Replies to Levin and Kipnis

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I appreciate the care that both Michael Levin[1] and Kenneth Kipnis[2] have taken to understand and respond to my paper.[3] Both concede much—even most—of what I want to argue, yet both refuse to draw my conclusions. Even though there is some overlap in their concern about blackmail contracts, their different approaches make it more convenient if I respond separately to each.

I Michael Levin's Critique

In allowing that the blackmailer violates no right of a blackmailee,[4] Levin concedes just about all I have ever argued.[5] The absence of any rights-violation, I have wanted to claim, is sufficient to justify blackmail's decriminalization. So his suggestion that it should *still* be prohibited presents a novel challenge.

(a) *Anxiety*. As Levin expresses it, legal blackmail "would create too much anxiety"[6]: a world in which decriminalized blackmail existed is not one in which he would choose to live.

A response to Levin's claim might take any one of several tacks. One might be to deny that blackmail causes anxiety, or that its decriminalization would. Because criminals and other wrongdoers would also be exposed to the possibility of blackmail, the effect of its decriminalization might be to reduce the general level of crime and other wrongdoing. Levin himself acknowledges as much: "People who do not wish to be spied on . . . can guarantee invulnerability to petty blackmail by leading blameless lives—an incidental benefit to the rest of us."[7]

A second tack would be to argue that any (or at least some of the) anxiety caused might be a good thing. Taking our lead from the passage just quoted, anxiety over the possibility of blackmail might keep us keep us "in line." In any case, anxiety is not necessarily bad: anxiety frequently spurs us to greater achievement.

But these responses are not wholly satisfactory: they are consequentialist in character and subject to all the shortcomings of consequentialist arguments. A better tack is simply to deny the relevance of anxiety to the issue of criminalization. Causing anxiety is not, per se, a ground for criminal prohibition. A great number of human activities—from exams to hangliding to investing in the stock market to being "victimized" by "hate" speech—are anxiety-producing, but we do not see such anxiety as a legitimate reason for seeking to prevent such activities. Almost any change is potentially anxiety-producing, and a policy of anxiety reduction would be a prescription for maintaining the status quo. If anxiety is the problem, it is better to see a psychiatrist.

Might Levin object that he does not intend the outlawing of all anxiety-producing activities but only those that are not associated with greatly valued benefits? I think not. Assertions of this kind presume, contrary to fact, that we can make interpersonal comparisons of utility. But considerations of justice trump those of utility, if only because interpersonal comparisons of happiness are impossible to make. The libertarian position on blackmail is grounded in considerations of justice: the rights of blackmailers and blackmailees. These rights cannot be overridden by utilitarian concerns about anxiety production.

(b) *Blackmail Contracts*. Levin notes that I "sometimes write . . . as if commercial blackmail would sometimes coalesce into one large Blackmail, Inc."[8] I did so simply as a convenience and as part of my criticism of Epstein. I am agnostic on the question of how blackmailers would work, if legalized. The critical question is whether they should be. And that is why the peculiarities of blackmail contracts deserve attention.

Despite the inventiveness of his discussion, I remain unconvinced that the problems Levin points out are at all telling. Given that such contracts do not violate rights per se, the issue is simply a practical one of implementation, not a theoretical one of principle. And the problem is not one that would emerge *de novo* with decriminalization, because blackmail agreements—albeit illegal—currently exist, and those who are parties to them have already to wrestle with the issue of trust. In many cases they appear to have done so satisfactorily. Blackmail contracts may differ from contracts of other kinds, but nothing that Levin says establishes that they are "unique"[9] in any sense that would make them impossible or inappropriate.[10]

One strategy for ensuring better compliance might be to *rent*—rather than *sell*—silence: I offer you my silence for one month for $100. An arrangement of this kind—renewable or renegotiable after a month—would be less likely to generate the problem that Levin envisages: a blackmailer coming back for more after an initial agreement.

Levin's claim that I "must reject" legally mandated memory erasure for blackmailers,[11] though correct, does not rule it out of question as part of a voluntary contract and, absent some further argument, I do not see why an honest blackmailer should resist agreeing to such memory erasure provided that the technology for achieving it has no other (for example, ill) effects.

(c) *Libertarianism and the Sufficiency of Rights.* In my original paper, I saw my purpose to be that of establishing that blackmail violated no rights and, therefore, given my libertarian premises, concluding that it ought not to be criminalized. Levin accepts that no rights are violated, but then rejects the libertarian framework that would have allowed my conclusion to be drawn. So I must now venture into territory that I originally took for granted.

For the libertarian, aggression presupposes *property rights.*

Levin's critique of libertarianism begins from a rejection of Locke's account of the origin of property rights. But libertarianism is erected on something more primordial—the ownership we each have over our own bodies. The libertarian position is that we are each rightfully self-owners of our persons. The only alternatives are that somebody else owns us—we are his slaves and owe him obedience—or that each of us owns an equal fraction of the other. Since the last position would result in an impossible coordination problem (even a right to scratch my nose would become impossible), that leaves only enslavement or self-ownership. Only self-ownership is sustainable.

Why is this so? Hans-Hermann Hoppe has argued the point as follows.[12] The only way in which any conclusion can be established is through argumentation. And no conclusion can be accepted that would require a rejection of the prerequisites of argumentation. Argumentation cannot go on without the human body and its functions. To claim, therefore, that one does not own one's body would be to undermine the prerequisites for argument. Ergo, one must own one's self. Once that has been granted, it is then possible to move convincingly into the world of property: not only does argumentation require bodies but a place for them to be—a chair, house, land, or whatever. Some private property rights are assumed by the very possibility of argument.

From this we can see that Levin's objection to the libertarian right to speak is incoherent. Were it the case that your speaking—"by agitating my body and ambient air without my consent"[13]—violated my property rights, then it would be impossible for us to argue.[14] A libertarianism based on argumentation makes no such claim. Rothbard, for example, distinguishes the invasion of property rights when *A* trespasses onto or places an object on *B*'s land from the case in which radio waves cross our properties without our consent.[15] In one case the boundary crossing affects the other person's exclusive possession, use, or enjoyment of his property. In the other case it does not.

A more sympathetic interpretation of Levin's homesteading theory might be the following: I breathe on my property and Levin, 100 yards away, breathes on his. Neither of us violates the property rights of the other because when we homesteaded our respective lands, we did so subject to the fact that the other was already breathing air and would continue to do so. We came to own our properties subject to the condition that the other had a continuing right to breathe.

Admittedly, the distinction between aggression and non-aggression is not always clear: it is not always easy to discern whether a boundary crossing affects another's rights. But that is not an argument against or even a problem exclusive to libertarianism.[16]

Important as the nonaggression axiom is to libertarianism, Levin misconstrues it by seeing it as fundamental. That way he can erect his straw-man arguments about the loaf of bread and the person dangling from the cliff. Although he is right to see that if non-aggression is taken to be fundamental a circular argument will arise if rights are specified in terms of aggression—since "aggression presupposes the idea of a right"[17]—he is wrong to see this as the basic libertarian claim. For the libertarian, aggression *presupposes* property rights. Aggression is quintessentially the violation of property rights, and property rights are essential to Levin's very speaking, writing, and publishing in opposition to libertarianism, or anything else.

Once this is recognized, Levin's examples can be easily addressed. In the dispute over the loaf of bread,[18] the violator of the non-aggression axiom was the ex-owner who refused to hand over the bread that no longer belonged to him. He was not justified in striking the new owner "defensively." Similarly, in the cliff example,[19] once you had been paid $1 for the help, I owned the service that you had agreed to, and your failure to act constituted a theft of the service. The case of the woman who allows her newborn to starve in the crib[20] is, however, more complicated. Here libertarians, along with others, make a firm distinction between adults and children.[21] Although there is some disagreement about this in libertarian circles, I take the view that—in the case of her child—the woman owes more than passive non-aggression. She has a duty to notify others of her intention not to care for the child, even if—as was traditionally done—only by placing it in the town square or on the church steps. Then, if no one else was willing to care for it, no rights violation would be involved were it allowed to die.[22]

(d) *Levin's Sociobiological Ethics.* Fascinating though I found Levin's sociobiological insights, I was puzzled as to how his "moral antirealism"—his denial "that anything is objectively good, bad, right or wrong"[23]—left him with the tools to question my claim that blackmail *ought* to be legalized. At best he is left with a way of *explaining* why we do or do not have rules to that effect.[24]

I have some sympathy for Darwinistic explanations of our moral (and other) senses, but believe that these are compatible with there also being true claims in morality (as well as in science and history). Not that all such claims are absolute: the bully may be lied to, since he has no property right to the truth. Some moral claims, however, function as side-constraints: we may not torture the child of a mad bomber, even if it would have greatly beneficial consequences. Here there is a victim whose rights have been invaded, and these are not subject to some utilitarian calculus.[25]

For this reason I have some difficulty with the view that Levin attributes to me in his note 24.[26] As I recall it, my position was that the torture of a child would violate the private property rights it has in its own person. Period. Given the choice between torturing the child and standing by while a city was consumed by a nuclear conflagration, however, I might well hope that someone—even I—might torture the child. But this would not be prompted by libertarian considerations, and were someone to do that he would have to pay for it under a libertarian code.[27]

Even allowing Levin's sociobiological approach, I might have expected him to adopt an account more closely attuned to a libertarian one. The extreme example he uses is just that: an extreme example. He would surely agree that the world would be a better place, better suited to our "happiness, productivity and, ultimately, reproductive fitness"[28] were we to adopt the libertarian proscription against aggression and its respect for property rights.

In sum, interesting though I find Levin's position to be, I do not think that he has succeeded either in refuting libertarianism or in establishing anxiety-reduction as a basis for retaining the current laws against blackmail.

II Kenneth Kipnis's Critique

Kipnis has clearly grasped the central thrust of my argument. And for the most part he leaves it unquestioned. Furthermore, he provides a valuable analysis of the prerequisites of being a blackmailer's "mark."[29] Even so, he fails to understand what drives my position when he asserts that contract is central to libertarian theory. Important as it is, it is not as central as the private property right we have in our own persons and things.[30] And it is because blackmail violates no such private property right that it should be decriminalized. The problems with blackmail contracts are not central.

Blackmail Overkill. Although I did not explicitly deny it in my original paper, I did not "assume [that] blackmailers [must] limit themselves to a single payment based on the mark's present financial means."[31] In earlier writings I had explicitly suggested an ongoing payment schedule.[32]

Kipnis contends that because the blackmailer will milk the mark for whatever he can, it may "now become necessary for the mark to supplement income in risky, questionable, and illegal ways."[33] I certainly agree that the blackmailer my exact a high fee from a blackmailee. But whether this should be seen as "unconscionably extortionate" is quite another matter. For one thing – as I made clear in my original article[34] – extortion involves the threat of an intrinsically criminal (malum in se) retaliation, whereas the disclosure involved in blackmail would be – leaving the issue of money aside – perfectly legal.

But there is another problem with his claim. Blackmailers are not the only people who charge what some see as unconscionable prices. So do most tradesmen and professionals. Should we consider criminalizing their fees-for-service? The same applies to his concern about the potential rage of blackmailees: that may be a reason for caution on the blackmailer's part, but not a ground for outlawing blackmail. Some sports fans become enraged when their team loses. Yet we would hardly ban all athletic contests.

Justice is not synonymous with openness, and sometimes closed proceedings will do more for justice than open ones.

Blackmail Contracts. The heart of Kipnis's case, however, is to be found in his critique of blackmail contracts. His initial questions, about their longevity and heritability,[35] the possibility of public scrutiny and report after a blackmailer's death, and so on, are interesting, but basically unproblematic. And even were it impossible to keep the secret after the blackmailer's death, that would be unfortunate but not a rights violation: the blackmailer offered silence for the term of his life; the blackmailee had no right to more.[36]

The key issue concerns their enforceability without jeopardizing the blackmailee's secret. Kipnis believes that our judicial system – in the case of an action (here, against a blackmailer) – depends for its justice on the fact "its proceedings [are] generally public and that parties can be called upon to testify truthfully."[37] But this is to elevate form over substance. No doubt it is generally true that open hearings will do more for justice than closed ones (a point that Kipnis's own wording concedes). But justice is not synonymous with openness, and sometimes closed proceedings will do more for justice than open ones. If, as Kipnis admits, "the courts will very occasionally accede to closed proceedings – in child abuse and trade secret cases,"[38] why not also for blackmail? He claims that "the weighty justifications for those exceptions do not apply in the disputes under review here"[39] but fails to say why. Kipnis's failure to provide reasons why breaches of blackmail contracts should not be considered in closed court leaves the onus on him. Blackmail secrets are in fact not so different from trade secrets. In both cases, there are dangers that attempts to force a contractual partner to live up to his obligations will boomerang.

Kipnis thus recasts the blackmail "paradox": "while the bilateral agreement guarantees the mark an urgently needed secrecy, the mark must waive the very secrecy he . . . is contractually entitled to in order judicially to secure an entitlement to secrecy. In other words, one must waive one's right to secrecy in order to secure one's entitlement to that same secrecy."[40]

But even were it true (a claim I dispute) that the blackmailee would have to give up his secret in order to hold the blackmailer to his contractual obligations, the former would gain a potent hold over the blackmailer. To be publicly held to have reneged on his contract, the blackmailer would undermine the basis for whatever credibility he has as a blackmailer. His ability to make a profitable blackmail deal will be diminished. Of course, this will still require a blackmailee who is willing to have his secret made known, and he cannot be expected to undertake this lightly.

Consider Kipnis's worst case scenario: "post-disclosure remedies are characteristically worthless to the client in that the entire game will have been decisively lost by then."[41] Why does this vitiate the argument for blackmail legalization? According to Kipnis: "When it is plain, as it is here, that the very structure of a contract precludes the possibility of fair judicial review, that, it seems, justifies treating such contracts as invalid. Contracts calling for the concealment of guilty secrets have precisely this flawed structure."[42] Not at all. Contracts calling for the concealment of *any* secrets have precisely this structure. And, just as fair judicial review of trade secrets may require a different form of oversight, so also should this be possible for blackmail secrets.

I am puzzled by the intended force of Kipnis's position. He writes that even if "the blackmailer's contract should be seen as void, it does not establish that what the blackmailer does in initiating and participating in such an arrangement should be a criminal offense."[43] His rough "sketch" of an argument that would yield the latter conclusion barely acknowledges what was the central point of my own essay, namely, the impropriety of criminalizing blackmail. As it is, his sketch must beg the question that