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TOWARD A LIBERTARIAN THEORY OF BLACKMAIL

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In order to apply the legal code of the libertarian political philosophy to the issue of blackmail, it is necessary to begin with a definition of terms. Murray Rothbard notes that this

> legal code, simply, would insist on the libertarian principle of no aggression against person or property, [and] define property rights in accordance with libertarian principle.[1]

Under this system, people would be free to do whatever they wished, without limits, except that they would have to respect everyone else's right to do the same. They could do this if and only if they refrained from initiating or threatening violence against another person or his property.

Blackmail is the request for money or other valuable consideration, coupled with an offer, typically, to refrain from exposing a secret which is embarrassing to the blackmailee. Since it is legal to request money, and it is also lawful to make offers, one would think that a complex act composed of both of these elements would also

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[1]Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1978), p. 235. This libertarian legal code would be based on homesteading virgin land, and, thereafter, on voluntary commercial acts such as trade and gifts. See, on this, Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer Academic Publishers, 1993).

pass muster under our system of jurisprudence. Such is not the case, however; blackmail is considered a crime.

More broadly, blackmail is the request or demand for money or other valuable consideration, coupled with *any* offer or threat, the carrying out of which involves no criminal behavior. For example, instead of offering to refrain from exposing a secret which is embarrassing to the blackmailee, one could offer to refrain from attempting to seduce the blackmailee's fiance.[2] Alternatively, one could threaten to seduce the fiance unless he were paid not to do so. Since neither seduction nor requesting or demanding money is a criminal act, we arrive again at the same paradox: if two acts are legal when engaged in separately, how can they become illegal when combined?

Whether in the broad or narrow interpretation, blackmail must be sharply distinguished from extortion, which it superficially resembles. In the latter case, there is the same request or demand for funds or other valuables. But now, instead of an accompanying threat to do, or offer to refrain from doing, something *legal*, the threat is to engage in criminal behavior. For example, the extortionist threatens to blow up your house or kill your children unless he is paid to refrain from doing so.

Perhaps the following depiction, which breaks blackmail and extortion into their basic components, will clarify the difference between them:

	Blackmail	Extortion
Demand	Money (legal)	Money (legal)[3]
Threat	To tell secret (legal)	To kill children (illegal)

[2]Leo Katz mentioned this example in "Blackmail and Other Forms of Arm-Twisting," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1568.

[3]It would appear at first glance that a demand for money would contravene our criminal codes. But a moment's reflection will convince us that this would be irrational. For example, as a newspaper vendor, I could demand 50 cents in return for my product. As a worker, you could demand $10 per hour for your services.

Now let us reformulate the depiction slightly, putting it into more common terms of exchange:

	Blackmail	Extortion
Request	Money (legal)	Money (legal)
Offer	To remain quiet (legal)	To refrain from killing children (illegal) [4]

Several commentators have considered this state of affairs, in which two legal "whites" combine to constitute a legal "black," a paradox.[5] Fletcher argues, to the contrary, "that blackmail is not an anomalous crime but rather a paradigm for understanding both criminal wrongdoing and punishment."[6]

Why? Fletcher asks: "Why should an innocent end (silence) coupled with a generally respectable means (monetary payment) constitute a crime?" He argues that "This supposed paradox . . . is not peculiar to blackmail." Why not? Because "many good acts are corrupted by doing them for a price."[7] This, on its face, is in sharp contrast with libertarianism, since paying for something is not *per se* invasive. Therefore, from this perspective, if it is legal to do *X*, it is also legal to pay for *X*; there could conceivably be moral "corruption" involved in paying for something, but there can be no legal defilement.[8]

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[4]It would appear that to refrain from killing another person's children is perfectly licit. Most of us "do" this every day of our lives, and are none the worse for it. But note that we are defining extortion as a contrary-to-fact conditional: the offer or threat amounts to extortion if, *were* it to be carried out, it would *then* constitute a criminal offense.

[5]See, e.g., James Lindgren, "Unraveling the Paradox of Blackmail," *Columbia Law Review* 84 (1984); also, Leo Katz and James Lindgren, "Instead of a Preface," *University of Pennsylvania Law Review* 141, no. 5 (May 1993).

[6]George P. Fletcher, "Blackmail: The Paradigmatic Case," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1617.

[7]Fletcher, "Blackmail," p. 1617.

[8]Some acts *cannot* be carried out for a price. For example, one cannot purchase true friendship. But this is a logical "cannot," rather than a legal one. That is, if one were to purchase a relationship, the English language

How does Fletcher defend this contention? He offers three examples. The first of which finds that:

> There is nothing wrong with government officials showing kindness or doing favors for their constituents, but doing them for a negotiated price becomes bribery.[9]

For purist libertarians, there shouldn't be any politicians in the first place: government itself, in the absence of a contract (constitution) signed unanimously, is invalid. Politicians themselves are the anomaly. Therefore, the question of their being bribed does not arise.[10]

In the more moderate version of this philosophy, there is, indeed, room for the state. Here, government has certain legitimate roles, typically limited to courts, armies, and police. Politicians and bureaucrats may indeed "do favors for their constituents," but these are severely truncated. They would be restricted to defending persons and property against invasion.[11] Certainly, no "favors" of the

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functions so as to logically preclude the possibility that it is a true friendship. Alternatively, a true friendship, by its very nature, could not have been purchased by either friend. But this is very different from the view expressed in the text.

[9]Fletcher, "Blackmail," p. 1617.

[10]On this, see Rothbard, *For a New Liberty*; Hoppe, *Economics and Ethics of Private Property*; Lysander Spooner, *No Treason* (1870; reprint, Larkspur, Colo.: Pine Tree Press, 1966); Bruce L. Benson, "Enforcement of Private Property Rights in Primitive Societies: Law Without Government," *The Journal of Libertarian Studies* 9, no. 1 (Winter 1989); Bruce L. Benson, "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (1989); Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990); David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2nd ed. (La Salle, Ill.: Open Court, 1989); Edward Stringham, "Market-Chosen Law," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–1999); Patrick Tinsely, "Private Police: A Note," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–1999).

[11]On this moderate version, see, e.g., Ayn Rand, *The Virtue of Selfishness* (New York: New American Library, 1962); Tibor Machan, "Law, Justice and Natural Rights," *Western Ontario Law Review* 14 (1975); Tibor Machan, *Individuals and Their Rights* (La Salle, Ill.: Open Court, 1989); John Hospers, *Libertarianism* (Los Angeles: Nash, 1971); David Boaz, *Libertarianism: A Primer* (New York: Free Press, 1997); and Charles Murray, *What It Means To Be A Libertarian* (New York: Broadway Books, 1997). In the more

usual pork barrel or subsidy variety would be tolerated. Politicians would have far less to do than at present.

However, suppose the friendly neighborhood cop protected a citizen from a mugger, and then turned around and charged the citizen for this service. This would certainly be untoward, but would not at all indicate that otherwise good acts can be corrupted by money payments. The unlawful behavior here would be contract violation, not bribery. In any reasonable police arrangement, a "no tipping" policy would be strictly enforced, lest it set in train motivations which would undermine the whole operation.

Similar adaptations prevail in the non-political arena.[12] For instance, a disc jockey is hired to play records which in his expert opinion are the "best." If financial considerations from record companies play any part in his choices, the entire radio station will come under suspicion. Therefore, the firm is likely to contractually bar bribes for its disk jockeys. But suppose it did not. Presume, that is, that the radio station publicly announced,[13] perhaps because its salaries were being seriously reduced, that its disk jockeys would henceforth be free to accept bribes, and to choose records on this basis. The station would have to take its chances with its customers—listeners and advertisers—but, since nothing in this scenario is equivalent to the initiation of violence against person or property, no libertarian law would have been violated.

Of course, a private police firm might engage in this commercially risky practice as well. If so, this would be but further evidence of the fact that financial payments do not render invalid otherwise licit acts.

Now assume that a government were so constituted as to allow and encourage side payments to its civil servants. As long as this were open and above board, this practice, while certainly peculiar, would not be legally improper. This indicates that it is not the side payments themselves which render this practice improper, but rather its behind-closed-doors (e.g., fraudulent) nature.

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radical version of libertarianism, these and all other functions would be privatized; a competing defense industry composed of police, army, and court firms would play this role.

[12]Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982), p. 130.

[13]The radio station in this example might make such a public announcement so that there could be no question of fraud.

Fletcher's second case in point is that "Sex is often desirable and permissible by itself, but if done in exchange for money, the act becomes prostitution."[14]

The response here is simple. Prostitution should be legalized forthwith. It is a "victimless crime," and if there is no victim, then there is no crime at all.[15] In some political jurisdictions—rural Nevada, the Netherlands, etc.—it *is* legal already.[16]

Fletcher's third example is that

> Confessing to a crime may be praiseworthy in some circumstances, but if the police pay the suspect to confess, the confession will undoubtedly be labeled involuntary and inadmissible.[17]

This is a rather strange scenario. Ordinarily, our concern is with police torturing suspects into confessing, not paying them to do so. Were this all there were to it, however, it would be unobjectionable. I, the alleged (but innocent) perpetrator, am likely to respond, "I didn't really steal that TV. But if the cops pay me $1,000,000, hell, I'll confess to it." Mutual gains from trade, and all that.

But this isn't really all there is to it. The problem under these assumptions is that the real thief will get away; the police will no longer look for him, as they have me in custody, the "confessed"

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[14]Fletcher, "Blackmail," p. 1617.

[15]It is not a victimless crime in the sense that no one can rationally object to or be hurt by it. But the same can be said of practically anything. Suppose I open up a grocery store. No more innocent an occupation can be imagined. Are there any "victims"? Certainly: at the very least, the employers and employees of already extant and, thus, competing groceries. Just as in the cases of prostitution or drugs, some of these people may become despondent, and even kill themselves or others. Nonetheless, opening a grocery store, for all that, is still a victimless activity, for what we mean by a crime with victims is one in which initiatory violence is used against innocent people. Neither grocers nor prostitutes fit this particular bill.

[16]This does not mean that prostitution would be allowed everywhere. As long as restrictive covenants and other forms of market zoning are allowed, such activities will be confined to areas where they cause few negative externalities. See Bernard Siegan, "Non-Zoning in Houston," *Journal of Law and Economics* 13, no. 1 (April 1970); Bernard Siegan, *Land Use Without Zoning* (Lexington, Mass.: D.C. Heath, 1972).

[17]Fletcher, "Blackmail," p. 1617.

robber. Thus, this devolves into our answer to the favor-giving politician: it is another example of contract violation. The reason we hire police is to catch criminals; if they "buy" convictions, they are violating their contract with us.

Fletcher's three examples having failed in their task, we conclude that the ordinary common sense insight remains standing, despite Fletcher's best anti-market efforts to undermine it: if an act is legal, doing it for a payment cannot render it criminal.

TEN CASES

Fletcher's method in the remainder of his article is to use ten legal cases as a vantage point from which to consider various theories of blackmail.[18] Let us follow in his footsteps with his ten cases:

1. Crime case: *D*[19] threatens, if not paid, to report *V*'s suspected crime to the local prosecutor.

2. Tort case: *V* rams his car into *D*'s. *D* threatens to sue if *V* does not compensate *D* for the resulting damage.

3. Hush money: *D* threatens to reveal a damaging truth, say a sexual peccadillo, about celebrity *V* unless the latter pays "hush money." The threat is supported by incriminating pictures.

4. Late employee: *D*, *V*'s employer, threatens to fire *V* if he does not get to work on time.

5. Lascivious employer: *D*, *V*'s employer, threatens to fire *V* unless he sleeps with her.

6. Baseball case: *D* offers to sell *V* a baseball autographed by Babe Ruth with knowledge that *V*'s child, who is dying, would receive solace from having the ball. *D* demands $6000 for the ball.

7. Dinner kiss: *D* says to *V*, "If you do not go to dinner with me, I will not kiss you." Alternatively, *D* says to *V*, "If you do go to dinner with me, I will kiss you."

8. Tattoo case: *D* tells his friends that unless they pay him money, he will have his entire body tattooed.

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[18] Fletcher's positions are taken from "Blackmail," pp. 1618–20.

[19] *D*, presumably, stands for defendant, or possible blackmailer, while *V* stands for victim. I have no problem with using *D* for defendant, but as I do not consider blackmail a crime, I cannot consider the person being blackmailed as a victim. Instead of that terminology, I use the more neutral "blackmailee."

9. Political embarrassment: *V* is a black political candidate. *D* is a black activist with anti-white views, whose connections to *V* are an embarrassment to *V*. *D* goes to *V* and tells him that unless he is paid off, he will speak out and repeatedly declare his support for *V*, thereby sabotaging *V*'s electoral chances.

10. Paid silence: Same story as in 9, but *V* goes to *D* and offers him $20,000 to "lay low" until after the election.

Let us compare Fletcher's evaluation of these cases with my own. We must step carefully here, though. Fletcher divides them into two categories: the crime of "blackmail" and "no crime." I divide them into two other categories: the non-crime of "blackmail" and the crime of "extortion." If we were each to stick to our own categorizations, the scorecard would look like this:

	Fletcher	*Block*	*Agree?*
1. Crime	blackmail	blackmail	no
2. Tort	no crime	blackmail	yes
3. Hush money	blackmail	blackmail	no
4. Late employee	no crime	blackmail	yes
5. Lascivious employer	blackmail	blackmail	no
6. Baseball	no crime	blackmail	yes
7. Dinner kiss	no crime	blackmail	yes
8. Tattoo	no crime	blackmail	yes
9. Political embarr.	blackmail	blackmail	no
10. Paid silence	no crime	blackmail	yes

My reasoning, it will be remembered, is that if what *D* threatens or offers is (or rather, should be, under the libertarian code) *per se* legal, then we have the non-crime of blackmail. On the other hand, if what *D* threatens or offers is (or rather should be under the libertarian code) *per se* illegal, then we have the crime of extortion. For me, whether or not money changes hands is irrelevant. Let us now consider each of these cases in detail.

Case 1

Is it, or should it be, legal for *D* to report *V*'s suspected crime to the local prosecutor? In order to avoid a straw man, we assume the worst case scenario for the libertarian point of view. That is, we

posit that *V* did not engage in the forbidden action, and *D* knows this. Under these circumstances, it should *still* not be illegal for *D* to exercise his free speech rights, because they do not constitute an invasion.[20] And, having threatened to say something he has every right to say, unless he is paid, this act must be considered licit blackmail, not illicit extortion.

How should we categorize the act of falsely accusing someone of a theft? The appropriate terminology would be "libel." This, in turn, is usually considered a crime, but not by libertarians. Rothbard explains:

> Smith has a property right to the ideas or opinions in his own head; he also has a property right to print anything he wants and disseminate it. He has a property right to *say* that Jones is a "thief" even if he knows it to be false, and to print and sell that statement.[21]

The usual argument against this line of reasoning is that if *D* falsely claims that *V* is a thief, he has ruined *D*'s reputation; the real robber, then, is *D*, for making such a statement. The problem here is that *V*'s reputation consists of the thoughts of many people about him, not his own about himself, and thus cannot be owned by anyone else, least of all the person to whom it refers, *V*. Therefore, *D*, in "taking away" *V*'s reputation, has not seized from *V* anything that *V* can legitimately own.[22]

But isn't it worse to make libelous statements to the police and courts? After all, they can lock you up, or, worse, impose the death penalty on the basis of such "free speech." On the contrary, in the

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[20]Does this mean that anything goes? That anyone may *say* anything he wishes at any time? No. Certain types of speech constitute invasions. For example, if I hold a gun on you and yell "Your money or your life!" this is a paradigm case of initiatory aggression, even apart from actually pulling the trigger. (If I am sufficiently larger and/or stronger than you, I will not even need a gun.) Similarly, if your son is at sea where he cannot be reached, and I tell you that I am holding him captive and ask for funds to secure his release, this, too, is an example of "mere" speech constituting a criminal border crossing.

[21]Rothbard, *The Ethics of Liberty*, p. 126.

[22]For a further elaboration of this point, including a demonstration that, in a seeming paradox, reputations would be *safer* in a libertarian world than they are now, see Walter Block, *Defending the Undefendable* (New York: Fox and Wilkes, 1976), pp. 59–62; and Rothbard, *The Ethics of Liberty*, pp. 126–27.

libertarian world, each person is responsible for his own acts. If the police or courts foolishly trust the statement about *V* by *D*, it is *their* responsibility. They will have engaged in an unwarranted border crossing, and, when the truth gets out, *they* will have to pay the appropriate penalty.[23] This is *a forteriori* no worse than an incitement which leads to death or injury. Rothbard illuminates:

> 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. Since every man is free to adopt or not adopt any course of action he wishes, we cannot say that in some way Green *determined* the members of the mob to their criminal activities; we cannot make him, because of his exhortation, at all responsible for *their* crimes. "Inciting to riot," therefore, is a pure exercise of a man's right to speak without being thereby implicated in crime.[24]

The point is that if a man has a right to incite, he certainly has a right[25] to bear false witness to the police or courts—subject, of course, to not violating a contract with them. Even on a mere utilitarian basis, he is likely to do far less harm, for experts, as opposed to members of an unruly mob, will be taking his testimony.

Case 2

Should it be legal for *D* to threaten *V* with a lawsuit unless he pays for the damages to *D*'s car? Yes, it should always be legal for anyone to launch a lawsuit against anyone else. Therefore, to threaten to do so would constitute legitimate blackmail, not extortion. There is, of course, such a thing as malicious prosecution, where the plaintiff can be successfully sued for launching annoying lawsuits. But to bring suit is not *per se* a rights violation; therefore, threatening to do so should be legal. In England, the plaintiff who loses a lawsuit must pay the costs, as determined by the court, of the defendant. In the U.S., this is not usually the case. Under libertarianism, the courts would be able to decide such matters.

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[23]This is an unusual claim. Typically, officials of the justice system are protected from the error of their ways. This would not be so under libertarianism.

[24]Rothbard, *The Ethics of Liberty*, p. 80.

[25]Throughout this article, we are concerned only with legal rights, not moral rights.

Case 3

Should it be legal to threaten to reveal an embarrassing secret unless one is paid not to do so? (Alternatively, should it be legal to remain silent about this secret for remuneration?) The answer from the libertarian perspective is a definite Yes, since publicizing this secret, e.g., gossiping about it, is itself legal. How can *threatening* to do something be criminal if actually *doing* it is not?

Case 4

Should it be legal for *D*, *V*'s employer, to fire *V* if he does not get to work on time? Of course. It is always legitimate to fire an employee *for any reason at all, at any time*, assuming that there is no long-run contract in force precluding this option. Since it is lawful to *do* this, it must be licit to *threaten* to do so.[26]

Case 5

Should it be legal to fire an employee who refuses to sleep with the boss? The same analysis applies to this as to the previous case. If the employer has a right to fire a worker for any reason, then this applies whether men of good will would likely support the reason (as in the "late employee" case) or not (as in the present one). Any attempt to show a relevant difference is doomed to failure. Fletcher attempts this by citing Feinberg to the effect that the lascivious employer is guilty of "exploitation." But one man's exploitation is another man's voluntarily-agreed-upon contract. Why is it necessarily more "exploitative" (whatever that weasel word means) to agree

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[26]Charles Baird, "American Union Law: Sources of Conflict," *Journal of Labor Research* (Summer 1990); Walter Block, "Labor Relations, Unions and Collective Bargaining: A Political Economic Analysis," *Journal of Social, Political, and Economic Studies* 16, no. 4 (Winter 1991); Bill Kauffman, "The Child Labor Amendment Debate of the 1920's; or, Catholics and Mugwumps and Farmers," *Journal of Libertarian Studies* 10, no. 2 (Fall 1992); Morgan O. Reynolds, "An Economic Analysis of the Norris–LaGuardia Act, the Wagner Act, and the Labor Representation Industry," *Journal of Libertarian Studies* 6, nos. 3–4 (Summer/Fall 1982); Morgan O. Reynolds, *Power and Privilege: Labor Unions in America* (New York: Manhattan Institute for Policy Research, 1984); Morgan O. Reynolds, *Making America Poorer: The Cost of Labor Law* (Washington, D.C.: Cato Institute, 1987); Barry W. Poulson, "Substantive Due Process and Labor Law," *Journal of Libertarian Studies* 6, nos. 3–4 (Summer/Fall 1982); Sylvester Petro, *The Labor Policy of the Free Society* (New York: Ronald Press, 1957).

to sleep with the boss than to arrive at work on time? Surely, for some people, it will be *less* onerous to do the former than the latter, although such slothful types will likely be in the minority.[27]

There is simply no reason for the law to accept certain voluntary contracts between consenting adults (ones stipulating that the worker has to appear at the office on time), while rejecting others (those stipulating a dual job, such as cook and bottle washer, or, more controversially, prostitute and secretary).[28] If prostitution itself should be legal, then so should a job which combines it with any other profession, such as, say, nursing or teaching.[29]

Case 6

Should it be legal for *D* to sell *V* a baseball card for $6000 so that a dying boy can have solace? Fletcher categorizes this as non-criminal, as do I. In my view, since there is no physical invasion of person or property involved in the "threat" to withhold the card unless the seller is paid, it is a licit act. But what of our author? Why doesn't Fletcher adopt a point of view consistent with his analysis of the lascivious employer? It is morally obnoxious in the minds of most people to combine the jobs of secretary and prostitute, which is, presumably, the reason Fletcher called this a crime. But this applies also (equally? more so?) to "taking advantage" of a child on his deathbed.

Case 7

Should it be legal for *D* to offer a kiss to *V* as a reward (penalty?) for going to dinner with him? The "threat" here is that if *V* refuses the culinary invitation, the kiss will be withheld. This is just one of a vast number of "capitalist acts between consenting adults"

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[27]Joel Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1988).

[28]Walter Block and Robert W. McGee, "Blackmail as a Victimless Crime," *Bracton Law Journal* 31 (1999).

[29]I personally regard such behavior as morally reprehensible, but that is an entirely different matter. See Walter Block, "Libertarianism vs. Libertinism," *Journal of Libertarian Studies* 11, no. 1 (1994). See also Walter Block and Roy Whitehead, "Sexual Harassment in the Workplace: A Property Rights Perspective," *University of Utah Journal of Law and Family Studies* (forthcoming), which makes a legal case in favor of such contracts.

that people conduct every day.[30] Since it does not imply the initiation of aggression, the libertarian will have no trouble passing on this as legal. But Fletcher, who also regards this as "no crime," has some explaining to do.

Why is this any different from the case of the lascivious employer? If we alter the players a bit and change the act from a kiss to sexual intercourse, it would appear that we have the same example. Surely, these changes of degree are irrelevant to the principle of the matter. The majesty of the law should, presumably, take no notice of the difference, except perhaps for degree of punishment if the act is imposed by the man on the woman. If so, how does Fletcher take one side here and the other there?

Case 8

Fletcher and I both agree that people should be allowed to threaten their friends that they will tattoo themselves if not paid.

Cases 9 and 10

These are really the same example. In 9, the radical black activist seeks money from the black politician to stay out of the latter's campaign; in 10, the politician offers money to the radical black activist to stay away. For the libertarian, both are instances of blackmail, and should be deemed legal. A contract is a contract; in terms of legality, it matters not one whit who initiates it.

For Fletcher, matters are otherwise. He designates the blackmailer-initiated example as "blackmail," while he calls the blackmailee-initiated example as "no crime." Again, it is difficult to see how he can reconcile this conclusion with his own legal philosophy.

Let us now look at all ten cases as a whole. I regard each and every one as an instance of blackmail, since none of the ten threats, if carried out, would be (better yet, *should* be) illegal. None are extortionate, since no threat of killing, maiming, etc., if valuable considerations were not forthcoming, ever appeared. Fletcher disagrees on cases 1, 3, 5, and 9, but he agrees that it is irrelevant whether the demand is in terms of money, sexual favors, or other valuable considerations. Furthermore, we agree that there is no "principled distinction" between the threat to disclose unwelcome information

[30]Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 163.

(3. hush money) and firing a worker (5. lascivious employer). We disagree, however, on the issue of the threshold. The difference between a kiss and sexual intercourse is of no moment, I maintain. If these favors are attained through legitimate non-invasive means (no use or threat of force or fraud), *either* is permissible; if not, not. Libertarianism is black and white on this issue: either the threat is invasive or not. If so, it constitutes extortion; if not, blackmail.[31]

THREATS AND OFFERS

In this and the next few sections of his article, our author examines these ten cases through various types of eyeglasses. Fletcher is on strong ground when he refuses to buy into the notion that all threats should be outlawed, and all offers legitimized. He correctly points out that "not all threats . . . are criminal; for example, the threat to sue in the tort case (no. 2), is considered permissible. So too the threat in the tattoo case (no. 8)."[32] Further, one can never forget the Marlon Brando character from "The Godfather," making his victims "an *offer* they cannot refuse." With "offers" like these, who needs threats?

Thus, it is hard to accept his view that "An all too facile resolution of these cases is that they contain threats that *D* has the right to make."[33] An "offer" or threat to cut your throat unless you abide by my commands is illicit, since I have no right to cut your throat. An offer or threat to sue you unless you abide by my commands should be legal, since I *do* have a right to launch a lawsuit against you.

Moreover, Fletcher is on weak ground when he accepts the notion that "Coercion is immoral because it deprives the victim of an option she would have had, and this deprivation interferes with her autonomy, i.e., her freedom of action."[34] Coercion of this sort may

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[31]Libertarians, along with everyone else, are aware that there is a continuum between aggression and non-aggression. If I swing my fist to within one inch of your nose with "bad intentions," even though I have not hit you (yet), this is dearly an initiation of violence. On the other hand, if I shake my fist at you from one mile away, it is not. At what precise point does a (legally) meaningless gesture become a "clear and present danger"? This is a grey area for all philosophical viewpoints.

[32]Fletcher, "Blackmail," p. 1621.

[33]Fletcher, "Blackmail," p. 1621.

[34]Fletcher, "Blackmail," p. 1621.

well be immoral,[35] but it certainly should not be illegal. If it were, Fletcher's theory would be wildly over-inclusive, as it would drag into its clutches most, if not all, competitive activity. For example, the successfully competing grocer will cost you profits, and eventually, perhaps, drive you into bankruptcy. If so, this would deprive you of an "option" you would otherwise have had, apart from his action, which will undoubtedly interfere with your "autonomy, i.e., (your) freedom of action." That is to say, you will have far fewer resources because of this grocer's "coercion."

Nor is his reliance on "the baseline of normalcy" at all convincing. For here, "we may regard proposed changes for the worse as threats."[36] But we have already seen that a new grocery store would comprise a change for the worse for you. Therefore, according to Fletcher, this would be a threat and, thus, presumably, outlawed. This is preposterous.

This leads Fletcher to another philosophical blunder. He says:

> Suppose that *D* sells sports memorabilia and the normal asking price for the ball autographed by Babe Ruth is $600. If *V* has an expectation and a right to buy at $600, then *D*'s setting the price ten times higher constitutes a threat to withhold the ball unless *V* pays the exploitative price. It is as though *D* threatened to take the ball away from *V* if *V* did not pay an additional $5400.[37]

As I am writing this, I am in the process of arranging a trip from Little Rock, Arkansas, to Rome, Italy, to give a speech there. I had expected the price to be about $650. I have just learned, much to my consternation, that the actual cost will be in the neighborhood of $1300, roughly double what I regard as normal. [38] In effect, I am *V*, and the airline is *D*. Did I have a "right" to buy at $650 merely because I had an "expectation" that this would be the price? According to Fletcher, I seemingly did. Therefore, the airline's "setting the price [twice as high] constitutes a threat to withhold the [ticket] unless I pay the exploitative price. It is as though [the airline] threatened to take the [ticket] away from [me] if I [or rather my host] did

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[35]Who knows, since this author has given us no criterion on the basis of which to judge?

[36]Fletcher, "Blackmail," p. 1622.

[37]Fletcher, "Blackmail," p. 1622 n.11.

[38]True, *I* don't have to pay it, but I *do* have to go through the embarrassment of telling my host in Italy, who had asked me to arrange travel from this end, that he will have to pay an additional $650.

not pay an additional $650." One shudders at such a conclusion. For this is by no means limited to philosophical speculation. Fletcher is seriously putting forth a theory of *criminal* behavior. If he were to have his way, the airline executives would be accused of blackmail, and have to pay a fine or serve a term in the pokey.[39]

This reasoning also leads Fletcher to misconceived support of Nozick's fallacious "productive activity."[40] After Rothbard's utter evisceration of this concept, it is difficult to understand why anyone would still utilize it. Rothbard points out that Nozick

> 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 Brown 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

[39]I also have certain expectations about my wife, children, friends, employers, etc., which, not to put too fine a point on it, are not always fully satisfied. (In contrast, I am perfect, and always satisfy any expectations that anyone ever has of me. Thus, according to Fletcher, I, alone, would not be subject to the penalties accorded to blackmailers.) As for these other people, if they don't watch out, I'll sic Fletcher on them, and they will face jail time. But then again, maybe I had better not make this threat, for Fletcher might accuse *me* of criminal blackmail. Come to think of it, I hereby retract it.

[40]Fletcher, "Blackmail," p. 1622 n.12; Nozick, *Anarchy, State, and Utopia*.

> 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? 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.[41]

Another difficulty with predicating the analysis on "the normal situation" is that doing so elevates the status quo into a legal litmus test. If, for example, in the hush money case (no. 3), it is normal for the information to be suppressed, then, according to Fletcher, this would be a case of criminal blackmail. However, he also concedes that "if the normal situation is that the information leaks out," then the opposite result obtains.[42] Come again?

But wait! Perhaps I am being unfair to Fletcher. After all, at the end of this section, he turns around and criticizes this very notion of normalcy, dismissing it as "insuperably ambiguous," and summarizes: "the distinction between threats and offers is not likely to get us very far."[43] This constitutes strong evidence that I am indeed misreading Fletcher. But I persevere in my error, if error it be: if Fletcher is not using something like the normal situation, or Nozick's horrendously misbegotten notion of "productive activity,"[44] then how is he able to determine that the "hush money" case (no. 3) is one of criminal blackmail? If gossip is the norm—and it is in certain circles—then this criterion would point in the diametrically opposed direction.

THIRD PARTY CHIPS

In this section,[45] Fletcher comments upon the work of Lindgren.[46] But he starts off on the wrong foot, stating that Lindgren's

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[41]Rothbard, *Ethics of Liberty*, pp. 241–42.

[42]Fletcher, "Blackmail," p. 1623.

[43]Fletcher, "Blackmail," p. 1623.

[44]Russell Hardin, in "Blackmailing for Mutual Good," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1806, states: "Richard Posner says blackmail . . . has no social product and should therefore be criminalized. This is a very odd conclusion. Much of what I do has no social product (for instance, I consume, I waste time), but surely it should not be criminalized."

[45]Fletcher, "Blackmail," pp. 1623–26.

[46]Lindgren, "Unraveling the Paradox of Blackmail."

"comprehensive study reviews the literature, [and] pans *all* competing theories."[47] Lindgren is not at all as comprehensive as Fletcher seems to think; it ignores a whole host of libertarian articles critical of the blackmail-as-paradox perspective, maintaining, instead, that there is no paradox, and that blackmail should be considered a legal (albeit not necessarily a moral) market activity.[48]

Fletcher, for the most part, is sympathetic to Lindgren, noting that the latter's theory applies most directly to what Katz calls "informational blackmail,"[49] e.g., cases 1 and 3, crime and hush money. Fletcher goes so far in helping Lindgren as to try to shoehorn the latter's theory so as to apply it to the lascivious employer (no. 5) and political embarrassment (no. 9) cases.

But then he lowers the boom. In his first critique, Fletcher argues that in both the political embarrassment and paid silence cases

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[47]Emphasis, and all material within brackets, is mine.

[48]See, for example, Walter Block, "The Blackmailer as Hero," *The Libertarian Forum* (December 1972); Block, *Defending the Undefendable*; Walter Block, "Trading Money for Silence," *University of Hawaii Law Review* 8, no. 1 (Spring 1986); Walter Block, "The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell," *Western State University Law Review* 24, no. 2 (Spring 1997); Walter Block, "A Libertarian Theory of Blackmail," *Irish Jurist* 33 (1998); Walter Block, "The Crime of Blackmail: A Libertarian Critique," *Criminal Justice Ethics* 18, no. 2 (Summer/Fall 1999); Walter Block, "The Legalization of Blackmail: A Reply to Professor Gordon," *Seton Hall Law Review* 30, no. 4 (2000), pp. 1182–223; Walter Block, "Blackmailing for Mutual Good: A Reply to Russell Hardin," *Vermont Law Review* 24 (Fall 1999); Walter Block and Robert W. McGee, "Blackmail from A to Z," *Mercer Law Review* 50, no. 2 (Winter 1999); Walter Block, "Blackmail and 'Economic' Analysis," *Thomas Jefferson Law Review* 21, no. 2 (October 1999); Walter Block and Gary Anderson, "Posner on Blackmail: A Critique," *New York Law School Law Journal* (forthcoming); Walter Block, N. Stephan Kinsella, and Hans-Hermann Hoppe, "The Second Paradox of Blackmail," *Business Ethics Quarterly* 10, no. 3 (July 2000); Walter Block, "Threats, Blackmail, Extortion, Robbery, and Other Bad Things," *University of Tulsa Law Journal* 35, no. 2 (Winter 2000); Walter Block, "Blackmail *is* Private Justice," *University of British Columbia Law Review* (forthcoming); Eric Mack, "In Defense of Blackmail," *Philosophical Studies* 41 (1982); Murray N. Rothbard, *Man, Economy, and State* (Auburn, Ala.: Ludwig von Mises Institute, 1993); Block and McGee, "Blackmail As a Victimless Crime"; and Rothbard, *Ethics of Liberty*.

[49]Katz, "Blackmail and Other Forms of Arm-Twisting," p. 1567.

(no. 9, no. 10), "*D* plays with a chip that seems to belong to someone else." Yet, *V* "is not the victim of blackmail if he initiates the transaction." My "intuition" is different from Fletcher's and that of the "most people" he alludes to in this regard. Take the hush money case (no. 3). If *V* were to approach *D*, and plead with him to keep secret *V*'s marital infidelity for a fee, my reading of the man on the street is that he would say that this, too, is blackmail. Certainly, Rothbard's Green–Brown scenario comes out much the same no matter who takes the first step. Why should it matter who opens the negotiations when *V*, by stipulation, has a "gun" held over him in any case?

Moreover, there cannot be property rights in information.[50] If information is the chip, then anyone who knows the key fact legitimately owns it. If I see the potential blackmailee leaving a married woman's home at 3 a.m., to say that I do not own this information is to say that I do not own the evidence of my own eyes.

His second critique is a telling one against Lindgren. Here, Fletcher argues that in the baseball case (no. 6),

> She [the seller] drives a hard exploitative bargain, but one that is neither criminal blackmail nor any other form of crime. The windfall profits derive from her taking advantage of something that does not belong to her, namely, the child's and parent's consumer surplus in possessing the ball. She is bargaining with a chip that does not belong to her, and for Lindgren, that should be enough to render her demand criminal. Since by common agreement is it not criminal, there must be something awry in Lindgren's argument.[51]

There are only two difficulties here. The first, somewhat off the main point, asks how a commercial interaction—which is voluntary for both buyer and seller—can be "exploitative." Surely there would be consumer surplus on *both* sides, even at the higher price. If there were not, the two parties would not have agreed to consummate the transaction. Second, "chip ownership" is more "flexible" than Fletcher seems to think. It is always open to Lindgren to assert that the baseball seller really owns the child's and

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[50] Block, "The Case for De-Criminalizing Blackmail; also N. Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001).

[51] Fletcher, "Blackmail," p. 1625.

parent's consumer surplus. With such ambiguous terms as "chips," anyone may say anything he likes. This leads to the real problem: the slipperiness of the concept.[52]

Third, Fletcher criticizes Lindgren for utilizing "a notion of extra-legal moral rights." If Fletcher had gone on to state that these were a concoction, something created out of the whole cloth with no justification, he would have been on firm footing. After all, anyone can create rights *de novo*, and then brand as criminals anyone who violates them. For example, I hereby declare, as a matter of law, the "right" to be free of left-handed redheads. We can now hunt them down mercilessly, secure in the knowledge that we are upholding this new "right."

Instead, however, Fletcher *accepted* these Lindgren-created other-people's-chip "rights," and argued that even if they were valid, the criminal law does not consider them to be legal rights. This is legal positivism run amuck. Happily, the law has not yet entrenched Lindgren. For once, the criminal law is *correct* in not recognizing "chip rights." But, contrary-to-fact conditional, suppose it *did*, as Fletcher seemingly accepts. Wouldn't it then be proper to penalize those who played with others' chips?

Fletcher demurs because "We do not penalize cheating on exams, committing adultery with other people's wives or husbands, or even stealing numerous forms of intellectual property." But cheating on an exam is a form of fraud, and *shouldn't* we punish fraud? Why should stealing intellectual property occupy a different legal category than other types of property? We certainly throw embezzlers in jail. And, as for adultery, there certainly have been times when this was considered a crime. That this no longer obtains is more an effect of the governmental monopolization of the marriage contract than that the law should not punish crime. That is to say, were we to erect a wall between marriage and state of the sort that some advocate between church and state, it is the rare contract, probably, that would stipulate a jail sentence for adultery. Governmentally imposed marriage contracts do make adultery a crime, but this has become a dead-letter law. In any case, it cannot be used to make Fletcher's (contrary-to-fact) point against Lindgren.

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[52]See, e.g., Walter Block and David Gordon, "Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick, and Lindgren," *Loyola of Los Angeles Law Review* 19, no. 1 (November 1985).

DOMINANCE AND SUBORDINATION

Having cleared the decks, so to speak, of "all" contending theories, Fletcher is now ready to regale us with the correct solution. It turns out that his is a variant of the Marxian critique of hierarchies based on dominance (bad) and subordination (victim status).

A key element of this insight is that the blackmailer can keep "coming back for more." This is illustrated in the difference between the crime (no. 1) and tort (no. 2) cases. According to Fletcher:

> If *V* pays *D* an amount necessary to settle the tort dispute between them, *D* must release his claim. He cannot thereafter come back to *V* and demand more. But if *V* pays *D* money to suppress a criminal investigation, *D* retains the option of coming back for more. . . . Living with that knowledge puts the victim of blackmail in a permanently subordinate position.[53]

A difficulty is that mere domination cannot necessarily be a crime. In the Marxist lexicon, the employer always dominates the employee; does that imply that the boss always blackmails the worker? One would suppose so, at least in Fletcher's Marxist world. In the feminist lexicon, the female is always subordinate to the male; does that imply that all women are always and ever being victimized by the blackmail of men? One can only suppose so, in Fletcher's feminist world. In the "black studies" lexicon, the black is always subordinate to the white; does that imply that all people of African extraction are always and ever being victimized by the blackmail of Caucasians? Again, one can only suppose so, in this particular worldview.

But this is only the tip of the iceberg. If *A* is more in love with *B* than *B* is with *A*, then *B* can get more from *A* than *A* can get from *B*. This *may*, conceivably, result in *B* blackmailing *A* (heck, it could also result in *B* extorting from *A*—almost anything is possible in these made-up scenarios), but *need* it do so, as Fletcher logically implies? Hardly.

Something like this domination–subordination relationship will occur, more generally, in *any* case where *X* wants what *Y* has more than *Y* wants what *X* has. Usually, a price change will alter this and, presumably, sweep away the "blackmail." For example, if the demand for apples is greater than the supply thereof, suppliers will "dominate" (e.g., criminally blackmail) demanders until the price

[53]Fletcher, "Blackmail," p. 1623.

rises and balances the two sides of the market, stopping this nefarious activity.

Having established this criterion, at least to his own satisfaction, Fletcher considers how it can shed light on his ten cases.

It would appear that dominance and subordination illuminate the hush money case (no. 3). The key seems to be that even after *V* pays off *D*, *V* will still never have a moment's peace, because *D* can always make new demands in the future. According to Fletcher,

> This is the essence of the blackmail—not in the transaction itself, but the relationship of dominance implicit in taking the first step of inducing the victim to pay money for her own protection.[54]

One minor point, to begin: Fletcher seems to resent the idea that people be forced to pay for their "own protection." But even under present circumstances, it is the citizens' tax money that is used in (very small) part for this purpose. Unfortunately, much of the proceeds earmarked for state police and courts are used not to protect the victims of crime, but rather to ensure procedural niceties to protect the "rights" of criminals.

Now for the major point: Fletcher appears to have inverted the usual time dimension of criminality. Traditionally, crimes take place in the *past* and are punished in the *future*. Here, there is an inversion: the blackmailer is guilty not for any action he has already taken, but for those he *might* take in the future. Fletcher worries that "Even if *D* says that she is surrendering the pictures and the negatives, there is no assurance that copies have not been made" and might not be brought to bear eventually.[55] Citing Altman, Fletcher bewails the fact that "there cannot be any guarantee that a first payment will not be followed by more demands."[56] What a way to run criminal law—on the basis of what people *might* do in the future. On this ground, we are *all* due for a spell in the pokey. For example, I *might* punch you in the nose next Tuesday. Shall I be incarcerated now for this crime? This would appear to be the logical implication of Fletcher's analysis.[57]

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[54]Fletcher, "Blackmail," p. 1627.

[55]Fletcher, "Blackmail," p. 1627.

[56]Scott Altman, "A Patchwork Theory of Blackmail," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1648; Fletcher, "Blackmail," p. 1627.

[57]This is eerily reminiscent of the Coase–Posner–Demsetz "law-and-economics" approach which determines property rights not on the basis of the

A slightly more sympathetic interpretation of Fletcher would find not that he advocates jailing people now for what they might do in the future, but jailing them *presently* for having an illicit "hold" over someone. For example, the blackmailer who has just been paid off still has a "hold" over the blackmailee. The former can always "come back for more."

But this, too, is over-inclusive. Many have a hold over or have something on others and are still free, and quite properly so. For example, parents have something on their young kids, in that they can always abandon them; later, adult kids have the same implicit threat hanging over their aging parents. To return to the Marxist view, there is an employer's sword of Damocles hanging over each worker: he can always be fired. In like manner, feminists and black studies theoreticians make similar claims vis-à-vis males and females, whites and blacks. The doctor with a good bedside manner (and a record of successful operations), the heroin seller, the husband who is nice to his wife (or mean to her, in the case of masochism), all set up dependencies, and thus have an implicit threat

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past, but predicates it upon speculations as to what people might do in the future. Specifically, it will tip the balance in favor of those whose future acts are expected to most increase economic wealth. See Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (October 1960); Harold Demsetz, "Ethics and Efficiency in Property Rights Systems," in *Time, Uncertainty, and Disequilibrium: Explorations of Austrian Themes*, ed. Mario Rizzo (Lexington, Mass.: D.C. Heath, 1979); and Richard A. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown, 1986). For a critique, see Walter Block, "Coase and Demsetz on Private Property Rights," *Journal of Libertarian Studies* 1, no. 2 (Spring 1977); Walter Block, "Ethics, Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Demsetz," *Review of Austrian Economics* 8, no. 2 (1995); Walter Block, "O.J.'s Defense: A *Reductio Ad Absurdum* of the Economics of Ronald Coase and Richard Posner," *European Journal of Law and Economics* 3 (1996); Gary North, *Tools of Dominion: The Case Laws of Exodus* (Tyler, Tex.: Institute for Christian Economics, 1990); Gary North, *The Coase Theorem* (Tyler, Tex.: Institute for Christian Economics, 1992); Roy E. Cordato, "Subjective Value, Time Passage, and the Economics of Harmful Effects," *Hamline Law Review* 12, no. 2, (1989); Roy E. Cordato, "Knowledge Problems and the Problem of Social Cost," *Journal of the History of Economic Thought* 14 (Fall 1992); Roy E. Cordato, *Welfare Economics and Externalities in an Open-Ended Universe: A Modern Austrian Perspective* (Boston: Kluwer Academic Publishers, 1992); Elisabeth Krecke, "Law and the Market Order: An Austrian Critique of the Economic Analysis of Law," *Commentaries on Law and Economics* 1 (1998).

over, e.g., the sick patient, the addict, the wife. According to Fletcher, they would all be guilty of blackmail. This interpretation, if we accept it, will scarcely keep *any*[58] of us out of jail.

Discussing the tardy employee case (no. 4), Fletcher argues that "So long as *V* shows up on time, *D* can make no additional threat of dismissal." In contrast, in the lascivious employer case (no. 5), he argues that if "*V* sleeps with *D*, he places himself in her power. The initial submission establishes a relationship of dominance and subordination that encourages further sexual demands."[59]

This appears to be a distinction without a difference. Why, just because *V* sleeps with *D* once, is he (*sic!*) more beholden to do it again? And how does *V*, the tardy employee, escape the clutches of *D*, the boss, just because he comes to work on time? Where is the difference in principle? One can as easily envision contradictory cases in which the blackmailer from the tardy employee case (no. 4) escalates the threats (perhaps into a full-blown demand for sex or money), or where the boss in the lascivious employer case (no. 5) pulls back after one sexual escapade. Neither "victim" is totally bereft of defensive resources; both the "late employee" and the worker subjected to the boss's unwanted sexual overtures can complain to the president of the company, or to the corporate or governmental harassment officer. I can certainly imagine the scenario as depicted by Fletcher, but is it the only realistic one? That it *must* be so seems a weak foundation upon which to build a theory of crime.

The baseball case (no. 6), although I would hardly call it a troublesome case, comes reasonably close to fitting Fletcher's theory, but not even it fits perfectly. He maintains that "Once the parent purchases the baseball, the seller *D* can demand nothing further."[60] I have previously suggested that this is not true in the general case,

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[58]All people are either whites, males, employers, parents, spouses, friends, children, or members of other similarly "exploitative" groups.

[59]Fletcher, "Blackmail," p. 1627. Fletcher's political correctness is not merely annoying, it is a threat to clear communication. In this case, he posits that a female is blackmailing a male to attain sexual favors. This is so much the reverse of the usual situation that every time this case is mentioned, one has to stop and think, to make sure one understands it correctly. Yes, there is a recent movie predicated on Fletcher's premise, but this is clearly a rare man-bites-dog story.

[60]Fletcher, "Blackmail," p. 1627.

for *anyone* can always demand *anything* of *any* victim in the *future*. However, at first glance it would appear that the parent does not put herself (*sic!*) in any *worse* position because of the purchase of the baseball. But, upon further reflection, even this is not true. For the "exploitative" baseball seller, thanks to this very sale, will now see a weakness in the buyer that was not apparent beforehand. Namely, this dying child is in a very precarious position, and the loving parents are willing to do whatever it takes to make his last few weeks enjoyable. Therefore, the exploitative blackmailing seller can perhaps interest them in more toys for their dying child, maybe a Michael Jordan sweatshirt this time around. The possibilities are endless, at least while the kid is still alive. Like a shark with the scent of blood in its nostrils, this seller now "has a hold over" the hapless parents, a hold which was not apparent but for the sale.[61]

Fletcher's theory further unravels when he considers the dinner kiss case (no. 7). He boldly asserts that "dominance requires something more than withholding a kiss."[62] Says who? In addition to rereading Marx, Fletcher ought to avail himself of some of the more outlandish writings of psychologists and psychiatrists, particularly of the "New Age" variety. Surely, the imaginative powers of a person like Fletcher are not beyond positing a scenario where a person commits suicide because of the lack of a kiss. If so, then the ability to offer or withhold this physical interaction would certainly put the "kisser" in a position of dominance over the "kissee."

Nor does Fletcher fare any better when it comes to the tattoo case (no. 8). He is unwise enough to assert that "no one can dominate someone else by asking for money to do or not to do that which is in one's recognized domain of freedom."[63] Here, Fletcher should make himself aware of the phenomenon of the "Jewish mother," an individual who recognizes no such domain of freedom, at least for her son. If a male Jew were to threaten his mother with total body tattoos, she would be putty in his hands. Surely, he could "dominate" her, to the extent that this could ever occur, given her secret weapon: guilt.

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[61]Let us not inquire too closely as to how great a hold the seller has over the parents, and whether this is of greater moment than the "hold" held over the head of the philanderer by the gossip. The impossibility of interpersonal comparisons of utility renders all such speculation invalid.

[62]Fletcher, "Blackmail," p. 1627.

[63]Fletcher, "Blackmail," pp. 1627–28.

However, in the course of his disquisition on tattoos, Fletcher gives the entire game away. His "smoking gun" statement is:

> The [tattoo] case resembles the problem of the landowner who threatens to build a wall on his own property that will deprive his neighbor of light. The neighbor has no easement to interpose against the landowner, and if the latter thus demands payment to forgo building the wall, the demand is within the landowner's rights; *there is no blackmail in demanding payments to do or not to do that which one has a right to do*. For the neighbor to complain of subordination to the whims of the wall builder, he would have to have some legitimate interest that is put in jeopardy by the repeated demands for payment.[64]

About this, a few comments: first, this resembles nothing so much as the "spite fence" case, or Rothbard's flaying of Nozick for his "productive exchange" concept with the Green–Brown pink building example.[65] Evidently, in making this statement, or, rather, to the degree that he really accepts this, Fletcher has changed his mind on these matters. Second, and even more telling, Fletcher has conceded the entire libertarian case in favor of legalizing blackmail.

Consider again his canonical case of hush money (no. 3), in light of the italicized sentence in the previous quotation. It is the libertarian contention that *D* has the right to reveal damaging truths about a sexual peccadillo of the celebrity *V*. No one on the other side of this debate really denies this. States Katz:

> *If Busybody had actually revealed Philanderer's affairs*, or if he 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.[66]

Even Fletcher himself admits that there "is nothing wrong with the separate acts of keeping silent or requesting payment for services rendered." [67]

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[64]Fletcher, "Blackmail," p. 1628, emphasis and bracketed material added.

[65]Rothbard, *Ethics of Liberty*, pp. 240–42.

[66]Katz, "Blackmail and Other Forms of Arm-Twisting," p. 1567, emphasis added.

[67]Fletcher, "Blackmail," p. 1617. Of course, he takes this all back with his discussion of good acts being "corrupted by doing them for a price," but

But if "there is no blackmail[68] in demanding payments to do or not to do that which one has a right to do," and people have a right to gossip, to remain silent, and to request or demand funds for services, and if silence is a service, then it follows ineluctably that people have a right to engage in blackmail.[69] And if this is true, it takes only the merest of logical deductions to reach the conclusion that this practice ought to be legalized. Once one agrees with Fletcher's "smoking gun," it is only a failure to follow through with the syllogism that leads to a conclusion other than the libertarian one.

Fletcher, however, does not see things this way. Instead, after taking this detour, he reverts back to his old patterns. He now tries to apply his dominance-and-subordination test to the political embarrassment and paid silence cases (nos. 9 and 10). But this criterion applies no matter who initiates the deal. That is, in *both* the political embarrassment (no. 9) and the paid silence (no. 10) cases, *D* can keep "coming back for more" money, and thus is "dominant" over the "subordinate" *V*; and yet, Fletcher characterizes the former as (criminal) blackmail and the latter as no crime. This seems unwarranted, given that his criterion operates equally in both cases. The politician is in a subordinate position whether he approaches the political activist or the activist approaches him.

PUNISHMENT AS THE NEGATION OF DOMINANCE

Having "now generated a coherent and convincing fit between the principle of dominance and these specific cases," Fletcher goes on to show that this principle "explain[s] not only why blackmail is undesirable but also why it is conventionally regarded as a crime."[70] This is because punishment, at the end of the day, can be fully justified neither on utilitarian grounds nor on Kantian ones. Instead, according to Fletcher,

> The failure of the state to come to the aid of victims, as expressed in a refusal to invoke the customary institutions of arrest, prosecution, and punishment, generates

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that is another matter. We can hardly expect logical consistency from those who argue in favor of criminalizing blackmail after making the concession quoted in the text.

[68]For Fletcher, this means there is no *criminality*.

[69]That is, that blackmail is a legitimate market transaction, not a crime.

[70]Fletcher, "Blackmail," p. 1628.

> moral complicity in the aftermath of the crime. The state's failure to punish also reaffirms the relationship of dominance over the victim that the criminal has already established.[71]

In effect, then, all crimes are but further instances of Fletcher's dominance-and-subordination motif. It cannot be denied that this is a necessary condition for crime. One could hardly have a violation of legitimate law without someone dominating someone else, thus rendering them subordinate.[72] But this certainly isn't sufficient to declare that a crime has occurred. As we have seen, and as common sense so fully attests, life is full of non-criminal hierarchies in which dominators outrank subordinates. In the orchestra, the conductor dominates the musicians; in sports, the coach dominates the players; in academia, the professor dominates the students; in family life, parents dominate children; in work, employers dominate employees; in construction, the architect dominates the builders. Are we to throw our whole society into jail?

But this does not fully exhaust the difficulties with Fletcher's perspective. For one thing, the state need not be the only institution of capture and punishment.[73] For another, even assuming the legitimacy of (only) government punishment, still left open is the question of whether this should be restricted to such clear-cut crimes as murder and rape, or expanded to include blackmail (as distinct from extortion). Nothing adduced by Fletcher inclines us to the latter opinion. Fletcher continues at the same old lemonade stand, worrying that the blackmailer can keep coming back for more from the

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[71]Fletcher, "Blackmail," p. 1634.

[72]In a real puzzler, Fletcher, in "Blackmail," p. 1634, specifically rejects this claim: "It would be difficult to maintain that all crimes are characterized by this feature of dominance. We can say, however, that this relationship of power lies at the core of the criminal law. It is characteristic of the system as a whole." But if the essence of blackmail consists of dominance and subordination, and if blackmail is "the paradigmatic crime," this feature of dominance must be at least a necessary condition of crime. Even I am willing to admit that this is so; it is strange that Fletcher would not.

[73]For examples of private alternatives, see Rothbard, *For A New Liberty*; Hoppe, *Economics and Ethics of Private Property*; Spooner, *No Treason*; Benson, "Enforcement of Private Property Rights in Primitive Societies"; Benson, "The Spontaneous Evolution of Commercial Law"; Benson, *The Enterprise of Law*; Friedman, *The Machinery of Freedom*; Tinsley, "Private Police"; and Stringham, "Market-Chosen Law."

victim, and thus "has a hold over" him in the future. He waxes eloquent about the fact that

> [r]ape victims have good reason to fear that the rapist will return, particularly if the rape occurred at home or the rapist otherwise knows the victim's address. Burglars and robbers pose the same threat.[74]

While this is a great concern to be sure, one would have thought it secondary to the *first and only* crime, the actual rape. The point here is that there was only one crime committed in these cases, the one that actually took place. The fears that this engenders about a repeat performance,[75] while important, are only peripheral. The main problem we have with the rapist or burglar is that he committed the crime. Even if, somehow, no fears ever arose about the future,[76] the rape or burglary itself would still not disappear. It is hard to avoid the conclusion that Fletcher overemphasizes the fears engendered by the crime, and underemphasizes the crime itself, because of his dominance-and-subordination theory.

OBJECTIONS

Here, reasonably enough, Fletcher considers objections to his thesis. Unfortunately for him, this section only worsens his difficulties. It emerges even more clearly how closely wedded he is to the concept of future fears of dominance, even at the expense of the actual (past) crime itself. For example, he admits that homicide does not fit his model, because the victim is now dead and, presumably, beyond any fears.

One would have thought, to the contrary, that homicide would have been the best example of the perpetrator dominating a subordinate victim. Here, the criminal goes so far as to actually annihilate his prey. Instead of focusing on this primordial fact, Fletcher gets lost in speculations about how much fear a murder will create in the minds of the "decedent's loved ones."[77] But suppose that the

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[74]Fletcher, "Blackmail," pp. 1634–35.

[75]Altman, in "A Patchwork Theory of Blackmail," pp. 1655–56, says "the criminal nature of making repeated demands does not explain why the first demand should be criminal . . . [and] we condemn and prohibit blackmail even when future demands are unlikely or impossible."

[76]Assume that the victim was psychologically secure, or that the world ended right after the crime took place, or that the criminal was killed.

[77]Fletcher, "Blackmail," p. 1635 n. 45.

victim was a hermit, and that the murder was never discovered. Although it could not increase fears of future homicides, it would not change the reality of the crime. That this irrelevancy should change matters for Fletcher is further evidence that his thesis is highly problematic.

The second objection that Fletcher considers is irrelevant to present concerns. It is clear that punishment would indeed "counteract the criminal's dominance over the victim."[78]

The third considered objection is of interest in that we have made it ourselves: that dominance is an insufficient account of the criminality of blackmail, since dominance may be justified, e.g., as in the case of voluntary hierarchy. Unfortunately, Fletcher does nothing to deflect this charge, instead contenting himself with reiterating the importance of the "*ensuing* relationship between *D* and *V*" and the "aftermath" of the crime,[79] all but ignoring the crime itself.

Last, Fletcher deals with this challenge: why not "wait for the second demand to ascertain whether the blackmailer intends to exercise his power"?[80] He rejects this on the ground that "the relationship of dominance and subordination comes into being as a result of the victim's making the first payment or engaging in the first coerced act of submission." Yes, indeed, that is exactly how he has defined the concept, as a "state of anticipation." But this is merely to reiterate his own position, not to seriously answer the charge that it is surely illicit to hold people guilty of a crime they *might* commit in the *future*.

Yes, as Fletcher asserts, "the existence of criminal sanctions give [the blackmailee] the possibility of asserting a counter threat of going to the police."[81] But this option would *also* obtain were we to legalize blackmail. In this case, the presumption is that a legally binding blackmail contract, stipulating the *entire* amount of the payment, would be signed. If the blackmailer demanded more, he would then be guilty of contract violation.[82]

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[78]Fletcher, "Blackmail," p. 1635.

[79]Fletcher, "Blackmail," p. 1637.

[80]Fletcher, "Blackmail," pp. 1637–38.

[81]Fletcher, "Blackmail," p. 1638.

[82]Of course, Fletcher might argue that if the blackmailee availed himself of this opportunity, his secret would likely come out. True. But the same applies to the case in which blackmail is illegal, and the blackmailee seeks police help.

Thus, if Fletcher is concerned with arming the blackmailee with a weapon, he need not stick to his own viewpoint. He could instead embrace the libertarian position of criminalizing only uninvited border crossings of invasions.

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