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ARTICLES

Libertarianism and the Paradox of Blackmail

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In the present article, we criticize a skeptical solution to the "paradox of blackmail" offered by libertarianism. For such libertarians as Rothbard and Block, there is no real paradox of blackmail, because blackmail is legitimate, or should be legal, and so it is not the case that two legal whites make a legal black. We contend that the libertarian theory of coercion which supports this libertarian skepticism of the paradox of blackmail is problematic and that it unduly monopolizes the discussion of blackmail. As we argue in Dominiak (2024), there is an alternative approach to the question of blackmail according to which blackmail, or at least some instances thereof, can be viewed as fraud rather than coercion. Accordingly, we submit, against libertarian skepticism, that the paradox of blackmail is a real libertarian paradox which, instead of a skeptical dissolution, merits a straight solution. Such a solution, however, should not be looked for in the libertarian theory of coercion but should be based on the libertarian theory of deception and fraud.

The paradox of blackmail consists in the fact that two or three actions that are independently legal—for example, threatening another with gossip, asking another for money, and offering another abstention from gossip—once combined, become illegal blackmail. In the literature, there are many attempts to solve this paradox—that is, to explain how it can be that two or three legal whites make a legal black. Libertarianism rejects all of them, instead claiming that blackmail should be legal and that the paradox of blackmail should be dissolved rather than solved. Such prominent libertarians as Murray

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Rothbard and Walter Block claim that blackmail, in contradistinction to extortion, is a legal white because, under the libertarian theory of coercion, blackmail does not coerce but extortion does. At any rate, the bottom line is that for these libertarians, two legal whites, quite unparadoxically, make also a legal white of blackmail. Once this fact is realized, the paradox of blackmail disappears.

In the present article, we argue that this libertarian skepticism about the paradox of blackmail is unfounded—that, in actual fact, libertarianism predicts that there is such a paradox and, most importantly, that it has intellectual resources to offer a straight, although unobvious, solution thereto. More specifically, we submit that the libertarian theory of coercion which supports libertarian skepticism of the paradox of blackmail is problematic and that it unduly monopolizes the discussion of blackmail. As we argue in Dominiak (2024), there is an alternative approach to the question of blackmail according to which blackmail, or at least some instances thereof, can be viewed as fraud rather than coercion. Thus, a libertarian solution to the paradox of blackmail should be looked for not in the libertarian theory of coercion but in the libertarian theory of fraud and deception. From this latter point of view, the blackmailer can be seen, at least sometimes, as deceiving the blackmailed about his intentions to execute the threatened action, thereby inducing him to part with his property—the fact that explains why blackmail should be illegal under libertarianism. Accordingly, the paradox of blackmail is a real paradox in which the two legal whites of (1) making false representations or lying about one's intentions and (2) asking for money make a legal black of a special kind of fraud.

Our argument unfolds in the following way. We first introduce the paradox of blackmail and make a distinction between its straight and skeptical solutions to properly classify the libertarian stance on the paradox. We then identify and criticize the libertarian theory of coercion as the main reason for libertarian skepticism of the paradox of blackmail. Finally, we discuss our own alternative approach to blackmail and argue for its merits as a straight libertarian solution to the paradox of blackmail.

The Paradox of Blackmail and Its Libertarian Dissolution

It is legal to ask another for money, as in the request, "Give me two thousand dollars." It is also legal to threaten another with something one has a right to do anyway, as in the threat, "I am going to reveal your affair to your wife." But it is illegal to do both—that is, to threaten another with something one has a legal right to do unless another pays for abstention, as in the typical blackmail proposal, "Give me two thousand dollars or I am going to reveal your affair to your wife." This seems paradoxical: how can it be that "two things that taken separately are moral and legal whites together make a moral and legal black" (Williams 1954, 163)? Or even more precisely, it is independently legal to (1) ask for money, (2) threaten with a lawful act, and

(3) offer to abstain from a lawful act, but it is illegal to combine the three (Clark 1994, 55–56). Yet how can it be that three legal whites make a legal black? This conundrum has been called the paradox of blackmail.[1]

Following David O. Brink (1989, 32–33), who in turn follows Saul A. Kripke (1982, 66–67), we can distinguish two general ways of solving a paradox, the paradox of blackmail included. One way is to offer a straight solution to a paradox. A straight solution recognizes a paradox "as legitimate and attempts to answer it in some way" (Brink 1989, 33). To recognize the paradox of blackmail as legitimate is to accept its premises (that it is independently legal to ask for money, threaten with a lawful action, and offer abstention from the said action) as well as its conclusion (that it is illegal to combine the three) and to explain how such a conclusion can follow from such premises. In the case of the paradox of blackmail one of the most common straight solutions is to argue that even though it is indeed legal to ask for money, threaten with an action one has a legal (although perhaps not a moral) right to perform, and offer abstention from the said action, to combine the three is to acquire another's money under duress or coercion—that is, without the valid consent of the blackmailed or without the proper title to the money—an answer that effectively subsumes blackmail under the category of broadly understood theft or attempted theft (see Katz 1996, 157–63).

Another type of solution to a paradox is a skeptical solution. According to Brink (1989, 33), "a skeptical solution attempts to dissolve the . . . problem as misconceived." In the case of the paradox of blackmail, a skeptical solution consists in denying either some of the paradox's premises or its conclusion. Thus, probably the boldest skeptical solution to the paradox of blackmail would be to deny the illegality of blackmail as such. After all, if it is legal to ask for money, threaten with an action one has a legal right to perform, and offer abstention from the said action, then it must also be legal to blackmail another—or so claims the boldest skeptical solution. But as pointed out by Brink (1989, 33), skeptical solutions "are in general not very satisfying resolutions of these problems; skeptical solutions dispose of disturbing challenges too easily and so fail to do justice to the worries that give rise to the . . . problems." Indeed, skeptical solutions are better called dissolutions, because they essentially consist in showing that there has never been a paradox to begin with.

It is important to note that libertarianism, insofar as it is represented by Murray Rothbard (1998, 2009) and Walter Block (2013), offers exactly such a skeptical solution to the paradox of blackmail because, while accepting its premises, it denies the illegality of blackmail. Thus, Rothbard (2009, 183)

1 Or the "first paradox of blackmail," in contradistinction to the "second paradox of blackmail," which consists in the question, How can it be that if A approaches B with a blackmail proposal, then it is illegal, but if B approaches A with an offer to pay for, say, silence, then it is legal? On the second paradox of blackmail, see, for example, Block, Kinsella, and Hoppe (2000, 593–622).

believes that "*blackmail* would not be illegal in the free society. For blackmail is the receipt of money in exchange for the service of not publicizing certain information about the other person. No violence or threat of violence to person or property is involved." And elaborating the logic behind this belief, Rothbard (1998, 124) admits that he finds denying the conclusion of the paradox of blackmail almost unavoidable: "In short, Smith has the right to 'blackmail' Jones. As in all voluntary exchanges, both parties benefit from such an exchange: Smith receives money, and Jones obtains the service of Smith's not disseminating information about him which Jones does not wish to see others possess. The right to blackmail is deducible from the general property right in one's person and knowledge and the right to disseminate or not disseminate that knowledge. How can the right to blackmail be denied?"

Similarly, Block (2013, iii), the number one libertarian proponent of blackmail legalization, also contends that "it is impossible for two separately legal acts to be rendered into an illegal one, and, therefore, blackmail should be legalized." Block (1986, 63) vehemently rejects the majority view, according to which "two rights can make a wrong." As he claims, "this conclusion is troubling. First, it would appear that the burden of proof should be on the side that is making a counter-intuitive claim. And there can be hardly anything more counter-intuitive than the claim that two rights can make a wrong." Block's (2013, 67) own position denies this counterintuitive stance: "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." For example, "since it is legal to gossip, it should therefore not be against the law to threaten to gossip, unless paid off not to do so. In short, blackmail . . . must be legalized if justice is to be attained" (Block and McGee 1998, 25).

Thus, Block (2013, 117) explicitly admits that "these are paradoxes only for legal theorists innocent of libertarian theory. [I] use that perspective to reject the claim that blackmail should be unlawful. If this act were legalized, then both paradoxes would disappear." He continues: "Theorists who support the outlawry of blackmail have thus spilled much ink generating contorted arguments trying to resolve these paradoxes. . . . These attempts are doomed to failure. There is an inconsistency involved in outlawing blackmail" (119). The inconsistency Block has in mind is profound, as seen in the following comparison: "It would be no paradox if one claimed that '2+2=5.' All attempts to resolve the contradictions emanating from such a statement would be doomed to irrelevancy. Our claim is that the 'paradoxes' of blackmail . . . resemble such cases. By recognizing that blackmail indeed should not be illegal, one realizes there is no paradox to resolve. Only by accepting a false political notion (that blackmail should be illegal) does one generate a paradox that needs resolving" (120).

Of course, that libertarianism offers a skeptical solution to the paradox of blackmail cannot in itself constitute the final argument against this position. After all, the paradox of blackmail might be only a bogus problem deserving dissolution.[2] It does, however, create a strong presumption against the libertarian skeptic, because the burden of proof is now on him to show why not a single answer among the straight solutions works—why not a single explanation of how it can be that two legal whites make a legal wrong succeeds. Again, it is worth remembering that in philosophy, as pointed out by Brink (1989, 33), "we should accept skeptical solutions . . . only if we have independently satisfying account of how the . . . worry is, and must be, misconceived or if we have good reason to believe that no straight solution to the . . . problem can possibly succeed." Accordingly, the question we should now explore is, What is the libertarian reason to believe that no straight solution to the paradox of blackmail is possible?

The Paradox of Blackmail and the Reason for Its Libertarian Dissolution

Let us begin our inquiry into the reason for the libertarian belief that no straight solution to the paradox of blackmail is possible by asking what it would take for libertarians to abandon their central claim—on which their entire skepticism depends—that blackmail should be legal. The answer turns out to be quite easy and reveals, as we will see in due course, the grounds on which libertarian skepticism is ultimately based. Thus, it would take the illegality of the blackmailer's threat for blackmail to be illegal—that is, if the blackmailer's threat were illegal, blackmail would be illegal as well. Or from a more conceptual angle, if the blackmailer's threat were illegal, then blackmail would become what libertarians call extortion. Now, since extortion is illegal, blackmail would (trivially, since it would not differ from extortion) be illegal as well. Hence, there must be something about the legality or illegality of the blackmailer's threat that accounts for the legality or illegality of blackmail. This something provides the grounds for the libertarian skepticism of the paradox of blackmail. If it turns out to be tenuous, libertarian skepticism will have to be jettisoned and a straight solution looked for instead. But before we do this, we will first provide some evidence for our claim that, insofar as libertarianism is concerned, if the blackmailer's threat were illegal, blackmail would be illegal as well.

This claim is supported by the libertarian distinction between blackmail and extortion. In this regard, Block (1986, 61) invites us to respect the following convention: "We shall use the term 'extortion' to refer only to a demand for money made on the basis of a threat of physical violence or other clearly criminal behavior. We shall reserve the appellation 'blackmail'

2 This is what Michael Clark (1994) suggests in his article "There Is No Paradox of Blackmail."

for those threats which, in the absence of a demand for money, would be considered legal." This terminological convention maps well onto the substantive distinction between what is legal and what is illegal under libertarianism. Thus, whereas blackmail should be legal, extortion should be illegal. Block and Anderson (2000–2001, 543) write,

> Further, extortion is the threat to do something which *should* be illegal (murder, rape, pillage), while in blackmail the offer is to commit the paradigm *lawful* act (i.e., engage in free speech or gossip about secrets which embarrass or humiliate other people). For example, since it would be legal to reveal a secret about adultery, it should also be lawful to offer to do just that, or to accept money, when offered, in exchange for not making such a revelation. In contrast, since it is illegal to murder or rape, it should also be a criminal act to threaten such acts.

But why should it be the case that if the threat is illegal, then the entire scheme should be illegal, while if the threat is legal, then the exchange should be legal? What is the link connecting the legality or illegality of the threat with the respective legality or illegality of the resulting exchange? Our hypothesis is that this link is established by the libertarian theory of coercion. If this theory is shaky, then so is the link and everything that depends on it—that is, crucially, the libertarian skeptical solution to the paradox of blackmail. By showing that it is tenuous, we will strengthen our prima facie case against the libertarian skeptical solution and will be in a good position to move to the positive case for our own (also libertarian friendly) straight solution to the paradox of blackmail. But first, we will demonstrate that the libertarian theory of coercion provides the missing link between the claims that the legality or illegality of the threat respectively determines the legality or illegality of the resulting exchange.

Typically, the effect of coercion is to render the coerced party's actions involuntary and thus to invalidate their moral consequences. As pointed out by Alan Wertheimer (1987, 90), "coercion claims have a negative function; they serve to block what would otherwise be normal legal effect of one's act. If the coercion claim is successful, one will be returned to the *status quo ante*, where one is not bound by one's agreement, where one's right has not been waived." For example, if B coerces A to transfer a resource to B, then, due to the involuntariness of A's actions, A's waiver of a right to the resource, and thus also A's transfer of title to the resource to B, is invalid. Thus, although B does not have a right to the resource, he nonetheless has the resource. This fact of having another's resource without any title thereto can not only result in a revoking of the entire transaction but also be subsumed, at least in certain circumstances, under a crime of theft, broadly construed, or tort

of conversion.[3] The criminal or tortious character of the resulting property distribution can then be imputed back to the character of coercion which brought about the distribution. Accordingly, the act of coercing another can be viewed as an attempted theft or, if successful, as an element of the crime of theft itself. Wertheimer (1987, 90), regarding extortion, explains, "In the paradigm case of *extortion*, A receives property or some other benefit from B by proposing to commit a violent crime against B; extortion is, therefore, assimilable to the crime of robbery. And while it might, at first glance, be thought that the extortive threat itself is mere *speech*, that it should not be punished if unaccompanied by any other wrongful act or transaction, the criminalization of extortive threats can, without great difficulty, be assimilated to the (uncontroversial) criminalization of *attempted* robbery or assault."[4]

Hence, we could say that blackmail is illegal—that is, it is a form of theft or attempted theft broadly construed—because it coerces the blackmailed to transfer his goods or services (typically) to the blackmailer. But this is not exactly what libertarians say. It is not enough that the blackmailer threatens the blackmailed with some undesirable consequences for the latter's transfer to be considered coerced under libertarianism. Another condition is needed: the threatener's proposal must itself be illegal. This in turn can be accomplished only by the threatener threatening another with a consequence that is otherwise illegal (again, via backward imputation, such a threat, even if unsuccessful, can be subsumed under an illegal attempt). But why should the threat itself be illegal to be coercive in the first place?

Enter the libertarian theory of coercion. According to this theory, coercion is a completely moralized phenomenon. To see this, it is instructive to look at the libertarian understanding of the condition defeated by coercion—that is, voluntariness, or freedom as it is sometimes, not entirely fortunately, called in these circles. Thus, Rothbard (2006, 50) famously defines freedom as "a condition in which a person's ownership rights in his own body and his legitimate material property are *not* invaded." Similarly, Robert Nozick believes that voluntariness of a person's actions is a function of rights distribution. As Nozick (1974, 262) points out, "whether a person's actions are voluntary depends on what it is that limits his alternatives. If facts of nature do so, the actions are voluntary. (I may voluntarily walk to someplace I would prefer to fly to unaided.) Other people's actions place limits on

3 On the comprehensive crime of appropriation or theft broadly construed and its historical development in various legal systems, see Fletcher (2000, 3–113). On conversion, see Epstein (1995, 642–51). Incidentally, regarding the crime of appropriation, sometimes understood as "any assumption of the rights of an owner," Fletcher (2000, 45) points out that "in the Anglo-American law, the notion of appropriation closely follows the concept of conversion in tort cases." In turn, conversion is traditionally understood as "a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or rights therein . . . without the owner's consent and without lawful justification" (Epstein 1995, 642).

4 Wertheimer (1987, 90) references here the Model Penal Code, sec. 223.4, and says that according to this document "successful extortion is considered a form of theft." Indeed, this section, entitled "Theft by Extortion," states that "a person is guilty of theft if he obtains property of another by threatening to [commit a disjunction of seven act types]" (quoted in Kadish, Schulhofer, and Steiker 2007, 1124).

one's available opportunities. Whether this makes one's resulting actions non-voluntary depends upon whether these others had the right to act as they did."

Hence, most radical libertarians reject not only entirely descriptive notions of coercion (a practice which might be justified) but also partly moralized ones. For example, criticizing Scott Altman's (1993) patchwork theory of blackmail, Block and McGee link their criticism of this theory to their rejection of Altman's partly moralized notion of coercion. As Block and McGee (1998, 30) put it, "this author's understanding of this concept is flawed in yet another way. He states: 'the removal of important available options to alter someone's actions is coercion.' This is not at all the case." But it is not at all the case only because, for Block and McGee, coercion is a totally rights-based notion, which they make explicit by admitting that "coercion, then, is equivalent to a taking of someone else's legitimately owned property, and/or a physical interference with his person, or the threat thereof" (29). In this, Block and McGee are on the same page as Richard Epstein (1975, 296), who believes that the threatened party is coerced only because "in the case of duress by the threat of force, [the threatener] has required [the threatened party] to abandon one of his rights to protect another." Block and Anderson (2000–2001, 546) also claim that, as far as extortion is concerned, "there is no voluntary exchange" because "when someone extorts money from you with the statement 'your money or your life!' and you give up the former, you are wronged since you own both." It is exactly this double-bind predicament that is missing in the case of blackmail. "When someone threatens 'Give me money or I reveal your secret,' you are not wronged since you do not have title to both" (Block and Anderson 2000–2001, 546). Accordingly, blackmail proposals cannot coerce, and therefore the resultant exchange cannot be subsumed under the crime of theft broadly construed.

As we can see, libertarian skepticism of the paradox of blackmail ultimately hinges on the libertarian theory of coercion. If this theory were tenuous, so would be the libertarian dissolution of the paradox. We believe there are good reasons—perhaps not decisive reasons but robust enough to strengthen our prima facie case against the libertarian skeptical solution—to believe that the libertarian theory of coercion is tenuous. Although this is not the place for a thorough examination of these reasons, we can stress some of the more important points.

First of all, it should be noted that the libertarian theory of coercion instantiates moralized accounts thereof and as such shares all the generic vulnerabilities with any moralized theory. A significant problem with moralized accounts is that they embrace the so-called inheritance view—the view that the wrongfulness of a threat to perform a certain action derives from the fact that the threatened action would be wrongful when performed independently (Kolodny 2017). It seems, however, that at times it might be

permissible to threaten to do what would be impermissible to do. Crucially, the paradox of blackmail relies on the denial of the inheritance view. After all, the paradoxical cases of blackmail rest on the assumption that it is impermissible to threaten to do what would be permissible to do. If the reader finds that to invoke the paradoxical cases of blackmail as an argument against the inheritance view is to beg the question (since it is the solution to the paradox that is at issue, the inheritance view may prevail in the end, with the paradox being dissolved), an independent scenario is offered by Edmundson (1995, 85–86) that he calls "tables turned on the gunman." In this case, the traveler "rather than comply with Gunman's demand . . . states that he, too, is armed, and that he is prepared to defend himself and his wallet with deadly force, if necessary." Edmundson concludes that to say that "the Traveler's threat is not wrongful is not to say that his shooting the Gunman to recover the money would be permissible, for sometimes it is permissible, even laudatory, to threaten to do what would be wrong to do."

What distinguishes the libertarian from other moralized accounts[5] of coercion is the construal of the coercive or noncoercive nature of a proposal, and ultimately of a resulting coerced or uncoerced exchange, as a function of one variable only (the legality or illegality of the threatened action). For a proposer to issue a coercive proposal, it is necessary and sufficient that the proposer previews the violation of the rights of the proposed in case of the latter's noncompliance with the former's demand. By the same token, if the proposed decides to exchange with the proposer in the face of the latter's coercive proposal, the exchange is deemed coerced and thus involuntary. Epstein (1975, 296) provides the most telling illustration: "Suppose that B has agreed to clean A's clothes for $10. After the work is done, B tells A that he will return the clothes only if A pays, or promises to pay, him $15. If A pays the $15, it is quite clear that he has an action to recover the $5 excess. B has put him to a choice between his clothes and his money. As in the case of duress by the threat of force, B has required A to abandon one of his rights to protect another."

Hence, as already established, since B's proposal previews the violation of A's right (A's giving up five dollars, the money that B has no title to), the proposal is coercive. And if A decides to pay B, the exchange counts as coerced, which in turn gives rise to A's "action to recover the $5 excess." By way of critique of this characteristically libertarian theory of coercion, Wertheimer (1987, 34) submits that "with reference to Epstein's case, for example, it simply begs the question to assume that B has been *required* to pay anything, particularly given that he could sue B to recover his clothes." The point that Wertheimer presses throughout his book is that whether the proposal carries with itself a threat of right violation is only a necessary condition for proving that a

5 For an excellent analysis of moralized accounts of coercion, see Hill (1997).

resulting exchange is coerced—that is, the immorality of a proposal must be supplemented by a lack of reasonable alternatives for the proposal to lead to a coerced exchange, something Epstein's scenario clearly falls short of. Hence, however simple and elegant it may be, the libertarian theory of coercion cannot withstand critical scrutiny.

Moreover, the Austro-libertarian faulty theory of coerced and voluntary exchanges yields wrong predictions about decreases or increases in social well-being. Normally, it is reasonable to say that voluntary exchanges are mutually beneficial—the Paretian rule, often employed for the purposes of welfare economics.[6] But since libertarians employ a moralized (that is, rights-based) notion of coerced and voluntary exchanges, the link between the coerciveness of an exchange and its nonmutually beneficial character becomes much less plausible.[7] And since the coercive or voluntary nature of an exchange is all about whether the exchange was preceded, respectively, by a proposal involving a promise of a right violation or not, the coerciveness or voluntariness of the exchange is logically distinct from its welfare-diminishing or welfare-enhancing character. We argued that coerced (in the libertarian moralized sense) exchanges can transpire to be welfare enhancing, while voluntary ones might prove to be welfare diminishing. Because the premise that "all voluntary exchanges are mutually beneficial" is given a moralized reading via its moralized notion of voluntariness, the arising conclusions pertaining to social welfare are erroneous. This, in turn, is yet another reason to jettison the typically libertarian theory of coercion.

The Paradox of Blackmail and Its Libertarian Straight Solution

Having established our prima facie case against libertarian skepticism, we are now in a position to offer what can be called a libertarian straight solution to the paradox of blackmail. Before presenting our argument, however, one caveat should be made up front. The solution we are about to offer can be considered only a pro tanto solution, because it applies exclusively to situations in which the blackmailer carries a specific motivational and conative attitude. Accordingly, it can hardly be applied to all cases of blackmail. Nevertheless, we will try to show that it does apply to many instances of blackmail. Furthermore, we will argue that the fact that it is only a pro tanto solution makes it even more attractive for libertarians, especially because it maps very well onto another libertarian—even if ultimately utilitarian—distinction between blackmail which makes the blackmailed better off and blackmail which makes him worse off.

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6 For an elaboration on the Paretian rule, see Friedman (1990, 2000).

7 For some eloquent presentations of Austrian (within its Rothbardian branch) welfare economics, see Rothbard ([1956] 2011) and Herbener (1997).

We will begin our presentation with the analysis of the earlier quoted libertarian thesis that "it is impossible for two separately legal acts to be rendered into an illegal one" (Block 2013, iii) and that "there can be hardly anything more counter-intuitive than the claim that two rights can make a wrong" (67). As pointed out by Michael Clark (1994, 55), however, there are many separately legal acts that become illegal when combined. Starting with the currently existing legal systems—which can be inconsistent with the libertarian ethics but nonetheless supply some evidence easily extended to libertarianism—"it is not in itself illegal to be drunk nor is it illegal to be in charge of a motor car, but it is illegal to be drunk in charge of a car" (Clark 1994, 55). What is most likely leveraging up these two legal whites to the status of a legal black is the fact that, when combined, they can put road users at risk of death or injury.

By the same token, and as we argue in Fegley and Dominiak (2025, 31), according to Block and Block (2000, 293), while it is legal to possess a pistol and legal to be in a crowded phone booth, if the only place in which one could possibly reside were a crowded phone booth where "not even a pistol, perhaps not even a knife, can possibly be used without impacting innocent people . . . then it may be banned just as today we properly prohibit ownership of nukes in cities." In such a case, the two legal whites of possessing a pistol and being in a crowded phone booth would be leveraged up to the status of a legal black because together they would put innocent people at risk of death or injury. For this exact reason, Block and Block (2000, 292) believe that, although it would be independently legal to possess nuclear weapons and to live on Earth, it is illegal to possess nuclear weapons while living on Earth. "When we focus only on earthly concerns, this philosophy favors the ban on nuclear weapons; since it is not possible to confine their force, their use must necessarily violate the libertarian axiom. However, when we incorporate the entire universe into our analysis, and science fiction considerations as well, then nukes cannot be banned, since a defensive purpose for them exists."

Other explanations of how two legal whites rise (or decline, if you will) to a legal black involve the causation of what Joel Feinberg (1985) calls offense to others and aiding and abetting a crime. In the first case, as Clark (1994, 55) points out, "it is not illegal for a man to have consensual sexual intercourse with his wife nor is it illegal for them to be seen together in a crowded public park, but it is illegal for them to be seen together having sexual intercourse in a crowded public park." Now, why, asks Feinberg (1985, 17), "should conduct perfectly acceptable in itself become 'indecent' when performed in public?" One possible answer is that it causes a nuisance[8] to the captive viewers by creating distractions which are very difficult to avoid.

8 On the libertarian theory of nuisance see Rothbard ([1982] 2011, 367–418).

As Feinberg (1985, 17) puts it, "nude bodies and copulating couples, like all forms of nuisance, have the power of preempting the attention and absorbing the reluctant viewer. . . . They are distractions that must be attended to and coped with whatever one might prefer to be doing or thinking."

Public indecency might be a problematic example from the libertarian point of view, but consider something more straightforwardly illegal under libertarianism—bribery. It is unproblematically legal for A to pay B, and libertarianism also recognizes as legal instances in which A incites B to commit a crime. After all, according to Rothbard (1998, 81), if A "exhorts a crowd: 'Go! Burn! Loot! Kill!' and the mob proceeds to do just that . . . 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." Thus, it is a fortiori legal for A to incite B to breach a contract with C. It is illegal, however, for A to pay B while inciting him to breach the contract with C because this would constitute bribery, which, according to Dominiak and Block (2017, 99), is illegal "from a libertarian point of view," since "paying a bribe when it involves a contract violation on the part of the bribe is, contrary to what Rothbard said, a crime that should be prosecuted and punished accordingly." Now the principle controlling the elevation of two legal whites of paying and inciting another to contractual breach to the status of the legal black of bribery is the principle of accomplice liability. Since, for Rothbard (1998, 81), incitement to crime is legal only insofar as the inciter has "nothing further to do with these criminal activities"—because only then is incitement "a pure exercise of a man's right to speak without being thereby implicated in crime"—and since paying another while inciting him to commit a breach clearly fulfils the condition of having something "further to do with these criminal activities," it follows that the briber is the accomplice implicated in the breach.

Moving closer to our straight solution to the paradox of blackmail, let us consider the case of fraud (see also Dominiak 2024, 2026). Under libertarianism, it is legal to lie about one's goods and services and it is legal to exchange them for another's money. But it is illegal to exchange one's goods and services for another's money while lying about them. To do so, at least in some circumstances, is to commit fraud. Thus, we have another case in which two legal whites (lying and exchanging) can make a legal black (defrauding) under libertarianism. For example, following Rothbard (1998, 143), suppose that "A sells to B a package which A says contains a radio, and it contains only a pile of scrap metal, then A has taken B's money and not fulfilled the agreed upon conditions for such a transfer—the delivery of radio. A has therefore stolen B's property." For this reason, the answer to Rothbard's question, "Under our proposed theory, would fraud be actionable at law?," is, "Yes, because fraud is failure to fulfill a voluntarily agreed upon transfer of property, and is therefore implicit theft." But it is clear that, under

libertarianism, A has a right to lie about his own package as well as he has a right to exchange it for B's money. Nevertheless, these two legal whites make a legal black, because A does not have a right, at least in some circumstances, to exchange his package for B's money while lying about the former.

More specifically, A does not have a right to make a false representation which causes B to part with his property, because doing so would constitute, both generally and under libertarianism, the actus reus of fraud. And if A made such a representation knowing that it is false and intending or knowing that it can cause B to part with his property, then, due to having the simultaneous mens rea of fraud, A would also be blameworthy, both generally and under libertarianism, for the crime of fraud.[9] To use the words of the Supreme Court of Canada from *Regina v. Théroux* ([1993] 2 S.C.R. 5), "the *actus reus* of fraud is established by proof of a prohibited act, be it an act of deceit, falsehood or other fraudulent means, and by proof of deprivation caused by the prohibited act (which may consist in actual loss or the placing of the victim's pecuniary interests at risk)," whereas "the *mens rea* would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk." But even if A did not succeed in causing B to part with his property and only came to dangerous proximity of doing so or made a substantial step toward this consequence (by, for example, making a false representation in an exchange context), then A would still commit an actus reus of attempted fraud and be blameworthy, if culpable of having the proper mens rea,[10] for the respective crime.[11]

Now, the crucial step is to realize that if it is legal under libertarianism to lie about one's goods and services and to exchange them for another's money, but it is illegal to exchange one's goods and services for another's money while lying about them, then it is also legal to lie about one's intentions to provide or abstain from providing one's goods and services and to exchange or abstain from exchanging these goods and services for another's money, but it is illegal to exchange or abstain from exchanging these goods and services while lying about the aforementioned intentions. For example, it is legal for A to lie about his intentions to pay a loan and legal for A to exchange his future performance of paying the loan for B's loan, but it is illegal for A to exchange his future performance of paying the loan for B's loan while lying about his intentions to pay the loan in the future. As pointed out by George Fletcher (2000, 12), it is "possible to commit the crime of false pretenses in many

9 Note, however, that, under libertarianism, as represented by Rothbard and Block, it is not necessary that A has the mens rea of fraud since the standard of criminal liability is strict. See Rothbard ([1982] 2011, 367–418), Block and Block (2000, 297), and O'Neill and Block (2013, 241).

10 Again, the same caveat about libertarianism and strict liability applies.

11 On attempts, see Yaffe (2012), Moore (2009, 17), and Kadish, Schulhofer, and Steiker (2007, 544–88).

jurisdictions by borrowing money with the intent not to repay it." Similarly, Rothbard (1998, 144) believes that, under libertarianism, "if the debtor is able to pay but conceals his assents, then his clear act of theft is compounded by fraud." Indeed, as reported by Fletcher (2000, 12) in *People v. Randono* (32 Cal. App. 3d 165 (1973)), the court found the crime of false pretenses by, inter alia, acknowledging that concealment of the liquor by the debtor after delivery by the creditor corroborates the witness's testimony that the debtor made a false promise to pay for the liquor. Thus, in such cases, the debtor's "deception, if any, is about his plans for the future," while only "the best evidence of that is what he does when the debt falls due. Though the crime is technically committed at the time the loan is received, the critical evidence of liability is furnished by his failure to repay at some future time" (Fletcher 2000, 12).

Which leads us directly to the realization that, as we argue in Dominiak (2024), blackmail, or at least some instances thereof, can be viewed as a special kind of fraud—and this fact supplies us with a libertarian straight solution to the paradox of blackmail. Analogously to the above cases, the argument can be made that although it is legal for A to lie about his intentions to abstain from gossiping about B and legal for A to exchange his abstention from gossiping about B for B's money, it is illegal for A to exchange his abstention from gossiping about B for B's money while lying about his intentions to abstain from such gossiping. To do so, at least in some circumstances, would be to commit fraud. More specifically, if A made a false representation about his intention to gossip about B and thereby caused B to part with his money, then A would commit the actus reus of fraud. And if A made such a representation knowing that it is false and that it could cause B to part with his money, then A would also have the mens rea of fraud and would thereby become guilty of the crime of fraud. But since A's actions would, under a different description, amount to blackmailing B, then we can conclude not only that blackmail—contra Rothbard and Block—is illegal under libertarianism but also that it is a legal black despite the fact that the actions comprising it are, separately, legal whites. In other words, we have just demonstrated not only that blackmail as fraud should be illegal but also that the paradox of blackmail can be solved in a straight rather than a skeptical way by showing that blackmail is subsumable under fraud, this subsumption providing an explanation for how it can be that two legal whites make a legal black.[12]

12 An anonymous referee submits that our proposed solution seems to have "perverse implications." It appears as if the bluffing blackmailer "could simply cultivate a disposition to intend [to X unless Y] and thereby render the blackmail proposal non-fraudulent." But as Kavka's (1983) thought experiment demonstrates, it is not easy to start intending to do what one has no reason to do. Reverting to our bluffing blackmailer, this sort of blackmailer is presumably a bluffer for a reason. Or more precisely, he does not have a reason to reveal the embarrassing information about the blackmailed in case of the latter's noncompliance. And if so, it is not easy for the blackmailer to start intending to carry out his threat in the situation where he has no reason to do so. According to Kavka, this problem parallels the problem with beliefs, since one cannot simply start believing "what one wants to believe" (36). If the bluffer could readily form an intention to carry out his threat, he would indeed, as the referee observes, be "worse than the bluffer." But we claim that the bluffing blackmailer who simply decides at will to cease to be a bluffer and thus turns into a nonbluffing blackmailer is hardly possible in the first place.

To sum up, in cases in which the blackmailer does not intend to execute the threatened action (for example, to reveal the blackmailed's secret) unless he is remunerated by the blackmailed but rather only wants to acquire the latter's property, he can be viewed as defrauding the blackmailed. Under the strict liability standard embraced by Rothbard and Block, this fact is sufficient to subsume the blackmailer's actions under the crime of fraud or attempted fraud, because the blackmailer, by making false representations of his intentions or other mental states, causes the blackmailed to part with his property—actions which, if successful, constitute the actus reus of fraud. Furthermore, if the blackmailer knows—which is quite naturally the case—that his representations are false and wants to induce the blackmailed to part with property, then he also has the requisite mens rea of fraud and is thereby indictable of this crime under more orthodox liability standards. Even if the blackmailer's threat does not coerce the blackmailed and so is in itself legal (as the libertarian theory of coercion predicts), it nonetheless invalidates the consent of the blackmailed to transfer his property by deceiving him. Accordingly, although the blackmailer's threat neither coerces the blackmailed (and so is in this regard legal) nor violates his rights in any other way—since making false representations or lying about one's mental states is in itself indubitably legal—it does, when coupled with the otherwise legal request for money, amount to a legal black of defrauding the property of the blackmailed. Hence, the answer to the question of how it can be that, in the case of blackmail, two legal whites quite impossibly give rise to a legal black—the straight solution to the paradox of blackmail—is that blackmail can be viewed as fraud.[13]

Before we conclude our investigations, two aspects of our straight solution to the paradox of blackmail are worth elucidating. First, there is a question of how prevalent are situations in which the blackmailer does not intend to execute the threatened action unless paid by the blackmailed. Second, there is an interesting match between our solution and some utilitarian arguments about blackmail rendering the blackmailed better off or worse off than, say, gossip, depending on a given baseline. We will begin with the first issue. As Altman (1993, 1641) very reasonably points out, "without the opportunity to negotiate, many blackmailers would not reveal the information. Although some blackmailers could sell their information elsewhere, they could rarely do so as profitably. As a result, information acquired for the purpose of blackmail would not have been acquired. Professional blackmailers might

13 The same anonymous referee also drew our attention to the possibility of squeezing raised by Coase (1987)—"that is, the possibility of the blackmailer coming back to the target for more after having negotiated the initial bargain." The referee then presses the point that a "blackmailer who intends to squeeze and also intends each time to carry through on the proposal would seem to be morally worse than a blackmailer who intends to squeeze but does not intend to follow through." And yet, allegedly, as far as our fraud-based account goes, "it is difficult to say that the former [blackmailer] commits fraud." Granted, our account commits to saying that he does not. But we make no pretense to align immorality with illegality. Rather, we modestly offer a libertarian straight solution to the paradox of blackmail. Specifically, we argue that libertarians themselves have a reason to ban some blackmail proposals and exchanges. We take no stand on whether all impermissible—by libertarian lights—blackmail exchanges are morally inferior to all permissible—by libertarian lights—blackmail exchanges. Apparently they are not, and so we side with the referee. But this concession hardly compromises our internal-to-libertarianism solution.

turn to kidnapping rather than journalism. Additionally, information acquired accidentally often would not have been disclosed." He adds, equally reasonably, that "this includes opportunistic blackmail in which information is discovered by accident, and participant blackmail, in which the information arises from some relationship between blackmailer and victim. Although disclosure is often relatively easy, it is rarely costless. One must first locate an appropriate listener. The information will sometimes be unwelcome, making disclosure itself unpleasant. With some information one risks the social stigma of being labeled a gossip."

Besides, venturing some armchair psychologizing, how probable is it that, approaching his victim, the blackmailer intends anything about what he is going to do with his information in the case of failure to pressure the blackmailed to pay? The only thing he intends is to get the blackmailed's money by pressuring him to pay. Moreover, it is not only in circumstances in which the blackmailer intends *not* to reveal the blackmailed's secrets in the case of noncompliance that blackmail can be subsumed under fraud. Our solution applies also to cases in which the blackmailer has no intention either to execute his threat or not to do so. Consider the following instance of informational blackmail. The blackmailer says to the blackmailed, "If you pay me one thousand dollars, I will keep your love affair a secret. If you do not pay me one thousand dollars, I will reveal your love affair." If the blackmailer intends *not* to reveal the love affair in case of the blackmailed's noncompliance but the blackmailed is still caused by the blackmailer to part with his money (the actus reus of fraud) and the blackmailer intended to deprive the blackmailed of his property (the mens rea of fraud), then, under our solution, one would be warranted in saying that the blackmailer committed the crime of fraud regardless of the fact that the blackmailer intended *not* to reveal the love affair in case of noncompliance. But the conditions for the crime of fraud would be met equally well if the blackmailer had *no* intention either to reveal or not to reveal the love affair in question. For example, the blackmailer might have no desire either way that the information be revealed or not. Still, since condition (2) in the above biconditional might still cause the blackmailed to part with his money and the blackmailer might still intend or believe that the expression of (2) does the causal work required, the commission of the crime of fraud seems to inevitably follow. All these considerations suggest that our solution can be applied quite extensively to various cases of blackmail, regardless of whether the blackmailer intends *not* to carry out his threat or has no intention either way to execute his threat or not.

For the second aspect regarding the match between our solution and utilitarian arguments about blackmail, we would like to offer a demonstration that the principled moral solution bans exactly the same instances of blackmail exchanges (namely, fraudulent ones) as an economic argument from efficiency, as applied to the law of blackmail. Moreover, and happily

again, our account permits exactly the same sort of blackmail exchanges (namely, nonfraudulent ones) as a utilitarian argument. Consider a simplified scenario involving a society S_1 in which all blackmailers bluff—that is, none of them intends to execute his threat in the case of his victim's noncompliance. What sort of law of blackmail should be enacted that would run along the lines of economic efficiency in S_1? Clearly, blackmail ought to be banned in S_1 in the name of economic efficiency, because if, in S_1, people who are blackmailed buy off the bluffing blackmailers, the former pay for nothing that would otherwise threaten them. After all, by stipulation, blackmailers in S_1 do not intend to carry out their threats in case their victims fail to succumb thereto. That is why if blackmail were permitted in S_1, those who are blackmailed would be worse off than if blackmail were to be illegal in this society, ceteris paribus. This is because if blackmail were rendered illegal in S_1, there would be no mere unproductive money transfers stemming from successful, and yet bluffing, blackmail proposals[14] for a trivial reason: under that society's legal regime, no one could legitimately engage in blackmail.

By contrast, let us stipulate a society S_2 in which all blackmailers intend to carry out their threats in case of their victims' noncompliance. For the sake of illustration, let us again analyze a paradigmatic case of blackmail—that is, informational blackmail, to test how the regime of blackmail prohibition would fare economically in S_2. One can easily see that the prohibition of blackmail in S_2 would render the blackmailed worse off than if blackmail proposals were to be permitted in this society, ceteris paribus. Remember that, by assumption, blackmailers in S_2 would carry out their threats in case those blackmailed failed to meet the former's demands. Hence, with blackmail being illegal in S_2, those blackmailed would be denied a significant option to buy the blackmailers off. If so, then (again, by assumption) blackmailers in this society would engage in gossiping, the activity that those blackmailed would be most willing to buy a relief from but could not legally do so. This proves the point that the prohibition of blackmail in S_2 would be economically inferior as compared to permitting it, all else being equal.[15]

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14 In fact, the bluffing blackmailer engaged in mongering embarrassing information and selling his silence to the blackmailed is even worse than a mere money transfer. After all, the bluffing blackmailer would rarely, if ever, acquire embarrassing information without cost to himself. Moreover, given the legality of blackmail, the prospective blackmailed would also incur some cost in guarding himself, often unsuccessfully, against the blackmailer. Hence, not only would the blackmailed pay for something that would not otherwise threaten him (in a paradigm case of informational blackmail, the revelation of embarrassing information) but also both parties would incur some cost, even if negligible. For an excellent economic analysis of blackmail, see Coase (1987) and Isenbergh (1993).

15 Interestingly enough, among other things "wrong with blackmail," Fletcher (1993, 1637) mentions its economically wasteful character. This author says that blackmail "leads to the waste of resources so far as blackmailers are induced to collect information that they are willing to suppress for a fee." On its face, Fletcher's remark appears compelling. Blackmailers expand resources to acquire information the nonrevelation of which they intend to sell. In other words, it looks as if the exchange between the blackmailed and the blackmailer is nonallocative, which is even worse than a mere money transfer and therefore socially wasteful—the point subscribed to by such prominent economists as Coase (1987), Ginsburg and Shechtman (1993), and Epstein (1983). However, as perspicuously noted by Isenbergh (1993, 1921–22), this "waste argument" (Gordon 1993) is not entirely correct. After all, bargaining (especially in a frictionless world of no transaction cost) would lead to an efficient distribution of a right to certain information. And hence, if the blackmailed buys silence, it is not the case that the status quo is preserved and the exchange is a nonallocative mere money transfer. Far from it, a right to some specific piece of information would be allocated to the person valuing it most, thus transferring from the blackmailer to the blackmailed in the scenario just envisaged. Upon hearing such a concession, a skeptic might argue that when the fraudulent blackmailer sold his silence, the blackmailed

Our solution bans fraudulent blackmail exchanges, which happen to render those blackmailed worse off and are thus economically inefficient, but it permits nonfraudulent blackmail proposals, which would give the prospective blackmailed an additional and very significant option to buy silence. After all, buying the nonbluffing blackmailer off might as well constitute the efficient allocation of rights, the result of which the two parties to the exchange could then freely bargain for.[16]

Conclusions

In the present article, we argued that the libertarian skeptical solution to the paradox of blackmail is unfounded. Focusing on coercion as the only way of looking at blackmail obfuscates some important aspects of this practice, while the libertarian theory of coercion is problematic to begin with and so should not be relied on. Instead, we offered our own straight solution to the paradox of blackmail, consisting in subsuming blackmail under fraud. This solution seems to work both generally and specifically under libertarianism. It undermines skepticism about the paradox of blackmail and explains how it can be that two legal whites make a legal black. Even though it is clearly legal to lie about one's intentions to execute the threatened action, to ask another for money, and to offer abstention from the threatened action, it is illegal to offer abstention for the threatened action in exchange for another's money while lying about one's intentions to execute the threatened action. To do so, at least in certain circumstances, is to defraud another. Thus, there is a paradox of blackmail and it has a straight solution: blackmail is an instance of fraud which should—contra Rothbard and Block—be illegal, both generally and under libertarianism.

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would also end up with a right to a certain piece of information. But this skeptical response misfires since buying this right would be a waste of resources anyway, the fraudulent blackmailer not having intended to reveal the embarrassing information in the first place. By contrast, buying a right to information from the nonfraudulent blackmailer would be effective since it would guard its recipient against the revelation of some embarrassing information, which is the activity this sort of blackmailer intended to embark on but for the purchase of that right by the blackmailed.

16 An anonymous referee raised the objection that in S_2, in which there are only nonbluffing blackmailers and blackmail is permissible, the blackmailers would have an incentive to squeeze. This objection weakens our economic demonstration because allowing blackmail exchanges might be allocatively efficient yet fail to be dynamically efficient—that is, permitting blackmail exchanges would give blackmailers a perverse incentive to approach their targets again and again. Blackmailers would be incentivized to discover the embarrassing information and dig it up for money—something which strikes us as a mere money transfer with additional cost (namely, that of searching for the embarrassing information) incurred, which would be nothing short of inefficiency. In our defense, we can only say that the Nozickian productive or unproductive exchanges hold at a given time rather than diachronically, and so our Nozickian-styled utilitarian argument should remain unscathed. We are very grateful to the referee for his or her insightful remark.

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