

# AUSTRIAN LAW AND ECONOMICS: THE CONTRIBUTIONS OF ADOLF REINACH AND MURRAY ROTHBARD ON LAW, ECONOMICS, AND PRAXEOLOGY

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NORMATIVE AND POSITIVE

The title of this symposium is Austrian Law and Economics: The Contributions of Adolf Reinach and Murray Rothbard. The second part of this title is not at all problematic; these two authors have made many and important contributions to both law and economics.<sup>1</sup> It is therefore of great interest to compare and contrast their eerily similar—but far from identical—ways of proceeding.

But the first conjunction, e.g., “Austrian law” does present difficulties, at least at the outset. After all, if “Austrian” means anything in common academic parlance, it refers not to law, nor yet to a nation in Europe, but to *economics*.<sup>2</sup> And this subject matter constitutes of course a value free, (Rothbard 1973b, pp. 35-39 and Block 1975, pp. 38-41) or positive science. Law, in sharp contrast, is anything but positive<sup>3</sup>; rather, it is very much of a normative enterprise. We have it on good authority,<sup>4</sup> that never the twain shall meet: specifically, that

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<sup>1</sup>See Reinach (1998 and 1983) and Rothbard (1990 and 1977a).

<sup>2</sup>The major contributions to Austrian economics include Rothbard (1962) and Mises (1957, 1998, 1971, 1981).

<sup>3</sup>With due apologies to the legal positivists.

<sup>4</sup>Hume (1966, pp. 177-78):

In every system of morality which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden, I am surprised to find that

from positive premises no normative conclusions at all can be drawn; or, alternatively, that one cannot derive an “ought” from an “is.” Since economics pertains to the realm of the “is,” and law to the “ought,” this translates into the denial that from economics one can derive legal principles. If so, then there can be nothing which can be described by “Austrian law”; any such terminology must refer not merely to a null set, but to an actual contradiction in terms.

Mises thought he had found a way around this difficulty, but ultimately he did not. In his view, it was reasonable to deduce what the law ought to be from purely economic considerations, provided only that we take as a given the utility of the normal or average man, who is in this case the typical advocate of government intervention, as the lodestar of our analysis.

He stated:

An economist investigates whether a measure *a* can bring about the result *p* for the attainment of which it is recommended, and finds that *a* does not result in *p* but in *g*, an effect which even the supporters of the measure *a* consider undesirable. If the economist states the outcome of his investigation by saying that *a* is a bad measure, he does not pronounce a judgment of value. He merely says that from the point of view of those aiming at the goal *p*, the measure *a* is inappropriate. (Mises 1998, p. 879)

But Rothbard offers a devastating refutation of this entire notion, after rejecting on praxeological grounds that the economist can know what is in the mind of the advocate of interventionism insofar as they are not demonstrated (Rothbard 1977b) by economic action:

Thus, Mises, *qua* economist, may show that price control (to use his example) will lead to unforeseen shortages of a good to the consumers. But how does Mises know that some advocates of price control do not *want* shortages? They may, for example, be socialists, anxious to use the controls as a step toward full collectivism. Some may be egalitarians who prefer shortages because the rich will not be able to use their money to buy more of the product than poorer people. (Rothbard 1998, p. 208)

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instead of the usual copulations of propositions, is, and is not I meet with no proposition that is not connected with an ought or ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this deduction from others, which are entirely different from it. [T]his small attention would subvert all the vulgar systems of morality, and let us see that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason.

I owe this cite to Bill and Shirley Friedman.

A second Misesian attempt to rule out of court on purely positive grounds such interventions as price controls stems from his notion that there is a harmony of all rightly understood interests on the part of all people, where “rightly understood” means “long run” (Mises 1998, p. 670). But Rothbard’s critique of this foray is also devastating. He plaintively asks: “But what about the high-time preference folk, who prefer to consult their short-run interests? How can the long-run be called ‘better’ than the short-run; why must ‘right understanding’ necessarily be the long-run?” (Rothbard 1998, p. 209).

So where are we in our inquiry as to the legitimacy of the concept “Austrian Law”? If Rothbard is correct in rejecting Mises’s attempt to create a legal ethic based on nothing more than economic considerations, and he is, then the “Austrian Law” part of the symposium “Austrian Law and Economics: The Contributions of Adolf Reinach and Murray Rothbard” would appear to be in need of jettisoning. There can *be* no such thing as Austrian law, since the “Austrian” part of this concept is a positive one, and the “law” aspect a normative one, and the two are like oil and water. Worse, combining the two is akin to adding up 2+2 and coming up with something other than 4.

Fortunately, there is a way out of this conundrum. It has been provided by Hoppe, with one of the most insightful analyses in all of political philosophy, for he has done nothing less than bridge the gap between the “ought” and the “is” in total and utter refutation of the Humean claim that this cannot be done. I take the liberty of quoting in its entirety the rather long passage where he pulls off this minor miracle:

First, it must be noted that the question of what is just or unjust—or, for that matter, the even more general one of what is a valid proposition and what is not—only arises insofar as I am, and others are, capable of propositional exchanges, i.e., of argumentation. The question does not arise *vis-à-vis* a stone or fish, because they are incapable of engaging in such exchanges and of producing validity claiming propositions. Yet if this is so—and one cannot deny that it is without contradicting oneself, as one cannot argue the case that one cannot argue—then any ethical proposal, as well as any other proposition, must be assumed to claim that it is capable of being validated by propositional or argumentative means. . . . In fact, in producing any proposition, overtly or as an internal thought, one demonstrates one’s preference for the willingness to rely on argumentative means in convincing oneself or others of something; and there is then, trivially enough, no way of justifying anything, unless it is a justification by means of propositional exchanges and arguments. But then it must be considered the ultimate defeat for an ethical proposal if one can demonstrate that its content is logically incompatible with the proponent’s claim that its validity be ascertainable by argumentative means. To demonstrate any such incompatibility would amount to an impossibility proof; and such proof would constitute the most deadly smash possible in the realm of intellectual inquiry.

Secondly, it must be noted that argumentation does not consist of free-floating propositions, but is a form of action requiring the employment of scarce means; and furthermore that the means, then, which a person demonstrates as preferring by engaging in propositional exchanges are those of

private property. For one thing, obviously, no one could possibly propose anything, and no one could become convinced of any proposition by argumentative means, if a person's right to make exclusive use of his physical body were not already presupposed. It is this recognition of each other's mutually exclusive control over one's own body which explains the distinctive character of propositional exchanges that, while one may disagree about what has been said, it is still possible to agree at least on the fact that there is disagreement. And obvious, too: Such property right in one's own body must be said to be justified *a priori*. For anyone who would try to justify any norm whatsoever would already have to presuppose an exclusive right to control over his body as a valid norm simply in order to say "I propose such and such." And anyone disputing such right, then, would become caught up in a practical contradiction, since arguing so would already implicitly have to accept the very norm which he was disputing.

Furthermore, it would be equally impossible to sustain argumentation for any length of time and rely on the propositional force of one's arguments, if one were not allowed to appropriate next to one's body other scarce means through homesteading action, i.e., by putting them to use before somebody else does, and if such means, and the rights of exclusive control regarding them, were not defined in objective, physical terms. For if no one had the right to control anything at all except his own body, then we would all cease to exist and the problem of justifying norms—as well as all other human problems—simply would not exist. Thus, by virtue of the fact of being alive then, property rights to other things must be presupposed to be valid, too. No one who is alive could argue otherwise.

And if a person did not acquire the right of exclusive control over such goods by homesteading action, i.e., by establishing some objective link between a particular person and a particular scarce resource before anybody else had done so, but if, instead, late-comers were assumed to have ownership claims to things, then literally no one would be allowed to do anything with anything as one would have to have all of the late-comers' consent prior to ever doing what one wanted to do. Neither we, our forefathers, nor our progeny could, do or will survive if one were to follow this rule. Yet in order for any person—past, present or future—to argue anything it must evidently be possible to survive then and now. And in order to do just this property rights cannot be conceived of as being "timeless" and non-specific regarding the number of people concerned. Rather, they must necessarily be thought of as originating through acting at definite points in time for specific acting individuals. Otherwise, it would be impossible for anyone to first say anything at a definite point in time and for someone else to be able to reply. Simply saying, then, that the first-user-first-owner rule of libertarianism can be ignored or is unjustified, implies a contradiction, as one's being able to say so must presuppose one's existence as an independent decision-making unit at a given point in time.

And lastly, acting and proposition-making would also be impossible, if the things acquired through homesteading were not defined in objective, physical terms (and if, correspondingly, aggression were not defined as an invasion of the physical integrity of another person's property), but, instead, in terms of subjective values and evaluations. . . .

By being alive and formulating any proposition, then, one demonstrates that any ethic except the libertarian private property ethic is invalid. Because if this were not so and late-comers were supposed to have legitimate claims to things or things owned were defined in subjective terms, no one could possibly survive as a physically independent decision-making unit at any given point in time, and hence no one could ever raise any validity claiming proposition whatsoever. . . .

As regards the utilitarian position, the proof contains its ultimate refutation. It demonstrates that simply in order to propose the utilitarian position, exclusive rights of control over one's body and one's homesteaded goods already must be presupposed as valid. And, more specifically, as regards the consequentialist aspect of libertarianism, the proof shows its praxeological impossibility: the assignment of rights of exclusive control cannot be dependent on the—"beneficial" or whatever else—outcome of certain things; one could never act and propose anything, unless private property rights existed already prior to any later outcome. A consequentialist ethic is a praxeological absurdity. Any ethic must, instead, be "aprioristic" or "instantaneous," in order to make it possible that one can act here and now proposing this or that, rather than having to suspend acting and wait until later. Nobody advocating a wait-for-the-outcome ethic could be around anymore to say anything if he were to take his own advice seriously. And to the extent that utilitarian proponents are still around, then, they demonstrate through their actions that their consequentialist doctrine is, and must be, regarded as false. Acting and proposition-making requires private property rights now, and cannot wait for them to be assigned only later.<sup>5</sup> (Hoppe 1993, pp. 204-07)

Given, then, that one cannot upon pain of self-contradiction even assert a proposition contrary to the libertarian law, let alone violate it,<sup>6</sup> and that this "first-user-first-owner rule" has been established through praxeological considerations, it is fair to characterize the perspective adumbrating these findings, and their logical implications, as "Austrian law."<sup>7</sup> This being the case, it

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<sup>5</sup>The point is, based on purely positive considerations, e.g., that arguments cannot be made without use of vocal chords, etc., and at least a place to stand, Hoppe derives the conclusion that it is a logical contradiction to maintain that people cannot have property rights in persons. As it happens, Hoppe does not agree with me in my interpretation of his argument from argument (personal correspondence). However, he should have no more standing than anyone else in this latter debate (he asserts no such special standing). The idea stands on its own. Just because Hoppe was the originator of it, gives him no priority over anyone else in its interpretation.

<sup>6</sup>We are "estopped" from doing so. On this see Kinsella (1997; 1996a; 1996b; 1992, p. 61).

<sup>7</sup>Suppose Hoppe (1993) had not written; or, posit that I am incorrect in my interpretation of his argument from argument as bridging the gap between "ought" and "is." Could there then be any such thing as "Austrian law"? There could not be, in any fully rigorous sense. But there still could be such an entity given an informal interpretation. For example, Austrian law would constitute the legal theories of Austrian economists when they wrote, not as economists but as legal theoreticians, about the law. Since most Austrian

remains for the present paper to flesh out the deductions that can be made from these principles, and to relate them to the work of Reinach and Rothbard.<sup>8</sup> Specifically, I shall attempt to use the one as a foil with which to shed light upon, and broaden, the other. More generally, I shall compare and contrast the Austrian libertarian philosophy of Rothbard with that of Reinach.

#### A COMPARISON

At the outset, there are strong similarities. Each is an exemplar of what for want of a better word can be characterized as the treatise or edifice “style.” Says Rothbard in this context:

One of the unhappy casualties of World War I, it seems, was the old fashioned treatise on economic “principles.” Before World War I, the standard method, both of presenting and advancing economic thought was to write a disquisition setting forth one’s vision of the corpus of economic science. A work of this kind had many virtues wholly missing from the modern world. . . . The author did not limit himself, textbook-fashion, to choppy and oversimplified compilations of currently fashionable doctrine. For better or worse, he carved out of economic theory an architectonic—an edifice. (1962, p. vii)

Both of these scholars, certainly in their longer prodigious works, but even in their shorter articles, indulged in this style.

Another similarity is that in each case the reader is presented with an argument which proceeds in a deductive manner. Starting with a few basic premises—whether in economics or law—each of them draws conclusions based solely on the laws of logic and upon the implications of the premises themselves. Nor is either of them to be considered an empiricist, in either of these two fields. Legal positivism, the doctrine that law is correct insofar as it comports with the views of legislators is equally anathema to both scholars. Similarly, in economics, each uses the hypothetical deductive method, and draws conclusions that are attempts to explain and understand situations pertaining to the real world. It cannot possibly be overstated how rare indeed are these characteristics in the scholarship of law and economics separately, and

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economists are libertarian, Austrian law would be, in effect, libertarian law. In similar vein, “Chicago law” could be seen as the legal writing of people such as Coase, Demsetz, and Posner, the writings of members of the Chicago School of economics when discussing legal issues. Chicago law, too, in this understanding, would be a normative discipline; Chicagoans give advice to judges, and this holds true even if their economic theories are purely value free. Since most Chicago economists are socialists of one variety or another, Chicago law and economics would be in effect legal socialism.

<sup>8</sup>For a work which in some ways parallels that of these two authors, see Blanshard (1964).

of law and economics as one specialized field. This, despite several differences to be discussed below, is a strong argument in favor of the contention that Rothbard and Reinach have much in common.

Where do the two scholars diverge? First, a relatively minor matter of presentation. Rothbard is pellucidly clear. Say what you will of him, and his critics were sharply condemnatory, but not a one of them ever did or could ever deny this. The same cannot be said of Reinach, in contrast, at least in the view of the present author. Perhaps it is the fact that Reinach did not write in English; perhaps it is due to the fact that his very tight prose style calls out for examples, cases in point, which are often not provided;<sup>9</sup> but at the end of the day it cannot be said that this author is an “easy read.” In what follows we consider several other incompatibilities between them.

### *1. Promises*

For Rothbard, while it may indeed be morally required to adhere to one’s promises, this is certainly nothing required by any just law (Rothbard 1998, pp. 133–43). This is because legislation compelling people to keep their promises violates the libertarian code of aggression being allowed only against those who have first aggressed. The point is, the promise breaker commits no aggression or theft against anyone else or his property. Therefore, to punish him in any way is to visit violence on a person who has not himself done so. For there to be theft, there would have to be something stolen. For example if there were consideration involved, then the attendant “promise” would be actionable. Suppose you sell me a chess set on credit, and I “promise” to pay you in a week. When that date arrives, I renege. Here, I have in effect stolen your chess set, and must be made by law to right this wrong. However, this is not merely a promise to pay in the future, but one on which I am contractually obligated to carry through.

Reinach’s analysis of promises is rather different, and much inferior from an Austrian or in effect libertarian point of view. For example, he states right at the outset of his in depth analysis of the subject: “promising produces a unique bond between the two persons in virtue of which the one person . . . can claim something and the other is obliged to perform it or grant it.”<sup>10</sup> This would appear to imply that promises should be legally binding. This author would appear to lessen the force of this claim with his reference to “the case where I make the resolution to do something for another and where I also inform him that I have made this resolution: I have thereby surely given no promise” (Reinach 1983, p. 17). All this does, however, is to distinguish a resolution from

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<sup>9</sup>Reinach’s own translator (John F. Crosby) states as follows (Reinach 1983, p. 48, note 10): “Reinach’s extremely concentrated train of thought here becomes fully clear if we give an example.” This is not to claim that Reinach gives no cases in point; he certainly does. See pp. 102, 109 for instance. It is merely to suggest that this author’s presentation is highly intense, not to say opaque, and that more examples would have helped.

<sup>10</sup>Reinach (1983, p. 8). He further states on p. 15: “A ‘cause’ which can generate claim and obligation is the act of promising.”

a promise. The former is not legally binding in his view, but this distinction does not mean the latter is not.<sup>11</sup>

## 2. *The State*

In the view of Reinach, “The state is obliged to certain ways of acting” (Reinach 1983, p. 12). While certainly Mises would find no fault with this, it is equally sure that Rothbard would, with perhaps the one exception that the state is obliged only to disband, and to compensate its victims for its crimes against them. So sharp a contrast must count in any calculation of the similarities and differences among and between Rothbard and Reinach.

## 3. *The Self*

Reinach takes the position that it is logically incoherent to forgive oneself:

There are experiences in which the performing subject and the subject to whom the act is related can be identical, there is a self-esteem, a self-hatred, a self-love, etc. But for other experiences it is essential that the subject to whom they are directed be another person. . . . I can for instance not envy myself, cannot forgive myself.

Although to the best of my knowledge Rothbard has not pronounced on this subject,<sup>12</sup> it does not seem obvious to me that people are logically prevented from forgiving themselves. Indeed, to the contrary, it would appear that internal well-being might be maximized by such a mental decision. The alternative, after all, to not forgiving oneself is to continue blaming oneself. And while, perhaps, a modicum of self-blame might conceivably spur an individual on to fewer mistakes, an excess of it might be injurious. Self-forgiveness, then, rather than being impossible seems reasonable and healthy. Reinach (1983, p. 21) himself refers to “a purely interior social act,” and it is difficult to see why self-forgiveness would not qualify under this rubric.

## 4. *Transitivity*

Transitivity, of course, does not find much favor in Austrian economic circles. If I prefer X to Y, and Y to Z, there is absolutely no reason why I should also rank X over Z when presented with these latter two options. The neo-classical supposition that I should place X and Z in this order stems from their mistaken notion that values are somehow fixed and unchanging, and exist in the never never world of indifference curve analysis apart from actual human action. For the Austrians each of these choices, between X and Y, Y and Z, and

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<sup>11</sup>There is, however, at least one point in which he appears to qualify his view of promises in a more Austrian libertarian direction. Reinach (1983, p. 110) states: “The power of producing through enactments legal effects in other persons has first to be conferred by these persons. Here too the act of promising proves to be insufficient.”

<sup>12</sup>Any such statement must be made with extreme caution, given the sheer quantity of his writings. See in this regard Rothbard’s list of publications, available at [www.mises.org](http://www.mises.org).

X and Z all take place at different points of time. As such, there is absolutely no rule that the human actor cannot change his preference rankings sometimes, often, or even every time he chooses between such pairs of options.

But this is economics. What of the libertarian, or law part of our Austrian Law and Economics considerations? Consider Reinach's statement in this regard: "We put forward the apriori law that the claim can only arise in the person of the addressee. It is apriori impossible that a person to whom the promise is not directed should acquire a claim from it" (Reinach 1983, p. 31). But suppose the following: A promises to do something for B; B by some coincidence promises to do exactly the same thing for C. Forget about legal obligation for the moment. Both Rothbard and Reinach each buy into the notion of the moral obligation of promise keeping. But if A is morally obliged to do something for B, and B for C, why then cannot B transfer to C that which is owed to him by A? A (morally) owes B a pencil; ditto for B, to C. It would appear that transitivity does apply here: A owes the pencil to C, even though he only committed his promise to B, not C. At the very least a *prima facie* case can be made out in this regard, in the absence of any reason why it should not apply.

But consider an objection. A hates C and would never in the world promise to give the latter a pencil, or anything else for that matter. It appears to be harsh on A to (morally) force him to give the pencil to C, his sworn enemy. Nevertheless, the pencil will end up in C's hands in any case, whether A gives it to him directly, or indirectly through the intermediation of B, who, under our assumptions, has promised an identical pencil to C.

Perhaps the difficulty has to do with morality, that slippery subject. If A were legally obligated to give a pencil to B, and B to C, and B were somehow to drop out of the picture (let us suppose he dies) then A would be forced by any law respecting private property rights to give the pencil directly to C, no matter how much he detests him.

### 5. Property

Reinach starts out his analysis of this concept in a manner fully compatible with that of Rothbard. In Reinach's view, "Among the rights over things the jurist usually selects out one as the most important and in a certain way as the foundational one: property" (Reinach 1983, p. 53). And again: "The bond between a person and the thing which he owns is a particularly close and powerful one" (1983, p. 55). If there is anything that characterizes the Rothbardian philosophy it is the importance, nay, the centrality, of private property rights. So the two scholars seem to be very much in accord with one another on this issue.

But what, then, are we to make of the following claim by Reinach: "A thing can be in my power without belonging to me. It can belong to me without being in my power" (p. 54). Unless Reinach is relying upon idiosyncratic definitions of "belong" or "power" this sentiment would not at all be in keeping with what I take to be Rothbard's correct perspective. For surely if this bicycle

belongs to me, then I should have the legitimate legal power to dispose of it as I wish (while of course respecting the property rights of all other people; I cannot throw this bike at you, or litter your lawn with it) and if not, not.

This attempt to separate ownership of property from control over it was pithily rejected by Wittgenstein. According to Norman Malcolm (Malcolm 1958, pp. 30–31),<sup>13</sup> Wittgenstein “gave” him some trees, provided that he did not do anything to them, nor prevent the “previous” owners from dealing with them as they wished, up to and including selling them. The point is, if you can’t do anything to or with your property, nor prevent others from doing so, then there is no meaningful sense in which you really own it. States Rothbard: “ownership signifies range of control” (Rothbard 1998, p. 45).

Another difficulty with Reinach on property is that he appears to take the position that it cannot be divided, even with the consent of the owner. He states: “a thing continues to belong to a person in exactly the same sense, however many rights he may want to alienate; it makes no sense at all to speak of a more or less with respect to belonging” (Reinach 1983, p. 56). And again: “This (property) relation remains completely intact even if all those rights have been granted to other persons” (ibid.). On the other hand, seemingly in direct contradiction of these two statements we read on the same page: “It lies in the essence of owning that all rights belong to the owner except insofar as they belong to another person as a result of some acts performed by the owner” (ibid.). This, of course, is fully compatible with the libertarian view of Rothbard that property can with the owner’s agreement be sold in part to others. Whereupon, in the tradition of the broken field runner, Reinach again reverses course, also on the very same page, and asserts: “One sometimes speaks of divided property. Now nothing is clearer than that property itself, the relation of belonging, cannot be divided, just as little as the relation of identity or similarity” (ibid.).

It is thus difficult to discern Reinach’s true position on the divisibility of property. Suffice it to say that *if* he takes the position that the owner can sell at his discretion part of an apple, or part of a bicycle, he is on the correct Rothbardian path, and if he denies this, he is not.<sup>14</sup>

In sharp contrast, if there are divergences between Rothbard and Reinach on property itself, it would appear that they are in full accord with regard to its origins. The latter speaks of the importance of “first occupation” in this context, and refers to the “clearer case in which someone produces (*schaffen*) a thing out of materials which have never belonged to anyone. Here it seems

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<sup>13</sup>I owe this citation to Michael Levin.

<sup>14</sup>Reinach (1983, p. 59) mentions without demur “the hereditary right to maintain a building on the property of another.” No such right would be valid in (Austrian) libertarian law. If I own the land, and your building happens to be sitting on it, either you must sell it to me or remove it from my land. See on this Rothbard (1998, p. 59).

quite obvious that the thing from its very beginning belongs to the one who produced it” (Reinach 1983, p. 73). A clear parallel can be found in Rothbard:

Moreover, if a producer is *not* entitled to the fruits of his labor, who is? It is difficult to see why a newborn Pakistani baby should have a moral claim to a quotal share of ownership of a piece of Iowa land that someone has just transformed into a wheatfield—and vice versa of course for an Iowan baby and a Pakistani farm. (Rothbard 1973a, p. 35)

### 6. Conflict with Positive Law

Although perhaps only a stylistic difference, the two scholars exhibit altogether different attitudes when their analysis deviates from the mainstream, or the accepted norm about extant legislation, or from positive law. To Reinach, this would appear to be a matter of concern, as witness his attempts to deflect this possible claim against him in a context where there is a patent divergence between it and his own views: “We can, therefore, not speak of a real contradiction between our essential laws and the propositions of the positive law” (Reinach 1983, p. 104). In sharp contrast, Rothbard exhibits no such sentiment. His analysis of the legal system is his own analysis, and if others agree, well and good. Indeed, throughout his writings are sprinkled generous citations to those of similar persuasion who came before him. But when there is a disagreement between the implications of his views and positive law, he is not at all behindhand in acknowledging this. Indeed, reading in between the lines, one might even suppose there is a certain level of joy when this occurs.

### 7. *Ex ante* Gains from Trade

States Reinach:

We can in general distinguish two kinds of essential laws: those which hold under all circumstances, and those which hold only if certain definite factors are absent. To the first class would belong for instance the law that color can only exist as joined in a certain way with extension. There are simply no circumstances at all which would refute the law that the fulfillment of desire is always accompanied by pleasure. This is certainly not gathered on the basis of repeated observations, rather just the contrary—the law which is grounded in the essence of fulfilled desire as such, underlies and guides our observation. (1983, p. 114)

So far so good. This sounds eerily similar to the praxeological point made by Mises and Rothbard pertaining to the necessity of positive gains from trade in the *ex ante* sense. But then in the very next sentence Reinach seems to take it all back:

The validity which it, considered by itself, has without exception, can however be blocked out under certain circumstances; thus it is possible that if the fruit which we want to taste turns out to taste excessively bitter, the experience of pleasure, which, considered in itself, accompanies an event

phenomenally characterized as fulfillment, does not come about. (Reinach 1983, p. 114)

Perhaps I misinterpret this author, but it appears that he is *not* taking the Austrian position that while trade *ex ante* must of praxeological necessity prove mutually beneficial (e.g., “fulfilling”) the same does not apply to utility *ex post*. Here, while perhaps in the case of most trades there are indeed mutual benefits, there is no logical requirement that this always be the case.

### 8. Punishment

It is Reinach’s view that the death sentence for murder can apply only to “a sane human being” who “intentionally and with purpose” (Reinach 1983, p. 8) commits this foul deed. There are difficulties here from the perspective of Austrian (libertarian) law. First of all, the concept of “sanity” is by no means as clear as might be imagined (Szasz 1979, 1961, 1963). Second, the Rothbardian theory of punishment is based on making the victim whole insofar as is possible (Barnett and Hagel 1977; Block forthcoming and 2003b; King 1980). In the case of murder, the obligation would revert to the heirs of the victim. But the point is, whether it is an insane man who commits this crime, or a baby, or a person by accident, still, a life was lost and therefore a life is owed. Perhaps in the case of the insane<sup>15</sup> or the underage perpetrator of this crime the person who must pay the extreme penalty is the relevant guardian, but paid it must be, if libertarian punishment theory is to be operationalized.

In some variants of libertarian punishment theory the penalty visited upon transgressors is “two teeth for a tooth” (Rothbard 1992, p. 94 n. 6.; Block 1999, pp. 37-88; Whitehead and Block forthcoming; Block 2003a, pp. 39-62). plus the costs of capture, plus consideration for fright, pain, and suffering. This might mean that if A steals a car from B, A owes B not only the car he took, but, also, an additional automobile, plus these other punishments. One compromise between the Rothbardian and Reinachian positions might be to reduce this penalty to only one tooth for a tooth, in the cases of people deemed not fully responsible for their actions. This would amount to compensation, but not punishment. The compromise might suffice in the case of a stolen auto, but it is difficult to see how it would do much good to the insane murderer. He would still owe one life to his victim, instead of two.

If people were like cats, and had nine lives, then this compromise would imply a difference between how the sane and insane murderer are treated. The former would have to give up two lives, etc., while the latter would be penalized only one of these nine. Of course, at present, where man and feline diverge in this capacity, this is a distinction without a difference.

It cannot be denied that it sounds harsh to put to death an insane person. In some sense, it will be argued, the murder he committed was not really his

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<sup>15</sup>On the anti-Szaszian assumption that this is a coherent concept.

“act.” He is incapable of acting in any rational manner,<sup>16</sup> and, therefore, should not be held responsible for what he cannot volitionally control. But suppose we had available to ourselves a machine that could transfer the life out of one person, and into the body of another, who is now dead.<sup>17</sup> Then, critics of putting to death insane murderers would be faced with a dilemma. For on the one hand we would have the body of the dead victim, and on the other, the aforesaid insane murderer, live as live can be. There is only one life to be had, but two persons who might emerge from our justice system intact (or “re-entacted”). When put in so stark a manner, it is clear that if anyone deserves to live, it is the former, not the latter. Yes, the insane murderer is innocent, in some sense. But this goes in spades for the person<sup>18</sup> victimized by him. After all, who is *less* responsible for this violation? But if justice consists of putting both bodies into this machine, flipping the switch, and transferring the life out of the live insane murderer and into the dead body of his victim, then the life of the former is forfeit. It is not unjust to kill him.

To return to reality for a moment, we of course do not have any such machine. Yet, through the use of it, we have proven that the (insane) murderer is no longer the proper owner of his life. Who, then, is? Obviously, the heirs of the victim. They would be justified in using him in what ever manner they wished: forgiving him, enslaving him, killing him.

### 9. Incitement

Another divergence between Rothbard and Reinach emerges insofar as “instigation” (Reinach 1998, p. 11) or “incitement” is concerned. States Rothbard about the latter:

[It] can only be considered a crime if we deny every man’s freedom of will and of choice, and assume that if *A* tells *B* and *C*: ‘You and him go ahead and riot!’ that somehow *B* and *C* are then helplessly determined to proceed and commit the wrongful act. (Rothbard 1992, p. 105)

Reinach takes virtually the diametric opposite point of view, even using a similar illustration: “If, for example, *A* persuades *B* to murder *C*, then *A* is not . . . punished for willful murder; rather, he is punished for instigation” (Reinach 1998, p. 12).

In the libertarian view, incitement is no more (and no less) than free speech. Of course, this is to be sharply distinguished from *A* ordering *B* to kill *C*, or *A* and *B* to riot and kill a group of innocent people. This is not mere incitement, but rather part and parcel of the murderous activity, in much the same way, albeit more seriously, that driving the getaway car for bank robbers

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<sup>16</sup>I am proceeding *arguendo*, abstracting from what we learn from Szasz.

<sup>17</sup>(Block 2003c). I am inspired in this by the many wondrous science fiction machines used to illustrate libertarian principles invented by Nozick (1974).

<sup>18</sup>We are here abstracting from the possibility of punishing the keeper of the insane person.

makes one a member of the gang. Hitler and Stalin need never have murdered a single individual themselves; still, they are mass murderers, because they ordered and threatened that if others did not do their bidding and slaughter the innocents, then they would be killed. But neither of these two merely incited, or instigated.

#### *10. Trespass*

Then, too, the two philosophers offer competing views of trespass. Says Reinach,

someone returns to his house in which he has not lived for a long time, and which in the time of his absence was closed. In the strong belief that the house was empty he sets it on fire in order to collect the insurance claim. Yet a homeless person, who during the time of the absence of the house owner has made himself at home, dies in the fire. The agent must here without doubt be punished for intentional fire arson which “caused” the death of a human being. (Reinach 1998, p. 27)

Rothbard takes a position incompatible with this: if a man

comes upon land that in any way bears the mark of a former human use, it is his responsibility to *assume* that the land is owned by someone. Any intrusion upon his land, without further inquiry, must be done at the risk of the newcomer being an aggressor. It is of course possible that the previously owned land has been abandoned; but the newcomer must not assume blithely that land which has obviously been transformed by man is no longer owned by anyone. He must take steps to find out. (Rothbard 1922, p. 65)

There may, conceivably, be some excuse for a man assuming that a bit of land which has fallen into wilderness has never been owned. But certainly not in the case of a house, which must of empirical necessity have been created and thus homesteaded by someone. Nor did the homeless person of Reinach’s example patently take any steps to determine if the property in question had been abandoned. In other words, this homeless person is himself a trespasser, an aggressive violator of property rights. It is not the responsibility of the rightful homeowner to determine if there are stowaways on his property. He can torch it on his own recognizance. (Of course, if in so doing he is cheating the insurance company, he is of course guilty of fraud. But not of murder.)

#### *11. Intentional Bringing About*

Under this heading Reinach considers a spate of cases (Reinach 1998, pp. 31–41), theme and variation on the supposition that A does something evil but relatively minor to B, which ends up in the demise of the latter. For example, sends him into the woods where he is struck by lightning, assaults him and then he dies while under convalescence, etc. Many different subcases are generated by assuming either that A somehow knows of the ultimate death facing his victim, thinks it possible, merely dreams it, etc.

How might such cases be analyzed utilizing an Austrian law and economics perspective? There are two key elements here. First, for A to be found guilty of murder which comes about most indirectly, he must first be clearly guilty of at least a minor crime. For example, if A orders B to stand under a tree at the point of a gun, whereupon B is struck by lightning, this would be a *prima facie* case for a murder verdict against A, whether A expects the lightning, thinks it possible, probable, or only dreamed about it. On the other hand, if A merely “sends” B into the forest at which point B perishes from lightning, A is innocent of all charges; this is because merely “sending” someone to do one’s bidding, as one might do with an employee or a servant, with the agreement of the latter, is no crime, not even a minor one. If it later turns out that this was a particularly dangerous place, that is the fault of B, not A, even if A somehow expected it.

Second is the principle that the criminal takes his victim as he finds him. Suppose that A pulls a gun on B and demands his money, or commits but a slight physical assault and battery upon him. Unbeknownst to A, B has a heart condition and dies as a result. Even though an ordinary victim would be unlikely in the extreme to perish from such treatment, still, under libertarian law A should be held responsible for this capital crime.

I am here interpreting “send” as an innocent act. The difficulty with this term is that it is somewhat ambiguous with regard to whether or not it violates the libertarian axiom of nonaggression. A similar analysis applies to “agitation” as in “B is very sick and A knows that any agitation can be dangerous for him” (Reinach 1998, p. 37). If the “agitation” constitutes even the slightest rights violation, then A is guilty of murder if B dies as a result of it. On the other hand, there are all sorts of “agitation” (e.g., engaging in free speech rights, strange hairdos, body piercing) which might also agitate unto death a weakened person. In all such cases A is innocent, and it is the responsibility of B to remove himself to a place free of such agitations.

Suppose A prays for the death of B, whereupon, B dies. Or suppose C sticks a pin into the heart of a doll fashioned in the likeness of D, and the latter’s life suddenly ceases. Currently, our legal system operates, properly, under the assumption that prayer and voodoo are inefficacious; they are without effect in the real world. Thus, if A prays for the murder of B, or D dies right after C performs voodoo activity against him, both A and B are innocent of any crime. Given our present scientific understanding, these deaths were entirely due to coincidence.

But posit that we lived in an alternative universe, a sort of Twilight Zone, where negative prayer and voodoo actually worked. Then, the law would properly take into account these new ways of killing, and deal with them in precisely the manner we now treat death by strangulation, or poison, or bullet.

## CONCLUSION

In the cases discussed above, where Rothbard and Reinach agree, I support both of them. Where they diverge, I am in accord with the former. Nevertheless, Reinach has made an important contribution to our analysis of law. His praxeological perspective is very much a complement to Austrian analysis. His examples alone are worth the price of admission. There is some overlap between the two legal philosophers, and that they approach these issues utilizing alternative analytic tools is of great interest to legal philosophy.

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