

# A LIBERTARIAN THEORY OF BLACKMAIL

WALTER BLOCK

This article will attempt to analyse the law prohibiting blackmail from a libertarian perspective. Libertarianism is a political philosophy; as such, it is a theory of the just use of violence. From this viewpoint, the just use of violence is essentially defensive: one may employ force only to repel an invasion; only to protect one's person or property from external threat, and for no other reason.

According to Rothbard:<sup>1</sup>

The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the 'nonaggression axiom.' 'Aggression' is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.

If no man may aggress against another; if, in short, everyone has the absolute right to be 'free' from aggression, then this at once implies that the libertarian stands foursquare for what are generally known as 'civil liberties': the freedom to speak, publish, assemble, and to engage in . . . 'victimless crimes.'

At the outset it may be claimed for this philosophy that it falls well within the tradition of the common law. Who, after all, advocates the initiation of coercion against innocent people? Thus the presumption is that if a law leads to the incarceration of people who have not initiated or threatened violence, it is out of synchronization with our legal mores.

The central question of this article, then, is whether blackmail constitutes an invasive act or threat, and should be prohibited under the libertarian axiom, and should thus be legalized. My thesis is that the latter is correct: blackmail to be sure embodies a threat but it is only to do that which one has a right to do. For example, I demand money from you as the price of refraining from gossiping about your penchant for rubber duckies in your bathtub. If your secret got out, it would prove embarrassing to you, but I have a free speech right to be a gossip.

States Rothbard:<sup>2</sup>

1. Rothbard, Murray N., *For a New Liberty*, Macmillan, New York, 1978, p. 23; see also Hoppe, Hans-Hermann, *A Theory of Socialism and Capitalism: Economics, Politics and Ethics*, Boston: Kluwer, 1989.
2. Rothbard, Murray N., *Man, Economy and State*, Auburn AL: Mises Institute, 1993, p. 443.

. . . blackmail would not be illegal in the free society. For blackmail is the receipt of money in exchange for the service of not publicizing certain information about the other person. No violence or threat of violence to person or property is involved.<sup>3</sup>

In sharp contrast is extortion, which superficially resembles blackmail. In both cases, a threat is made, coupled with a demand (usually for money, but it might include sexual or other services, etc.) But in the former case, as we have seen, the threat is to do something licit; e.g., indulge in free speech. In the latter, the threat is anything but legal. For example, I might threaten to kill *you*, or kidnap your children, or firebomb your house, unless you give *me* some valuable consideration.

With this introduction, let us consider Katz<sup>4</sup> who maintains that blackmail ought to be legally proscribed. His reasoning furnishes an illuminating contrast with that of libertarianism.

## CASES AND MATERIALS

Katz starts off by considering the case of Busybody threatening to tell Philanderer's wife about her husband's affairs, unless he is paid \$10,000. He acknowledges that:

. . . if Busybody had actually revealed Philanderer's affairs, or if he

3. For other works which make the case for the legalization of blackmail, see Block, Walter. *Defending the Undefendable*, New York: Fox and Wilkes, 1985; Block, Walter, 'Trading Money for Silence', *University of Hawaii Law Review*, Vol. 8, No. 1, Spring 1986, pp. 57-73; Block, Walter, and Cordon, 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, 'The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell', *Western State University Law Review*, forthcoming; Block, Walter, 'The Blackmailer as Hero', *The Libertarian Forum*, December 1972, pp. 14; Block, Walter, 'Toward a Libertarian Theory of Blackmail: Reply to George Fletcher', *Journal of Libertarian Studies*, forthcoming; Block, Walter, and McGee, Robert W., 'Blackmail from A to Z: A Reply to Joseph Isenberg's, Blackmail from A to C', *Merger Law Review*, forthcoming; Mack, Eric. *In Defense of Blackmail*, 41 *Philosophical Studies* 274, 1982; Rothbard, Murray N., *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J., 1982; Rothbard, Murray N., *Power and Market: Government and the Economy*, Menlo Park Cal.: Institute for Humane Studies, 1970.
4. Katz, Leo. 'Blackmail and Other Forms of Arm-Twisting', *University of Pennsylvania Law Review*, Vol. 141, No. 5, May, 1993, pp. 1567-1615. This article is part of a compilation of no fewer than 12 pieces, all of them united in the supposition that blackmail should be against the law. Not one of the authors represented there is representative of the libertarian position on the matter to the contrary.
5. Katz, *supra*, fn.4 at 1567.

had threatened Philanderer with doing so but not mentioned the money, or if he had asked for the money but not mentioned what he was going to do if he didn't get it – if he had done any of these things, he would **not** be guilty of any crime whatsoever. Yet when he combines these various actions, a crime results – blackmail.

Katz asks why this should be so, but before he answers, he attempts to eliminate wrong answer the thought that 'blackmail is essentially a crime of information, that it invariably involves the threat to disclose an embarrassing fact about the victim'.<sup>6</sup>

In this, Katz is absolutely correct. Blackmail involves **any** illicit threat, coupled with a demand for money. For example, I may be considering selling a car, and you buying it from me. Whereupon I claim if you don't give me \$10,000 (demand for money), I won't give you **this car (threat)**.<sup>7</sup> But this is no more than the 'threat' made during every business transaction; and, as every commercial arrangement also call for some sort of payment, we have a delicious *reductio ad absurdum* in the making: all exchange is really blackmail, and should be prohibited, at least by **those**, such as Katz, who advocate the outlawry of this practice.

Now consider a series of cases offered by our author as instances of blackmail. They involve no informational aspects, **but** he sees them as illicit. What are they, and how would a libertarian react to each?

1. 'Pay me \$10,000, or I'll call on my men to strike.'

This is extortion, not blackmail, because that which is being threatened is itself illegitimate. Mere, we assume that the union leader is only authorized to promote a strike when it is in the best interests of 'the rank and file' that he do so, not in order to feather his own nest. This being the case, his demand for \$10,000 passes from legitimate blackmail to illegitimate extortion.'

2. 'Pay me \$10,000, or I'll flunk you on the exam.'

This **too** is extortion, **since**: the threat is an improper one. Here, the contractual violation, like that between the union leader and its members, concerns the professor and the university's board of trustees. Presumably, the faculty member was hired, among other things, to award grades on the

6. *Supra*, fn.4 at 1567.

7. Katz, p. 1603 explicitly acknowledges this statement, but refuses to call it blackmail.

8. Rothbard, *supra*, fn.3, pp. 129-130 analyzes a similar case in terms of bribery and payola. In his view, the corrupt union leader of Katz's, e.g., the bribee, but not the corporate victim or who is forced to become the briber, would be guilty of illegal behavior; this would be due to contract violation with the members of the labor organization. In the present paper we characterize such behavior as extortion, but this term is inclusive of all illicit threats, such as that which occurs in Rothbard's bribery case.

basis of student learning **as** measured by exams, not for the purpose of enriching himself in this manner.<sup>9</sup>

3. 'Pay me \$10,000, or I'll cause some really bad blood, at the next faculty meeting.'

This is mere blackmail, since the professor has every right to create 'bad blood,' which we here interpret as saying something nasty about someone.

Katz claims that the next few cases are controversial, indicating he thinks these are not. Yet, as we have seen, there is disagreement on two out of the three cases, so far.

4. 'Pay me \$10,000, or I will seduce your fiance.'<sup>10</sup>

Again we have a case of (legally) innocuous blackmail, not illegitimate extortion. Had the threat been to rape the fiance, the latter category would apply.

But seduction, presumably of an adult woman, amounts to no more than turning on the charm, being nice, buying flowers, etc. Surely this is **not** against the law, nor should it be. But if not, then to threaten this act should also be considered legal.

5. 'Pay me \$10,000, or I will persuade your son that it is his patriotic duty to volunteer for combat in Vietnam.'

Again, this time on the assumption that your son is an adult (otherwise, he would scarcely be accepted by the military) this is just a matter of threatening to engage in free speech. Unless you are **contractually** obligated to stay away from the man's son (that is, the father has paid you, and you have agreed to stay away), then your threat, no matter how morally reprehensible (or **not**), should **not** be legally proscribed.

6. 'Pay me \$10,000, or I will give your high-spirited, risk-addictive 19-year-old daughter a motorcycle for Christmas.'

On the assumption that her age is **equal** to or past that of legal consent, it would certainly **not** be an indictable offense to **give** her the vehicle; how, then, can it offend any rational law to threaten to do that which one has a **right** to do (again, no matter how reprehensible).

7. 'Pay me \$10,000, or I will hasten our ailing father's death by leaving the Catholic church.'

A similar analysis applies. Leaving Catholicism is not and cannot be ille-

9. On the other hand, under the libertarian legal code it would be perfectly legal for a university to pay low salaries, with the explicit understanding that professors could enhance their incomes by selling grades for money. As long as the students were made aware of this rather unique system, no fraud would have been perpetrated upon them. As a practical matter, of course, this scheme would not likely succeed, but that is a very different issue.

10. Kiitz, *supra*, fn.4 at 1567.

gal. Threatening to do so, even from the lowest of motives, therefore, cannot be legally prohibited either.

Yes, Katz<sup>11</sup> is entirely correct in pointing out that 'the disclosure of embarrassing facts' is not the central issue, nor is it even necessary that money be demanded. Sexual favors will do quite well to establish blackmail. But apart from that, there is a deep chasm between us.

This author next introduces a series of what he categorizes as 'collateral problems'.<sup>12</sup> Let us consider them in the order he establishes.

Abigail is a very successful competitor of Mildred's for parts in plays. If Mildred threatens Abigail with exposure of her infidelities as a means of eliminating her competition (Variation I) there is no doubt this is blackmail (but not extortion). But suppose Mildred informs (e.g., warns) Abigail that she has sent a letter to her husband, disclosing these peccadilloes, which will be delivered at the time of the audition. Abigail can intercept this mail, but only during the audition. Is this blackmail?

In the libertarian perspective, both are lawful activities, in that neither threatens or uses force. But in the latter example, although Mildred is still trying to attain the same goal, no threat is made, so it does not formally match the conditions of blackmail, as does the first.

In respect of omissions, Katz<sup>13</sup> attempts to distance from blackmail the ordinary bargain, or commercial relationship, where the seller threatens to omit giving the buyer the commodity unless he is paid for it. He gives three cases of such threatened omissions. I cite them, and give the libertarian response to each:

1. . . . the potential employer who offers an applicant a secretarial job if she will sleep with him.

Here, the threat is that the woman will not get the job unless she succumbs to the boss's advances, e.g., the job will be omitted. But since she has no right to the job in the first place, this is blackmail, not extortion.

Alternatively, this can be looked upon as merely the offer of a dual job, secretary and prostitute.<sup>14</sup> This is akin to offering other dual positions, such as that of cook and bottle washer, or secretary and treasurer, or dean and professor, or handyman (carpenter, plumber, etc.), or groundskeeper (gardener, masonry, etc.) It is a dramatic example only because of the unclear legal status of prostitution, and heightened sensibility about sexual harassment.

2. . . . the American who offers to marry a foreign heiress, unable to

11. *Ibid.* at 1568.

12. *Ibid.* at 1569.

13. *Ibid.* at 1570.

14. For the case on behalf of legalizing prostitution (but not in favor of this activity per se) see Block, *Defending the Indefensible* (New York, 1985).

secure citizenship, if in exchange she will fund some of his financial ventures.

Here we have the straight offer of a trade, money for a marriage of convenience. The threat is typical in such arrangements: unless you give me what I want, I won't give you what you want. That Katz can mention this in an article ostensibly devoted to blackmail further strengthens our contention that there is no legally relevant difference between blackmail and ordinary commercial interaction.

3. . . . the outgoing governor who offers to endorse his aspiring replacement in exchange for a financial token of gratitude.

We have already analyzed a similar case, that of the corrupt union official. As in that instance, the governor is 'selling' something that does not belong to him: his endorsement, which is, presumably, supposed to be based on the merits of the competitors, not their willingness to offer a bribe.

In relation to manipulative crimes Katz states:

Oscar implores Alonzo not to go on a concert tour of the Soviet Union, in protest against the Afghan war. Alonzo is unrelenting. Oscar threatens to destroy the one and only violin on which the eccentric Alonzo is willing to play, unless he promises not to go. Alonzo just laughs. Eventually, Oscar sets fire to Alonzo's violin, and Alonzo has to cancel his tour. Oscar's acts were not, of course, spurred by the sheer joy of torching Alonzo's violin. No doubt he is guilty of the comparatively minor offense of maliciously destroying someone else's property. But given the purpose of his actions, is he not also guilty of blackmail? After all, had his threat succeeded in dissuading Alonzo from making the trip, he clearly would be guilty

15. For the case that all union officials are necessarily corrupt, *per se*, see Block, Walter, 'Labor Relations, Unions and Collective Bargaining: A Political Economic Analysis', *Journal of Social Political and Economic Studies*, Vol. 16, No. 4, Winter 1991, pp. 477-507; Hutt, W.H., 'Trade Unions: The Private Use of Coercive Power', *Review of Austrian Economics*, Vol. 3, 1980, pp. 109-120; Heldman, Daniel C., *American Labor Unions: Political Values and Financial Structure*, Council on American Affairs, Washington D.C. 1977; Heldman, Daniel C., Junes T. Bennett, and Manuel Johnson, *Deregulating Labor Relations*, Fisher Institute, Dallas, 1981; DiLorenzo, Thomas, 'Labor Markets and Liberty', *Proceedings of the Banff Conference*, Vol. III in the Rating Economic Freedom Series, Stephen Easton and Michael Walker, eds., Vancouver: The Fraser Institute, 1992; Reynolds, Morgan O., *Power and Privilege: Labor Unions in America*, New York: Manhattan Institute for Policy Research, 1984; Reynolds, Morgan O., 1987, *Making America Poorer: The Cost of Labor Law*, Washington D.C.: Cato Institute; Reynolds, Morgan, 'A Critique of What Do Unions Do?', *Review of Austrian Economics*, Vol. 2, 1988, pp. 259-271.

of blackmail. How can making good on that threat improve Oscar's moral, and legal, position – especially when it secures for him the very advantage which the threat was originally meant **to** secure!"

First we are focussing solely on legal issues in this paper, not moral ones; we must therefore tread cautiously on the latter issue. Second, I agree that making good on the threat can scarcely improve Oscar's legal position. Surely, it is of lesser moment to threaten to kill someone than to actually do it. Third note the difference between Katz and myself on the burning of the musical instrument. Katz characterizes this as 'the comparatively minor offense of maliciously destroying someone else's property.' I see this as the essence of the piece, the threat which elevates (or, rather, lowers) this whole episode from one of blackmail to downright extortion. I do not see this as 'minor' at all. Nor need the punishment, if it is to fit the crime, be limited **to** the value of the violin. We might also contemplate incorporating the costs of the foregone concert tour.

States Katz:

Anatole steals a Rembrandt from the Metropolitan Museum. He sends a letter to the museum which reads: 'Pay me \$10,000, or you'll never see that Rembrandt again.' The museum buys back its painting for \$10,000. **Anatole** is clearly guilty of **theft** for taking the Rembrandt. But what about the second transaction? Is it a simple sale (as one German court held) or blackmail? ('Pay me \$10,000 or else...,' certainly sounds **like** blackmail.) More generally, is Anatole morally better or worse for not having held on **to** that painting, but instead having sold it back for a fraction of its market price?"

First, it is by **no** means clear that the museum was the rightful owner. If, as I suspect, it is a government, or state funded museum, then it bought that painting with stolen (e.g., taxed) dollars.<sup>18</sup> This being the case, no crime was committed by relieving the museum of its ill gotten property."<sup>19</sup> Second, let us stipulate, just for the sake of argument that it **was** a private, hence, legitimate museum. Anatole, then, is guilty not of blackmail, but of extortion. But what about the second transaction! In order to delete any odor of impermissability, let us suppose that the writer of that letter ('Pay me \$10,000, or no Rembrandt') merely found it. Better yet, let us assume that he, like Ragnar, forcibly took it from Anatole, the thief, with the intention of returning it to its rightful owner. Is he entitled to more than a voluntary reward? ('Here is your painting back, now, please, give me a reward for returning it'.) If we borrow a leaf of what international law has to say

16. *Supra*, fn.4 at 1571 (footnotes deleted).

17. *Supra*, fn.4 at 1571 (footnotes deleted).

about finding boats, or retrieving them from pirates, then this letter writer is due a 'salvage' payment, typically one third the value of the recovered ship, and **thus far** more than \$10,000.

**So Anatole** is only guilty, in the first instance, of extortion, but is guiltless for writing that follow up letter.

In respect of self-sacrifice Katz"<sup>20</sup> treats **us** to three (sets of) fascinating legal cases.

1. First, there are Matilda, Leopold, Genovcvc and Ferdinand, who all threaten to kill themselves in various ways or risk death unless someone else does their bidding. They are indeed all engaging in blackmail, and thus should be deemed innocent, since what they threatened (various forms of suicide) they had every right to do. If not true under present law, this is the **case** at least under the libertarian legal code, since none of the four threatened or invaded other people, only themselves.

2. Second, there is:

Angelica, a pedestrian, (who) wants to reserve a parking space for her friend who is due to arrive imminently. Boniface has his eyes on the same spot. As he tries to drive his car into the empty space, Angelica plants herself squarely in front of him and announces 'Over my dead body.'

'You're kidding,' replies Boniface, 'you are threatening **to** die for the sake of a parking space?'

'Exactly.'

'Well, I won't be blackmailed. I'm going to park here anyway.'

'You mean you are threatening to run me over with your car unless I move?'

'Exactly.'

'Well, I won't be blackmailed. I'm staying.'

Thereupon Boniface drives in, and Angelica jumps aside at the last minute.<sup>21</sup>

The problem here is that two different entities (Angelica, Boniface and his car) cannot possibly occupy the same space at the same time. The libertarian solution **to** all such problems is to determine who is the owner of the

18. This statement need not imply that *all* taxes are theft. But even in the classical liberal vision of limited government, where the state is confined to armies, courts and police (see for example Machan, Tibor, *Individuals and their Rights*, LaSalle, IL: Open Court, 1989), museums are an improper interference with economic liberty. Tax payments to underwrite such expenses would clearly be illegitimate, and hence akin to theft.

19. See the Ragnar Danneskjold episode in Rand, Ayn, *Atlas Shrugged*, New York, Random House, 1957.

20. *Supra*, fn.4 at 1571-1573.

21. *Supra*, fn.4 at 1572.

property right under dispute, and then to resolve the matter as he wishes.<sup>22</sup> If there were a parking space in a private lot, the resolution would be easy. If the owner says that the first person with a car to arrive there has the parking right, then Angelica, it turns out, had engaged in extortion. (She used force to gain her ends.) If the owner takes the position that the first person with or without a car to arrive there has the parking right, then Boniface, it turns out, had engaged in extortion. (He used force to gain his ends.) Similarly, if one believes in the legitimacy of public streets, sidewalks and parking spots, then the government must make this determination. Only if we know whether it is operating on a rule which allows people to 'save' spaces for friends in cars can we determine who has utilized force against whom.<sup>23</sup>

3. Third, there are two cases from Greek mythology. In the first, Odysseus is faking madness so that he won't have to go to war. Palamedes places his infant son so that Odysseus will have to act rationally in order to save him, thus revealing his fitness for war. This was clearly an illicit act, since no matter whether or not the father is culpable, the son certainly is innocent. To put him in danger is to initiate violence against a non aggressor, a clear violation of the libertarian legal code.

In the second case, Katz seems to have strayed from the main point. This time Achilles is refusing to take part in a fight, hiding out in the guise of a girl. Odysseus orders a sudden loud trumpet call to battle, and Achilles, going on instinct, picks up a spear, thus coming out of the female closet, so to speak. But here there was no threat or violence used. Thus, there was neither blackmail nor extortion. All that occurred was a bit of sharp detect-

22. This is to leave the market to determine whether the property owner's decision was a wise (profitable) or unwise (unprofitable) one. The libertarian legal code only determines justice, not wealth enhancement, an entirely different matter. For a contrary view, see Block, Walter, 'O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner', *European Journal of Law and Economics*, 1996, Vol. 3, pp. 265-286; Coase, Ronald, H., 'The Problem of Social Cost', *Journal of Law and Economics*, October 1960, Vol. 3, pp. 1-44; Cordato, Roy, E., 'Knowledge Problems and the Problem of Social Cost', *Journal of the History of Economic Thought*, 14 Fall 1992; Cordato, Roy E., 'Time Passage and the Economics of Coming to the Nuisance: Reassessing the Coasean Perspective', *Campbell Law Review*, 1998, Vol. 20, No. 2, pp. 273-292; Cordato, Roy E., 'Subjective Value, Time Passage, and the Economics of Harmful Effects', *Hamline Law Review*, Vol. 12, No. 2, Spring 1989, pp. 229-244; Cordato, Roy E., *Welfare Economics and Externalities in an Open-Ended Universe: A Modern Austrian Perspective*, Boston: Kluwer, 1992; North, Gary, *Tools of Dominion: The Case Laws of Exodus*, Tyler, TX: Institute for Christian Economics, 1990; North, Gary, *The Coase Theorem*, Tyler, TX: The Institute for Christian Economics, 1992.

23. But this is hardly unique. If we see two men, A and B, both fighting over a wallet, we cannot tell who is in the right (and is the victim) and who is in the wrong (and is the aggressor) until and unless the property rights can be established. See on this Rothbard, *The Ethics of Liberty* (1982), p. 51.

ing. If Achilles was legally obliged to wage war (say, he had signed a contract to do so), then the trick was used to a good end. Otherwise, it was not.

Finally, Hortense knows two embarrassing secrets about Thaddeus: *viz.*, marital infidelity and corrupt finances. In her initial demand for money, she mentions only the first secret. He refuses to pay. Then, she reveals knowledge of the second secret. Asks Katz:<sup>24</sup> 'Has her greater honesty improved her moral position, or has her increased threat only aggravated it?' The answer from this side of the net is that since, presumably, it is immoral to blackmail, her second attempt worsened her ethical position. As far as her legal position is concerned, however, a threat to be a gossip should be allowed by law since this is merely a legitimate exercise of free speech and not a crime. A request for money to maintain silence is like any other commercial arrangement. To do this twice instead of once should make no legal difference.

#### BLACKMAIL IN RELATION TO 'PLAIN VANILLA' COERCION

Having set the stage, our author now moves into his second section. Here, he adumbrates his theory of crime, which he will later attempt to use to shed light on the blackmail conundrum. Considering the utterance 'Your money or your life,' Katz<sup>25</sup> starts off well by focussing on the crucial question: '...what is the difference between a threat – which is deemed coercive – and an offer which is not.' But his reply, as he doesn't seem to appreciate, is actually in two parts, each inconsistent with the other. The first is in sharp variance with libertarianism: 'The answer is that offers enlarge your opportunity set whereas threats shrink it.'

Katz<sup>26</sup> goes so far as to cite Nozick<sup>27</sup> as 'A classic source in which (Katz's) distinction between offers and threats is explored' (material in brackets supplied by present author). This is injudicious, in view of the devastating and eviscerating critique of Nozick's 'drop dead' principle offered by Rothbard:<sup>28</sup>

For his criterion of a 'productive' exchange is one where each party is better off than if the other did not exist at all; whereas a 'non-productive' exchange is one where one party would be better off if the other dropped dead. Thus: 'if I pay you for not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me.' (84).

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24. *Supra*, fn.4 at 1573.

25. *Supra*, fn.4 at 1574.

26. *Ibid.* at 1574, fn.11.

27. Nozick, *Anarchy, State and Utopia* (New York, 1974).

28. Rothbard, *supra*, fn.23, pp. 240-242.

Let us then see how Nozick applies his 'non-productive' . . . criteria to the problem of blackmail. Nozick tries to rehabilitate the outlawry of blackmail by asserting that 'non-productive' contracts should be illegal, and that a blackmail contract is non-productive because a blackmailee is worse off because of the blackmailer's very existence (84-86). In short, if blackmailer Smith dropped dead, Jones (the blackmailee) would be better off. Or, to put it another way, Jones is paying not for Smith's making him better off, but for not making him worse off. But surely the latter is also a productive contract, because Jones is still better off making the exchange than he would have been if the exchange were not made.

But this theory gets Nozick into very muddy waters indeed; some (though by no means all) of which he recognizes. He concedes, for example, that his reason for outlawing blackmail would force him also to outlaw the following contract: Brown comes to Green, his next-door neighbor, with the following proposition: I intend to build such-and-such a pink building on my property (which he knows Green will detest). I won't build this building, however, if you pay me X amount of money. Nozick concedes that this too, would have to be illegal in his schema, because Green would be paying Brown for not being worse off, and hence the contract would be 'non-productive.' In essence, Green would be better off if Brown dropped dead. It is difficult, however, for a libertarian to square such outlawry with any plausible theory of property rights. . . . In analogy with the blackmail example above, furthermore, Nozick concedes that it would be legal, in his schema, for Green, on finding out about Brown's projected pink building, to come to Brown and offer to pay him not to go ahead. But why would such an exchange be 'productive' just because Green made the offer? What difference does it make who makes the offer in this situation? Wouldn't Green still be better off if Brown dropped dead? And again, following the analogy, would Nozick make it illegal for Brown to refuse Green's offer and then ask for more money? Why? Or, again, would Nozick make it illegal for Brown to subtly let Green know about the projected pink building and then let nature take its course: say, by advertising in the paper about the building and sending Green the clipping?<sup>29</sup> Couldn't this be taken as an act of courtesy? And why should merely advertising something be illegal? Clearly, Nozick's case becomes ever more flimsy as we consider the implications.

Furthermore, Nozick has not at all considered the manifold implications of his 'drop dead' principle. If he is saying, as he seems to, that A is illegitimately 'coercing' B if B is better off should A drop dead, then consider the following case: Brown and Green are competing at auction for the same painting which they desire. They are the last two customers left. Wouldn't Green be better off if Brown dropped dead? Isn't Brown therefore illegally coercing Green in

some way, and therefore shouldn't Brown's participation in the auction be outlawed? Or *per contra*, isn't Green coercing Brown in the same manner and shouldn't Green's participation in the auction be outlawed? If not why not? Or, suppose that Brown and Green are competing for the hand of the same girl; wouldn't each be better off if the other dropped dead, and shouldn't either or both's participation in the courtship therefore be outlawed? The ramifications are virtually endless.

Nozick, furthermore, gets himself into a deeper quagmire when he adds that a blackmail exchange is not 'productive' because outlawing the exchange makes one party (the blackmailee) no worse off. But that of course is not true: as Professor Block has pointed out, outlawing a blackmail contract means that the blackmailer has no further incentive not to disseminate the unwelcome, hitherto secret information about the blackmailed party'."

The second part of Katz's explication of the distinction between threat and offer, in contrast, is on firm (e.g., libertarian) ground:

The threat permits you to choose which of many things you are entitled to you will give up. The offer permits you to choose which of many things you are entitled to you will, if you want to, exchange for something else which you are not entitled to. The robber coerces because he offers to sell you back what he has first unlawfully taken from you – the chance to go on living.<sup>31</sup>

Let us use Rothbard's insights, and put matters in terms more congenial with Katz's terminology. In the Brown-Green-pink building, or auction-painting, or suitor for girl examples, if we use Katz's first enlarging or shrinking the 'opportunity set' criterion, we would have to conclude that Brown is criminally threatening Green, not milking him an offer. For in each case, because of Brown, Green's 'opportunity set' is shrunken, not enlarged. But it is highly problematic to consider Brown a robber in any of these cases, and a theory of blackmail which rests on this vision of criminality cannot be a valid one. Expanding or contracting 'opportunity sets' is irrelevant to misconduct. The key, rather, is the libertarian axiom of non aggression.

On the other hand, Katz is on firm ground with his second criteria, the one which speaks of entitlements. Here, Brown never in a million years even came close to making Green choose to give up anything to which he was entitled. Green wasn't entitled to live in a 'pink building free' zone. Green wasn't entitled to the painting. Green wasn't entitled to the girl.

29. Shades of Katz's Mildred and Abigail 'warning' case.
30. See Gorr, Michael, 'Nozick's Argument Against Blackmail', 58 *Personalist* 187, 190, (1977).
31. Katz, *supra*, fn.4 at 1574.

Katz's second criterion is entirely consistent with, even equivalent to, the libertarian theory of crime, which focuses entirely on the initiation or threatened violence against person **and** legitimately owned property. Property entitlement is the bedrock upon which the libertarian theory of crime rests. Unfortunately, as we shall see, Katz seems wedded both to his first, illegitimate, 'opportunity' set criterion **and to** his second appropriate, libertarian, 'entitlement' one.

Let turn now to a consideration of several cases posed by Katz<sup>32</sup> in order **to** illustrate his theory(ies) of crime:

1. A illegally blocks the public sidewalk, so that pedestrians can pass only by walking in the street. In order to pass, B walks in the street, knowing that there is a substantial danger of being struck by passing traffic. He is struck and injured by a negligently driven automobile.

Did B assume the risk of injury and is he therefore barred from recovering from A? Keeping in mind the robbery analogy, one soon sees why the answer should be no. A illegally narrowed B's choices, much as the robber narrowed those of his victim. A forced B to buy back - by exposing himself to the risk of being hit by a car - something that was already his, namely the right to walk down the street.'

Here we see Katz trying to ride two horses at once. On the assumption that it is illegal to block a public sidewalk, A is indeed at fault, but not because he 'narrowed B's choices.' As we have seen from Rothbard, Green can narrow Brown's choices until the cows come home and will nevertheless commit no illegal act. On the contrary, the reason A is at fault is because he improperly (according **to** our assumption) took away a property right of B's, namely his right to walk down the street.

But why need we assume that this was an illegal blockage? Don't people also have the right to stand on the sidewalk? My wife and I along with Charles Koch and his wife were standing on a sidewalk, peacefully, minding our own business, chatting quietly, when along came an inebriated lout, demanding that we step aside for him. Were we wrong to refuse and thus force him to detour around us into the street?

If it is a private sidewalk we are talking about (such as can be found in a shopping mall or Disney World) then it is the owner who is entitled to determine who has precedence. If his ruling is in favor of the walker, then Katz is correct, but if in favor of 'first come first served,' then A, who was there first, is guiltless. If the sidewalk in question is a public one, then, perhaps, the person who is blocking it is protesting the lack of privatization. In the libertarian legal code, this person would be in the right, and B would have to take his chances with vehicular traffic, since sidewalk provision is not a legitimate government function.

32. Katz, *supra*, fn.4 at 1575-1576

In the second case, a caterer at the very last moment raises his contractually agreed upon price; the party giver reluctantly acquiesces, but late claims duress. Katz hews to the libertarian line: this was indeed a robbery in that the hostess was forced **to** give up something she (contractually owned - the lower initial price).

In this case, **the** police, contrary to a court ruling of constitutionality threaten a traveller who fits the Drug Enforcement Agency's courier profile, that unless he consents to a search for drugs, they will detain him until they obtain a search warrant. Katz claims this is an illegal search and seizure on the ground that the traveler has been in effect robbed of something he owns, namely, 'the right not to be detained.'

There are many things in this analysis which offend libertarian sensibilities. First, drug use is a victimless crime, in that it does not involve what Katz<sup>33</sup> in another context correctly calls 'impermissible boundary crossings,' or 'discernable invasions.' (If Katz sees this as a necessary condition for criminality, why does he refrain from applying that insight to the present case?) Therefore, **anything**<sup>34</sup> done by the Drug Enforcement Agency, or the police who do their bidding, is illegitimate. We certainly don't need fancy theories about criminality to reach that conclusion. Second, on the assumption that the police are dealing with a real criminal (e.g., a rapist, murderer, etc.), the supreme court ruling that police may not stop and question suspicious looking characters is itself improper. True, if they do so, and the detainee is proven innocent, then the police themselves are liable for an improper border crossing, but that is entirely another matter.<sup>35</sup> There is, then no 'right not to be detained,' for criminals, that is.

Katz's fourth case is as follows:

The prosecutor has inadmissible but conclusive evidence demonstrating that the defendant is guilty of murder. He also has admissible but flimsy evidence implicating him in a rape. The prosecutor does not believe the defendant committed the rape. Nonetheless, desperate to put someone he knows to be a murderer in jail, he threatens the defendant with a rape prosecution unless he pleads guilty **to** some lesser charge (let's say, the aggravated battery of the fellow he murdered). The fearful defendant consents. But his consent is no more valid than the robbery victim's. The defendant is being asked to buy back (by pleading guilty to aggravated battery) relief from a trial, which the prosecutor is not entitled to launch anyway (given the frivolousness of the rape charge).

This analysis, I claim, is nonsense on stilts, albeit predicated on modern jurisprudence. It takes rather a warped and corrupt notion of justice to sa-

33. *Ibid.* at 1576.

34. That is, apart from disbanding.

35. If the detention is of a few moments, it would fall under *de minimis* rules. If for days or weeks, this is equivalent to kidnapping.

vour the murderer's side in behalf of a hyper convoluted notion of procedural rights. From whence springs the absolute right not to be charged with a crime on the basis of flimsy evidence? To be sure, there is such a thing as malicious prosecution, and the prosecutor in this case may well have left himself open to such a charge. But if his detestation of murder is greater than his fear of being found guilty of such an act, he will proceed. In any case, why is there such a thing inadmissible evidence? No doubt, we do not want our police torturing defendants into confessing. But if this occurs, why should the murderer be let go, instead of the policeman charged with the crime of torture? Why, in general terms, should we treat procedural error with the freeing of the criminal, instead of punishment for the evil doer? None of this makes any sense from a libertarian point of view, which takes a harsh view of criminals who violate property and personal entitlements. Katz pays lip service to the latter idea, but fails to carry through on it.

Katz<sup>36</sup> next considers the attempts of several other authors to explain the prohibition of blackmail. Let us consider each of them in turn, Katz's commentaries on them, and then offer a response.

In Katz's view, Epstein's<sup>37</sup> main contribution is to focus attention on Blackmail, Inc., a corporation which would come into being upon legalization. Its business would be to acquire embarrassing information, and then to blackmail people with it. Apart from the crime of blackmail per se, this would lead blackmailees,<sup>38</sup> as it does drug addicts, into still other crimes in order to pay for their 'fraud habit'.<sup>39</sup>

Katz criticises this theory on three grounds. First, it is wedded to informational blackmail, and cannot be applied to non informational examples such as the threat to call a strike, to give the daughter a motorcycle, etc. The problem here, from the libertarian perspective, as we have seen, is that there is no warrant to call several of these examples blackmail, let alone extortion. Thus, we side with Epstein vis a vis Katz, on this point.

Second, Katz taxes Epstein on the latter's account that hiding embarrassing facts about oneself amounts to fraud. Again, we give the nod to Epstein. Yes, fraud is equivalent to theft,<sup>40</sup> but merely keeping one's own business private cannot be considered a crime. Later, in his analysis of Feinberg,<sup>41</sup> Katz<sup>42</sup> waxes eloquent about privacy rights. Here, he appears to be attacking the notion. One discerns a bit of a contradiction.

36. *Supra*, fn.4 at 1576-1582.

37. Epstein, Richard, 'Blackmail, Inc.', 50 *U. Chi. L. Rev.* 553 (1983).

38. Following Rothbart, I refuse to call them 'victims' since blackmail (but not extortion!) is a voluntary trade, and in all such cases there are mutual gains, at least in the *ex ante* sense.

39. Katz, *supra*, fn.4 at 1578.

40. Rothbard, 1982, pp. 78-79.

41. Feinberg, Joel, *Harmless Wrongdoing* (1988).

42. Katz, 1993, p. 1580.

Katz<sup>43</sup> enters another sticky wicket when he asks: 'Is the reason we are upset with the blackmailer who promises not to reveal a fellow employee homosexuality (for a fee) that we would in fact like him to tell the employer what he knows?' Although Katz does not vouchsafe us an answer to this question, one can easily imagine his answer to be 'Hardly.' That Katz is disturbed by the blackmailer because he sees his act as despicable.

But this is a very unreasonable basis for a legal system. As for the 'revulsion'<sup>44</sup> feels at the practice of blackmail, many people feel an equal amount of revulsion, if not more, for homosexuality. Does this mean we should ban the latter activity as well, according to Katz? This would certainly not follow from a libertarian point of view, as homosexuality, at least between consenting adults in private, does not constitute a border crossing, and hence should be legal.

Third, Katz takes Epstein to task for unduly weighting the fact that blackmail will lead to 'other' crime, so that the blackmailee can pay off Blackmail, Inc. He does so on the ground that even if true, this isn't the real reason for our 'revulsion'?' at blackmail. However, he contends that Epstein's empirical account is 'very plausible.' In doing so, Katz fails to reckon with Block and Gordon,<sup>46</sup> who criticized Epstein<sup>47</sup> on the ground that the legalization of blackmail can actually *reduce* real crime.

Here we come to a section of the paper that is more than just passing curious. Katz<sup>48</sup> accurately describes Nozick's<sup>49</sup> contribution to the blackmail literature, and then masterfully refutes it. Blackmail, for Nozick, should be banned because the blackmailee would be better off if the blackmail dropped dead; e.g., the blackmailer is reducing the 'opportunity set' of the blackmailee. Katz's critique is that Nozick's theory is both over and underinclusive. It is overinclusive because a lot of innocent activity is swept into the category of illegality. States Katz<sup>50</sup> 'The silver medalist at the Olympics would be better off if the gold medalist didn't exist.' The only problem is, in making this point, he contradicts his own<sup>51</sup> reliance on the Nozickian notion of crime, as diminution of opportunity sets.'

Why is Nozick underinclusive? Because his theory 'does not cover the kind of blackmail in which the blackmailer promises to perform some beneficial act in return for the payoff'.<sup>52</sup> This sounds like a voluntary mutually beneficial trade not something to be outlawed.

43. *Id.*, p. 1567.

44. Katz, *op. cit.*, p. 1578.

45. *Id.*, p. 1578.

46. Block and Gordon (1985).

47. Epstein (1983).

48. Katz, pp. 1578-1579.

49. Nozick (1974).

50. Katz, p. 1579.

51. *Id.*, p. 1574.

52. *Id.*, p. 1579.

In his analysis of Feinberg's position, Katz<sup>53</sup> takes the position that the blackmailer '... is asking the victim to buy back what the victim, morally speaking, already owns, like **the** right to keep his homosexuality secret ...'

Let us pause a moment and consider what kind of a world it would be if people really owned the right to keep homosexuality<sup>54</sup> secret.

It would mean, for one thing, that anyone else who saw them engage in this practice would be a thief. That is, if C as much as saw Mr. A and Mr. B kissing, C would at that moment cease to be an innocent person. Instead, C would now be guilty of the crime of stealing, for he now knows something that is the private property of A and B. For another thing, all detectives, and detective agencies, would be forthwith and summarily jailed. For the essence of detecting is to unearth other people's secrets. But if each person owns all secrets which pertain to him, any detective who makes it discovery is per se an aggressor. Take that, Arthur Conan Doyle!

And not only detectives; this also applies to investigative reporters, newshounds, gossip columnists, etc. Further, no one would be able to take anyone else's picture without permission, and this applies to police doing so to speeding motorists. The jails will be overfull in the Katzian world.

States Rothbard<sup>55</sup> on this matter:

But is there really such a right to privacy? How can there be? How can there be a right to prevent Smith by force from disseminating knowledge which he possesses? Surely **there** can be no such right. Smith owns his own body, and therefore has the property right to own the knowledge he has inside his head, including his knowledge about Jones (that he is a liar, thief or homosexual). And therefore he has the corollary right to print and disseminate that knowledge. In short, as in the case of the 'human right' free speech, *there is no such thing as a right to privacy except the right to protect one's property from invasion*. The only right to 'privacy' is the right to protect one's property from being invaded by someone else. In brief, no one has the right to burgle someone else's home, or to wiretap someone's phone lines. Wiretapping is properly a crime not because of some vague and wooly 'invasion of a "right to privacy"', but because it is an invasion of the *property right of* the person being wiretapped.

In Lindgren's<sup>56</sup> theory, the blackmailer improperly seizes 'bargaining chips,'

53. *Id.*, p. 1580.

54. The same analysis would apply to marital infidelity, or financial cheating, or any other embarrassing act.

55. Rothbard, 1982, pp. 121-122

56. Lintgren, James, 'Unravelling the Paradox of Blackmail', 84 *Columbia Law Review*, 670 (1984); see also Lintgren, 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.

the secrets of the blackmailee, which are the latter's property, and uses them against him. One complaint of Katz against this viewpoint is that it is underinclusive: it cannot account for the noninformational cases: 'Pay us \$10,000 - or I will cause bad blood at our club, seduce your fiance, persuade your son to enlist,' etc.<sup>57</sup> The problem here is, as we have seen, that these cases do not violate the libertarian axiom of non aggression.

However, Katz<sup>58</sup> quite properly castigates Lindgren on the ground that

The bargaining chips which he finds the blackmailer guilty of misappropriating seem like a very unreal sort of commodity, made of the most diaphanous of tissues. It is hard to see the principle that elevates this very metaphorical kind of misappropriation to the level of a robbery.<sup>59</sup>

#### A PUZZLE ABOUT PUNISHMENT

In this section Katz launches himself into a long, and seemingly irrelevant but very interesting disquisition on the punishment fitting the crime. His main interest is evaluating the theory that 'Harm is in the eye of the victim,' and<sup>60</sup> who should therefore determine the level of imprisonment. For example, if a would be rape victim prefers death to dishonor, should the murderer or rapist receive a stiffer penalty? Ordinarily, the former is punished more severely; but to the extent we incorporate the victim's preferences, this would be reversed.

Unfortunately, while Katz is willing to seriously entertain this preference based approach, for a whole host of real crimes (although he ultimately rejects it), he gives the blackmail hand to the victimless variety. He states,<sup>61</sup> 'Excepting odd cases like prostitution and drugs, what a victim wants cannot count as an injury.' It is somewhat strange to characterize prostitution and drugs, two of our larger industries, as 'odd cases' while dealing with a whole host of made up mind boggling puzzlers without distinguishing them on this ground. It is logically inconsistent to seriously consider the tastes of victims, no matter how 'idiosyncratic',<sup>62</sup> while ignoring those with a desire for addictive drugs or commercial sex.

Why, despite the superficial plausibility of seriously taking into account the idiosyncratic tastes of victims in sentencing, does Katz<sup>63</sup> think we should nevertheless reject the preference based approach?

57. Katz, p. 1581.

58. *Id.*, p. 1581.

59. For critiques along similar lines, see Block and Gordon, 1985; and Block, 1997, *op. cit.*

60. Katz, p. 1584.

61. *Id.*, p. 1584.

62. Katz, p. 1584.

63. *Id.*, pp. 1590-1595.

According to him, this is because of a bifurcation between the views of the individual victim and those of the judge, who represents all of society. The former cares only about the level of harm; it matters not one whit whether this comes about as a result of commission or omission. The latter, in contrast, 'will generally deem the omission innocent and the act culpable',<sup>64</sup> and, as well, will be less harsh with negligent wrongs than intentional ones, remotely caused wrongs than proximately caused ones.

And why is this? Because the latter in each of these three sets is 'more invasive!'.<sup>65</sup> His evidence for this is that it would be worse (because more invasive) to steal an extra redundant kidney from the inside of a person who has another, fully functioning one, than to take a yet to be implanted kidney out of a refrigerator, even if its intended recipient dies as a result.

Now Katz's concern about invasiveness certainly strikes a libertarian chord. Remember, this is at the very essence of the non aggression axiom. But surely it is a greater rights infringement to cause a death by stealing the kidney in the refrigerator from the would be recipient who has none, than it is to invade the body of a person who has two 'through a completely risk free and painless procedure'.<sup>66</sup> After all, a death will occur in the second case, not the first. Yes, other things equal, the presumption is that an attack on the person is worse than an attack on his property, and rifling through property in his immediate vicinity is a more serious crime than doing so with his possessions far removed. But other things are not always equal. And further, the statement 'You have more of a claim to the things in your immediate vicinity than to those further away',<sup>67</sup> sounds more like an attack on absentee ownership than a libertarian protection of property rights.

Nor does Katz's example of torture fully resonate. Yes, perhaps, he has put his finger on why in the west we do not torture prisoners, even though many might prefer it to a lengthy jail sentence. Certainly this was the reaction when a young American was given 5 lashes in Singapore for a misdemeanor. But the Singaporeans, obviously, do not hold this view, thus rendering it less than obviously true on an intuitive basis. Nor is it fully reasonable, even in the west, that people who torture their victims ought not be treated in the same manner.

If his torture example does not work, his 'straightforward analogy in government assistance for the poor'" is really tortured'.<sup>68</sup> He says that we would rather give welfare in the form of medical care, food stamps, etc., than in the form of money (which they would prefer), not because we are necessarily paternalistic, but, in effect, because 'we believe that they only have a claim on our providing them the particular things usually granted as

64. *Id.*, p. 1590.

65. *Id.*, p. 1591.

66. Katz, p. 1590.

67. *Id.*, p. 1592.

68. *Id.*, p. 1593.

69. Pardon the pun, I couldn't help myself.

aid-in-kind.<sup>70</sup> What is the connection between these remarks and invasiveness? It would appear to be that Katz thinks it invasive not to give the poor things to which he thinks they have a claim. But why do they have a claim to anything from the rich, let alone the particular things to which Katz thinks they do?<sup>71</sup> A more serious problem is that welfare, whether in money or in kind, is the paradigm case of invasiveness: it takes money from taxpayers against their will. How can he use any supposed shortcoming of this program as an example of invasiveness when its very existence is an instance of that quality? This argument applies as well to his championing of tax progressivity as less invasive.<sup>72</sup>

Nor does his example of sentencing criminals constitute much evidence in support of his underlying contention that 'harms are to be objectively rather than subjectively judged!',<sup>73</sup> so as to reduce invasiveness. Katz argues<sup>74</sup> that if we were really concerned to equalize (e.g., be objective and non invasive with regard to) the suffering of inmates, we would treat more harshly the happy go lucky person; he maintains that we do not because in effect this would be too subjective and hence invasive. An alternative, more reasonable explanation is that we simply cannot tell, scientifically, who is naturally cheerful and who is morose. Any, attempt to discern this (once captives found out what was going on) would all but preclude jailbirds similar to those (like Zero Mostel) in the movie 'The Producers'. Further, we must continue to protest the equation of non invasiveness with egalitarianism.

If we were really concerned with non invasiveness, moreover, we would not focus too heavily on the punishment of criminals. Instead, we would devote our attention to making the victim whole.<sup>75</sup> Remember, the are ac-

70. Katz, p. 1593.

71. Katz gives no reasons for this stance, but it would presumably be because he has an affinity for egalitarianism, and/or he believes that this actually helps the poor. As for the former, he should reread Nozick, Robert, *Anarchy, State and Utopia*, New York: Basic Books, 1974, which he several times cites in other contexts, which constitutes one of the best antidotes to egalitarianism ever penned. As for the latter, he might consult Murray, Charles, *Losing Ground: American Social Policy from 1950 to 1980*, New York: Basic Books, 1984.

72. See Rothbard, 1970.

73. Katz, p. 1594.

74. *Id.*, p. 1595.

75. See Randy E. Barnett and John Hagel III, eds., *Assessing the Criminal: Restitution, Retribution and the Legal Process*, Cambridge, Mass: Ballinger, 1977; King, J. Charles, 'A Rationale for Punishment', 4 *J. Libertarian Stud.* 151, 154 (1980); Kinsella, Stephan N., 'A Libertarian Theory of Punishment and Rights', (volume) 30 *Loy. L.A. L. Rev.* 607-45 (1997); Kinsella, Stephan N., 'New Rationalist Directions in Libertarian Rights Theory', 12:2 *J. Libertarian Stud.* 313-26 (Fall 1996); Kinsella, Stephan M., 'Punishment and Proportionality: The Estoppel Approach', 12:1 *J. Libertarian Stud.* 51 (Spring 1996); Kinsella, Stephan N., 'Estoppel: A New Justification for Individual Rights', *Reason Papers* No. 17 (Fall 1992), p. 61; *Philosophical Perspectives on Punishment* (Gertrude Ezorsky ed.,

tual victims of real crime. In the libertarian philosophy, it is *their* welfare, not that of the criminal, which is the main concern.

Katz's last example<sup>76</sup> concerns the burglar, Smithy, the victims Bartleby and Bartholomea, and their two Vases. His point, again, is that we should penalize the criminal based upon the objective not **the** subjective value of the vases; his underlying reasoning is that this is less invasive.

Katz's closing argument in this section is as follows:<sup>77</sup>

If we took the position that what we are really after in assessing the wickedness of the theft is the victim's subjective sense **of** loss, then presumably the theft of a thousand dollars from a millionaire is a less serious affair than the theft of the same amount from someone less wealthy. And that would certainly seem odd.

Yes, indeed, that would seem odd – but Katz is logically precluded from drawing any such conclusion. For this author<sup>78</sup> is **on** record in support of progressive taxation, and this is precisely the ground upon which such a system is supported. That is, there is declining marginal utility **of** money, such that the loss **of** \$1000 hurts a millionaire less than the gain of it benefits a poor man; if we take the money from the latter and give it to the former through redistributive progressive taxation, 'social welfare' (that which is obtained by adding up the welfare of the two of them) therefore increases. If this is sauce for progressive taxes, why should this not be also for the analysis of theft?

There is an alternative explanation (to invasiveness) as to why we should prefer objective to subjective punishments, even though **value** is at bottom subjective, not **objective**.<sup>79</sup> And that is because it is impossible to scientifically compare utility **interpersonally**.<sup>80</sup> This, not the supposed non invasiveness of our society, is a far better explanation of what objectivity we have.

Let us conclude this section. Libertarians are very sympathetic **to** non invasiveness. It lies at **the** very heart of our philosophy. But Katz, through a welter of highly inventive, weird, exotic and fascinating **cases** relies on the supposed thread of non invasiveness which exists, now, in our present institutions. This must ring false, however, **to** any libertarian, since many

1972); Kleinig, John, 'Criminal Liability for Failures', *Law and Contemporary Problems*, Vol. 49, No. 3, Summer 1986, pp. 161-180.

76. Katz, pp. 1594-1595.

77. *Id.*, p. 1595.

78. Katz, p. 1593.

79. Mises, Ludwig von. *Human action*, Chicago: Regnery, 1949, 1963, 1966. See also Buchanan, James M. and G.E. Thirlby, eds., *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.

80. Rothbard, Murray N., 'Toward a Reconstruction of Utility and Welfare Economics', San Francisco: Center for Libertarian Studies, Occasional Paper #3, 1977

of the institutions he cites (welfare, punishment, taxation) are often paradigm cases of the **presence** of invasiveness. To deduce non invasiveness from invasiveness is a task beyond even the inventive powers of Katz.

### BLACKMAIL PROPER

After this tour through the legal philosophy **of** punishment, Katz now returns to blackmail. He maintains (1993, p. 1595):

In both puzzles the defendant's accommodation of the victim's preferences aggravates rather than improves his moral position. In both puzzles the defendant is considered worse, not better, for having gone along with the victim's choice.

We have previously given good and sufficient reasons for calling this very statement into question. Now, we will suppose, just for the sake of argument, that it is true. It still does not follow that a mere immorality can serve as the basis **of** a criminal act. This is the nub of Katz's problem: how to invest an act which has not one single iota **of** criminality in it with illegality of the invasive variety. This is why he brings in criminality, his 'puzzle.' even though he admits that **the** blackmailer is guilty of no *per se* criminal behavior. It is an attempt to smuggle into the pristine (in the legal sense, that is) world **of** blackmail the invasive act of the criminal.

Kitty, only succeeds in confusing matters with his example of Anatole, the thief **of** the Metropolitan Museum's Rembrandt who then tries to sell this picture back to them. Our author asks us to forget about the fact that this is a stolen painting, and to concentrate on the second act in the play, the one where the blackmailer tries to 'steal' \$10,000 from the Museum in return for this object d'art. Previously, we objected on **the** grounds that the Museum probably wasn't the rightful owner anyway, and that even if it were, it would still owe *it* salvage fee to Anatole. Now, just for the sake of argument, we will suppose that Katz' scenario makes **sense**, and cannot be toppled on these grounds. Still, he has not succeeded in deducing crime from an immorality, since the **holding** of a stolen good is still a crime. Katz validly concludes that blackmail is a crime in this one case, only because this **crime**, not immorality, appears in the premise. On no fewer than four separate occasions in the paragraph beginning of p. 1596 and ending on p. 1597 Katz characterizes Anatole's holding of the painting as 'noncriminal.' But repetition cannot alter reality. The threat in blackmail is non criminal gossiping. The threat in Anatole's 'offer' of the return of the stolen painting for the \$10,000 is to hold onto stolen property. If this is not a crime, then nothing is.<sup>81</sup> In our terminology, Anatole is an extortionist, not a blackmailer.

81. States Rothbard, *op. cit.*, 1982, p. 51: 'The criminal has no natural right whatever to the retention of property that he has stolen'.

But this does not begin to exhaust Katz's difficulties. He uses immorality, not invasiveness, as the springboard for his charges of blackmail, but he is not at all clear on what is immoral. Katz never gives us a criterion, or a definition nor examples. One would have expected at least the latter, given this author's penchant for numerous and mesmerizing cases in point. If immorality is this bedrock, he is building his blackmail edifice on a foundation of shifting sand.

Second, Katz would have to withstand any number of reductio ad absurdum, and he cannot contend with even a one of them. What else is or has ever been considered immoral? Premarital sex, open marriage, polygamy, pornography, gambling, homosexuality, overeating, impoliteness, sloth, greed, not contributing to charity, nose picking, suicide, smoking tobacco, using addictive drugs, breaking wind, drinking alcohol, immediately spring to mind. But then, with his theory, the threat of any of these things would have to be outlawed, surely not a welcome conclusion. However immorality is defined, we would surely wish to distinguish between it and invasive criminal behavior.

Katz<sup>82</sup> appears to have a reply to this charge:

If for instance Anatole's threat to the museum had not been to sit on the Rembrandt forever but merely to be surly to the museum director, that threat too would involve a wrong, but altogether too minor a one to turn the transaction into blackmail.

But this opens up more problems than it solves. For not only does Katz base his theory of blackmail on an undefined immorality, even within that category it would appear that there are serious immoralities (which do entail blackmail) and minor ones (which do not). Needless to say, just as Katz nowhere articulates his perspective on immorality, he never draws the line between serious and trivial violations thereof.

Be that as it may, Katz is now ready to apply his insights to the various types of blackmail, and we will continue to follow his lead.

It will be remembered that in the canonical problem, Busybody asks for \$10,000 for his silence about Philanderer's infidelities. Katz,<sup>83</sup> based on his long discourse into punishment theory, characterizes this as follows:

Busybody is putting Philanderer to a choice between two wrongs. Busybody will either commit the **theft** – the unconsented-to taking of \$10,000 – or the revelation of Philanderer's infidelities. Why is the payment of \$10,000 unconsented-to, given that Philanderer is paying voluntarily? It is unconsented-to because it is made with the threat of something wrongful, the revelation. But how is the revelation wrongful when it is not in fact prohibited by the criminal law?

82. Katz, p. 1597.

83. Katz, p. 1598.

It is wrongful because it is immoral, even though not criminal or even tortious. To be sure, it is not a major immorality by any means, but simply 'swinishness.' Indeed it wouldn't even be immoral if it had been made out of friendship with the cheated wife. It is immoral only because, if it were to be done, it would be done for purely retaliatory reasons – retaliation for Philanderer's refusal to pay. But now comes the most formidable objection: if revealing the infidelities is only a minor immorality, then how can the taking of money which the victim prefers to that minor immorality be anything more than a minor immorality itself? That's where our solution to the punishment puzzle comes in. The lesson of the punishment puzzle was that when the defendant has the victim choose between either of two immoralities which he must endure, the gravity of the defendant's wrongdoing is to be judged by what he actually did (or sought to achieve), not by what he threatened to do.

In a previous life, Katz must have been a broken field runner of no little talent; one can see, if one looks carefully, at the swiveling of the hips at a prodigious rate as he attempts to evade the logic and implications of his own views. But the truth of the matter is that even if what **Busybody** did was immoral, no amount of twisting and turning can render this invasive criminal behavior. Period. And, as Katz<sup>84</sup> himself is on record as identifying à la Nozick<sup>85</sup> 'impermissible boundary crossings,' or 'discernable invasions' as the necessary characteristics of a crime, it is a complete mystery as to how he can regard mere blackmail in this light. The blackmailer never invades, or threatens to invade, anyone's boundary.

Suppose there were a case where 'defendant (does not have) the victim choose between either of two immorality which he must endure.' Would this let the blackmailer off the hook in Katz's view? Such a situation is easy to construct.<sup>86</sup> Suppose that Philander had somehow gotten wind of the fact that Busybody had the goods on him, and was about to spill the beans to his wife. Philanderer then approaches Busybody, not the other way around, and begs him to keep quiet, offering \$10,000 for Busybody's silence. Here, Busybody is not the initiator of the offer; Philanderer is. Here, Busybody is not at all forcing his 'victim (to) choose between either of two immorality which he must endure.' Rather, the 'victim' is making this offer to the blackmailer. According to the analysis offered by Katz, this case could not be considered one of blackmail. And yet this is just as much the canonical blackmail case as the one depicted by Katz.

In respect of blackmail and 'plain vanilla' coercion, Katz<sup>87</sup> characterizes the blackmailer as attempting to 'take money without the owner's con-

84. Katz, p. 1576.

85. Nozick, 1074.

86. Rothbard, 1982, pp. 124-125.

87. Katz, p. 1599.

sent.' But this is seen to be false when we consider the deal initiated by **the blackmailee**, not the blackmailer. In our scenario, the blackmailee is practically begging the blackmailer to blackmail him, rather than engage in free speech gossip about him. How this can be converted into 'without consent' can only be considered a product of a lawyer's facility with language.

Omissions, too, can be considered blackmail. According to Katz:<sup>88</sup>

Not throwing the drowning stranger a life vest is at least mildly immoral, though generally not criminal. Hence, not surprisingly, it sounds like blackmail for the defendant to say to the drowning victim: 'Pay me \$10,000 or I won't throw you that life vest.'

But not contributing **to** charity is also immoral, one presumes. Hence, if I told you that unless you give me \$10,000, I won't contribute **to** charity, I would be summarily relegated to the hoosegow by Katz.

Is it really invasive not to do something you are not contractually obligated **to** do? Hardly. So Katz must either leave off his quasi libertarian concern with invasiveness, or change his tune on blackmail.

Moreover, the canonical commercial transaction fits this omission format. For does not the salesman always (implicitly) make this 'threat' to the customer: 'Pay me \$10,000, or won't **sell** you this car'? If so, Katz's theory is shown yet again to be wildly overinclusive. There would be an awful lot of people cooling their heels in jail for engaging in such economic 'crimes.'

Asks Katz<sup>89</sup> 'What about the employer who offers an applicant a secretarial job if she will sleep with him?' His conclusion is that this is blackmail, since 'the employer is putting the victim to a choice between two moral wrongs - a retaliatory non hiring, or non consensual sex.'

There are grave problems here. What about the woman who approaches a male employer and offers **to** work for him in not one but two capacities: secretary and prostitute. *He* would appear guilty **of** blackmail, no matter what his reply. For *he* would be putting *her* in a position where she would have **to** accept one of two immoral states of the world. If *he* refuses, the immorality would consist of her not being hired (the 'non-hire'). If he accepts, he would be immorally involving her in prostitution, which Katz would undoubtedly regard as non consensual, even though she made the proposal. And for her very offer, she, too, would be considered culpable of this crime. For then *she* would be demanding of *him* that either he hire her on this basis (which Katz, at least, is on record as regarding as immoral), or not working at all (which Katz is also on record as regarding as immoral - this is the 'non-hire'.)

Suppose another case. A man offers marriage to a woman if she will 1. sleep with him; 2. sleep with him, but not in the missionary position. On

the ground that all sex is non-consensual (which seems to be Katz's position), case 1 constitutes blackmail. On the ground that the missionary position is the only moral one, the man is additionally guilty of blackmail. Jail overcrowding, here we come.

We are ambivalent on the question **of** whether the prisoner **who** goes on hunger strike in support of some demand or other, or the husband who threatens to commit suicide if his wife leaves him ought to qualify **as** blackmailers. We are ambivalent because **we** are ambivalent on whether the threatened wrong represents any wrong whatsoever.<sup>90</sup>

If I read this correctly, the uncertainty stems from the fact that Katz does not know whether or not suicide is more immoral than, say surliness. This strikes one as odd, since suicide is typically a paradigm case of immorality. This author's analysis is unsatisfactory, in that it intimately relies not only on morality which is never defined, but on a certain level of morality. 'a *de minimis* threshold' which seems to have escaped even him. One may perhaps be excused for thinking that this sounds rather like a poker game where **the** one of the players makes up the rules as he goes along, to fit the hands he happens to be dealt.

In the case **of** brutal honesty Hortense increases the blackmail pressure on Thaddeus by not only threatening to expose his infidelity, but now, also, his financial peccadilloes. Katz<sup>92</sup> thinks this leaves the level of her blameworthiness untouched, since this 'is largely determined by the demanded advantage and not the threat' which remains unchanged (Hortense offers Thaddeus a two for one deal: the same price to keep both secrets as to keep one). I persist in thinking that since she only engages in (two) blackmail(s), and not extortion, she is legally blameless. Since I am not at all clear on the immorality charge, I will leave it to experts such as Kntz.

Turning to the question **of** prior theories,<sup>93</sup> Katz<sup>94</sup> thinks that Lindgren's test is not overinclusive, since 'what is usually described (by the latter) as playing with someone else's bargaining chips will invariably turn out to involve the threat **to** commit some . . . swinishness unless one is paid off. . .' (material in brackets added by present author). But it is underinclusive in that not all instances of 'swinishness pass the bargaining chip test'.<sup>95</sup>

90. Katz, 1993, p. 1600.

91. Kntz, p. 1600.

92. *Id.*, p. 1601.

93. Katz is reasonably inclusive as to the prior theories of blackmail he considers. Too bad, then, he did not comment on any of the theories which interpret blackmail as a non crime, e.g., op.cit., Block, 1972, 1985, 1986, 1997; Block and Gordon, 1985; Block, forthcoming, Block and McGee, forthcoming; Mack, 1982; Rothbard, 1982, 1993).

94. Katz, p. 1601.

88. Katz, p. 1599.

89. *Id.*, p. 1600.

Here, much as it pains me to side with Lindgren,<sup>96</sup> I must take his side at least partially against that of Katz. Contrary to him, many people would consider it the height of 'swinishness' to 'encourage someone's son to volunteer for combat duty in Vietnam.' Katz, however, is shielded from my full opposition since I cannot measure levels of 'swinishness,' at least not without help from him, which is not forthcoming. So who knows if this is swinish or not? Presumably, it is, for Vietnam war opponents, but not for advocates. Strange to have a possible jail sentence (for the 'crime' of blackmail) turn on considerations of this sort. Certainly, this would not pass muster under Hayek's<sup>97</sup> 'rule of law.'"

Katz's<sup>98</sup> reexamination of Feinberg and Epstein depends upon the former's idiosyncratic sense of immorality. This has already been commented on.

Katz claims that Nozick's 'existence' test<sup>100</sup> really functions so as to distinguish commissions from omissions, and that since most immoral conduct (whatever that is) involves an act, the latter has stumbled onto a pretty good proxy for blackmail. After Rothbard's critique of Nozick, one would have thought that nothing worthwhile was still standing of this philosophical edifice. In any case, an act is by definition an omission of a failure to act. Thus, it doesn't seem as if this distinction would give us much forward momentum in our attempt to shed light on blackmail.

#### OBJECTIONS

In this section, Katz<sup>101</sup> deals with an objection to his thesis. Suppose, instead of Anatole stealing a Rembrandt from the museum, he had taken \$100,000; but rather than asking for a 'reward' of \$10,000, he had simply deducted this amount, and returned only \$90,000.

In the view of most people, this triumph of form over substance would make no difference. Our evaluation of both acts would be identical. However, for Katz it is of crucial importance; similarly, Katz analyzed the Mildred Abigail example differently as alternative means of blackmail were chosen. (Based on this, one imagines that Katz would also treat as dissimilar the case where the blackmailee approaches the blackmailer.)

95. Katz, p. 1602.

96. see Block and Cordon, 1985.

97. Hayek, Friedrich A., *The Constitution of Liberty*, Henry Regnery Company, Chicago, 1960, pp 397-411.

98. For a libertarian critique of Hayek's political philosophy, see Rothbard, op. cit., 1982, pp. 219-228, and Block, Walter, 'Mayek's Road to Serfdom', *Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. 12, No. 2, Fall 1996, pp. 327-350.

99. Katz, p. 1602.

100. This is what Rothbard, 1982, calls Nozick's 'drop dead' criterion.

101. Katz, pp. 1603-1605.

Katz attempts to explain his position by recourse to two cases put forth by Judith Jarvis Thompson. In the first, the trolley conductor has the choice between allowing his vehicle to follow its original track, and kill five people, or steer onto another path, and kill only one (the brakes are not working, so he cannot simply stop.) Katz<sup>102</sup> gives it as 'nearly unanimous opinion' that the latter course of action is preferable; after all, five lives are saved at the expense of one, yielding a net balance of plus four. But in the surgeon case, there are five patients on the verge of death, for lack of a heart, liver, etc. Along comes another patient with a full complement of organs; the surgeon kills him, and distributes these amongst the other five. Again, five lives are saved at the expense of one, yielding a net balance of plus four. But this time 'opinions are nearly unanimous'" that this would be illegal.

Katz, 1993, p. 1605 now states:

Let's now consider a hypothetical that combines elements from both of the foregoing cases. Think again of the unstoppable trolley. Imagine that the driver can't make up his mind about what to do, and thus ends up running over the five, rather than the one. Miraculously, he doesn't kill them, but only hurts them badly. Nevertheless, they are certain to die from their injuries unless furnished with certain transplant organs. . . . Suppose now the driver deeply regrets not having turned the trolley and announces: 'It would have been all right had I turned the trolley and thereby killed the one for the sake of the five. I hesitated because I wanted to give the matter more thought. Upon reflection, I have decided it would indeed have been better to have killed the one to save the five, and I want to make up for my earlier omission. The victim really isn't entitled to protest: He is giving up nothing other than what I would have been entitled to take from him anyway.'

Katz takes this to be evidence of the triumph of form over substance. If this consideration can work here, it can be applied as well to Anatole and the Museum. This, at least, is his defense for his form over substance analysis of that case. But there is an alternative explanation."<sup>103</sup> It is that the trolley conductor has only a choice between killing one or five people; no matter what he does, he will have to violate the rights of at least one person. The surgeon, in contrast, faces no such dilemma. He need not engage in the border crossing of anyone. True, five patients will die if he refrains from the initiation of aggression against an innocent victim, but if he refuses, he can at least be comforted by the fact that he followed the libertarian axiom.

And the same applies to Katz's trolley conductor who later changed his mind. First, it seems to be a bit of a stretch to say of the person who was

102. *Id.*, p. 1604.

103. Katz, p. 1605.

104. I am indebted to Matthew Block for helping to put this point into focus for me.

spared when the five were killed that he is 'giving up nothing other than what I would have been *entitled* to take from him anyway.' The conductor was hardly entitled to kill this pedestrian; rather, he could not *avoid* doing so. Second, and more important, for the trolley driver, *the first time around he had to kill someone by invasion*; that is the essence of the dilemma. But *the second time, after the conductor had reconsidered, he no longer has to engage in a border crossing*. He could do nothing and allow his first five victims to die, the exact position occupied by the surgeon.

Say what you will about Katz, you must at least admit he is clear about what he is doing. No shilly shallying and purposeful obfuscation for him. It is at least possible to achieve real disagreement with Katz, **no mean accomplishment**. He admits, in black and white, that his theory of blackmail depends on his (and our?) ability to tell the difference between 'a sufficiently grave piece of obnoxiousness' and 'of nothing more than garden-variety meanness.'

And that makes blackmail, says Katz:<sup>105</sup>

... a very odd kind of offense: **As** the defendant's threat edges up on, but stays shy of, some ill specified magical threshold, he is merely considered a crafty, nasty, unsavory, slightly immoral negotiator. Once he passes that threshold, his blameworthiness suddenly soars into the stratosphere – **soars**, that is, **to the level of a regular blackmailer**. That sort of radical discontinuity must seem both alarming and implausible.

If this 'radical discontinuity' were all that were wrong with his explanation, that alone would be sufficient to disqualify it from being a full and accurate account of blackmail. Who, after all, can make such fine, not to say meaningless, distinctions? But this does not at all end his problems. He has still not explained why we should regard *any* immoral albeit **legal threat** as that of an outlaw. *That is* the most serious drawback **to** his analysis.

Katz spends the next few pages<sup>106</sup> claiming that as such radical discontinuity can be found in physics, chemistry, political elections, psychology, computers, anthropology, game theory, negligence law, the mens rea of knowledge, intention, and finally, alumni loyalty. But as this phenomenon is not really **at** the heart of the libertarian critique of Katz, we pass by these claims, all of which are really irrelevant to the issue of blackmail in any case.

#### IMPLICATIONS. RAMIFICATIONS AND SPECULATIONS

Katz first draws an implication from his blackmail theory to the distinction

105. Katz, p. 1606.

106. Katz, pp. 1607-1611.

between torts and crimes. As for the libertarian this is an invalid distinction,<sup>107</sup> we shall not pursue him on this matter.

As employed by Katz, the concept of unconstitutional conditions applies **to** a governmental grant of a favor (e.g., a subsidy) predicated **on** a condition that would not otherwise obtain (e.g., that the recipient not 'air . . . his political convictions'").<sup>108</sup> As there would be no such governmental favors granted **to** anyone in a libertarian society, we again will not take Kiitz up on this matter?"

Katz"" poses the question, if it is immoral to drop a nuclear bomb on someone, is it also immoral to threaten or intend to do so? As stated, this query falls outside of the realm of libertarianism, which encompasses only legality, not morality. We can instead ask, If it is invasive to drop a nuclear bomb on someone, is it also a rights violation to threaten or intend **to do so**? The answer, at least as offered by Rothbard<sup>111</sup> is a resounding 'Yes.' The negative effects of such weapons cannot by their very nature be confined **to** guilty parties; they must necessarily impact innocent people, and are thus contrary to the non aggression axiom. Intentions to the side,<sup>112</sup> threats of nuclear war also fall outside the realm of licit behavior.

Katz<sup>113</sup> is inclined to argue to the contrary 'if the policy really **does** what it purports to do, deter nuclear war.' But surely, if true, this would not be the first time **on** record that illicit threats had utilitarian effects. Or, to put this the other way around, just because an action has effects that some consider salutary does not mean it was not an improper border crossing. For example, banning homosexuality might well reduce the incidence of AIDS; still, to throw people in jail for adult consensual sex is a violation of their rights, something **not to** be tolerated in the libertarian society. Or, black male teenagers are disproportionately over represented in crime statistics. Were we to engage in preventive detention for this entire age-sex-race cohort, from, say, ages 13 to 19, the level of rapes, murders and robberies would undoubtedly decrease. But to do so would be a grave injustice, at least according to libertarianism, if not Katzianism; for this would involve the initiation of violence against innocent people (the overwhelming majority of black male teens who **do** not engage in criminal wrongdoing).

107. Rothbard, 1982, p. 60. It. I.

108. Katz, p. 1613.

109. But what of the limited government libertarian, who will eschew subsidies but will certainly allow for some government employment? May the state impose conditions on its civil servants, such as that they stay out of politics. This, presumably, would depend upon the stipulations of the agreement (the constitution) under which the government operates. But there would certainly be no blanket objection to such a stipulation.

110. Katz, p. 1613.

111. 1982, pp. 100-191.

112. If people could be jailed for their unexpressed and not carried out intentions, most of us would have long ago been incarcerated.

113. Kiitz, p. 1613.

ing.) Similarly, a *threat* to do this would also constitute a serious inequity. Or, a ban on interracial dating, sex and marriage might well reduce the rights of all, and increase the utility of (particularly) white males and black females, and all others who oppose this practice. Yet, according to the libertarian philosophy, such activity is well within the rights of all who engage in it.

Katz<sup>114</sup> maintains that the installation of a spring gun which automatically shoots intruders is legally wrong if it actually is employed in that manner, since no one is 'entitled to defend property by the use of deadly force.' Let us assume he is correct in this. Yet, he argues<sup>115</sup> that the mere establishment of this mechanism, that is, the *threat* to shoot the burglar is not legally impermissible, since the 'successfully demanded, not the threatened contingency, determines the level of blameworthiness of the defendant's conduct.' Here, the successfully demanded behavior is the 'non-intrusion onto one's property,' and since this is not morally blameworthy, neither is the threat which attains this goal.

About all that one can say of this is that it is indeed a logically consistent application of Katz's blackmail theory. But suppose I blackmail you into doing something *good*. For example, you are an overweight rubber fetishist, who is ashamed only of the latter. I threaten that unless you go on a diet, I will disclose your secret. Since a diet, by stipulation is good for you, the presumption is that I am not acting immorally.<sup>116</sup> This being the case, Katz could not condemn this as blackmail. Yet, it has all the earmarks of Katz's canonical case of blackmail, if ever there was one.

It has been a pleasure chasing down Katz. Although I disagree with him on many things, I am aware in reading him of dealing with a lively mind, one determined to 'pursue . . . (the) ripple effects odd assumptions in one area can have in an entirely different area'.<sup>117</sup> It is a delight to deal with someone willing to confront the logical implications of his theory, wherever they lead.

Nevertheless, I must conclude that the libertarian position on blackmail, that it should be decriminalized, remains unscathed, Katz's best efforts to the contrary notwithstanding.<sup>118</sup>

114. Katz, p. 1613.

115. *Id.*, p. 1614.

116. As a libertarian, I am by definition limited to engaging in legal analysis, and precluded from engaging in the moral variety; thus, I can only entertain this line of thought for argument's sake.

117. Katz, p. 1614.

118. I would like to express a debt of gratitude to David Kennedy and Antony T. Sullivan and their colleagues at the Earhart Foundation for financial support. The usual disclaimers, of course, apply.