about this. First, as I see things, if C accidentally shoots D's TV set, a case could be made that C is *still* estopped from protesting when D demands that C give him, D, his own C's (equivalently valued, or the money to buy one) TV set. After all, a reasonable, peaceful C, one who wanted to live according to libertarian principles, would certainly apologize to D. He would say something along the lines of, "Hey, sorry, it was just an accident; don't worry, I'll pay for a replacement." Surely, a non invasive C would take *some* responsibility for the mishap. He might even denigrate himself; say something along the lines of "I'm such a klutz; I couldn't help it; but I'll make it up to you." If he did none of these things, we would scarcely welcome him (back) to the community of civilized people.

An accidental shooting, or a motor vehicle accident is not exactly like a heart beat, or a sneeze or an eye blink. There is *some* blame, surely, properly attached in these accident cases. Clumsiness, for example. No one sneezes clumsily. That is entirely a reflex. But there are accident prone people. Perhaps there is a continuum involved here. I am not enough of a biologist to know this. But I know that there is a difference, which proper law should incorporate, between a reflex and an accident.[5]

Can A, who accidentally shoots a TV belonging to B, estop B from demanding from A, based on threats of violence from B if he does not comply, that A replace the broken item? KT (2004, 101) say so, as we have seen.

However, in my view, A cannot reasonably object. Were it not for A, B's TV set would still be intact. True, A did not *act* in the Austrian sense of that word (Mises, 1998). It is only the case that his *behavior* resulted in B's TV set exploding. And, it must also be conceded, that were B to subsequently force A to make this compensation accidentally.

What is the reason, according to KT, that A *can* estop B from physically forcing him, B, to compensate A for the TV? It is because these authors define A's behavior as non aggressive. When B demands, upon the threat of violence, that A compensate him, KT call A's act an aggressive one.

But this analysis stems solely from the fact that KT limit aggression to human action, and refuse to see that "mere" behavior, too, can justify violent, if need be, retaliation. Yes there is one lack of congruence. A *behaves*, in breaking the TV, and B acts in demanding compensation. But there is another sense in which there is no lack of congruence. Without A on the scene, B would still have an intact TV.

Let us ask a different question. Suppose, arguendo, that B could *behave*, not *act*, in such a way such that A gave him a TV. Let us not

[5] I go further. Suppose that C has a reflex, a heart beat, or a sneeze or an eye blink, and somehow, don't ask, as a causal result of this, D's TV is broken. I would still hold C (minimally) responsible. He shouldn't have located himself so close to D's TV. On the other hand, if we enter a world of magic, where an "innocent" sneeze can break a TV 5 miles away, then all bets are off. In such a scenario I would speculate that causal relations are so different than those presently operating that libertarian punishment theory as we now know it, along with pretty much everything else, would be in a shambles. Hexes and voodoo are different. If they were to work, they would comprise, merely, a different type of weapon. Anyone caught using them in an invasive manner would be punished under libertarian law.

enquire too closely as to how this could happen, just for the sake of argument. The question is, would any injustice have taken place? I think that KT are logically obligated to acquiesce in the notion that no injustice would have taken place under such circumstances. After all, B did not *act*, he only behaved, and KT are on record (apart from 2004, 109, fn. 11, where they contradict themselves) with the view that only *action* can violate the non aggression axiom, not *behavior*. For very different reasons I, also, claim that A cannot estop B from so doing. Because of A's behavior (albeit not action), B's TV is now ruined. It is the essence of justice that B be compensated for this outrage.

2. Incitement

KT claim that the inciter of riots is guilty of whatever mayhem the subsequent rioters are responsible for. This is in sharp contrast to Rothbard (1998, 81), and, also, to myself (Block, 2004) who hold him blameless. According to Rothbard:

> Should it be illegal . . . to "incite to riot"? Suppose that Green exhorts a crowd: "Go! Burn! Loot! Kill!" and the mob proceeds to do just that, with Green having nothing further to do with these criminal activities. Since every man is free to adopt or not adopt any course of action he wishes, we cannot say that in some way Green *determined* the members of the mob to their criminal activities; we cannot make him, because of his exhortation, at all responsible for *their* crimes. "Inciting to riot," therefore, is a pure exercise of a man's right to speak without being thereby implicated in 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. This is a seemingly subtle distinction which in practice is clearcut—there is a world of difference between the head of a criminal gang and a soap-box orator during a riot; the former is not, properly to be charged simply with "incitement."[6]

Why is the inciter guilty of the crime committed by the rioters in the view of KT? Because the former has used the latter as a means

[6] The present article is an attempt of mine to defend this analysis of incitement of Rothbard's against the critique of it by KT (2004). It will be said, perhaps, by critics of mine that this shows I am but a "pale carbon copy" of Rothbard, or have a cultish relationship with him in which I can only defend never criticize him. Not so, not so. For evidence on this contention, see Block, 1998, 2003, 2011; Barnett and Block, 2005, 2005–2006; Block, Barnett and Salerno, 2006; Block, Klein and Hansen, 2007; Block and Callahan, 2003.

toward his nefarious ends, in much the same way as the letter bomber has utilized the courier in such a manner. KT (2004, 104) claim: "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 letter bomber's acts are mediated by other people; for example, by the courier, even by the victim who opens the letter, and yet the letter bomber is still guilty of murder. For KT, there is a strong parallel with the inciter. His speech acts,[7] too, are also mediated by others, the rioters, so the inciter should be considered a murderer as well.

In contrast, my view[8] is that if a person uses other people as a means toward an evil end by cooperating and conspiring with them he is indeed a criminal himself. The same applies if he orders them to do evil deeds under threat from himself. But, if he uses people as a means toward evil ends *without* cooperating or conspiring with them, or threatening them, then he is innocent of their crimes. Only *they* are guilty. My claim is that KT do not place sufficient emphasis on individual responsibility. The key here is whether or not there is an arm's length relationship between the actor and those who he uses as a means. If the connection between is loose, as in the case of Rothbard's "Green," the inciter is innocent. If is it close, as in cooperating, conspiring with, or threatening them, then the inciter is guilty.

Needless to say, "loose" and "close" are matters of degree. They fall out on a continuum. This is why, I expect, KT, authors with whom I have a great degree of overlap philosophically,[9] appear to disagree so starkly with me on the matters under discussion. They are seeing orange where I see red, and the two colors blend into one another. This way of looking at these matters, not theirs, is both correct and will lead to some sort of reconciliation regarding our seeming areas of disagreement.

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[7] I do *not* take the position that incitement is not criminal because it constitutes, only, a speech act, and all speech acts are licit, based on free speech rights or some such. Very much to the contrary, I believe that *some* speech acts should be per se illegal. For example, "give me your money or I'll blow your head off" is "merely" an exercise of one's vocal chords. But it is a threat, and therefore would be ruled out of court by the libertarian legal code (unless of course these words are uttered in the context where they do not constitute a threat, such as in a play, where actors say these words to each other).

[8] My debt to Rothbard on this should be apparent.

[9] See Tinsley, Kinsella and Block. 2004; Block, Kinsella and Whitehead, forthcoming; Block, Kinsella and Hoppe, 2000; Block and Kinsella, 2005.

Another area of sharp disagreement between myself, and, if I may say so, Rothbard on the one hand, and KT on the other, concerns this business of free will. KT (2004, 103) are of the opinion that:

> 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.

The problem I have with the KT analysis is that the courier did not really have free will in any meaningful sense. Yes, he may have felt that he did, but as far as he was concerned, he was only delivering an ordinary letter, not a letter bomb. Had he but known of the true facts of the case, he never in a million years would have consented to do so. Or, if he had so consented, he would no longer be considered an innocent person.

What KT do not seem to appreciate is that there is all the world of difference between the courier and the members of the mob exhorted by Green to, in Rothbard's inimitable words, "Go! Burn! Loot! Kill!" The courier is innocent and the letter bomber guilty, while Rothbard's Green is innocent and the mob he incites is guilty of criminal action. Why? Because the mob knew precisely what it was doing, while the courier had no such information. Yes, both the courier and the mob were enmeshed in a causal nexus, set up, respectively, by the letter bomber and Green. By the same token, the get away driver who conspires with the robber gang is guilty of

whatever their crimes are, while the taxi driver who unknowingly brings them to the scene of the crime is not.

So much for the relevance of mere cause and effect to legal analysis.

3. X blackmails Y into murdering Z

According to the libertarian analysis of blackmail (Block, Kinsella, Hoppe, 2000), X is not *paying* Y for the service of ending Z's life. In what coin is this payment made? X offers Y his secrecy services: If Y will murder Z, X will not reveal a secret about Y that Y wants to keep hidden. We assume that Y cannot turn around and kill X, instead of the innocent Z, since X holds the threat over Y that if he does this, that is, if Y kills X, Y's secrets will be revealed posthumously.

Is there an "arm's length" relationship between X, the inciter, and Y, the incitee? At first blush one could readily be forgiven for thinking so, since in the view of most people a hostile not a cooperative relationship exists between the two of them, X and Y, the blackmailer and the blackmailee. But superficial appearances can be deceiving. For, praxeologically, there really is no difference between this case and the one where the wife (X) gets her lover (Y) to kill her husband (Z) in return for (continued) sexual services. In both cases there is cooperation, not confrontation, between the X and the Y, to the detriment of the Z. Do not be fooled by superficial and only apparent differences. Yes, the blackmailee wishes that the blackmailer would disappear (or drop dead of natural causes without revealing his secret). But the lover may well wish he could have the other man's wife without having to murder the husband. In *both* cases there is a request for murder services, coupled with an offer (sex, secrecy, it matters not which) that the person holding down the Y slot voluntarily accepts.

The point of all this is that the blackmailer, like the wife, is doing more than *inciting*, far more. Neither has any sort of arm's length relationship with the contract killer, Y. Both are paying him off to murder Z, only in different coin.

State KT (2004, 106, fn. 6) in this regard:

> 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.

The answer is that paying someone, whether in the form of money, sex, secrecy maintenance or other valuable consideration, eliminates the arm's length relationship that would otherwise obtain between the inciter and the incitee. Thus, it is no longer mere incitement.

But what about "gratitude" mentioned by KT in the previous quote from them? Said the king: "Who will rid me of this noxious priest?"[10] He did not order any of his henchmen to do this. He did not pay them to do so. Was he at great enough arm's length from the murderers of this priest so that he could be considered an innocent inciter engaging in his free speech rights (even kings have them) or was he so closely associated with his nobles that he could be considered a member, nay, the leader of this murderous gang? I think the latter. But, suppose Cartman were to say to a group of strangers at one of the mayor of South Park's meetings, "Who will rid me of the vexatious Kenny?" and then walk out, having nothing more to do with any of the subsequent proceedings. And, further suppose that as a result of his brief statement, we are talking causal connection here, Jimbo killed Kenny, in order to earn the gratitude of Cartman. Here, I would judge Cartman entirely innocent. He *only* incited. He is not *responsible* for Kenny's death. He is *not* one of the "bastards!" who are always killing Kenny. I admit there is a continuum in operation here. However, in my judgment, despite the fact that Cartman is purposefully acting, not merely behaving, using other people as a means toward his nefarious ends, he is still completely innocent of the murder. Anyone such as Jimbo who is foolish enough to bump off Kenny on Cartman's silly say so, just to earn his gratitude, is entirely and solely responsible for this murder.

Suppose X says, "I think Z deserves to die" whereupon Y goes out and murders Z. Is X guilty of murder, or mere free speech incitement? My claim is that absent any further particulars of the case, no further information is furnished as to the roles played any of these actors in society, the presumption is that Z, alone, is the murderer, and that X is innocent of any crime. But this presumption can be defeated. Here is where the operation of the continuum comes in. The presumption is rent asunder if X threatens Y, or X pays Y to do the murder, or if X uses Y as an innocent courier (the KT example) or in any other (such type) way takes on a less than arm's length relationship with Y.

[10] http://www.eyewitnesstohistory.com/becket.htm

KT (2004, 106, fn. deleted) would reply to this sally of mine as follows:

> 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. It makes more sense to scrutinize actions in terms of the praxeological means-end framework. This framework explains all the "exceptions" noted above.

But this is because they misunderstand the rule. 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. However, this would hardly be the first time in libertarian analysis that particular problem arose (Block and Barnett, 2008).

In order to flesh this out further, consider the case of the fatwa. The Ayatollah issues a fatwa against Salman Rushdie. Let us say it is of the exact format used by Cartman against Kenny: "Who will rid me of the vexatious Salman Rushdie?" One of the followers of the Ayatollah rushes out, let us assume, and murders this author. He is obviously guilty of murder. What about the fatwa issuer? He in effect offers payment not only of gratitude, but also of 93 virgins, and eternal residence in heaven. Is he a mere inciter, or is he, too, guilty of murder?

I am not sure. But at least I have, thanks to Rothbard (1998), a coherent theory which can shed light on the issue. It depends upon the precise relationship between the Ayatollah and the follower and I admit I am ignorant of this matter. Did a Priest, Minister, or Rabbi issue such a fatwa-like statement, and were a member his congregation to follow up on it, my relatively superior knowledge of how things work in this arena leads me to believe that these men of the cloth would be entirely innocent of any crime, despite purposefully using their followers as a means to commit murder. This is because the relationship between the leaders of these respective flocks, and their followers is such that, you guessed it, there is an arm's length relationship exists between the former and the latter.[11]

If there are any "exceptions" marring a theory, they lie with KT, not with my Rothbardian vision. They talk the talk of causal rela-

[11] For a fictional, but true to fact description of this relationship in Reform Judaism, see the Rabbi David Small books of Harry Kemelman (http://homepage.ntlworld.com/philipg/detectives/small.html)

tions. But, they (KT, 2004, 109) offer an exception for "cause-in-fact" and also "intentionality" They state:

> 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).

Let me be clear on this. I think KT are perfectly justified in making an exception for "cause-in-fact" and "intentionality." I do not at all object to this. It certainly makes their theory a more reasonable one. However, it cannot be denied that these are "exceptions." In contrast, my (Rothbardian) theory has the aesthetic benefit of being exceptionless. They misread it in thinking otherwise.

Next, consider KT (2004, 106, fn. 6) view that "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." The president is commander and chief of the nation's armed forces. He can hire and fire generals. Officers of this rank have vast powers to threaten. So, therefore, in a derived manner, does the president. Certainly, the *presumption* is that the "president who orders bombs be dropped . . . is not literally threatening anyone" who refuses to do so. This would come under the heading of refusing to obey orders, a serious crime in the military (http://usmilitary.about.com/od/punitivearticles/a/mcm94.htm). However, KT (2004, 105) seemingly contradict themselves on this point when they support Van Dun's (2003) contention that: "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." Where is the contradiction? In the first quote KT (2004, 106, fn. 6) are holding the military commander innocent of a crime that he orders. In the second KT (2004, 105) they hold a person in the same role as guilty ("not exonerated").

III. REDUCTIOS

I am now going to unleash a series of *reductios ad absurdum* against the KT position. In each case I shall demonstrate that their theory catches within its criminal net all sorts of people that everyone, including themselves, would have to admit are innocent. That is, the KT theory of cause based on the praxeological insight of human action holds all too many people of criminal behavior.

But before I do, I must remove one objection they think they might have at their disposal. They are likely to protest that in none of the cases to be introduced below must these obviously innocent people be declared criminals since none of them *intended* these deaths, and purpose, or *mens rea*, is a crucial necessarily element before their theory would hold anyone guilty.

To this possible objection of theirs, I have two replies. First, in my view, even if there were actual intent, purpose, mens rea, I would not hold any of the accused guilty in these cases below. There is simply too great a divide between the inciter and the incitee. Those playing the latter role have, yes, free will; it was solely up to them as to whether or not to commit the crime, unlike the KT of the innocent courier.

Second, and far more important, there is such a thing as negligence, and reckless disregard for the safety of others. Yes, actual intent, purpose, mens rea, when coupled with rights violations, are *sufficient* conditions to establish criminality, but they are hardly necessary. Negligence, and reckless disregard for the safety of others, too, when coupled with rights violations against innocent parties, are *also* sufficient to determine that a crime has taken place.[12]

Suppose someone were to fire a rifle at random in a crowded street. We could not convict such a man of first degree purposeful murder of any single victim, since he never intended to kill *that particular* person, he could rightly object.[13] Nevertheless he would be guilty of a crime, call it second degree murder or at the very least manslaughter.

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[12] KT (2004, 107) ask: "was the first party a *cause* of the result that was actually committed by an intermediate person." I suggest that this is only the beginning of the analysis, not the end of it.

[13] Caplan's (1999, 833) "penmanship" example is apropos here. This author claims that as far as anyone can tell when someone signs a contract, he might not be agreeing to its contents, rather, merely, practicing his penmanship. In like manner, the rifle shooter might just be exercising his finger. For a critique of Caplan, see Barnett, 2006; Block, 2005, 2007; Hülsmann, 1999; Hoppe, 2005.

Consider in this regard a quote from a Time Magazine (12/12/05, p. 50) interview with Steven Spielberg:

> Q: Do you think this film ("Munich") will do any good?
>
> A: I've never, ever made a movie where I said I'm making this picture because the message can do some good for the world.…I made the picture out of just pure wanting to get that story told.

This is in a crucial and highly relevant insight into the thinking of an important movie maker. It is important since several of my *reductios ad absurdum* will concern artists, writers, movie producers, novelists, etc.

Suppose a person was incited by this movie into killing someone. This would not render Spielberg guilty of the crime of incitement according to KT, since this artist had not *acted* in this manner. That is, it was not his purpose nor intent that this occur as a causal result of his movie.

However, I think it fair to characterize Spielberg's attitude as one of negligence or reckless disregard of or for this possible result. By his own admission, he just didn't *think* about the possibility that someone might be "incited" by his movie and go out and commit murder as a result of seeing it. Like a good athlete who "keeps his eye on the ball," Spielberg, if I can venture to get into his head, was thinking of one thing and one thing only in the creation of this movie: he wanted, as he says in this interview, to make "the picture out of just pure wanting to get that story told." He was yearning, again if I can put words into his mouth, "to tell the truth" about a certain episode in history, and the furthest thing from his mind was this incitement scenario. But, the same could be said about my fictional target shooter.

I "concede" to KT that according to their theory, Spielberg would not be guilty of first degree murder. But, he would indeed be justly charged with the crime of second degree murder or at the very least manslaughter. For he *was* negligent. Had he not heard of other cases where people went out and committed crimes as a result of viewing movies?[14] And, in my view, this is highly problematic.

With this introduction, we are now ready to consider that spate of *reductios ad absurdum.* In some of these I claim reckless endangerment; in others, I posit purposeful incitement. In all of these cases I maintain that KT would hold the perpetrators guilty. I, in contrast, would consider them innocent of any crime under a proper libertarian legal code.

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[14] See fn. 16 below.

1. There are many novels, movies and video games that utilize violence as a theme. Claims have been made the effect that, at least for the easily suggestible, these "mere" speech acts, depictions, characterizations, pictures, thoughts are causally linked to subsequent mayhem.[15] Thus, there is "causation," what KT (2004, 104) characterize as "the key." All that is needed in addition for KT to discern guilty on the part of these writers, play-rights, actors, directors, and, yes, cartoonists, is motive or intent. Let us posit that at least in some cases there was malice aforethought: part of the reason someone became involved in some of these productions was precisely to foment uninvited border crossings. On KT's analysis, any such people would be guilty of a crime. In my view, they would be entirely innocent. There is simply too loose of a connection between the likes of William Shakespeare, Stephen King, Sam Peckinpah, Spike Lee, the producers of horror movies, rap music, gangster movies, *The Shield, CSI,* the *Sopranos*, *The Godfather, The Birth of a Nation*, on the one hand, and those easily suggestible folk who go out and commit crimes after viewing them, even if this was their explicit and avowed intention.[16] Cause and intent be damned, say I. Free will intervened to lengthen the already very long arm's length relationship.

2. Consider the Nazi march in Skokie, any KKK rally you care to mention, name calling, the use of "fighting words," the use of the "N" word,[17] Holocaust denial, etc. Let us posit one, a causal rela-

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[15] "The Warriors (http://www.hollywoodvideo.com/movies/movie.aspx?MID=1835) had a comic-book feel from virtually the first shot and, despite the fact that the advent of the now-prehistoric PacMan was still a year away, it retrospectively had video game written all over it.

"While this neon-reflected backdrop of gangland warfare in New York may seem tame by today's ultra-violent standards, it was so real back in 1979 that it set off copycat fights—including two homicides—in the theatres where it was shown, prompting Paramount Pictures to cancel advertising and send out a telegram to theatre owners releasing them from their contractual obligation to show the film." (http://www.fradical.com/The_Warriors_cashes_in_on_gang_violence.htm) See also Roth, 1990.

[16] "'I can say without a shred of doubt that I have never, nor has anyone else that I have ever known, heard of gang members conducting a drive-by shooting while listening to Mozart or Vivaldi. But the same can not be said about 50 Cent—even the opening of his first and hopefully last movie spawned shootings at movie theaters across the country,' said Kathleen Jenkins, a juvenile parole officer at the Virginia Department of Juvenile Justice office in Staunton who works closely with local teens who have gotten themselves caught up in area street gangs" (http://www.augustafreepress.com/stories/storyReader$39101)

tionship between these events and subsequent violence, and two, that these events were perpetrated by people who purposefully intended that very result. They wanted to provoke violence. They were *using* easily suggestible folk[18] as a means to promote initiatory violence against innocent people for the sheer job of it. Bad motive is hereby stipulated. A causal relationship is easy to establish. KT would have to declare illegal, and criminal, all such goings on since the Holocaust deniers, the KKK, those using fighting words or racial epithets would be purposefully using other people as a means to evil ends. My theory would not; these inciters are not cooperating or conspiring with or threatening the easily led rioters. There is way too much of an arm's length relationship between the two sets of people.

3. Jones goes to a ball game, and refuses to stand during the playing of the national anthem, or the pledge of allegiance. He knows full well this refusal will provoke nearby American "patriots" to spill beer on him, punch him out, etc. Jones is purposefully *using* these "patriots" as a means to get them to violate his own rights. He is a masochist. Or, he wants to make a political statement. He is, with malice (or whatever) aforethought, *using* these people for his own ends. Without these *acts* of his, not mere behavior, they would not launched these attacks upon him. According to KT, Jones is an aggressor. He should be punished as the criminal he is.

In my view, Jones is not cooperating with these hooligans. He is not paying them to molest him. He is not threatening them to this end. He has every right not stand up for the national anthem.[19] He has a right to refuse this *for whatever reason he wishes, or for no reason.* There is a complete arm's length distance between Jones and his molesters. Thus, he should be considered innocent by any proper libertarian legal code.

4. There have been several recent cases[20] of religious incitement. First, consider the case of the Danish cartoons, which unleashed vast mayhem on the part of protesting Muslims (http://www.google.ca/

[17] When uttered by a white person, not a black person.

[18] We are now talking about adults. Children always occupy a unique position in libertarian legal theory, and the present case is no exception to that rule.

[19] We abstract from the possibility that the owner of the stadium requires this, and/or this all occurs on, don't ask, unowned property.

search?hl=en&q=Danish+cartoons&btnG=Google+Search&meta=). What were these cartoonists thinking when they drew these pictures? This is an important question for KT in determining their guilt or lack of same. For me, in contrast, it matters not one whit what was on their minds at that time. I don't care if they were hoping that incitees who viewed these pictures would do precisely what they actually did. They are still innocent of any crime as far as I am concerned. But, back to KT. If these Danes had in mind exactly what later transpired, then for these authors they are guilty of murder, first degree murder. It would be hard to prove this, and the cartoonists never admitted any such thing. But still, suppose they did. Most likely, I infer from *vershtehen*, their motives were merely to demonstrate the rights of free speech; like Spielberg, they were focusing on this one thing, and ignored pretty much everything else. As a *reductio* I maintain that KT are logically obligated, still, to hold them guilty of criminal behavior for drawing these cartoons; not of first degree murder,

A similar situation obtains with regard to the pope (http://www.google.ca/search?hl=en&q=pope+speech%2C+nun+killed&btnG=Google+Search&meta=) Benedict gave a speech which mentioned an obscure opponent of Islam. The pope merely quoted this critic. And yet, such is the situation in the Muslim world that this set off a conflagration, which may have resulted in the death of a nun. Let us stipulate that this is so. Again, KT are logically required, if they cleave to their theory, by their own admission, to consider the pope an inciter and therefore a murderer if he foresaw these events and purposefully aimed at them. Then, he would have murdered the nun indirectly by unleashing these horrific forces. He would have *used* these killers to his own nefarious ends. While no rational person comes anywhere near to thinking that, my position is that even if, arguendo, he *did act* in this way, still, he is not a murderer; instead,

[20] There was also Andres Serrano's "Piss Christ," a crucifix places in a glass of urine (http://www.google.ca/search?hl=en&q=piss+christ&btnG=Google+Search&meta=), Chris Ofili's painting "The Holy Virgin Mary," which featured an exposed breast of the mother of Jesus made of elephant dung (http://www.google.ca/search?hl=en&q=Chris+Ofili+The+virgin+mary&btnG=Search&meta=), and an opera house in Berlin which cancelled a production of Mozart's "Idomeneo," since it featured the severed head of the Prophet Mohammed (http://www.google.ca/search?hl=en&q=opera+house+in+Berlin+cancelled+a+production+of+Mozart%E2%80%99s+%E2%80%9CIdomeneo%2C%E2%80%9D+&btnG=Google+Search&meta=). Incitements all. Mozart, it turns out, was not a "red" (Rothbard, 1986) but he was a criminal inciter.

those people who killed the nun are. The arm's length chasm that exists between his writing of his essay, *no matter what purposes he had in mind* is simply too large to sustain any such connection. However, I contend, and I would like to see KT try to squeeze out of this implication, that if under the eminently more sensible assumption that the pope did not intend this result, did not even think it remotely possible for it to occur, and instead focused solely on the scholarly message he was addressing, while recklessly and negligently ignoring this possibility, then he is guilty of second degree murder or manslaughter.

Note, I do not deny in any of these cases that the inciter *caused* the murder. He was indeed part of the causal chain. In just the same way that Hitler's mother was part of the causal chain that brought this scourge to us. But, in both cases, the causal gap is simply too great to indict the respective causal agents. As it happens, all parents who think about these things at all realize that there is some very small chance that their child may turn out to be another Stalin. Even if that is their *intention*, libertarian law cannot hold them guilty unless they train their child to such ends. KT, I contend, must logically hold all parents of such monsters guilty, their claim to the contrary notwithstanding, of second degree murder or manslaughter.

5. Consider the following case:[21] Joe's friend Red is very jealous of his wife. He is violently jealous. Red has assaulted people before, been in jail previously when he thought his wife was too friendly with other men, after having attacked them. Over beers, Joe tells Red that their neighbor, Roger (who Joe dislikes), told him the other day that Roger was having intercourse with Red's wife. Red storms out of there, and beats the hell out of Roger. Now, surely, Red is guilty. But is Joe also guilty? Joe just giggles about this episode and laughs that he got away with getting Roger beaten up. KT's position on this is clear: Joe is an inciter, and thus guilty of Red's crime. This is wrong in my view: Joe engaged in his free speech rights only. He is innocent of any criminal wrong doing.[22] Of course if Joe aided and abetted Red, say, by giving him a baseball bat, or brass knuckles, or told him where Roger was located, or in any other way helped Red, then he is a guilty accomplice. But, then, he would have done more, far more, than mere incitement. Rothbard's proviso is crucial: "with Green having nothing further to do with these criminal activities." If Green, in Rothbard's case, or Joe, in ours, *does* have something "further to do

[21] I owe this example to Stephan Kinsella.

[22] Morality is a different matter, particularly if Joe lied about Roger and Red's wife.

with these criminal activities," then the arm's length connection is broken. It is no longer mere incitement. Now, it moves up into the arena of cooperating, aiding and abetting, etc.

6. Our friends on the left regard ostentatious displays of wealth, indeed, in the extreme, *any* disparities in wealth whatsoever, as incitement. Surely, a rich man riding around in a limousine, with his wife bedecked in jewels, both of them well fed, would constitute a provocation to poor starving people. Suppose, just suppose, that such people rode around with the express purpose of enticing some poor person to attack them. Then, if I understand KT (2004), that ride would constitute a crime. If they did not at all consider the possibility that poor people would look upon their very existence as a provocation, then, in my *reductio*, KT would again be obligated to consider these rich people as criminals.

7. I personally consider people such as Barbra Streisand, Hilary Clinton, Al Gore, Michael Moore and George Clooney, on the left, and George Bush I and II, Donald Rumsfeld, Richard Cheney and William F. Buckley on the right despicable. Their very existence is an open sore as far as I am concerned. Thus, they constitute an incitement to me. I am tempted toward blowing up every time I as much as think of them, let alone view them on TV. According to KT, they are criminal inciters for this reason alone if they intentionally acted in a manner that would thus arouse me. I find this highly problematic.

8. Libel, slander and blackmail can be considered incitements. They can arouse their "victims" to fever pitch. If so, these acts are causally related to subsequent crimes. If the perpetrators of these human actions foresaw this result, welcomed it, acted in this manner to bring it about, then, they would have to be considered criminals by KT. Yet, there is a libertarian literature attesting to the fact that under the libertarian legal code, libel, slander and blackmail would all be legal.[23]

9. KT are authors. They wrote KT (2004).[24] It featured the courier scenario, where murder took place. Some unbalanced person might have read that, and, caught up in a causal web created by KT, commit a "copy cat" crime. Now, it would be grotesque to even contemplate the idea that KT wrote their article with this sort of thing in mind. But it is not at all unreasonable to suppose that the "reck-

[23] For blackmail, see Block, Kinsella and Hoppe, 2000; for libel and slander, Rothbard, 1998, 126–128.

[24] among many other publications which we for the moment shall ignore; virtually any of them would be subject to this objection.

lessly" ignored this possibility. If so, then, according to my *reductio*, they are "guilty" of incitement. If so, they are *estopped* from the writing of it in the first place. Since it is now long after the fact, they ought, either, to turn themselves in to the legal authorities as the criminals they are, or, eschew KT (2004).

IV. CONCLUSION

I have criticized KT's use of the Austrian concept of human action, as opposed to behavior for analysis of criminality. Does that mean that no praxeological concepts can be of use in this context? No. I would opt for subjectivism instead. It, too, has a long distinguished pedigree in Austrian praxeological economics (Barnett, 1989; Buchanan, 1969; Mises, 1998). It seems to me it is more fitting than human action, in that it is compatible with the idea of arm's length and continuums we have developed in the present paper.

Let me summarize my objections to KT's (2004) analysis. They place far too much weight on causation, and far too little on individual responsibility.[25] Even if my purpose of writing the present essay was to create havoc, by intentionally using other people (the weak minded) to this end, I am guilty of no crime. This directly confronts their thesis. But more. In writing this, I "frankly didn't give a damn" about what weak minded people might be led to do as a result. If I

[25] This brilliant statement by Thomson (1991, 293–294) is very much on point. She states: "It is a very odd idea . . . that a person's intentions play a role in fixing what he may or may not do. What I have in mind comes out as follows. Suppose a pilot comes to us with a request for advice: 'See, we're at war with a villainous country called Bad, and my superiors have ordered me to drop some bombs at Placetown in Bad. Now there's a munitions factory at Placetown, but there's a children's hospital there too. Is it permissible for me to drop the bombs?' And suppose we make the following reply: 'Well, it all depends on what your intentions would be in dropping the bombs. If you would be intending to destroy the munitions factory and thereby win the war, merely foreseeing, though not intending, the deaths of the children, then yes, you may drop the bombs. On the other hand, if you would be intending to destroy the children and thereby terrorize the Bads and thereby win the war, merely foreseeing, though not intending, the destruction of the munitions factory, then no, you may not drop the bombs.' What a queer performance this would be! Can anyone really thing that the pilot should decide whether he may drop the bombs by looking inward for the intention with which he would be dropping them if he dropped them?

"Here is Alfred, whose wife is dying, and whose death he wishes to hasten. He buys a certain stuff, thinking it a poison and intending to give it to his wife to hasten her death. Unbeknownst to him, that stuff is the only existing

can flatter myself by putting myself in the same category as Spielberg, I was only after the truth of the matter, and let the chips fall where they may in this regard. My *reductio* is that by admitting this, I would be a criminal in the view of KT, did they only incorporate negligence and reckless disregard into their analysis, and I do not see how they can logically fail to do so.

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cure for what ails his wife. Is it permissible for Alfred to give it to her? Surely yes. We cannot plausibly think that the fact that if he gives it to her he will give it to her to kill her means that he may not give it to her. (How could *his* having a bad intention make it impermissible for him to do what *she* needs for life?)"

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