

The Logic of the Argument in Behalf of Legalizing Blackmail

by

Professor Walter Block
Economics and Finance Department
University of Central Arkansas
Conway Ar 72035
wblock@mail.uca.edu
tel: 501450 5355
fax 501450 5302

The Logic of the Argument in Behalf of Legalizing Blackmail'

I. Introduction

Extortion is the demand for money or other valuable consideration, coupled with the threat to do something which both is and should be illegal. For example, "Give me \$X of your money or I will kidnap your children," or "Go to bed with me or I will bum down your house." In very sharp contrast, blackmail is the demand for money or other valuable consideration, coupled with the threat to do something which both is and should be legal. For example, "Give me \$X of your money or will tell everyone that you take a bath with a rubber duckie" or "Go to bed with me or I will gossip about your hidden adultery."

There are no commentators who call for the legalization of extortion. As to blackmail, while most legal philosophers who have written about the subject favor its present prohibition²,

¹ The author wishes to acknowledge the great help afforded him in the writing of this article by Michael R. Edelstein and David Gordon. Others who made contributions include Hannah Block, Robert P. Murphy, Gene Callahan, Roger W. Garrison. The usual caveats certainly apply

² Alldridge, Peter, "Attempted Murder of the Soul': Blackmail, Privacy and Secrets," Oxford Journal of Legal Studies Vol. 13, No. 3, pp. 368-387; Altman, Scott, "A Patchwork Theory of Blackmail," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1639-1661; Becker, Gary, "The Case Against Blackmail," Jan. 1985, unpublished; Berman, Mitchell N., "The Evidentiary Theory of Blackmail: Taking Motives Seriously," University of Chicago Law Review, v. 65, Summer, 1998, pp. 795-878; Boyle, James, "A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading," California Law Review, Vol. 80, No. 6, December 1992, pp. 1413-1540; Brown, Jennifer Gerarda, "Blackmail as Private Justice," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1935-1973; Campbell, Debra J., "Why Blackmail Should be Criminalized: A Reply to Walter Block and David Gordon," Loyola of Los Angeles Law Review, Vol. 21, No. 3, November 1988, pp. 883-892; Campbell, A.H., "The Anomalies of Blackmail," 55 Legal Quarterly Review, 382 (1939); Coase, Ronald, "The 1987 McCorkle Lecture: Blackmail," Virginia Law Review, Vol. 74, No. 4, 1988, pp. 655-676; Daly, George, and Giertz, J. Fred, "Externalities, Extortion, and Efficiency: Reply," 68 (65) American Economic Review, 736, 1978 (1975); DeLong, Sidney W.,

"Blackmailers, Bribe Takers, and the Second Paradox," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1663-1693; Ellsberg, Daniel, "The Theory and Practice of Blackmail," in Bargaining: Formal Theories of Negotiation, 343, Oran R. Young, ed., 1975; Epstein, Richard, "Blackmail, Inc.," (1983) 50 University of Chicano Law Review, 553; Evans, Hugh, "Why Blackmail Should be Banned," Philosophy, Vol 65, 1990, pp. 89-94; Feinberg, Joel, "The Paradox of Blackmail," 1 Ratio Juris 83 (1988); Feinberg, Joel, The Moral Limits of the Criminal Law: Harmless Wrongdoing, 1988; Feinberg, Joel, Harmless Wrongdoing, New York: Oxford University Press, 1990; Fletcher, George P., "Blackmail: The Paradigmatic Case," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1617-1638; Fried, Charles, Contract As Promise, 102 (1981); Ginsburg, Douglas H., and Shechtman, Paul, "University of Pennsylvania Law Review," Vol. 141, No. 5, May, 1993, pp. 11849-1875; Goodhart, Arthur L., "Blackmail and Consideration in Contracts," 44 Legal Quarterly Review 436 (1928), reprinted in Goodhart, Arthur L., Essays in Jurisprudence and the Common Law 175 (1931); Gordon, Wendy, J., "Truth and Consequences: The Force of Blackmail's Central Case," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1741-1785; Gorr, Michael, "Nozick's Argument Against Blackmail," 58 Personalist 187, 190, 1977; Gorr, Michael, "Liberalism and the Paradox of Blackmail," Philosophy and Public Affairs, Vol. 21, 1992, pp. 43-66; Haksar, Vinit, "Coercive Proposals," Political Theory, February 1976, pp. 65-79; Hale, Robert L., "Bargaining, Duress and Economic Liberty," 43 Columbia Law Review, 603-628 (1943); Hale, Robert L., "Coercion and Distribution in a Supposedly Non-Coercive State," 38 Political Science Quarterly 470 (1923); Hardin, Russell, "Blackmailing for Mutual Good," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1787-1815; Hepworth, Michael, Blackmail: Publicity and Secrecy in Everyday Life, London: Routledge and Kegan Paul, 1975, pp. 29-40; Isenbergh, Joseph, "Blackmail from A to C," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1905-1933; Jandoo, R.S., and Harland, W. Arthur, "Legally Aided Blackmail," New Law Journal, 27 April 1984, pp. 402-404; Katz, Leo, "Blackmail and Other Forms of Arm-Twisting," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1567-1615; Katz, Leo, and Lindgren, James, "Instead of a Preface," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, p. 1565; D. Kipnis, "Blackmail as a Career Choice: A Liberal Assessment", Criminal Justice Ethics, Vol. 18, No. 2, Summer/Fall 1999, pp., 19-22; Landes, William, and Posner, Richard A., "The Private Enforcement of Law," (1975) 4 Journal of Legal Studies, 1, 43; Levin, Michael, "Blockmail," Criminal Justice Ethics, Vol. 18, No. 2, Summer/Fall 1999, pp. 11-18; Lindgren, James, "Unraveling the Paradox of Blackmail," 84 Columbia Law Review, 670 (1984); Lindgren, James, "More Blackmail Ink: a Critique of 'Blackmail, Inc.,' Epstein's Theory of Blackmail" (1984) 16 Connecticut Law Review 909; Lindgren, James, "In Defense of Keeping Blackmail A Crime: Responding to Block and Gordon," Lovola of Los Angeles Law Review, Vol. 20, No. 1, November 1986, pp. 35-44; Lindgren, James, "Blackmail: *On Waste, Morals and Ronald Coase*," 36 UCLA Law Review, 597, 1989; Lindgren, James, "Kept in the Dark: Owen's view of Blackmail" (1989) 21 Connecticut Law Review 749; Lindgren, James, "Secret Rights: A Comment on Campbell's Theory of Blackmail," Connecticut Law Review, Vol. 21, 1989, pp.

there is a minority who oppose it, and call for its legalization³. Popular amongst the former

407-410; Lindgren, James, "Blackmail: An Afterward," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1975-1989; Lindgren, James, "The Theory, History and Practice of the Bribery-Extortion Distinction," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 11695-1739; Lyons, Daniel, "Welcome Threats and Coercive Offers," Philosophy, October 1975, pp. 425-436; Murphy, Jeffrie, G., "Blackmail: A Preliminary Inquiry," 63 Monist 156 (1980); Nozick, Robert, Anarchy, State and Utopia, New York: Basic Books, 1974; Owens, David, "Should Blackmail be Banned?," Philosophy, Vol 163, No. 246, 1979, pp. 501-514; Posner, Richard A., Economic Analysis of Law, fourth ed., Boston: Little Brown, 1992; Posner, Richard, "Blackmail, Privacy and Freedom of Contract," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1817-1847; Shavell, Steven, "An Economic Analysis of Threats and Their Legality: Blackmail, Extortion and Robbery," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, pp. 1877-1903; Tooher, L.G., "Developments in the Law of Blackmail in England and Australia," 27 International and Comparative Law Quarterly, 337 (1978); Waldron, Jeremy, "Blackmail as Complicity," 4 (Nov. 1992) unpublished; Williams, Glanville, "Blackmail," The Criminal Law Review, (1954); Winder, W.H.D., "The Development of Blackmail," 5 Modern Law Review, 21, 36-41 (1941).

³ See Mack, Eric, "In Defense of Blackmail," 41 Philosophical Studies 274 (1982); Rothbard, Murray N., The Ethics of Liberty, New York: New York University Press, 1998; Rothbard, Murray N., Man, Economy and State, Auburn AL: Mises Institute, 1993, p. 443, ft. 49; Scalise, Ronald Joseph, "Blackmail. Legality and Liberalism," 74 Tulane Law Review 1483, March 2000; Block, Walter, "The Blackmailer as Hero," The Libertarian Forum, December 1972, pp. 1-4; Block, Walter, Defending the Undefendable, New York: Fox and Wilkes, 1976, pp. 44-49; Block, Walter, and Gordon, David, "Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren," Loyola of Los Angeles Law Review, Vol. 19, No. 1, November 1985, pp. 37-54; Block, Walter, "Trading Money for Silence," University of Hawaii Law Review, Vol. 8, No. 1, Spring 1986, pp. 57-73; Block, Walter, "The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell," Western State University Law Review, Vol. 24, No. 2, Spring, 1997, pp. 225-246; Block, Walter, "A Libertarian Theory of Blackmail," Irish Jurist, Vol XXXIII, 1998, pp. 280-310; Block, Walter, and Robert W. McGee, "Blackmail from A to Z: A Reply to Joseph Isenbergh's 'Blackmail from A to C,'" Mercer Law Review, Vol. 50, No. 2, Winter 1999, pp. 569-601; Block, Walter and Robert W. McGee, "Blackmail as a Victimless Crime," Bracton Law Journal, Vol. 31, 1999, pp. 24-48; Block Walter and Christopher E. Kent, "Blackmail," Magill's Legal Guide, Pasadena, CA: Salem Press, 1999, p. 109; Block, Walter, "Blackmailing for Mutual Good: A Reply to Russell Hardin," Vermont Law Review, Vol. 24, No. 1, Fall 1999, pp. 121-141; Block, Walter, "Blackmail and Economic Analysis," Thomas Jefferson Law Review, Vol. 21, No. 2, October 1999, pp. 165-192; Block, Walter, "The Crime of Blackmail: A Libertarian Critique," Criminal Justice Ethics, Vol. 18, No. 2, Summer/Fall 1999, pp. 3-10; Block, Walter, "Replies to Levin and Kipnis on Blackmail," Criminal Justice Ethics, Vol. 18, No. 2, Summer/Fall 1999, pp. 23-28;

group of commentators is the view that blackmail is a puzzle, or a paradox, or an enigma. How can it be that two acts, when they occur in isolation from one another are both legal, and yet when they take place in tandem, or together, the complex act consisting of them both should be prohibited by law.⁴ For the latter group, there is no quandary to be solved. The two acts which together comprise blackmail are each licit, and so is the deed in its entirety.

II. Libertarianism

The theory of what should be illegal which underlies the present paper is the philosophy of libertarianism. This is the view that all acts may be undertaken, with the sole exception of those which violate or transgress rights to personal integrity, or private property rights. These, in turn, are established by homesteading principles, along Lockean lines. This gives rise to the libertarian non aggression axiom. The only thing that the law need be concerned about is

Block, Walter, Stephan Kinsella and Hans-Hermann Hoppe, "The Second Paradox of Blackmail," Business Ethics Quarterly; Vol. 10, No. 3, July 2000, pp. 593-622; Block, Walter, "The Legalization of Blackmail: A Reply to Professor Gordon," Seton Hall Law Review, Vol. 30, No. 4, 2000, pp. 1182-1223; Block, Walter, "Threats, Blackmail, Extortion and Robbery And Other Bad Things," University of Tulsa Law Journal, Vol. 35, No. 2, Winter 2000, pp. 333-351; Block, Walter, and Anderson, Gary, "Blackmail, Extortion and Exchange," New York Law School Law Review, forthcoming; Block, Walter, Blackmail is Private Justice," University of British Columbia Law Review, Vol. 33, No. 2, 2000; Block, Walter, "Reply to Wexler: Libertarianism, Blackmail and Decency," University of British Columbia Law Review, forthcoming; Block, Walter, "Toward a Libertarian Theory of Blackmail," Journal of Libertarian Studies, Vol. 14, No. 2, 2000.

⁴ States Berman, pp. 800-801, cited in footnote 2, "Any satisfactory theory must account for both parts of the blackmail puzzle. First, it must explain whether and why blackmail should be made criminal. Second, if it supports criminalization of blackmail, it must explain whether and why unconditional performance of the acts a blackmailer might threaten should remain lawful. Put otherwise, the theory should provide an account of the blackmail threat that both justifies its criminalization and distinguishes it, in a manner relevant to that justification, from the act upon which the threat is leveraged."

unwarranted boundary crossings, or invasions of person and/or property.

States Murray Rothbard in this regard:

"...(this)... legal code, simply, would insist on the libertarian principle of no aggression against person or property, (and) define property rights in accordance with libertarian principle."⁵

⁵ Rothbard, Murray N., For a New Liberty, Macmillan, New York, 1978, p. 235. For further elucidation of this philosophy, see Anderson, Terry and Hill, P.J., "An American Experiment in Anarcho-Capitalism: the not so Wild, Wild West," Journal of Libertarian Studies Vol. 3, No. 1, 1979, pp. 9-29; Anderson, William L., Myles Wallace and John Warner, "Government Spending and Taxation: What Causes What," Southern Economic Journal, Vol. 52, no. 3, January 1986, pp. 630-639; Barnett, Randy E., The Structure of Liberty: Justice and the Rule of Law, Oxford: Clarendon Press, 1998; Benson, Bruce L., 1989, Enforcement of Private Property Rights in Primitive Societies: Law Without Government," The Journal of Libertarian Studies, Vol. IX, No. 1, Winter, pp. 1-26; Benson, Bruce L., "The Spontaneous Evolution of Commercial Law," Southern Economic Journal, 55: 644-661, 1989; Benson, Bruce L., The Enterprise of Law: Justice Without the State, San Francisco: Pacific Research Institute for Public Policy, 1990; Cuzán, Alfred G., "Do We Ever Really Get Out of Anarchy?," Journal of Libertarian Studies, Vol. 3, No. 2 (Summer, 1979); De Jasay, Anthony, The State, Oxford: Basil Blackwell, 1985; Friedman, David, The Machinery of Freedom: Guide to a Radical Capitalism, La Salle, IL: Open Court, 2nd ed., 1989; Friedman, David, "Private Creation and Enforcement of Law: A Historical Case," Journal of Legal Studies, 8: 399-415, 1979; Hoppe, Hans-Hermann, A Theory of Socialism and Capitalism: Economics, Politics and Ethics, Boston: Kluwer, 1989; Hoppe, Hans-Hermann, The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy, Boston: Kluwer, 1993; Hoppe, Hans-Hermann, "The Private Production of Defense," Journal of Libertarian Studies, Vol. 14, No. 1, Winter 1998-1999, pp. 27-52; Hummel, Jeffrey Rogers, National Goods Versus Public Goods: Defense, Disarmament, and Free Riders, 4 Rev. Austrian Econ. 88 (1990); Kinsella, Stephan, "New Rationalist Directions in Libertarian Rights Theory," 12:2 Journal of Libertarian Studies 313-26 (Fall 1996); Kinsella, Stephan, "Legislation and the Discovery of Law in a Free Society," 11 Journal of Libertarian Studies 132 (Summer 1995); <http://www.mises.org/journals/jls/11_2/11_2_5.pdf>; Kinsella, Stephan, "The Undeniable Morality of Capitalism," 25 St. Mary's Law Journal 1419 (1994) (review essay of Hans-Hermann Hoppe, The Economics and Ethics of Private Property (1993)); Kinsella, Stephan, "Estoppel: A New Justification for Individual Rights," Reason Papers No. 17 (Fall 1992), p. 61; Morriss, Andrew P., "Miners, Vigilantes and Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law," Land and Water Law Review, Vol. XXXIII, No. 2, 1998, pp. 581-696; Peden, Joseph R., 1977, "Property rights in Celtic Irish law," The Journal of Libertarian Studies, Vol. 1, No. 2, Spring, pp. 81-96; Rothbard, Murray N., The Ethics of Liberty, Humanities Press, Atlantic Highlands, N.J., 1982; Rothbard, Murray N., "Society Without a State." J. R. Pennock and J. W. Chapman (eds.), Anarchism: Nomos XIX. New York:

111. Objections

An immediate objection to the libertarian theory of blackmail arises. We are in effect saying (among other things) that since act A (the demand for money) is legitimate, and act B (the contractual promise to refrain from exercising one's free speech rights to gossip) violates no proper law, that therefore the complex deed comprised of both of these acts must be legalized

Given this, the argument would appear to be vulnerable to the objection of non sequitur: the conclusion does not logically follow from the premises.

1. Carbon monoxide

Consider the following example:

A: a person is exposed to a piece of carbon; this is harmless, and, we shall assume for the sake of argument, lawful

B: a person is exposed to some oxygen; this is harmless, and, we shall assume for the sake of argument, lawful

A+B: a person is exposed to some carbon monoxide; this is not at all harmless, but rather poisonous. As a result, he dies. We need not make any assumptions about this case for

New York University Press, 1978, pp. 191-207; Rothbard, Murray N., Man, Economy and State, Auburn AL: Mises Institute, 1993; Skoble, Aeon J. "The Anarchism Controversy," in Liberty for the 21st Century: Essays in Contemporary Libertarian Thought, eds. Tibor Machan and Douglas Rasmussen, Lanham MD: Rowman and Littlefield, 1995, pp. 77-96; Sechrest, Larry J., "Rand, Anarchy, and Taxes," The Journal of Ayn Rand Studies, Vol. I, No. 1, Fall 1999, pp. 87-105; Spooner, Lysander, No Treason, Larkspur, Colorado, (1870) 1966; Stringham, Edward, "Justice Without Government," Journal of Libertarian Studies, Vol. 14, No. 1, Winter 1998-1999, pp. 53-77; Tinsley, Patrick, "With Liberty and Justice for All: A Case for Private Police," Journal of Libertarian Studies, Vol. 14, No. 1, Winter 1998-1999, pp. 95-100; Tannehill, Morris and Linda, The Market for Liberty, New York: Laissez Faire Books, 1984; Woolridge, William C., Uncle Sam the Monopoly Man, New Rochelle, N.Y.: Arlington House, 1970.

argument's sake. This is clearly unlawful, at the very least, and almost certainly first degree murder."

This parallels the libertarian argument in favor of legalizing blackmail. For there, too, the claim is that a legal A, plus a legal B⁷ must yield an equally legal A+B. We have seen, however, that this line of reasoning has difficulties.

Before we go any further in the analysis, let us distinguish this case from another, easily confused with it. Previously, we were exploring the logic of deducing from A is ok, B is ok, therefore A+B is ok. This new case, now to be introduced, alleges something seemingly similar, but actually altogether different. The logic of this second case is as follows: A+B is **ok**, therefore A is ok, and B is ok.

To put this in tabular format:

Equation 1: A is **ok**, B is **ok**, therefore A+B is **ok**

Equation 2: A+B is ok, therefore A is ok, and B is ok.

2. Doctor

Here is an example of equation 2:

In order to operate, a surgeon might need to shut off his patient's breathing and attach him to a respirator. Assume that this is morally 'all right'. It does not follow that it is morally all right

⁶ I owe this example to David Gordon and Hannah Block.

⁷ The blackmail paradox is sometimes couched in the question of "How can two legal whites amount to an illegal black?"

⁸ We have been using, interchangeably, the terms moral, ok, legal, legitimate, white, harmless and licit. Our main interest in blackmail concerns what the law should be, not whether or not blackmail is moral, or ok, or proper, or appropriate. These other phrases are used only to

to stop the patient's breathing but not put him on the respirator.

Here, A+B is the complex act of shutting off a patient's breathing and attaching him to a life saving respirator. We are stipulating that this is lawful, even commendable. But it does not follow that either A or B alone is legitimate. A fails because stopping a patient's breathing, and doing nothing else to help him, will kill him, and this is murder. B, too, can be unacceptable if placing a patient on a respirator without first shutting off his own (sickly, inferior) breathing can choke and hence kill him, and then this too would be murder.

Having distinguished between these two cases, let us return to the first, for only it is a direct attack on the libertarian position on blackmail. If the latter is to be sustained, we must unearth a disanalogy between blackmail and poison gas, in both of which are taken two actions, each of which is uncontroversially legal when separate, but not in their amalgamation.

An easy disanalogy is that one case concerns chemical reactions, the other human action. That is, while the carbon and the oxygen combine to create something which is very different from its constituent elements in terms of violating the rights of people, the same cannot be said for the two separate acts of the blackmailer. At the end of the day, there is nothing in carbon monoxide, as far as murdering a person is concerned, that can be found, separately, in either carbon or oxygen, or in both of them, provided only that they are kept apart from chemically interacting with each other.

On the other hand, the act of requesting money or other valuable consideration, and the

make the non blackmail examples in the text read more easily.

threat of revealing a secret' are entirely separable from the amalgamation of the two, the complex two stage act which comprises blackmail. While neither carbon alone nor oxygen alone can kill, while certainly carbon monoxide can, neither a request for money (which can be declined) or an announcement of incipient gossip, or the renunciation of this right for a fee (which is an integral part of free speech) violates rights, nor does the request, when combined with the threat. While each chemical on its own is harmless, when they come together their interaction is poisonous. But in the case of blackmail, there is no such same or similar or analogous "poisonous" interaction.

Critics of the libertarian theory of blackmail" will of course object on the ground that the latter statement is the very point in question. But surely the burden of proof should rest with those urging a very paradoxical legal position, namely, that two legitimate acts can, when combined, constitute an illegitimate one. And yet, not only have these critics ignored this burden, they have for the most part completely ignored the legalization position on the issue." In

⁹ If it is lawful to do x, surely it is (or rather, should be) legal to threaten to do x, or to announce that x will be done in future (which can amount to precisely the same thing.) David Gordon puts the matter as follows: "If doing R to Q does not violate rights, and doing S to Q does not violate rights, then offering Q a choice between R and S does not violate rights. Thus, if asking someone for money does not violate his rights, and disclosing unfavorable information about someone does not violate his rights, then giving him a choice between exposure and paying you money not to do so does not violate rights." Personal correspondence, dated 1/3/01.

¹⁰ See footnote 3, supra.

¹¹ For exceptions to this generalization, see Lindgren, James, "In Defense of Keeping Blackmail A Crime: Responding to Block and Gordon," Loyola of Los Angeles Law Review, Vol. 20, No. 1, November 1986, pp. 35-44; Campbell, Debra J., "Why Blackmail Should be Criminalized: A Reply to Walter Block and David Gordon," Loyola of Los Angeles Law Review, Vol. 21, No. 3, November 1988, pp. 883-892; D. Kipnis, "Blackmail as a Career Choice: A Liberal Assessment", Criminal Justice Ethics, Vol. 18, No. 2, Summer/Fall 1999, pp.,

blackmail, no one has satisfied this burden, at least on libertarian grounds; e.g., no one has shown that the combination of A (request for money) and B (contractual silence) either together, or alone, violate the non aggression axiom¹².

So let us veer away from legality for the moment, and consider only harm, abstracting from the objection that harm is necessarily subjective, and thus incommensurable across persons.¹³ Again, oxygen alone is harmless, carbon by itself is harmless, but when combined into carbon monoxide, the amalgamation is lethal. If the analogy is to survive, the same pattern must emerge under blackmail. It does not. Consider. A mere request for funds is harmless; it can always be refused. The announcement (or threat) of future public discussion of the rubber duckie or the adultery is harmful, not harmless. Further, it is less harmful than the actual blackmail. That is, it is far worse to be in the hands of the gossip, than of the blackmailer. Once

19-22; Levin, Michael, "Blockmail," Criminal Justice Ethics, Vol. 18, No. 2, Summer/Fall 1999, pp. 11-18; Posner, Richard, "Blackmail, Privacy and Freedom of Contract," University of Pennsylvania Law Review, Vol. 141, No. 5, May, 1993, p. 1832, fn. 32.

For a rejoinder to the first pair of articles, see Block, Walter, "The Case for Decriminalizing Blackmail: A Reply to Lindgren and Campbell," Western State University Law Review, Vol. 24, No. 2, Spring, 1997, pp. 225-246, (cited in footnote 3); for a response to the second pair, see Block, Walter, "Replies to Levin and Kipnis on Blackmail," Criminal Justice Ethics, Vol. 18, No. 2, Summer/Fall 1999, pp. 23-28 (cited in footnote 3); for a reply to the fifth, by Posner, see Block, Walter, and Gary Anderson, "Blackmail, Extortion and Exchange" New York Law School Law Review, forthcoming (cited in footnote 3); and for a reply to the sixth, by Berman, see Block, Walter, "Berman on Blackmail: Taking Motives Fervently."

¹² For attempts to do so, see footnote 2 supra. For refutations of these attempts, see footnote 3, supra.

¹³ See on this Buchanan, James M. and G.F. Thirlby, L.S.E. Essays on Cost, New York: New York University Press, 1981; Buchanan, James M., Cost and Choice: An Inquiry into Economic Theory, Chicago: Markham, 1969; Mises, Ludwig von, Human action, Chicago: Regnery, 1949, 1963, 1966; Rothbard, Murray N., Man, Economy and State, Auburn AL: Ludwig von Mises Institute, 1993.

the gossip gains hold of the secret, all is lost, the beans are spilled, the jig is up. However, the blackmailer has the decency, completely lacking on the part of the blabbermouth, to offer you a choice. Either the secret gets told, or you pay up. If you avail yourself of this offer, you have in effect demonstrated, or revealed¹⁴ that the secret is more valuable to you than the money or other consideration you must give up. Nothing of the sort obtains in the case of the chemical reaction. Hence it fails to overturn the libertarian analysis of blackmail.

3. Lunch appointments

Here is a counter argument to our attempt to show a disanalogy between human action and chemical reactions:

A: X makes an appointment to have lunch with Y at 12:00 noon tomorrow in city V.

B: X makes an appointment to have lunch with Z at 12:00 noon tomorrow in city W.

A+B: X makes incompatible appointments to have lunch with both Y at 12:00 noon tomorrow in city V, and also with Z at 12:00 noon tomorrow in city W.¹⁵

Here, there are no chemical reactions to serve as the basis for the disanalogy. It cannot be denied that both blackmail and two-timing are human actions“. Again, however, there is a disanalogy. Not chemical, to be sure, but a disanalogy, nevertheless.

¹⁴ See Rothbard, Murray N., “Toward a Reconstruction of Utility and Welfare Economics,” in The Logic of Action: Method, Money and the Austrian School, Vol. I, Cheltenham, UK: Edward Elgar, 1997

¹⁵ I owe this example to David Gordon.

¹⁶ We pass over as irrelevant the objection that while blackmail is (claimed by most commentators to be) a crime, two timing is not, but is rather, presumably, “merely” immoral.

It is as follows. X's first act is indubitably legitimate. But the second is not.¹⁷ Remember the context. When X is in the act of making the second appointment with Z, he has already first committed himself to Y. Thus, the second in this pair of acts, unlike in blackmail, is illicit. Hence this counterexample, too, fails. The point is, there is supposed to be an analogy between this luncheon case and blackmail. To the extent that there is one, we cannot argue, in the blackmail or any other context, that just because A and B are just, separately, that A+B together is also licit. After all, this is certainly not a valid argument in the luncheon case. But to the extent that these two cases are different, then we cannot reason from the fallacy of A is ok, B is ok therefore A+B **ok** in the luncheon case to that of blackmail.

The claim that blackmail should be prohibited by law, given that its two constituent elements are both and should be legal, is like being told that fishing is legal, bicycle riding is not against the law, but that dropping a baited hook into the water in an attempt to catch a fish -- while sitting on a bicycle -- will land you a term in the hoosegow. A request for money, and a promise to keep a secret, have as little intrinsically to do with one another as a fish and a bicycle. In contrast, in the attempts to undermine case 1 we have considered, the A's and the B's are intimately connected. In the carbon monoxide case so much so that the A+B has entirely different chemical properties than the A and the B alone. In the two timing luncheon case so much so that making the second appointment is per se ruled out of court, once the first has been made (and not then canceled).

There is a tremendous leap in logic between saying that A is ok, B is ok, therefore A+B

¹⁷ I owe this point to Michael Edelstein.

are ok is a fallacy in the chemical or luncheon cases and maintaining this view for blackmail.

Drawing this conclusion in the former case is invalid, but this does not prove this for the latter.

This is true if and only if there is a parallel between the two cases, blackmail on the one hand and gases or lunch appointments on the other, but as we have seen, there is not.

In the chemical or the luncheon cases, if you combine an A and a B into an A+B, you either kill an innocent person, or disappoint one luncheon partner. But if I accept money from you, and contract with you not to spill the beans about your secret, I haven't violated any of your rights.

I claim that A is ok, B is ok, therefore A+B is **ok** is a valid argument, assuming that the A and the B are really independent of one another, as they very much are for blackmail, but not in the other cases we have considered. In blackmail, A and B still retain their essential nature. In the chemical example, A and B do not. And in the luncheon appointments case, there is an improper specification. A is stipulated to be a legitimate agreement; but if so, then B be cannot be proper.

4. Telephone call

Consider the following case. It is perfectly all right to A, make a telephone call in the nude. It is also well within the bounds of decency to B, use a public telephone booth. But A+B, combining the two scenarios, e.g., making a telephone call from a public booth in the nude, would be severely frowned upon by Amy Vanderbilt.¹⁸ This is not a chemical reaction or a case of human action. However, again there is a disconnect. Contextually, nude phone calling is not at all a combination of being naked in the privacy of one's home (while making a telephone call)

¹⁸ I owe this example to Michael Edelstein.

and doing so in public. Going out into the world without one's clothes is altogether different.

What of the following objection:

“You are right on your blackmail thesis. If I accept money from you, and contract with you not to spill the beans about your secret, I haven't violated any rights. But the problem is this: Some legal theorists disagree. They think that blackmail does violate rights. How can we show that they are mistaken? One way is to appeal to the principle, if **A** is all right and **B** is all right, then **A + B** must be all right. But this general principle is vulnerable to counterexamples (e.g., carbon monoxide, luncheon two timing). Thus, it cannot be used, in an unmodified form, to support a pro-blackmail position. The principle must be modified if it is to do the job.”¹⁹

My answer to this objection is that the principle need not be “modified.” It is fully able to “do the job” of protecting the libertarian thesis on blackmail. What must be done, instead, is to deconstruct the examples, and show that they are not fully analogous to the blackmail case.

5. Contemporaneous letter

Let us now consider another objection:

“I like your remark that the burden of proof rests on the person who claims that **A + B** is wrong, where **A** is all right and **B** is all right. But I am not so sure that this burden can never be discharged. In the two-promise example, there is no need that the promise to meet **Y** for lunch be made after the promise to **Z**. Suppose someone sends a letter to each inviting him to lunch, and the letters are sent and arrive at the same time. Here is another sort of example in which **A** is all right by itself, **B** is all right by itself, but **A + B** is not all right.”²⁰

But this is mistaken. Two acts cannot possibly take place at the same time. If two purportedly separate acts did somehow occur with no time gap between them, they would be one and the same act.²¹ It cannot be denied that the letters may well arrive at the doorsteps of **Y** and

¹⁹ This objection was articulated to me by David Gordon.

²⁰ I owe this example to David Gordon.

²¹ This is a synthetic a priori claim, not an empirical one. Thus, it is not refutable by experience. This claim works in a similar manner to the one which states: two things cannot be in the same place at the same time, in the same respect. “Place” is in effect defined as that in

Z at identical times. Here, after all, are two separate acts undertaken by two distinct postal workers. But, as they were not written at the same time, while the first was a legitimate one, the second was not, for it was written after the first, and incompatible with it. This case thus reduces to the previous one, where the second (and incompatible) invitation was issued after the first.

Mises expresses himself on the possibility of undertaking two separate acts at the same time as follows:

“Two actions of an individual are never synchronous; their temporal relation is that of sooner and later. Actions of various individuals can be considered as synchronous only in the light of the physical methods for the measurement of time. Synchronism is a praxeological notion only with regard to the concerted efforts of various acting men.

A man’s individual actions succeed one another. They can never be effected at the same instant; they can only follow one another in more or less rapid succession. There are actions which serve several purposes at one blow. It would be misleading to refer to them as a coincidence of various actions.

People have often failed to recognize the meaning of the term ‘scale of value’ and have disregarded the obstacles preventing the assumption of synchronism in the various actions of an individual. They have interpreted a man’s various acts as the outcome of a scale of value, independent of these acts and preceding them, and of a previously devised plan whose realization they aim at. The scale of value and the plan to which duration and immutability for a certain period of time were attributed, were hypostatized into the cause and motive of the various individual actions. Synchronism which could not be asserted with regard to various acts was then easily discovered in the scale of value and in the plan. But this overlooks the fact that the scale of value is nothing but a constructed tool of thought. The scale of value manifests itself only in real acting; it can be discerned only from the observation of real acting. It is therefore impermissible to contrast it with real acting and to use it as a yardstick for the appraisal of real actions.”²²

which two different things cannot be found. States Rothbard, Murray N., Man, Economy and State, Auburn AL: Mises Institute, 1993, p. 615 in this regard: This is due to the eternal law of human action, and indeed of all matter, that only one thing can be in one place at one time.” (I thank Laurant Carnis for bringing this quote to my attention.)

²² Mises, Ludwig, Human Action, <http://www.mises.org/humanaction/chap5sec4.asp>, 103. I thank Gene Callahan, for bringing this quote and cite to my attention in personal correspondence, dated 1/4/01. He adds the following: “Although Mises doesn’t use the word ‘alternate,’ I don’t see any reason why the ‘more or less rapid succession’ should not take the form of A-B-A-B-A-B, and so on. Of course, each A and B could be regarded as unique acts. But

But this leaves open the obvious objection that man can indeed walk and talk and the same time, read while eating, watch tv while smoking cigarettes, mark exam papers while smoking a cigar, walk and chew gum at the same time²³, etc. The answer is that while man can indeed engage in these pairs of activities at the same time (and many other examples could be furnished), they are not both at the same time “human actions” as defined by Mises. That is, both acts in each pair cannot at the same time be purposefully undertaken. At least one of them has to be automatic; only one can be purposeful at any given time. Consider the fact that man can, at one and the same time, ingest food, keep his heart pumping, walk, engage in peristalsis, talk, and blink his eyelids. The point is, at any one given time, only one of these can be purposeful. The bodily functions are all automatic. But so is walking, while talking. The body, during those occasions, is on, as it were, “automatic pilot.” Ditto for walking and chewing gum, eating and reading, smoking and watching tv., etc. At one point in time the person decides to chew gum. At another, he decides to go for a walk. At a third occasion, during this walk, he thinks about differential equations. At a fourth, a tune goes through his head. But he can only purposefully decide upon any of these ad seriatim, one at a time.

Gene Callahan makes the following observation on this matter:

“Mises points out that actions can alternate, perhaps rapidly. Consider a professor smoking a cigar while marking a student’s exam paper. This consists of two separate sub-actions (which are, as Mises points out, actions in their own right): sometimes he was consciously

also, they could be taken as component acts of more encompassing actions: ‘smoking a cigar’ and ‘reading a student’s paper.’ If the professor really took note of what he was purposively doing at any point in time, I would suspect he would find the **A-B** pattern above. Each particular A and B would be “taking this puff” and “reading this paragraph.”

²³ Roger Garrison pointed out to me these last two examples.

smoking, with a student's exam paper in front of him, and sometimes he was consciously reading, with the cigar dangling in his mouth, unattended. I discovered, in attempting to play polyrhythmic music, that it was possible to focus on the entire pattern, or on any one part, but never on two parts-qua-parts.

To focus on any limb meant to put the other limbs on auto-pilot, or to suffer a rhythm meltdown. Mises defines the ego as the unity of action, and I think it is fruitful to do so.

And his contextual setting here is to deny the reality of preference scales except as a tool of thought in economic analysis. Lachmann had a beautiful elaboration on this theme -- to view acting man as going around with an existing preference scale off of which he plucks the highest utility available in the current situation is to hypothesize that we go around with all possible courses of action as existing plans, ready for instant implementation.

I.e., when I wake up on Monday, I won't simply decide whether to go into the office. I'll choose among each of the (what? million? billion?) ways I might go about going to work, and each of the thousands of other destinations on the earth's surface I might contemplate heading to, and every one of the means I might use to get there, and things I might do once there... To have an existing preference scale in place I must have a plan ready for each option, for, after all, without a plan, how could I know the costs of the option?"²⁴

Mises states:

"There are actions which serve several purposes at one blow. It would be misleading to refer to them as a coincidence of various actions."²⁵

And in the view of Stephan Kinsella:

"One possibility is that the professor was engaged not in two different acts, but in the single action of cigar-smoking-and-grading-papers... Or, some single action with dual purposes..."²⁶

But we do not have to definitely solve the issue of walking and talking, or doing any of these other things contemporaneously to realize that writing two separate letters to two different

²⁴ Personal communication, dated 1/6/01

²⁵ (To be supplied). I thank Stephan Kinsella for bringing this quote to my attention.

²⁶ Personal communication, dated 1/6/01

people inviting them to lunch at the same time, cannot both be acted upon at exactly the same time. Letter writing must be a purposeful act. It is impossible to engage in two purposeful acts at the same time, no matter what conclusion we make about (possibly) automatic behavior coupled with purposeful activity.

6. Double signal

Next, consider the following objection to the foregoing:

“I do not think that your recourse to the claim that two actions of the same person cannot be absolutely simultaneous helps your argument. Why can’t one action have two consequences? Suppose, e.g., that waving my hand a certain way invites both Pat and Mike separately to lunch, but I cannot and/or will not for some reason dine with both of them at the same time.”²⁷

This example would appear to obviate the point that two different purposeful acts cannot both take place at the same time. In order to show that **A** good, **B** good, therefore **A+B** good, they need not both be simultaneous. For here, one and the same act, e.g., the hand signal, leads to an **A+B** which is problematic, in that the inviter cannot have lunch with both, and must therefore disappoint at least one of them.

However, there is a difficulty with this objection. Remember, the purpose of this objection is to cast logical aspersions upon equation 1: **A** is **ok**, **B** is **ok**, therefore **A+B** is **ok**. This objection succeeds, admirably, in demonstrating that the consequent, **A+B** is problematic. It is, since both luncheon appointments cannot be satisfied. But it does so at the expense of obviating a separate **A** and **B**. That is, there are no longer two separate acts, **A** and **B**, each of which alone is unobjectionable, and together (**A+B**) problematic. There are simply no two separate acts, **A** and **B**. Rather, there is one single “signal,” which indicates that the person in

²⁷ I owe this example to David Gordon.

question is inviting both “Pat” (A) and “Mike” (B) to lunch. To put this in representational form, the objection runs as follows: A+B (the hand signal) is problematic, and so is A+B (the fact that one of the two invitees will necessarily be disappointed).

7. Ice cream

Let us try a different tack:

“Suppose at 1:00p.m. I promise to buy you an ice cream cone an hour hence, namely, at 2:00 p.m. But when that time rolls around, at 2:00 p.m., I have changed my mind and refuse to buy you the ice cream cone. Here my refusal is not all right, because of my promise. But apart from the promise, I am under no obligation to get you an ice cream cone.”²⁸

This, too, fails, to undermine our principle. A is the initial promise. There is nothing wrong with that. B is the refusal to purchase and ice cream cone for me at 2:00 p.m. Again, there is nothing wrong with that either, since you do not owe me an ice cream cone. However, in the context of A, B is indeed problematic. That is, having made the promise at 1:00p.m., that which would have been ethical at 2:00 p.m., namely refusal to give me this dessert, no longer remains moral. Thus, this example reduces to the one about the two timing luncheon: the second premise, B, standing on its own would have been unobjectionable, but when made in the context of A, the promise, or the first luncheon invitation, is very much objectionable.

8. Prostitution

There is yet one more disanalogy to consider. Apart from the carbon monoxide, all of these examples, (both versions of the multiple incompatible invitation to) luncheon, the ice cream cone promise are aspects of ethics, morality, etiquette, propriety, mores, but not law. In contrast, the claim that if A is legal, and B legal, then A+B should also be legal is an aspect of

²⁸ I owe this example to David Gordon.

have seen, one of these premises must be rejected at least according to strict codes of morality

9. Burden of Proof

Let us consider one last criticism of my thesis that blackmail, consisting of two acts which are admitted by all parties to the debate to be licit, is necessarily lawful when found in combination. The objection runs as follows:

“I think I have located part of the problem in our difference of opinion on A + B. In each case where I allege a counterexample, you say that A and B have some Connection with each other. Thus, with conflicting promises, Promise B does not stand by itself. It is a promise made in spite of the fact that a conflicting promise – Promise A – exists. This is not then, you say, a pure A + B case; and the A + B principle stands unrefuted.

Your intuition here is I think sound. It cannot be the bare coexistence of A and B that makes A + B wrong, if A and B are separately all right. There must be something about the conjunction of the two that makes A + B impermissible.

But if you take the A + B principle this way, it does not help you in your defense of blackmail. Blackmail is not just a situation where I offer you money (A) and you do not publicize negative information about me (B). It is a situation in which I give you money in return for your not spreading dirt about me. We don't have a case, then, in which A and B have no connection but mere coexistence; and appeal to the A + B principle is irrelevant. In brief, the A + B principle, taken to avoid counterexamples, does not suffice to make blackmail legitimate.”³¹

The argument, here, is that when A and B are combined into A+B in the case of blackmail there is as it were some sort of “chemical” interaction between the two constituent elements, such that what is innocuous alone, becomes “poisonous” when in combination. This is all well and good as an objection, provided that we be furnished with the particulars; that is, it is insufficient to point out that asking for money or other valuable consideration (A) and contracting to keep quiet about embarrassing facts (B), each of which is lawful in isolation, *may* require prohibition due to rights violation when combined. This is exactly the point at issue, one which has not been sufficiently addressed by any defended of the present prohibition of

³¹ This objection was articulated to me by David Gordon.

blackmail.³² Again I return to my claim about the burden of proof. This rests with those, the opponents of blackmail legalization, who have not (yet) discharged it.

I shall leave until last what I consider to be a definitive refutation of the objections to blackmail legalization I have been considering. States Scalise³³:

“... Michael Clark argues that there is no paradox of blackmail because two innocent acts often combine to form a criminal one (e.g., being drunk and driving a car). See Michael Clark, “There is no paradox of blackmail,” 54 Analysis 54, 55 (1994). Clark’s argument fails when one realizes that stating the paradox as two innocent acts that do not cause harm to another combine to form a criminal act that still does not cause harm to another. Stating the argument in the latter manner makes it evident that the paradox does not lie in the criminalization of an act that contains innocent constituent parts but in the criminalization of an act whose innocent constituent parts, when combined, create **an** act that is criminalized despite the nonharming nature (in the right’s violating sense) of the act. In maintaining that a paradox remains despite Clark’s contention, I reject both his rejoinder that ‘many harmful acts consist of components which on their own are innocuous’ and his example of two innocuous drugs combining to have harmful effects. *Id.* at 56. After all, the only way two innocuous drugs can have a harmful effect when combined is if the harm is produced by certain chemical interactions either between the two drugs or between each drug and a third chemical in the body. If it is Clark’s contention that certain interactions between the demand and the threat in blackmail produce the resulting harm, his argument is unpersuasive because discovering that interaction is precisely the issue to be resolved. Assuming that some mystical interaction occurs is clearly an insufficient response.”³⁴

Precisely. It is not enough to point out that there might be some sort of interaction between the two entirely licit elements of blackmail which somehow render them legally illicit when in combination. In order to show that equation 1 is fallacious when applied to blackmail, required is a specification of this process. This has not even been attempted, let alone attained, in

³² See footnote 2, *supra*.

³³ Scalise, Jr., Ronald Joseph, “Blackmail, Legality and Liberalism,” Tulane Law Review, Vol. 74, No. 4, March 2000, pp. 1483-1517. I ran across this article right after I had finished writing the above, but before I revised it. In time, that is, to include it at the end of this paper, but not into the body of the text.

³⁴ *Ibid*, footnote 9, pp. 1484-1485, emphasis added by present author.

the entire annals of blackmail literature.

10. Conclusion

I conclude that the case for legalizing blackmail is overwhelming. It consists of two acts which are each properly legal, and there has never been put forth an explanation of any interaction between them that would render their amalgamation legally illicit. The defenders of our present prohibition of blackmail not succeeded in showing how the fusion of the two legal whites ought to be considered a legal black.