REPLY TO MATT MORTELLARO ON "BLOCK'S PARADOX": CAUSATION, RESPONSIBILITY, LIBERTARIAN LAW, ENTRAPMENT, THREATS, AND BLACKMAIL

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MORTELLARO (2009) IS A brilliant article. Unswerving in its devotion to Rothbardian analysis, it makes numerous new and important points. Part of his essay is devoted to a critique of my own previous publications, (Block 1991, 2001, 2004A, 2004B). My commentary on Mortellaro (2009) shall focus for the most part, on its rejoinders to me, in defense of my own positions.

However, I cannot resist commenting, once again (see Block, 2004C) on Hoppe, who offers this scenario for our consideration:

> A, B's employer, orders B to come directly to him, knowing that half-way there is a concealed trap. B walks into the trap and is injured. Reinach would find A liable. Rothbard would let him go, because there is no 'overt physical invasion' initiated by A. A merely says something (which in itself is clearly a noninvasive act) to B; and then "nature" takes its course with no further interference on A's part. That is, entrapment, as an indirectly and ... in itself noninvasive means [of effecting] physical harm, would have to remain free of punishment. [Hoppe 2004, p. 92]

I take a different position on this than Hoppe. Focus on this shorter statement for a moment: "A merely says something (which in itself is clearly a

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noninvasive act)." False. The libertarian axiom of nonaggression is always couched in terms of the initiation of force, or the *threat* thereof. True, no physical invasion can occur through a mere speech act.[1] But, it is still *invasive* for all that. If a large, strong, powerful A *says* to a 90-pound weakling, B, "Give me your money or I'll punch you senseless," it is "only" an act of speech, in one sense. But it most certainly can count as an invasion, since it constitutes a *threat*. I go further; this is the very paradigm case of an act the libertarian nonaggression axiom prohibits. Thus, I think it highly inaccurate to say that "Rothbard would let him (A) go." Very much to the contrary, Rothbard would see A as a criminal.

And what is Mortellaro's take on this matter? He states that

> It seems obvious here that, indeed, the requirement of an 'overt physical invasion' is too great and that, intuitively, we would have trouble denying the criminality of A's actions. All the same, it would seem that this is no disagreement with the non-aggression principle *per se*, but rather with what we might call "Block's Paradox." In this construction of the non-aggression principle, any combination of acts which, by themselves, are non-invasive cannot create an act which is itself invasive (and therefore illicit). Yet, rejecting this particular construction does not seem to, by itself, threaten the non-aggression principle nor many of its traditionally-assumed conclusions.

While I am grateful to Mortellaro for naming this paradox after me, I cannot see how it addresses Hoppe's error. Where are the two non invasive acts in this scenario, which, taken together, constitute an invasive one? One candidate for this appellation is the sentence uttered by A to B: "Come here," or "come toward me," or some such. But where is the other *act*? The only candidate for that second slot is "nature" taking its course, but that is hardly an *act*. And, in any case, the statement "Come here," or "come toward me," is hardly an innocent speech act, in my view, at least not in the context of the trap that will befall B.

But Mortellaro has one more arrow in his quiver. He attacks "Block's Paradox" as follows:

> …we can take a case where all would agree that an invasive action occurs, murder by shooting. And yet, it becomes hard to see what invasive actions make up this criminal act in all circumstances. What objective, overt physical actions must be taken for the murder to occur? First, the gun must be pointed at the victim. Here, we might

[1]We here abstract from speaking very LOUDLY, and rupturing someone's ear drum. Here "speech" would constitute a physical invasion.

> have an immediate objection, for pointing a gun at someone is surely a threat. However, let us assume the victim in this case is blind and thus cannot see the pointed gun. Is this still a threat? Unless the victim has some way of knowing that the gun is pointed at him, certainly it is not. The second thing that must happen is the murderer must pull the trigger. Now this, in itself, is not objectionable at all—if the gun was pointed at a target in a shooting gallery, or at an attacking criminal, we would have no cause for saying that the murderer has committed a violation of the non-aggression principle. So, where did the invasive action occur? It appears that this is another example of two actions which, separately, are non-invasive combining to form an illicit action (namely, murder). With this in mind, we have reason to believe that rejecting Block's Paradox is far from a rejection of the non-aggression principle, and indeed may be a welcome correction.

There are difficulties with this position. Pointing a gun at a blind man is still a threat, and illicit under libertarian law. The blind man may well not be aware of this (he might be; other senses sometimes become more acute when eyesight fails), but his *bodyguard* certainly would be. The bodyguard would be eminently justified in shooting, forthwith, anyone pointing a gun at his client. How can it not be an unjustified threat against the blind man, if his bodyguard would be justified in killing the person pointing a gun at his client?

Pulling the trigger on the firing range is one thing, but doing so when one has a gun aimed at a blind man is surely quite another. The most accurate description of this act is not "pulling the trigger." Rather, it is either "pulling the trigger on the firing range" *or* "pulling the trigger when one has a gun aimed at an innocent, non criminal, blind man." The former is justified. The latter is the very paradigm case of a violation of the libertarian axiom of nonaggression. To fail to distinguish between these two very different acts is the height of context dropping.

Thus, while I congratulate Mr. Mortellaro on attempting an intriguing and interesting refutation of my work on blackmail theory (Block 2001), I cannot see my way clear to agreeing with him.

Let us consider several sub-scenarios of the one offered by Hoppe. In all cases to be considered, A calls, requests, or orders B to move toward him. In all cases, there is a trap between the two of them, such that if B follows A's advice, suggestion, or whatever, and moves in this direction, he will fall into the trap and die. But, the devil is in the details, and, I contend, a proper libertarian analysis of this overall situation depends upon, precisely, which of these descriptions is correct: Are A and B connected contractually, such that A is B's boss? Is A B's employer? A higher ranking officer in the military? Is A the dean, and B a lowly professor? Or are they arms-length strangers, with

no connection at all? Is A the parent of B; and is B a child? Has A set the trap, or does he merely know about it (we assume in all permutations that B is unaware of it). Matters become more complex, still, when we ask the all-important question for the libertarian: on whose property is this statement being made? Is A the owner? B? A third party, C? Or, possibly, both A and B are standing on unowned, not yet homesteaded land.

In my view, if there is no connection whatever between A and B, (they are complete strangers) and if A has not set the trap (but merely knows about it), then A's statement to B must be interpreted as a mere suggestion. It does *not* constitute murder. It is as if two men, A and B, are standing on the roof of a tall building, and A tells B to jump off. B might look at him incredulously, and, of course, refuse.

If both are located on C's land at the time of the statement, A and C would be guilty of a conspiracy to commit murder of B. This result is even more clear if A and B are both standing on land owned by A. B is now, in effect, the guest of A. For A to make this sort of statement, that eventuates in the death of B, is an even more clear cut case of the murder of B by A. Surely, there is an implicit contract, when A invites B onto his land, that A would not do any such thing. If A invites B to a party at A's house, A has now taken on the role of host to B. Well, part of "hosting" is *not* to murder the guest by asking him to "come here," in the context where B will thus be entrapped.

When A hires B to do typing for him, there is at least an implicit agreement, maybe even an unwritten but explicit contract between them, that would preclude A murdering B under "color" of this employer-employee relationship. When A tells B to "come here," the understanding between them is that A is saying this to B pursuant to B's job as a typist. Were this not the case, then A would have to pay B hazard pay for a dangerous occupation. Hoppe's scenario comes down to the one where A commits fraud on B. A hires B to do some typing, and instead confronts him with very dangerous working conditions, that would have been rejected by B were he told of them.

Suppose, now, that A and B are both standing on unowned, not yet homesteaded land. Whereupon A beckons B to come forward (toward the hidden trap). A owes B no contractual obligation whatsoever.[2] In my view, it is in this type of case and *only* in this type of case, where there is no connection between them at all, that A is innocent of murder. B should look before he leaps; he should not blindly follow suggestions of other people. B

[2]Good Samaritan laws are incompatible with libertarianism.

should at least ask A, "Why do you want me to come forward toward you?" If A says something along the lines of "Because I said so," or "Just do what I say," and B nonetheless obeys, A continues to be innocent of murder. A has in no way obligated himself to protect B's life with statements of this sort. But suppose A replies to this query of B's, "I want you to walk toward me because I want to give you this $100 bill (that he waves around), and I'm too lazy to walk all the way over to you." In my analysis, A would now be guilty of perpetuating fraud (even if he fully intended to give the $100 to B should B somehow, miraculously, avoid the trap.) But fraud, a relatively minor[3] criminal act that results in the death of an innocent victim, counts as murder.

But these comments by no means force Mortellaro to retire from this field of intellectual battle, for he has yet another rebuttal:

> There might be reason to think that it is unfair to Block's position to use this example in this way—it might be objected that pulling the trigger *whilst* pointing it at an innocent are not two separate acts, as described above, but rather are simply one complex act. And, indeed, such an argument is not totally without merit, though such a system seems far from stable. For example, why not extend such analysis to the issue of blackmail? This would set us up with two opposing choices. On the one hand, we could take the position Block does and say that the demand for money and the threat of telling secrets are two separate acts, and since each is licit on its own, we may reject the notion that combined they become criminal. But, on the other hand, what if we were to construct the situation such that the demand for money and the threat of telling secrets was not two separate acts, but rather just one complex act? It would seem that we might have reason at that point to call the action criminal—after all, payment is being extracted by threat and some legal theorists even within libertarian circles oppose blackmail.[4] The case of entrapment, too, could appeal to this "complex action" loophole, in effect making it as though the boss threw his worker into the trap. However, this entire process of deciding what actions count as separate or complex seems to drift dangerously into the realm of *ad hoc*, arbitrary judgments.…

[3]It is minor, given that the offer is only for $100.

[4]At this point, Morellaro cites van Dun, "Against Libertarian Legalism," pp. 72–73; and van Dun, "Natural Law and the Jurisprudence of Freedom," pp. 34–36. I regard this as no more than an argument from authority. In my view, those "libertarians" who favor the prohibition of blackmail may be libertarians on many, many other issues, but *not* on this one.

I do not see how this supposed dilemma undermines my[5] views on blackmail. I am perfectly happy to accept either of its "horns." On the one hand, my preferred way of putting the matter is that blackmail consists of two separate acts, a request for money, and an offer to keep a secret, or a threat to reveal a secret in the form of gossip, each of which is legitimate; therefore, the combination of these two innocent acts is, of necessity, also licit.

On the other hand, I have no objection to accepting the "complex action 'loophole,'" and saying that blackmail is a complex act, consisting of a request or demand for money, coupled with the "threat" to engage in free speech (gossip). Why should this "complex act" be prohibited by libertarian law? It is worlds away from *extortion,* with which blackmail is often confused. In *that* case, the demand for money (or other valuable consideration, such as sexual services) is coupled—whether in a complex single act, or two separate acts it makes not one whit of difference—not with the threat[6] to indulge in free speech rights, but, rather, to maim, murder, kidnap, or some such.

Mortellaro concludes this section of his paper on the following note:

> Hoppe's case for entrapment being a form of aggression thus is not in contention with the non-aggression principle and should be unobjectionable to the Rothbardian. In many ways, the insights of Reinach and Hoppe up to this point are a significant improvement on the traditional understanding of the non-aggression principle. … it cannot be denied that the inclusion of entrapment as an aggressive act is an important and positive contribution to the current understanding of libertarian law.

I cannot agree with this assessment. Hoppe's entire case against Rothbard is that "Rothbard would let him (A) go, because there is no 'overt physical invasion' initiated by A." Not so, not so. Hoppe has to do better than this, and Mortellaro is in error in supporting Hoppe without any evidence in this regard. At the very least, these authors must cite Rothbard on an entrapment case of this sort. I am unaware of Rothbard explicitly making any such analysis. It is all too easy to *infer* that Rothbard *would* have reached this verdict, or *should* have, were he to remain true to his principles. Coulda, woulda, shoulda. Rothbard has an easy out, as discussed above: No, there is no "overt physical invasion" in A's entrapment statement. But there need not be! Assuming any relationship at all between A and B, A is guilty of fraud, thus there was a *crime* being committed by A, and that ought to more than suffice in a finding that A is guilty. It is only if there is no relationship

[5]And Rothbard's (2001, p. 443).

[6]This is a real threat. No quotation marks around the word this time.

whatsoever between A and B, and this scenario takes place on unowned land, that A can be considered innocent. This option is certainly open to Rothbard,[7] Hoppe and Mortellaro to the contrary notwithstanding.

Mortellaro is on far firmer ground in his critique of Hoppe regarding failed attempts. His point to the effect that proportional punishment would be zero punishment, and Mortellaro's debunking of Hoppe's analogy between "failed" homesteading and failed murder attempts, are themselves worth the full price of admission. It is a strange crime indeed that could not justifiably be punished at all. The point is clear: bad intentions are necessary, but they are not sufficient for criminality. In addition, the perpetrator must actually *harm* the "victim." Voodoo or "praying to death" are other arguments against penalizing attempted (but failed) murder, by law. In the first case, in an attempt to kill you, I fashion a doll in your likeness, and stick a pin in its heart (ok, ok, in its chest, where its heart would be, if it had a heart). In the second, I fervently pray for your death. Both of my attempts fail. I don't tell you or anyone else about my praying and voodooing, so there can be no question about any threat. Am I to be punished by law for these attempts at murder? According to Hoppe, yes. This seems counter intuitive, at least for libertarian punishment theory, which places front and center actual physical invasion, or the threat thereof. Here is another case where Reinach and Rothbard diverge, and, again, I (Block, 2004C) support the latter, along with Mortellaro.

However, when he discusses incitement, or instigation, I fear that Mortellaro and I again part company.[8] He states,

> For the first case, incitement-by-monetary-payment, we shall take the paradigm example of the hitman contract to analyze the actions of this type of inciter. This is, for good reason, precisely the situation Block examines.

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[7]Curiously, in his own fn. 24 Mortellaro offers the following quote from Rothbard: "In *The Ethics of Liberty*, he says the following: 'invasion may include [in addition to] actual physical aggression: *intimidation*, or a direct threat of physical violence… and this is equivalent to the invasion itself'" (pp. 77–78). Given this, it is surprising the Mortellaro could support Hoppe's criticism of Rothbard. It is problematic that Hoppe made it in the first place.

[8]I support Mortellaro's critique of the views of Kinsella and Tinsely on incitement. I especially appreciate his point that the "victim" of incitement is estopped from doing anything more to the inciter, as a punishment, than inciting other people against him, the original inciter. Strange, isn't it, that I support Mortellaro's criticisms of everyone in his paper—Hoppe, Kinsella, Tinsely, van Dun—except for those aimed at me? Might I be biased? Perish the thought.

At this point, Mortellaro cites me (Block 2004A, p. 17) to the effect that the person who hires the hitman is indeed guilty of committing a crime; he is not merely an innocent inciter.

Mortellaro continues:

> At first glance, it seems rather odd that Block would take this view, given his position on incitement-by-words. This initial feeling is caused by the extremely deterministic outlook Block has on the hitman, an outlook that is most certainly not applied to rioters. The implicit assumption here seems to be that hitmen not only *must* follow through on any agreement to kill someone, but furthermore that they must accept any and all requests.

My response is that no, the hitman doesn't have to follow through. Reneging is not unknown in this milieu. But there is a relevant difference: the person who hires the hitman is doing more, far more, than merely "inciting-through-words". He is actively engaged in the crime. He is aiding and abetting the hitman. He is as involved in the crime as is the wheel man for a robber gang. The getaway driver, let us stipulate, does not pull any trigger. But, he is still responsible for the murder of the gang's victim. Would anyone be so rash as to claim that the chauffer of the gang is merely guilty of *instigating* the crime? Hopefully, not.

Mortellaro is again guilty[9] of not fully taking into account the distinction between an arm's length relationship (e.g., where there is no obligation at all), that occurs on unowned land (such that the owner of the land in question where the trap is located is not guilty of a conspiracy to commit murder with A), and the more ordinary one, where there are all sorts of legal connections between A and B. "Incitement-through-money," indeed. If money or other valuable consideration passes hands, then A and B are legally connected. Then, it is no longer mere instigation. Now, there is aiding

[9]I greatly regret having to criticize Mortellaro. Not only does he name a "Paradox" after me, he pays me one of the best compliments I have ever received in the scholarly literature: "Arguably the most stringent and radical adherent to Rothbard's legal philosophy is Walter Block, whose writings on a multitude of issues are often used interchangeably with Rothbard's own writings." All I can say to this is, wowie. No, *double* wowie! I am honored and humbled. I have almost always felt myself to be on the same wavelength as Rothbard. Indeed, he has "stolen" numerous of my ideas. True, he published them, typically, 20 years before I ever thought of them, but still.… On the other hand, there are several occasions upon which Rothbard and I have parted company: Block, 1998, 2003, 2007, 2009, forthcoming B, C; Barnett and Block, 2005, 2005-2006, 2006, 2007 (see fn 16); Block, Barnett and Salerno, 2006; Block and Callahan, 2003; Block, Klein and Hansen, 2007.

and abetting. There is conspiracy. There is *crime* afoot, as Sherlock Holmes would say.

At this point in his essay, Mortellaro (2009) brings in the heavy hitters, Kinsella and Tinsley (2004), in an effort to chase me down. However, I have already replied in full to these authors (Block, forthcoming A), so will not respond to this part of Mortellaro's critique of me that relies on these authors, regarding determinism, or gratitude.[10]

Mortellaro continues his critique of my views:

> With regard to the necessity of the inciter, it would seem that the hitman has the ability and means to engage in the crime without the help of the inciter. Indeed, unless the inciter plays some other role—if he helps hide the hitman from the authorities, drives the getaway car, picks the lock on the target's door, or something actually involved in the crime itself, then and only then would he have been necessary for the hitman to carry out the crime.

I find it difficult to fully comprehend this. On the one hand, Mortellaro and I are 180 degrees removed from each other. I claim the person who hires the hitman is a criminal; my debating opponent flat out denies this. Further, he taxes me with logical inconsistency if I cleave to my position, since this would require me to favor a ban on "hate speech," which I certainly do not, as Mortellaro fully and graciously acknowledges.

On the other hand, we are so *close*. As I see matters, in paying for the services of the hitman, the person who does so in effect "helps hide the hitman from the authorities, drives the getaway car, picks the lock on the target's door." Money is fungible. It can be used for *all* of these things. Indeed, it would be the rare hitman who did *not* use the down payment on the hit *precisely* for such purposes. My problem with Mortellaro's rendition of this situation is that he fully acknowledges that *helping* the hitman is indeed a crime, and yet does not recognize that to *pay* the hitman is to *help* him. If giving someone money is not aiding and abetting him, then nothing is. Later on in his paper, when Mortellaro addresses the issue of "incitement-by-extortion," he says: "If A had kicked in C's door, or provided B shelter, a 'safe house' so to speak, or anything of that nature, then we could put A

[10]Block, forthcoming A, was written in 2006, and submitted for publication to the *Journal of Libertarian Studies* in late 2006. It was accepted by that Journal for publication in early 2007; but, due to the several changes in the editorship of the *Journal of Libertarian Studies*, it will not appear there until late 2009. I sent Block, forthcoming A, to Mortellaro only in mid 2009, after I had seen his article, Mortellaro (2009). So, he cannot be held responsible for not incorporating into his essay this response of mine to Kinsella and Tinsley, 2004.

down as necessary and therefore liable." But, does not money consist of "anything of that nature? Of course it does. That being the case, Mortellaro would appear to be contradicting himself, and coming down on *my* side of the argument. To wit, the person who pays off the hit man is doing more, far more, than innocently inciting; rather, he is a veritable criminal. Perhaps Mortellaro and I are not as far apart on this matter as might otherwise appear to be the case.

Let us now turn to Mortellaro's treatment of "incitement-by-extortion." My learned colleague in this context asks:

> When Block says that dictators are not 'innocent of all wrongdoing' does he mean that they are liable for the crimes of their subordinates or that they are liable for the crime of threatening their subordinates?

Mortallero answers, quite correctly in my opinion:

> However, given the context in which Block is making these arguments, it would seem that he means to say that incitement-by-extortion does indeed make the inciter liable for the actions of the incited.

That is indeed my position. Were this not true, we could not say that Hitler, Mao, and Stalin were mass *murderers*, who are responsible for the deaths of millions. We could only say that they were very successful *inciters*, which is a pale carbon copy of the truth. Killing people in the tens of millions is, I presume, beyond the ability of any one man. World class killers need help. Although, I confess, I had never thought of whether the extortionist is guilty, also, of "the crime of threatening their subordinates." Thanks to Mortellaro, I can answer I that I think the extortionist guilty of both crimes.

I must confess, in many intellectual debates over libertarian law, I typically take a counterintuitive stance—for example, regarding abortion, stem cell research, blackmail, two-teeth-for-a-tooth punishment theory, complete road privatization. But, in the present case, I am making what I see as the very intuitive case that Hitler, Stalin, et al., even if they never once pulled any triggers, are still mass murderers. In contrast, Mortellaro is of the opinion that this is not the case; as long as these bloody dictators[11] did not actually shoot anyone, personally.

[11]In the view of my intellectual opponents, it would be improper to call either of these people "bloody," on the assumption that they never got their own hands dirty with any actual killing. I'll stand pat with "bloody," though.

Mortellaro now employs the test he proposed in section II of his paper: "First, is B *aware* of what he is doing, that is, does he realize that his actions are violating the rights of C? … (Second), is A *necessary* for the commission of the crime?"

I cannot help but think that this way of looking at the matter is irrelevant to our main concern. To wit, is there, *can* there be, such a thing as "incitement-by-extortion?" Remember what Rothbard (1998, 81, emphasis added) said:

> Should it be illegal … to "incite to riot"? Suppose that Green exhorts a crowd: 'Go! Burn! Loot! Kill!' and the mob proceeds to do just that, with Green *having nothing further to do with* these criminal activities.

In the above quote, I have emphasized these words: "*having nothing further to do with.*" I think Rothbard meant them seriously, or he would not have included them. Yet, Mortellaro gives them no weight, whatsoever. How can "incitement-by-extortion"[12] possibly pass muster with these emphasized words? Mortellaro is here attacking a straw man, not of Rothbard's (nor my) devising. The only kind of incitement that Rothbard and I consider legal is that kind where the inciter has *"nothing further to do with*" the incitees, or rioters, or hitmen, or whomever. But in the cases of both "incitement-by-monetary-payment" and "incitement-by-extortion" this is patently false. In both these cases, there is no arms-length relationship between the inciter and the incited. Very much to the contrary, there is *an intimate* relationship between the two, in both cases.

According to Mortellaro, "So it is with those who have their property damaged by B, they may only bring suit against him, not against A, who has nothing to do with them. B, on the other hand, *does* have legal recourse against A, for threatening him."

If I understand this correctly, Hitler/Stalin is A, and B are the German and Soviet soldiers, concentration camp guards, who did the bidding of A. C, if we were to add another letter to the mix, stands for the victims of these depredations. In the view of Mortellaro, C may only seek redress from B, not from A (although B may seek compensation from A). I find it *very* counterintuitive to conclude that C, the victims of Communism and Nazism, would be precluded by libertarian law from seeking a pound of flesh, or more, much more, from Hitler and Stalin, the very people at the head of these monstrous institutions—that they would have to limit their lawsuits to

[12]And, also, "incitement-by-monetary-payment."

the subordinates of Hitler and Stalin, the soldiers who actually inflicted physical invasions upon them.

Conclusion

It has been a pleasure to intellectually wrestle with Mortellaro. I think he lands telling blows against some of his opponents, such as Hoppe, Kinsella, Tinsely, van Dun. That is no mean feat, given that they are among the leading theoreticians of the libertarian movement.

In his extraordinarily scholarly and incisive essay, Mortellaro demonstrates intimate knowledge of a broad range of libertarian literatures. He manages to bring under scrutiny libertarian punishment theory, incitement, intellectual property, blackmail, causation, responsibility, entrapment, and threats, and that is just the tip of the iceberg. As I have not before heard of this author, I am delighted to welcome him to the libertarian intellectual movement.

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