

INCHOATE CRIME, ACCESSORIES, AND CONSTRUCTIVE MALICE IN LIBERTARIAN LAW

BEN O'NEILL AND WALTER BLOCK*

This paper arose out of a previous enquiry to one of the authors regarding whether a particular set of actions which may constitute an inchoate crime under present positive law would also amount to a crime “under libertarian standards.” By an “inchoate crime” we refer to a crime that is incomplete in some respect (the exact definition is discussed further below). This paper is concerned with the application of libertarian moral-political theory to assess legal doctrines on inchoate crimes and related matters in criminal law. In particular, we examine the account of natural law provided by Rothbard (2002) and elaborated in O’Neill (2012), and use this to assess the legitimacy of various legal doctrines under a libertarian account of natural law. (Questions pertaining to the structure and practices of enforcement agencies under libertarianism, and the nature of the resulting court/police system, are beyond the scope of our present inquiry.)

The libertarian account of natural law à la Rothbard grounds laws in objective rules applying to the acquisition and transfer of property interests,

*Ben O’Neill (ben.oneill@hotmail.com) is a Lecturer in Statistics at the University of New South Wales (Canberra). Walter E. Block (wblock@loyno.edu) is Harold E. Wirth Eminent Scholar Endowed Chair and Professor of Economics at Loyola University (New Orleans). We have benefitted immensely from the comments of two very active and helpful referees. Any remaining infelicities and errors of commission and omission are entirely our own.

CITATION INFORMATION FOR THIS ARTICLE:

Ben O’Neill and Walter Block. 2013. “Inchoate Crime, Accessories, and constructive malice under Libertarian Law.” *Libertarian Papers*. 5 (2): 219-250. ONLINE AT: libertarianpapers.org. THIS ARTICLE IS subject to a Creative Commons Attribution 3.0 License (creativecommons.org/licenses).

including ownership interests in each person's own body. This account is libertarian in the sense that the rules of natural law are predicated on the non-aggression principle (NAP) —that no one is allowed to threaten or initiate the use of force against another person or his property. This primary directive of libertarianism has implications for law since it sets out the proper rules of property ownership and the use of force. It is also clear that extant doctrines of law may have a better or worse fit with this ethical principle of libertarianism. For example, criminal law prohibitions on the possession or consumption of narcotics would not be compatible with NAP and would therefore not be recognised as valid under a libertarian legal system, but prohibitions on murder and assault would. Similarly, the doctrine that a person can be *doli incapax* would still be recognised as a legitimate doctrine consistent with libertarianism, whereas the doctrine of *ignorantia juris non excusat* might be more in doubt.¹ In making these assessments we can be guided by an analysis of the objective moral and political doctrines of libertarian theory. This gives us an objective basis to assess the various doctrines of criminal law and compare them to “libertarian law.”

Though libertarianism gives an objective standard for grounding ideas in natural law, it is, of course, not a substitute for legal analysis. Libertarianism is a political philosophy, concerned with a general exposition of the issues pertaining to the use of force. This has implications for the proper content of law, but the overarching political doctrine does not supply details at this level. The libertarian principles of private property ownership and non-aggression are quite abstract, and indeed, they are probably too abstract to guide personal conduct in the kinds of complicated situations that arise in many legal cases. This is recognised in the theory of legal precepts in Barnett (1998), which refers to the fundamental principles of property and contract as “background” rights, and argues that more specific legal rights must be developed that conform to these background rights (p. 16). Barnett refers to the more specific legal rules as ‘legal precepts’ (pp. 94-95). The goal here is for the legal principles to be sufficiently specific to serve as an *operational* basis for the resolution of legal disputes.

¹ To be ‘doli incapax’ means that one is deemed incapable of forming the intent necessary to commit a crime or tort. It applies to children who are too young to understand the moral and legal responsibilities relating to law, and also applies in some limited cases to adults. The doctrine of ‘ignorantia juris non excusat’ holds that ignorance of the law is no defence against criminal prosecution, so that only a mistake of fact can vitiate the intention element of a crime.

As with many other legal systems, specific legal precepts in a libertarian society would arise, at least in part, through some consideration of the disputes arising in actual cases. Following the suggestion of Barnett, Kinsella (1999) notes that legal precepts could be developed by induction from consideration of actual cases (in the fashion of the common law), or by philosophising on the justness of outcomes in hypothetical cases (more in the fashion of Roman law) (pp. 61-62). However, he also notes that “[i]t probably makes little sense devoting scarce time and resources to developing legal precepts for imaginary or unrealistic scenarios. If nothing else, a common-law type system that develops and refines legal precepts as new cases arise serves as a sort of filter that selects which disputes (i.e., real, commonly-encountered ones) to devote attention to” (p. 62).

This means there is already a vast body of legal material and doctrine that libertarians can draw on to determine the legal precepts of a libertarian legal order. In many past legal cases, issues relating to property rights have been considered, not in the context of a libertarian society, but in the context of disputes where many of the same principles have been recognised. (And of course, there have also been many past legal cases where the principles applied have been very un-libertarian.) Hence, it should not be thought that libertarians would throw out all of the wisdom of legal investigation embodied in past legal judgements, especially in cases where libertarian principles have been applied.

“Libertarian law” would constitute a body of legal precepts of this kind, fleshing out the overarching libertarian principles of property and non-aggression. Some of this would no doubt derive from existing doctrines and case law, in cases where those doctrines and case laws are consistent with the overarching libertarian theory. Barnett (1998) has in fact argued that existing legal doctrines “...generated by a sound legal process may even be entitled to presumptive legitimacy” (p. 130). Proceeding in this manner, our goal in the present paper is to look at some doctrines of law that have arisen under the common law and see if they can be reconciled with the overarching principle of non-aggression. As suggested by Barnett and Kinsella, we do this by reference to an actual motivating example, taken from a real legal dispute.

1. The Notion of Criminality in Libertarian Law

Before explaining our motivating example, we give a brief explanation of a libertarian framework for assessing criminal law. This is included as background to our analysis, and we cannot attempt to justify this system here, beyond giving some heuristic explanation for how it fits together.

The notion of criminality in libertarian legal theory is based on the NAP (Rothbard, 2002, pp. 3-28). Under this libertarian political philosophy, it is a violation of rights to initiate the use of force against another person or his property (2002, pp. 51-62). This prohibition includes acts of fraud since these are predicated on an illegitimate property transfer, which render the subsequent use of the acquired property an aggression.

The non-aggression principle sets up the boundaries of ordered social conduct. It is accompanied by rules of title-transfer for property and these form the basis of property and contract law (see Kinsella, 1992). As with criminal law doctrines prevailing in many present legal systems, there is a distinction between an act done intentionally in defiance of the legal rights of a victim, and an act which accidentally violates these rights. An act is a *crime* if it is done in violation of the NAP and this breach is “intentional” in some reasonable sense that can be made clearer by analysis of the relevant legal precepts. The *actus reus* of a crime would refer to an act done in violation of the NAP, and the *mens rea* would refer to the state of mind necessary to show that the person had a “guilty mind.”

The basis for a finding of criminality in libertarian legal theory is the moral culpability of a person for intentionally breaching the non-aggression principle. The basis for the punishment of this breach is the doctrine of estoppel—a person who violates the rights of others through an intentional criminal act is estopped from asserting his own rights to a proportionate extent (Kinsella, 1992, 1996, 1997). This is because the performative contradiction involved in asserting one’s own rights while violating the rights of others is regarded as sufficient to nullify the former protection. As in equity, a person cannot rely on a protection which they have, through their own conduct, implicitly denied.

An analysis of the proper legal framework and doctrines for punishment of aggressors is set out in Rothbard (1982). He argues that criminal and tort law should both be subsumed under a single type of action which he designates as “enlarged tort law.” The basic idea of this approach would be to recognise that the rights of restitution and punishment against a criminal lie with the victim in a libertarian legal system, so that there is no need for a separation of criminal cases from tort cases—the applicant is the same in both. The legal rules for tortious relief and criminal punishment would still differ, according to the appropriate principles for each kind of

relief sought, but both could form part of the same action, since they would involve the same acts and the same parties.²

This combined tort/criminal legal action would grant the victim of aggression restitution from the aggressor on the basis of tort law and would also allow for punitive damages and other punishments exercisable by the victim in cases of intentional aggression.³ The system would be restitution-based in the sense that the wrongdoer would be expected to compensate for the harm done from their aggression. This would encapsulate cases of negligence and unintentional breaches of contract, where there has been an unintentional aggression against the property of the victim. In cases where there is intentional aggression the rules of estoppel might lead to further punishment, through loss of rights of the wrongdoer. In either case, the rights of restitution and punishment would lie with the victim of the aggression (or his assigns in the case of murder⁴). There would be no public prosecutor to take action on behalf of the State or “society” at large (Rothbard, 1982, pp. 91-93). The victim would be free to pursue or decline the grant of restitution or the exercise of punishment.

Standard philosophical arguments justifying the punishment of crimes fall into the categories of retribution, deterrence, incapacitation, and rehabilitation (Brown et al., 1996, p. 1333). In our approach to libertarian

² In some cases the aggression would be accidental and would give rise only to an application for restitution. In others, where there is an actual crime, including the relevant *mens rea*, the victim might also seek criminal punishment of the offender according to the doctrine of estoppel. An application for criminal punishment of the aggressor might require a higher standard of proof than an application for restitution for the aggression, and might also differ in other respects. Nevertheless, it is unlikely that this would require two separate actions, since the applicant and defendant in both cases would be the same, and the acts complained of are also the same.

³ In the case of strict liability restitution the victim would not need to prove any *mens rea* on the part of the aggressor. In the case of an application for criminal punishment, the victim would have to establish that a crime was committed, which would require the establishment of relevant *mens rea*.

⁴ In the case of murder a person would be free to assign the decision over prosecution and punishment to anyone they wish. As with other testamentary assignments, they would also be free to give instructions on this matter. This would include the ability for a person to assign his prosecution rights as a murder victim to an organisation known to pursue and punish criminals to the full extent of the law, etc. In this way the victim would still retain control over this matter, presuming he has had the foresight to think about this prior to his own death.

theory, the justification for punishment is an estoppel argument which can be regarded as having a natural form of retribution, deterrence, and incapacitation as its concomitant, with these accruing from the performative contradiction we have mentioned. Rehabilitation of the aggressor may be an indirect and salutary offshoot of this result, but this is not the justification for punishment. Indeed, according to Rothbard, “It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive* theory of punishment, a ‘tooth (or two teeth) for a tooth’ theory.”⁵ This approach is consistent with a general decline in the rehabilitative ideal in punishment theory and a corresponding rise in retributive theory.⁶

Genuine criminality in libertarian theory is assessed relative to the natural law derived from the foundational principles of the theory (O’Neill, 2012). Hence, it is not relevant that the positive law is inconsistent with this theory—our concern is not with positive law embodied in legislative instruments, but with natural law embodied in the principles of libertarianism. As a semantic matter it is proper to regard this as a more genuine form of law and criminality than that which refers to breaches of positive law (O’Neill, 2012; contra Hart, 1994; Austin, 1998; Dworkin, 1998). This gives us a solid basis on which to examine the legitimacy of various purported inchoate crimes, which will then allow us to make an assessment of the posited scenarios “under libertarian standards.”

In the Rothbardian view of libertarian law any violation of rights can be addressed directly by the victim or his assigns with appropriate retaliatory force. In order to avoid risks of overstepping this authority and committing an aggression, most victims would likely choose to address their grievances through an organised system of private courts designed to assess complaints and impose appropriate retaliatory force to extract restitution and punishment. This would be a tort-based system in which the victim (or his assigns) takes action against one or more aggressors to obtain restitution for the aggression and to impose any further punishment warranted by the estoppel doctrine.

⁵ See Rothbard (2002), p. 88n6. For more on this view of libertarian punishment, see Block (2003), (2004), (2006), (2009A), (2009B); Block, Barnett and Callahan, (2005); Kinsella, (1996); Olson, (1979); Whitehead and Block, (2003).

⁶ See Allen (1981) for discussion of the decline of retributive justifications of punishment.

2. A Motivating Example

The motivating example for this paper regards an incident in early 2012 when film-maker Spike Lee used the social-networking website Twitter to send a message to his fans that could be construed as an incitement to violence against accused killer George Zimmerman.⁷ (We will talk later about what constitutes genuine incitement. For now we use the term in an informal sense.) The incident was discussed briefly and with some trepidation by one of the present authors in Block (2012) but we pursue the legal questions relating to this kind of case in more detail here. To assess some important legal questions from the point of view of libertarian theory, we stipulate the following particulars, which are based on a useful embellishment of the facts of the Spike Lee case:

Person A wants violent physical harm⁸ to befall person B. To pursue this end without using violence himself, A communicates with a large body of people who are known to admire him (A) and hate B. A encourages these people to initiate violence against B and provides them with an address for B, which they previously did not have. His encouragement is somewhat vague and euphemistic: he tells them to “feel free to reach out and touch” B, implying a desire for at least some kind of physical assault on B. On the basis of this, person C takes this to mean that he should kill B. He visits the address provided to him by A with the intention of killing B. Let us suggest two possible scenarios that might result from these events:

Scenario 1: C visits the address and kills the person at that address, who is B.

Scenario 2: C visits the address and kills the person at that address, thinking him to be B. As it turns out, the supplied address is mistaken, and the person killed is person D, who has the same name as B, but bears no other relationship to him.

⁷ For relevant media coverage see Huffington Post (2012), Stableford (2012), CNN (2012), and Haque (2012). Zimmerman was prosecuted for the murder of Trayvon Martin and acquitted on grounds of self-defence.

⁸ It is important to couch this in the format of *physical* harm, rather than harm caused by some non-aggressive act. See Block and Hoppe (2011) for discussion. For, under libertarian legal theory, one is permitted to harm another in various ways that do not involve the initiation or threat of force. For example, X opens up a grocery next door to Y's grocery and this reduces the custom of the latter, thereby “harming” Y. Or, C marries D, thereby “harming” E, who also wanted to marry D.

Clearly C has committed murder under either of these two scenarios—he has caused the death of a person (B in the first scenario and D in the second), and has done so intentionally and without lawful excuse. Assuming evidence of the stipulated facts, this would be sufficient to establish the *actus reus* and *mens rea* for the offence and convict C of murder. This would also be accepted under libertarian standards, since murder is an unlawful aggression against a person. This is all clear and uncontroversial.

The question of interest is not whether C has committed any crime in these scenarios, for clearly he has. The question is whether or not A has committed a crime. And more generally, what is the libertarian view on the various inchoate crimes that might be at issue here?

An inchoate crime denotes an act (plus any relevant fault element) which is regarded as a crime despite the fact that it is only partial or incomplete in some respect. It is defined as “[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment” (Garner, 1999, p. 765). An inchoate crime is regarded as such even though the substantive crime being aimed at was not completed merely by the inchoate part—harm may not have been realised by that part, and if harm was realised, this must have been from something more than the inchoate aspect.

In order to provide a counterpoint to our discussion of libertarian theory, we begin by considering the legal doctrines that have prevailed under English common law in dealing with inchoate crime. English common law has recognised three categories of inchoate crimes: attempt, conspiracy, and incitement (Brown *et al.* 1996, pp. 1208-1210).⁹ In the first category, a person attempts to commit a substantive crime, but fails to execute the required act. In the second category, two or more people agree to commit a criminal act, but each person does not commit all the required acts of that crime himself. (It is the agreement itself which is potentially punishable, even if the agreement is never put into effect.) In the third category, a person incites another person (or persons) to commit a substantive crime, but does not participate in the substantive crime himself. (Again, it is the incitement which is potentially punishable, even if it does not succeed in inducing anyone to commit the substantive crime.) The doctrine of “merger” holds that the inchoate crimes of attempt and incitement merge into the primary

⁹ These former common law positions have now been codified into criminal statute in most jurisdictions, but the principles derive from the common law doctrines. The codification is embodied in a large number of state and federal legislation in various countries.

substantive crime if the latter can be proven, so that there is no “double jeopardy” (i.e., the person cannot be convicted of the primary crime plus the attempt). This does not hold for the inchoate crime of conspiracy, which is considered as a separate non-merging offence, as will be explained below.

In addition to these inchoate crimes, English common law has recognised various doctrines that extend criminal liability beyond the principal offender and the actual intended crime that occurred or might have occurred. In particular, the common law has recognised accessories to a principal offender, in cases where an accessory facilitates the crime of the principal in some way. The common law has also had a fault category of “constructive malice” for certain crimes, under which a person who is committing one crime is deemed to have the relevant *mens rea* fault element for another unintended crime.

In the two scenarios under consideration in this paper these inchoate crimes come into play by virtue of the fact that A does not personally kill B or D. Under libertarian law, the relevant question is which (if any) of these inchoate crimes should be recognised as actual crimes, and how this would apply to the posited situations. In both of these scenarios one might argue that A is in a conspiracy with C to kill B, that A incites C to kill B, or that A is an accessory to the principal C in his murder of B. In scenario 2 there is a further complicating factor, namely, that A is mistaken in the address he furnishes to C, and as a result, the person killed is not the person that A wished or intended to harm. This gives rise to additional questions about the required fault element for an offence by A, and brings into play the possibility of an inchoate crime of attempt or a crime based on “constructive malice.”

3. The Inchoate Crime of “Attempt”

Though libertarian theory strictly demarcates the concept of criminality by actual instances of aggression, this still allows some scope for application to unsuccessful attempts to commit crimes. The reason for this is cogently expressed by Rothbard (1982), who notes that “most unsuccessful attempts at invasion result nevertheless in ‘successful’ though lesser invasions of person or property, and would therefore be prosecutable under tort law.¹⁰ Secondly, even if the attempted crime created no invasion of property per se, if the attempted battery or murder became *known* to the victim, the resulting creation of fear in the victim would be prosecutable as an assault. So the attempted criminal (or tortfeasor) could not get away unscratched” (p. 92).

¹⁰ That is, under Rothbard’s “enlarged tort law.”

Rothbard cites examples from Barnett (1977), who points out that “...attempted murder is usually an aggravated assault and battery, attempted armed robbery is usually an assault, attempted car theft or burglary is usually a trespass” (p. 376).

Given a libertarian theory of punishment grounded in the notion of estoppel, it is sensible that the estoppel claim is raised whenever a person *attempts* to violate the NAP, even if they somehow fail. For example, if X swings his axe at a shape hidden behind the curtains, thinking it to be Y, then X is intending to initiate force against Y (assuming it is not retaliation for a prior aggression). This is so even if nothing turns out to be there, and X's axe tears his own curtain and nothing more. If Y is far away from the scene at the time there is no crime, because there has been no actual force and no threat of force known to Y. However, if Y is close enough to be aware of this action, or if he is away at the time, but later becomes aware of it, then this might constitute an assault on Y insofar as it puts him in anticipation of unlawful aggression against him—it is a threat to initiate force. This holds notwithstanding the fact that Y is physically unharmed. In such a case Y is entitled to restitution from X for this assault and X is legitimately estopped from asserting his own rights (to a proportionate extent) against Y. X has aggressed against Y, albeit in a way that was not the intended outcome. (There may be issues as to the proximity of Y to the event, and whether X's behaviour really does constitute a threat if Y is far away. The key point is that to establish a crime Y must also establish that some actual threat has occurred by virtue of the conduct complained of.)

“Attempt” has been defined by Enker (1977) as “engaging in conduct with the specific intention to produce forbidden consequences while aware of the possibility that the circumstances that render such consequences criminal may exist” (p. 879). This would seem to be sufficient grounding for the performative contradiction at the heart of an estoppel claim. When coupled with an actual aggression (even if it is not the intended aggression) this would be sufficient to render the action criminal in the libertarian theory. Hence, it would appear that our approach accepts that attempt-based crimes are legitimate inchoate crimes: if a person acts with the specific intention to produce consequences that are forbidden by the non-aggression principle, and this in fact results in the threat of the initiation of force, then he has committed a crime under libertarian law, even if he did not succeed in actually imposing force on his victim through a completed and successful act of aggression.

Aside from its legitimacy under estoppel rules, this recognition of attempt-based crimes also has the upshot of increasing the base disincentive for criminal action. Posner points out that criminal liability for attempt acts as

“...a way of increasing expected punishment cost without making the sanction for the completed crime more severe...” (1985, p. 1217; see also Schmidt, 1987). This would seem to be a legitimate consideration; indeed, the use of a punishment (i.e., a loss of rights) which creates a genuine disincentive for aggressive action would itself seem to be a sensible requirement of the libertarian theory, such that the proportional loss of rights may properly have regard to the disincentives for aggressive action created.

Under English common law, an “attempt” crime occurs when the defendant embarks on the action for a crime but fails to commit the *actus reus* for the offence. There must be some act that is “proximate” to the actual crime rather than being merely preparatory and in practice this can be a difficult distinction (see Brown *et al.* 1996, p. 1210). The perpetrator must also have specific intention to commit the full crime. This doctrine is consistent with the above formulation and is consistent with the libertarian view which bases criminal liability on the doctrine of estoppel.¹¹ In this view, a person who intends to commit a crime and takes some proximate act towards this end can rightly be said to be acting in denial of the rights of others, and thereby be estopped from asserting his own rights, to a proportionate extent.

Unlike the common law position, the libertarian theory outlined by Rothbard holds that an actual aggression must have occurred in order to constitute an inchoate offence. This means that the act of X cannot be regarded as an inchoate offence if there is no actual aggression or threat of aggression against Y. The fact that our approach recognises the *threat* of aggression as a breach of rights means that there is still wide scope for attempt-based crimes in this view.¹² However, there are some differences worth noting. The main one is that our approach adopts a “subjective test” for the assessment of the assault inherent in an unsuccessful attempt at aggression rather than the “objective test” that has prevailed under English common law. Under the libertarian approach it is not enough for the act to be one that is objectively threatening in nature, or that would be threatening

¹¹ Enker (1977) points out that the requirement of specific intent is not merely an aspect of the mens rea for the offence, but an inherent element of the notion of attempt itself.

¹² Of course, all legal actions must be accompanied by evidence. The fact that a certain set of actions would constitute a crime in our libertarian theory does not necessarily mean this would be easy to prove. For example, in our former example of X swinging his axe at his own curtains, it may be extremely difficult for Y to establish that X intended to kill him.

to “the reasonable man” had he known about it; in order to constitute a crime the act must have been threatening to the victim bringing the legal action.

One consequence of this subjective test is that an act cannot be regarded as an inchoate crime under the law of attempts if no aggression has occurred because no one but the actor knows about the act that was done.¹³ For example, if no one witnesses X’s swinging of the axe into his curtains then no one can have been threatened by it and hence, no threat of aggression has occurred. Though the act is objectively threatening in nature to someone who is fully acquainted with the facts, it is not actually threatening to anyone due to the absence of knowledge of its occurrence, and hence, it is not a breach of rights. Of course, as a practical matter this distinction is probably irrelevant, since X can only be identified and *convicted* of a crime if there is *evidence* of the acts in question, and this would require at least some complainant to know that the act occurred. (And of course, one could certainly still conclude that X’s actions were immoral, even though they do not rise to the standard of a breach of rights allowing for restitution.¹⁴)

It is important to note that the subjective state of mind of the victim is a necessary but not sufficient element of the crime. There must also be *mens rea* on the part of the perpetrator to establish a criminal act, and this would presumably be absent in the case where a victim is unreasonably sensitive to

¹³ This of course does not mean that a successful murder would be non-criminal just because no one but the murderer knows about it. In this case there is an actual initiation of force, and so we do not need to fall back on an asserted threat.

¹⁴ In this regard it is worth understanding that the purpose of law in our libertarian theory is merely to set out a normative theory of when force should be used. It does not exist as a means of determining when an act is moral or immoral. By its nature it will only countenance the use of retaliatory force when prior force has already been used, and in this case it is correcting what should be a legal wrong (a violation of the NAP). However, it should not be thought that the absence of criminal liability under libertarian law means the action is morally approved of; one can still make arguments against the morality of actions that do not amount to a breach of rights.

some objectively non-threatening act.¹⁵ The libertarian doctrine would give rise to attempt-based crimes in cases where there is an intentional but failed attempt at aggression that amounts to an actual, albeit lesser, threat of aggression. There is always some disconnect between the *actus reus* and *mens rea* in these cases, since the intended act is unsuccessful. Nevertheless, the intention to breach the rights of the victim, coupled with an actual lesser breach of rights is sufficient to establish the crime, and estop the criminal from asserting his own rights in return. (We will discuss this in more detail in our section on “constructive malice.”) When X swings his axe at the curtains he puts Y in a state of fear, since it is clear that he intended to kill Y. However, his actual intention was not to induce this state of fear, but rather, to induce the state of death! This does not let X off the hook—he intended to breach the rights of Y and he has succeeded, albeit in a different and smaller way than he anticipated. Under libertarian law Y now has a right to recover restitution and impose punishment, with X being estopped from asserting his own rights against Y to a proportionate extent. (Again we note that this might be subject to some consideration of proximity in this case, to determine whether Y’s assertion of being in fear of this threat is plausible.)

Let us consider an example to flesh out this point. In our view, to be a criminal, the person must *do* something criminal, such as commit an actual invasive act or a threat thereof. Mere intention is not enough, unless coupled with such an invasive act, or a threat. To illustrate this, suppose that X has a penchant for mysticism and sticks a pin into the heart of a voodoo-doll he has made in the likeness of his would-be victim, Y. X genuinely believes in the powers of voodoo magic and therefore fully believes that his actions are causing physical harm to Y. Is this a criminal act? No, because voodoo magic does not actually work, and sticking pins into one’s own doll is not an act of aggression.

If Y discovers this act he may simply laugh it off, in which case there is no successful threat and no inchoate crime. Alternatively, he may feel threatened by the manifest intention of X to do him physical harm, and he may worry that future acts by X in pursuit of this goal will employ a more

¹⁵ This issue relates directly to analogous issues in tort law in cases of the “eggshell skull” rule (i.e., where a plaintiff is especially sensitive to damage). In tort law and in criminal law it is generally recognised that a wrongdoer is responsible for all harm inflicted on their victim, even if this results from some special weakness or disability on the part of the victim. Our approach adopts the common law position that those “who use violence on others must take their victims as they find them” (per Lawson J in *R v Blaue* (1975) 61 Cr App R 271).

effective means. In this case Y may prosecute X for an attempted crime, but this would require him to convince a court that the act performed was an actual threat against him, notwithstanding that it employed a means which cannot be effective in causing harm. This would seem to be a difficult thing to establish since the act is one that is well-known to have no malign effect at all. In either case it is an absolute requirement that an actual substantive offence must take place in order for a crime to have occurred—intent, alone, is insufficient.

In this example there is an evidentiary interaction between objective and subjective considerations for threatening behaviour. Though our theory does not adopt the objective test for what is threatening, the objective nature of the act will still be important for assessing the credibility of the claim of the subjectively threatened state-of-mind of the victim. Establishing a subjective threat will be difficult if the act is one that is not threatening “to the reasonable person,” because in such a case the complainant would need to establish he is especially sensitive to the kind of act performed, and this may not be plausible given the facts. In the present case, for Y to successfully prosecute X, he would need to establish that he genuinely feels threatened by the act of X having stuck pins in this voodoo-doll.¹⁶

4. The Inchoate Crime of “Conspiracy”

Under English common law, a “conspiracy” occurs when there is an agreement between two or more people to perform an “unlawful act.” It is the agreement that forms the basis for the inchoate crime, rather than the execution of that agreement, such that the crime of conspiracy is regarded to have taken place even if the agreement has not been acted upon, and the unlawful act in question has not occurred (Brown *et al.*, 1996, pp. 1236-1237, 1250-1251).¹⁷

The common law view of conspiracy extends beyond agreements to commit actual crimes to other acts that are regarded as “unlawful” in the

¹⁶ An obvious objection to our thesis is that the same act (sticking a pin in a voodoo doll), might be legal in some places, and illegal in others. But this would not be the only time that a given action had different implications in different locales. For example, to raise the middle finger of one’s hand can mean very different things in different cultures; it might be a threat in one, but not in another.

¹⁷ There are some exceptions to this at common law and under statute. Some hold that there must be at least some progress towards the commission of the actual substantive offence in order for a conspiracy to occur.

non-criminal sense (e.g., committing a tort, or creating a public nuisance). This means that the common law has recognised inchoate crimes in cases where there is no substantive underlying crime. Brown *et al.* notes that, historically speaking, “[t]he vagueness and ‘flexibility’ of the offence of conspiracy has facilitated use of the offence against political groups, trade unions, and other ‘unpopular causes’ where either no criminal offence exists or where a criminal offence may have been committed but proof of that offence would be much more difficult than proof of the conspiracy to commit the offence” (1996, p. 1237).

Historically, the inchoate offence of conspiracy pre-dated the inchoate offence of attempt and was arguably used for the purpose of dealing with attempts (Arnold, 1931). In more modern cases it is mostly used to deal with organised crime, but still has wide scope to deal with agreements for non-criminal “unlawful acts.” (It is worth noting that the crime of conspiracy is accompanied by the doctrine of complicity, which holds that the conspiring group are all held equally responsible for the actions of any person in the group, subject to consideration of the scope of the agreement. Complicity is not a separate crime, but rather, a theory of liability attaching to the inchoate offence itself; see Brown *et al.*, 1996, p. 1209.)

There is no difficulty in applying the concept of conspiracy to the theory we have outlined, and indeed, some of the difficulties of the common law doctrine collapse. Libertarians recognise the possibility that multiple individuals may conspire to share the various actions involved in the commission of a crime. In such cases there is no problem with imposing joint liability (Rothbard, 1982). However, unlike the common law case, there is no recognition of a crime of conspiracy under libertarian theory unless the agreement is for an underlying primary *crime*. Under libertarianism, all primary substantive crimes must involve some aggression against person or property, and as a result, an inchoate conspiracy cannot amount to a crime unless the relevant agreement is for an underlying crime (i.e., some aggressive act). This also follows from the estoppel justification for punishment, since one cannot be stopped from asserting one’s rights merely because one has agreed to do an act which is not itself a violation of rights.

One subtle complication of this issue needs to be mentioned. Our theory recognises acts that trespass against others or their property as restitution-based torts when done unintentionally, but criminal when done intentionally.¹⁸ Hence, a conspiracy to commit a tort may amount to a crime

¹⁸ Although Rothbard argues the latter would still be punished under an enlarged tort-based system (1982, 2002).

under libertarian law, not because the presence of more than one person raises it to criminal status, but because the conspiracy demonstrates that it is an intentional action and thus raises it to the status of an intentional trespass. Here the raising of the act from tortious to criminal status would still have occurred if there was no conspiracy, with only a single person intentionally committing the aggressive act. The conspiracy serves only to demonstrate that there was agreement, and hence, an intentional breach of law.

As in the case of attempt-based crimes, we are concerned with whether or not actual aggression, or threat thereof, has occurred. Hence, unlike the English common law doctrine, the mere fact of an agreement is insufficient to establish a crime unless this can itself be regarded as sufficient to establish a threat of aggression. Obviously this would depend on the particular case; in some instances the agreement will be sufficiently proximate to a coming aggression as to constitute a threat, while in others it may be too remote. The relevance of the agreement is that it establishes the actions of each member of the conspiracy as part of a joint enterprise, allowing each individual conspirator to be judged based on the collective actions of the entire group. Hence, if an agreement is established, then the victim need only show that the collective actions of the conspirators amount to a threat. Even if the actions of conspirator A are not sufficient to establish a threat, he may now be held criminally liable for the actions of conspirator B, since he has agreed to a joint undertaking with him.

As with the law of attempts, there can be no inchoate crime separate from an actual violation of the NAP. Since an action by a victim presumes knowledge and evidence of a conspiracy to commit an aggression, this may amount to a threat of aggression if the action taken is sufficient to induce this threatened state of mind in the victim. Alternatively, subsequent actions in pursuit of the joint aggression may be sufficient to establish a threat. Again, the relevant requirement would be to prove the rights-violation by the conspirators, who would be judged by the same legal standard as if each acted on his own. (Of course, communications among conspirators may provide more acts by which to do this than in the case of a single criminal acting alone.)

Under English common law, to form a conspiracy there must be some “concert-of-action” by the offenders, meaning there must be multiple people agreeing to split or jointly engage in some task that could in principle be performed by a single person. In respect of unlawful activities (under positive law) that require multiple offenders to commit (e.g., gambling, prostitution) these will be regarded as substantive primary offences but not as inchoate conspiracies (unless there is also some further agreement by additional people acting in concert). In the case of prostitution this means there is no

conspiracy between the prostitute and client (notwithstanding their agreement) because the agreement between them is the *primary* offence of prostitution, not an inchoate offence derived from it. This exception to the common law of conspiracy is called Wharton's Rule (Wharton and Ruppenthal, 1932, § I604). The requirement of concert-of-action is sensible, but this additional rule is unnecessary under libertarian law. The reason is that, in this system of law, any primary crime must involve some kind of aggression against person or property, which can, in principle, be done by a single person. There is no recognition of any "crime" such as gambling or prostitution in which there must of necessity be more than one offender.

5. The Inchoate Crime of "Incitement"

Conspiracy requires an actual agreement between offenders, not merely an exhortation by one person to another in an effort to convince the latter to do something. This means the conspiracy applies properly to situations where criminals act in concert on roughly equal terms or when one criminal gives an order to another to commit a crime under an existing agreement or organisational structure (e.g., in the case of organised crime). This means there must be some actual agreement to aggress against person or property and some actions by the conspirators amounting to an aggression or threat thereof.

Under English common law this is further extended by the inchoate offence of "incitement". This offence is an effort to combine the inchoate offence of attempt with that of conspiracy:

If he who procures a felony to be committed by another be himself a felon...it follows that he who attempts to procure it attempts to commit a felony. The gist of the offence then is the attempt or endeavour; the manner of doing it is matter of evidence, and need not be laid in the indictment. (*R v Higgins* (1801) 2 East 5, at 12)

Hence, in common law, if a person counsels or procures another to commit a crime then he can be regarded as attempting to form an agreement that the latter will commit that crime. Under the doctrine of incitement this is recognised as an inchoate offence in itself, even if no agreement to commit the crime is actually formed. This means the attempt to procure the criminal act is itself a crime.

Some commentators draw a distinction between exhortations made to only a small and restricted number of people (instigation) and exhortations made to large anonymous bodies of people through public oration, publications of works, etc. (incitement). Our present concern here is not to distinguish these cases and so we refer to all of them as incitement. The

archetypal example of incitement under this doctrine would be the attempt of a person to hire a hit-man to kill some person he does not like. Here the act of counselling the hit-man to commit the crime is regarded as an inchoate offence in its own right, even if no agreement is ultimately formed. (Perhaps the hit-man has a busy schedule and has to decline the offer of work.) In such a case this action may itself constitute a threat since it is an act calculated to arrange the killing of an intended victim. The person attempting to procure this service is estopped from asserting his own rights, to a proportionate extent. This category of crime would therefore seem to be legitimate, especially in view of the fact that our theory recognises attempt and conspiracy-based inchoate crimes. Since an incitement of this kind is an attempt to form an agreement to commit a crime, the incitement is itself an attempt to conspire to commit the crime, and since both of these are recognised as inchoate crimes under libertarianism, the incitement is too. As with the previous inchoate crimes, the incitement here amounts to a threat in itself, insofar as it is an act calculated to arrange a conspiracy between the inciter and the incited to commit a crime against the victim.

This would not extend to a situation where a person exhorts another to commit a crime, but makes no attempt to form an actual agreement with that other person, which would raise the situation to a conspiracy or attempted conspiracy. Indeed, Rothbard argues that “incitement” of this kind is a legitimate use of one’s right to speak. He explains his position as follows:

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.” (2002, p. 81)

This is compatible with the libertarian NAP. The mere “exhortation” of a speaker for a listener to commit a crime is not in itself an act of aggression against person or property, nor yet a threat of this, even if the

listener carries out the crime. Nor is it pursuant to an actual agreement, nor even an attempt to procure such an agreement. This rests on the fact that the inciter is not in control of the listener and does not reasonably expect the listener to enter into a criminal conspiracy with himself—the latter is merely left free to do whatever he likes. There is no existing agreement nor is there any attempt to create an agreement.

This is in sharp contrast to a genuine conspiracy, in which both parties agree to participate in a crime, or an “exhortation” which amounts in actual fact to an *instruction* issued by the head of a gang to his underlings. It is also in contrast with attempts to procure such an agreement or arrangement, as with the attempt to hire a hit-man to kill one’s enemy. Though the latter still leaves the hit-man free to accept the contract or decline it, he is not merely exhorted to do some act: he is solicited for a criminal agreement to that effect.

This amounts to more than mere exhortation in cases where there is a genuine attempt to procure an agreement to commit a crime. In such cases the act is a threat of aggression in itself, and this is sufficient to found the estoppel, since the inciter seeks to enter into an actual criminal conspiracy with the incited person. This rests on the conjoined application of the previous doctrines of attempt and conspiracy. However, in the case of an exhortation to commit crime (“Go! Burn! Loot! Kill!”), there is neither agreement between the parties, nor any attempt to procure such an agreement. (Of course, there may be an “agreement” in the sense that the recipient of the exhortation agrees the suggestion to commit a crime sounds like a good idea, but there is no agreement in the legal sense of a joint undertaking to create a conspiracy relationship between the parties.)

Though Rothbard stresses the free-will of the recipient of the exhortation not to commit the crime, this is actually not necessarily determinative of the legal status of the matter.¹⁹ The underling of the mob boss we posit retains his free will to refuse his boss’s instruction, though probably at great personal danger. The hit-man also presumably retains the free will to refuse a murder contract from a would-be client, and probably without any real danger in most cases (since he is probably more dangerous than the person trying to hire him).

¹⁹ This depends upon whether a person acting under duress still retains his free will, a philosophical issue far removed from our present concerns. For a libertarian analysis of whether people acting under duress are guilty for the crimes they are “forced” to commit, see Block (2010, 2011A, 2011B).

The seemingly subtle distinction which in practice is “clearcut” is simply the distinction between a person trying to procure an actual agreement to commit a crime (e.g., trying to hire a hit-man) and a person who merely exhorts others to commit crimes that are not pursuant to any agreement or attempted agreement, or any aiding or abetting, or even any threat if the suggestions are not followed (“Go! Burn! Loot! Kill!”). There will be difficult cases, as there often are in law, but there are several factual aspects that can illustrate the difference.²⁰ The nature of the distinction will usually be clear firstly by the relationship between the inciter and the listener, and secondly by the nature of the exhortation. The head of a criminal gang who gives an instruction to his underling does not need to convince his underlings of the soundness of a particular instruction—he simply states his instruction to go out and kill person B, and this is regarded as reason enough to act on the order, since it is in pursuance of an existing criminal arrangement. Similarly, a person who attempts to procure the services of a hit-man does not need to convince him what a bad person B is, he simply hands over the money, and tells the hit-man B is the desired target. Contrarily, the person who acts without any attempt to procure an actual agreement must inflame the passions of his audience in order to convince them to act on his exhortation. He cannot just say “Please go out and kill B.” He must say something on the order of, “B is evil! B has committed heinous acts! B does not deserve to live! Go out and inflict justice on B!” Here the persuasive power of the exhortation is predicated purely on the conviction of the speaker and the views of the listener—there is no attempt to arrange a conspiracy. (Here we also see that libertarianism allows a wide ambit of “free speech” in such cases. Mere exhortation to commit crime does not, in itself, constitute a crime.)

Our theory suggests incitement is a genuine inchoate crime so long as it is clearly restricted to cases of attempt to procure a criminal agreement, and does not extend to more general cases of “incitement to riot” or “incitement to hate.” This theory would not recognise the legitimacy of extensions of incitement to modern statutory offences for “inciting hatred” and so on. The reason for this is twofold. First of all, mere “hatred” is not an aggressive act, and hence, not a crime under libertarian theory (and therefore no inchoate offence could be built on it).²¹ Secondly, even if this were a legitimate primary crime, mere exhortation to commit a crime, without some attempt to procure

²⁰ There are always grey areas in the legal arena. For an analysis of legal continuums, see Block and Barnett (2008).

²¹ For a libertarian analysis of “hate speech,” see Gordon (2012).

a conspiratorial agreement, is insufficient to establish the inchoate offence recognised.

With regard to the capacity for a libertarian society to prevent harmful exhortations to commit crimes, it is worth noting that this type of society grants control over property to its owners, and this allows them discretion to limit speech and other acts on their property. Hence, our approach does not recognise any unrestricted “right of free speech,” though it also does not punish certain speech acts as crimes to the same degree as some contemporary societies. Rather, it recognises a right to use one’s own property (including one’s body and vocal chords) to do things that do not violate the property rights of others. In practice, this would mean those who exhort others to commit crimes would probably face sanctions from other members of society through their refusal to deal with that person. This protection is usually undermined or absent in a statist society.

6. Criminal Facilitation and “Accessories”

Under English common law a person is an accessory to a crime if he “aids, abets, counsels or procures” the principal offender to commit the crime (Brown *et al.*, 1996, p. 1292). To “aid or abet” refers to acts done during the crime itself whereas to “counsel or procure” refers to acts done to assist in the preparation of the crime. Procurement in this case is different from incitement in that there must be some actual participation by the accessory in the preparation for the crime. Usually this category of offence covers situations of preparatory assistance in an offence, assistance in the commission of the offence, or assistance in covering up the offence after it is committed.

Unlike other inchoate crimes, it is necessary for the *actus reus* of the offence to have been performed in order for a person to be regarded as an accessory to that crime. This is because it is not possible to be an accessory to a crime that has not occurred. Though the *actus reus* of the crime must actually have been performed for the accessory to be culpable, it is not necessary for the principal person to have had the necessary fault element for the offence. It is therefore possible for the accessory to be found criminally culpable even if the principal is found not to have committed a crime on the basis of lack of *mens rea*. (This allows the conviction of an accessory in cases of “innocent agency.”) This means that the relevant elements of the crime include the *actus reus* of the offence by the principal, the *actus reus* of the accessory in aiding, abetting, counselling, or procuring the principal, and the *mens rea* of the accessory in knowingly and willingly participating in the crime.

Criminal culpability under the common law position for accessories is limited by the extent of the knowledge and contemplation of the accessory, but this includes contemplation of acts that might possibly arise as a result of the joint criminal enterprise, even if these have not been agreed or discussed between the parties. Courts have found that an accessory bears "...a criminal liability for an act which was within the contemplation of both himself and the [principal offender] as an act which might be done in the course of carrying out the primary criminal intention—an act contemplated as a possible incident of the original planned particular venture" (Brown *et al.*, 1996, p. 1310; cited from *Johns (TS)* (198) 143 CLR 108; *McAuliffe and McAuliffe* (1995) 130 ALR 26.) For example, suppose that X provides his friend Y with a machete and balaclava for an armed robbery, knowing that Y intends to commit the robbery, but does not intend for anyone to get hurt. In such a case X may be held liable as an accessory for the crime of armed robbery, notwithstanding the fact that the supply of these items would not ordinarily be a crime. Moreover, if things go wrong and Y kills someone during the robbery, X might be held liable as an accessory to murder on the basis that such an outcome is one that would have been contemplated, even if never discussed.

It is certainly possible to extend criminal liability in this way, but as with attempt and conspiracy there would need to be some assistance provided in an actual aggression or threat of aggression. If a person knowingly and willingly assists in committing a crime then this is sufficient to estop him from reliance on his own rights. The participant gives consent to the crime itself, in the same way as for a principal offender. Hence, there is no reason why this category of crime would not be recognised. In the case of criminal facilitation by an accessory, the relevant question would be whether or not the facilitation was provided with knowledge that it would be used for a criminal purpose, and what kind of purpose was contemplated by the principal and the accessory. Here again the subjective state of mind of the accessory is relevant because it founds the estoppel argument on which the criminal liability is based.

The getaway driver may not actually murder any innocent people, but he actively aids and abets the trigger man with knowledge or contemplation of what was going on. In contrast, the murderer may not have been able to partake in his evil deed, say, without shoes, or breakfast. And yet the people who unknowingly provided him with these necessary conditions are of course not guilty of any crime.

7. “Constructive Malice”

Criminal laws generally consist of an action element and a fault element. The latter is usually implemented by the rule that the accused is only guilty of a crime if the act he is accused of committing is accompanied by *mens rea*—a “guilty mind.” This fault element may require actual intention to bring about the act or consequence complained of, or it may require foresight or recklessness as to the consequences of one’s actions, in the sense of having seen that a certain outcome was possible or probable (or having been wilfully blind to this). According to Rothbard: “In some ways, tort law can be summed up as: ‘No liability without fault, no fault without liability’” (1997, p. 272).

The English common law doctrine has sometimes extended the fault element in criminal law to cover instances of non-intentional conduct such as gross negligence or omission. Criminal punishment for this conduct is not compatible with libertarianism, since the absence of any intention makes it impossible to construct a valid estoppel argument for curtailing the ordinary rights of the tortfeasor. A person who violates the rights of another due to an unintentional act of, say, gross negligence would still be required to give restitution under strict liability, but would not be guilty of a crime. Rothbard notes the strict liability doctrine “...returns the common law to its original strict emphasis on causation, fault, and liability, shorn of modern accretions of negligence and pseudo-“efficiency” considerations” (Rothbard, 1997, p. 272).

The idea of the doctrine of *mens rea* is to preserve the link between acts done in a state of guilt and acts done in some non-criminal state of mind. In libertarian theory this is preserved by the idea that one cannot impose an estoppel argument to punish an unlawful act unless there is good reason to hold that the assertion of ordinary rights by the perpetrator would amount to a performative contradiction. For example, if a person accidentally drives his car into a pedestrian and breaks the pedestrian’s legs without any intent to do so (and without any recklessness, etc.), then it is no performative contradiction for the driver to assert that others should not be allowed to break his own legs intentionally. He has not intentionally aggressed against another and so there is no performative contradiction in his expectation that others should not punish him as a criminal. He is liable under strict liability for restitution to the pedestrian, but there is no crime, and so there is no other loss of rights arising from any estoppel argument.

Despite this standard fault position, another form of crime that has developed in various legal systems is the imposition of criminal liability under “constructive malice.” Under this doctrine a person may be *deemed* to have the

relevant *mens rea* fault element for a crime, notwithstanding that relevant intent or recklessness was actually absent. This is done in cases where a person commits an intentional crime, and in the course of that crime, some unintentional breach of law occurs. In this case the person may be held to have the required malice for the unintentional breach of law.

This doctrine of constructive intent leads to a form of crime lacking a direct fault element. In the early twentieth-century, Perkins warned that “[s]uch “constructive intent” is a fiction which permits lip service to the notion that intention is essential to criminality, at the same time recognizing that unintended consequences of an act may sometimes be sufficient for guilt of some offenses” (1939, p. 910). For example, an armed robber who accidentally discharges his gun during the robbery and kills a person may be convicted of murder even if he did not intend for this to occur. He is deemed to have “constructive malice” for the crime of murder on the basis that he undertook an intentional act (armed robbery) involving a foreseeable risk of accidentally killing someone. This doctrine is based on the idea that a person ought to be criminally responsible for unintended breaches of law if these occurred during an intentional crime. In such cases there must be a connection between the two in the sense that the unintentional breach must be foreseeable on the basis of the intentional crime. (Hence, a person would not be regarded as having constructive malice for murder if they accidentally killed someone in the course of a minor non-violent crime.)

Though constructive malice is not technically an inchoate crime in its own right, it has a similar effect as a member of that category. In cases where the elements for the regular offence are lacking, the perpetrator may nonetheless be held accountable for the crime as if it had been fully completed (including the relevant fault element) under the doctrine of constructive malice. This would be consistent with the estoppel standard. By engaging in an intentional crime the person would be estopped from asserting his own rights to an extent proportionate to his disregard for the rights of others. This would include a violation of rights that is an accidental—but nonetheless foreseeable—consequence of the intentional act.

This doctrine helps to bridge the gap between the differing *actus reus* and *mens rea* of an attempt-based crime in libertarian theory. We have already noted that in such cases the attempt amounts to a crime under libertarian law if it is a threat to initiate force. This occurs despite the fact that the actor does not intend a mere threat, but rather, intends the actual execution of that threat. The reason is that it is foreseeable that an attempt to execute an aggressive act may fail, but nonetheless lead to a situation where the attempt amounts to a threat to perform that aggressive act. Hence, a person who attempts an intentional aggression would have “constructive malice” for the

threat as an immediate consequence of his actual intention to commit the threatened act.

8. Application to the Posited Scenarios

On the basis of the above analysis we assert that libertarian legal theory should recognise the inchoate crimes of attempt, conspiracy, and incitement in cases where there is an underlying primary crime, and where the acts occurring amount to an actual aggression or threat of aggression, albeit of lesser importance. In cases of incitement our libertarian theory would only recognise instances amounting to a genuine attempt to form a conspiracy—it would not recognise wider crimes of “incitement to riot” or “incitement to hate.” We also assert that this philosophical tradition would recognise constructive malice to the extent of dealing with the foreseeable consequences of intentional crimes. We now apply this reasoning to our motivating example, the Spike Lee case.

In our embellished example of the Spike Lee case, A intends for B to suffer some violence. He exhorts C to do harm to B but does not enter into an actual agreement with C to this effect. Nor does he attempt to enter into an actual agreement with C. Indeed, he does not even attempt two-way communication with C at all—he merely puts his exhortation “out there” to a large number of admirers, and hopes that it will find a successful target. From our analysis we have seen that this is insufficient to establish A as a conspirator or inciter of B. He is in the position described by Rothbard as a person who exhorts others to “Go! Burn! Loot! Kill!” If this is all there is to the posited situation then it would not be sufficient to establish a crime on the part of A.

However, in this case A has not merely exhorted C to commit a crime. He has also supplied him with an address to assist in committing this depredation. Clearly C is the principal actor whose action most contributes to the death of B or D. However, if it can be established that without the address he could not have committed this act, then this may well be sufficient to establish A as an accessory to the crime. Here A has facilitated the crime of C in a direct effort to aid C in committing that crime. By supplying an address for his intended victim he raises his conduct from a mere exhortation to a joint operation where he is acting in concert with C. Depending on

exactly what could be proved, this could establish A as an accessory to the murder committed by C.²²

In the first scenario, where C murders B, there is no further complication. In this case the person killed is the one A wanted to be victimized. It is therefore easy to establish that A did his action with the intention of violating the rights of B, and so the *mens rea* for an accessory offence would be satisfied—A supplied C with the address with the intention of assisting C to physically harm B. (Whether A intended for B to be killed, or merely hurt, would be relevant to his proper punishment.) However, in the second scenario, it is D who is killed, not B. In this case, the person harmed is not who A wanted killed, and A cannot be regarded as having intended any harm to come to D. One could still make an accessory argument in this case, on the basis that A still intended to assist C to commit a crime of that type (assault or murder), even though he aimed at a different target. Alternatively, one could make a very strong argument for constructive malice, on the basis that the actual result, though unintended, was a foreseeable risk in supplying an address to C under these circumstances.

In the second scenario, A cannot be regarded like a person exploding a bomb in a crowded shopping centre, who simply wishes to inflict indiscriminate harm. Rather, he intended that a certain targeted person (B) would be harmed, but through his error, another person (D) was instead victimized. A's situation is less like the bomber, and more like the sniper who shoots to kill a targeted victim, and misses his shot, instead killing a bystander. (Of course, in our case he is an accessory rather than the principal offender.)

We can see there is no major impediment, under libertarian theory, for a criminal finding against A under these scenarios. Unlike certain present statutory offences, a libertarian legal system would not allow A to be held criminally liable merely for any exhortation against B. What more is required is some actual agreement to commit a crime (conspiracy), attempted agreement to commit a crime (incitement), or intentional facilitation of a crime (accessory). Nor is there any problem in libertarian theory in dealing with a situation in which the harm that occurs from a crime occurs in some unintentional but foreseeable way.

²² Happily, no such thing occurred in reality. In the actual Spike Lee case, the address supplied was indeed incorrect, and this led to threats being made against those residents at that address. They temporarily moved out of their home and into a hotel to avoid these threats and possible violence against them. At the time of writing, George Zimmerman is alive and has been acquitted of the charges against him.

In the case that motivated the present enquiry, Spike Lee made his comments through the website Twitter and did indeed give an address for the wrong person. This led to threats being made against an elderly couple living there. As a result of these threats, the couple moved out of their home and into a hotel temporarily, until the error was corrected, and it became clear they were not the intended targets of Lee's acrimony. Lee later apologized to the couple and offered to pay their relocation costs (Baker, 2012). Under a libertarian legal system Lee could not be held criminally culpable for a mere exhortation, but could have been held responsible as an accessory for threats performed based on the facilitation he provided or, more reasonably, if it could have been established that his action amounted to a threat of aggression. Given that libertarian theory is sometimes accused of lacking proper legal recourses in cases of this kind, it is notable that Lee suffered no criminal penalty or even criminal investigation in our present society, with its multitude of statutory instruments and regulations.

9. Concluding Remarks

The idea that libertarian theory is encapsulated in a single principle of conduct may give the false impression that it grants *carte blanche* to many actions prohibited under other legal systems. However, one should not imagine that the non-aggression principle of libertarian theory restricts criminal culpability and liability merely to actual aggressive acts which have been fully performed by the person under consideration. Basing the notion of criminal liability on the doctrine of estoppel, libertarianism also recognises several categories of inchoate crime and other related legal doctrines that impose liability on a person for attempts, agreements, intentional facilitation, and foreseeable errors in crimes, so long as some threat has occurred.

As in any other system of law, difficult questions of fact and law would arise, and the NAP does not supply the details to settle all these controversies. Detailed legal and jurisprudential analysis based on the NAP would serve to develop a fully fleshed-out legal system consistent with libertarianism. The NAP at the heart of this theory supplies an overarching principle to assist in the determination of which legal doctrines are sound and which are not.

References

- Allen, F.A. (1981) *The Decline of the Rehabilitative Ideal*. Yale University Press:
New Haven.

- Arnold, T.W. (1931) Criminal attempts: the rise and fall of an abstraction. *Yale Law Journal* 40(1), pp. 53-80.
- Austin, J. (1998) *The Province of Jurisprudence Determined and The Uses of the Studies of Jurisprudence*. Hackett Publishing Company: Indianapolis.
- Baker, S. (2012) Director Spike Lee reaches settlement with elderly couple after retweeting wrong address. *The Blaze*, 29 March 2012.
- Barnett, R.E. (1977) *Assessing the Criminal: Restitution, Retribution, and the Legal Process*. Ballinger Publishing Company: Cambridge, MA.
- Barnett, R.E. (1998) *The Structure of Liberty: Justice and the Rule of Law*. Oxford University Press: New York.
- Block, W. (2003) The Nonaggression Axiom of Libertarianism. Lewrockwell.com, 17 February 2003.
- Block, W. (2004) Austrian law and economics: the contributions of Adolf Reinach and Murray Rothbard. *Quarterly Journal of Austrian Economics* 7(4), pp. 69-85.
- Block, W. (2006) Radical libertarianism: applying libertarian principles to dealing with the unjust government, Part II. *Reason Papers* 28 (Spring), pp. 85-109.
- Block, W. (2009a) Toward a libertarian theory of guilt and punishment for the crime of statism. In Hulsmann, J.G and Kinsella, S. (eds) *Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe*. Ludwig von Mises Institute: Auburn, pp. 137-148.
- Block, W. (2009b) Libertarian punishment theory: working for, and donating to, the state. *Libertarian Papers* 1, 17.
- Block, W. (2010) Response to Jakobsson on human body shields. *Libertarian*

Papers 2, 25.

- Block, W. (2010a) Rejoinder to Kinsella and Tinsley on incitement, causation, aggression and praxeology. *Journal of Libertarian Studies* 22, pp. 641–664.
- Block, W. (2011) The human body shield. *Journal of Libertarian Studies* 22, pp. 625-630.
- Block, W. (2012) *Spike Lee and Incitement*. Lewrockwell.com, 2 April 2012.
- Block, W., Barnett, W. and Callahan, G. (2005) The paradox of Coase as a defender of free markets. *NYU Journal of Law and Liberty* 1(3), pp. 1075-1095.
- Block, W. and Barnett, W. (2008) Continuums. *Ethics & Politics* 10(1), pp. 151-166.
- Block, W. and Hoppe, H.H. (2011) On property and exploitation. *International Journal of Value-Based Management* 15, pp. 225-236.
- Brown, D. Farrier, D., Neal, D. and Weisbrot, D. (1996) *Criminal Laws (Second Edition)*. The Federation Press: Sydney.
- CNN (2012) Spike Lee apologises for retweeting wrong Zimmerman address. *CNN*, 28 March 2012.
- Dworkin, R. (1998) *Law's Empire*. Hart Publishing: Oxford.
- Enker, A.N. (1977) Mens rea and criminal attempt. *Law and Social Inquiry* 2(4), pp. 845-879.
- Garner, B.A. (ed) (1999) *Black's Law Dictionary (Seventh Edition)*. West Group: St. Paul, Minnesota.
- Gordon, D. (2012) The harm in hate-speech laws. *Mises Daily*, 30 May 2012.
- Hart, H.L.A. (1994) *The Concept of Law (Second Edition)*. Oxford University

Press: Oxford.

Haque, F. (2012) Spike Lee reaches settlement for tweeting wrong address for George Zimmerman. *The Washington Post*, 30 March 2012.

Huffington Post (2012) Spike Lee retweets wrong address for George Zimmerman, residents forced to flee home. *The Huffington Post*, 28 March 2012.

Kinsella, N.S. (1992) Estoppel: a new justification for individual rights. *Reason Papers* 17(4), pp. 61-74.

Kinsella, N.S. (1996) Punishment and proportionality: the estoppel approach. *The Journal of Libertarian Studies* 12(1), pp. 51-74.

Kinsella, N.S. (1997) A libertarian theory of punishment and rights. *Loyola Law Review* 30(2), pp. 607-645.

Kinsella, N.S. (1999) Knowledge, calculation, conflict and law. *Quarterly Journal of Austrian Economics* 2(4), pp. 49-71.

Kinsella, N.S. (2003) A libertarian theory of contract: title transfer, binding promises, and inalienability. *Journal of Libertarian Studies* 17(2), pp. 11-37.

Olson, C.B. (1979) Law in Anarchy. *Libertarian Forum* 12(6), p. 4.

O'Neill, B. (2012) Natural law and the liberal (libertarian) society. *Journal of Peace, Freedom and Prosperity* 1, pp. 29-50.

Perkins, R.M. (1939) A rationale of mens rea. *Harvard Law Review* 52(6), pp. 905-928.

Posner, R.A. (1985) Economic theory of the criminal law. *Columbia Law Review* 85(6), pp. 1193-1231.

Rothbard, M.N. (1982) Law, property rights and air pollution. *Cato Journal* 2(1), pp. 55-100.

Rothbard, M.N. (1997) *The Logic of Action One: Money and the Austrian School*.

Edward Elgar: Cheltenham.

Rothbard, M.N. (2002) *The Ethics of Liberty*. New York University Press: New York.

Schmidtz, D. (1987) Deterrence and criminal attempts. *Canadian Journal of Philosophy* 17(3), pp. 615-623.

Stableford, D. (2012) Spike Lee retweet with wrong Zimmerman address sparks outrage and fear. *Yahoo News*, 28 March 2012.

Wharton, F. and Ruppenthal, J.C. (1932) *Criminal Law (Twelfth Edition)*.

Lawyers Cooperative Publishing Company: New York.

Whitehead, R. and Block, W. (2003) Taking the assets of the criminal to compensate victims of violence: a legal and philosophical approach. *Wayne State University Law School Journal of Law in Society* 5(1), pp.229-254.

