**Criminality and liberty in the two-person society**

Renaud Fillieule

*2013 International Liberty Conference* (International Society for Individual Liberty)

Lausanne

24 August 2013

**Abstract.** The inverse relationship between criminality and liberty is investigated in the basic framework of Rothbard’s libertarian theory of justice, successively for an isolated individual, a contractual two-person society, and a hegemonic two-person society.

The subject of this paper is criminality and liberty, and I shall quite simply try and argue that in a libertarian perspective these two concepts are in a very simple relationship of inverse proportionality. The more crime prevails, the less liberty there is, and conversely, as in the formula:

This formula must of course not be taken too seriously, and there will be no attempt here to measure degrees of freedom and criminality, but it is suggestive as a kind of summary or visualization of the result or aim of this investigation.

**1. Introduction: crime and the law**

It is a bit surprising to realize that when the expression “criminality and liberty” is entered into a search engine, only one relevant result is found, namely a link to Rothbard’s *The Ethics of Liberty* (1998 [1982]), more specifically to his Chapter 9 on “Property and criminality.” This result is very relevant indeed, as we shall see, but no other appropriate reference emerges from search engines. Apparently, there are very few investigations that try to relate the concepts of criminality and of liberty.

This disappointing circumstance can perhaps be explained by the fact that most studies of crime adopt either a purely legalistic or an ad hoc definition of crime. When studying crime and criminals, sociologists, psychologists and law students tend to take the legal system as an external datum: a crime is simply the violation of a law that happens to be sanctioned by the State at this moment. Now, if a particular law restricts the liberty of the individuals–a frequent occurrence nowadays–, then of course the inverse relationship between criminality and liberty completely disappears.

Another kind of attempt is to define crime in the framework of a theory of action. In their important–and otherwise excellent–book on the sociology of crime, criminologists Gottfredson and Hirschi define crimes as “acts of force or fraud undertaken in pursuit of self-interest” (1990, p. 15). This definition, however, is not satisfactory. The first reason is that the use of force can be perfectly legitimate. When a person defends her life in self-defense against an aggressor that initiated violence, she performs an act of force, but she does not commit a crime. Likewise, when the police retrieves stolen goods and confiscates them in order to return them to their legitimate owners, this act of force is not a crime at all. The second reason this definition of crimes is unsatisfactory is because “fraud” is a problematic concept that very much depends on the nature and extent of the legal system. The list of frauds by the FBI is quite disparate,[[1]](#footnote-1) including Ponzi schemes and market manipulation, actions that would probably not be considered as crimes in a society of liberty. The list of crimes analyzed by Gottfredson and Hirschi is also too eclectic. They study the cases of burglary, robbery, homicide, auto theft, rape, white collar crime (embezzlement), drug and alcohol abuse. But homicide is not necessarily a crime (in the case of self-defense), and drug use is a victimless crime. There is a third reason that their definition of crime is inadequate, when they speak of crimes as acts committed “in pursuit of self-interest.” Many purely legitimate actions are effected under the motive of self-interest, and it can even be argued that *any* action is self-interested, if a broad and subjective conception of interest is taken into account. So here we have two outstanding sociologists, among the most eminent specialists in criminology, who devote the first part of their book to the concept of crime, and yet cannot come up with a convincing definition.

The reason for these difficulties is quite simply that we cannot seriously conceive what crime is without a theory of justice. It is deeply unsatisfying for the thinking mind to define crime as any violation of the legal system as it exists at this particular moment, or to conceive crime as an act that displays some intrinsic characteristics. Criminality needs to be defined in the framework of a theory of justice, such as the theory elaborated by Rothbard (1998 [1982], Part 2).

**2. Crime and liberty for an isolated individual (Robinson)**

The first step of the reasoning by Rothbard is to analyze the case of an isolated individual, traditionally called Robinson, in reference to the main protagonist of the famous novel by Daniel Defoe. So Robinson is alone in an environment where he tries to survive by producing his own food and beverages. This model of the isolated individual was used by Rothbard in his economic treatise (1962, Chap. 1) to investigate the most basic principles of economics, such as action, consumption, production, investment, time preference, etc. In *Ethics of Liberty*, he uses the same model as a foundation for his theory of justice by stating that Robinson is the legitimate owner of his body and of the products of his labor. When Robinson “mixes” his labor with the hitherto non appropriated natural resources that he finds in his environment, the products are legitimately his own. Furthermore, Robinson is “*absolutely* free” (1998 [1982], p. 33). Why? Because he cannot be the victim of any crime. No one can infringe upon his property, i.e. his body or the goods he has produced, for the very simple reason that there is nobody else around! His possessions can of course be damaged by natural events or grabbed by animals, but these are accidents, not crimes. So we have here a case of absolute freedom and total absence of crime. And the two are indeed closely related: saying that no crime can be committed against him is just another way of saying that Robinson is totally free. In pseudo-mathematical terms, crime is absent (criminality = 0) so that, by application of the formula, liberty is infinite (liberty = 1/0 = ∞).

**3. Society appears, or not (Robinson and Friday)**

Now another individual called Friday and formerly isolated enters the scene. So Robinson and Friday unexpectedly see one another. What can then happen? The different possible scenarios are investigated by Rothbard in *Man, Economy, and State* (1962, Chap. 2).

First, Robinson and Friday can retrace their steps and walk away to never meet again. This is the situation of separation and reciprocal ignorance, or in one word *autarchy*. Each one goes back to isolation and no society appears.

Second, one can attack and kill the other. This is the situation that we can call *genocide*. A very violent confrontation occurs, through which only one individual survives. Afterwards, the survivor is still isolated: no society appears either.

Third, they can decide to exchange, i.e. to trade voluntarily the products of their labor or their labor itself. This is the *contractual society*. Only mutually beneficial transactions are undertaken. There are two ways to acquire goods legitimately, by production and by exchange.

Fourth, one individual is powerful enough to enslave the other one and force him to work for him. This is the *hegemonic society* based on predation or compulsory labor.[[2]](#footnote-2)

A brief explanation can be offered as to why individuals would choose one or another of these four possibilities. Autarchy could be chosen because the natural supplies are ample enough for both individuals, and conversely genocide because the natural resources are so scarce that they can barely suffice for two individuals; each individual’s survival is threatened by the fact that the other one picks up some of the meager available resources. Exchange can be chosen because it opens the possibility of a division of labor that will enhance the overall productivity of labor. Hegemony, finally, can be chosen by the powerful individual because it enables him to take by force and enjoy the goods produced by someone else. Through all these cases and in this basic framework, society emerges or does not emerge as a result of voluntary–and mostly self-interested–acts performed by one individual or by both of them.

**4. Crime and liberty in the contractual society**

Crime and liberty in the two-person contractual society are pretty simple to explain and to relate to one another. A crime is a violation of the property rights as defined by the rights on one’s own body and labor, on the previously non appropriated natural resources to which one’s labor has been mixed, on the products of the combination of one’s labor and goods rightfully owned, and on the goods that have been received through an exchange or a gift from their equally legitimate owners. If Robinson confiscates a good rightfully owned by Friday, or if he forces the latter to work for him (confiscating the services of Friday’s labor), then Robinson has committed a crime and the liberty of Friday has been infringed.

Now, when a crime is committed against an individual, he loses a part of his liberty, and he loses a bigger part if he suffers a more serious crime or a greater number of crimes. So the inverse relationship between liberty and criminality clearly appears, even though–of course–it has no quantitative accuracy. As long as a person can intentionally move her own body, she retains a minimum of liberty, and the only way to deprive her of the totality of her freedom is either to paralyze her body or, of course, to murder her. In this case, we could say that liberty is totally absent (liberty = 0) and crime is “absolute” (crime = ∞), so that the “mathematical” formula still holds.

Conversely, a violated liberty can be restored, for instance a stolen good can be recovered, or a compensation for the crime suffered can be extracted (forcibly or voluntarily) from the offender. With such restitution, the victim of this crime regains a part or the totality of the liberty that had been lost. As Rothbard convincingly explains, a just restitution implies, not only that the stolen goods (or equivalents) are returned to the victim, but that the latter receives from the offender additional reparation in order to compensate for the disagreement of being robbed and of temporarily not being able to use one’s own property.[[3]](#footnote-3)

In the simple setting that has been analyzed, it is also quite easy to answer the question of *why crimes are committed*. The perpetrator seeks an easy and quick gratification of his desires. An act of production is painful for two reasons, first because it requires labor and the sacrifice of leisure, and second because it takes time to get the end-result. Now, instead of taking the trouble to work and of having the patience to wait until the end of the production process, the perpetrator can grab the goods right now, with few efforts and no waiting.[[4]](#footnote-4)

This explanation of crime is important in that it leads to the conclusion that *there will be crime*.[[5]](#footnote-5) As society develops and becomes more and more complex with the intensification of the division of labor, crime needs to be tackled by specialized organizations whose services are costly. The fight against crime becomes a specific service that needs to be paid for one way or another–and this is where the two main currents of libertarianism part way, namely anarcho-capitalism (private funding of competing insurance agencies) and minarchism (public funding of State police, army and courts, through compulsory taxes).

Let us briefly present an objection that can be directed against this libertarian theory of justice from an egalitarian perspective. Suppose that Robinson is endowed with more favorable genetic characteristics than Friday, so that he is a better hunter, fisher, etc. Since he is more productive than Friday, he will get a higher standard of living. But this greater production and consumption comes from pure luck, not from any special effort. A supporter of egalitarianism or socialism would probably consider that, in this case, justice requires that the overall product of society be distributed equally between the two individuals: Friday is entitled to the same share as Robinson and can legitimately use force in order to equalize the proceeds. From a libertarian perspective, this use of compulsion is totally unacceptable because Robinson has done no wrong to Friday. The simple fact to be less productive than another individual, even out of pure bad luck, cannot justify the use of force against the more productive individual. Furthermore, the argument of luck is not as compelling as it may at first appear, because it can be overturned: if egalitarianism is enforced in this two-person society, then Friday becomes the lucky one because he happens–but only by chance!–to be associated with a more productive individual than himself. The implementation of the egalitarian principle simply transfers the luck from Robinson to Friday. So even in the situation most favorable to egalitarianism, the case for a contractual society appears much more compelling as far as justice is concerned.

**5. Crime and liberty in the hegemonic society**

In the hegemonic two-person society, the dominant individual (the ruler) has the power to confiscate the products or the labor of the subordinate individual (the subject). To that extent, the ruler is in a situation that resembles the situation of the State of a developed society with its power to tax. It is therefore possible to investigate, in the very simplified context of a two-person society, the question of the justice of State power and action. However, this question of “public” criminality is a bit more difficult and elusive than the question of private criminality analyzed above.

Rothbard, perhaps unfortunately, does not use in the case of the State the simplified model that was so fruitful in the foundation of his theory of justice (1998 [1982], Chap. 22). According to him, “the State is a coercive criminal organization” (1998 [1982], p. 172), “a vast engine of institutionalized crime and aggression” (p. 183). He argues that: (a) the State is based on force and not on contract, (b) the State relies nowadays on a variety of institutions aiming at developing and conveying a pro-State ideology, and (c) a Minimal State will not remain minimal for long, and will instead quickly come to exceed its mission of protection of the property rights, becoming a violator of these very rights it was supposed to protect in the first place. These arguments are undoubtedly correct, but the present paper will use a more gradual approach and focus on the very simple two-person situation–with the aim to analyze the issues in the most basic framework that can be conceived.

The first form of hegemonic society is pure exploitation or slavery. The ruler simply confiscates the production of the subject and lives partially or totally on the subject’s labor. For this society to persist, the subject must consume and get a sufficient part of his own produce, but the ruler can fix this pay at the minimum level necessary to sustain life–this is the kind of society in which Marx’s theory of exploitation is indeed relevant.[[6]](#footnote-6) Anyone with even a modicum degree of impartiality should agree that this form of society is criminal: the ruler is perpetrating a continuous crime against his subject. Even if the ruler remunerates the subject above the minimum level of subsistence, this “gift” is made with goods that should rightfully belong to the subject in the first place. So here, the more the ruler confiscates, the more criminality prevails, and the less liberty the subject enjoys.

A hegemonic society is not necessarily of the purely exploitative kind. The State as it currently exists is a hegemonic entity in the sense that it uses force to extract resources produced by the citizens.[[7]](#footnote-7) But then, with these resources, it funds the supply of a series of services to the population, such as protection, education, healthcare, and so on. A supporter of the “Social State” or “Welfare State” would consider that this kind of hegemonic society is not criminal at all, and instead very beneficial. Many public services are useful, of course, but why should they be provided through the compulsory confiscation of wealth?

Suppose that the ruler confiscates a part of the subject’s production, not in order to live as a pure parasite, but rather to be able to provide a *“public” service of education*. Is this a criminal society? The property rights of the subject are clearly infringed upon. But suppose now that these educational services make the subject a much better hunter, fisherman, farmer, etc., so that he ends up with *more goods and a higher standard of living*, even after deducting the forced payment he has to make for the lessons that he receives. Then, it could be argued, the ruler is certainly not a criminal but a benefactor. This argument, however, is not persuasive. If it is in the subject’s own interest to follow these lessons, then he will *voluntarily* buy them from the other individual. A division of labor that is the most productive for both individuals will be implemented without the need to resort to force. The price of the educational services will be settled through a bargaining that will necessarily result in a mutual agreement satisfying both parties. In the hegemonic society and with the use of force, either the price of the education services will be higher or the quality will be lower, because otherwise there is no reason to use force. Why would the ruler use coercion if he ends up worse off than through a simple contractual agreement? (Unless he is a *true* benefactor and can get the same result simply by selling out or giving away his services to the other individual: there should be no need of compulsion to get the other individual to accept a gift!)

The only argument that can justify the use of force to supply educational services here is the argument of *ignorance*. If the subject does not know how much he would benefit from these services, then the ruler does him a real favor by forcing him to provide for his own education. And this is indeed the main argument used nowadays to support a public and compulsory educational system. The economists, for instance, explain that if people were left to decide by themselves how much education they should buy, they would systematically underestimate the overall benefits that they get from a generalized system of formal education. As a result, people would tend to consume too few educational services and everybody would lose.[[8]](#footnote-8) The coercion of the hegemonic society can only be justified if the ruler knows while the subject ignores. In the opposite case, i.e. if the subject knows, then the ruler can be called criminal (even if his intentions are good) because he impoverishes the subject through a violation of his property rights. In our time, the States benefit from the advices of many experts. But the quality of these experts–for instance in the realm of education–is highly questionable because they rely on dubious and sometimes controversial theories, and because they often have a political or syndical agenda that takes precedence over the search for truth. The general argument that “The State knows better” is unconvincing–especially today, as the Western economies endure a crisis that the States were totally unable to predict and against which they seem largely helpless.

This example also shows that the violation of the property rights by itself may not be sufficient to label the ruler a “criminal.” An empirical or historical assessment of the situation in relation with a possible asymmetry of knowledge may be required. Rothbard, on the other hand, seems to consider any such violation as criminal.

A different example is the provision of supply in case of need, and this is perhaps the closest that we can get to the *services of social security* in a two-person society. The ruler wants to take care of the subject when the latter needs it, i.e. in case of illness, accident, bad crops, etc. Since he does not know when those unfortunate events will take place, he maintains a precautionary saving that he forcibly extracts from the subject at the beginning of each month (for instance), and returns in case of urgent need. At the end of the month, the stock is rotten or useless and the ruler confiscates a new one, so that this kind of social security system persists over time. Now, even if he was not under duress, the subject would choose to insure himself against these future risks and would voluntarily keep a part of his produce to be able to survive through these difficult moments that occur from time to time. There is no need here to suppose that knowledge is asymmetric: both the ruler and the subject have the same estimation of the probability for these risks to occur and can calculate the portion of the product that they wish to save in case of emergency.[[9]](#footnote-9) This precautionary saving, however, implies an *intertemporal choice*, because the individual saves now in order to be able to consume later (if the risk occurs). An individual with a stronger preference for the present (higher degree of time preference) will choose to consume more in the present and near future, and therefore to save less for a more distant future: his precautionary stock will be smaller. Conversely, an individual with a lower degree of time preference will choose to consume less now and to keep a larger stock of precautionary saving because he gives (relatively) more weight to the future. Now, there is no reason to suppose that the ruler and his subject have the same degree of time preference, so that two cases can happen: the ruler can be more “presentist” than the subject, or he can be less “presentist.”

If the ruler is *more presentist*, he will save less than the subject, i.e. will confiscate a smaller stock than the subject wishes to save. In this case, no problem occurs in spite of the use of force. The subject will voluntarily collect an additional stock so that the total precautionary saving exactly matches his desired stock. The use of coercion has no tangible effect and is in fact completely pointless. Even though he infringes upon the property rights of the subject, the ruler cannot really be called a criminal, because his “crime” is quite innocuous and will not negatively affect the subject. A quasi-harmless crime barely diminishes liberty. The damage is more formal than real.

If the ruler is *less presentist*, he will confiscate a greater stock than the subject wishes to save. Here, the subject suffers a genuine coercion that reduces his satisfaction by changing his pattern of consumption over time. Can this coercion be justified? It does not seem so. The difference between the ruler and the subject is only a difference between their respective subjective preferences. A difference between value scales is insufficient to excuse the use of force. When the ruler imposes his subjective preferences to the subject, he infringes upon his liberty and makes him poorer, so that this use of force can be considered as criminal. The larger the discrepancy between the respective rates of time preference of the ruler and the subject, the more serious the crime, and consequently the more the liberty of the subject is reduced.

Yet, we often hear the argument that State intervention is justified because it has a lower time preference than people and firms, that the latter are “myopic” while the State takes much more adequately the future and the long-term interest of the population into account. But if the State forces people in one way or another to save more than they wish, it reduces their satisfaction and does them harm, not good. Furthermore, the idea that the State is more future-oriented than people and firms is very questionable. The huge public debts that the Western States have been piling up for decades show exactly the opposite, namely that these democratic States are very much present-oriented (Hoppe, 2001).

**Conclusion**

The very first case for or against the State should be made at the lowest level possible, i.e. in a two-person society. Of course, there are many issues that cannot be analyzed at this elementary level, such as redistribution for instance. But in this simple setting some of the most basic arguments can already be put forward and analyzed, such as the inverse relationship between liberty and criminality. And it appears quite difficult to justify a benevolent use of force, unless we suppose that there is a deep knowledge asymmetry between the hegemonic individual and his subject. Is the State a criminal organization? Rothbard’s answer is an emphatic “Yes.” In this paper, a more qualified answer has been provided, based on a gradual approach using the methodology inaugurated by Rothbard himself.

**References**

Böhm-Bawerk (1959 [1884]) *Capital and Interest*, vol. 1: *History and Critique of Interest Theories*, South Holland, Ill., Libertarian Press.

Gottfredson, Michael R. and Hirschi, Travis (1990) *A General Theory of Crime*, Stanford, Cal., Stanford University Press.

Hoppe, Hans-Hermann (2001) *Democracy: The God that Failed. The Economics and Politics of Monarchy, Democracy, and Natural Order*, New Brunswick, N.J., Transaction Publishers.

Mises, Ludwig von (1998 [1949]) *Human Action. A Treatise on Economics*, Auburn, Ala., Ludwig von Mises Institute.

Rothbard, Murray (1962) *Man, Economy, and State. A Treatise on Economic Principles*, Princeton, N.J., D. Van Nostrand.

Rothbard, Murray (1998 [1982]) [*The Ethics of Liberty*](http://library.mises.org/books/Murray%20N%20Rothbard/The%20Ethics%20of%20Liberty.pdf), New York, N.Y., New York University Press.

Taylor, Ian R., Paul Walton and Jock Young (1973) *The New Criminology: For a Social Theory of Deviance*, London, Routledge.

West, Edwin G. (1994) *Education and the State. A Study in Political Economy*, 3rd edition, Indianapolis, Ind., Liberty Fund.

1. See <http://www.fbi.gov/scams-safety/fraud/fraud>. [↑](#footnote-ref-1)
2. The terminology of these two forms of social cooperation, “contractual” and “hegemonic,” originates in Mises (1998 [1949], pp. 196-197). [↑](#footnote-ref-2)
3. See Rothbard (1998 [1982], Chap. 13, “Punishment and Proportionality”). [↑](#footnote-ref-3)
4. See Gottfredson and Hirschi (1990) for very interesting developments on this topic in a criminological perspective (see also Hoppe, 2001, Chap. 1). [↑](#footnote-ref-4)
5. A book of sociology of delinquency published in the 1970’s by socialist criminologists reached the stunning conclusion that in a fully realized socialist society crime will entirely disappear (Taylor *et al*., 1973). Their explanation was that crime can only happen in a capitalist society based on power and control. A socialist society completely breaks with this model, power and control disappear, and with them crime also disappears. This is obviously utter nonsense. Hardcore socialists such as Taylor *et al*. are utopian (in a bad way) and libertarians are much more down-to-earth: they know that there *will* be crime, and that it is therefore necessary to devise institutions that try and prevent it (even if they can never suppress it entirely), institutions that punish crime when it occurs, and rules to compensate the victims that have suffered from this violation of their property rights. [↑](#footnote-ref-5)
6. That this theory of exploitation is inapplicable to a capitalist economic system has been shown long ago by Böhm-Bawerk (1959 [1884], Chap. 12). [↑](#footnote-ref-6)
7. “Only the State obtains its revenue by coercion, by threatening dire penalties should the income not be forthcoming. That coercion is known as ‘taxation,’ although in less regularized epochs it was often known as ‘tribute’” (Rothbard, 1998 [1982], p. 162). [↑](#footnote-ref-7)
8. For a detailed critique of this economic argument (an argument based on the concept of the positive externalities of education), see West (1994). [↑](#footnote-ref-8)
9. If the information was asymmetric, and for instance the subject underestimated the probability of illness and accident, then the ruler could be a benefactor by forcing him to get the “right” level of insurance–i.e. the level of insurance that corresponds to the objective probability of the risk incurred. [↑](#footnote-ref-9)